

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 13, 2001

Cornelia G. Clark
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. 00-2443-FT

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

CAREW CONCRETE & SUPPLY CO., INC.,

PLAINTIFF-APPELLANT,

V.

TOWN OF HUMBOLDT,

DEFENDANT-RESPONDENT.

APPEAL from an order of the circuit court for Brown County:
WILLIAM M. ATKINSON, Judge. *Affirmed.*

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

¶1 PER CURIAM. Carew Concrete & Supply Co., appeals an order affirming the Town of Humboldt's decision to deny Carew a conditional use permit to construct a concrete batch plant on property located within the Town's limited

industrial district.¹ Carew argues that: (1) the Town's decision is not supported by credible evidence and that Carew has met the conditions for a conditional use permit; (2) the Town improperly exceeded its jurisdiction; and (3) the Town's actions were arbitrary, oppressive, unreasonable and represented its will and not its judgment. We affirm the order.

BACKGROUND

¶2 Carew owns 35.6 acres of unimproved property in the Town's limited industrial district. Carew applied for a conditional use permit to construct a concrete batch plant on 6.5 acres of its property. Another concrete batch plant, owned by Green & Gold Concrete, and a driving range already exist within the district.

¶3 A series of public hearings was held before the plan commission. The commission heard from members of the community and one expert witness. Relying on the evidence presented to it and its experience with Green & Gold, the commission voted to recommend that the Town deny the conditional use permit.

¶4 The Town subsequently denied Carew's application on the basis that: (1) granting the request did not address the current or future needs of the community; (2) the request would negatively impact or diminish property values, existing wells and the quality of life; (3) the type of traffic the plant would require was unacceptable; (4) heavily loaded trucks would make an already unsafe area less safe; (5) neighbors reported problems with their well water since the existing concrete facility increased its production; (6) the request did not contribute

¹ This is an expedited appeal under WIS. STAT. RULE 809.17 (1999-2000).

positively to the public health, safety, convenience, general welfare or prosperity of the Town; and (7) granting the request would have negative results and detract from the aesthetics of the Town.

¶5 Carew sought certiorari review of the Town's denial of its application for a conditional use permit. The circuit court affirmed the Town's decision. This appeal followed.

STANDARD OF REVIEW

¶6 We review the record before the Town to determine whether: (1) the Town kept within its jurisdiction; (2) it acted according to law; (3) its action was arbitrary, oppressive or unreasonable and represented its will and not its judgment; and (4) the evidence was such that the Town might reasonably make the determination in question. *See State ex rel. Brookside Poultry Farms, Inc. v. Jefferson County Bd. of Adjust.*, 131 Wis. 2d 101, 119-20, 388 N.W.2d 593 (1986).

¶7 In applying this standard, we must “accord a presumption of correctness and validity” to the Town's decision. *Kapischke v. County of Walworth*, 226 Wis. 2d 320, 327-28, 595 N.W.2d 42 (Ct. App. 1999) (citations omitted). Carew carries the burden of overcoming this presumption of correctness. *See Miswald v. Waukesha County Bd. of Adjust.*, 202 Wis. 2d 401, 408-09, 550 N.W.2d 434 (Ct. App. 1996). If a reasonable view of the evidence would sustain the findings of the Town, the findings are conclusive. *Clark v. Waupaca County Bd. of Adjust.*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). We may not substitute our discretion for the Town's. *Arndorfer v. Sauk County Bd. of Adjust.*, 162 Wis. 2d 246, 253, 469 N.W.2d 831 (1991).

DISCUSSION

¶8 The Town's limited industrial district was established by a comprehensive land use plan. The plan states that its goal is to "Encourage development of commercial and industrial uses to meet the existing and future needs of the community without creating land use conflicts." The district was designated to provide an environment "suitable for industrial activities that do not create appreciable nuisances or hazards, or that require a pleasant, hazard, and nuisance free environment." The included uses were to be retail and wholesale business as well as warehousing, storage and limited low intensive manufacturing.

I. Credible Evidence

¶9 Carew argues that the Town's denial of its application for a conditional use permit was not based upon credible evidence. Carew contends that the evidence before the commission indicated that: (1) allowing another concrete batch plant in the district would be suitable use; (2) the proposed plant would not affect adjacent properties; and (3) the proposed plant would contribute to the health and general welfare of the community.

A. Suitable Use

¶10 Carew contends that the Town's denial of its application for a conditional use permit on the basis that over 50% of the industrial park would be dedicated to concrete manufacturing and related activities is without a rational basis. We disagree. A review of the record reveals the Town reasonably concluded that Carew's application was not a suitable use for the industrial park because over 50% of the district would in fact be dedicated to concrete manufacturing.

¶11 The industrial park is 60.1 acres. Green & Gold owns 8.36 acres. John Carew, owner of Carew Concrete, testified that although his plant would occupy about six acres of his thirty-five-acre plot, he had no plans for the remaining acreage. As a result, the Town found that building a concrete plant next to Green & Gold would have the effect of dedicating “over 50% of the limited industrial district to concrete manufacturing and related activities” While the entire acreage would not be used for concrete production, the resulting effect would be that other business would be excluded from that area.

¶12 The Town’s findings are common sense conclusions regarding the effects that a second concrete batch plant would have on the industrial park. The Town determined that the effects were contrary to the goals and objectives of the comprehensive plan and concluded that the Town was better served by having more diversified businesses in the limited industrial park. The Town’s view of the evidence is reasonable.

B. Impact On Adjacent Properties

¶13 Carew contends that the Town improperly denied his conditional use permit because there was no credible evidence that the plant would adversely impact adjacent property values, would create safety issues because of increased traffic, and would have a negative impact on the local water supply.

¶14 Carew contends that no testimony was produced that would support a finding that property values would be adversely impacted or that traffic would become unsafe. Carew cites *Schalow v. Waupaca County*, 139 Wis. 2d 284, 289, 407 N.W.2d 316 (Ct. App. 1987), to argue that the Town’s decision must be based on substantial evidence. In *Schalow*, the board of adjustment’s decision was based on factors upon which no credible evidence was presented. The decision

was reversed because it was not supported by testimony. *See id.* Here, the Town did have credible evidence. It was able to draw on its experience with Green & Gold when it considered the impact on property values and traffic.

¶15 Carew simply wants the Town to ignore its experience with the existing plant. We conclude that it was reasonable for the Town to draw upon whatever experience it has. Because Green & Gold is a business similar to Carew, the Town properly relied on its experience to gauge the impact on property values and the increase in traffic.

¶16 Carew further argues that the record does not support a conclusion that its plant would have a negative impact on existing wells in the area. Carew contends that Vldamir Wojnar, a hydrologist and engineer who testified that the plant would not affect the neighboring wells' ability to draw water, provided the only credible evidence.

¶17 The record reveals that the Town, in fact, heard testimony from residents regarding low well levels during dry periods and water pressure problems during Green & Gold's hours of operation. Carew argues that the Town should disregard the anecdotal evidence and consider only the testimony of Wojnar's opinion. However, the Town's decision will not be disturbed if any reasonable evidence sustains it. *See Kapischke*, 226 Wis. 2d at 328.

¶18 Here, the Town heard both anecdotal evidence and expert testimony regarding the affect on the water supply. The Town concluded that it could not know the effect the new concrete batch plant would have on the surrounding water. However, it concluded that there was a possibility that an additional plant would negatively impact the water supply in the surrounding area. The Town

properly weighed the evidence and reasonably exercised its discretion when it chose to disregard the expert testimony.

C. Public Health and General Welfare

¶19 Carew argues that the Town offers no rationale for its conclusion that the plant would not contribute positively to the public health, safety, convenience, general welfare or property of the Town's residents or other businesses. Carew argues that the plant would be consistent with the goals and objectives of the plan and adds to the tax base, provides competition, and would provide five to ten additional jobs in the area.

¶20 The Town concluded that in light of the overall impact of the proposed use, the positive aspects of the plant were not enough to overcome other negative aspects. Contrary to Carew's arguments, the Town's concerns went beyond aesthetics. The Town was concerned about the future of the industrial park, the impact on traffic, and the water supply.

¶21 Contrary to Carew's assertion that the Town's decision prohibits virtually all industrial development, the Town is furthering its goal by attempting to provide "an environment, suitable for industrial activities that do not create appreciable nuisances or hazards, or that require a pleasant, hazard, and nuisance free environment." As a result, we conclude that credible evidence exists to support the Town's denial of Carew's application for a conditional use permit.

II. EXCEEDED JURISDICTION

¶22 Carew next argues that the Town exceeded its jurisdiction because it failed to rely on Wojnar's undisputed testimony. Carew contends that no other credible evidence was presented and that the Town was bound to accept Wojnar's

conclusions. See *State ex rel. Heller v. Lawler*, 103 Wis. 460, 79 N.W. 777 (1899).

¶23 As noted above, there were various other residents who reported difficulties with their water supply. The commission was charged with evaluating the evidence and deciding what weight, if any, to give the evidence. The commission's discretion may be questioned only if its decision is contrary to credible evidence which "indisputably establishes a fact." *Merkel v. Village of Germantown*, 218 Wis. 2d 572, 578, 581 N.W.2d 552 (Ct. App. 1998). Wojnar's opinion does not establish a fact. Therefore, the Town did not exceed its jurisdiction when it weighed the credibility of the testimony and evidence.

III. The Town's Will and Not Its Judgment

A. Bias

¶24 Carew argues that the Town was swayed by political pressure and that its decision was based on emotions, feelings and speculation. Carew contends that town board member Merlin VandenPlas's comments,² made before the Town denied the application, are evidence that the decision of the Town represented its will and not its judgment.

² VandenPlas stated that:

We don't need another one I'm concerned about the constituents out there. After all, these people elected me, and the man stated it well back there, that I have to listen to the people that elected me. After all, I'm representing him, representing them, and when they say they don't want this – there's been – this Town Hall has been much fuller a lot of times than it is tonight, and these people don't want it So like I said, these people, I represent them, they say they don't want it here, that's how I feel about it. That's as much as I am going to say right now.

¶25 However, VandenPlas’s comments were a summary of his view of the commission’s report read into the record. He concluded that the weight of the evidence was contrary to Carew’s application. VandenPlas is an elected official. He stated his concerns for his constituency, but did so in the context of his concerns over the negative impact the commission reported the plant would have on the community. This is not bias. VandenPlas’s comments are a reasonable evaluation of the evidence placed before the commission.

¶26 Carew also argues that commissioner Clete Cisler was biased. Cisler lives adjacent to the proposed site. He and his wife were opposed to granting a conditional use permit to Carew. Carew contends that Cisler should have recused himself from the outset and that the damage had already been done when he finally did recuse himself.

¶27 Carew argues that *Marris v. City of Cedarburg*, 176 Wis. 2d 14, 498 N.W.2d 842 (1993), requires a reversal of the Town’s decision. In *Marris*, our supreme court stated:

[Z]oning decisions are especially vulnerable to problems of bias and conflicts of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate geographical area, and the adjudicative, legislative and political nature of the zoning process. Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding and rational decision-making as well as to ensure public confidence in the decision-making process.

Id. at 25-26 (footnotes omitted).

¶28 *Marris* is factually distinguishable from the instant case. *Marris* involved a biased board member who voted on the central substantive issue before the board. *Marris* instructs that when a “Board member prejudges the facts or the

application of the law, then [the] right to an impartial decision-maker is violated.” *Id.* at 26. In that case, over Marris's objection, the board member who made the prejudicial comments refused to recuse himself from the final vote, which decided the central issue. Thus, “Marris assert[ed] that because the totality of the comments indicate prejudgment, the chairperson's refusal to recuse himself denied her a fair hearing.” *Id.* at 28.

¶29 Here, Cisler recused himself from the vote on the conditional use permit. The record is clear that the Town did all it could to ensure that Carew received a fair hearing.

B. Equal Protection

¶30 Carew contends that the Town was aware of the possible negative effects of creating a limited industrial park and it granted preferential treatment to Green & Gold because the Town allowed it to expand its operations. Carew refers to an application by Green & Gold in 1995 to erect a garage on its property to store trucks. The application indicated Green & Gold needed the garage to protect its trucks from vandalism. This is not preferential treatment by the Town, but a reasonable response to a reasonable request by an existing business.

¶31 The equal protection clause of the Fourteenth Amendment is violated when an ordinance is administered “with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights.” *Village of Menomonee Falls v. Michelson*, 104 Wis. 2d 137, 145, 311 N.W.2d 658 (Ct. App. 1981) (quoted source omitted). However, evidence that a municipality has enforced an ordinance in one instance and not in another does not in itself establish a violation of the equal protection clause. *See id.* Rather, there must be a showing that the

ordinance's enforcement was intentionally, systematically and arbitrarily discriminatory. *See id.*

¶32 Carew does not present evidence that the Town's treatment of its application for a conditional use permit was done with "an evil eye and an unequal hand." Carew simply makes bald assertions that members of the town board and commission had vested interests in stifling Carew as a competitor.

¶33 Carew further contends that the proposed plant is consistent with the Town's zoning ordinance and that the Town denied the application merely because of a concern over the aesthetic impact the plant would have on the industrial district.

¶34 Carew cites *State ex rel. O'Neil v. Town of Hallie*, 19 Wis. 2d 558, 120 N.W.2d 641 (1963), to argue that the Town based its decision on speculation and conjecture. In *O'Neil*, our supreme court pointed out that a town board had, by granting a license to one theater, effected an administrative determination of the standards set by ordinance and that it could not then refuse to meet the de facto standards of the ordinance even though licensing is, in general, a discretionary function. *Id.* at 567.

¶35 Here, there is ample evidence in the record to sustain the Town's denial of Carew's application. It is the Town's responsibility to ensure that conditional use permit applications fit within the overall scope of the zoning ordinance. The Town found that granting Carew's request would have a negative result on the Town. It determined that the plant would detract from the aesthetic appearance of the Town, that the plant would likely have a negative impact on the Town's water supply and, finally, that the type of traffic the plant would bring to the area would create safety issues.

¶36 The members of the Town board have the best opportunity to evaluate the evidence and determine its impact. Our supreme court has recognized that these members are supposed to have opinions on these matters:

Nevertheless, a board member's opinions on land use and preferences regarding land development should not necessarily disqualify the member from hearing a zoning matter. Since they are purposefully selected from the local area and reflect community values and preferences regarding land use, zoning board members will be familiar with local conditions and the people of the community and can be expected to have opinions about local zoning issues.

Marris, 16 Wis. 2d at 26 (footnote omitted). That the board members filtered their analysis of the evidence through common sense and experience does not mean they acted arbitrarily and capriciously.

¶37 We conclude that the Town's decision to deny the conditional use permit was based on a reasonable interpretation of the evidence.

By the Court.—Order affirmed.

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

