COURT OF APPEALS
DECISION
DATED AND RELEASED

November 8, 1995

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.

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No. 94-3301

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

JOSEPH F. WISNESKI and HELEN M. WISNESKI,

Plaintiffs-Appellants,

v.

CALUMET COUNTY BOARD OF ADJUSTMENTS,

Defendant-Respondent.

APPEAL from an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Affirmed.*

Before Brown, Nettesheim and Snyder, JJ.

BROWN, J. Joseph F. and Helen M. Wisneski own a home along the shores of Lake Winnebago. In September 1993, they approached the Calumet County Board of Adjustments seeking a special exception permit enabling them to add landfill and make other improvements to their front yard to alleviate drainage problems. While the Board granted this request, it also

ordered the Wisneskis to remove illegal fill that they had previously placed in their rear yard. The Wisneskis then sought certiorari review in the trial court on grounds that the Board did not provide them with notice that the improvements to their rear yard would be reviewed. They also argued that the Board was arbitrary. The petition was denied. We affirm.

The Wisneskis' homesite is separated into two parts by a private road that runs east-west. Their house is located on the south (front) yard of the parcel. A garage and storage shed are located across the road on the north (rear) yard. The three neighboring homesites which share the private road are improved in a similar fashion—houses on the front yard and garages on the rear.

The relevant history of this dispute dates back to September 1989. At that time, the Wisneskis[1] approached the Board for a variance to local shoreland regulations. They wanted to build a storage shed and in the process would add twelve inches of gravel fill as a foundation. They needed an exception to the ordinance which restricted the total height to fifteen feet. *See* CALUMET COUNTY, WIS., SHORELAND ZONING ORDINANCE § 3.61 (1993). The Board approved this request. The record contains evidence that in the process

[1] The 1989 petition for a variance named only Joseph F. Wisneski. However, for convenience, we have referred to the Wisneskis collectively throughout the text.

of completing this project, the Wisneskis placed about 4500 square feet of fill on the rear yard in and around the shed.

The low lying areas around the Wisneskis and their immediate neighbors is apparently subject to flooding. Furthermore, the situation was aggravated by the addition of new homes in recent years. To alleviate the problems, some homeowners have allegedly added fill to their yards. There was evidence that the Wisneskis had placed 6480 square feet of fill on their front yard.

These drainage improvements came to the attention of county officials. In April 1993, the county's planning director sent a memo to the Wisneskis and three of their neighbors which stated:

> This correspondence is being sent regarding the continuing concern that exists over fill that has been placed in this area. This fill has occurred without any approvals or permits from Calumet County. The County Shoreland Zoning Ordinance requires the receipt of a special exception permit from the Zoning Board of Adjustment. This review should have occurred prior to these fill projects occurring.

Moreover, in an effort to resolve the problem, the planning director also asked the homeowners to develop a drainage plan and bring it before the Board for approval.

Accordingly, the Wisneskis and a neighbor filed petitions for a special exception with the Board to sanction the fill they already had placed on their property and to authorize other drainage improvements. The Wisneskis specifically sought authorization to "allow fill to get rid of water problem." On September 23, 1993, the Wisneskis and some of their neighbors appeared for a hearing.

Their neighbor submitted a formal plan which became the focus of the Board's fact-finding. It involved installation of drain tiles along the full edge of the property which would draw water from the low areas of the front yard. The rear yard would also feed into this system and would be graded to better direct the water towards the drain. The Wisneskis did not submit a plan of their own. They recognized that their property suffered from the same problems as this neighbor and reasoned that there was no need to "waste the money on a duplicate plan when [we] can invest it in the pipe."

After hearing from both homeowners, the county planning director provided the Board members with his summary of the submitted plan. He also added:

> Drainage of the back lots have been a problem. Varying amounts of fill have been added with the outcome just moving the water to someone else's property. No effort has been made to effectively deal with the water. The greatest amount of fill has been placed by Mr. Wisneski in his storage garage project. This project was approved by the Zoning Board on September 18, 1989. Concern was expressed at the hearing on the amount of fill proposed.

Nonetheless, after some questioning of the Wisneskis and their neighbor, the Board approved an exception for their existing fill and installation of a drainage system in accordance with the submitted plan.

Immediately thereafter, however, the Board received comments from other neighboring homeowners who were in the audience. They voiced concern that the Wisneskis' addition of fill on their rear yard when they built the storage shed was the primary reason for the flooding that they all experienced in their front yards. The neighbors told the Board that the Wisneskis had added soil fill which was not covered by the variance for the storage shed they obtained back in 1989.

At first, the Board was reluctant to revisit this question. The members expressed concern about whether they could rescind the permit they had just granted to the Wisneskis. The Board contacted the corporate counsel and was told that it could reopen the discussion and take further action. The Board then proceeded to ask questions of all those present about the degree of filling on these sites. After consideration of the problem, it ordered the Wisneskis to remove the illegal fill from the rear yard of their property, but reapproved the drainage plan submitted earlier that evening.

The Wisneskis subsequently filed a petition for certiorari review with the trial court raising an array of due process oriented challenges to the Board's decision. *See* § 59.99(10), STATS. The petition was denied. They now present these claims to this court.

Our review is limited to four issues: (1) whether the Board kept within its jurisdiction; (2) whether it acted according to 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 determination in question. ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment,*** 131 Wis.2d 101, 119-20, 388 N.W.2d 593, 600-01 (1986).

Here, the Wisneskis raise two challenges. First, they contend that the Board did not have jurisdiction to order the removal of the illegal fill from the rear yard because it did not provide them with notice that this specific issue would be considered. Next, they claim that the Board's failure to adhere to established procedures during the hearing reveals that its decision was arbitrary and unreasoned. We review these arguments without deference to the trial court. ***Clark v. Waupaca County Bd. of Adjustment,*** 186 Wis.2d 300, 303, 519 N.W.2d 782, 784 (Ct. App. 1994).

We will first address the notice argument. Although we have not located any Wisconsin case in which a zoning board's decision has been overturned because the parties did not have notice (thus depriving the board of jurisdiction), we observe that other jurisdictions have reached this conclusion. *See generally* E.C. YOKLEY, ZONING LAW & PRACTICE § 18-6, at 148-49 (4th ed. 1979) (collecting cases). Nevertheless, this is not the exact situation before us. Here, the Wisneskis knew that the Board was meeting to discuss the drainage problems affecting their property. Indeed, they filed the petition with the Board

asking it to convene and hear this matter. Thus, as they outline in their briefs to this court, the issue narrows to whether they had "reason to believe that on September 22, 1993, the Board of Adjustments would discuss the fill around the garage in their back yard?"

As support, they point to the language they used in their petition (i.e., "allow fill to get rid of the water problem") and the notice in the local paper which provided:

> Cyrus Anderson and Joe Wisneski are petitioning for a special exception permit from the County Shoreland Zoning Ordinance for filling and grading an area in excess of 10,000 sq. ft. along Lake Winnebago.

They also stress how they believed that any problems with the rear yard were covered by the variance granted back in 1989. In essence, their position is that this second petition was intended only to address problems in the front yard. They claim that they were blind sided by the Board's decision to visit the drainage problems in the rear yards as well.

Nonetheless, the Wisneskis concede in their briefs that the petition did not specifically state that they were only seeking a fill permit for the front yard. We also note that the Wisneskis were acting in response to the letter from the county planning director who warned them about illegal filling on their property; this letter did not delineate between front and rear yards. Further, the drainage plan which the Wisneskis endorsed involved linking the front and rear yards with drainpipe.[2] Thus, in consideration of the entire history of this

[2] At the hearing before the trial court, the Wisneskis' attorney acknowledged that "the plan submitted did go through the back yards of these properties." Although he cautioned that "the only

dispute and the Wisneskis' actions, we conclude that they were provided with adequate notice of the possibility that the Board would take a collective look at the drainage problem and take action with respect to both the front and rear yards.

Still, the Wisneskis emphasize that during the hearing, a Board member mentioned that he had personally seen the Wisneskis' rear yard improvements and had approved them in accordance with the 1989 variance. This fact, they contend, supports a conclusion that they were not notified about the potential for reexamination of their rear yard. But back in 1989, the Wisneskis and the Board were only concerned about the height of the shed, not whether there would be a violation of zoning restrictions on filling and grading of shorelands. *Compare* SHORELAND ZONING ORDINANCE § 3.61 (fifteen-foot height restriction on accessory structures on shoreland) *with* § 6.22 (permits needed for filling or grading of shoreland property). This was revealed during the following colloquy:

> [Member Uitenbroek] According to previous records that garage was supposed to have 1' of gravel around it and that was it. The question was asked at that hearing on how much you were going to fill. You stated that it would be 1' of gravel. That we presumed would be around the building and that would be it.
>
> Wisneski — You asked me about fill then and I said that it would be filled around the garage and sloped down. You

(..continued)
reason it went through the back yards is they will not get a drainage permit to go back into Lake Winnebago," this legal restriction only strengthens our conclusion that the Wisneskis had knowledge of how conditions on all of their property (front and rear yards) would be examined by the Board.

> want me to slope that down so the water runs a little faster to the neighbors?
>
> Uitenbroek — We don't want that filled. That is the law. That is the reason you have to come for a [special exception]. If you have a legitimate reason to fill other than aesthetics, yes. But if you are just going to fill just to fill and keep the water off of your property and put it to someone else's … I don't think that it is right.

This discussion reveals that when the Board granted the height variance in 1989, it did not contemplate that the Wisneskis would add soil fill thereby creating a drainage problem for the neighbors. As a result, the Wisneskis acted unreasonably when they assumed that authorization to add one foot of gravel fill as foundation for a storage shed authorized them to add 4500 square feet of soil fill to curtail a drainage problem. Moreover, the letter from the county planning director was sufficient to inform them that the filling that they did do in their rear yard was in jeopardy.

The Wisneskis also challenge the merits of the Board's decision, claiming that it is arbitrary and oppressive. Here, they place great weight on the trial court's opinion of the proceedings that evening. It noted:

> I cannot hold up the procedures of this Board as a model of how to proceed at meetings. There is much to be desired as to the way in which they proceeded, and with the formality with which they proceeded.

They further argue: "The free for all that occurred on September 22, 1993, had no relationship whatsoever with notions of considered deliberations by a tribunal." Thus, their theory seems to be that these arguably

lackluster proceedings produced an insupportable result. We disagree, however, with their characterizations of the procedural quality of this hearing and the substantive quality of the result.

The hearing transcripts reveal how the debate among these neighbors became heated. Nonetheless, the Board's fact-finding does not seem to have been affected. For example, when the question about proper procedure came up, the Board took the time to contact its legal counsel. Although the Wisneskis argue that the hearing deteriorated to the point where an audience member had to tell the Board how to proceed, in fact the Board acted responsibly and sought its own answer on the question.

The Wisneskis also claim that the Board did not engage in any fact-finding before it ordered the rear yard fill to be removed. However, it only needed to determine that some filling had occurred beyond that authorized by the 1989 height variance. Any filling beyond that necessary to provide structural support was illegal. *See* SHORELAND ZONING ORDINANCE § 8.33.2.d. Moreover, the Wisneskis admitted during the hearing that they had done some filling in their rear yard beyond that associated with the storage shed. Thus, we conclude that the Board had before it enough factual foundation to reach a reasonable conclusion that there was illegal filling on the rear yard of the Wisneskis' property.

By the Court.—*Order affirmed.*

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