

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 14, 2006

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. 2005AP1091

Cir. Ct. No. 2004CV62

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JERROLD W. ODNESS AND CHERI L. ODNESS,

PLAINTIFFS-RESPONDENTS,

V.

DUNN COUNTY BOARD OF ADJUSTMENT,

DEFENDANT,

ENVIRO-SERVICES OF WISCONSIN,

INTERVENING DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dunn County:
WILLIAM C. STEWART, JR., Judge. *Reversed.*

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

¶1 CANE, C.J. Enviro-Services of Wisconsin appeals an order of the circuit court, which reversed and remanded a decision of the Dunn County Board of Adjustment. The issue on appeal is whether there is substantial evidence to support the Board's findings that the proposed landfill would not have a substantial adverse impact on the surrounding property values and that the landfill would provide an important service to the community. Because we hold there was substantial evidence to support the Board's findings, we reverse the circuit court's order and affirm the Board's decision.

BACKGROUND

¶2 Enviro-Services proposed construction and operation of a landfill on a former mine pit. The area surrounding the mine was experiencing a great deal of new home construction. Enviro-Services sought a zoning special exception permit from the Dunn County Board of Adjustment so it could proceed with its plans. The Dunn County Planning, Resources and Development Department prepared a report and provided testimony to the Board that contended the landfill would be a substantial improvement to the land over its current use as a clay mine and a contractor's storage yard. Specifically, the department contended that the landfill would be safer and more aesthetically pleasing. The Board granted Enviro-Service's special exception permit request.

¶3 Jerrold and Cheri Odness, local property owners, filed a certiorari action in circuit court, challenging the Board's issuance of the permit. The Odnesses claimed the Board was biased and prejudged the matter, and they claimed there were errors relating to notice and timeliness of the Board's proceedings and actions. The Odnesses also argued the Board's decision was based upon a lack of substantial evidence in the record.

¶4 The circuit court rejected the Odnesses' claims regarding prejudice, bias, and errors relating to notice and timeliness. The court also rejected some of the Odnesses' sufficiency of the evidence arguments, but it agreed with them on two issues. First, the court stated that there was a lack of substantial evidence in the record to support the finding that the landfill would not be "substantially adverse to property values in the neighborhood," as required under DUNN COUNTY, WIS., COMPREHENSIVE ZONING ORDINANCE § 9.2.03(c)2 (1993). Second, the court found the record lacked substantial evidence for the Board to have fully considered the "importance of the service provided by the proposed facility to the community," as required under ORDINANCE § 9.2.03(d)7.

STANDARD OF REVIEW

¶5 A decision of a zoning board of adjustment is reviewed under a certiorari standard. WIS. STAT. § 59.694(10). This court reviews the decision of the Board and not that of the circuit court. *University of Wisconsin v. Dane County Bd. of Adj.*, 2000 WI App 211, ¶10, 238 Wis. 2d 810, 618 N.W.2d 537. We accord a presumption of "correctness and validity" to the Board's decision. *State ex rel. Ziervogel v. Washington County Bd. of Adj.*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401. Statutory certiorari review is limited to the following issues: "(1) [w]hether 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." *Arndorfer v. Sauk County Bd. of Adj.*, 162 Wis. 2d 246, 254, 469 N.W. 2d 831 (1991) (citation omitted).

¶6 The Board’s decision must be upheld if “it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion.” *Sills v. Walworth County Land Mgmt. Comm.*, 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878. More specifically, “[s]ubstantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision.” *Id.* The substantial evidence standard is a “significant hurdle,” which a party challenging a decision must overcome. *Id.*, ¶10. The Board, not the reviewing court, determines the weight of the evidence in the record. *Id.*, ¶11.

DISCUSSION

¶7 Enviro-Services first contends that there was substantial evidence to support the Board’s determination that the landfill would not have a substantially adverse impact on property values, pursuant to DUNN COUNTY ORDINANCE, *supra*, § 9.2.03(c)2. The record supports this conclusion. The report specifically addressed this issue, stating that the landfill would have little negative impact on its surroundings and would actually significantly improve the property:

Property Values: This medium-sized landfill will have little if any off-site impact. Materials buried at the landfill will be construction and demolition debris, not solid waste (*i.e.* garbage). Neighboring properties will not experience odors, air pollution, intolerable noises or traffic, dusts, fumes, or water pollution problems. The landfill will be in operation only for a limited number of years, then the site will be converted to a hillside meadow where there now is a large deep hole with steep sides that actually poses a risk to passers by. The use of the site after landfill closure will likely be less intensive than how the site is used currently as a clay mine and a contractor’s storage yard. The visual aesthetics will become more pleasing after a short period of active landfill use. The current visual aesthetics are not at all pleasing, and we have incorporated a mandatory clean up of the large volumes of materials that were improperly disposed of there some years ago Financial assurances

have been agreed upon to back up promises with financial penalties for failure to live up to promises made.

Enviro-Services presented further evidence in its permit application and operation plan. The documents detail the extensive body of state regulatory law, which requires Enviro-Services to construct and operate the landfill in a manner that will cause minimal disruption to the surrounding area. The documents detail how Enviro-Services will fully comply with the regulations. Thus, the Board could reasonably draw the inference that a safer, regulated and aesthetically improved use would not have an adverse impact on property values. Further, the area around the mine was already experiencing a great deal of new construction, and logically an improved facility on the mine pit's location could only be expected to increase the location's attractiveness to potential developers.

¶8 This evidence alone is enough to support the Board's determination that the landfill would not have a substantially adverse impact on property values, but even more evidence was presented. For example, rather than removing productive land to construct the landfill, the landfill was to be located in an existing mining pit. As stated in its permit application, "Agricultural land will not be used in the development of the landfill. Forested areas will not be harvested to make way for the facility, [and] wetlands will not be harmed." Consequently, Enviro-Services intended to utilize land that was already conducive to the construction and operation of a landfill instead of disturbing otherwise valuable and useful land. Thus, substantial evidence exists to support the Board's decision.

¶9 Enviro-Services next argues that the Board's determination that the landfill would provide an important service to the community is supported by substantial evidence, pursuant to DUNN COUNTY ORDINANCE, *supra*, § 9.2.03(c)7. Again, substantial evidence exists to uphold the Board's conclusion. The report

notes, “Dunn county currently generates large quantities of [construction and demolition] wastes because of the amount of building occurring. Yet, there currently is no permitted site in the County for such materials.” Certainly, it was reasonable for the Board to conclude that the presence of a facility that can deal with this type of waste would provide a benefit to the community.

¶10 The Odnesses respond by attacking the sources for the evidence in the record, stating the report offers “conclusory claims [which] are inadequate under the substantial evidence test.” Although they acknowledge that the report indicates the landfill would cause little off-site impact, they assert that no data was provided to support the report’s “conclusory” claims. It appears the Odnesses are actually arguing that no foundation for the report was presented. However, the rules of evidence do not apply in this instance. *See State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 74, 508 N.W.2d 603 (1993). Therefore, the department was not required to provide extensive background on its conclusions.

¶11 The Odnesses also argue that the department’s director, who provided testimony similar to the report, is not credible. Our review is limited to whether the evidence in the record supports that the Board’s decision was reasonable. The Board determines issues of weight and credibility, not the court. *See Sills*, 254 Wis. 2d 538, ¶11. Because substantial evidence exists to support the Board’s granting the special exception, we must uphold its decision. *See id.*

¶12 Finally, the Odnesses argue the Board improperly considered factors not set forth in the ordinance. However, the Odnesses do not provide legal authority that holds a board of adjustment may not consider factors outside of the relevant ordinance in its exercise of discretion. Instead, they provide a litany of cases where the government boards very clearly violated applicable legal

standards. Thus, we reject the Odnesses' argument that the Board acted arbitrarily and capriciously when it considered the other factors.

By the Court.—Order reversed.

Not recommended for publication in the official reports.

