COURT OF APPEALS
DECISION
DATED AND RELEASED

March 13, 1997

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. *See* § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 96-1473

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

BETH SEVER, PAUL SEVER, DUAN WHEELER, MICHAEL WHEELER, MICHAEL SKIBINSKI, ELIZABETH A. HOFFMAN, RICHARD WALDSCHMIDT, HONEE WALDSCHMIDT, TERRY HUSTAD, LISA D. HUSTAD, GREGORY P. GARTH AND DENISE M. GARTH,

Plaintiffs-Appellants,

DAVID J. OKADA AND TINA L. OKADA,

Plaintiffs,

v.

DANE COUNTY, WISCONSIN; DANE COUNTY BOARD OF SUPERVISORS; DANE COUNTY ZONING AND NATURAL RESOURCES COMMITTEE AND ITS MEMBERS IN THEIR OFFICIAL CAPACITY, LYMAN ANDERSON, HELEN HELLENBRAND, KEVIN KESTERSON, JOAN WECKMUELLER, EUGENE KRAFT, JOHN HENDRICK AND PHILIP SALKIN; DANE COUNTY BOARD OF ADJUSTMENT; JAMES GREGORIUS, DANE COUNTY ZONING ADMINISTRATOR; LYMAN F. ANDERSON, IN

HIS INDIVIDUAL CAPACITY; WILLIAM G. BUGLASS; AND PAYNE & DOLAN, INC.,

Defendants-Respondents.

APPEAL from an order of the circuit court for Dane County: MORIA KRUEGER, Judge. *Affirmed*.

Before Dykman, P.J., Vergeront and Deininger, JJ.

DYKMAN, P.J. Beth Sever, Paul Sever and several other residents of the town or village of Oregon (collectively "the Severs") filed a complaint with the circuit court seeking certiorari review of the methods and procedures by which Dane County governmental bodies approved Lyman Anderson's request for a conditional use permit (CUP). The Severs also sought a judgment declaring that the ordinances under which the defendants acted are unconstitutional.

The Severs appeal from the circuit court's order dismissing their complaint. They raise the following issues: (1) whether they were entitled to appeal the decision of the Dane County Zoning and Natural Resource Committee (ZNR Committee) to the Dane County Board of Adjustment (BOA); (2) whether they were entitled to a contested case hearing on administrative appeal under Chapter 68, STATS.; (3) whether the ZNR Committee and the County Board failed to comply with the procedures required by ordinance and by the concepts of fair play and due process; (4) whether the ZNR Committee and the County Board erred in concluding that the zoning ordinance allows blasting; and (5) whether the ZNR Committee and County Board acted arbitrarily, oppressively and unreasonably. We conclude that: (1) Dane County properly vested its County Board with the exclusive authority to review ZNR Committee decisions on CUP applications; (2) the Severs were not entitled to a contested case hearing under Chapter 68, STATS.; (3) the ZNR Committee and the County Board complied with all necessary procedural requirements; (4) the zoning ordinance allows for blasting; and (5) the ZNR Committee and County Board did not act arbitrarily, oppressively or unreasonably. We therefore affirm the circuit court's order.

BACKGROUND

Prior to June 30, 1995, Lyman Anderson and Payne & Dolan, Inc. entered into a mineral lease agreement that granted Payne & Dolan the right to extract mineral aggregate from approximately twenty-three acres of Anderson's property in the town of Oregon. Because this land was zoned as A-1 Agriculture (Exclusive), Anderson needed to obtain a conditional use permit (CUP) from Dane County before Payne & Dolan could initiate any quarry operations. Anderson applied to the Dane County Zoning and Natural Resources Committee (ZNR Committee) for the CUP. On August 22, 1995, the ZNR Committee approved Anderson's request with certain conditions.

The Severs appealed the ZNR Committee's decision to both the Dane County Board of Adjustment (BOA) and the Dane County Board. The Severs also requested the ZNR Committee to review its decision in accordance with the procedures of Chapter 68, STATS. The ZNR Committee did not review its decision under Chapter 68 and the BOA refused to hear the appeal, concluding that it did not have jurisdiction over CUP appeals. On September 21, 1995, the County Board affirmed the ZNR Committee's decision.

The Severs filed a complaint with the circuit court seeking certiorari review of Dane County's approval of the CUP, of the ZNR Committee's failure to review its decision under Chapter 68, STATS., and of the BOA's refusal to hear the appeal of the ZNR Committee's grant of the CUP. The Severs also sought a declaratory judgment that the ordinances under which the defendants acted were violative of state law and unconstitutional. After filing the complaint, the Severs sought a temporary injunction staying Payne & Dolan from commencing mineral excavation under the CUP. The circuit court denied the Severs' request for a temporary injunction and dismissed the complaint on the merits.[1] The Severs appeal.

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[1] After hearing the Severs' motion for a temporary injunction, the circuit court concluded that it had heard enough evidence to rule on the merits of the case. The court reasoned:

> The review required to examine plaintiffs' likelihood of success on the merits has been of a depth and effort equal to that

STANDARD OF REVIEW

This case is before us on certiorari, and thus our review is limited to: (1) whether the board kept within its jurisdiction; (2) whether it proceeded on a correct theory of 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 Bd. of Adjustment***, 74 Wis.2d 468, 475, 247 N.W.2d 98, 102 (1976).

APPEAL TO BOARD OF ADJUSTMENT

The BOA refused to review the ZNR Committee's grant of the CUP, concluding that it lacked jurisdiction to hear CUP appeals. The BOA based its denial on § 10.255(2)(j), Dane County Ordinances,[2] which provides in relevant part:

(..continued)

> demanded to decide the ultimate merits of this case. Unless plaintiffs can point to some issue or consideration not addressed in this decision, there seems to be no purpose to continuing this case. Every point pressed or argument made in this challenge to the CUP has fallen when analyzed. However, since the status of the case when the parties were briefing was not that of readying it for a final decision on the merits, some latitude will be given to plaintiffs to demonstrate that there might be some viable point which this decision has failed to address.

The court's order subsequently provided: "Plaintiffs have 30 days from this date to present **new** grounds based on the pleadings or **new** argument in support of their petition or the case will be dismissed on the merits." The appellants did not present any new argument to the circuit court, and therefore the order became final.

[2] Neither party provides record cites to the relevant Dane County ordinances, and we did not find these ordinances in the record upon our independent review. Therefore, we rely on the parties' briefs for the ordinances' content.

> Any person aggrieved by the grant or denial of a conditional use permit ... may appeal the decision of the Zoning Committee to the County Board. Such appeal must specify the grounds thereof in respect to the finding of the Zoning Committee, the reason why the appellant is aggrieved, and must be filed with the office of the Zoning Supervisor within 20 days of the final action for the Zoning Committee. The Zoning Administrator shall transmit such appeal to the County Clerk who shall file such appeal with the County Board. The County Board shall fix a reasonable time for the hearing of the appeal and give public notice thereof as well as due notice to the applicant and the appellant(s), and decide the same within a reasonable time. The action of the Zoning Committee shall be deemed just and equitable unless the County Board by three-fourths vote of supervisors present and voting reverses or modifies the action of the Zoning Committee. An appeal from a decision of the Committee shall be taken to the County Board. No other entity of county government has jurisdiction to hear any such appeal and the avenue of appeal provided for herein is intended to be the sole avenue of appeal from a decision of the Committee.

The Severs argue that this ordinance deviates from the appeal scheme required by § 59.99, STATS., which they contend vests the BOA, not the County Board, with the authority to review the ZNR Committee's decision. They cite § 59.99(4), which provides that "[a]ppeals to the [BOA] may be taken by any person aggrieved ... by any decision of the building inspector or other administrative officer," and § 59.99(7)(a), which provides that the BOA has the power "[t]o hear and decide appeals where it is alleged there is error in any order, requirement, decision or determination made by an administrative official in the enforcement of s. 59.97 or of any ordinance adopted pursuant thereto."

Resolution of this issue depends on our interpretation of § 59.99(1), STATS., which provides:

> APPOINTMENT, POWER. The county board may provide for the appointment of a board of adjustment, and in the regulations and restrictions adopted pursuant to s. 59.97 may provide that such board of adjustment may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained. Nothing in this subsection shall preclude the *granting* of special exceptions by the county zoning agency designated under s. 59.97 (2) (a) or the county board in accordance with regulations and restrictions adopted pursuant to s. 59.97 which were in effect on July 7, 1973 or adopted after that date.

(Emphasis added.) This issue presents a question of statutory construction, which we review *de novo*. *See* ***GTE North Inc. v. PSC***, 176 Wis.2d 559, 564, 500 N.W.2d 284, 286 (1993).

The parties agree that § 59.99(1), STATS., allows a county zoning committee or county board to *grant* CUPs.[3] They disagree, however, as to whether the county can preempt application of § 59.99 by providing that the County Board must hear appeals of ZNR Committee decisions. In deciding this issue, we find ***State ex rel. Skelly Oil Co. v. Common Council***, 58 Wis.2d 695, 207 N.W.2d 585 (1973), and ***Town of Hudson v. Hudson Town Bd. of Adjustment***, 158 Wis.2d 263, 461 N.W.2d 827 (Ct. App. 1990), instructive.

In ***Skelly Oil***, Delafield's zoning ordinances provided that all conditional uses of buildings or premises must be approved by the plan commission. ***Skelly Oil***, 58 Wis.2d at 699, 207 N.W.2d at 586. The ordinances

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[3] The statute uses the term "special exceptions," which is synonymous with the term "conditional use permits." While both are commonly used, "conditional use" is the more appropriate term because there is no actual "exception" to the provisions of an ordinance in allowing such a use. *See* ***State ex rel. Skelly Oil Co. v. Common Council***, 58 Wis.2d 695, 700 n.2, 207 N.W.2d 585, 587 (1973) (citing 2 RATHKOPF, THE LAW OF ZONING AND PLANNING 54-1 (1968)).

also provided that any person aggrieved by a decision of the plan commission could appeal to the Delafield common council for review. ***Id.***

Skelly Oil applied to the plan commission for a CUP to build a service station. ***Id.*** at 697, 207 N.W.2d at 585. Following a hearing, the plan commission rejected the request. Skelly appealed to the common council, which affirmed the decision. ***Id.*** at 698, 207 N.W.2d at 586. Skelly petitioned the circuit court for a writ of certiorari to review the common council's action, arguing that the common council is not, by statute, the correct body to review decisions of a plan commission. ***Id.*** The circuit court concluded that the acts of both the plan commission and the common council were in accordance with Wisconsin's statutes and dismissed Skelly's action. ***Id.*** at 699, 207 N.W.2d at 586.

The supreme court reversed. It based its decision on § 62.23(7)(e), STATS., 1971, which provided:

> (e) *Board of appeals.* 1. The council which enacts zoning regulations pursuant to this section shall by ordinance provide for the appointment of a board of appeals, and shall provide in such regulations that said board of appeals may, in appropriate cases and subject to appropriate conditions and safeguards, make special exceptions to the terms of the ordinance in harmony with its general purpose and intent and in accordance with general or specific rules therein contained.

The court concluded that this statute "vests exclusive authority in the board of zoning appeals to pass upon conditional uses or special exceptions." ***Id.*** at 703, 207 N.W.2d at 588.

The supreme court did not make its ruling without reluctance. The opinion provided:

> In making our ruling, we are mindful of the fact that while the retention of this authority by the city plan

> commission and the common council was in direct derogation of state law, it may well be that such procedure might be better suited to the complicated task of providing for effective city planning.

Id. The court went on to quote RICHARD W. CUTLER, ZONING LAW AND PRACTICE IN WISCONSIN 37 (1967), in stating:

> In Wisconsin and elsewhere, it is more current usage for flexibility in the legislative provisions of the zoning ordinance to be accomplished by authorizing the planning commission or the elected governing body, rather than the board of zoning appeals, to determine whether a certain proposed use is consistent with the standards established in the ordinance. *The reason for this more frequent reliance upon the plan commission or elected body is that they are continuously involved in the process of recommending legislative changes in the zoning ordinance and therefore more apt to be conversant with the "purpose and intent" of the ordinance than the board of zoning appeals whose primary function is the quasi judicial one of granting variances from the express terms of the ordinance* because hardship exists, rather than that such a deviation is explicitly authorized in the ordinance if certain standards are determined to have been met.

Id. The court concluded: "Regardless of the potential merits of such procedure, this court cannot amend the statute." ***Id.***

Approximately one month after the supreme court decided ***Skelly Oil***, the legislature amended § 62.23(7)(e)1, STATS. This amendment added the following language:

Nothing in this subdivision shall preclude the granting of special exceptions by the city plan commission or the common council in accordance with the zoning regulations adopted pursuant to this section which

> were in effect on July 7, 1973 or adopted after that date.

Similar language was added to § 59.99(1), STATS.

In ***Town of Hudson***, we had the occasion to interpret the language added to § 62.23(7)(e)1, STATS. Transport Corporation of America applied to the Hudson town board for a CUP to expand its truck service center. ***Town of Hudson***, 158 Wis.2d at 267-68, 461 N.W.2d at 828. The town board denied the permit, and Transport appealed the decision to Hudson's BOA. ***Id.*** at 268, 461 N.W.2d at 828. After a *de novo*-type hearing, the BOA overruled the town board and granted the permit subject to conditions. ***Id.*** The circuit court concluded, however, that the BOA should have conducted a certiorari-type review, not a *de novo* review, and therefore ruled that the BOA exceeded its authority. ***Id.***

On appeal, Transport argued that § 62.23(7)(e)1, STATS., vests the BOA with the final authority to grant or deny CUPs, regardless of the town board's initial determination. ***Id.*** at 269, 461 N.W.2d at 829. We disagreed. We construed the 1973 amendment to § 62.23(7)(e)1, STATS., "as essentially adopting the court's rationale in ***Skelley***, which allows a municipality to authorize, by ordinance, a town board the exclusive power to consider applications for special exception permits." ***Id.*** at 273, 461 N.W.2d at 830. Therefore, we concluded that the statute authorizes the town board preemptive power to grant CUPs if the town so chooses by ordinance, and when such a preemptive ordinance is adopted, the BOA cannot review the town board's actions. ***Id.*** at 268, 461 N.W.2d at 828.

We now apply ***Skelly Oil*** and ***Town of Hudson*** to the case at hand.[4] Section 10.255(2)(b), Dane County Ordinances, provides: "The zoning committee, after a public hearing, shall within a reasonable time, grant or deny any application for conditional use...." This ordinance is consistent with § 59.99(1), STATS., which allows a county to adopt an ordinance assigning to its

[4] It is irrelevant that we are construing § 59.99(1), STATS., while ***Skelly Oil*** and ***Town of Hudson*** construed § 62.23(7)(e)1, STATS. The language added to § 59.99(1) in 1973 is substantively the same as the language added to § 62.23(7)(e), the only difference being that § 59.99 applies to county zoning ordinances, while § 62.23(7) applies to city zoning ordinances.

zoning committee the power to grant or deny CUPs. And according to ***Town of Hudson***, when a county adopts such an ordinance, the BOA is preempted from reviewing the zoning committee's action. *See* ***Town of Hudson***, 158 Wis.2d at 268, 461 N.W.2d at 828.

The Severs agree that the amendatory language of § 59.99(1), STATS., allows Dane County to assign the ZNR Committee the authority to *grant* CUPs. They argue, however, that § 59.99(1) does not authorize the county to assign the County Board the authority to *review* ZNR Committee decisions. This authority, the Severs argue, rests with the BOA by operation of § 59.99.

We agree that § 59.99(1) authorizes only the ZNR Committee's grant of CUPs, not the County Board's review of ZNR Committee decisions. This does not allow the BOA to hear an appeal of the ZNR Committee's grant of the CUP, however, as the appeal provisions of § 59.99 were preempted by Dane County ordinance. *See* ***Town of Hudson***, 158 Wis.2d at 268, 461 N.W.2d at 828.

Dane County's authority to give the County Board the authority to review the ZNR Committee's decision derives not from § 59.99(1), STATS., but from § 59.97(6), STATS. Section 59.99(1) provides that the county zoning agency or county board may grant CUPs "in accordance with regulations and restrictions adopted under s. 59.97." And § 59.97(6) provides: "Nothing in this section shall be construed to prohibit the zoning agency or the county board ... from adopting any procedures, formal or informal, in addition to those prescribed in this section and not in conflict therewith." The appeal procedure provided by § 10.255(2)(j), Dane County Ordinances, does not conflict with any procedure of § 59.97, and therefore provides *an additional procedure* allowable under § 59.97(6).

The Severs also argue that the language of § 91.73(1), STATS., makes the permissive language of § 59.99(1), STATS., mandatory when granting CUPs on property zoned as exclusively agricultural. Section 91.73(1) provides: "Except as otherwise provided, exclusive agricultural zoning ordinances shall be adopted and administered in accordance with ss. 59.97 to 59.99, 61.35 or 62.23 or subch. VIII of ch. 60...." We agree that § 91.73(1) provides that an agricultural zoning ordinance must be administered in accordance with § 59.99. However, § 59.99(1), as interpreted by ***Town of Hudson***, still allows a county to preempt the BOA appeal procedure by providing by ordinance that the county

zoning committee or county board has the authority to grant or deny CUP applications.

Finally, the Severs argue that the ZNR Committee's decision is appealable to the BOA under ***League of Women Voters v. Outagamie County***, 113 Wis.2d 313, 334 N.W.2d 887 (1983), and ***State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment***, 131 Wis.2d 101, 388 N.W.2d 593 (1986). In ***League of Women Voters***, General Growth Development Corporation applied to the Outagamie County zoning committee for six conditional use permits to relocate two streams, construct two bridges, construct a storm water detention basin, and perform grading on the banks of both streams, all in preparation for constructing a shopping mall. ***League of Women Voters***, 113 Wis.2d at 315-17, 334 N.W.2d at 888-89. The plaintiffs requested that the public hearing on General Growth's application be conducted as a contested case hearing under Chapter 68, STATS. ***Id.*** at 317, 334 N.W.2d at 889. Outagamie County rejected the request, and the plaintiffs requested a declaratory judgment holding that Chapter 68 required a contested case hearing to be held during the administrative process. ***Id.***

The supreme court determined that the plaintiffs were not entitled to a contested case hearing. The court based its conclusion on § 68.03(2), STATS., which provides that actions subject to administrative or judicial review procedures under other statutes are not reviewable under Chapter 68. The court concluded that the zoning committee's decision was reviewable by the BOA under § 59.99, STATS., and as such, was not reviewable under Chapter 68. ***Id.*** at 326, 334 N.W.2d at 893. The Severs argue that, consistent with ***League of Women Voters***, we should conclude that the ZNR Committee's decision was reviewable by the BOA under § 59.99.

League of Women Voters is distinguishable, however, because it involved the application of § 59.971(4), STATS. Section 59.971(4)(b) provides that "appeals regarding shorelands within a county are for the board of adjustment for that county under s. 59.99, and the procedures of that section apply." Because § 59.971(4) independently provides that appeals regarding shorelands "are for the [BOA]," the ***League of Women Voters*** court did not need to address whether the BOA appeals procedure was preempted by Outagamie County ordinance. Because ***League of Women Voters*** did not involve application of the 1973 amendment to § 59.99(1), STATS., its discussion is inapplicable to the case at hand.

Brookside Poultry also involved a BOA review of a zoning committee decision. The Severs argue that because both the supreme court and the court of appeals assumed, without question, that the BOA was the appropriate venue for appeal in ***Brookside Poultry***, the BOA should also be the appropriate venue for the appeal of the ZNR Committee's decision.

We disagree with this argument for two reasons. First, appellate courts generally do not discuss issues not raised by the parties. ***Waushara County v. Graf***, 166 Wis.2d 442, 451, 480 N.W.2d 16, 19 (1992). Therefore, the fact that the supreme court did not discuss whether the BOA was the appropriate venue for appeal is not determinative of the issue of whether the BOA in fact was the proper venue. Second and more importantly, it is not explicit in ***Brookside Poultry*** whether the Jefferson County ordinance established the BOA as the proper venue for zoning committee decisions. In fact, it is implicit that the zoning ordinance did provide that appeals to the BOA could be taken by any person aggrieved. *See* ***Brookside Poultry***, 131 Wis.2d at 110, 388 N.W.2d at 596. If a county ordinance provided that zoning committee decisions are to be appealed to the BOA, then the appellants and the supreme court would have had no reason to question the BOA's authority to review the committee's decision.

CONTESTED CASE HEARING UNDER CHAPTER 68

The Severs argue that they were entitled to a contested case hearing on administrative appeal from the ZNR Committee's decision under Chapter 68, STATS. This again presents a question of statutory construction, which we review *de novo*. ***GTE North Inc. v. PSC***, 176 Wis.2d 559, 564, 500 N.W.2d 284, 286 (1993).

Section 68.03(2), STATS., provides that any action subject to administrative or judicial review procedures under other statutes is not reviewable under Chapter 68, STATS. *See* ***League of Women Voters***, 113 Wis.2d at 322, 334 N.W.2d at 891. The circuit court concluded that § 10.255(2)(j), Dane County Ordinances, which was adopted pursuant to § 59.99(1), STATS., provided an administrative procedure for review of the ZNR Committee's decision, and that § 781.01, STATS.,[5] provided a judicial review procedure.

[5] Section 781.01, STATS., provides: "The remedy available by a writ of mandamus, prohibition, quo warranto, certiorari or habeas corpus may be granted by the final

Therefore, the court concluded, a contested case hearing under Chapter 68 was not available. The Severs argue that the administrative appeal procedure in § 10.255(2)(j) is provided by ordinance, not statute, and therefore is insufficient to trigger the exclusion set forth in § 68.03(2). The Severs also argue that § 781.01 review is generally available to all parties aggrieved by decisions of local governments, and therefore if we accepted the circuit court's reasoning, we would effectively vitiate the protections otherwise afforded by Chapter 68.

We do not need to address whether § 10.255(2)(j), Dane County Ordinances, and § 781.01, STATS., make the procedures of Chapter 68, STATS., inapplicable to the Severs' appeal. Chapter 68 does not apply to the Severs' appeal by operation of § 68.03(8), STATS. This section provides: "Any action which is subject to administrative review procedures under an ordinance providing such procedures as defined in s. 68.16" is not reviewable under Chapter 68. Section 68.16, STATS., provides: "The governing body of any municipality may elect not to be governed by this chapter in whole or in part by an ordinance or resolution which provides procedures for administrative review of municipal determinations."

Section 10.255(2)(j), Dane County Ordinances, provides procedures for the administrative review of ZNR Committee decisions on CUP applications. It provides that the appeal must specify the grounds thereof and the reason why the appellant is aggrieved. The appeal must be filed within twenty days of the final action of Zoning Committee. The County Board must fix a reasonable time for the hearing and must give due notice to the applicant and appellant as well as public notice. The Board must decide the appeal within a reasonable time, and the Zoning Committee is upheld unless the County Board by three-fourths vote reverses or modifies the action of the Zoning Committee. Because § 10.255(2)(j) provides procedures for administrative review of ZNR Committee decisions, Dane County has elected not to be governed by Chapter 68, STATS., by operation of §§ 68.03(8) and 68.16, STATS. Therefore, the ZNR Committee did not err by refusing to review its decision in accordance with Chapter 68.

PROCEDURAL REQUIREMENTS

(..continued)
judgment or allowed as a provisional remedy in an action or proceeding...."

The Severs argue that the ZNR Committee and the County Board failed to comply with several necessary procedural requirements. We will address each argument in turn.

Cross-Examination

First, the Severs argue that the ZNR Committee failed to conduct its hearing consistent with the characteristics of a quasi-judicial proceeding.[6] Specifically, they argue that the Committee should have allowed them the opportunity for cross-examination. Wisconsin courts have set forth several procedural characteristics of quasi-judicial proceedings. *See, e.g.*, ***Coffey v. City of Milwaukee***, 74 Wis.2d 526, 534, 247 N.W.2d 132, 136 (1976) (notice and hearing, the exercise of discretion and a decision on the record); ***Schalow v. Waupaca County***, 139 Wis.2d 284, 289, 407 N.W.2d 316, 318 (Ct. App. 1987) (the board must act upon evidence). No Wisconsin court has concluded, however, that cross-examination during CUP application hearings is necessary to satisfy the requirements of due process.

In support of their argument, the Severs cite ***Coral Reef Nurseries, Inc. v. Babcock Co.***, 410 So.2d 648, 652-53 (Fla. App. 1982), and ***Kaelin v. City of Louisville***, 643 S.W.2d 590 (Ky. 1982), in which the courts recognized a right to cross-examination in quasi-judicial hearings. State courts are divided, however, on whether cross-examination during quasi-judicial hearings is necessary to satisfy due process. *See, e.g.*, ***Barton Contracting Co. v. City of Afton***, 268 N.W.2d 712, 716 (Minn. 1978).

Due process means that a person must have notice and an opportunity to be heard at a meaningful time and in a meaningful manner. ***Wilke v. City of Appleton***, 197 Wis.2d 717, 727, 541 N.W.2d 198, 202 (Ct. App. 1995). After reviewing relevant Wisconsin law, we conclude that due process does not require cross-examination during CUP application hearings. The procedural protections required during the CUP application process are not the same as the protections required in a judicial hearing. "Administrative boards in performing quasi-judicial functions are not required to follow all the rules of

[6] *See* § 59.97(2)(bm), STATS. ("[T]he county zoning agency ... shall be a quasi-judicial body with decision-making power that includes but is not limited to conditional use, planned unit development and rezoning....").

procedure, and customary practices, of courts of law." ***State ex rel. Wasilewski v. Board of Sch. Dirs.***, 14 Wis.2d 243, 268, 111 N.W.2d 198, 212 (1961). In ***Gray Well Drilling Co. v. State Bd. of Health***, 263 Wis. 417, 419, 58 N.W.2d 64, 65 (1953), the court stated:

> Not only pleadings, but all proceedings before administrative bodies, are generally simple and informal. The functions of administrative agencies and courts are so different that the rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute. It is not the province of courts to prescribe rules of procedure for administrative bodies, as that function belongs to the legislature. The legislature may either prescribe rules for pleadings and procedure before such bodies, or it may authorize the administrative board or agency to prescribe its own rules.

We recognize that § 68.11(2), STATS., provides for cross-examination in some municipal administrative hearings. But the Wisconsin legislature has not provided that cross-examination must be allowed in all quasi-judicial proceedings before municipal bodies. Instead, the legislature has provided that municipalities may adopt ordinances providing their own procedure for administrative review of municipal determinations. *See* § 68.16, STATS. Dane County has removed itself from the operation of Chapter 68 by providing its own review procedure.

"Due process is a flexible concept that requires procedural protections as the particular situations demands." ***Estate of Wolff v. Town Bd.***, 156 Wis.2d 588, 594, 457 N.W.2d 510, 512 (Ct. App. 1990). Proceedings before municipal bodies are generally simple and informal. The absence of cross-examination in Dane County's procedure is consistent with this simplicity and informality. The Severs had the opportunity to present evidence and testify before both the ZNR Committee and County Board. We conclude that they had an opportunity to be heard at a meaningful time and in a meaningful manner, and therefore were not deprived of their due process rights.

Sufficiency of Findings of Fact

Section 10.255(2)(b), Dane County Ordinances, provides: "Prior to granting or denying a conditional use, the committee shall make findings of fact based on the evidence presented ...." The Severs acknowledge that the ZNR Committee's findings of fact are found in the CUP itself. They argue however, that "the *pro forma* `findings of fact' found in the permit are, for example, a mere repetition of the standards embodied in § 10.255(2)(j), Dane County Ordinances, thereby being clearly inadequate."

The only authority cited the by Severs in support of this argument is MCQUILLIN, MUNICIPAL CORPORATIONS § 25.264 (3d ed.). The Severs fail, however, to quote or paraphrase this treatise or state why it supports their proposition. Because the Severs have failed to adequately brief or develop this argument, we will not address it further. *See* ***State v. Pettit***, 171 Wis.2d 627, 646-47, 492 N.W.2d 633, 642 (Ct. App. 1992).

The Severs also argue that the ZNR Committee failed to consider all necessary factors in its findings. Specifically, they argue that the Committee failed to consider § 10.123(3)(a)1.E, Dane County Ordinances, which requires it to consider the compatibility of the quarry with existing or permitted uses on adjacent lands. The record does not support the Severs' contention, however, as the ZNR Committee's findings of fact include "[t]hat the uses, values and enjoyment of other property in the neighborhood for purposes already permitted will not be substantially impaired or diminished by the establishment, maintenance and operation of the proposed conditional use" and "[t]hat the establishment of the proposed conditional use will not impede the normal and orderly development and improvement of the surrounding property for uses permitted in the district." These findings satisfy § 10.123(3)(a)1.E, and therefore we reject the Severs' argument.

Impartial Decisionmaker

The Severs argue that they were denied their right to an impartial decisionmaker. A fair and impartial decisionmaker is a minimal requirement of due process. ***Guthrie v. WERC***, 111 Wis.2d 447, 454, 331 N.W.2d 331, 335 (1983). Although due process is violated when there is bias in fact, it can also be violated when the risk of bias is impermissibly high. ***Id.*** It is presumed, however, that adjudicators serve their duty with honesty and integrity. ***Id.*** at 455, 331 N.W.2d at 335.

The Severs argue that the ZNR Committee was biased because Anderson was the chair of the ZNR Committee at the time of his application for the CUP. The Severs do not argue that any member of the ZNR Committee showed any actual bias. Rather, they argue that Anderson's position on the ZNR Committee and his relationship with each of its members made the risk that members of the Committee would prejudge the merits of the CUP application impermissibly high.

We do not agree that Anderson's membership on the ZNR Committee overcomes the presumption of the honesty and integrity of the Committee. We agree with the circuit court that the ZNR Committee took adequate safeguards to insure impartiality. The circuit court stated:

> A careful reading of the record does not reveal any obvious impropriety. The ZNR Committee sought ethical advice from Corporation Counsel. That advice was followed and exceeded. As was advised, Mr. Anderson stepped down as chairperson while testimony was heard before the ZNR Committee, and he left the room during the committee floor debate. The ethics letter from Corporation Counsel was read during the floor debate. Subsequently, at the appeal hearing before the County Board, Mr. Anderson was absent from the room before the start of the public testimony, through the floor debate and the vote. During the County Board floor debate, individual Board members stated that they had not been lobbied by Mr. Anderson. The members each stated their reasons for supporting or opposing the permit, and several stressed that they often vote in opposition to positions taken by Mr. Anderson, and so felt no compulsion to vote in his favor on the permit.

The Severs also argue that the County Board was biased because members of the ZNR Committee were allowed to vote as County Board members on the appeal from the decision of the ZNR Committee. The Severs do not cite any authority in support of their proposition that members of a county committee cannot also sit on a county board that hears appeals of that

committee's decisions. Because this argument is unsupported by reference to legal authority, it will not be considered. *See* ***Pettit***, 171 Wis.2d at 646, 492 N.W.2d at 642.

BLASTING

The Severs argue that Dane County zoning ordinance did not allow for blasting in connection with mineral extraction operations, as allowed by the CUP.[7] Section 10.01(36m), Dane County Ordinances, defines "mineral extraction" as "[q]uarrying or excavation of sand, gravel, limestone, earth, soil or other mineral resources...." The interpretation of an ordinance is a question of law, which we review *de novo*. ***Browndale Int'l, Ltd. v. Board of Adjustment***, 60 Wis.2d 182, 199, 208 N.W.2d 121, 130 (1973).

In ***Weber v. Town of Saukville***, 197 Wis.2d 830, 541 N.W.2d 221 (Ct. App. 1995), *review granted*, 546 N.W.2d 468 (1996), we concluded that the terms "excavate," leveling" and "stripping" as contained in a zoning ordinance did not contemplate blasting because those terms refer to similar methods of mineral deposit removal by machinery and mechanical means, while blasting is defined as removal through the use of explosives. ***Id.*** at 838, 541 N.W.2d at 224. Therefore, the use of the term "excavation" in Dane County's ordinance does not connote the extraction of minerals by use of explosives.

Dane County's ordinance differs from Saukville's, however, by its use of the term "quarrying." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1860 (1993), defines "quarrying" as "the ... act of extracting stone, marble, or slate from quarries." Unlike the terms in ***Weber***, this term does not solely

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[7] The CUP provides that the quarry is subject to the Town and Operator Agreement, which provides in relevant part:

> Use. The mineral extraction operations to be conducted on the Property shall include the removal of rock, gravel, sand, or any other minerals from the earth from excavating, stripping or leveling. These operations include reasonable accessory uses for mineral extraction, including, but not limited to, blasting, crushing, sorting, washing (with settling basins) stockpiling and sale of aggregate material.

contemplate the extraction of minerals by machinery and mechanical means. On the contrary, it refers to the *act* of extracting stone.

The definition of "blasting" contemplates that it is included in the act of extracting stone. WEBSTER'S DICTIONARY, *supra* at 231, defines "blasting" as "the practice ... of breaking up heavy masses (as of rock) by means of explosives." The ***Weber*** court construed this definition as meaning "removal through the use of explosives." ***Weber***, 197 Wis.2d at 838, 541 N.W.2d at 224. Because blasting is a means of mineral extraction, it is included in the definition of "quarrying." Therefore, "blasting" is included in the definition of "mineral extraction" contained in Dane County ordinance.

ARBITRARY, OPPRESSIVE OR UNREASONABLE ACTION

The Severs argue that the ZNR Committee and County Board acted arbitrarily, oppressively and unreasonably because the evidence failed to establish each and every standard and condition required by Dane County zoning ordinance for the granting of the CUP. In ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis.2d 300, 304-05, 519 N.W.2d 782, 784 (Ct. App. 1994), we set forth the test for examining a zoning authority's findings of fact:

> On certiorari, we apply the substantial evidence test to determine whether the evidence is sufficient. Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. As the substantial evidence 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, in the absence of statutory authorization we cannot substitute our judgment for that of the zoning authority.
>
> (Citations omitted.)

The Severs challenge the findings that the conditional use will not be detrimental to or endanger public health or safety and that the conditional use will not substantially impair or diminish the use, enjoyment or value of nearby properties as not supported by substantial evidence. We conclude, however, that reasonable people could have reached the same conclusion as the County Board after reviewing the evidence. We agree with the trial court's characterization of the evidence:

> The record shows that the County Board had a great deal of information upon which to make its decision. There were reports stating that there would be no substantial impairment of the values and enjoyment of other neighborhood property. There was testimony from neighbors of the nearby Reindahl Quarry, stating that the quarry did not impair their enjoyment of their property, nor effect their health, safety, comfort or general welfare. There were reports that measures had been taken to minimize traffic congestion....
>
> It is recognized that there was also much testimony in opposition to the CUP. Evidence was submitted about the effects of dust on respiratory health, on decreasing property values, on increased traffic and noise. The letters and testimony from those individuals who do not wish to have the quarry in their neighborhood are impassioned and moving. The County Board had difficult issues before it when it made its decision. That decision, regardless of its popularity, is entitled to a presumption of validity.... Because evidence exists in the record on which the Board could reasonably rest its determination to affirm the ZNR Committee, that determination is upheld.

The Severs challenge the relevance and credibility of much of the evidence offered in support of the quarry. They are not entitled, however, to a *de novo* review of the evidence. On certiorari review, we may not substitute our view of the evidence for that of the Board and cannot evaluate the credibility or weight of the evidence. *See* ***Clark***, 186 Wis.2d at 304, 519 N.W.2d at 784. The

County Board evidently concluded that the challenged testimony was credible, and therefore we will uphold its findings.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.