**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**May 10, 2016**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2015AP491** **Cir. Ct. No. 2013CV245**

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

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**ALLENERGY CORPORATION AND ALLENERGY SILICA, ARCADIA, LLC,**

**PETITIONERS-APPELLANTS,**

**V.**

**TREMPEALEAU COUNTY ENVIRONMENT & LAND USE COMMITTEE,**

**RESPONDENT-RESPONDENT.**

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APPEAL from an order of the circuit court for Trempealeau County: ELLIOT M. LEVINE, Judge. *Affirmed*.

Before Hruz, Seidl and Neubauer, JJ.

¶1 PER CURIAM. AllEnergy Corporation and AllEnergy Silica, Arcadia, LLC (collectively AllEnergy) appeal an order affirming, on certiorari review, the Trempealeau County Environment & Land Use Committee's decision to deny AllEnergy's application for a conditional use permit (CUP) to establish a

silica sand mine. AllEnergy raises a large number of arguments on appeal. Like the circuit court, we reject AllEnergy's arguments and conclude the Committee did not exceed its jurisdiction, proceeded on a correct theory of law, did not act arbitrarily, and its decision was supported by substantial evidence. Accordingly, we affirm.

## BACKGROUND

¶2 AllEnergy submitted a CUP application for a non-metallic mine to the Trempealeau County Zoning Administrator on August 2, 2013. AllEnergy sought to mine, process, and transport silica sand, which is used in hydraulic fracturing, or "fracking." The proposed mining area was approximately 265 acres located in an agricultural zoning district in the Town of Arcadia. Non-metallic mining within that zoning district is a conditional use, requiring any person or entity seeking to operate such a mine to obtain a CUP from the Committee.

¶3 Trempealeau County's Department of Land Management initially reviewed AllEnergy's application and referred it to a contracted engineering company for third-party review. The review noted numerous deficiencies in the application, and AllEnergy provided two written responses. The Department deemed AllEnergy's application "complete" on August 27, 2013. AllEnergy's application was submitted approximately one month before Trempealeau County adopted a one-year moratorium on new non-metallic mines in order to study the health and environmental effects of the numerous sand mines that had located in the area since 2010.

¶4 The Committee held a public hearing on AllEnergy's application at its regular meeting on October 9, 2013. AllEnergy representatives and its retained experts gave a presentation summarizing the proposed mining operation. The

meeting was then opened to public comment, and staff read into the record letters and emails the county had received both in support of and in opposition to AllEnergy's proposal. While those in favor of the project principally signaled their support through form letters with little or no further comment, the vast majority of those who attended the meeting and offered comments were opposed to granting the CUP. AllEnergy was permitted to respond to matters raised during the public comment portion of the hearing before the Committee began deliberating on the matter.

¶5 During deliberations, the Committee reviewed the standards for granting a non-metallic mining CUP, which are primarily contained in TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE §§ 10.04(5) and 13.03(3).[1] The Committee considered twenty-three conditions recommended by the Town of Arcadia Board of Supervisors; the Committee struck six of these and deemed appropriate the remaining seventeen conditions, some with modifications. The Committee also determined eighteen CUP conditions recommended by county staff were appropriate, as well as two additional conditions relating to land reclamation. The Committee then voted seven-to-one to adopt the conditions as discussed.

¶6 Immediately after voting on the conditions attendant to the potential CUP, the Committee considered whether to approve AllEnergy's application. The motion to approve the application failed on a five-to-three vote, after which the Committee members voting against the application explained their reasons for doing so on the record. AllEnergy filed a petition for certiorari review of the

[1] The date of the ordinance is not indicated.

Committee's decision in the circuit court, which the court denied. AllEnergy appeals.

## DISCUSSION

¶7 A person aggrieved by the denial of a conditional use permit may commence an action against the municipality "seeking the remedy available by certiorari." WIS. STAT. § 59.694(10).[2] When no additional evidence is taken,[3] statutory certiorari review is limited to whether the government authority:

[2] All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

[3] The circuit court in this case did not take additional evidence. Accordingly, the parties' dispute regarding whether this case involves statutory or common law certiorari is largely irrelevant. *See* ***Ottman v. Town of Primrose***, 2011 WI 18, ¶¶41-42, 332 Wis. 2d 3, 796 N.W.2d 411 (holding that when the circuit court takes no additional evidence, the circuit court reviews the record under the traditional standards of common law certiorari).

The circuit court denied AllEnergy's request that it take judicial notice of various public documents, including purported Department of Natural Resources (DNR) permits AllEnergy obtained for the proposed mine after the public hearing. AllEnergy renews its request for judicial notice of these documents on appeal. Like the circuit court, we decline.

On certiorari review, we are typically limited to the record before the municipality, but may also consider "any additional facts that can be judicially noticed." ***Franklin v. Housing Auth. of Milwaukee***, 155 Wis. 2d 419, 425, 455 N.W.2d 668 (Ct. App. 1990). We may take judicial notice of matters of record in government files. *See* ***Sisson v. Hansen Storage Co.***, 2008 WI App 111, ¶11, 313 Wis. 2d 411, 756 N.W.2d 667.

Here, AllEnergy contends the DNR permits are "additional evidence that the [Committee's] decision was unsupported by substantial evidence." AllEnergy reaches this conclusion because, in its view, the "DNR's findings are more credible, relevant, and probative evidence of environmental impacts than the general unsubstantiated citizen and [Committee] comments at the hearing." AllEnergy effectively asks that we conduct a de novo weighing of evidence, which is beyond the scope of certiorari review. In any event, the Committee was aware that AllEnergy was moving forward with DNR permitting processes, and there were no statements at the hearing that the CUP was denied based on the lack of DNR permits or a belief that the DNR would not approve the mine project. Accordingly, AllEnergy cannot show the Committee's decision would have been different even if the permits had been issued prior to the

(continued)

> (1) kept within its jurisdiction; (2) proceeded on a correct theory of law; (3) acted in an arbitrary, oppressive or unreasonable manner that represented its will and not its judgment; and (4) "might reasonably make the order or determination in question based on the evidence."

***Hegwood v. Town of Eagle Zoning Bd. of Appeals***, 2013 WI App 118, ¶5, 351 Wis. 2d 196, 839 N.W.2d 111 (quoting ***Murr v. St. Croix Cty. Bd. of Adjustment***, 2011 WI App 29, ¶7, 332 Wis. 2d 172, 796 N.W.2d 837). We must accord a presumption of correctness and validity to the Committee's decision. *See* ***State ex rel. Ziervogel v. Washington Cty. Bd. of Adjustment***, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401.

¶8 Many of AllEnergy's arguments are, in effect, arguments that the Committee simply made the wrong decision. In particular, AllEnergy argues it "offered substantial evidence in support of the Ordinance criteria and is entitled to a CUP." This argument misapprehends our standard of review. The substantial evidence test is "highly deferential" to the Committee's findings, and we may not substitute our view of the evidence for the Committee's when reviewing the sufficiency of the evidence on certiorari. *See* ***Clark v. Waupaca Cty. Bd. of Adjustment***, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994) (citing ***Van Ermen v. DHSS***, 84 Wis. 2d 57, 64, 267 N.W.2d 17 (1978)). If any reasonable view of the evidence would sustain the Committee's findings, they are conclusive. ***Id.*** at 304-05 (citing ***Nufer v. Village Bd.***, 92 Wis. 2d 289, 301, 284 N.W.2d 649

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public hearing on this matter. *See infra* ¶¶12-18. AllEnergy asserts the remaining documents, which purport to contain the conditions placed on other mines previously approved in Trempealeau County, are evidence that the Committee acted arbitrarily. To the contrary, as the zoning ordinance makes clear, "[e]ach application [for a non-metallic mining permit] shall be judged on its own merits." TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE § 13.01. In short, we agree with the Committee that AllEnergy has failed to demonstrate how these documents affect the validity of the Committee's decision for purposes of certiorari review.

(1979)). "Even if we would not have made the same decision, in the absence of statutory authorization, we cannot substitute our judgment for that of the zoning authority." ***Id.*** at 305 (citing ***Buhler v. Racine Cty.***, 33 Wis. 2d 137, 146-47, 146 N.W.2d 403 (1966)). Thus, the circuit court correctly recognized that "[w]hether AllEnergy provided substantial evidence on which the CUP could have been granted is irrelevant."[4]

¶9 We conclude the Committee's decision was supported by substantial evidence. "'Substantial evidence' is evidence of such convincing power that reasonable persons could reach the same decision as the board." ***Oneida Seven Generations Corp. v. City of Green Bay***, 2015 WI 50, ¶43, 362 Wis. 2d 290, 865 N.W.2d 162 (quoting ***Clark***, 186 Wis. 2d at 304). Substantial evidence is less than a preponderance of the evidence, but more than a mere scintilla of evidence, and more than conjecture, speculation or uncorroborated hearsay. ***Id.*** (citing ***Smith v. City of Milwaukee***, 2014 WI App 95, ¶22, 356 Wis. 2d 779, 854 N.W.2d 857, and ***Gehin v. Wisconsin Group Ins. Bd.***, 2005 WI 16, ¶48, 278 Wis. 2d 111, 692 N.W.2d 572). We review the evidence in context, taking into account all evidence in the record. ***Id.***, ¶45. However, "the weight to accord the evidence lies within the discretion of the municipality." ***Id.***, ¶44.

[4] As a corollary to this argument, AllEnergy asserts that once it submitted substantial evidence in favor of its CUP application, "the burden shifted to the [Committee] to show that there was substantial evidence supporting denial of the CUP application." The case AllEnergy cites for this proposition, ***Roberts v. Manitowoc County Board of Adjustment***, 2006 WI App 169, 295 Wis. 2d 522, 721 N.W.2d 499, does not even remotely support this notion of burden shifting. To the contrary, there is no presumption that a conditional use serves the public interest, and the burden rests upon the applicant to prove that it has met the conditions of the ordinance. ***Delta Biological Res., Inc. v. Board of Zoning Appeals of Milwaukee***, 160 Wis. 2d 905, 912, 467 N.W.2d 164 (Ct. App. 1991). Further, TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE § 10.04(5)(c) states: "At all times the burden of proof to demonstrate satisfaction of these criteria remains with the applicant."

¶10 The zoning ordinance at issue here gives the Committee broad discretion to consider a wide range of factors when determining whether to grant a non-metallic mining CUP. The general standards applicable to all CUP requests are as follows:

> The Zoning Committee shall review each conditional use permit application for compliance with all requirements applicable to that specific use and to all other relevant provisions of this Ordinance. In approving conditional uses, the Zoning Committee also shall determine that the proposed use at the proposed location will not be contrary to the public interest and will not be detrimental or injurious to the public health, public safety, or character of the surrounding area.

TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE § 10.04(5)(a). The Committee is authorized to consider sixteen specific factors, including adverse effects on property in the area; noise, odor or dust that will be created by the project; whether the project ensures proper surface water drainage; a change in the natural character of the area through the removal of natural vegetation or altering of the topography; and whether the project would adversely affect the area's natural beauty. ***Id.***, § 10.04(5)(b)1.-16. The Committee is not limited to these factors and may consider "additional factors as are deemed by it to be relevant to its decision making process." ***Id.***, § 10.04(5)(b).

¶11 Zoning considerations for non-metallic mining specifically are set forth in TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE ch. 13. In addition to the general criteria governing the granting of CUPs, the Committee is required to analyze proposals for non-metallic mining in light of the "County's interest in providing for the wise use of the natural resources of the county, aesthetic implications of the siting of such a mine at a given location and the impacts of such a mining operation on the general health, safety and welfare of the

public." TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE § 13.01. The zoning ordinance further provides:

> (a) When considering an application for a non-metallic mineral mine permit, the County shall consider, among other factors, the following: the effect or impact of the proposed operation upon; (1) public infrastructure, including but not limited to streets and highways, schools and other public facilities; (2) present and proposed uses of land in the vicinity of the proposed operation; (3) surface water drainage, water quality and supply; (4) soil erosion; (5) aesthetics, including but not limited to scenic beauty and the conservation of natural resources of outstanding quality or uniqueness; (6) the market value of lands in the vicinity of the proposed operation; (7) the physical practicality of reclamation of the site after the operation has been concluded; and (8) the public interest from the standpoints of smoke, dust, noxious or toxic gases and odors, noise, vibration, blasting and the operation of heavy machinery and equipment.
>
> (b) In order to grant a conditional use permit for non-metallic mineral mining, the County shall find that the proposed operation is an appropriate land use at the site in question, based upon consideration of such factors as: existence of non-metallic mineral deposits; proximity of site to transportation facilities and to markets; and the ability of the operator to avoid harm to the public health, safety and welfare and to the legitimate interests of properties in the vicinity of the proposed operation.

***Id.***, § 13.03(3). Despite the extensive criteria outlined above, the zoning ordinance acknowledges it is "impossible to prescribe the criteria upon which such a permit may be granted in each and every case." ***Id.***, § 13.01.

¶12 At the public hearing, following the Committee's vote to deny AllEnergy's CUP application, the members voting against the application discussed their reasons for doing so. There were four primary reasons articulated for the denial: (1) AllEnergy's application was "incomplete" and "rushed;"

(2) environmental concerns with the proposed mine; (3) changes to the landscape and adverse effects on wildlife and recreational opportunities available to residents and tourists; and (4) health concerns and changes in local culture and social conditions.[5]

¶13 AllEnergy argues there was not substantial evidence supporting the Committee's concerns that the CUP application was "rushed" and "incomplete." Further, AllEnergy contends this conclusion was incorrect as a matter of law, because the Committee was without authority to adjudge the completeness of the application and the "record shows that the CUP application was complete as a matter of law under the [o]rdinance." We reject each of these arguments.

¶14 At the public hearing, AllEnergy representatives stated AllEnergy first took interest in the Arcadia site in May 2013. AllEnergy met with an engineering firm on June 5, 2013, and directed it to have a CUP plan prepared one month later. The firm told AllEnergy that was an impossible deadline and instead proposed a deadline of August 2, 2013. AllEnergy submitted the CUP application on that date, and the Department deemed it "complete" on August 27. However, county staff at the public hearing in October remarked that the plan AllEnergy

[5] It does not appear the Committee issued a separate written document setting forth the Committee's reasons for denying the permit, in which case the Committee was arguably in violation of TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE § 13.03(4). Although the hearing minutes reflect that a staff member "typed up" the reasons for the denial, the Committee appears to have agreed at the public hearing that it was sufficient to record the members' reasons for voting against the application as stated following the "no" vote. AllEnergy, in its brief-in-chief, does not argue the Committee's decision was in any way invalid for this reason, and it "does not dispute" that the reasons we have articulated were the reasons stated at the public hearing. To the extent AllEnergy does hint at a challenge to the Committee's decision for its failure to provide a written decision, the issue is raised for the first time in its reply brief, which is improper. *See* ***Fouts v. Breezy Point Condo. Ass'n***, 2014 WI App 77, ¶21, 355 Wis. 2d 487, 851 N.W.2d 845.

presented at that hearing differed from the one deemed complete on August 27. Several members of the public commented that there had been inadequate opportunities for public review and to study the potential health effects of having another sand mine in the area.

¶15 Citing ***Weber v. Town of Saukville***, 209 Wis. 2d 214, 232-36, 562 N.W.2d 412 (1997), AllEnergy argues it does not matter that its plan had been changed between its submission to the Department and the date of the public hearing as there was no prejudice to the public and the zoning ordinance allows for the later submission of information. However, the point is not that AllEnergy was forbidden to revise its plan; the revisions simply add credibility to the public's concerns that AllEnergy's plan was subject to insufficient review. AllEnergy appears to believe the Committee could not rely on statements to that effect by members of the public because such statements did not constitute expert testimony. AllEnergy does not cite any authority for this proposition, which is a particularly glaring omission given that land use and zoning are matters of significant public concern.[6] We reject AllEnergy's contention that the considerable public testimony opposing the CUP is insufficient, on certiorari review, for purposes of the Committee determining whether AllEnergy met the ordinance criteria for granting the CUP, merely because that testimony was not expert in nature. In this particular case, and given the record, the issue was one of

[6] AllEnergy does cite a 1939 decision of the Wisconsin Supreme Court, but the court's discussion in that case, which concerned the testimony of employees before the labor relations board that a principal of the corporate employer discouraged union membership, stands only for the unremarkable proposition that substantial evidence does not consist of bare opinion regarding another's intent, which is generally speculation and rumor. *See* ***Folding Furniture Works v. Wisconsin Labor Relations Bd.***, 232 Wis. 170, 188-89, 285 N.W. 851 (1939).

the weight to be accorded to the various opinions, which conclusion remains within the province of the Committee, not this court.[7]

¶16 More important than this public testimony, though, is the apparent failure of AllEnergy's application to satisfy the requirements of the zoning ordinance, as a matter of law. AllEnergy's application included some discussion of its reclamation plans for the site, but it is undisputed that AllEnergy's application did not include a reclamation permit issued under TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE ch. 20. Subsection 13.02(7) of the zoning ordinance states: "Non-metallic mining sites of one acre or greater must attach [to a non-metallic mining CUP application] a County approved … non-metallic mining reclamation permit issued through Chapter 20 of the County Comprehensive Zoning Ordinance."

¶17 AllEnergy asserts no Committee member stated he or she was relying on the lack of a reclamation permit to deny the CUP application. This is clearly incorrect. Two members specifically mentioned this deficiency during their post-vote comments. AllEnergy also argues it was advised at the public hearing that the Committee would consider the CUP application and reclamation plan at the same hearing. However, AllEnergy does not explain why any

[7] Because the proceedings in this case concerned a project that was not in existence, in a sense all of the evidence regarding the proposed mine—including the testimony of AllEnergy's retained experts—was necessarily "speculative." Nonetheless, the Committee was tasked with determining whether the proposed use was appropriate given all the considerations in the zoning ordinance. As a result, the evidence regarding the potential effects of the mine, uncertain though those effects may be, was not *unreasonably* speculative under the circumstances. AllEnergy's argument in this regard is broad, implicating the entire body of public commentary at the hearing without specifying what particular lay testimony was improper. Whether to credit the expert opinions offered by AllEnergy or the lay testimony by the public was a matter of the weight of the evidence and was within the Committee's discretion.

representation by a Committee member at the public hearing excuses its failure to comply with the relevant zoning ordinances upon submitting its application months earlier.

¶18 AllEnergy also argues there is insufficient evidence supporting the Committee's remaining reasons for denying the CUP, which included adverse effects to the environment, wildlife, recreational opportunities, public health, and local culture. Again, we disagree. AllEnergy does not dispute that the proposed mine would affect wetlands in and around the mine site; indeed, AllEnergy representatives stated at the public hearing that AllEnergy would purchase wetland mitigation credits to offset the impacts of the proposed mine. One member of the public expressed concern for the various species of waterfowl that used the seasonal wetlands as breeding grounds. Another observed that the mine was near Trout Run Creek, a class II trout stream, which, according to a 2014 impaired water documentation study, was already endangered as a habitat by "run-off from uplands and barnyards." The individual concluded external drainage associated with sand mining could carry sediment into the creek causing further damage to the stream's health. Many individuals noted that with so many sand mines operating in Trempealeau County, the aesthetic character of the area was changing such that there was a significant risk to one of the area's most attractive attributes, its natural, scenic beauty. One area resident stated that when the wind was blowing from the direction of an existing mine, clothing placed outside to dry would "come back dirtier than when I placed them on the clothesline." The same resident also expressed concern for the health effects of blowing sand and noted repeated problems with sand caught in vehicle air filters. The public comment portion of the hearing is replete with statements expressing concern for the health effects of, and property damage caused by, airborne sand. An AllEnergy

representative at the hearing acknowledged these were "very valid concerns and he understands why people are asking." In sum, many of the public comments at the hearing were of sufficient quality to constitute relevant, probative evidence upon which a reasonable factfinder could rely.

¶19 AllEnergy argues that regardless of whether there was substantial evidence to support the Committee's decision, AllEnergy was entitled to the CUP as a matter of law for two reasons. First, AllEnergy asserts the Committee's "adopti[on] of 37 conditions of approval was a *de jure* approval of the CUP" under the zoning ordinance. Second, AllEnergy argues it was entitled to a CUP because, as a matter of law, it "met the conditions of the [o]rdinance and agreed to be bound by the additional 37 conditions of approval adopted by the [Committee]."

¶20 AllEnergy's contention that the Committee tacitly approved the CUP by first adopting conditions is a nonstarter. AllEnergy bases this argument on the language of a provision in the zoning ordinance directing that the "Zoning Committee may, *in approving an application for a conditional use permit*, impose such restriction and conditions that it determines are required to prevent or minimize adverse effects …." TREMPEALEAU COUNTY COMPREHENSIVE ZONING ORDINANCE § 10.04(6) (emphasis added). AllEnergy reasons the Committee must have approved the application if it attached conditions to the CUP, and therefore the subsequent denial was arbitrary. AllEnergy's strained reading of § 10.04(6) cannot withstand scrutiny.

¶21 AllEnergy is correct that the rules of statutory interpretation also apply to the interpretation of ordinances. *See* ***Marris v. City of Cedarburg***, 176 Wis. 2d 14, 32, 498 N.W.2d 842 (1993). However, AllEnergy ignores that courts "give varying degrees of deference to agency interpretations of a law and

frequently refrain from substituting their interpretation for that of the agency charged with administration of the law." ***Id.*** In this case, it is apparent the Committee interpreted the phrase "in approving" to broadly refer to the overall process of considering the CUP application. Put another way, the ordinance was applied such that the Committee would first decide which conditions AllEnergy was required to satisfy if the CUP was granted, and then determine whether it was appropriate to issue the CUP.

¶22 Ultimately, seven of the eight members voted that the CUP could be granted only if subjected to the approved conditions, but five of the eight members then determined that, even with those conditions in place, the desired permit should not be granted. AllEnergy cannot argue the Committee intended to approve the CUP application by imposing the conditions because the Committee voted moments later to deny the application even with conditions attached. Implicit in the Committee's action is the conclusion that the approved conditions did not adequately address a majority of the members' concerns. Rather, under the guise of statutory interpretation, AllEnergy is attempting to bind the Committee to an outcome that was clearly contrary to the Committee's actions and intent.

¶23 As an offshoot of its ordinance interpretation argument, AllEnergy asserts the Committee was required to grant the CUP because the approved conditions "addressed" all of the Committee's concerns regarding the sand mine. AllEnergy's view of the law is that a "special permit may not be denied based on negative land use impacts that could be substantially eliminated or mitigated by conditions attached to the permit." *See* 3 ARDEN H. RATHKOPF ET AL.,

RATHKOPF'S THE LAW OF ZONING AND PLANNING § 61:49 (4th ed. 2016). Even assuming this is correct,[8] AllEnergy's brief is completely devoid of any analysis regarding *how* the specific conditions imposed in this case "substantially eliminated or mitigated" all of the Committee's concerns. Accordingly, we will not address this argument further. *See* ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (We may decline to review arguments supported only by general statements.).

¶24 AllEnergy's argument that it satisfied all ordinance criteria as a matter of law also fails. AllEnergy's argument on this point is not entirely clear, but as best we can discern, AllEnergy is asserting the Committee had no discretion in the matter and was required to issue the CUP. AllEnergy reasons that because it satisfied all ordinance criteria and promised to be bound by the additional thirty-seven conditions approved, the Committee's reliance on "general" concerns regarding health, safety, environmental issues, and other matters to deny the CUP was contrary to law.

¶25 There are two problems with this argument. First, AllEnergy's assertion that it satisfied all ordinance criteria is an "eye of the beholder" proposition. While AllEnergy believes it met the terms of the zoning ordinance,

[8] AllEnergy claims our supreme court adopted this standard in ***Oneida Seven Generations Corp. v. City of Green Bay***, 2015 WI 50, 362 Wis. 2d 290, 865 N.W.2d 162, by observing that the City of Green Bay could have imposed conditions when granting a CUP to address concerns that were later the basis for the city's decision to revoke the CUP. We do not read ***Oneida Seven*** as adopting the rule of law AllEnergy proposes because we see a distinction between an authority's initial decision to grant a CUP versus its decision to revoke a previously granted CUP. In the latter scenario, ***Oneida Seven*** states that when a condition attendant to the initial CUP approval expressly provides one standard, it is unreasonable to revoke a CUP based on allegations of intentional misrepresentations relating to a more-restrictive standard. *See* ***id.***, ¶74.

the Committee concluded otherwise. Again, AllEnergy, not the Committee, "has the burden of showing that the permit meets" the ordinance standards. ***Edward Kraemer & Sons v. Sauk Cty. Bd. of Adjustment***, 183 Wis. 2d 1, 16-17, 515 N.W.2d 256 (1994). The Committee's consideration of "general" matters in this case was appropriate, as the zoning ordinance at issue permits consideration of such matters. *See* ***id.*** at 13-15 (zoning authority may consider any standards set forth in zoning ordinance, and the general nature of such standards "does not impair the validity of these portions of the ordinance"). Further, contrary to AllEnergy's assertion, the Committee did not violate AllEnergy's due process rights by relying on a "hidden" rationale for which there was no evidence submitted and that AllEnergy had no opportunity to rebut. *See* ***Schalow v. Waupaca Cty.***, 139 Wis. 2d 284, 289-90, 407 N.W.2d 316 (Ct. App. 1987). The bases for the Committee's decision in this case were anything but "hidden" during the public hearing.

¶26 Second, as the circuit court recognized, this argument is contrary to ***Town of Rhine v. Bizzell***, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780. There, the ordinance at issue made every use within a particular zoning classification a conditional use; there were no permitted uses expressly allowed for the land. ***Id.***, ¶54. The supreme court rejected the town's reasoning that conditional uses were, in fact, permitted uses because "once the standards have been satisfied a landowner is 'entitled' to the conditional use." ***Id.***, ¶55. In short, there is a distinction between a permitted use and a conditional use; the latter is a use that "is not inherently incompatible with a particular area, but which might create

problems if permitted to locate there as a matter of right."[9] ***Id.***, ¶57 (quoting ***Primeco Pers. Commc'ns, L.P. v. City of Mequon***, 242 F. Supp. 2d 567, 576 (E.D. Wis. 2003)). Although conditional uses may be authorized pursuant to an ordinance, they are not uses as of right and are only allowed if approved by the local governmental body. ***Id.***, ¶¶56-57.[10]

¶27 Finally, AllEnergy argues the Committee exceeded its jurisdiction by applying the general environmental criteria contained in the zoning ordinance more stringently than the specific statewide standards administered by the DNR. In effect, AllEnergy argues the Committee was required to defer to the DNR on all matters for which DNR permits were required. However, it is not clear the Committee denied the CUP based on the application of more-stringent regulatory standards than have been established statewide. Conditional use standards are often stated generally, given that their purpose is to confer a degree of flexibility in land use regulation. ***Weber***, 209 Wis. 2d at 225-26.

¶28 In any event, we agree with the Committee that AllEnergy's argument is precluded by ***Willow Creek Ranch, L.L.C. v. Town of Shelby***, 2000 WI 56, ¶16, 235 Wis. 2d 409, 611 N.W.2d 693. In ***Willow Creek***, the petitioner argued that regulation of game farms was the exclusive province of the DNR and that municipalities had no authority to restrict such operations through the

[9] AllEnergy dismisses this portion of the opinion as dictum and urges this court to do the same. However, "the court of appeals may not dismiss a statement from an opinion by [the supreme court] by concluding that it is dictum." ***Zarder v. Humana Ins. Co.***, 2010 WI 35, ¶58, 324 Wis. 2d 325, 782 N.W.2d 682.

[10] In ***Town of Rhine v. Bizzell***, 2008 WI 76, 311 Wis. 2d 1, 751 N.W.2d 780, the supreme court allowed that an entitlement might be created by an ordinance that enacts sufficiently specific standards and provides that a CUP shall be granted if such standards are satisfied. ***Id.***, ¶¶58-59. Neither is true of the zoning ordinance in this case.

enforcement of zoning ordinances and the veto of a rezoning petition. ***Id.***, ¶16. Although the supreme court observed that there was not "explicit local authority" to regulate game farms granted by state statute, the court held that such authority was implicit in the broad zoning powers granted to municipalities under WIS. STAT. ch. 59. *See* ***Willow Creek***, 235 Wis. 2d 409, ¶19. Only local ordinances that "attempt to regulate the identical activity as the state and … are 'diametrically opposed' to the state's policy" are invalid. ***Id.***, ¶¶21-22. Here, as in ***Willow Creek***, the Committee's general zoning authority and the DNR's permitting authority are distinct powers that do not conflict. AllEnergy needed both approvals to proceed with the mine.

*By the Court.*—Order affirmed.

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