**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

December 3, 1998

**Marilyn L. Graves**
**Clerk, Court of Appeals**
**of Wisconsin**

## NOTICE

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**Nos. 98-0381**
**98-0382**
**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT IV**

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**No. 98-0381**

**ROBERT J. HANSON AND EARLENE HANSON,**

**PLAINTIFFS-APPELLANTS,**

**V.**

**TOWN OF PORTER BOARD OF ADJUSTMENT,**

**DEFENDANT-RESPONDENT.**

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**No. 98-0382**

**STATE OF WISCONSIN EX REL. MARK E. HOPPE,**

**PLAINTIFF-APPELLANT,**

**V.**

**TOWN OF PORTER BOARD OF ADJUSTMENT,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Rock County: MICHAEL J. BYRON, Judge. *Affirmed.*

Before Eich, Vergeront and Roggensack, JJ.

EICH, J. Robert and Erlene Hanson and Mark Hoppe appeal from an order upholding the Town of Porter Board of Adjustment's grant of a conditional use permit to Carl and Mary Larsen permitting them to operate a 400-cow feed-lot operation on their farm. Appellants, who own property near the Larsens' farm, argue: (1) that the board (a) did not comply with applicable town ordinances, and (b) acted arbitrarily by failing to articulate reasons for its findings; and (2) that there was insufficient evidence to support the board's decision. We reject the arguments and affirm the order.

The permit was initially granted by the Town's planning and zoning committee, after two town meetings had been held on the Larsen's application. The Hansons and Hoppe, whose homes are within 1200 feet of the Larsen's proposed operation, appealed the committee's decision to the board. After holding two additional hearings, the three-member board voted unanimously to deny the appeals and uphold the zoning committee's issuance of the permit.

The Hansons and Hoppe then sought *certiorari* review of the board's decision. Because the record was incomplete due to technical reasons—the tape recordings of the board's meetings were unintelligible—the court remanded the matter to the board with instructions that it "complete the record" and "summariz[e] the basis of [its] decision." The board reconvened and, after discussion of its specific findings, again affirmed the zoning committee's action, this time on a two-to-one vote.

The Hansons and Hoppe then moved the circuit court to vacate the board's decision. The court denied the motion and this appeal followed.[1]

On *certiorari*, we review the board's action *de novo*. ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990). We accord a presumption of correctness and validity to the board's decision and the issues on review are strictly limited to (1) whether the board kept within its jurisdiction;[2] (2) whether it acted according to 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 order or determination in question. ***Snyder v. Waukesha County Zoning Board***, 74 Wis.2d 468, 476, 247 N.W.2d 98, 103 (1976). Interpretation of ordinances, of course, is a question of law which we review *de novo*. ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 32-33, 498 N.W.2d 842 (1993).

The Hansons[3] argue first that the board did not act according to law when it proceeded with an "alternate" member at the meeting held after the remand from the circuit court. The alternate, Jim Smith—who acted as chair—had participated in the two initial hearings, sitting in place of a board member who was unavailable at the time. He remained in place for the remanded hearings, and the Hansons claim that his continued participation violated Town of Porter Ordinance Section 8.2(4), which provides that an alternate member "shall act only when a regular member is absent or refuses to vote because of a conflict of interest."

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[1] The Hansons' and Hoppe's appeals were consolidated by order dated May 21, 1998.

[2] Appellants do not contest that the board acted within its jurisdiction.

[3] Because these began as separate appeals, the Hansons' and Hoppe's arguments occasionally diverge.

They maintain because the "regular" board member was not shown to be unavailable at the continued hearings, Smith's continued service "flies in the face of common sense and experience" and thus must be considered improper. When the Hansons objected to Smith's participation at the final, post-remand, meeting, the board responded that since he had participated in the initial proceedings, and voted on the original decision, it would be appropriate for Smith to also serve during the review meeting, the purpose of which was for the board to clarify its previous findings and summarize the basis for its decision for the record. We see nothing amiss in Smith's participation in the subsequent proceedings.

Hoppe also complains that the board acted contrary to the zoning ordinances when it approved the conditional use permit for the Larsens' 400-cow confinement facility. The applicable ordinance, Town of Porter Zoning Ordinance 4.3 (A)(3), provides in pertinent part that a conditional use permit is required for "confinement operations exceeding 400 animal units or 2 animal units per acre (whichever is less)…." Hoppe claims that because the Larsens' farm is 178 acres, the maximum number of animals allowed by the ordinance for their confinement operation would be 356 (178 acres x 2 animals per acre). Claiming that the "land factor" of the cow-to-land ratio should include only tillable acreage—land that is suitable for manure disposal—he says that the maximum number would be reduced further if a wooded area on the Larsens' land were excluded from the ratio. Whatever the arithmetic, Hoppe argues that the final numbers exceed the maximum established by the ordinance.

We think Hoppe misreads the ordinance. He appears to see it as setting "400 animal units or 2 animal units per acre (which ever is less)" as the ultimate limit on the number of animals that can be confined *pursuant to a conditional use permit*. Under the ordinance's plain terms, however, the animal-

unit-per-acre factor is the threshold requirement for *issuance* of a conditional use permit. If the use exceeds the limit, a permit is required; if it does not, none is required. Hoppe has not persuaded us that the board acted contrary to law when it approved the issuance of the Larsens' conditional use permit based on the animal-per-acre provisions of the ordinance.

The Hansons and Hoppe next argue that the board acted arbitrarily by failing to adequately articulate the reasons for its decision. They do not contest that the board comprehensively stated its findings, and that those findings closely parallel the required standards enumerated in the applicable ordinance;[4] rather,

[4] Town of Porter Ordinance, Section 5.5(A), provides as follows:

> (A) In passing upon a Conditional Use Permit application in the A-1 District, the Planning and Zoning Committee and Town Board shall also consider the following factors:
>
> (1) The potential for conflict with agricultural use.
>
> (2) The need of the proposed use for a location in an agricultural area.
>
> (3) The availability of alternative locations.
>
> (4) Compatibility with existing or permitted uses on adjacent lands.
>
> (5) The productivity of the lands involved.
>
> (6) The location of the proposed use so as to reduce to a minimum the amount of productive agricultural land converted.
>
> (7) The need for public services created by the proposed use.
>
> (8) The availability of adequate public services and the ability of affected local units of government to provide them without an unreasonable burden.
>
> (9) The effect of the proposed use on water or air quality, soil erosion, and rare or irreplaceable natural resources.

they challenge the adequacy of the findings made. According to the Hansons and Hoppe, the board must do more than make the required findings; it must go further and express the reasoning process involved in arriving at its decision.

A board's decision is arbitrary if it is unreasonable or lacks a rational basis. ***Snyder***, 74 Wis.2d at 476, 247 N.W.2d at 103. We are satisfied that the board engaged in a rational decision-making process and adequately stated its findings.

The board made the findings required under the applicable ordinance. As the Town points out, the board's final decision reflected its "collective reasoning" with respect to the evidence presented, and the arguments made, over the course of five meetings—two zoning committee meetings and three subsequent board meetings. And while the ordinance requires the board to "consider" the enumerated standards in passing upon a conditional use permit application, neither the ordinance itself, nor any applicable legal precedent to which we have been referred, requires the board to make a specific finding with respect to each and every stated criterion, or to discuss and analyze all of the evidence before it, in order for it to validly act on a petition. We agree with the trial court that the board's task was to consider the criteria in the ordinance and strike a "balance [between] the general purposes of the ordinance and the [requested] uses." And we also agree that that is what it did here.

The board had the benefit of all of the parties' pro-and-con positions on the matter, including both oral and written expert testimony, together with documentary submissions and related materials. In ***Old Tuckaway Assoc. v. City of Greenfield***, 180 Wis.2d 254, 509 N.W.2d 323 (Ct. App. 1993), a city board of zoning appeals rejected an appeal from a developer whose request to amend the

density requirements of the applicable zoning ordinance had been denied by the city planning commission and common council on grounds of "aesthetic compatibility and economic feasibility." ***Id***. at 267, 509 N.W.2d at 328. The appeals board had before it "substantial written argument, a complete set of the Common Council's minutes concerning [its two] meetings [on the request], and a tape of a meeting ... between the city attorney and counsel representing the competing interest groups." ***Id***. at 276, 509 N.W.2d at 331. After hearing the arguments of counsel, the board voted to deny the appeal, agreeing with one member's statement of the reasons for the denial:

> I believe the Common Council has every right to make its decision based on aesthetics and economics in all [such proceedings]. These are prime reasons for the[] Council to even be considering a project. How it could act if it didn't decide on these very important issues if aesthetics and economic factors where what the Council based its decision on, and I think the Council was correct.

***Id.*** On *certiorari* review, the developer argued that the appeals board's decision was "procedurally improper" because it "failed to make findings of fact or to articulate any reasons for its decision." ***Id.*** at 275, 509 N.W.2d at 331. In upholding the board's action, we began by noting the supreme court's statement in ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis.2d 646, 660, 275 N.W.2d 668, 675 (1979), that

> [t]here is no requirement that the administrative agency indulge in the elaborate opinion procedure of an appellate court. It is sufficient if the findings of fact and conclusions of law are specific enough to inform the parties and the courts on appeal of the basis of the decision.

***Id***. at 277, 509 N.W.2d at 331-32. We went on to conclude in ***Tuckaway*** that the board member's brief statement was sufficient under this standard.

> In the present case, the findings of fact and the conclusion of law rendered by the Board … were specific enough to inform the parties, as well as this court on appeal, of the basis of the decision. As noted above, the Board had before it the minutes from the Common Council's meetings regarding the project and entertained statements from both parties concerning all facets of the Project. Although succinct, the findings of the Board are clear—the Council rejected the Project based on aesthetics and economic feasibility, both of which were proper criteria on which to render a decision. Based on these considerations, the Board denied Tuckaway's appeal.

***Id.*** at 277, 509 N.W.2d at 332.

While the board's final analysis in this case was brief—although certainly not as brief or cursory as that in ***Tuckaway***—the basis of its ultimate decision is clear in light of the record before us, and it passes muster under the applicable law.

Finally, the Hansons and Hoppe argue that the evidence was insufficient to support the board's findings. In *certiorari* cases, we apply the substantial evidence test to determine whether the evidence is sufficient. ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis.2d 300, 519 N.W.2d 782 (Ct. App. 1994).

> Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. As the … test is highly deferential to the board's findings, we may not substitute our view of the evidence for that of the board when reviewing the sufficiency of the evidence on certiorari. If any reasonable view of the evidence would sustain the board's findings, they are conclusive. Even if we would not have made the same

> decision … we cannot substitute our judgment for that of the zoning authority.

***Id***. at 304-05, 519 N.W.2d at 784.

The record satisfies us that there was ample evidence before the board to allow it to approve the conditional use permit. At the January 23, 1996, meeting before the zoning committee, Rock County Agricultural Agent Dennis Nehring testified that soil samples from the proposed site demonstrated its ability to support the manure pit, and that the Larsens planned to meet the applicable environmental standards for manure disposal. Richard Barton, the planner for the Larsens' dairy operation, also testified as to the manure treatment and disposal process. At the second zoning committee meeting, held on February 13, 1996, the Larsens and Barton presented additional evidence—including a detailed topographical map showing the slopes on the proposed site, the emergency plan for feed bunker run-off, and the maintenance plan for the pit lining—and answered all questions posed by the committee. After the Larsens agreed to abide by the specified manure disposal plan, to provide proof of additional acres to be used for manure disposal, to refrain from piping manure over the Badfish Creek, provide for annual inspections of the pit lining, and to abide by all site locations and construction specifications submitted to the committee—the committee members voted to approve the conditional use permit (with several additional conditions).

At the first hearing on the Hansons' and Hoppe's appeal to the board, on May 7, 1996, Burton again spoke at length, addressing the objectors' concerns about contamination, manure disposal and the effect of the Larsen's proposed operation on local property values. He stated that the Larsens had voluntarily agreed to follow the state's manure management plan and to have all of the plan's requirements included in the permit. He also explained that the

Larsens had made arrangements with neighboring farmers to have an additional 1400 additional acres available upon which to spread their manure—approximately five times the required area. After again addressing the manure pit inspection issue, Burton testified that, based on consideration of similar operations in the Green Bay area, the Larsen's project would not be expected to decrease neighboring property values.

When the board reconvened on May 28, 1996, it voted unanimously to uphold the zoning committee's grant of the conditional use permit, and board members briefly explained their reasons for voting as they did. Board member Ruth Towns stated that "concerns about the confinement operation had been aired and addressed," that "[t]he Larsens had brought alternative solutions back to the [zoning] committee and they had been approved." She also noted that "[i]f the Larsens did not follow the conditions, their permit could be revoked." Alternate board member Jim Smith "felt the committee had followed the requirements as set forth in the Zoning Ordinance." The third board member, Bill Porter, stated that, while he felt some of the guidelines in the ordinance had not been followed, the permit should still issue.

At the June 17, 1997 meeting, following the circuit court's remand, the board heard additional testimony and arguments. It then considered and voted on eight separate findings the Town's attorney had prepared based upon his review of the minutes and records from previous meetings. The board discussed and voted on the proposed findings individually, adopting each one either unanimously or by a vote of two to one.

Specifically, the board found that the proposed operation was "consistent with agricultural uses in [the] district and falls within the goals of the

town development plan." It found that the project's site, design and use characteristics were "adequate to protect the environment and the public interest," noting that if environmental concerns were to develop, both the board and the zoning committee could review the permit and impose such additional conditions as might be necessary to eliminate any such problems. It found that the proposed use would be "harmonious with development," and would promote development of the tax base in both the town county. It found that the operation would not require additional governmental services, and would neither adversely affect the community nor impair the value of neighboring properties, citing Barton's testimony that similar facilities at other locations "had not detracted from the neighboring properties." Then, citing the testimony of "designers and University of Wisconsin personnel," the board found that the Larsens' operation would not adversely affect water or air quality, soil erosion, or "irreplaceable natural resources." Finally, the board found that the operation was "consistent with the current agricultural trends of development of farms within the township, [the] Rock County area and southern Wisconsin."

The minutes of the meeting also include the following "additional statements" of the individual board members:

> Jim stated that the Larsen[]s had met the requirements of the P[lanning] & Z[oning] Committee. They had reduced the herd size, shown they had access to additional neighbor's land for manure disposal, and had agreed to knife in the manure, reducing runoff and odors.
>
> Ruth stated that it was her understanding that the Larsen[]s had proposed a manure management program that was above and beyond the state's requirements. She felt there would be many people watching for any signs of manure leaking. She felt the P[lanning] & Z[oning] committee had made criteria for the operation and the Larsen[]s had met [them].

A third member disagreed, stating that, in his opinion, "the requirements had not been met."

The Hansons and Hoppe claim that because certain issues were not addressed specifically, or in greater depth, at the final meeting, they must have been ignored in the board's overall decision-making process. For example, they criticize the lack of discussion of the board's finding that the Larsens' operation would be consistent with agricultural uses, and they point to the fact that there was no specific evidence countering Professor Warren Porter's testimony with respect to groundwater contamination, or to Real Estate Appraiser Robert Winn's testimony regarding the negative impact on property values. They also challenge the sufficiency of the evidence with regard to the "management" of the manure and the impact a large dairy operation is likely to have on area watercourses.

The record indicates, however, that while these issues may not have been fully discussed at the final meeting, they were brought to the board's attention and considered over the course of the several meetings and were plainly contemplated in the board's final decision.[5] The board was not required, at its final meeting, to review each piece of testimony and evidence accumulated in the

[5] The Hansons also contend that the board acted arbitrarily by declining to postpone its decision until after it had an opportunity to review written materials prepared by Professor Warren Porter regarding groundwater contamination from the leaking of manure pits. Porter, a University of Wisconsin professor of zoology and environmental toxicology, had attended the first two board meetings, but was unable to attend the last meeting. We see no error in the board's failure to postpone the meeting. There had been extensive discussion throughout the proceedings regarding manure leakage and groundwater contamination, and the Hansons have not persuaded us that the board needed to postpone its final decision once again in order to consider additional materials. This is especially so, we think, in light of the fact that the final meeting, although open to new testimony, was essentially a *review* meeting, held in response to the circuit court's remand for the specific purpose of allowing the board to reiterate its reasons for issuing the permit. Indeed, the record reveals that the Hansons' attorney did not request a postponement at the time of the last meeting, stating only that he would like the opportunity to submit some written materials prepared by Professor Porter for the record.

record—which, in the Hansons' own words, was "lengthy" and "developed." The meeting was held in compliance with the circuit court's directive—issued in light of a technical failure to preserve the board's earlier minutes—to "complete the record" by "summarizing the basis of [the board's] decision for granting the conditional use permit."

We have emphasized above that the substantial evidence test is highly deferential to the board's findings, and we must uphold those findings if any reasonable view of the evidence sustains them. We do not weigh the evidence independently or pass on the credibility of the witnesses. ***Holtz & Krause, Inc. v. DNR***, 85 Wis.2d 198, 204, 270 N.W.2d 409, 413 (1978). And the substantial-evidence standard does not permit us to overturn an agency's finding even if it may be against the great weight and clear preponderance of the evidence. ***Id.*** Our review of the record satisfies us that the board considered the applicable zoning-ordinance standards, balanced the totality of the evidence presented against the backdrop of those standards, and adequately stated its findings. We conclude that a reasonable view of the evidence presented to the board throughout its eighteen-month consideration of the Larsens' proposal supports its final decision.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.