COURT OF APPEALS
DECISION
DATED AND FILED

December 27, 2007

David R. Schanker
Clerk of Court of Appeals

Appeal No. 2007AP1051 **Cir. Ct. No. 2005CV55**

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

BEVERLY MATERIALS, LLC,

PLAINTIFF-APPELLANT,

V.

TOWN OF LAPRAIRIE BOARD OF SUPERVISORS AND TOWN OF LAPRAIRIE PLANNING & ZONING COMMITTEE,

DEFENDANTS-RESPONDENT.

APPEAL from an order of the circuit court for Rock County: JOHN W. ROETHE, Judge. *Affirmed*.

Before Higginbotham, P.J., Vergeront and Bridge, JJ.

¶1 VERGERONT, J. This is a certiorari action in which Beverly Materials, LLC seeks review of a decision by the Town of LaPrairie Board of Supervisors denying its applications for a conditional use permit and request for rezoning to allow Beverly Materials to conduct a sand and gravel mining

operation. The circuit court affirmed the Board's decision and Beverly Materials appeals. We affirm the circuit court.

BACKGROUND

¶2 Beverly Materials owns property consisting of 153 acres in the Town of LaPrairie, Rock County, immediately south of County O and east of County J. The eastern portion of this parcel, approximately eighty acres, was at one time used for a mining operation that extracted sand and gravel and is zoned "special purpose." The remaining western portion of the parcel has not been disturbed, is in crop production, and is zoned as an agricultural district, A-1.

¶3 In September 2004, Beverly Materials submitted a conditional use permit application (CUP) seeking to resume mining for sand and gravel on the eastern portion. The application did not address the western portion of the parcel, although Beverly Materials had plans to attempt to expand the mining operation to that portion.

¶4 The Planning & Zoning Committee (P&Z Committee) met with representatives of Beverly Materials at a public hearing attended by the Board members and citizens. The issues raised in questions to Beverly Materials' representatives included the effect on groundwater—because Beverly Materials wanted to go down fifty feet, which was below the water table—and the fill materials that had been dumped by the railroad that had formerly used the property. The Board members and the P&Z Committee members made a site visit. In December 2004, the P&Z Committee and the Board held a joint meeting to address the application. Beverly Materials presented information regarding its plans for operation and the reclamation plan it had submitted to Rock County in order to obtain a nonmetallic mine reclamation permit as required by the county

ordinance. Approximately fifty citizens attended and many asked questions of Beverly Materials.

¶5 After the presentations and questions, the Board chairman closed the public hearing. The P&Z Committee members discussed the application, voted unanimously to recommend denial of the application, and adjourned. The Board then reconvened in an open meeting and a Board member made a motion to deny the application. After the motion was seconded, the chairman asked the attorney representing the Board to "insert some findings for us" and the attorney proposed a number of findings. The Board voted unanimously to accept those findings and deny the petition. The findings adopted by the Board are as follows:

> … The easterly 73 acres of the proposed site was mined for aggregate in the past. And portions of the site, particularly the parts under examination tonight, the easterly portion have been used as a dumping ground for various materials, some of which appear to raise concerns of groundwater contamination (inaudible) that's already there.
>
> Next, the operation of the machinery, mining machinery, in the aquifer that serves as a water table or water supply for many residents in the town, I would add that the city of Janesville utility informed me that they have three wells that draw from that aquifer between here and the river as well, and the prospect of the water table being enclosed permanently over a surface area that ultimately is proposed by the applicant to be 88 acres in size (inaudible) the whole thing, 88 acres in size, 20 feet approximately in depth, creates the possibility of groundwater contamination, potentially affecting nearby properties (inaudible) conditional use.
>
> Next, the hauling of millions of tons of materials, mostly by truck, will have major impacts on roads and highway safety.
>
> Next, and we didn't discuss this but perhaps it would not be relevant, but it's hard to envision a reclamation use such as this 88-acre lake that would have positive advantages to the town and its residents. It should be noted that the reclamation plan was submitted to and approved by the

> county with almost no involvement that I can find by the county. That was purely a transaction between the applicant and the county.
>
> And finally, the town has no legal obligations (inaudible) to rezone property or grant conditional use approval when the property has positive economic value in its present use that is found in the agricultural (inaudible) property (inaudible) the western half of the property, which is a [sic] true in the case of the subject property. There is no claim that could be made that just because it's (inaudible) economic use now, that somehow a conditional use has to be granted when you look at the property as a whole.
>
> So that addresses the contamination of groundwater concerns, it addresses the trucking and the traffic, it addresses the after-use issues, and I suggest that, while it's brief, it encompasses most of what I've heard this evening and the (inaudible) discussions….

¶6 Beverly Materials filed this action in January 2005 seeking review by certiorari of the denial of its CUP application. As the result of mediation, the parties stipulated that, "without prejudice to the parties' claims and/or defenses in [this] action," they "desire[d] to allow [Beverly Materials] to pursue a separate rezoning and permitting process." The parties agreed to a stay in this action for that purpose.

¶7 Beverly Materials filed an amended CUP application for the eastern portion of the parcel, a request for rezoning the western portion from A-1 to "special purpose," and, if the rezoning request was granted, a CUP application for the western portion to permit the mining operation there. With this application, Beverly Materials proposed a higher elevation for the mining activity with the stated purpose of avoiding disturbance of the water table. The Town Board held a hearing in May 2006, at which representatives of Beverly Materials presented information on the proposal for a mine operation on both parcels and answered questions of members of the Board and the public. Subsequently, the P&Z

Committee met and voted to deny the CUP application for the eastern portion and the rezoning request for the western portion. Prior to the vote, a representative from Beverly Materials and its attorney were given the opportunity to speak, as was anyone from the township. The reasons for the committee's decision were as follows: concern over the groundwater; loss of A-1 land, which is prime farmland; truck traffic; noise; dust; lack of support in the township; lack of benefit to the township; and problems with the reclamation plan. The problems cited regarding the reclamation plan were that it would result in reducing the topsoil on the western portion and did not provide for reclamation until the end of the project, and the reclamation viewed at another Beverly Materials site was inadequate. The Board voted to deny the CUP application for the reasons stated by the P&Z Committee and for the reasons previously given for denial of the first CUP application. The Board also voted to deny the rezoning request for the western portion for the reasons stated by the P&Z Committee in support of their recommendation.

¶8 Beverly Materials amended its certiorari complaint to challenge these decisions, as well as the denial of its first CUP application. The circuit court affirmed all the Board's decisions.

DISCUSSION

¶9 On appeal Beverly Materials contends that the Board[1] prejudged the decisions to deny its CUP applications and its rezoning request, acted arbitrarily, and made decisions that were not based on substantial evidence.

[1] Although the complaint names both the Board and the P&Z Committee, the decision subject to review is that of the Board. We therefore generally refer to the Board as the (continued)

¶10 On appeal from a circuit court's decision in an action for certiorari review of a board's decision, we review the decision of the board, not that of the circuit court. ***Roberts v. Manitowoc Cty. Bd. of Adjustment***, 2006 WI App 169, ¶10, 295 Wis. 2d 522, 721 N.W.2d 449. We accord the decision a presumption of correctness and the person appealing the board's decision must overcome that presumption. ***Id.*** Our review, like that of the circuit court, is limited to inquiring: (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 determination in question. ***Id.***, ¶11. Beverly Materials' challenge to the Board's decisions implicates the second,[2] third, and fourth inquiries.

I. First CUP Application

A. Prejudging

¶11 The requirement that a board "act … according to law" includes "the concept of due process and fair play" under which a party is entitled "to have matters decided by an impartial board." ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 24, 498 N.W.2d 842 (1993). If a decision-maker prejudges the facts or the

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respondent. To the extent Beverly Materials' argument on prejudice and arbitrariness may be directed at the P&Z Committee as well as the Board, our rejection of those arguments applies to both bodies.

[2] Beverly Materials frames its prejudging argument as part of the third inquiry—whether the Board's action was arbitrary, oppressive, or unreasonable, and represented its will and not its judgment. Because ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 24, 498 N.W.2d 842 (1993), on which Beverly Materials relies, views the issue of a biased decision maker as an aspect of "act[ing] according to law," we do so, too. However, our analysis and conclusion is not affected by whether Beverly Materials' argument implicates the second or third inquiry.

application of the law, the right to an impartial decision-maker is violated. ***Id.*** at 26. We presume administrative decision-makers act with honesty and integrity. *See* ***Guthrie v. WERC***, 111 Wis. 2d 447, 455, 331 N.W.2d 331 (1983); ***Marder v. Board of Regents***, 2005 WI 159, ¶29, 286 Wis. 2d 252, 706 N.W.2d 110.

¶12 Beverly Materials contends that the Board prejudged the first CUP application because it never had any intention of fairly considering the application or making a decision based on the facts and the law. In support of this contention, Beverly Materials asserts that the Board denied the application without a discussion of the reasons and instead adopted findings that its counsel had prepared prior to the hearing.

¶13 We do not agree with Beverly Materials' reading of the record. The record does not indicate that the Town's attorney had prepared the proposed findings before the hearing. It is a reasonable reading of the record that the Board members and counsel were present during the P&Z Committee's discussion and vote on its recommendation, and counsel was therefore aware of the reasons for that recommendation. After a Board member made a motion to deny the application based on that recommendation, the chairman asked counsel to "insert some findings for us" before the motion is voted on. We read this to mean that the chairman was aware that the Board needed to give reasons for its decision[3] and

[3] In what appears to be a separate argument but is included under the heading of "The Town Prejudged the First CUP," Beverly Materials contends that the findings adopted by the Board are, in any event, inadequate under ***Lamar Cent. Outdoor, Inc. v. Board of Zoning Appeals***, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87, because they do not refer to specific facts. We disagree. ***Lamar*** requires that a board "may not simply grant or deny an application with conclusory statements that the application does or does not satisfy the statutory criteria … [but must] express, on the record, its reasoning *why* an application does or does not meet the statutory criteria." ***Id.***, ¶32 (emphasis in original). The findings adopted by the Board here explain the reasons the Board concluded this application did not meet the criteria for a special use under the ordinance, which we set forth in the next section.

asked counsel to propose "findings" based on the discussion preceding the P&Z Committee's vote to recommend denial. The findings were plainly only a proposal by counsel, and the Board had the opportunity to decide which ones, if any, to make a part of the motion to deny the application.

¶14 We do not read counsel's statement that "we didn't discuss this" prefacing the proposed finding on the reclamation plan as proposing, in Beverly Materials' words, a "hidden reason which [Beverly Materials] had no opportunity to rebut." There was much discussion of the reclamation plan at the hearing, in which Beverly Materials participated. We understand that counsel was referring to the discussion the P&Z Committee had in voting on its recommendation. That is, we understand counsel to be saying that, unlike the other proposed findings, this was not discussed by the committee, but counsel was offering it for consideration by the Board.

¶15 Because of the presumption that the Board and its counsel acted with integrity, we will not look for ways in which the record might conceivably be read to support Beverly Materials' assertion of prejudging. We are satisfied that a reasonable reading of the record does not support this assertion.

B. Sufficiency of Evidence

¶16 The zoning ordinance for the Town of LaPrairie provides as follows with respect to a "special purpose" district:

> (1) Purpose and Intent of Special Purpose Districts (S-P)
>
> The purpose of this district is to provide a means of obtaining the goals and objectives of the Development Guide. The S-P District is intended to provide for those uses which create, or could present special problems, hazards or other circumstances with regard to the use of land. This District is to include those uses of land which

> require large expanses of land; those which afford hazards to health, safety, or other aspects of the general welfare; those for which it is desirable to have a limited number of a given land use within the community.
>
> (2) Conditional Uses
>
> All such uses shall be conditional uses and subject to the consideration and approval of the Town Board with regard to such matters as the creation of nuisance conditions for the public or for users of nearby areas. The Committee will review the applicable facts pertaining to the proposed conditional use as found in Section 5 [governing conditional use permits] of this ordinance and will approve the conditional use only after finding that its inclusion in this district, possesses a high likelihood of not creating problems with regard to nearby parcels of land or occupants thereof, and which are therefore permitted only subject to the fulfillment of conditions which effectively insure that no such problems will be created. The Committee may require special facilities as a condition of approval such as, but not limited to fences, trees, shrubbery, barriers, and other applicable material to protect the general public, the aesthetics of the area, or the immediate environment.
>
> ….
>
> (B) Facilities for the production, mining, or processing or storage of concrete, blacktop, asphalt, or other pavings or road surfacing or building materials.

LAPRAIRIE, WIS., ZONING ORDINANCE § 4.3(1977) (emphasis in original).[4]

¶17 The relevant provisions in section (5) governing conditional uses are:

> 5.3 Standards Applicable to All Conditional Uses
>
> In passing upon a Conditional Use Permit application, the Planning & Zoning Committee shall consider the following factors:

[4] All references to the LaPrairie Zoning Ordinance are to the 1977 version unless otherwise noted.

> (1)(A)[sic] The location, nature, and size of the proposed use.
>
> (B)[sic] The size of the site in relation to it.
>
> (3) The location of the site with respect to existing or future roads giving access to it.
>
> (4) Its compatibility with existing uses on land adjacent thereto.
>
> (5) Its harmony with the future development of the district.
>
> (6) Existing topography, drainage, soils types, and vegetative cover.
>
> (7) Its relationship to the public interest, the purpose and intent of this Ordinance and substantial justice to all parties concerned.
>
> 5.4 Conditions Attached to Conditional Use Permit
>
> Upon consideration of the factors listed above, the Planning & Zoning Committee may attach such conditions, in addition to those otherwise specifically listed, that it deems necessary in furthering the purposes of this Ordinance. Violation of any of these conditions shall be deemed a violation of this Ordinance.

LAPRAIRIE, WIS., ZONING ORDINANCE §§ 5.3, 5.4.

¶18 The decision to grant a conditional use permit is discretionary; we hesitate to interfere with such decisions and will not substitute our judgment for that of the board. ***Roberts***, 295 Wis. 2d 522, ¶10. The burden is on the party seeking a conditional use permit to establish that it has met the conditions. ***Delta Biological Res. v. BOZA***, 160 Wis. 2d 905, 912, 467 N.W.2d 164 (1991).

¶19 When the challenge is to the sufficiency of the evidence under the fourth inquiry for certiorari review, we examine the record to determine if the board's decision is based on substantial evidence, meaning "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Roberts, 295 Wis. 2d 522, ¶28 (citing ***Stacy v. Ashland Cty. Dep't of Pub. Welfare***, 39 Wis. 2d 595, 603, 159 N.W.2d 630 (1968)). This test is highly deferential to the board and we may not substitute our view of the evidence for that of the board. ***Clark v. Waupaca Cty. Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). We do not assess credibility or decide what weight to give the evidence; that is the role of the board. ***Stacy***, 39 Wis. 2d at 603; ***Roberts***, 295 Wis. 2d 522, ¶32. It is irrelevant whether there is substantial evidence to support the opposite outcome if there is substantial evidence to support the outcome reached by the board. ***Roberts***, 295 Wis. 2d 522, ¶32.

¶20 Beverly Materials frames its argument on the lack of substantial evidence to support the Board's denial by pointing to evidence that, in its view, supports granting the first CUP. However, the approach mandated by the case law is to review the record to determine if there is relevant evidence that reasonably supports the Board's decision to deny the first CUP. We conclude there is.

¶21 There was evidence to support the conclusion that the operation of the quarry presented a risk of contaminating the groundwater that was the source of the wells for area residents. Beverly Materials wanted to operate below the water table with its equipment and it presented no response to the concerns of the residents except to say that there would be no contamination. When pressed, the Beverly Materials representative acknowledged that it was not possible to prove this could not happen, and, after stating that Beverly Materials wanted to be a good neighbor and correct any negative effect of its activities, he also acknowledged that Beverly Materials could not "just indemnify the entire township." The investigation that Beverly Materials commissioned did not

address this issue but, rather, the issues of contamination from a nearby superfund site and from the buried fill materials.[5] The Board could reasonably conclude that Beverly Materials had not demonstrated that its proposed operation had a "high likelihood of not creating problems with regard to nearby parcels of land or occupants thereof…." LAPRAIRIE, WIS., ZONING ORDINANCE § 4.3(2).

¶22 Beverly Materials' representative acknowledged that there would be an increase in truck traffic and there was evidence that the area where this would occur was already congested. Beverly Materials' representative's response was that it would be up to the county to decide how to deal with traffic problems resulting from the increase. This is an additional basis on which the Board could reasonably conclude that Beverly Materials had not demonstrated that its proposed operation had a "high likelihood of not creating problems with regard to nearby parcels of land or occupants thereof…." ***Id.***

¶23 Because reasonable minds could conclude the evidence supported the denial of the first CUP application on at least two grounds, we do not examine the Board's other reasons. We are satisfied the denial was supported by substantial evidence.[6]

[5] The report concluded the superfund site would not affect this property and the buried fill materials "do not appear to pose a risk to human health or the environment."

[6] Beverly Materials contends that the denial of its CUP applications is the equivalent of making nonmetallic mining a prohibited use. We do not follow the logic of this argument. It was Beverly Materials' obligation to demonstrate that the nonmetallic mining operation it proposed met the requirements of the ordinance. The Board's conclusion that Beverly Materials had not demonstrated this does not mean that no application for any nonmetallic mining operation could succeed.

II. Amended CUP Application and Rezoning Request—Prejudging and Arbitrariness

¶24 Beverly Materials contends the Town prejudged the amended CUP application and rezoning request and that it demonstrated this prejudgment in two ways: it required Beverly Materials to pay $10,000 for consultants that were never retained and testing that was never performed, and it amended its ordinance to prevent future quarry activity. We conclude this conduct does not demonstrate prejudging.

¶25 With respect to the deposited fees, section 5.6(1) of the zoning ordinance allows the Town to collect the costs of reviewing zoning applications from the applicant. LAPRAIRIE, WIS., ZONING ORDINANCE § 5.6(1). The stipulation between the parties required Beverly Materials to pay all outstanding fees owed the Town and to deposit in the Town's counsel's trust account the amount estimated by the Town for "reasonable costs for consulting fees, testing, and other costs associated with the Town's review" of the applications contemplated by the stipulation. The Town estimated $10,000 and Beverly Materials deposited this amount. Apparently the Town determined that it did not need to retain experts to evaluate the proposal and therefore it did not spend the money deposited, which both parties stipulated would be returned to Beverly Materials within thirty days of the Town's final decision on Beverly Materials' applications. There is nothing in the stipulation or anywhere else Beverly Materials directs us that obligated the Town to spend the money Beverly Materials deposited to hire experts or perform tests. There is no basis in the record for concluding that the Town's decision not to spend the money shows it had no intention of fairly considering the application for the amended CUP and the request for rezoning.

¶26 There is also no merit to Beverly Materials' argument of prejudgment based on the amendment to the zoning ordinance. The amendment provides that the only mining that is permitted as a conditional use in the "special purpose" district is mining that was operating legally as of March 2006 and further provides that the amendment does not apply to Beverly Materials' applications.[7] LAPRAIRIE, WIS., ZONING ORDINANCE § 4.3 (2006). The amendment was first discussed in a joint meeting of the Board and the P&Z Committee in February 2006, before Beverly Materials submitted its second set of applications in March 2006. A hearing was held on the proposed amendment in May 2006, while the process of considering Beverly Materials' applications was continuing. There is no indication in the record that Beverly Materials ever objected to the amendment as adversely affecting its rights, and we do not see how it does adversely affect Beverly Materials' rights. We conclude there is no basis in the record for inferring that the amendment shows an intent to deny or to not fairly consider the applications of Beverly Materials that were expressly exempted by the amendment.

¶27 Beverly Materials makes an additional argument that the Town acted arbitrarily because it shifted its treatment of Beverly Materials' property, first treating both the eastern and western portions as one parcel and then, when Beverly Materials sought a CUP for both portions, treating them as two separate parcels. We conclude that the instances Beverly Materials refers to as evidence of inconsistent treatment, when considered in context, do not show arbitrariness.

[7] The precise wording is that the amendment "… shall not apply to an application for rezoning to this District and/or for conditional use approval pursuant to an order of the Rock County Circuit Court in case No. 05-CV-55 [this action]." LAPRAIRIE, WIS., ZONING ORDINANCE § 4.3 (2006).

Moreover, Beverly Materials' argument relies on information regarding the assessment of its property for property tax purposes that was not part of the record before the Board. The circuit court stated that these materials were not part of the record and Beverly Materials does not explain why they are properly before this court. We therefore do not consider them.

III. The Amended CUP Application—Sufficiency of Evidence

¶28 As with our analysis of the Board's denial of the first CUP application, our inquiry with respect to the denial of the amended application is whether there was relevant evidence that "a reasonable mind might accept as adequate to support" the Board's conclusion. ***Roberts***, 295 Wis. 2d 522, ¶28. We need not look for evidence that supports a conclusion other than the one reached by the Board, if there is substantial evidence to support the Board's conclusion. *See* ***id***, ¶32 (stating that whether substantial evidence supports the virtues of granting a CUP is "irrelevant" if there is substantial evidence to support the opposite conclusion).

¶29 Beverly Materials' amended CUP application was based on the premise that its operation would take place on both the eastern and western portions of the parcel. Beverly Materials' representative explained that, in exchange for avoiding the water table, it needed the additional sand and gravel from the western portion to make the project economically feasible. Beverly Materials' representative explained that it would limit the floor of its extraction operations to an elevation of 790-805 feet; given its statement that the average elevation of the groundwater in the area was 785-800 feet, it stated that it would be operating at least five feet above the water table. In response to questions about the fluctuation of the water table, Beverly Materials' representative agreed there

were fluctuations and acknowledged that Beverly Materials did not have enough historic data to know the historic high and low and that it was "shoot[ing] for … an average." If Beverly Materials encountered groundwater in its operations, he stated, it would back out. Reasonable minds could conclude based on this evidence that Beverly Materials' proposed depth of operation did not adequately protect against the risk of its machinery coming into contact with the groundwater.

¶30 The additional information Beverly Materials provided on the increased traffic included an estimate that there would be 240 truckloads per day and this would increase traffic on County J by 8.9% and on County O by 3.9%. However, Beverly Materials' representative acknowledged that its estimate of 240 truckloads per day had to be doubled because there were returning trips for each load going out. Although Beverly Materials did not view this as a significant increase in traffic and did not see it as causing traffic problems, some residents disagreed with Beverly Materials' evaluation. Beverly Materials' representative had stated at the hearing on the first application that one solution to increased truck traffic would be to use rail; but, at the time of the hearing on the amended application, he stated that no steps had yet been taken to accomplish that. Based on this evidence, reasonable minds could conclude that the increased truck traffic would cause a problem for area residents and that Beverly Materials' approach was to minimize the significance of this rather than to work on a solution.

¶31 Beverly Materials' reclamation plan involved taking the topsoil from the western portion and spreading it over the entire property after extraction was completed, which would be done in ten-acre phases. Beverly Materials' representative acknowledged that this would mean the topsoil for crop production on the western portion would be thinner than it is now and suggested that it might be able to import some dirt to correct that. There were statements from area

farmers that the soil on the western portion was unusually good soil for crop production and that replacing it with soil from other places would not maintain that quality. There was also evidence that there were many places in Rock County where sand and gravel were available for mining but where good crops could not be efficiently produced. Based on this evidence, reasonable minds could conclude that using the topsoil on the western portion for reclamation purposes on the entire property was inconsistent with preserving productive and historic agricultural soils. That is one of the stated intents of the ordinance, LAPRAIRIE, WIS., ZONING ORDINANCE § 1.3, and therefore a factor to consider in acting on CUP applications. Section 5.3(7).

¶32 Based on the above, we conclude the Board's decision to deny the amended CUP application was based on substantial evidence. We therefore do not consider whether the other stated grounds for denial were supported by substantial evidence.

IV. Request for Rezoning—Sufficiency of the Evidence

¶33 The parties disagree on our standard of review of the Board's denial of the request for rezoning. Beverly Materials appears to agree with the Board that rezoning, like zoning, is a legislative function. *See* ***Buhler v. Racine County***, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966). However, relying on ***State ex rel. Madison Landfills, Inc. v. Dane County***, 183 Wis. 2d 282, 515 N.W.2d 322 (Ct. App. 1994), Beverly Materials contends that we nonetheless must apply the "substantial evidence" test on certiorari review of a decision granting or denying a rezoning request.

¶34 The Board apparently agrees that certiorari review of a decision granting or denying a rezoning request is proper. However, it contends that courts

must give more deference to a municipal authority's decision on a rezoning request than to a decision on a CUP application. The Board relies on case law holding that, because zoning and rezoning are legislative decisions, court review is limited to deciding whether they are unconstitutional, unreasonable, or discriminatory. *See, e.g.*, ***Buhler***, 33 Wis. 2d at 146; ***Quinn v. Town of Dodgeville***, 122 Wis. 2d 570, 585, 364 N.W.2d 149 (1985); ***Schmeling v. Phelps***, 212 Wis. 2d 898, 912, 569 N.W.2d 784 (Ct. App. 1997). The Board also contends that, in making zoning and rezoning decisions, the municipality is not limited to evidence contained in the record. The Board cites ***Step Now Citizens Group v. Town of Utica Planning & Zoning Committee***, 2003 WI App 109, ¶¶47-48, 264 Wis. 2d 662, 663 N.W.2d 833, in which we held that, in making a decision to rezone, which is a legislative decision, the municipality may properly consider information gathered at meetings or visits that do not include all parties.

¶35 We can understand the parties' disagreement: the case law on the procedure for and scope of a court's review of a zoning or rezoning request does not appear to be consistent. Review by certiorari tests the validity of a judicial or quasi-judicial decision, *see* ***Merkel v. Village of Germantown***, 218 Wis. 2d 572, 577-78, 581 N.W.2d 552 (Ct. App. 1998), and the court's review is generally limited to review of the record before the decision-maker. ***Tomaszewski v. Giera***, 2003 WI App 65, ¶18, 260 Wis. 2d 569, 659 N.W.2d 882. The legislative process does not have the same requirements for presenting evidence and making a record as do quasi-judicial proceedings. Most of the challenges to zoning and rezoning decisions that we are aware of are not by means of certiorari review of a record but an action alleging the decision to be unconstitutional. *See, e.g.*, ***Buhler***, 33 Wis. 2d at 146; ***Quinn***, 122 Wis. 2d at 585; and ***Schmeling***, 212 Wis. 2d at 916 (noting that an attack based on the unreasonableness or arbitrariness of a legislative

decision is the equivalent of a claim of unconstitutionality based on a denial of equal protection or due process).

¶36 However, Beverly Materials is correct that in ***Madison Landfills***, 183 Wis. 2d at 286, we reviewed the denial of a rezoning petition using the standard of review for a certiorari proceeding. At the same time, we cited ***Buhler***, 33 Wis. 2d at 146-47, for our limited role in reviewing the decision, ***id.*** at 288, and we did not, as Beverly Materials suggests in its brief, refer to "substantial evidence" as the appropriate test in reviewing the evidence. ***Id.*** at 290. Rather, mindful of ***Buhler***, we stated that "the extent of our authority" was to determine if the denial of the petition for rezoning "was arbitrary, unreasonable and not based on the evidence before it." ***Id.***

¶37 Although we have identified what appears to be an inconsistency in the case law, it is unnecessary to resolve this in order to decide Beverly Materials' challenge to the denial of its rezoning request. Even if we apply the substantial evidence test that is used for certiorari review generally, we conclude that the Board's decision was supported by substantial evidence. As we have already explained in the context of the amended CUP application, reasonable minds could conclude, based on the relevant evidence, that permitting the removal of the topsoil from the western portion, was inconsistent with a stated intent of the ordinance—preserving productive and historic agricultural soils. Reasonable minds could also conclude, based on the relevant evidence, that rezoning from A-1 to "special purpose" to permit this to occur would be inconsistent with that intent as well as with the intent to "further the appropriate use of land." LAPRAIRIE, WIS., ZONING ORDINANCE § 1.3 (1977). These reasons support denying the request to rezone and they are based on substantial evidence, assuming that is the correct standard to apply.

CONCLUSION

¶38 We conclude the Board did not prejudge or act arbitrarily and that its decisions to deny the CUP applications and the rezoning request were based on substantial evidence. We therefore affirm.

By the Court.—Order affirmed.

Not recommended for publication in the official reports.