**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**November 7, 2002**

**Cornelia G. Clark**
**Clerk of Court of Appeals**



**Appeal No. 01-3025**

**Cir. Ct. No. 00-CV-285**
**00-CV-286**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS**
**DISTRICT IV**

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**THE TOWN OF DAYTON, STEVE SUHS, JUDY SUHS, TOM THYSSEN, LAURIE THYSSEN, JANE HAASCH, ROGER BRICCO, BONNIE BRICCO, KIM KINNON, KEVIN KINNON, HERB WARAX, SUE WARAX, JOE TURRUBIATES AND DONNA TURRUBIATES,**

**PLAINTIFFS-RESPONDENTS,**

**V.**

**THE WAUPACA COUNTY ZONING BOARD OF ADJUSTMENT,**

**DEFENDANT-CO-APPELLANT,**

**CAREW CONCRETE & SUPPLY CO., INC.,**

**INTERVENOR-DEFENDANT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Waupaca County: PHILIP M. KIRK, Judge. *Affirmed.*

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

¶1 DEININGER, J. The Waupaca County Zoning Board of Adjustment and Carew Concrete & Supply Co., Inc., appeal a judgment which reversed the board's approval of Carew's application for a conditional use permit. The Waupaca County Zoning Committee had denied Carew's application for the permit, but the board reversed that action and granted a permit subject to certain conditions. Carew and the board claim the circuit court erred in setting aside the board's issuance of the conditional use permit. We conclude, however, that the board exceeded its limited authority to review the zoning committee's decision for an erroneous interpretation of the governing zoning ordinance.

¶2 We also conclude that the committee's denial was reasonable and supported by the evidence before it. Accordingly, we affirm the circuit court judgment which set aside the board's action, thereby reinstating the zoning committee's denial of Carew's permit.

## BACKGROUND

¶3 Carew owns an eighty-acre parcel in the Town of Dayton, Waupaca County, on which it has operated a gravel pit for a number of years. Carew's operations are a "conditional use" within the applicable zoning district under the Waupaca County zoning ordinance. Carew and its predecessor had obtained permits in the past to operate on two five-acre "cells" of the Carew land. This appeal involves administrative action taken on Carew's application in 1999 to commence operations on the remaining seventy acres of its land. Although some aspects of Carew's prior permit applications were disputed and spawned litigation, no issues relating to the permits granted for the initial ten acres are relevant to this

appeal. Accordingly, our background summary begins with proceedings before the Waupaca County Zoning Committee in April and May 1999.[1]

¶4 At a public hearing on Carew's request to extend its operations into the remaining seventy acres, a number of residents of the Town of Dayton objected to the issuance of a permit. Their complaints were many but largely centered on the existing noise level, truck traffic, and berm erosion, which residents feared would continue or be exacerbated if Carew were permitted to commence quarrying operations on additional "cells." A committee member moved denial of the application, citing section 21.01 of the Waupaca County zoning ordinance ("the ordinance") which lists factors to be considered when acting on conditional use applications.[2] The movant specifically noted the

[1] We note that section 21.01 of the Waupaca County zoning ordinance refers to the "Planning Committee," while other provisions of the ordinance refer to the "Land Use and Zoning Committee." The circuit court and the parties denominate the committee that denied Carew's application "the Zoning Committee," and the committee in question also referred to itself in that fashion. We assume that all of the foregoing references are to the same entity—a committee of the Waupaca County Board of Supervisors having land use, planning and zoning responsibilities. No argument is made that there is more than one such committee, or that the ordinance is ambiguous with respect to what entity exercises primary conditional use permit approval authority under the ordinance. We follow the parties' practice and refer to the committee as the zoning committee, or at times, simply "the committee."

[2] Section 21.01 of the Waupaca County zoning ordinance directs the committee to consider the following when determining whether to grant a conditional use permit:

> [T]he health, general welfare, safety and economic prosperity of the county and of the immediate area in which such use would be located, including such considerations as the effect on the established character and quality of the area, its physical attractiveness, the movement of traffic, the demand for related services, the possible hazardous, harmful[,] noxious, offensive, or nuisance effects resulting from noise, dust, smoke, or odor and other factors.

agricultural and residential character of the area in question and reviewed the concerns of numerous residents expressed at the hearing.

¶5 The committee voted unanimously to deny any expansion or extension of gravel pit operations beyond the ten acres for which the use had previously been approved. Carew appealed the zoning committee's denial to the board of adjustment. At the beginning of the board's hearing on Carew's appeal, the board's secretary gave the following description of the scope of the board's proceeding:

> As a quasi-judicial body, the Board of Adjustments has only one role on these appeals. The Board of Adjustment must answer the question, did the Zoning Committee correctly and rationally apply the zoning ordinance to the facts before them and making the decision now being appealed? The Board of Adjustment, in answering this question, can only look to the facts and evidence that the Zoning Committee had before it in making its decision. It is inappropriate for the Board of Adjustment to hear new testimony or evidence that the Zoning Committee did not have before it. The Board of Adjustment is, however, willing to listen to any arguments as to whether the Zoning Committee correctly applied the law in making its decision.

Consistent with this statement of the scope of its review, the board limited its consideration of public input to hearing arguments from representatives for Carew and the objectors.[3]

[3] For example, at one point, in response to the proffer of certain letters to the board, the secretary inquired of the chair "if we are to just decide whether the Zoning Committee correctly applied the evidence in front of them," to which the chair replied that it was "concerned about that too because we've been getting a lot of testimony here that should have been given to the Zoning Committee instead. Because the only thing we are interested in is if the Zoning Committee did the proper procedures and met the ordinance and regulations that's necessary."

¶6 At the conclusion of the public hearing on Carew's appeal, the board's secretary reiterated that the question before the board was "[d]id the Waupaca County Zoning Committee correctly apply the Waupaca County … Zoning Ordinance to the facts before them in making the decision now being appealed?" Following discussion among members of the board, the secretary made the following motion:

> I move to reverse the decision of the Zoning Committee based on the fact that they used Section 21.02 [sic] general -- the general section of conditional uses, and did not apply Section 27.05, which dealt with conditional use decisions, and Section 21.02(10), which dealt with mineral extractions and its standards.

The motion also provided that, rather than remanding the matter to the zoning committee, the board would direct the issuance of a conditional use permit to Carew for an additional five-acre cell to be operated on conditions similar to those contained in previous permits. The motion passed on a four-to-one vote.

¶7 The Town of Dayton and several residents sought judicial review of the board's action. In a June 22, 2000 decision, the circuit court reversed the board's decision and returned "the matter to the Board for further proceedings." In reversing the board, the court (Circuit Judge Richard DelForge) concluded that the board had erred by not considering "the factors in 21.01 which are re-emphasized in 27.04(2)." Because the board of adjustment had failed to consider certain mandatory factors and standards, in the circuit court's view, "the Board did not follow the appropriate law and its decision must be reversed and the matter returned to the Board to apply the proper standards."

¶8 The board again took up the Carew permit in response to the circuit court order. At an August 2000 meeting, the board opted to receive no additional

testimony or argument, and instead to "have a discussion amongst the board of adjustment." The board's secretary opened the discussion by presenting a lengthy summary of the status of the case, and she gave her view of the record with respect to the general factors applicable to conditional uses under section 21.01 of the ordinance.[4] The board members then discussed the Carew permit and voted three to one to reaffirm its original decision to grant a permit on certain conditions.

¶9 The Town of Dayton and several landowners again sought certiorari review in the circuit court. The two actions were consolidated and Carew Concrete was permitted to intervene. Following briefing and argument, the circuit court (Circuit Judge Philip Kirk) reversed the board's approval of Carew's permit. The court began its bench decision by reviewing the testimony presented to the zoning committee in April 1999 and the committee's decision to deny Carew's permit for additional cells. The court concluded that the committee had before it substantial evidence to support its decision to deny the permit, and that the committee had a rational basis for doing so.

¶10 The court then reviewed the transcript of the board of adjustment's proceedings following the remand by Judge DelForge. The court concluded that the board had failed to identify any error in the zoning committee's decision to deny the permit, and instead had substituted its own judgment regarding the merits of Carew's permit application. This, in the court's view, was not in keeping with the board's proper role in the administrative appeal process set forth in the county ordinance and applicable statutes. Accordingly, the court entered a judgment

[4] The secretary's summary, which also appears in the record as a separate, typewritten document, was apparently prepared in advance of the meeting.

which set aside the board of adjustment's action and reinstated the zoning committee's denial of Carew's permit. The board and Carew appeal, filing separate briefs, and the Town of Dayton and a number of town residents respond in a combined brief.[5]

## ANALYSIS

¶11 The parties agree that this court's review is of the administrative decision or decisions at issue, not of the circuit court's decision, and that we review the administrative determination according no deference to the trial court's conclusions. ***Citizens' Util. Bd. v. PSC***, 211 Wis. 2d 537, 543-44, 565 N.W.2d 554 (Ct. App. 1997). The parties disagree, however, over the proper scope of our review of the administrative actions in this case. Specifically, they dispute whether the initial judicial review proceeding before Judge DelForge, from which there was no appeal, served to limit the issues the circuit court and this court may decide in the present review proceeding.

¶12 The board argues that the only question we may decide is whether it complied with Judge DelForge's remand order. The board contends that Judge DelForge's direction that the board consider section 21.01 of the ordinance became "the law of the case," and consequently, all other issues (such as the standard for the board's review of the zoning committee decision) did not survive the DelForge remand order. Thus, in the board's view, there is no reason for us to now consider either the board's original decision of July 1, 1999, or the zoning committee's decision which preceded it.

[5] We will refer to the appellants collectively as "the board," and to the respondents as "the Town."

¶13 The Town, on the other hand, maintains that the scope of our review cannot be narrowed in this fashion. It argues that Judge DelForge set aside the board's initial granting of Carew's permit in its entirety, and that when the Town obtained judicial review of the board's post-remand determination, both the board's original decision and the zoning committee decision it reversed were again placed before the court for purposes of certiorari review. The Town also argues that, because the board itself acknowledged its limited, error-correcting role regarding zoning committee actions on conditional use permits (see ¶5), the circuit court and this court may review whether the board remained within its "jurisdiction" when it reversed the zoning committee's decision to deny Carew a permit.

¶14 We conclude that the Town presents the better analysis of the scope of the instant review proceedings. Presently before this court is the final administrative action of the Waupaca County Zoning Board of Adjustment which granted Carew Concrete a conditional use permit to conduct gravel pit operations on an additional five-acre cell of its land in the Town of Dayton. The standard for our review of that final administrative action is well settled. We must decide whether, in taking the action that it did, the board (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted arbitrarily, oppressively or unreasonably, imposing its will rather than its judgment; and (4) whether the evidence before the board was such that it might reasonably make the order or determination that it did. *See* ***Kapischke v. County of Walworth***, 226 Wis. 2d 320, 327-28, 595 N.W.2d 42 (Ct. App. 1999).

¶15 In addressing the first review criteria—whether the board exceeded its "jurisdiction"—we must of necessity determine the extent of the board's authority to countermand the zoning committee's denial of a conditional use

permit. We thus begin by reviewing the relevant provisions of the county zoning enabling statutes and of the Waupaca County zoning ordinance.

¶16 Counties may create boards of adjustment. WIS. STAT. § 59.694(1). Among other things, a board of adjustment may consider appeals of decisions made by "the building inspector or other administrative officer." Section 59.694(4). In addition, a board may "hear and decide appeals where it is alleged there is error in an order, requirement, decision or determination made by an administrative official in the enforcement" of a county zoning ordinance. Section 59.694(7)(a). It may also "hear and decide special exceptions" if so authorized by the applicable ordinance. Section 59.694(7)(b). And, receiving particular attention from the parties to this appeal, the following statutory provision also speaks to the board's authority:

> In exercising the powers under this section, *the board of adjustment may*, in conformity with the provisions of this section, reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may *make the order, requirement, decision or determination as ought to be made, and to that end shall have all the powers of the officer from whom the appeal is taken*.

Section 59.694(8) (emphasis added).

¶17 The attorney general has opined, in response to an inquiry under an earlier but similarly worded version of the county zoning statute, that a board of adjustment may hear "an appeal of a decision of the Zoning and Planning Committee … on conditional uses," if authorized to do so by the county's ordinance. 69 Op. Att'y Gen. 146, 149 (1980). The attorney general noted that the term "administrative official" was broad enough to include administrative bodies such as planning and zoning committees. ***Id***. at 150. He also concluded

that the statute authorizes counties to vest primary or sole authority to grant conditional use permits with the board of adjustment; or a county could place that authority elsewhere, such as with a "planning and zoning committee"; and if placed with a committee, a county ordinance may provide for administrative review of the committee's conditional use decisions by the board. ***Id***. at 152-53.

¶18 The parties do not dispute that Waupaca County has chosen the last option. Its zoning ordinance vests primary authority in the zoning committee to act on applications for conditional use permits, but the ordinance also grants persons aggrieved by the committee's decision a right of appeal to the board of adjustment. The parties do not agree, however, on the scope of the board's review—whether it must be limited and deferential to the committee's determination, or whether the board may consider the application de novo and decide independently whether a permit should be granted and on what conditions.[6] We turn now to the pertinent provisions of the ordinance.

¶19 Section 27.05 of the ordinance sets out the duties of the zoning committee, which includes "Conditional Use Decisions." A landowner wishing to engage in a conditional use must submit an application for approval, which is forwarded to the committee. The committee must conduct a public hearing, following which and "other investigations," the committee is to "decide the matter upon the following standards:"

> (1) Whether the use is listed as a conditional use in the zoning district where the lands are located ….

[6] As we have noted, the parties also dispute what effect Judge DelForge's earlier remand order may have on the question of the scope of the board's review authority in this case, an issue we discuss further below. See ¶¶27-30.

> (2) …[The] specific standards for the class of conditional use under consideration [that may be established by "regulations of the zoning district in which the lands are located"] ….
>
> (3) *In addition*, or where the zoning district contains no standards unique to that district or use, *the committee shall apply the following general standards*:
>
> > (a) No grant or a conditional use shall violate the spirit or intent of this ordinance.
> >
> > *(b) No conditional use shall be allowed which would be contrary to the public health, safety, or general welfare, or which would be substantially adverse to property values in the neighborhood affected.*
> >
> > *(c) No use shall be permitted that would constitute a nuisance by reason of noise, dust, smoke, odor or other similar factors.*

Section 27.05(c) (emphasis added). We note that the emphasized language parallels the "general" standards which must be applied in conditional use determinations under section 21.01 of the ordinance. (See footnote 2.)

¶20 The ordinance also contains specific standards applicable to nonmetallic "mineral extraction." Section 21.02(10) of the ordinance requires an applicant for this conditional use to "submit a site plan, operation plan, and/or reclamation plan, showing how different stages of the operation will fully comply with the standards of this ordinance." The committee is directed to "impose conditions deemed necessary by the Committee to be [sic] to protect public health and safety." The "mineral extraction" use standards also authorize the committee to impose additional "conditions for aesthetic or other public welfare purposes," to "limit hours and days of operation," and to establish "reclamation" requirements to address environmental concerns.

¶21 We next examine the ordinance's provisions relating to the appeal of zoning committee actions on conditional use permit applications. Section 27.04 of the ordinance authorizes the board to hear administrative appeals of certain decisions made by the zoning administrator and zoning committee. Under section 27.04(2)(a)(1) and (2), an aggrieved person may appeal to the board any decisions of the administrator which consist of "interpretations of the terms of Waupaca County land use ordinances" or which involve "ordinance enforcement activities." As to decisions of the committee, the ordinance provides as follows:

> (3) *Decisions* by the Land Use and Zoning Committee *which consist of interpretations of the terms of the Waupaca County Zoning ordinance* and which are made in the course of determining whether a permit or approval will be issued by said committee are appealable to the Board of Adjustment as administrative appeals. Land Use and Zoning Committee decisions on zoning amendment matters are not appealable to the Board of Adjustments [sic].

Section 27.04(2)(a)(3) (emphasis added).

¶22 When acting on administrative appeals, the board must conduct a public hearing and may pursue "other investigation," and it "*shall decide the matter based upon whether the decision, determination or interpretation being appealed was in error.*" Section 27.04(2)(b)(5) (emphasis added). Mirroring the language of WIS. STAT. § 59.694(8), the ordinance also provides that the board may "reverse or affirm, wholly or partly, or may modify the decision appealed from, and may make such decision as ought to have been made, and to that end shall have all powers of the officer from whom the appeal is taken." Section 27.04(2)(b)(5). Finally, the ordinance directs that all "*decisions by the Board on administrative appeals shall be based upon the terms of the ordinance and evidence as to intent of the County Board*." ***Id***. (emphasis added).

¶23 The language of the ordinance plainly imposes on the zoning committee the duty to weigh and balance the factors set out in the ordinance for conditional use approvals. Thus, the ordinance invests the committee with discretion to grant or deny conditional use permits. The ordinance just as plainly, in the provisions we have quoted and emphasized in the preceding two paragraphs, limits the authority of the board of adjustment to the correction of erroneous "interpretations of the terms of the Waupaca County Zoning ordinance." Section 27.04(2)(a)(3). The ordinance does *not* authorize the board to substitute its judgment for that of the committee with regard to the discretionary determination of whether a permit should be granted, and if so, on what conditions.

¶24 We conclude the board is not empowered under the ordinance to set aside the zoning committee's decision to deny Carew a permit to enlarge its quarrying operation absent an erroneous interpretation by the committee of some provision of the Waupaca County zoning ordinance. Neither the board nor Carew points to any "interpretation error" on the part of the zoning committee that would constitute grounds for the board to reverse the committee's denial of the Carew permit. Rather, both claim that the applicable statutes, the zoning ordinance itself, or Judge DelForge's prior order authorized the board to consider de novo the various factors applicable to Carew's application. We reject these arguments and conclude, as did the circuit court, that the board exceeded its authority in reversing the committee's denial of a permit to Carew.

¶25 Our conclusion in this regard finds some support in ***Town of Hudson v. Hudson Town Board of Adjustment***, 158 Wis. 2d 263, 461 N.W.2d 827 (Ct. App. 1990). Although the case deals with city, not county, zoning enabling statutes, and with a "special exception" as opposed to a "conditional use," the landowner in ***Town of Hudson***, like Carew, was initially denied a permit

by the town board. The landowner appealed the denial to the board of adjustment, which "overruled the town board and granted the permit subject to conditions." ***Id***. at 268. We affirmed the circuit court's reversal of the board of adjustment's action, concluding that where an enabling statute permits a municipal body to grant specific decision-making authority to either the board of adjustment or some other entity, we must look to the zoning ordinance to determine what role, if any, the board may have in acting on the issue in question. *See* ***id***. at 268-74 (concluding that statute in question authorizes a town board preemptive power to grant special exceptions if town so opts by ordinance, and Town of Hudson had done so, leaving board of adjustment no role in the process).

¶26 Here, similar to the circumstance in ***Town of Hudson***, Waupaca County has exercised its option to grant its zoning committee, as opposed to its board of adjustment, the plenary power to grant or deny conditional use permits. This option is authorized under WIS. STAT. § 59.694(1) and not precluded by any other provision of WIS. STAT. §§ 59.69 through .694. Waupaca County has further opted to allow limited appeals of committee conditional use decisions to the board, with the appealable decisions being only those which "consist of interpretations of the terms of the Waupaca County Zoning ordinance." Section 27.04(2)(a)(3). As we have explained, the board's authority extends only to

determining "whether the … interpretation being appealed was in error," section 27.04(2)(b)(5), not to determining whether the permit should have been granted.[7]

¶27 We next consider whether, as the board contends, Judge DelForge's earlier remand order authorized the board to apply and weigh the section 21.01 conditional use factors de novo, regardless of the zoning committee's denial of Carew's permit based on its own consideration of those factors. We have no quarrel with the board's assertion that, absent an appeal to this court, the parties were bound to follow and implement Judge DelForge's order. We also agree that, generally, "a decision on a legal issue by [a reviewing] court establishes the law of the case, which must be followed in all subsequent proceedings." ***Univest Corp. v. General Split Corp.***, 148 Wis. 2d 29, 38, 435 N.W.2d 234 (1989). We disagree, however, that the "law of the case" doctrine justifies the board's de novo consideration of the merits of Carew's application for a conditional use permit, notwithstanding its lack of authority to do so under the zoning ordinance.

¶28 Judge DelForge concluded that the board had jurisdiction, under the statutory and ordinance provisions we have discussed above, "to hear appeals from the Committee and properly did so in this case." He also concluded, however, that the board had improperly applied the law because it failed to "even consider the

[7] The board's appellate authority over the zoning administrator's decisions regarding issuance of permits or approvals is similarly limited to questions of ordinance interpretation. The scope of the board's review of the administrator's "enforcement demand" and "ordinance enforcement activities" is arguably broader, given that the limiting language ("which consists of interpretations of the terms of Waupaca County" land use and zoning ordinances) is absent. *See* Section 27.04(2)(a)(1) and (2). In any event, we are satisfied that the reference in section 27.04(2)(b)(5) to "the decision, determination or interpretation being appealed," does not broaden the limitation expressed in section 27.04(2)(a)(3) that only zoning committee permit or approval decisions "which consist of interpretations of the terms of the Waupaca County Zoning ordinance" are appealable to the board.

factors and standards set forth in 21.01," which are applicable to all conditional use decisions and which had formed the principal basis for the zoning committee's decision to deny Carew's application. Accordingly, Judge DelForge reversed "the decision of the Board and return[ed] the matter to the Board for further proceedings." Before doing so, however, he rejected the Town's claim that the board's decision was "biased" simply because the board had acted after its secretary had read a "prepared statement that was ultimately the decision of the Board."

¶29 We agree with the Town that nothing in Judge DelForge's decision and order either expressly or impliedly empowered the board to engage in a de novo re-weighing of the relevant factors for acting on conditional use applications. Nowhere in his opinion did Judge DelForge disavow the board's own view, clearly enunciated at the inception of the board's hearing on the Carew permit (see ¶5), that the scope of the board's review of the committee decision was limited to error correction. Rather, Judge DelForge noted that the board had given no consideration whatsoever to the zoning committee's application of the general conditional use standards set forth in section 21.01 of the zoning ordinance, and that omission alone was sufficient grounds for setting aside the board's initial decision.

¶30 A reviewing court may reverse an appealed decision on only one of several possible grounds, and when it does so, the court's decision should not be interpreted as an "'implicit[] endorse[ment]'" of any position on issues the court did not reach or address. *See* ***Wal-Mart Stores, Inc. v. LIRC***, 2000 WI App 272, ¶27 n.12, 240 Wis. 2d 209, 621 N.W.2d 633, *review denied,* 2001 WI 15, 241 Wis. 2d 210, 626 N.W.2d 808 (Wis. Feb. 7, 2001) (No. 99-2632). In short, simply because Judge DelForge cited only one shortcoming when he reversed the board's

initial action in this case, the remand order cannot be read as a judicial endorsement of all other facets of the board's original decision. As we have discussed, Judge DelForge's order set aside the board's initial action in its entirety. When the board elected, after discussing the section 21.01 factors, to "reaffirm" its original decision to grant Carew's permit, the final administrative determination, in its entirety, came before Judge Kirk for review.[8]

¶31 Judge Kirk was thus free, as are we, to consider whether the board acted within its authority in setting aside the zoning committee's action for the reasons it did. We have previously explained that the board exceeded its authority because it reversed the committee's denial of Carew's permit for reasons other than an erroneous interpretation by the committee of the county zoning ordinance. Accordingly, our final task is to consider, giving no deference to the decisions of either the trial court or the board of adjustment, whether (1) the committee kept within its jurisdiction; (2) the committee proceeded on the correct theory of law; (3) the committee's action was arbitrary, oppressive or unreasonable; and (4) the evidence was such that the committee might reasonably have made the determination in question. *See* ***Town of Hudson***, 158 Wis. 2d at 275.

¶32 We have already described the committee's authority under the Waupaca County ordinance to grant or deny conditional use permits, that is, its "jurisdiction" to act on permit applications such as Carew's. See ¶¶18-19, 23. The committee member who moved denial of the Carew application cited section

[8] Only two potential claims by the Town were arguably foreclosed by Judge DelForge's prior, unappealed decision and order—that the board lacked jurisdiction under the ordinance to consider appeals of zoning committee conditional use decisions, and that the board's original decision was "biased." Judge DelForge specifically addressed and rejected both of these claims. (See ¶28.)

21.01 of the ordinance and applied its standards to the public hearing testimony as follows:

> As far as the established character of this particular area I think we pretty much agree that as it stands right now it's very much agricultural and residential. And as far as the attractiveness, I feel that there probably isn't any pit anywhere that lends to the physical attractiveness of an area.
>
> And [section 21.01] goes on to say that the -- and the quality of the area, it's [sic] physical attractiveness, the movement of traffic, the demand for related services, the possible hazardous, harmful, noxious, offensive or nuisance effects resulting from noise, dust, smoke, or odor or other factors.
>
> Now I think we certainly concede that there is a demand for related services here that apply to the material that's taken out of this pit. But I for one feel that the volume of material that is being removed from this particular pit far exceeds the demands of Waupaca County and it's [sic] residents, the one with which we are concerned with.
>
> Going on I feel that resulting from noise, certainly we have a noise factor out there. We have a dust factor out there. I think smoke is maybe a minor thing, if there's any smoke at all. And the same with odor. And then it says and other factors. And there are a couple things here just to name a couple that come to mind that concern me. One is the sliding down and washing of the berms. I've inspected the berms out there and I can see where there's a considerable amount of washing into surrounding land owned by other people. And I'm concerned about the depth of the pit and the possible impact that it might have on ground water.
>
> So taking into consideration all that I've mentioned here as far as the general restrictions, considerations to be given to Conditional Use Permits, and with all of the other things that have been brought up during the course of the public hearing -- like I say again, in reading it over a number of times through the transcript, I for one feel that -- that myself, I am all for denying issuing a Conditional Use Permit to extend beyond the present 10 acre parcel. And as such I will put that into a motion form.

¶33 The committee's unanimous vote to deny Carew a permit to extend its gravel pit operation onto additional land immediately followed the foregoing statement and motion. We therefore take the statement as reflecting the committee's rationale for denying the permit, and we conclude the denial was both founded on a correct "theory of law" (the application of section 21.01 of the governing ordinance), and not arbitrary or unreasonable. The facts and factors upon which the denial was based were explicitly stated and were germane to the issue at hand.

¶34 Finally, we consider whether there was evidence before the committee such that it might reasonably have made the determination in question, that is, "whether there is any reasonable view of the evidence to support that [committee's] determination." ***Town of Hudson***, 158 Wis. 2d at 277. We have reviewed the transcript of the April 15, 1999 public hearing before the committee, and we agree with the circuit court that it provided ample support for the committee's decision to deny Carew's application for a conditional use permit. As the circuit court also observed, there was testimony at the public hearing that would have supported a decision to grant the permit, had the committee "chosen to make that it's [sic] decision." Our responsibility as a reviewing court, however, is not to re-weigh the evidence before the committee, or to place our own interpretations upon it; neither may we reverse the committee's decision simply because it might have rationally reached a different result. *See* ***Snyder v. Waukesha County Zoning Bd. of Adjustment***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976).

## CONCLUSION

¶35 For the reasons discussed above, we affirm the appealed judgment.

*By the Court.*—Judgment affirmed.

Not recommended for publication in the official reports.