COURT OF APPEALS
DECISION
DATED AND FILED

DECEMBER 10, 1997

Marilyn L. Graves
Clerk, Court of Appeals
of Wisconsin

No. 97-0304

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

STATE EX REL. HALQUIST STONE COMPANY, INC.,

PLAINTIFF-APPELLANT,

V.

TOWN OF BROTHERTOWN PLANNING AND ZONING COMMITTEE AND TOWN OF BROTHERTOWN,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Calumet County: DONALD A. POPPY, Judge. *Reversed and cause remanded.*

Before Snyder, P.J., Brown and Anderson, JJ.

ANDERSON, J. Halquist Stone Company, Inc. appeals from an order affirming the decision of the Town of Brothertown Planning and Zoning Committee and the Town of Brothertown to deny a conditional use permit to operate a building stone quarry. Halquist filed a petition for writ of certiorari

alleging among other things that the committee acted arbitrarily and capriciously without regard to the evidence before it and that an insufficient amount of evidence was adduced in opposition to the application, such that the committee could not reasonably deny the permit. We conclude that the committee's findings lack specificity, and therefore, we cannot discern why it denied the conditional use permit and we cannot determine whether the error, if any, was prejudicial. Accordingly, we reverse and remand for a determination consistent with this decision.

FACTS

In August 1995, Halquist applied for a conditional use permit with the Town of Brothertown in order to extract building stone and flagstone from the site. Halquist planned to quarry the land for forty years starting in 1996. Halquist submitted a plan of operation addressing the concerns outlined in TOWN OF BROTHERTOWN, WIS., ZONING ORDINANCES §§ 11.03 and 12.04 (1986), including such issues as traffic, safety, hours of operation and reclamation.

On August 30 and September 5, 1995, public hearings were held before the Town of Brothertown Planning and Zoning Committee on Halquist's application. At the September hearing, the committee voted to deny Halquist's permit for the following reasons: "Noise of blasting; the depth of stone removal; deterioration of roads; devaluation of homes in the area and petition signatures of town residents against the quarry."

Consequently, Halquist filed a petition for writ of certiorari with the Calumet County Circuit Court. Halquist argued that the committee's findings were not supported by the evidence; the decision was arbitrary and capricious, represented the misuse of police power, denied Halquist equal protection and due

process of law; and the denial constituted a taking. The circuit court denied the petition finding that the action of the Town was not an unconstitutional taking and did not deny equal protection or violate Halquist's rights of due process, the ordinance set forth sufficient criteria, the Town acted within its jurisdiction, and the record contained evidence supporting the Town's decision. Halquist appeals.

STANDARD OF REVIEW

Halquist commenced this action by petition for writ of certiorari under § 62.23(7)(e)10, STATS. In certiorari proceedings, we review the decision of the agency, not the trial court, *see* ***State ex rel. Whiting v. Kolb***, 158 Wis.2d 226, 233, 461 N.W.2d 816, 819 (Ct. App. 1990), and our review is limited to the record made before the agency, *see* ***State ex rel. Irby v. Israel***, 95 Wis.2d 697, 703, 291 N.W.2d 643, 646 (Ct. App. 1980). We review the record independent of the circuit court. *See* ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis.2d 300, 303, 519 N.W.2d 782, 784 (Ct. App. 1994). We determine only: (1) whether the commission 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 order or determination in question. *See* ***id.*** at 304, 519 N.W.2d at 784. If we conclude that any one of the committee's reasons for denying the variances at issue passes certiorari review, we affirm without commenting on the other reasons. *See* ***id.***

REVIEW OF COMMITTEE'S DECISION

Again, the committee set forth five reasons for denying Halquist's conditional use permit: (1) noise of blasting, (2) depth of stone removal, (3)

deterioration of roads, (4) devaluation of homes, and (5) petition signatures.[1] According to Halquist, the committee's decision was arbitrary, oppressive or unreasonable and represented its will and not its judgment—the third standard for certiorari review. Because "[t]he fourth standard—whether the evidence was such that it might reasonably make the order—controls the third criterion," ***State ex rel. Harris v. Annuity & Pension Board***, 87 Wis.2d 646, 652, 275 N.W.2d 668, 671 (1979), the question is really one of the sufficiency of the evidence.

We apply the substantial evidence test to determine whether the evidence is sufficient. *See* ***Clark***, 186 Wis.2d at 304, 519 N.W.2d at 784. Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the committee.[2] *See* ***id.*** "To reach this determination, it is necessary for this court—assuming credibility of evidence, except where evidence may be incredible as a matter of law—to examine the record and to determine whether the evidence relied on by the [committee] is sufficient reasonably to support the decision." ***Harris***, 87 Wis.2d at 652, 275 N.W.2d at 671.

Although the committee is not required to engage in the elaborate opinion procedure of an appellate court, its findings of fact and conclusions of law

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[1] The trial court rejected "petition signatures" as valid grounds for denial of the conditional use permit. This determination was not appealed.

[2] The cases actually equate "substantial evidence" with evidence that "reasonably" supports the decision. *See* ***State ex rel. Harris v. Annuity & Pension Bd.***, 87 Wis.2d 646, 652, 275 N.W.2d 668, 671 (1979); *see also* ***Clark v. Waupaca County Bd. of Adjustment***, 186 Wis.2d 300, 304-05, 519 N.W.2d 782, 784 (Ct. App. 1994) (The substantial evidence test is highly deferential to the board's findings; we may not substitute our view of the evidence for that of the board. If any reasonable view of the evidence would sustain the board's findings, they are conclusive.). Although the parties attempt to distinguish the two "standards," it is a distinction without a difference.

must be specific enough to inform the parties and the court on appeal of the basis for its decision. *See* ***id***. at 661, 275 N.W.2d at 675. In prior opinions, our courts have required a citizen committee or board to "'give clear indication that it has exercised the discretion with which [it was] empowered.'" *See* ***Transport Oil, Inc. v. Cummings,*** 54 Wis.2d 256, 264, 195 N.W.2d 649, 653 (1972) (quoting ***Securities Comm'n v. Chenery Corp.***, 318 U.S. 80, 94-95 (1943)). An administrative body properly exercises its discretion when it articulates its reasoning, relies on facts of record and the correct legal standards, and reaches a reasonable result. *See* ***Hartung v. Hartung***, 102 Wis.2d 58, 66, 306 N.W.2d 16, 20 (1981).

After review of the committee's decision, we are unable to determine whether the committee properly exercised its discretion. The committee set forth five reasons for ultimately denying Halquist's permit. However, the reasoning underlying those conclusions is not evident. The deliberations fail to provide any additional guidance. It appears that the committee made ultimate findings, but it has failed to set forth a basis for those findings.[3]

Of additional concern is the validity of two of the committee's ultimate findings. The circuit court determined that the petition signatures were an invalid ground for denial and this decision has not been appealed. In addition, the committee's "evidence" of devaluation of homes was obtained through

[3] Basic findings are those on which the ultimate findings rest. *See* ***Transport Oil, Inc. v. Cummings***, 54 Wis.2d 256, 263, 195 N.W.2d 649, 653 (1972). However, basic findings may not be implied from ultimate findings. *See* ***id.***

communications with the Town's assessor. This evidence, however, is not part of the record and is therefore not a valid reason for denial of the permit.

Nevertheless, the committee's denial indicates that it is based upon all five reasons listed. It may be that the two erroneous findings were significant factors in the committee's denial of the permit; this is really unknown. In a situation "where the court is satisfied that an unsupported finding or conclusion did not affect the result, no reversal and remand should be required." ***State ex rel. Wasilewski v. Board of Sch. Dirs.***, 14 Wis.2d 243, 262, 111 N.W.2d 198, 209 (1961). Because we cannot determine whether the unsupported findings influenced the committee's decision or not, we believe the matter should be returned to the committee for further consideration. *Cf.* ***Gray Well Drilling Co. v. State Bd. of Health***, 263 Wis. 417, 423, 58 N.W.2d 64, 67 (1953).

In ***Edmonds v. Board of Fire & Police Commissioners***, 66 Wis.2d 337, 348, 224 N.W.2d 575, 581 (1975), the supreme court outlined five practical reasons for requiring findings simply as a matter of common law:

> First, findings facilitate judicial review by allowing the court to focus its attention on the actual basis for the decision and the evidentiary support therefor. Second, requiring findings serves the goal of limited judicial review. The reviewing court is not required to supply its own factual conclusions through a de novo search of the record. This point is particularly important where the reviewing court concludes the agency applied the wrong rule of law to the case. Third, findings help prevent arbitrary decision making. Where administrators have to state the factual basis for a decision that may be subject to close scrutiny in subsequent judicial proceedings, they are bound to take more care in arriving at their determination. Fourth, … findings help parties plan their cases for judicial review or rehearing … [and] parties have a right to be informed of why they lost. Finally, … requiring agencies to state findings allows reviewing courts to keep the agencies within their jurisdiction.

These principles are equally applicable to decisions made by town boards and committees.

Because the committee made ultimate findings, we cannot discern the reasons upon which its determination was based, and therefore we cannot determine whether it properly exercised its discretion. In addition, without evidence that the committee exercised its discretion, we cannot determine whether the error, if there was one, affected the result. Accordingly, we reverse and remand for a determination consistent with this opinion.

ADDITIONAL ISSUES

As a final matter, we must address two additional issues raised on appeal. Halquist contends that "the Town's arbitrary, oppressive and unreasonable actions are seen in its historical handling of mineral extraction operations." Halquist maintains that the Town did not require Halquist's competitors to obtain conditional use permits for operations that were started after the effective date of the ordinance. Halquist contests the Town's selective enforcement of the ordinance with respect to Halquist's quarrying operations. We interpret this as an equal protection argument.

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, 662 (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.***

The record shows that Halquist did not establish that the Town's enforcement of the ordinance against it was intentionally, systematically and arbitrarily discriminatory. Rather, Halquist simply established that the Town never sought to enforce the ordinance against either Buechel Stone or Eden Stone. Different treatment, without more, does not in itself establish an equal protection violation. *See* ***id.*** Rather, purposeful discrimination is the condition that offends the Fourteenth Amendment. *See* ***Washington v. Seattle Sch. Dist. No. 1***, 458 U.S. 457, 484 (1982). Absent evidence of intent to discriminate, we cannot conclude that the Town deprived Halquist of equal protection of the law.[4]

Finally, Halquist intimates that the Town supervisor leading the charge to deny the conditional use permit could be a relative of the family that owned a competitor, Buechel Stone. Our supreme court has determined that any person who is a member of a board should disqualify himself or herself from sitting in a case in which he or she has a direct financial interest or one which he or she cannot fairly decide. *See* ***Kachian v. Optometry Examining Bd.***, 44 Wis.2d 12-13, 170 N.W.2d 743, 749 (1969). Parties are entitled to a fair hearing which

[4] We also note that the supreme court has recognized that a town's earlier failure to enforce a rule does not bar it from enforcing it at a later date. In ***State v. City of Green Bay***, 96 Wis.2d 195, 201, 291 N.W.2d 508, 511 (1980), the court stated: "'"We have not allowed estoppel to be invoked against the government when application of the doctrine interferes with the police power for the protection of the public health, safety, or general welfare."'" (Quoted source omitted.) Also, in ***Westgate Hotel, Inc. v. Krumbiegel***, 39 Wis.2d 108, 114, 158 N.W.2d 362, 365 (1968), the supreme court refused to apply estoppel principles to prohibit a city health department from applying a health-related rule to a hotel, despite the department's having ignored similar deficiencies in the past, concluding: "It … is axiomatic that a law-enforcing body, when faced with the practical difficulties of enforcing all of its regulations at once, is not thereby barred from future enforcement of the law …."

includes the right to have matters decided by an impartial board. *See* ***Marris v. City of Cedarburg***, 176 Wis.2d 14, 24, 498 N.W.2d 842, 847 (1993). However, Halquist has failed to make a record at either the hearing before the committee or before the trial court. Therefore, the issue is waived on appeal. *See* ***Meas v. Young***, 138 Wis.2d 89, 94 n.3, 405 N.W.2d 697, 699 (Ct. App. 1987).

By the Court.—Order reversed and cause remanded.

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