

**COURT OF APPEALS
DECISION
DATED AND FILED**

July 26, 2011

A. John Voelker
Acting Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2010AP340

Cir. Ct. No. 2009CV29

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

LINDA D. ZILLMER,

PETITIONER-RESPONDENT,

V.

SAWYER COUNTY BOARD OF APPEALS/ADJUSTMENT,

RESPONDENT-APPELLANT.

APPEAL from a judgment of the circuit court for Sawyer County:
EUGENE D. HARRINGTON, Judge. *Reversed.*

Before Hoover, P.J., Peterson and Brunner, JJ.

¶1 PER CURIAM. Sawyer County Board of Appeals/Adjustment appeals a judgment reversing the Board's nonconforming use determination concerning Linda Zillmer's request to conduct livestock grazing activities. We conclude the circuit court misapplied the law, and reverse the judgment.

¶2 Zillmer owns a small farm in Sawyer County. Cattle were last raised on the farm in the mid-1970s, but hay or oats have consistently been grown on the farm. As part of a comprehensive zoning amendment in 1971, the property was zoned Forestry One and Residential/Recreational, under which raising livestock and agricultural activities constitute nonconforming uses. In 2005, Zillmer began to rebuild the farm fences in order to raise forty to fifty head of cattle on the property. After a request for rezoning was denied, Zillmer requested a formal nonconforming use determination.

¶3 The Sawyer County zoning committee determined that the only nonconforming use which may continue on the property was the haying operation. The committee also concluded that Zillmer's request for livestock grazing would be an illegal expansion of a nonconforming use. The Board upheld the committee's decision, and Zillmer sought certiorari review. The circuit court reversed and remanded the Board's determination. The court held that the Board failed to comply with the statutory requirements of WIS. STAT. § 59.69(10)(b)3. and (c),¹ by failing to record and annually list nonconforming premises and buildings. The court also concluded the Board proceeded on an incorrect theory of law by not allowing Zillmer the opportunity to present further evidence before the Board, contrary to *Osterhues v. Board of Adjustment*, 2005 WI 92, 282 Wis. 2d 228, 698 N.W.2d 701. The Board now appeals.²

¹ References to the Wisconsin Statutes are to the 2009-10 version unless noted.

² Zillmer argues in her response brief that the appeal in this matter was permissive and therefore untimely under WIS. STAT. RULE 809.50. Zillmer is incorrect. The circuit court's judgment was final and therefore appealable as a matter of right under WIS. STAT. § 808.03(1).

¶4 We conclude the circuit court misapplied the law in several respects. First, the court concluded that the Board failed to identify the nonconforming uses as required by WIS. STAT. § 59.69(10)(b)3., and failed to conduct an annual listing of nonconforming uses continued or created since the previous listing as required under § 59.69(10)(c). However, § 59.69(10)(d) provides:³ “Paragraphs 10(b) and (c) shall not apply to counties issuing building permits or occupancy permits as a means of enforcing the zoning ordinance or to counties which have provided other procedures for this purpose.”

¶5 Here, Sawyer County required land use permits when it enacted the zoning ordinance in 1971.⁴ Accordingly, the nonconforming use statutes relied upon by the circuit court did not apply, pursuant to WIS. STAT. § 59.69(10)(d). Further, at the time of the Board hearing, the parties agreed that the Board had jurisdiction to hear the matter.

¶6 Finally, the Board did not erroneously deny Zillmer the opportunity to present further evidence to the Board. Although the board of adjustment in *Osterhues* heard evidence, our supreme court held that the taking of evidence by the board was discretionary. See *Osterhues*, 282 Wis. 2d 228, ¶39. In the present case, the Board properly exercised its discretion in determining that the hearing

³ WISCONSIN STAT. § 59.69(10) is entitled “Nonconforming Uses.” The statute applicable in 1971 was numbered WIS. STAT. § 59.97(10). Former subsec. (10)(b) is substantially the same as current § 59.69(10)(b)1., 3., and former § 59.97(10)(c) is nearly identical to the current § 59.69(10)(c).

⁴ Zillmer does not dispute that Sawyer County required land use permits when it enacted the zoning ordinance. Nevertheless, Zillmer contends without citation to legal authority, that general farming and agricultural uses “do not require permits.” We will not consider unsupported arguments. See *M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

was for the purpose of oral argument, and that its decision would be based on the record before the committee. Further, the record is clear that counsel confirmed prior to oral argument that the hearing before the Board would not be de novo and Zillmer waived the introduction of more evidence. And, significantly, Zillmer does not explain what additional evidence she would have presented or how the evidence would have affected the Board's decision.⁵ We therefore shall not further consider the issue. *See M.C.I., Inc. v. Elbin*, 146 Wis. 2d 239, 244-45, 430 N.W.2d 366 (Ct. App. 1988).

By the Court.—Judgment reversed.

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

⁵ Apparently, there was a dispute concerning Zillmer's request for a nonconforming use determination, and emails were discussed at the hearing. However, the Board determined it did not need to see them. As one Board member stated, "I mean I'm convinced Linda wanted a determination. I don't need to see a letter asking for it."

