

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 27, 2007

A. John Voelker
Acting 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. 2006AP311

Cir. Ct. No. 2004CV1199

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

SCHWISTER FAMILY TRUST,

PETITIONER-APPELLANT,

V.

OUTAGAMIE COUNTY BOARD OF ADJUSTMENT,

RESPONDENT-RESPONDENT.

APPEAL from a judgment of the circuit court for Outagamie County: MICHAEL W. GAGE, Judge. *Affirmed.*

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

¶1 PER CURIAM. Schwister Family Trust (“Schwister”) appeals the denial of a conditional use permit to place fill within a floodplain and wetland in order to elevate a driveway for a proposed residence. The Outagamie County Board of Adjustment (“the board”) concluded the permit would be contrary to the

OUTAGAMIE COUNTY, WI, SHORELAND-FLOODPLAIN-WETLAND ORDINANCE (“the County Ordinance”). We conclude the board acted properly and affirm.

¶2 Schwister’s property is located within a floodplain and wetland district. Schwister’s driveway connects to Ballard Road, which is also below the regional flood elevation in that area. The Outagamie County zoning committee denied Schwister’s application for a conditional use permit on May 25, 2004. After a public hearing, the board unanimously denied Schwister’s permit application. Schwister filed an action in certiorari in the Outagamie County Circuit Court and the court affirmed the decision of the board. Schwister now appeals.

¶3 On appeal from a circuit court decision entered on certiorari, an appellate court does not review the judgment or findings of the circuit court but rather reviews the record of the administrative board to which certiorari is directed. *Hearst-Argyle Stations, Inc. v. Board of Zoning Appeals*, 2003 WI App 48, ¶12, 260 Wis. 2d 494, 659 N.W.2d 424. Thus, we will not address the question of whether the circuit court made the right decision, but whether the board’s decision was reached properly. *Id.*

¶4 Schwister concedes the board’s decision is due deference. *See Klinger v. Oneida County*, 149 Wis. 2d 838, 844, 440 N.W.2d 348 (1989). When certiorari is invoked, the findings of the board upon the facts before it are conclusive if under any reasonable view the evidence sustains it. *Hearst-Argyle*, 260 Wis. 2d 494, ¶13. This court may not substitute its discretion for that the legislature committed to the board. *State ex. rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd.*, 131 Wis. 2d 101, 120, 388 N.W.2d 593 (1986). Accordingly, the standard of review in the present case is limited to: (1) whether

the board kept within its jurisdiction; (2) whether the board acted according to the law; (3) whether the board's actions were arbitrary, oppressive or unreasonable; and (4) whether the evidence was such that it might reasonably make the order or determination in question. *Id.*

¶5 There is no dispute the board had proper jurisdiction to decide this matter pursuant to the county ordinance. However, Schwister insists the board's denial of the permit constituted an error of law, and was arbitrary and unreasonable. We disagree.

¶6 Schwister was notified by a letter from the assistant zoning administrator dated May 1, 2003, that any fill placed in the floodplain required a conditional use permit from the Outagamie County Zoning Department.¹ There is no dispute that Schwister's property is subject to the floodplain requirements of the county ordinance, which requires contiguous dry land access for emergency vehicles during periods of regional flooding. See OUTAGAMIE COUNTY, WI, SHORELAND-FLOODPLAIN-WETLAND ORDINANCE § 16.32(4)(b)3.

¶7 Testimony at the hearing indicated the zoning committee based its decision to deny the permit on information given to it from the emergency

¹ We note Schwister was also notified by the May 1, 2003 letter that among other things, in order for Schwister to proceed with his permit application he would need to rezone his wetlands. This notice was in conformity with OUTAGAMIE COUNTY ORDINANCE, *supra*, § 16.38(4), which states: "Any use not listed in sub. (3) is prohibited unless the wetland or portion of it has been rezoned." OUTAGAMIE COUNTY ORDINANCE, *supra*, § 16.38(3)(c)1 allows for limited fill for the construction and maintenance of a road "necessary to conduct silvicultural or agricultural activities." In fact, Schwister was earlier granted a permit to place a limited amount of fill for the driveway in order to allow access for silvicultural (logging). However, testimony at the hearing indicated the permit was never intended to be extended to allow for expansion to a residential access. Nothing within the county ordinance allows for the placement of fill for the construction and maintenance of a driveway for residential use. No evidence has been cited that the zoning change required by the county ordinance was accomplished.

providers in the area who advised they would not be able to guarantee emergency services to the property. The testimony at the hearing also expressed a clear concern that allowing a use incompatible with the floodplain for the benefit of one individual could create huge liabilities for infrastructure upgrades. Supervisor Carl Anthony and Town of Black Creek Chairman Marvin Samson testified that raising the driveway would create a damming effect that could alter the natural flow of the drainage and put further pressure on Ballard Road and the Duck Creek drainage district. A representative from the Town of Osborn testified at the hearing that it would cost approximately \$1.5 million to reconstruct the two miles of Ballard Road that is impassable at times during the spring. A representative of the Town of Black Creek testified “1.5 million dollars to take care of the road was a little thin. Instead, we are looking at an additional \$650,000 to do for this road what would have to happen if this petition was granted. It just makes no fiscal sense.” Testimony also indicated that several private contractors were questioned concerning reconstruction and all indicated they would not even bid on such a project. The Outagamie County Highway Department indicated it would require digging down to a minimum of twelve feet to remove all the muck for two miles and condemning property alongside to allow room to do the digging.

¶8 Testimony further indicated the board examined the situation and there was one resident on Ballard Road in that section, and he did not object to blocking off the road when the water went over the road in the spring. Testimony further indicated Schwister’s driveway could require large ditches which could impede emergency vehicles that may need to back out of the driveway, in addition to potential school bus problems.

¶9 As the circuit court correctly observed in its written decision: “There is a practical and well-grounded concern that periodically the adjacent road

will be submerged. Public safety concerns are obviously augmented when property adjacent to the road is used for residential rather than agricultural or silvicultural uses.” We conclude the evidence at the hearing overwhelmingly supports the board’s decision.

¶10 Schwister insists the Towns of Osborn and Black Creek have a duty to fix or maintain Ballard Road, regardless of what use is made of Schwister’s property. Schwister argues that WIS. STAT. § 82.03(1)(a), when read in conjunction with WIS. STAT. § 82.05(3), requires that when any highway becomes impassable the town shall put the highway in passable condition as soon as practicable.² However, Schwister does not reply to the board’s argument that “as soon as practicable” may include closing the road in the spring during high water. Arguments unrefuted are deemed conceded. *See Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979).

¶11 Schwister’s argument is also contrary to the statement of purpose contained within the county ordinance. The statement of purpose is contained in OUTAGAMIE COUNTY ORDINANCE, *supra*, § 16.03 and states in pertinent part as follows:

STATEMENT OF PURPOSE. For the purpose of promoting and protecting the public health, life, property, safety, convenience and general welfare, this chapter has been established to:

(1) Minimize expenditures of public moneys for costly flood control projects as well as rescue and relief efforts.

....

² References to Wisconsin statutes are to the 2003-04 version unless otherwise noted.

(3) Control building sites, placement of structures and land uses through:

(a) Separating incompatible land uses.

....

(6) Minimize damage to public facilities on the floodplains, such as water mains, sewer lines, streets and bridges.

¶12 Schwister insists “[e]levating the Schwister driveway will not cause any damage whatsoever to public facilities on the floodplain...” Schwister further asserts: “Whether the streets (Ballard Road) are in poor condition as alleged by the Towns of Osborn and Black Creek has nothing to do with Schwister’s permit.” Schwister fails to provide record support for these conclusory arguments and the record, as noted above, is to the contrary.

¶13 The board’s decision was based upon a correct theory of law, supported by the evidence, and was not arbitrary or unreasonable.

By the Court.—Judgment affirmed.

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

