

**COURT OF APPEALS
DECISION
DATED AND FILED**

January 14, 2003

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. 02-1131

Cir. Ct. No. 01-CV-42

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

**JULIE CASPER, ON BEHALF OF HERSELF AND CITIZENS
FOR A THOUGHTFUL TOWER PLAN,**

PLAINTIFFS-APPELLANTS,

v.

BAYFIELD COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT,

**AMERICAN TOWER, L.P., A DELAWARE LIMITED
PARTNERSHIP,**

INTERVENOR-RESPONDENT.

APPEAL from an order of the circuit court for Bayfield County:
NORMAN L. YACKEL, Judge. *Affirmed.*

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

¶1 PER CURIAM. Julie Casper and Citizens for a Thoughtful Tower Plan (Casper) appeal an order upholding the Bayfield County Board of Adjustment’s decision to issue a conditional use permit for the construction of a telecommunications tower. Casper argues that due to procedural irregularities, the board’s decision must be voided. Specifically, Casper contends: (1) the board violated WIS. STAT. § 59.694(3)¹ when it failed to conduct its deliberations in open session; (2) the board’s decision was arbitrary and unreasonable; and (3) the board failed to act according to law when it did not remand to the zoning committee for a public hearing on newly submitted materials. We reject these arguments and affirm the order.

¶2 Following a January 2001 meeting, the Bayfield County Zoning and Planning Committee voted to grant the application of the American Tower Company for a conditional use permit to construct a telecommunications tower in the Fire Tower Hill subdivision. As Casper explains, this location draws its name from the fire tower that was once present. Now, radio towers are located in the area. At the public meeting, one committee member stated that the company had looked “for a place on Fire Tower Hill where the other ones are, so I don’t really have a problem with this [application] either.”

¶3 Casper appealed the committee’s decision to the board. In March 2001, the board held a public hearing almost seven hours long. At the end of the public hearing, the board went into closed session for its deliberations. After deliberating, the board granted the permit with several conditions. Casper filed a

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

writ of certiorari in circuit court. The court upheld the board's decision. This appeal follows.

¶4 On certiorari review, “[a] reviewing court must accord a presumption of correctness and validity to a board of adjustment’s decision.” *State v. Outagamie County Bd. of Adj.*, 2001 WI 78, ¶25, 628 N.W.2d 376. Our review of the board of adjustment’s decision is limited to whether the board (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted arbitrarily, oppressively or unreasonably, and according to its will, not its judgment; and (4) reached a decision reasonably supported by the evidence. *Clark v. Waupaca County Bd. of Adj.*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994).

¶5 Casper argues that regardless whether the issue was raised with the board of adjustment, that the board met in closed session violates WIS. STAT. § 59.694(3)² and its decision should be voided. Casper does not dispute that a seven-hour public hearing preceded the board’s closed session for deliberations, and that no objection to this procedure was raised. Consequently, we do not address this issue for the first time on appeal. *See Outagamie County Bd. of Adj.*, 2001 WI 78 at ¶55 (“It is settled law that to preserve an issue for judicial review, a party must raise it before the administrative agency.”).

¶6 Next, Casper contends that the board’s decision was arbitrary, unreasonable and represented its will, not its judgment. Casper argues that the board previously considered an application of another individual to construct a

² WISCONSIN STAT. § 59.694(3) provides in part: “[A]ll meetings of the board of adjustment shall be open to the public.”

telecommunications tower and that this earlier proceeding prejudiced its judgment. She claims that a zoning committee member's comment showed that its decision was predetermined and, in any event, the proceedings presented an impermissibly high risk of bias. Casper seeks to have the matter remanded with the requirement that it be heard by a board not composed of members who participated in the earlier application proceedings.

¶7 We review the board's decision, not that of the circuit court. *Id.* at ¶26. In our view, however, the circuit court nonetheless aptly summed up the record, finding it difficult to find grounds to overturn the board considering the

volume of material in this matter, the hours devoted to the hearings, and the opportunity to give all the parties to speak to the issue before the Board. Everyone that wanted to speak was given an opportunity to be heard, and they were not limited to what they could say. ... [Casper argues] that one comment by a member of the Board and the contact by corporation counsel [with] Mr. Davidson constitutes a denial of due process, throwing out the entire decision as somehow defective.

¶8 In any event, we conclude that if Casper believed that earlier proceedings on a previous application prejudiced the board, the appropriate time to object was before the board, not now on appeal. There is no showing that Casper objected that the proceedings before the board were impermissibly prejudiced by the proceedings on an earlier application by another individual at a different location. *See id.* at ¶101 (Prosser, J., concurring) (“[A] court should be reluctant to fault a board of adjustment for not considering a legal argument that was never made.”). Consequently, we reject her argument.

¶9 Finally, Casper complains that the board erroneously failed to remand the matter to the zoning committee because, at the hearing before the zoning committee, the tower company presented a packet of information that the

public and the committee members had no previous opportunity to review. Casper contends that the failure to hold an additional zoning committee meeting denies her due process. The board responds that at the seven-hour public hearing before the board that followed, the tower opponents and committee members had an opportunity to dispute or comment on the information packet.

¶10 We agree with the board that Casper failed to show any prejudice as a result of the zoning committee's failure to hold an additional meeting following receipt of the information packet. The subsequent seven-hour public hearing before the board provided the tower's opponents ample opportunity to challenge the information in the packet. Further, Casper fails to identify the objectionable information in the packet and consequently fails to indicate how the information in the packet caused prejudice.

By the Court.—Order affirmed.

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

