

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 30, 2002

Cornelia G. Clark
Clerk of Court of Appeals

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 WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 02-0340
STATE OF WISCONSIN**

Cir. Ct. No. 00-CV-715

**IN COURT OF APPEALS
DISTRICT III**

RANDALL G. HORLACHER AND TRUDY H. HORLACHER,

PLAINTIFFS-APPELLANTS,

v.

**EAU CLAIRE COUNTY BOARD OF LAND USE APPEALS,
EAU CLAIRE COUNTY, DONALD KRENZ, JR., AND EAU
CLAIRE CELLULAR TELEPHONE LIMITED PARTNERSHIP,**

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Eau Claire County: BENJAMIN D. PROCTOR, Judge. *Affirmed.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Randall and Trudy Horlacher appeal a judgment affirming the grant of a conditional use permit to build a telecommunications tower on land zoned exclusively agricultural. The Horlachers argue that the

Eau Claire County Board of Land Use Appeals erred when it granted the conditional use permit because the tower is not consistent with agricultural use and therefore is not a permitted use in a district zoned A-1 agricultural. The County¹ argues that the Horlachers waived any argument regarding the board's interpretation of the ordinance and that the board applied the appropriate legal standards to the facts when it considered the application. We agree with the County and therefore affirm the grant of the conditional use permit.

BACKGROUND

¶2 Eau Claire Cellular Telephone Limited Partnership, doing business as CenturyTel, applied to the Eau Claire County Committee on Planning & Development for a conditional use permit to build a telecommunications tower on agricultural land. CenturyTel claimed that the tower was necessary to cover a gap in cellular service and proposed to build the tower on property leased from Donald Krenz.

¶3 The committee grants or denies applications for conditional use permits after holding a public hearing. Before the hearing, committee staff evaluates incoming applications and makes recommendations to the committee regarding whether the staff believes the permit should be granted. The staff recommended that the permit application be denied because they determined that the proposed tower location did not meet the standards for consistency with

¹ The defendants and respondents in this case include the Eau Claire County Board of Land Use Appeals; Eau Claire County; the landowner, Donald Krenz; and Eau Claire Cellular Telephone Limited Partnership. We refer to them collectively as the County.

agricultural use. CenturyTel withdrew its application, and no hearing was held or committee decision made on the initial location.

¶4 CenturyTel later resubmitted its application for a conditional permit to build the tower at a new location. The new application moved the proposed tower location off cultivated and prime soils. It also changed the tower structure, reducing the total amount of land required for placement of the tower. The staff recommended approval of the application because the new location was not on prime soil, the proposed site had not had a crop on it for the last three years and the new tower design “should not interfere with the farming of the property.”

¶5 The committee held a public hearing on the permit application on August 22, 2000. The county zoning administrator presented his staff’s findings and recommendation at the start of the hearing. The staff found (1) that the new tower area would not interfere with agricultural use of the property; (2) that there is a cellular coverage problem in the area that needs to be met; and (3) that CenturyTel had evaluated and reasonably rejected an alternative site at the staff’s request, which the staff deemed more suitable. After the hearing, the committee approved the permit in a two to one vote.

¶6 The Horlachers appealed the committee’s decision to the board, which held a public hearing on the appeal on September 27, 2000. The board voted four to zero to deny the appeal and affirm the conditional use permit. CenturyTel proceeded to construct the tower.

¶7 The Horlachers appealed the board’s decision to the trial court. The court affirmed the board’s decision and denied the Horlachers’ request for certiorari relief. The Horlachers now appeal.

EAU CLAIRE COUNTY ZONING CODE

¶8 Under the Wisconsin Farmland Preservation Program, farmers can receive a tax credit by zoning their land exclusively for agriculture and strictly limiting their right to develop the land. Krenz is a participant in the program.

¶9 WISCONSIN STAT. § 91.75² sets the standards a zoning ordinance must meet to qualify a district for the Farmland Preservation Program. Section 91.75(3) states that “No structure or improvement may be built on the land unless consistent with agricultural uses.” However, § 91.75(5) authorizes the ordinances to provide for certain conditional uses: “Special exceptions and conditional uses are limited to those agricultural-related, religious, other utility, institutional or governmental uses that are consistent with agricultural use and are found to be necessary in light of the alternative locations available for such uses.”

¶10 Here, we consider an application for a conditional use permit under the Eau Claire County zoning code.³ An application for a conditional use permit must set forth that the proposal is for a permitted conditional use, EAU CLAIRE COUNTY, WIS., ZONING CODE § 18.04.030 (2000). Section 18.04.030 lists the conditional uses in the A-1 district, including: temporary housing for seasonal farm help, sawmill operations, game farms, religious and governmental uses, utility buildings and structures, agricultural-related businesses, housing for farm workers and seasonal structures. Also, the structure must be included in

² All references to the Wisconsin Statutes are to the 1999-2000 version.

³ The zoning code was not adopted as part of the record. It was provided as an appendix to the Horlachers’ reply brief, although it is not a part of the record and appears nowhere else. The parties do not dispute the language, however, just its meaning. Therefore, we will consider the ordinance language as presented by the parties.

§ 18.04.035 as a permitted structure under a conditional use permit. Then, § 18.04.040 sets forth the factors the board must consider before issuing a conditional use permit. It provides:

When reviewing conditional use permit requests for the A-1 district, the committee shall consider the following factors:

- A. The statements of purpose of the Zoning Code in this chapter;
- B. The compatibility with adjacent land uses and potential for conflict with agricultural use;
- C. The need for the proposed use in the A-1 district, and the availability of alternative locations;
- D. The productivity of the land involved in the efforts to minimize the amount of productive land converted to non-farm use;
- E. The need for public services created by the proposed use;
- F. The availability of local units of government to provide services without unreasonable burden;
- G. The effect of the proposed use on water and air pollution, soil erosion, sedimentation and other possible environmental damage.

STANDARD OF REVIEW

¶11 On appeal, we review the board's decision and not the trial court's. *Clark v. Waupaca Cty. Bd. of Adj.*, 186 Wis. 3d 300, 303, 519 N.W.2d 782 (Ct. App. 1994). Our review is limited to four issues: (1) whether the board kept within its jurisdiction; (2) whether it acted according to the 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 v. Winnebago Cty.*, 196 Wis. 2d 836, 842,

540 N.W.2d 6 (Ct. App. 1995). We address the issues without deference to the trial court and review the record de novo. *Id.*

DISCUSSION

A. WAIVER

¶12 The Horlachers argue that the board erred, as a matter of law, when it approved the grant of a conditional use permit for a telecommunications tower. They maintain that the tower is not a permitted conditional use in an A-1 district because it does not qualify as a “utility structure” under EAU CLAIRE COUNTY, WIS., ZONING CODE §§ 18.04.030 and 18.04.035 (2000).

¶13 It is well settled that to preserve an issue for judicial review, a party must raise it before the administrative agency. *State v. Outagamie County Bd. of Adj.*, 2001 WI 78, ¶55, 251 Wis. 2d 484, 628 N.W.2d 376. We generally will not consider issues beyond those properly raised before the administrative agency. *Id.* A failure to raise an issue generally constitutes a waiver of the right to raise the issue before the reviewing court. *Id.* Because the agency charged to administer Eau Claire’s zoning ordinances did not have an opportunity to address the Horlachers’ contentions, we decline to do so here. *See id.* at ¶56 n.17.

¶14 We conclude that the Horlachers waived any argument regarding the board’s interpretation of the ordinance. The Horlachers did not specifically make arguments regarding ordinance interpretation before the committee or the board, and their reply is unpersuasive regarding the preservation of the argument. In their reply brief, the Horlachers cite their arguments to the board that rezoning is required to locate the tower on Krenz’s land. This argument does not remotely mirror the argument the Horlachers attempt to pursue here on appeal regarding

whether the tower is a “utility structure” under the applicable ordinance. They also argue, “one cannot raise the argument that the Board failed to follow the law until the Board fails to follow the law.” Although this argument has superficial intuitive appeal, it does not serve as a substitute for squarely addressing before the board the arguments upon which their position rests. It was incumbent upon the Horlachers to argue the law they believed the board was required to follow.

B. CONDITIONAL USE PERMIT

¶15 The County contends that the board applied the appropriate legal standards to the facts when it considered the application for a conditional use permit.⁴ We agree and therefore affirm the grant of the permit.

¶16 A conditional use permit allows property to be put to a use the ordinance expressly permits when certain conditions have been met. *State ex rel. Skelly Oil Co. v. Common Council*, 58 Wis. 2d 695, 701, 207 N.W.2d 585 (1973). The decision to grant a conditional use permit is discretionary in nature. *Board of Regents v. Dane Cty. Bd. of Adj.*, 2000 WI App 211, §17, 238 Wis. 2d 810, 618 N.W.2d 537. When deciding whether to grant a conditional use permit, a board considers whether the proposed use meets the specific requirements set forth by the ordinance at issue, as well as the ordinance’s general purpose. *See Edward Kraemer & Sons v. Sauk Cty. Bd. of Adj.*, 183 Wis. 2d 1, 10-11, 515 N.W.2d 256

⁴ Also, Eau Claire argues that *Board of Regents v. Dane County Bd. of Adj.*, 2000 WI App 211, 238 Wis. 2d 810, 618 N.W.2d 537, stands for the proposition that a utility tower can be placed in an A-1 district. We disagree. In *Board of Regents*, we interpreted Dane County zoning ordinances and determined that a University of Wisconsin radio tower was a “governmental use” and therefore permitted as a specific conditional use in Dane County’s A-1 agricultural district. *Id.* at ¶¶1-2, 17. *Board of Regents* does not control this case. The decision did not specifically address whether a tower could be placed in an A-1 district. It merely interpreted the meaning of “governmental use.” *Id.*

(1994). The standards for granting conditional uses are those stated in the county ordinance, including the ordinance’s statement of purpose. *See id.* at 13-14.

¶17 Although WIS. STAT. § 91.75(3) requires county zoning ordinances to broadly prohibit any use not consistent with agriculture use, § 91.75(5) allows counties to develop schemes to permit certain conditional uses. Because the tower is an appropriate conditional use and structure, the board must consider the factors set forth in EAU CLAIRE COUNTY, WIS., ZONING CODE § 18.04.040 (2000). Further, although “the potential for conflict with agricultural use” is one factor the board shall consider, no one of the seven factors is dispositive. *Id.* The board must consider seven factors, including the “compatibility with adjacent land uses and potential for conflict with agricultural use;” the “need for the proposed use in the A-1 district, and the availability of alternate locations;” and the “productivity of the land involved and efforts to minimize the amount of productive land converted to non-farm use” *Id.*

¶18 Here, the board considered the required factors and granted the conditional use permit for the tower. The evidence in the record supports its determination. The board did not err when it granted the conditional use permit to construct the tower.

C. “CONSISTENT WITH AGRICULTURAL USE”

¶19 The Horlachers contend that any conditional use must be “consistent with agricultural use” and “necessary in light of the alternative locations available

for such uses,” based on WIS. STAT. § 91.75(5).⁵ The Horlachers rely on the zoning code’s definition of “consistent with agricultural use.”⁶

¶20 However, the Horlachers’ argument centers on a statute that does not apply. As indicated above, WIS. STAT. § 91.75(5) sets the standards for Farmland Preservation zoning ordinances and permits conditional uses. It does not provide the standard for conditional use permits in Eau Claire County. The zoning code does. In any event, the statute has its own definition of “consistent with agricultural use.” The zoning code definition applies only to the phrase as used in the zoning code. The phrase is mentioned twice in EAU CLAIRE COUNTY, WIS., ZONING CODE ch. 18.04 (2000) dealing with A-1 exclusive agricultural districts. Neither mention pertains to this case.

¶21 At best, this is a collateral attack on the ordinance. While it may be that the Horlachers intended to attack the ordinance as insufficient under WIS. STAT. § 91.75(5), this argument is not sufficiently developed to permit a response.

⁵ The Horlachers also argue that the tower is not an “essential service” under the zoning code. The County does not disagree, but does not in any way rely in its argument on the tower being an “essential service.” This is not an issue necessary for us to resolve. *Sweet v. Berge*, 113 Wis. 2d 61, 67, 334 N.W.2d 559 (Ct. App. 1983).

⁶ EAU CLAIRE COUNTY, WIS., ZONING CODE § 18.02.020(30) (2000) reads:

“Consistent with Agricultural Use” means a use of the land, other than an agricultural use, that will do none of the following:

- a. Convert, to a nonagricultural use, land that has been in agricultural use for at least 12 consecutive months during the last 36 months.
- b. Limit the potential for agricultural use of surrounding lands.
- c. Conflict with any current agricultural use of land.

By the Court.—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE
§ 809.23(1)(b)5.

