COURT OF APPEALS
DECISION
DATED AND FILED

November 3, 2010

A. John Voelker
Acting Clerk of Court of Appeals

Appeal No. 2010AP229 **Cir. Ct. No. 2007CV1374**

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

ROBERT W. KRUSE, TRUSTEE OF THE ROBERT W. KRUSE TRUST AND CAROLE L. KRUSE, TRUSTEE OF THE CAROLE L. KRUSE TRUST,

PLAINTIFFS-RESPONDENTS,

V.

WALWORTH COUNTY DEPARTMENT OF LAND USE AND RESOURCE MANAGEMENT AND WALWORTH COUNTY BOARD OF ADJUSTMENT,

DEFENDANTS-APPELLANTS.

APPEAL from a judgment of the circuit court for Walworth County: MICHAEL S. GIBBS, Judge. *Affirmed*.

Before Neubauer, P.J., Anderson and Reilly, JJ.

¶1 NEUBAUER, P.J. Walworth County Department of Land Use and Resource Management (LURM) and Walworth County Board of Adjustment

(BOA) (collectively, the County) appeal from a declaratory judgment entered in favor of Robert W. Kruse, as trustee of the Robert W. Kruse Trust, and Carole L. Kruse, as trustee of the Carole L. Kruse Trust. The County contends that the circuit court erred in two respects. First, the County contends that the circuit court erred in allowing the Kruses to maintain a declaratory judgment action when they had not exhausted their remedies in the administrative proceedings. The Kruses failed to request certiorari review of the BOA's decision within the thirty-day time limit. Second, the County argues that the circuit court erred in permitting the declaratory judgment action to proceed based on a constitutional challenge to the ordinance at issue and then failed to address the constitutionality of the ordinance prior to entering judgment. We conclude that the circuit court properly exercised its discretion.

BACKGROUND

¶2 Walworth County adopted its zoning ordinance in 1973. WALWORTH COUNTY, WIS., ORDINANCE § 74-181 generally requires a minimum lot size in a R-1 (single family residential) district of 40,000 square feet, with a width of 150 feet. However, zoning ORDINANCE § 74-221 recognizes "[e]xisting substandard lots." It provides:

> In any residential, conservation, or agricultural district, a one-family detached dwelling and its accessory structures may be erected on an existing substandard legal lot or parcel of record in the county register of deeds office before the effective date or amendment of this ordinance, provided such legal lot or parcel meets frontage requirements … and all the following minimum substandard lot requirements, and further provided that all requirements of the county sanitary ordinance are met.
>
> [Table of minimum substandard lot requirements omitted.]

> Once a substandard lot has been changed or altered so as to comply with the standard provisions of this ordinance, it shall not revert back to a substandard lot. *The combination of pre-platted lots under one tax key number constitutes a change or alteration.* (Emphasis added.)

The last sentence of the section was added by an April 2006 amendment.

¶3 In November 1990, the Kruses purchased Lots 32, 33, and 34 in Block 1 of Thansland, Town of LaGrange, Walworth County. The three lots were "[e]xisting substandard lots" which had been created and approved before Walworth county adopted its ordinance requiring that buildable lots have a minimum 40,000 square foot size and 150 foot minimum width. In October 1993, the Kruses transferred Lots 32, 33, and 34 to their trusts. At the time of the transfer the three lots had a single parcel identification number (PIN), or tax key number, of HTL 00012.

¶4 In 2006, the Kruses were advised by a Walworth county zoning official that Walworth county would consider the three lots as one lot because they had only one tax key number. Thus, on May 5, 2006, the Kruses recorded a quit claim deed for the three lots then under the PIN HTL 00012. The quit claim deed indicates: "The purpose of this deed is to divide the described property into three tax parcels and provide for separate tax bills for each of the above described lots." As a result, the lots are now designated as HTL 00012, HTL 00012B, and HTL 00012C.

¶5 The Kruses subsequently filed an application for a variance to recharacterize or confirm the existence of three substandard lots. In correspondence dated April 18, 2007, Walworth county code enforcement officer Darrin Schwanke informed the Kruses that the BOA had "voted to deny the

request to permit three lots under one tax key number to be designated as three buildable substandard parcels." He further explained:

> The outcome … leaves you with one buildable standard R-1 zoned lot. You will be allowed to construct one single family home on this lot. A condition to build on this lot will be that you combine the three tax key numbers into one before any permits will be issued. I am requesting that you file a quit claim deed in the Walworth County Register of deeds to combine the parcels back into one tax key number.

¶6 On November 14, 2007, the Kruses filed this action against the County requesting a declaratory judgment "ending the use of tax key numbers as a method of zoning interpretation" and a judgment overturning the BOA's decision. In setting forth their claim, the Kruses argued that the County's proclaimed use of the tax key number as a land division control violated common law and constitutional concepts of due process. The County responded that the Kruses had waived their claims by failing to timely pursue a writ of certiorari under WIS. STAT. § 59.694.[1] It subsequently moved for judgment on the pleadings.

[1] WISCONSIN STAT. § 59.694(10) provides:

> CERTIORARI. A person aggrieved by any decision of the board of adjustment, or a taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari. The court shall not stay the decision appealed from, but may, with notice to the board, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.

¶7 Following briefing, the circuit court held a hearing on March 19, 2008. The circuit court determined that because the Kruses were challenging the constitutionality of the statute, they were entitled to proceed under the exception to the exhaustion of remedies doctrine carved out in ***Kmiec v. Town of Spider Lake***, 60 Wis. 2d 640, 211 N.W.2d 471 (1973). Although it denied the County's motion, the court cautioned that the matter could still be subject to the exhaustion of remedies doctrine if the Kruses' constitutional challenge was not supported by the record.

¶8 After the parties had engaged in further discovery and briefing, the circuit court issued a written decision on November 19, 2009. The court determined that exhaustion was not required in this case. The court determined that it was the County's "retrospective or retroactive application of the ordinance to the [Kruses'] property that [was] the problem." It declared that the Kruses "retain the right to possess and convey their three lots individually and separately; the Court declines to address the constitutionality of the zoning ordinance as unnecessary to render [the Kruses] the relief they seek."[2]

¶9 In analyzing the BOA's retroactive application of the ordinance, the circuit court found: (1) the Kruses' substandard lots "were approved before the current [minimum size] requirement"; (2) the Kruses' lots had one tax key number and "there is no evidence showing that at any time, the three lots were combined

[2] On appeal, neither party argued that the retroactive application of the ordinance to the Kruses' property was unconstitutional. We therefore limit our discussion to the basis upon which the circuit court and parties address the issue.

into a single standard lot";[3] and (3) there is no language in the ordinance enabling retroactive application. The court reasoned:

> Defendants must follow the dictates of the Ordinance: a condition precedent (change or alteration in a tax key combination) must occur in a timely fashion to comply with the 2006 Ordinance. Defendants cannot assert and enforce the position that acts done years before the 2006 Ordinance were done for the express purpose of complying with the 2006 Ordinance, which obviously was not in existence at the time of those previous acts. Therefore, the Court confirms the existence of [the Kruses'] three separate lots under three separate tax key numbers, respectively.

The circuit court entered a declaratory judgment in favor of the Kruses on December 9, 2009, providing that they "retain the right to possess, convey or otherwise dispose of their three (3) lots individually and separately." The County appeals.

DISCUSSION

¶10 The County contends that the Kruses were required to comply with the exhaustion of remedies doctrine by filing a writ of certiorari within the thirty-day time limit and that the circuit court erred in refusing to address the constitutionality of the ordinance under ***Kmiec***. A circuit court's decision as to the application of the exhaustion doctrine is discretionary in nature and is reviewed

[3] On this issue, the court further found:

> [T]here is no Wisconsin statute which explicitly provides that if the owner has one tax key number for multiple existing substandard lots, the lots are therefore deemed combined as one standard lot. Despite this, [Walworth County] ha[s] taken the position that existing substandard lots, held under one tax key number, are combined as one parcel and negate previously approved and recorded subdivision plats and other land divisions.

using an erroneous exercise of discretion standard. ***St. Croix Valley Home Builders Ass'n, Inc. v. Township of Oak Grove***, 2010 WI App 96, ¶10, ___ Wis. 2d ___, 787 N.W.2d 454. Thus, we will uphold the circuit court's decision if it examined the relevant facts, applied a proper standard of law and used a demonstrably rational process to reach a reasonable conclusion. ***Id.***

¶11 The County is correct that judicial relief is generally denied until the parties have exhausted all of their administrative remedies. *See* ***Nodell Inv. Corp. v. City of Glendale***, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977). While ***Kmiec*** sets forth an exception to the exhaustion of administrative remedies when a party challenges the constitutionality of an ordinance, ***Kmiec***, 60 Wis. 2d at 645-46, the parties dispute whether the exception applies in this case. However, the circuit court expressly declined to address the constitutionality of the ordinance itself. Instead, the court excepted the Kruses from the exhaustion requirement, finding that the 2006 ordinance had been improperly applied retroactively to the Kruses' existing substandard lots. The County contends that the circuit court erred in doing so. We believe the supreme court's decision in ***County of Sauk v. Trager***, 118 Wis. 2d 204, 346 N.W.2d 756 (1984), provides the appropriate guidance for our review of the circuit court's exercise of discretion.[4]

[4] We acknowledge that the circuit court failed to expressly address the basis for declining to apply the exhaustion doctrine to the Kruses' request for declaratory judgment. A decision that requires an exercise of discretion and that on its face demonstrates no consideration of any of the factors on which it should be properly based constitutes an erroneous exercise of discretion. ***Schmid v. Olsen***, 111 Wis. 2d 228, 237, 330 N.W.2d 547 (1983). However, the circuit court's failure to express the exercise of its discretion does not require reversal. A reviewing court is obliged to uphold a discretionary determination if it can independently conclude that the facts of record applied to the proper legal standards support the circuit court's decision. *See* ***Andrew J.N. v. Wendy L.D.***, 174 Wis. 2d 745, 767, 498 N.W.2d 235 (1993); ***Schmid***, 111 Wis. 2d at 237. "We may independently search the record to determine whether it provides a basis for the circuit court's unexpressed exercise of discretion." ***Farrell v. John Deere Co.***, 151 Wis. 2d 45, 78, 443 N.W.2d 50 (Ct. App. 1989).

¶12 In ***Trager***, the property owner began constructing a foundation for a garage in 1960, but did not resume work until after 1970. ***Id.*** at 207. Prior to 1970, there was no zoning ordinance requiring either a permit or a setback. ***Id.*** In December 1978, the county informed the property owner that his garage, as positioned during the construction of the foundation, violated the setback requirements and that he would either have to move the garage or seek the necessary approval from the board of adjustment. ***Id.*** After a hearing before the board and its decision to reaffirm on reconsideration, the property owner failed to appeal the adverse decision by the board within the thirty-day time limit. ***Id.*** at 208. When the property owner attempted to challenge the validity of the board's decision in the context of an enforcement action filed by the county approximately one year later, the county argued that the exclusive means by which he could obtain judicial review was through statutory certiorari proceedings. ***Id.*** at 208-09. The county argued that the property owner was precluded from judicial review because he had not exhausted his remedies. ***Id.*** at 209.

¶13 In ***Trager***, the supreme court acknowledged that although the doctrine of exhaustion of administrative remedies "is sometimes expressed in absolute terms and in terms of a court's subject-matter jurisdiction, we have not applied the doctrine in this manner." ***Id.*** at 210. The court further noted that the exhaustion doctrine has "numerous exceptions," and that "[o]ur court has been willing to assume jurisdiction of a case, notwithstanding a party's failure to exhaust administrative remedies, where the court finds that the reasons supporting the exhaustion rule are lacking." ***Id.*** (citing ***Nodell***, 78 Wis. 2d at 424-26).

¶14 The court examined the circumstances under which the doctrine arises and the reasons for the doctrine and then balanced the advantages and disadvantages of applying it. ***Trager***, 118 Wis. 2d at 210-12. The court noted that

the exhaustion doctrine is typically applied when a party seeks judicial intervention before completing "all the steps prescribed in the hierarchy of administrative agency proceedings." ***Id.*** at 210. In such a case, the purpose of the exhaustion doctrine is to allow the administrative agency to perform the functions delegated to it by the legislature without interference by the courts; "[t]he doctrine allows the agency to apply its special competence and expertise to make a factual record." ***Id.*** at 210-11. However, in ***Trager***, there were no further steps to be taken in the administrative agency process. ***Id.*** at 211. The board had the opportunity to perform its functions, to compile a factual record, and to interpret and apply the ordinance. ***Id.***

¶15 Relevant to the Kruses' action, the supreme court in ***Trager*** also discussed the application of the exhaustion doctrine when a party does not follow the statutorily prescribed procedure for judicial review of an agency decision and seeks judicial review in a different forum or proceeding.[5] ***Id.*** at 211. The court noted that in such a case, it is usually the party aggrieved by an administrative decision who seeks judicial assistance by initiating an action challenging the agency's decision. ***Id.*** The court explained:

> The purpose of the exhaustion rule in this type of case is not to achieve a proper allocation of functions between administrative agencies and courts but to achieve finality of administrative agency decision-making, to maintain orderly judicial process, to prevent a multiplicity of suits, and to achieve economy of judicial time. The exhaustion rule is a rule of policy, convenience, and discretion, not a rule regulating the jurisdiction of the court.

[5] Given the court's discussion, we reject the County's contention that the supreme court's reasoning in ***County of Sauk v. Trager***, 118 Wis. 2d 204, 346 N.W.2d 756 (1984), is limited to the application of the exhaustion doctrine in an enforcement proceeding.

Id. at 211-12 (citation omitted). While acknowledging the general rule set forth in ***Jefferson County v. Timmel***, 261 Wis. 39, 63-64, 51 N.W.2d 518 (1952), that the statutory certiorari review procedure is exclusive except in cases where the validity of the ordinance itself is attacked, the ***Trager*** court recognized that "it need not apply the exhaustion doctrine in a rigid, unbending way." ***Trager***, 118 Wis. 2d at 213-14. The court recognized that there are exceptional cases in which the court will not apply the exhaustion doctrine. It held:

> A court need not apply the exhaustion doctrine when a good reason exists for making an exception. In exercising its discretion in whether to apply the exhaustion doctrine, the court should balance the litigant's need for judicial review, the agency's interest in precluding the litigant from defending the action, and the public's interest in the sound administration of justice.

Id. at 214.

¶16 In declining to apply the exhaustion doctrine in ***Trager***, the court considered the following factors: (1) the question presented to the court is the same question as would have been presented to a court in a statutory certiorari review proceeding and the procedures in both types of review appear to be substantially similar—the question before the court is the validity of the board's decision; (2) there is no dispute as to the facts, as to an exercise of the agency's discretion, or as to whether the ordinance applies to these facts—the question presented concerns the meaning of the ordinance and whether the board proceeded on a correct interpretation of the ordinance; (3) the pleadings and stipulation of facts indicated that the board's decision was suspect on its face and courts are reluctant to apply the exhaustion rule when it would preclude a person from raising what appears to be a "sound defense" unless policies favoring preclusion outweigh considerations of equity; and (4) the application of the exhaustion

doctrine would be harsh and courts are reluctant to invoke the exhaustion doctrine if it results in harsh consequences. ***Id.*** at 215-16.

¶17 Considering the Kruses' request for judicial review in light of the factors set forth in ***Trager***, we conclude that the circuit court did not err in its implicit finding that the adverse consequences that would result from applying the exhaustion rule in this case outweigh its benefits. The question presented to the court for declaratory judgment is essentially the same as would have been presented on certiorari review: Whether the County erred in applying the tax key combination property classification under ORDINANCE § 74-221, as amended in 2006, retroactively to the Kruses' property, thereby causing them to lose the right to possess and convey their three lots individually and separately. The parties agreed before the circuit court that the question could be decided on the record, and our review of the record on appeal reveals no dispute as to the material underlying facts. Further, our review of the record indicates that the BOA had the opportunity to perform its function of interpreting and applying the ordinance and its resulting decision was suspect on its face (the 2006 ordinance amendment did not contain a provision for retroactive application);[6] the Kruses have a sound defense to the application of the zoning ordinance (they had not combined the three preplatted lots under one property tax key number after the ordinance was amended); and the application of the exhaustion doctrine to the Kruses' claim would be harsh (they had been divested of their right to hold the lots as approved

[6] The County does not specifically challenge the circuit court's retroactivity analysis, but rather focuses on whether the Kruses are entitled to judicial review generally. Therefore, any challenge as to the retroactivity analysis is deemed waived. *See* ***Reiman Assocs., Inc. v. R/A Advertising, Inc.***, 102 Wis. 2d 305, 306 n.1, 306 N.W.2d 292 (Ct. App. 1981) (an issue raised on appeal, but not briefed or argued, is deemed abandoned).

"[e]xisting substandard lots"). Moreover, we fail to discern what public interest would be served by applying the exhaustion doctrine in this case. We therefore conclude that the circuit court properly exercised its discretion in treating this case as an exception to the exhaustion doctrine. *See* ***Trager***, 118 Wis. 2d at 217; ***St. Croix Valley Home Builders Ass'n, Inc.***, 2010 WI App 96, ¶10.

CONCLUSION

¶18 We conclude that the circuit court properly exercised its discretion in declining to apply the exhaustion doctrine to the Kruses' request for declaratory judgment. The adverse consequences that would result from applying the exhaustion rule in this case outweighed its benefits. We therefore affirm the judgment.

By the Court.—Judgment affirmed.

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