COURT OF APPEALS
DECISION
DATED AND FILED

June 28, 2013

Diane M. Fremgen
Clerk of Court of Appeals

Appeal No. 2012AP2048 **Cir. Ct. No. 2010CV126**

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

KRAEMER MINING & MATERIALS, INC., WILLIAM E. JOHNSON, GLYN THORMAN, CINDY THORMAN AND ROCHFORD, INC.,

PLAINTIFFS-APPELLANTS,

V.

POLK COUNTY LAND INFORMATION COMMITTEE AND POLK COUNTY,

DEFENDANTS-RESPONDENTS.

APPEAL from a judgment of the circuit court for Polk County: EDWARD F. VLACK III, Judge. *Affirmed*.

Before Hoover, P.J., Mangerson, J., and Thomas Cane, Reserve Judge.

¶1 PER CURIAM. Kraemer Mining & Materials, Inc., appeals a judgment upholding a decision of the Polk County Land Information Committee

that denied Kraemer's application for a special exception permit to operate a quarry in an area zoned for agriculture. We conclude that, applying the proper standards relative to certiorari review, Kraemer has failed to demonstrate the Committee acted arbitrarily or upon insufficient evidence. Accordingly, we affirm.

BACKGROUND

¶2 In October 2008, Kraemer submitted an application to the Committee seeking a special exception permit to operate a non-metallic quarry in the Town of Osceola, Polk County, Wisconsin. The application was subsequently amended and a revised application submitted on August 4, 2009. The Committee held public hearings on October 21 and 22, and December 15, 2009, and deliberated on January 6, 2010. The transcript of the public hearings exceeds 380 pages, but the Committee's deliberations were not memorialized.

¶3 The Committee issued its decision on January 20, 2010. The area involved in Kraemer's application is zoned A-1 Agricultural pursuant to the Polk County Comprehensive Land Use Ordinance. The Committee noted that quarrying could qualify as a special exception use of the land if it otherwise fell within the Ordinance's special exception definition, which provides as follows:

> Any use whereby the location of each such use shall be approved in writing by the Zoning Committee, or as otherwise provided by this ordinance, after public hearing and after reviewing the proposed site or sites. Such approval shall be consistent with the general purpose and intent of this ordinance and shall be based upon such evidence as may be presented as such public hearing tending to show the desirability or undesirability of specific proposed locations for the proposed use from the standpoint of the public interest because of factors as (without limitation because of enumeration) smoke, dust, noxious and toxic gases and odors, noise, vibrations from operation

> of heavy equipment, heavy vehicular traffic and increased traffic.

After observing that the purpose of the Ordinance is to "promote the public health, safety, morals and general welfare of Polk County," and that the proposed quarry was "close to homes with wells" and "close to the Lotus Lake area and its residents," the Committee denied Kraemer's application. The Committee recognized that the objective data provided by expert witnesses was conflicting, but found the evidence presented by experts opposed to the mine "more persuasive and credible."

¶4 The Committee provided five reasons for rejecting the application. First, it credited evidence that there would be "increased traffic in the area disrupting the flow of emergency services." Second, it concluded the quarry would cause noise issues attributable to blasting, operation of the crusher and other heavy equipment, and increased traffic. Third, the Committee expressed skepticism that proposed noise reduction efforts would sufficiently reduce harmful effects of cumulative noise. Fourth, it credited the report and testimony of Dr. Daryoush Allaei, an expert in noise vibration and shock controls, concluding that vibrations could cause structural damage within the area. Finally, the Committee concluded that water quality could be negatively impacted for residents. It was the Committee's conclusion that "operating the proposed [q]uarry at the proposed site would have a negative impact on the health, safety and welfare of those who live, work and play in Polk County."

¶5 Kraemer then petitioned the circuit court for certiorari review. After citing the appropriate certiorari standard of review, the court observed that Kraemer, under the guise of ***Soo Line Railroad Company v. Wisconsin Department of Revenue***, 97 Wis. 2d 56, 292 N.W.2d 869 (1980) (per curiam),

was essentially asking the reviewing court to substitute its judgment for that of the Committee as to the weight and credibility of the testimony presented at the public hearings. The court distinguished ***Soo Line*** and concluded it was not its task on certiorari review to independently weigh the credibility of the witnesses.

¶6 Applying the proper standard, the court concluded the Committee's decision was reasonable and sufficiently supported. The court determined the Committee had not acted arbitrarily because it had "clearly laid out its reasons" for deeming the quarry inconsistent with the purpose and intent of the Ordinance. The court also thoroughly reviewed the administrative record, concluding there were "clearly differing expert opinions presented to the Committee" as to the noise impact of operations, danger to the water table, and consequences of blasting and crushing operations. However, the court did not "recall evidence that increased traffic may specifically have an impact on emergency vehicles," observing that emergency vehicles displaying proper lights and sirens are accorded the right of way by law.[1] Thus, it agreed with Kraemer that insufficient evidence supported the Committee's finding regarding the traffic impact on emergency services, but concluded the Committee's decision was adequately supported in all other respects. Kraemer appeals.

[1] We construe this as a modification of the Committee's decision under WIS. STAT. § 59.694(10) (court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review). The Committee does not directly challenge this modification, though its brief does cite testimony discussing a significant increase in the percentage of truck traffic in a residential area.

All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

DISCUSSION

¶7 Kraemer cites the correct standards for certiorari review. Under common-law certiorari, review is limited to (1) whether the Committee 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. *See* ***Klinger v. Oneida Cnty.***, 149 Wis. 2d 838, 843, 440 N.W.2d 348 (1989). We presume that a municipality's decision is correct and valid. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶48, 332 Wis. 2d 3, 796 N.W.2d 411. These presumptions recognize that "locally elected officials are especially attuned to local concerns." ***Id.***, ¶51. The petitioner bears the burden to overcome the presumptions of correctness and validity. ***Id.***, ¶50.

¶8 Despite Kraemer's recognition of the proper standard of review, much of its brief ignores that standard entirely. Kraemer devotes a full fifteen pages of its brief to a rehashing of the evidence before the Committee, pointing out supposed flaws in the testimony or reports of opposition experts. On certiorari review, it is not this court's function to weigh the evidence and independently determine the credibility of witnesses. We cannot substitute our view of the evidence for that of the zoning authority. *See* ***Clark v. Waupaca Cnty. Bd. of Adj.***, 186 Wis. 2d 300, 304-05, 519 N.W.2d 782 (Ct. App. 1994).

¶9 In essence, Kraemer takes each of the four bases for the Committee's decision, recites the expert evidence supporting it, and argues that evidence was refuted by its own expert. This is inappropriate. "We must uphold the Committee's decision so long as it is supported by substantial evidence, even if there is also substantial evidence to support the opposite conclusion." ***Sills v.***

Walworth Cnty. Land Mgmt. Comm., 2002 WI App 111, ¶11, 254 Wis. 2d 538, 648 N.W.2d 878. It is the Committee, not this court, that determines the weight to be given to the evidence of record. *See* ***Roberts v. Manitowoc Cnty. Bd. of Adj.***, 2006 WI App 169, ¶32, 295 Wis. 2d 522, 721 N.W.2d 499.

¶10 In addition, Kraemer discounts entirely lay testimony presented at the public hearings. Kraemer complains that these lay witnesses (twenty-four, by Kraemer's count) "offered no personal experience or academic or technical training to support their 'beliefs' [about the deleterious effects of the quarry]." It further agues their testimony does not comply with case law construing WIS. STAT. § 907.01, which establishes certain criteria for the admission of non-expert opinions or inferences.

¶11 However, Kraemer cites no legal authority whatsoever that would have required the Committee to conduct its hearing in accordance with the rules of evidence. Indeed, Kraemer concedes that was not mandatory. This is a proper concession. Wisconsin courts have repeatedly observed that the rules of evidence do not apply in these types of informal proceedings. *See* ***State ex rel. Ortega v. McCaughtry***, 221 Wis. 2d 376, 389 n.4, 585 N.W.2d 640 (Ct. App. 1998) (prison adjustment committee not bound by rules of evidence); ***State ex rel. Kaczkowski v. Board of Fire & Police Comm'rs of City of Milwaukee***, 33 Wis. 2d 488, 504a, 148 N.W.2d 44 (1967) (record of board inquiry revealed that rules of evidence were "scrupulously observed, a standard not required in most board hearings").

¶12 Thus, we deem Kraemer's challenge to the evidence to be nothing more than an attempt to have this court independently review the Committee's decision, crediting the testimony of their witnesses and experts. In that sense, it is much like the argument we rejected in ***Roberts***. There, the petitioner asserted that

the board of adjustment disregarded evidence in opposition to a wind energy park, lamenting, "Had the Board been willing to show even the least bit of open-mindedness or curiosity, they would have discovered substantial concerns, supported by evidence in the Record which clouded the purported virtues of wind power[.]" ***Roberts***, 295 Wis. 2d 522, ¶28. We concluded, as we do here, that the zoning authority was entitled to reach the conclusion it did, regardless of whether there was substantial evidence supporting the opposite conclusion. *See* ***id.***, ¶32.

¶13 To justify its approach, Kraemer cites ***Soo Line*** for the proposition that "courts [on certiorari review] should engage in a review of competing expert evidence in view of the use of formulae applied to a set of facts because credibility is not the most reliable test to use to determine which expert is correct." In ***Soo Line***, our supreme court, in a brief, per curiam opinion, summarily affirmed a decision of the court of appeals overturning the Department of Revenue's valuation of the railroad. ***Soo Line***, 97 Wis. 2d at 58. The court concluded the DOR improperly applied income capitalization, cost, and stock and debt methods of determining value, and, as a result, assessed the Soo Line's property at substantially more than its full value. ***Id.***

¶14 Procedurally, ***Soo Line*** is not analogous to the case at hand. The operative statute there called for *de novo* review by the trial court. Soo Line commenced an action for review of the DOR's assessment pursuant to WIS. STAT. § 76.08 (1979-80). Under that statute, any company aggrieved by an assessment of its property could seek to have its assessment redetermined by "the Dane County Circuit Court." That is precisely what occurred; a trial was held before the court at which five different appraisers gave their opinions as to the value of the property to be taxed. ***Soo Line***, 97 Wis. 2d at 57. The circuit court specifically found that the DOR assessment was not substantially more or less than the actual

fair market value of the railroad's operating property, a finding which the DOR argued must be accepted on review. ***Id.*** at 59. The supreme court disagreed, observing that that the finding had "little to do with the credibility of witnesses" and was simply "the product of an abstract formula devised by DOR and applied to the facts or data which are themselves undisputed." ***Id.*** at 59-60. Consequently, "a trial court stands in no better position to [examine the formula and rationally assess the mathematic and economic principles underlying it] than an appellate court," and "the appellate court need not accord special deference to the trial court's ultimate factual determination." ***Id.*** at 60.

¶15 Here, we review the findings and conclusions of a zoning authority, not a trial court, and the case does not involve application of an abstract formula to undisputed facts. Kraemer cites state regulations concerning noise, vibration, and water quality, as well as standards applied by experts who testified at the public hearings, to argue that this case is about nothing more than "abstract formulas." However, the Committee's primary considerations were whether the quarry, at its proposed location, was in the public interest and consistent with the purpose and intent of the Ordinance. Nothing in ***Soo Line*** suggests that, under these circumstances, our usual approach to certiorari review must be modified. We agree with the only court that has directly addressed ***Soo Line***'s departure from the ordinary standard of review:[2] it "must be limited to its specific context," that being "the statutorily prescribed judicial review of a taxing authority's property

[2] In a second case, ***Mineral Point Valley Limited Partnership v. City of Mineral Point Board of Review***, 2004 WI App 158, ¶21, 275 Wis. 2d 784, 686 N.W.2d 697, Judge Deininger penned a concurrence asserting that the ***Soo Line*** standard should be applied to a dispute "over which mortgage interest rate to employ in valuing federally subsidized housing for tax assessment purposes." This rationale was not adopted by the remainder of the court, however, which declined to cite ***Soo Line***.

value assessment." ***Siker v. Siker***, 225 Wis. 2d 522, 531, 593 N.W.2d 830 (Ct. App. 1999).[3]

¶16 In an offshoot of its ***Soo Line*** argument, Kraemer asserts that it was not permitted to cross examine opposing witnesses, and therefore the Committee's decision should not be accorded the usual deference owed to zoning decisions. However, Kraemer readily concedes that "hearings of this type are not contested case hearings." Kraemer cites no authority for the rule that an administrative decision rendered in the absence of "contested case" procedures is reviewed without deference. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (Arguments unsupported by references to legal authority will not be considered.). In any event, Kraemer concedes this argument was not raised below. *See* ***City of Mequon v. Hess***, 158 Wis. 2d 500, 506, 463 N.W.2d 687 (Ct. App. 1990) (court will generally not consider arguments raised for the first time on appeal).

¶17 Kraemer's final argument is that the standards against which its application was judged are vague and violate minimal due process. However, the sole authority Kraemer cites for this argument is ***Lamar Central Outdoor, Inc. v. Board of Zoning Appeals of City of Milwaukee***, 2005 WI 117, 284 Wis. 2d 1, 700 N.W.2d 87. In ***Lamar***, the supreme court observed that the petitioner "had the

[3] Kraemer contends ***Siker v. Siker***, 225 Wis. 2d 522, 531, 593 N.W.2d 830 (Ct. App. 1999) represents an impermissible overruling of supreme court precedent, and that any effort to distinguish ***Soo Line*** from the present case represents an invasion into the supreme court's exclusive domain as a "law declaring court." It should go without saying that these arguments are hogwash. Distinguishing one case from another is a time-honored tradition in the law and is the very practice that Kraemer employs in arguing that traditional certiorari standards do not apply. In addition, it is Kraemer who asks us to "declare law" by adopting the analysis of the concurrence in ***Mineral Point***.

right to know not only the statutory criteria under which the Board rejected its claim, but also the *reasons* ("grounds") why the Board decided that the facts did not fit the statutory criteria." ***Id.***, ¶27. Here, the Committee produced a thorough written decision that recited not only the criteria for granting a special exception permit, but also the Committee's reasons for denying the permit. Thus, it has fully complied with ***Lamar***. To the extent Kraemer's argument is not based on ***Lamar***, it is undeveloped and unsupported by citation to legal authority. *See* ***Pettit***, 171 Wis. 2d at 646.

By the Court.—Judgment affirmed

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