COURT OF APPEALS
DECISION
DATED AND RELEASED

September 17, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-3315

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

SELGREN DEVELOPMENT CORPORATION,

PLAINTIFF-APPELLANT,

V.

WISCONSIN DEPARTMENT OF TRANSPORTATION,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Walworth County: JAMES L. CARLSON, Judge. *Affirmed.*

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

ANDERSON, J. Selgren Development Corporation (Selgren) appeals from a summary judgment in favor of the Wisconsin Department of Transportation (DOT), thereby dismissing its complaint. Selgren contends that certain DOT regulations effected a taking without just compensation in violation of Article I, § 13 of the Wisconsin Constitution, pursuant to § 32.10,

STATS. We conclude that Selgren failed to exhaust its administrative remedies; we therefore affirm the summary judgment.

The relevant facts are as follows. In 1991, Selgren began developing lots adjacent to Walworth County Trunk Highway X (CTH X) and abutting Interstate Highway 43. The land underlying CTH X and I-43 are titled to the DOT. Pursuant to the requirements of § 236.12, STATS., Selgren's final plat proposal was submitted to the DOT for review.[1]

On May 2, 1991, the DOT notified the City of Delavan Plan Commission (Plan Commission) that it objected to Selgren's final plat proposal. When CTH X was reconstructed, a culvert was installed under the highway to handle surface water runoff from the upland areas along the highway. The culvert was designed to protect the highway from flood damage. Selgren's proposed plat did not provide for adequate surface drainage and would not protect the highway from damage. The DOT indicated that certification or nonobjection was conditioned upon a drainage computation that complied with the rules. The DOT provided the drainage computation formula, but provided no further direction.

In response to the DOT objection, Selgren submitted a revised layout designed to protect the existing highway drainage system. Selgren's new layout expected to route both on-site and off-site runoff to a detention basin located within the Westbury Subdivision. The proposal called for the controlled release of

[1] The DOT has authority to review any plats that abut or adjoin a state trunk highway or connecting highway. *See* § 236.12(2)(a), STATS. Although the DOT does not have authority to approve a plat, it may object to a proposal that does not comply with the DOT's rules promulgated under § 236.13, STATS. *See* § 236.12(2)(a). Section 236.12(2)(a) has been amended by 1995 Wis. Act 27, § 6309. The changes do not affect our analysis.

storm water runoff from the detention basin at a rate not to exceed the existing drainage capacity of the culvert.

The DOT reviewed Selgren's revised plat proposal. The design section found that the existing drainage condition would be maintained by the construction of the proposed retention pond. Accordingly, on June 14, 1991, the DOT submitted its nonobjection to Selgren's final plat. Subsequently, the Plan Commission approved the final plat. Selgren completed the condominium development in compliance with the approved plat.

Four years later, on March 2, 1995, Selgren brought an inverse condemnation action against the DOT under § 32.10, STATS., in which Selgren claimed that its real estate "has been occupied and taken by [the DOT] since 1991, and has been put by [the DOT] to the use of an area-wide storm detention facility."[2] The DOT moved for summary judgment. The trial court granted the motion and dismissed Selgren's complaint with prejudice. Selgren appeals.

Our review of a trial court's grant of summary judgment is de novo. *See* ***Carrell v. Wolken,*** 173 Wis.2d 426, 431, 496 N.W.2d 651, 653 (Ct. App. 1992). In reviewing a summary judgment motion, we apply the methodology set forth in § 802.08(2), STATS., in the same manner as the trial court. *See* ***Carrell***, 173 Wis.2d at 431, 496 N.W.2d at 653. Summary judgment is required if the court determines that there is no genuine issue of material fact and the moving party is entitled to a judgment as a matter of law. *See* § 802.08(2). If a court determines that a party has not exhausted its administrative remedies, summary

[2] In between Selgren's decision to comply with the DOT's rules and its suit against the DOT, Selgren unsuccessfully sued its own engineering consultant for malpractice in the design and location of the detention basin.

judgment may be granted. *See* ***Hermann v. Town of Delavan***, 208 Wis.2d 216, 228, 560 N.W.2d 280, 285 (Ct. App. 1996).

Selgren failed to exhaust its administrative remedies. Chapter 236, STATS., governs the procedures for the approval of plats. The final plat of a subdivision must be approved by "the approving authority" which can be either the town board, the governing body of the municipality or the county planning agency depending on where the plat is situated. *See* § 236.10(1)(a)-(c), STATS. The DOT has the authority to review any subdivision plat that abuts or adjoins a state trunk highway or connecting highway. *See* § 236.12(2)(a), STATS. The DOT does not have authority to approve a plat; however, it may object to a proposal that does not comply with the DOT's rules promulgated under § 236.13, STATS. *See* § 236.12(2)(a).

The statutes further provide that:

> Any person aggrieved by an objection to a plat or a failure to approve a plat may appeal therefrom as provided in s. 62.23(7)(e)10., 14. and 15., within 30 days of notification of the rejection of the plat. For the purpose of such appeal the term "board of appeals" means an "approving authority". Where the failure to approve is based on an unsatisfied objection, the agency making the objection shall be made a party to the action. The court shall direct that the plat be approved if it finds that the action of the approving authority or objecting agency is arbitrary, unreasonable or discriminatory.

Section 236.13(5), STATS. Section 62.23(7)(e)10, STATS., states in part: "Any person … aggrieved by any decision of the board of appeals … may, within 30 days after the filing of the decision … commence an action seeking the remedy available by certiorari."

Here, the DOT's objection was to Selgren's drainage plan because the DOT believed it would adversely affect the adjacent highway. The DOT

provided the appropriate drainage computation formula. Selgren could have challenged the DOT's objection to the drainage situation, as well as its drainage formula. Selgren however opted to relocate and redesign the detention pond—the DOT did not direct this action.[3]

Selgren never challenged the DOT's objection or its drainage computation formula prior to final plat approval. Instead, Selgren waited four years to bring this inverse condemnation claim relying on legal theories that were available and ripe at the time of the plat approval proceedings. In order to assert a regulatory takings claim, it is an essential prerequisite that "'a final and authoritative determination of the type and intensity of development legally permitted on the subject property [is made]. A court cannot determine whether a regulation has gone "too far" unless it knows how far the regulation goes.'" *See* ***Hoepker v. City of Madison Plan Comm'n***, 209 Wis.2d 633, 652, 563 N.W.2d 145, 153 (1997) (quoted source omitted). If we were to allow Selgren to hold back its grievances until years after it had accepted and complied with the DOT's objection and regulations, we would be authorizing and encouraging "'lying in the weeds.'" ***Sewerage Comm'n v. DNR,*** 102 Wis.2d 613, 631-32, 307 N.W.2d 189, 198 (1981). This we refuse to do.

The circumstances before us support application of the exhaustion doctrine. The purpose of the exhaustion doctrine is to allow the administrative agency to perform the functions delegated to it by the legislature without

[3] In May 1991, construction of the first condominium building had begun and condominium purchasers were expecting to move in. Selgren's president averred that "[b]ecause of these circumstances and to preserve my professional reputation, I had to proceed with the project and I had no choice but to sign the plat which depicted the 2.1 acre detention basin on Outlot 1, against my wishes."

interference by the courts. *See* ***County of Sauk v. Trager***, 118 Wis.2d 204, 210, 346 N.W.2d 756, 759 (1984). If a method of review is prescribed by statute, as it was here, and adequate relief may be obtained through the review procedure, the pursuit of administrative relief is a prerequisite to judicial review. *See* ***Jackson County Iron Co. v. Musolf,*** 134 Wis.2d 95, 102, 396 N.W.2d 323, 326 (1986); *see also* ***Hermann***, 208 Wis.2d at 228, 560 N.W.2d at 285.

The exhaustion doctrine "reflects a fundamental policy that parties to an administrative proceeding must raise known issues and objections and that all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record." ***Omernick v. DNR,*** 100 Wis.2d 234, 248, 301 N.W.2d 437, 444 (1981). When agency action is circumvented, meaningful judicial review of agency proceedings is prevented. *See* ***Trager***, 118 Wis.2d at 215 n.4, 346 N.W.2d at 761. The exhaustion doctrine is properly applied "when a party seeks judicial intervention before *completing all the steps*" statutorily prescribed for administrative agency proceedings. *See* ***id.*** at 210, 346 N.W.2d at 759 (emphasis added).

Essentially, Selgren had two choices in 1991: (1) it could have answered the DOT's objection and gotten the plat approved or, (2) it could have challenged the DOT's objection to the Plan Commission and, if rejected by the Plan Commission, appealed to the court. Selgren chose to answer the DOT's objection—it voluntarily relocated and increased the size of the basin and then completed the condominium development. By disregarding its ability to seek agency review, Selgren eliminated the opportunity to develop a record regarding the propriety of the DOT drainage outflow requirements. Selgren has waived its right to make an inverse condemnation claim. Accordingly, we affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.