COURT OF APPEALS
DECISION
DATED AND RELEASED

OCTOBER 10, 1995

No. 95-1051

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT III

WISCONSIN POWER AND LIGHT COMPANY,

Petitioner-Respondent,

v.

LANGLADE COUNTY BOARD OF ADJUSTMENT,

Respondent-Appellant.

APPEAL from a judgment of the circuit court for Langlade County: ROBERT E. KINNEY, Judge. *Reversed and cause remanded with directions.*

Before Cane, P.J., LaRocque and Myse, JJ.

PER CURIAM. The Langlade County Board of Adjustment appeals a judgment overturning its decision to revoke a permit granted to the Wisconsin Power and Light Company (WPL). The permit allowed WPL to erect electrical transmission lines near the Langlade County airport. The board argues that the circuit court improperly substituted its judgment for that of the board, contrary to its standard of review. WPL argues that we should affirm

the circuit court because: (1) The board misinterpreted the zoning ordinance; (2) its decision was not supported by evidence; (3) its decision was unreasonable, arbitrary, oppressive and represented its will, not its judgment; and (4) the circuit court correctly reviewed the record. We reject WPL's contentions. Because there is at least one reasonable basis for the board's decision, we conclude the board's decision should be sustained. Consequently, we reverse the circuit court's judgment and remand with directions to reinstate the board's decision.

WPL filed an action seeking certiorari review of the board's decision to deny it a permit to erect a 69k V transmission line. The board's basis for denying the permit was that the construction of the transmission lines surrounding the perimeter of the airport would endanger the maneuverability of aircraft and interfere with radio communications.

In 1989, the Public Service Commission approved the construction of approximately eight miles of transmission lines between Antigo and Polar. The FAA and Wisconsin Department of Transportation Bureau of Aeronautics also approved the plans. Thereafter, WPL sought a permit from the Langlade County zoning administrator. The plan called for the power line to follow highways 52 and 64, which border the Langlade County airport. Due to public safety concerns, the WPL planned to bury the cables in the vicinity of two runway approaches.

Because the power lines did not exceed the county zoning ordinance height limitations of fifty feet, the zoning administrator issued the permit. An appeal to the board ensued, and a public hearing was held. The board overturned the zoning administrator's decision to issue the permit.

Carl Kerstetter, the Langlade County airport manager and a licensed pilot since 1962, testified at the hearing that he was concerned that the power lines would cause radio interference and endanger maneuverability of aircraft. Kerstetter did not believe the FAA standards were necessarily safe nor that burial of the power line at the runway approaches was sufficient.

> Under ideal flight conditions, ideal pilot procedures, and normal aircraft operation, this burial area would meet the minimum FAA standards. However, we fly in the

> "real world." ... Wires are practically invisible during poor weather. The pilot-in-command is authorized to violate any regulation to meet an emergency. ... pilot illness, engine failure, fire, landing gear inoperative ... it's not a question of whether an airplane will hit a wire, but rather when. Speaking as a seasoned pilot and flight instructor, these wires present an added hurdle against our flying safety.

Kerstetter read into the record several letters from local pilots. One asked why the lines could not be buried all around the airport, stating: "A typical power line cannot be seen during daylight hours until within 150 feet of the wire. This distance is flown in less than two seconds."

Jeffrey Bell, the manager of Ag-Air and a pilot with over 3,000 hours in the air, testified that he runs a crop dusting operation at the airport. Langlade County is an agricultural area, and the proposed wires would run in the area of potato fields. He was concerned that the wires would be an obstruction to pilots, noting that within the year one of his pilots hit a wire, but it did not bring the plane down.

> I'm flying an airplane that sometimes has such limited performance because I'm loaded up, and sometimes predictions of what the airplane is going to do at that time, are not easy to judge. ... I'm sure you're aware that this usually happens once a year, that we tear a wire down. In my opinion, this is going to happen if these wires go up around the airport. Unfortunately, I don't think these wires will break, and someone will be hurt or killed.

Bell submitted the following letter dated July 15, 1985, from Wisconsin Public Service to Ag-Air that stated:

> Your pilot, Mark Konig, has contacted our electric lines twice this year, tearing down primary conductors. As has been explained to you verbally this could cause a serious accident. All lines in the Antigo area are energized at

> 14,400/24,900 volts. If he should strike a larger wire the aircraft could turn over and crash into the ground/or cause the pilot to be electrocuted.

Upon certiorari, we review the decision of the board, not the circuit court. ***Gordie Boucher Lincoln-Mercury Madison, Inc. v. Madison Plan Comm'n,*** 178 Wis.2d 74, 84, 503 N.W.2d 265, 267 (Ct. App. 1993).[1] Our review is limited to whether: (1) the board kept within its jurisdiction; (2) it proceeded on a correct theory of law; (3) its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) the evidence was such that it might reasonably make the determination in question. ***Marris v. Cedarburg,*** 176 Wis.2d 14, 24, 498 N.W.2d 842, 846 (1993). If we conclude that any one of the board's reasons for its decision passes certiorari review, we may affirm without commenting on the board's other reasons. ***Clark v. Waupaca County Bd. of Adj.,*** 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994). On certiorari, we apply the substantial evidence test to determine whether the evidence is sufficient. ***Id.***

WPL argues that the board's decision must be overturned because the board misinterpreted Langlade County Code of Ordinances § 21.02. We disagree. The interpretation of a zoning ordinance presents a question of law

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[1] Section 59.99(10), STATS., provides:

> **Certiorari**. Any person or persons, jointly or severally, aggrieved by any decision of the board of adjustment, or any taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari. The court shall not stay proceedings upon the decision appealed from, but may, on application, on notice to the board and on due cause shown, grant a restraining order. The board of adjustment shall not be required to return the original papers acted upon by it, but it shall be sufficient to return certified or sworn copies thereof. If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.

and rules of statutory interpretation apply. ***Marris,*** 176 Wis.2d at 32, 489 N.W.2d at 850. Absent an ambiguity, the plain language governs. Section 990.01(1), STATS. The ordinance in question states: "Except as otherwise provided in this chapter, no structure shall be constructed, altered, located or permitted to remain after such construction, alteration or location and no trees shall be allowed to grow to a height in excess of the height limitation indicated on the map referred to in Section 21.02 above." Langlade County Code of Ordinances § 21.03.

The ordinance also provides that notwithstanding the provisions of § 21.03 above, no use may be made of land in any zone in such a manner as to: "(a) Create electrical interference with radio communications between the airport and aircraft. ... (e) Otherwise endanger the landing, taking off or maneuvering of aircraft." *See* Langlade County Code of Ordinances § 21.04.

The map in question indicates that structures within one half mile of the airport may not exceed fifty feet. However, if a proposed structure exceeds thirty-five feet, a permit is required. WPL argues that the board applied the ordinance as if all structures in excess of thirty-five feet would violate the ordinance. It also contends that the board wrongly determined that committee members would be held liable for any future accidents.

The record does not support WPL's argument.[2] The record demonstrates that the board relied on ordinance § 21.04(a) and (e) and concluded that the proposed construction would endanger maneuvering aircraft and cause radio interference. Because these reasons are derived from the plain language of § 21.04(a) and (e), we conclude that the board proceeded on a correct interpretation.

Next, WPL argues that the board's decision is unreasonable because it is unsupported by substantial evidence. We disagree. The substantial evidence test is highly deferential to the board's findings. ***Clark***, 186 Wis.2d at 304, 519 N.W.2d at 784. "[W]e may not substitute our view of the evidence for that of the board when reviewing the sufficiency of the evidence on certiorari." ***Id.*** "If any reasonable view of the evidence would sustain the

[2] The board members' discussions of these and other issues do not invalidate their ultimate determination.

board's findings, they are conclusive." ***Id.*** In applying the substantial evidence test, the "reviewing court cannot evaluate the credibility or weight of the evidence." ***Bucyrus-Erie Co. v. DILHR,*** 90 Wis.2d 408, 418, 280 N.W.2d 142, 147 (1979). "Substantial evidence is not equated with preponderance of the evidence. There may be cases where two conflicting views may each be sustained by substantial evidence. In such a case, it is for the agency to determine which view of the evidence it wishes to accept." ***Id.*** (Citations omitted.)

Here, the board concluded that the power lines would endanger the maneuverability, landing and take-off of aircraft. The record supports this determination. WPL's brief disputes at length the board's findings that the power lines would cause the radio interference. However, because at least one reasonable basis exists for the board's decision, we need not comment on the board's other reasons. ***Clark***, 186 Wis.2d at 304, 519 N.W.2d at 784.[3]

WPL argues, however, that the record indicates that other obstacles in the area, including residential power lines and trees, are also obstructions. It contends that it is unreasonable to find that the construction of another power line would endanger the aircraft maneuverability. The testimony and letters presented at the hearing, however, directly oppose WPL's argument. The pilots opposed the power lines not only due to their height, but also due to their voltage, which is greater than the existing lines. The letter from WPL supports the pilots' concerns.

WPL's objections are summarized in its argument: "Rather than relying on the opinions of two administrative agencies charged with upholding federal and state safety laws and requirements, the Board arbitrarily chose instead to believe the self-serving testimony of a number of pilots." The reviewing courts do not assess weight and credibility of testimony. ***Bucyrus-Erie***, 90 Wis.2d at 418, 280 N.W.2d at 147. Because the board's view has a reasonable basis in the record, we may not substitute a contrary view of the evidence.

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[3] We do not imply that there is no basis in the record for the board's second reason, that of radio interference. We need only address dispositional issues and decide the matter on the narrowest ground. *See* ***Clark v. Waupaca County Bd. of Adj.***, 186 Wis.2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994).

Next, WPL argues that the board's decision should be overturned because it is arbitrary. It argues that "[t]here is simply no evidence of electrical interference or navigational hazard from buried transmission lines." This argument mischaracterizes the issue. The permit in question was not for the construction of buried lines. The permit in question was for a construction plan of a 69k V line on poles along highways 52 and 64 bordering the airport, with the provision that the lines would be buried at the two runway approaches. However, it was the above-ground section of lines to which the objections were launched. We conclude that the board's decision is not arbitrary.

Next, WPL argues that the board's decision must be overturned because it is oppressive. It argues that it is not possible to drop the lines to less than thirty-five feet, that it cannot bury additional lines and that it has expended millions of dollars on the lines, now near completion. It argues that the lines are necessary to provide its customers reliable service. WPL's argument is unpersuasive. First, WPL makes no record reference to any facts that suggest that it is not possible to bury additional portions of the lines surrounding the airport.[4] Second, there is no explanation why WPL commenced construction before the permit application process was complete or why it did not wait until the appeal time frame had expired. Apparently, Langlade County had a different ordinance in effect at the time WPL commenced construction. WPL, however, makes no argument that the earlier ordinance should apply, or that the current ordinance is inapplicable because it took effect after construction commenced. On the record and briefs before us, we cannot conclude that the board's decision is oppressive.

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[4] Judy Kerstetter testified that she attended a July 5, 1990, public meeting with WPL, the Bureau of Aeronautics, the PSC and the airport committee, and that, according to the notes she took at the meeting:

> Mike Taggart of the Public Service Commission estimated the cost of burying the lines all the way around the airport on Highway '52' and '64' to be one million dollars. ... Their findings of fact by the Public Service Commission stated that there were approximately 306,774 customers of Wisconsin Power and Light in northeast and central Wisconsin. A million dollars distributed among 306,774 customers translates into $3.26 per customer. That's not per month or per year, but once.

Next, WPL contends that the board's decision represented its will and not its judgment. We disagree. The record discloses that the board's determination was based upon its finding that the proposed power lines would endanger landing and take off of aircraft in less than ideal flying conditions. The finding is based upon substantial evidence. Because the board's determination had a reasonable basis in the record, we do not overturn it on appeal.

WPL argues at various times that the board's decision was outside its "jurisdiction." Other than the arguments we have already addressed, WPL gives no reasons for its jurisdictional objection. Consequently, we find no jurisdictional basis to overturn the board's decision. Therefore, the circuit court's decision is reversed.[5]

By the Court.– Judgment reversed and cause remanded with directions.

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

[5] The board argues that the court erroneously exercised its discretion by declining additional evidence. Because we have reversed on other grounds, we need not address this issue. ***Gross v. Hoffman,*** 227 Wis. 296, 300, 277 N.W. 663, 665 (1938).