

**COURT OF APPEALS  
DECISION  
DATED AND RELEASED**

**NOTICE**

April 24, 1997

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. 95-3398

STATE OF WISCONSIN

IN COURT OF APPEALS  
DISTRICT IV

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EDWARD PRYZINA,

PETITIONER-APPELLANT,

v.

CITY OF THORP,

RESPONDENT-RESPONDENT.

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APPEAL from an order of the circuit court for Clark County:  
EDWARD F. ZAPPEN, JR., Judge. *Affirmed.*

Before Eich, C.J., Dykman, P.J., and Roggensack, J.

PER CURIAM. Edward Pryzina appeals from an order affirming a decision of the City of Thorp Board of Zoning Appeals. At issue is the board's approval of a zoning variance allowing Pryzina's neighbors to build a garage within inches of his lot line. Pryzina contends that: the trial court should have taken additional evidence on review; he did not receive due notice of the board's

hearing; the evidence did not reasonably allow the board to approve the variance; and the board acted arbitrarily and capriciously in so doing. We reject each of Pryzina's arguments and therefore affirm.

Pryzina owns property in a residential neighborhood. His next-door neighbors, the Browns, reside on a lot that is fifty feet wide. Because the lot is unusually narrow, the Browns determined that they could not feasibly build a thirteen-foot-wide garage without a variance from the City's three- to eight-foot sideyard setback requirements. Accordingly, they applied for a variance allowing them to built a garage within twenty-two inches or less from Pryzina's lot line.

On September 12, 1994, the city clerk scheduled a zoning board hearing on the matter for October 3, 1994. Notice of the hearing appeared in the *Thorp Courier*, a local newspaper, on September 15 and 22. The clerk reported that on September 12 she also mailed a notice of the hearing to Pryzina at his tax roll address, in Colorado, and at his utility billing address, in Arizona.

Pryzina later told the board that he left Thorp for Arizona on September 8 and was in transit until September 27 or 28, learning of the hearing only after his arrival. In his petition for review, he stated that he learned of the hearing when he read a copy of the *Thorp Courier* on September 29, before reaching his Arizona home. In any event, he sent the board a letter, dated September 29, in which he made two objections to the variance: (1) the garage threatened to cause water to run off into his basement; and (2) it could potentially damage a nearby tree. Pryzina voiced similar concerns in telephone calls he made to two board members and to his city council representative, who appeared at the hearing and relayed Pryzina's concerns. His letter also expressed his regrets that he could not attend the hearing in person.

In neither his written nor his verbal communications did Pryzina request an adjournment, and the hearing occurred as scheduled on October 3. After considering such factors as the size of the lot, the impracticability of alternative placements, the Browns' need for a garage, the purpose of the setback ordinance and the board's action on prior, similar requests, the board voted to approve the variance. To address Pryzina's concerns, the board's order conditioned approval on a design that directed drainage flow away from Pryzina's lot, and required the Browns to avoid any damage to Pryzina's tree. On certiorari review, the trial court affirmed based on the record of the administrative proceeding.

Pryzina has waived his right to claim error because the trial court did not take additional evidence. Unlike common-law certiorari review, the trial court may hear additional evidence in zoning board appeals. Section 62.23(7)(e)10, STATS. However, Pryzina never asked the court to take additional evidence. He did not identify what additional evidence he had to present in the trial court, nor has he done so on appeal. Absent persuasive circumstances, we will not review an issue raised for the first time on appeal, *O'Neill v. Buchanan*, 186 Wis.2d 229, 232, 519 N.W.2d 750, 751 (Ct. App. 1994), and we decline to do so here.

The board gave Pryzina due notice, as required by § 62.23(7)(e)6, STATS. Three weeks before the hearing, the clerk mailed notice to Pryzina at the two addresses he had provided the City. Notice was also published twice in the local newspaper. The only reason Pryzina did not receive notice until September 28 or 29 was that he was traveling, a circumstance that is neither the board's responsibility nor concern. After receiving his mail, Pryzina could have requested an adjournment if he believed that five days was insufficient time to present his concerns to the board. However, he did not.

The evidence of record reasonably supports the board's decision. The limitations imposed by the Browns' fifty-foot lot were undisputed. The board heard evidence of the Browns' need for a garage, the unavailability of other sites, the board's action on prior, similar requests, the availability of means to resolve Pryzina's concerns, and the otherwise benign impact on the neighborhood. If deemed credible, and accorded due weight, that evidence provided reasonable support for the decision. The board, rather than the courts, determines the weight and credibility of the evidence. *Delta Biological Resources, Inc. v. Board of Zoning Appeals*, 160 Wis.2d 905, 915, 467 N.W.2d 164, 168 (Ct. App. 1991).

The board did not act arbitrarily or capriciously. The record indicates the board engaged in extensive discussion of the variance request and reached its decision by giving due regard to the various factors deemed relevant by the city's zoning ordinance. The board fully considered Pryzina's concerns and tailored its order to alleviate those concerns. Pryzina cannot plausibly contend that the determination was an arbitrary exercise of the board's will, as opposed to a reasonable attempt to resolve the matter on the evidence before it.

*By the Court.*—Order affirmed.

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

