

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**December 19, 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. 02-1430-FT  
STATE OF WISCONSIN**

**Cir. Ct. No. 01-CV-428**

**IN COURT OF APPEALS  
DISTRICT IV**

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**DONN WENDORFF,**

**PLAINTIFF-APPELLANT,**

**V.**

**ANDREW A. OECHSNER,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the trial court for Dodge County:  
DANIEL GEORGE, Judge. *Reversed and cause remanded with directions.*

Before Dykman, Deininger and Lundsten, JJ.

¶1 PER CURIAM. Donn Wendorff appeals the trial court's order dismissing his injunction action against Andrew Oechsner. The issue is whether

the trial court erred in dismissing the case. We conclude that it did and therefore reverse.<sup>1</sup>

¶2 Donn Wendorff and Andrew Oechsner are neighbors. Wendorff commenced an injunction action against Oechsner, contending that he was keeping animals in a building on his property that was not set back far enough from the property line, contrary to the zoning ordinances in the Town of Williamstown. After Wendorff commenced the action, Oechsner applied for and was granted a certificate of zoning compliance for a nonconforming use by the land use administrator for the township. Wendorff was notified that he had a right to appeal the issuance of the certificate, which he did. While that action was pending at the administrative level, Oechsner filed a motion to dismiss this litigation, arguing that Wendorff had not exhausted his administrative remedies. The trial court dismissed without prejudice because it concluded that Wendorff had not exhausted his administrative remedies and, therefore, it lacked jurisdiction.

¶3 Wendorff argues that the trial court erred in concluding that it lacked jurisdiction over this case. We agree. “The rule of exhaustion of administrative remedies is a doctrine of judicial restraint which the legislature and the courts have evolved in drawing the boundary line between administrative and judicial spheres of activity.” See *Nodell Inv. Corp. v. City of Glendale*, 78 Wis. 2d 416, 424, 254 N.W.2d 310 (1977). The general rule is that “the parties must complete the administrative proceedings before they come to court.” *Id.*

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<sup>1</sup> This case has been placed on the expedited appeals calendar. See WIS. STAT. RULE 809.17 (1999-2000). All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

¶4 The doctrine of exhaustion of administrative remedies does not apply in this case because no administrative action had taken place when Wendorff commenced this injunction action in the trial court. *See State v. WERC*, 65 Wis. 2d 624, 635, 223 N.W.2d 543 (1974), *corrected in part*, 319 N.W.2d 927 (1974) (The doctrine of exhaustion of administrative remedies “contemplates a situation where some administrative action is under way but is as yet uncompleted.”). The premise of the exhaustion rule is that an administrative remedy is available to the plaintiff at his initiative, which was not the case here because Oechsner had not applied for and received the certificate of zoning compliance before Wendorff commenced this action. *See Nodell*, 78 Wis. 2d at 424. There can be no administrative remedy for an administrative action that has not yet been taken.

¶5 Even if the doctrine did apply, the trial court had jurisdiction over the action because the doctrine “does not go to the subject matter jurisdiction of the court, but it is addressed to the trial court’s *discretion to decline jurisdiction* in favor of that of the agency.” *WERC*, 65 Wis. 2d at 635 (emphasis added). Thus, the trial court also erred because it concluded it lacked jurisdiction instead of considering whether it should, in its discretion, decline jurisdiction in favor of the administrative agency.

¶6 Because the trial court concluded that it had no jurisdiction based on the doctrine of exhaustion of administrative remedies, we reverse the trial court’s order dismissing this case and remand to the trial court for further proceedings. Our reading of the trial court’s decision suggests that the trial court concluded it would be better to allow the administrative proceedings to be resolved before it took action. If that continues to be the case, the trial court may of course stay these proceedings pending resolution of the administrative action.

*By the Court.*—Order reversed and cause remanded with directions.

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

