

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 20, 1998

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

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 § 808.10 and RULE 809.62, STATS.

No. 97-2970

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JOHN R. AMMERMAN,

PLAINTIFF-APPELLANT,

v.

ADAMS COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Adams County:
MICHAEL W. BRENNAN, Judge. *Affirmed.*

Before Dykman, P.J., Roggensack and Higginbotham¹, JJ

PER CURIAM. John Ammerman appeals from an order affirming a decision of the Adams County Board of Adjustment. In its decision the Board

¹ Circuit Judge Paul B. Higginbotham is sitting by special assignment pursuant to the Judicial Exchange Program.

denied Ammerman a permit to fill and grade land that lies in the Wisconsin River floodplain. He contends that the circuit court erred by remanding the matter for further proceedings after reversing the Board's initial determination on his permit, and that the decision on remand was arbitrary, unreasonable and contrary to the evidence. We reject these arguments and affirm.

Ammerman wanted to build three or four log homes on an eighty-five foot wide, 1.43 acre lot on the Wisconsin River. To create room for more than two homes, he needed a special exception permit under the Adams County Shoreland Protection Ordinance to fill and grade part of the lot in order to raise it above the floodplain. He also needed a retaining wall to protect the fill and prevent runoff. Other lot owners in the area vehemently objected, citing the danger of runoff and sedimentation, aesthetic reasons and the introduction of a commercial venture into a single-family residential area.

The Board denied him a permit in June 1995 for a four-house project and again in April 1996, on a modified plan to build three houses. It reasoned that allowing Ammerman to fill and grade riverside land would set an undesirable precedent requiring it to extend the same privilege to others.

On certiorari review, the circuit court reversed, holding that under the ordinance the Board was required to exercise its discretion based on Ammerman's individual circumstances, without regard to the precedent setting consequences of its decision. The circuit court therefore remanded for reconsideration, based on the evidence already presented.

On remand, the Board denied Ammerman a permit because

- (1) Poor soils and over development of the property could cause runoff and pollution,

- (2) There is no need present as there are areas that can be developed on the property that do not require a special exception permit,
- (3) The retaining wall being constructed 10 feet from the lot lines could cause soil erosion to adjacent properties, and
- (4) Construction of the retaining wall would change the topography which would effect runoff for 60 feet.

The circuit court affirmed, concluding that there was sufficient, although not overwhelming, evidence to sustain the Board's decision. This appeal is the result of that decision.

The Adams County Shoreland Protection Ordinance requires a special exception permit in most cases, including this one, where there is filling or grading of any area within 300 feet of an ordinary high water mark, and there is surface drainage toward the water. The ordinance also provides that the Board may grant or deny a special exception permit after considering safety and health, prevention and control of water pollution, existing features of the site, location of the site with respect to floodplains and floodways, the site's erosion potential, its relation to existing or future roads, and the need for the proposed use and its compatibility with the adjacent land uses. Additionally, the Board must give preference to domestic uses, uses not inherently a source of pollution and use locations that minimize the possibility of pollution over those that tend to increase possible pollution.

Our review of the Board's determination in these matters is limited to (1) whether the Board kept within its jurisdiction; (2) whether it proceeded on a 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. *Arndorfer v. Sauk County Bd. of Adjustment*, 162 Wis.2d 246, 254, 469 N.W.2d 831, 834 (1991). We presume that the Board's decision is correct and valid. *Id.* at 253, 469 N.W.2d at 833. The Board, and not the reviewing courts, determine the weight and credibility of the evidence. *Delta Biological Resources, Inc. v. Board of Zoning Appeals of City of Milwaukee*, 160 Wis.2d 905, 915, 467 N.W.2d 164, 168 (Ct. App. 1991).

Ammerman first argues that the circuit court lacked authority to remand to the Board after its first decision. According to Ammerman, the circuit court's only recourse upon reversal was to order the Board to issue him the permit. However, the supreme court has unequivocally authorized remands for further proceedings when a Board of Adjustment decision is made without a rational basis. *Id.* at 250, 469 N.W.2d at 832. In fact, Ammerman acknowledged that holding in his circuit court brief, and has therefore waived the issue on appeal. *See Wirth v. Ehly*, 93 Wis.2d 433, 443-44, 287 N.W.2d 140, 145-46 (1980) (issue raised for the first time on appeal is generally not reviewed). *See also Shawn B.N v. State*, 173 Wis.2d 343, 372, 497 N.W.2d 141, 152 (Ct. App. 1992) (party may not invite a ruling and then argue on appeal that it is error).

Ammerman next argues that the circuit court erred by remanding because it should have recognized after the first two Board decisions that the Board had abandoned impartiality. Again, the record does not indicate that Ammerman raised this issue in the circuit court proceeding. Therefore, it also is waived.

Each of the Board's findings is reasonably supported by the evidence, and each reasonably relates to the criteria found in the Shoreland Protection Ordinance.

- (1) Poor soils and over development of the property could cause runoff and pollution.

Two persons familiar with the area stated that the lot consisted of hard, nonabsorbing clay soil, and numerous persons, including elected town and county officials, described the plan for three houses in an area of one per lot family homes and vacation cottages as an overdevelopment of the site. The Board could reasonably infer from the combination of the soil and the added hard surfaces of the buildings, driveways, etc., that additional runoff and pollution would result despite Ammerman's best efforts to control it.

- (2) There is no need present as there are areas that can be developed on the property that do not require a special exception permit.

Ammerman already had permits to build two houses on the site, and a septic system to accommodate them, without adding fill. He presented no evidence that he needed the third house on the filled area, other than to profit from it.

- (3) The retaining wall being constructed 10 feet from the lot lines could cause soil erosion to adjacent properties.

The planned walls would cut across the natural contours and, in the Board's view, would inevitably alter the drainage pattern and would channel storm and melt runoff. We cannot say that the Board's view was unreasonable, nor that it precluded a reasonable inference that erosion might possibly result. Although the Board's view ultimately represents only its opinion, Board members are

entitled to apply their personal knowledge and experience to the facts. *Petersen v. Dane County*, 136 Wis.2d 501, 511, 402 N.W.2d 376, 381 (Ct. App. 1987).

- (4) Construction of the retaining wall would change the topography which would effect runoff for 60 feet.

Again, the Board could reasonably infer channelization of runoff, and adverse consequences resulting from it, from a wall built across the natural drainage slope. In short, the Board reasonably based its decision on the facts before it, and the record does not indicate an arbitrary, oppressive or unreasonable decision representing the Board's will as opposed to its judgment.

By the Court.—Order affirmed.

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

