

**COURT OF APPEALS
DECISION
DATED AND FILED**

March 2, 2000

Cornelia G. Clark
Acting Clerk, Court of Appeals
of Wisconsin

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.

No. 99-1989

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

**PAYNE & DOLAN, INC., CURTIS A. HERFEL, AND
DEBRA D. HERFEL,**

PLAINTIFFS-APPELLANTS,

v.

**DANE COUNTY, DANE COUNTY BOARD OF SUPERVISORS,
DANE COUNTY ZONING/NATURAL RESOURCES COMMITTEE,
AND JOSEPH T. PARISI,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
RICHARD J. CALLAWAY, Judge. *Affirmed.*

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

¶1 PER CURIAM. Payne & Dolan, Inc. and Curtis and Debra Herfel appeal from a trial court order affirming on certiorari review the Dane County Board of Supervisors' denial of an application for a conditional use permit to

allow Payne & Dolan to operate a gravel quarry on the Herfels' property. The appellants claim the supervisors improperly and arbitrarily gave lay testimony undue weight when compared with contrary expert opinion testimony. However, we conclude that testimony about the concerns of area residents was substantial, and thus sufficient to support the supervisors' decision, notwithstanding expert testimony that addressed some of the expressed concerns about the proposed quarry. We therefore affirm.

BACKGROUND

¶2 The Herfels own a parcel of land in the Town of Verona that is zoned as A-1 exclusive agricultural and is currently used for crops and pasture. The parcel is divided by State Highway 69 and is bordered by other agricultural property, residential property and a strip of land zoned residential and commercial. A creek running through the property flows into the Sugar River.

¶3 Payne & Dolan seek to operate a quarry on the Herfels' property to supply local asphalt and concrete plants with sand and gravel. They propose extracting the gravel by dragline equipment, which would involve crushing, screening and washing processes, but no blasting or drilling. Mining would not occur within any floodplain area, within 100 feet of the property borders or within 500 feet of the creek, and earthen berms would be constructed to screen the mining pits from public view.

¶4 The proposed 75 acre quarry would extract about 300,000 tons of material each year until 2022. The quarry would operate between 8:00 a.m. and 6:00 p.m. on weekdays, with trucks averaging 160 hauling trips per day up to 250 trips per day in the peak season. A 150 foot acceleration lane and another 150 foot turning lane along Highway 69 would facilitate the additional truck traffic.

¶5 The Herfels applied for a conditional use permit to allow mineral extraction on their property. Area residents objected to the proposed use at a series of hearings held before the Dane County Zoning and Natural Resources Committee (ZNR). The citizens expressed various concerns relating to the loss of the rural character of the area; possible pollution of surface water, groundwater and nearby private wells; altered water levels; diminished quality of life due to the noise, dust, visual impact and traffic created by the quarry; and loss of property values.

¶6 Payne & Dolan responded to the expressed concerns by proposing a set of forty-seven conditions to the permit with which they pledged to comply in order to minimize any adverse impact from the quarry. They also presented expert testimony (including the opinions of several governmental agencies such as the Wisconsin Department of Natural Resources, the State of Wisconsin Geological and Natural History Survey, the Dane County Department of Public Health, County Land Conservation, County Lakes and Watershed Department, and Dane County Parks) which indicated that the traffic impact from the quarry would be minor; the excavation would not significantly affect groundwater temperature, level or flow; assuming compliance with the proposed conditions and pollution prevention plan, the operations would not create any significant water quality, erosion, airborne particle or wildlife habitat problems; and would not adversely impact surrounding property values. At least one of the experts admitted there could be significant damage to groundwater resources in the event of a petroleum spill, but there was no expert testimony that a spill was likely.

¶7 The ZNR concluded the applicants had failed to satisfy the criteria for a conditional use permit. Its decision was based on findings that the proposed quarry site was located within a sensitive environmental area which could be

polluted by a petroleum spill; a spill could be difficult to control quickly due to the groundwater's proximity to the proposed quarry; groundwater flow to the creek could be drawn down in dry periods; ponds could increase basement flooding in nearby residences; the multitude of proposed operational constraints and conditions of approval designed to protect public health would be extremely difficult to enforce over the proposed operation period; and noise, visual impact, traffic, fear of water contamination and loss of property values would negatively impact the general welfare and quality of life for nearby residents. The Dane County Board of Supervisors affirmed the ZNR's decision, and the circuit court affirmed the supervisors' decision on certiorari. Payne & Dolan and the Herfels appeal.

STANDARD OF REVIEW

¶8 On certiorari, we review the supervisors' decision, rather than that of the circuit court. See *State ex rel. Whiting v. Kolb*, 158 Wis. 2d 226, 233, 461 N.W.2d 816 (Ct. App. 1990). We therefore do not consider the appellants' assertion that the circuit court erred in its determination by relying on misstated facts or distortions of the record. We will consider only whether: (1) the supervisors stayed within their jurisdiction, (2) they acted according to law, (3) their action was arbitrary, oppressive or unreasonable, representing their will and not their judgment, and (4) the evidence was such that they could reasonably make the order or determination in question. *Id.* With regard to the sufficiency of the evidence, we will uphold the supervisors' decision if it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion. See *CBS, Inc. v. LIRC*, 219 Wis. 2d 564, 568 n.4, 579 N.W.2d 668 (1998). Substantial evidence means relevant, credible and probative

evidence upon which reasonable persons could rely to reach a conclusion. *See Princess House, Inc. v. DILHR*, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983).

ANALYSIS

¶9 Property zoned as A-1 agricultural in Dane County may be used for mineral extraction pursuant to a conditional use permit, so long as “the establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare.” DANE COUNTY ORDINANCE § 10.255(2)(h)1.¹ The appellants contend the expert testimony they offered was sufficient to establish that the proposed quarry would not have an adverse effect on public health or general welfare, and the lay testimony offered by area residents was not competent to refute their experts’ opinions as to the quarry’s potential impact on surface water resources, groundwater level and flow, water quality, local ecology, or the quality of life for nearby residents resulting from noise, visual impact, fear of water contamination, and loss of property values.

¶10 The appellants cite cases from Delaware, Rhode Island, Pennsylvania, Ohio, Florida and New York to support their contention that lay people’s expressions of fear about pollution, declining property values, traffic congestion or noise provide an insufficient basis to deny a conditional use permit. *See Zoning Bd. of Adjustment v. Dragon Run Terrace, Inc.*, 222 A.2d 315 (Del. Super. Ct. 1966); *Goldstein v. Zoning Bd. of Review*, 227 A.2d 195 (R.I. 1967); *Zoning Hearing Bd. v. Konyk*, 290 A.2d 715 (Pa. Commw. Ct. 1972); *Libis v.*

¹ The ordinance sets forth five other requirements for granting a conditional use permit, but none of them are at issue here.

Board of Zoning Appeals, 292 N.E.2d 642 (Ohio Ct. App. 1972); *Flowers Baking Co. v. City of Melbourne*, 537 So.2d 1040 (Fla. Dist. Ct. App. 1989); *Elmira S.P.C.A. v. Town Bd.*, 58 A.D.2d 691 (N.Y. App. Div. 1977). The respondents, in turn, cite cases from Delaware, Oregon, California and Missouri to show that layperson testimony may be sufficient to raise concerns about increased dust, damage to local roadways from increased traffic, safety of children near mining pits, potential threats to water supplies, noise and nuisance problems, and valuation of property. See *Steen v. County Council*, 576 A.2d 642 (Del. Ch. 1989); *Anderson v. Peden*, 587 P.2d 59 (Or. 1978); *Desmond v. County of Contra Costa*, 21 Cal. App. 4th 330 (1993); *Prince v. County Comm'n*, 769 S.W.2d 833 (Mo. Ct. App. 1989).

¶11 Although the parties do not cite any Wisconsin cases on this point, and we could find none specifically discussing the issue, we are satisfied that in Wisconsin it is proper for area residents to testify about the impact they believe a proposed use will have on their general welfare, and that the weight to be given such testimony lies within the discretion of the zoning authorities. See, e.g., *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjustment*, 125 Wis. 2d 387, 397-98, 373 N.W.2d 450 (Ct. App. 1985) (upholding limitation on the size of an egg laying facility based on concerns over traffic, odor and waste disposal, without saying whether expert testimony was given or needed), *aff'd*, 131 Wis. 2d 101, 388 N.W.2d 593 (1986); *Town of Hudson v. Hudson Town Bd. of Adjustment*, 158 Wis. 2d 263, 277, 461 N.W.2d 827 (Ct. App. 1990) (upholding denial of a special exception permit for an expanded service station based on inference of increased traffic from fact of proposed additional parking, without expert testimony); *Delta Biological Resources, Inc. v. Board of Zoning Appeals*, 160 Wis. 2d 905, 914-915, 467 N.W.2d 164 (Ct. App. 1991) (upholding

denial of conditional use permit for plasma center based in part upon opposing petition by area residents concerned about possibility of loitering, and noting that the weight to be accorded facts is for the board); *and Old Tuckaway Assoc. Ltd. Partnership v. City of Greenfield*, 180 Wis. 2d 254, 275, 509 N.W.2d 323 (Ct. App. 1993) (upholding denial of amendments to a planned unit development based on aesthetics and economic feasibility, notwithstanding expert testimony that the project would otherwise comply with local regulations). Unlike the more technical question whether the quarry would pose significant threats to the environment or public health, the adverse impact that unsightly mounds and increased traffic, dust and noise could have on the quality of area residents' lives is clearly a matter of common experience. We therefore reject the contention that all of the neighbors' testimony in this case was incompetent.²

¶12 Furthermore, the expert testimony offered did not fully rebut the possibility of increased basement flooding or water contamination in the event of a spill. It was not unreasonable for the ZNR and the supervisors to consider the amount of regulation that would be required to assure such problems did not occur, which was implicit in the number of conditions proposed as necessary to protect the environment. In sum we are satisfied that the local zoning authority acted reasonably, pursuant to the applicable law and in accordance with the evidence before it, when it denied the Herfels a conditional use permit for mineral extraction.

² Because it was not briefed, we do not address the appellants' premise, assumed without citation to any authority, that evidentiary rules regarding the admissibility of expert and lay opinion testimony apply to hearings before a zoning authority.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE
809.23(1)(b)5.

