COURT OF APPEALS
DECISION
DATED AND FILED

November 21, 2000

Cornelia G. Clark
Clerk, Court of Appeals
of Wisconsin

NOTICE

No. 00-0599

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

RIVIERA AIRPORT, INC.,

PLAINTIFF-APPELLANT,

v.

PIERCE COUNTY BOARD OF ADJUSTMENT,

DEFENDANT-RESPONDENT.

CITIZENS FOR THE PRESERVATION OF THE ST. CROIX, THE SIERRA CLUB, JAMES BJERKE, BONNIE BJERKE, ROBERT CLICK, MARJORIE CLICK, JOHN CRUMLEY, MOLLY CRUMLEY, AUDREY HALVERSON, DELONE "BUD" HALVERSON, AUDREY HALVERSON, AS TRUSTEE OF THE PEMBLE FAMILY TRUST, HAROLD HALVERSON, CHRISTINE HALVERSON, HOWARD HALVERSON, MICHELLE HALVERSON, MARGARET KENNEALLY, ALICE PEMBLE, INDIVIDUALLY AND AS TRUSTEE OF THE ALICE PEMBLE TRUST, TERRENCE SCHUBERT, JUNE SCHUBERT, TODD STEDTFELD, MARY STEDTFELD, ROSE WILSON, AS TRUSTEE OF THE PEMBLE FAMILY TRUST, SHANNON ZIMMERMAN, AND ANGELA ZIMMERMAN,

PLAINTIFFS-RESPONDENTS,

V.

PIERCE COUNTY BOARD OF ADJUSTMENT,

DEFENDANT,

RIVIERA AIRPORT, INC.,

INTERVENING-DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Pierce County: ROBERT W. WING, Judge. *Reversed.*

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

¶1 HOOVER, P.J. Riviera Airport, Inc., appeals the circuit court's order reversing the Pierce County Board of Adjustment's grant of a conditional use permit to Riviera authorizing it to use land zoned agricultural as an airstrip.[1] It also challenges two conditions that the board included in the permit. Riviera raises three issues on appeal: (1) whether the trial court erred by ruling that the board lacked authority to grant the conditional use permit; (2) whether the trial court erred by concluding, in the alternative, that the board erroneously modified a permit condition; and (3) whether the board erred by imposing permit conditions limiting the number and timing of flights and limiting the term of the permit.

[1] Riviera cannot use the airstrip as a matter of right in an area zoned agricultural. *See* PIERCE COUNTY, WIS., ZONING ORD. § 18.04.120 (1972); ***Citizens for the Preservation of the St. Croix, Inc. v. Riviera Airport, Inc.***, No. 97-0501, unpublished slip op. at 5 (Wis. Ct. App. July 31, 1997) (***Riviera I***).

Riviera also questions whether Citizens is procedurally barred from challenging the board's issuance of the conditional use permit. For the reasons stated below, we reverse the circuit court order and affirm the board's grant of the conditional use permit, including all of the conditions imposed in the board's decisions dated August 1998 and November 1999, except the condition that requires runway realignment.[2]

STANDARD OF REVIEW

¶2 There is no guaranteed right to a conditional use permit, which is discretionary in nature. *See* ***Village of DeForest v. County of Dane***, 211 Wis. 2d 804, 816, 565 N.W.2d 296 (Ct. App. 1997). The appellate court in a certiorari action reviews the board's and not the circuit court's decision. *See* ***Schroeder v. Dane County Bd. of Adjust.***, 228 Wis. 2d 324, 330, 596 N.W.2d 472 (Ct. App. 1999). Our scope of review is limited to four questions: "(1) whether the board stayed within its jurisdiction; (2) whether it acted according to law; (3) whether its action was arbitrary, oppressive or unreasonable, representing its will instead of its judgment; and (4) whether the evidence was such that the board might reasonably have made the determination under review." ***Id.*** at 330-31.

¶3 The board's decisions are presumed to be correct and valid. *See* ***Snyder v. Waukesha County Zoning Bd.***, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). Conditions set on a permit will be upheld if they are reasonable. *See* ***Delta Biological Resources, Inc. v. Board of Zoning Appeals***, 160 Wis. 2d 905, 910, 467 N.W.2d 164 (Ct. App. 1991). Reviewing courts are hesitant to interfere with

[2] The permit is limited by ***Riviera Airport, Inc. v. Pierce County***, No. 99-2198, unpublished slip op. (Wis. Ct. App. June 27, 2000) (***Riviera III***). *See* paragraphs nine through thirteen of this opinion for further discussion.

administrative decisions and accord to the board's decision a presumption of correctness and validity. *See* ***Snyder***, 74 Wis. 2d at 476.

¶4 It is for the zoning authority, not the courts, to determine the weight to be accorded the facts surrounding an application for a conditional use permit. *See* ***Delta***, 160 Wis. 2d at 915. The board's findings of fact will be upheld if substantial evidence supports its decision, even if substantial evidence also supports the opposite conclusion. *See* ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 568 n.4, 579 N.W.2d 668 (1998). Substantial evidence means relevant, credible and probative evidence upon which reasonable persons could rely to reach a conclusion. *See* ***Princess House, Inc. v. DILHR***, 111 Wis. 2d 46, 54-55, 330 N.W.2d 169 (1983).

BACKGROUND

¶5 Riviera operates a grass airstrip[3] in an area of Pierce County zoned agricultural. Parcels located adjacent to the airstrip were marketed and sold specifically to people who wanted to live near and have access to an airstrip. Some of these owners have built homes and accessory buildings to house their airplanes. Those who own property adjacent to the airstrip and some others are "members" of Riviera as defined in Riviera's "Declaration of Covenants." Use of the airstrip is limited to members and their guests.

¶6 The other parties included Citizens for the Preservation of the St. Croix, the Sierra Club, and twenty-two individuals (collectively, Citizens) who

[3] The parties alternate between calling the contested property an airstrip or an airport. For purposes of this opinion, we will refer to the property as an airstrip.

oppose the airstrip's permit, and the board, which seeks to have its decision affirmed. Neither Citizens nor the board have appealed to this court.

¶7 The dispute between Riviera and those opposed to the airstrip[4] has been before this court on three previous occasions. In ***Citizens for the Preservation of the St. Croix, Inc. v. Riviera Airport, Inc.***, No. 97-0501, unpublished slip op. (Wis. Ct. App. July 31, 1997) (***Riviera I)***, we determined that Riviera's use of the airstrip was not a prior nonconforming use grandfathered into Pierce County's 1972 zoning ordinances.[5] ***Id.*** at 3. We concluded, without deciding whether the airstrip was public or semi-public, that even if it was, the use did not comply with the Pierce County zoning ordinances because Riviera did not possess a conditional use permit. As a result of that decision, Riviera applied for a conditional use permit from the land management committee, the County's zoning committee. After evidentiary hearings, the committee issued a permit with twelve conditions. Riviera appealed to the board, challenging certain conditions. After the board refused to hear the appeal, claiming it lacked authority to do so, Riviera appealed to the circuit court. This court agreed with the circuit court's ruling that the board was the appropriate body to review the appeal. *See* ***Riviera Airport, Inc. v. Pierce County Bd. of Adjustment***, No. 98-2135, unpublished slip op. at 3-4 (Wis. Ct. App. March 30, 1999) (***Riviera II***).

¶8 On remand, the board revised or amended several of the conditions in the permit and filed its decision on August 6, 1998. The changes relevant to

[4] Citizens was not a party in two of the three prior cases.

[5] Although enacted in 1972, these ordinances were in effect at the time of ***Citizens for the Preservation of the St. Croix, Inc. v. Riviera Airport, Inc.***, No. 97-0501, unpublished slip op. (Wis. Ct. App. July 31, 1997) (***Riviera I***), and the circuit court ruling that led to that decision. All references to the Pierce County zoning ordinances are to the 1972 version.

this appeal are as follows. The board (1) deleted a condition that required Riviera to purchase the lots located at the southeast end of the airstrip and the corresponding deadline; (2) deleted a condition that confined the airport operations to the agricultural district; (3) amended a condition expanding the number of flights from forty to eighty per month; and (4) extended the deadline to accomplish realigning the runway to August 5, 1999. Riviera and Citizens appealed this decision, and their cases were consolidated in the circuit court.

¶9 While the parties challenged the board's August 1998 decision in the circuit court, Riviera also brought a separate claim in the circuit court seeking a declaration that using the northwest portion of its property as an airstrip was permissible under other ordinances. The northwest part of the airstrip, composing slightly less than one-half of the airstrip, lies in the St. Croix Riverway zoning district.[6] Riviera sought a declaration that its use was recreational and permissible under the Riverway zoning ordinance. The circuit court agreed that it was. Citizens appealed that decision to this court.

¶10 While that appeal was pending, the circuit court, in a decision dated August 1999, vacated two conditions of the August 1998 board decision, striking the runway realignment condition and the corresponding deadline. The circuit court suspended further review and remanded for the board to consider two issues:

> a. whether the Board should reinstate condition #2 of the conditional use permit [requiring airstrip realignment] in light of [the circuit] court's ruling that Riviera may use the portion of the airstrip in the Riverway zoning district; and
> b. Whether the Board wishes to make additional findings or clarify its findings in striking condition #1 of the

[6] The St. Croix Riverway district is a separate zoning district from the Pierce County zoning ordinances and has its own ordinances.

> conditional use permit [requiring purchase of the lots located at the southeast end of the airstrip] now that Riviera may use that portion of the airstrip in the Riverway zoning district.

The circuit court retained jurisdiction, stating, "There need be no additional appeal from the actions of the Board on remand. The court will review the remaining challenges to the permit conditions following Board action on the remand." The board considered the issues the circuit court outlined and filed its decision dated November 16, 1999, in the circuit court as part of the case before us now.

¶11 The board concluded in its November 1999 decision that the addition of the riverway district land to the airstrip "gives the Board of Adjustment more options to approve the runway while protecting public safety." The board revised a condition to require that Riviera reposition the runway end markers "so the NW end of the runway is 300 feet from 850th Avenue and the SW runway end is 700 feet from 846th Avenue." With regard to airstrip realignment, the board agreed that this condition could be deleted if Riviera repositioned its runway markers as stated above.

¶12 The circuit court reviewed both the August 1998 and November 1999 board decisions. In an order dated February 4, 2000, the court concluded that the board lacked authority to issue a conditional use permit for a private airstrip on the portion of Riviera's property that did not lie in the Riverway zoning district. The circuit court found that all of the evidence showed that the airstrip was private and that only public or semi-public airstrips could qualify for a conditional use permit under the ordinance. The circuit court reversed the board's decision to issue a permit, regardless of the conditions. Furthermore, the circuit court concluded that even if the board had the authority to issue a permit in this case, "it acted erroneously and arbitrarily." Riviera appeals the circuit court's

decision and asks this court to review the board's decisions. *See* ***Bettendorf v. St. Croix County Bd. of Adjust.***, 224 Wis. 2d 735, 738, 591 N.W.2d 916 (Ct. App. 1999).

¶13 As noted earlier, while the circuit court was considering the August 1998 and November 1999 board decisions, ***Riviera Airport, Inc. v. Pierce County***, No. 99-2198, unpublished slip op. (Wis. Ct. App. June 27, 2000) (***Riviera III***),[7] was before us. In ***Riviera III***, we concluded that Pierce County's St. Croix Riverway zoning ordinance does not allow the airstrip as a permitted recreational use. *See* ***id.*** at ¶¶1, 6. Recognizing that the property is concomitantly governed by the Riverway zoning ordinance and the general Pierce County zoning ordinance, we noted, "To the extent the airstrip's impermissibility within the riverway district conflicts with Riviera's conditional use permit under the general zoning ordinance, the more restrictive ordinance controls." *See* ***id.*** at ¶7 n.3 (citing PIERCE COUNTY, WIS., ST. CROIX RIVERWAY ZONING ORD. § 19.04.020). Because ***Riviera III*** was released after the circuit court issued the February 2000 decision that Riviera now appeals, neither the board nor the circuit court addressed the impact of ***Riviera III*** on this case.

¶14 As indicated, the February 2000 circuit court order that forms the basis of the current appeal considered the August 1998 and November 1999 board proceedings. The parties do not argue that only one of the board's decisions should be reviewed to the exclusion of the other. Further, Riviera asks for changes to conditions that were not reviewed by the board in 1999 (e.g., conditions limiting the number of flights and duration of the permit). Also, the board did not discuss

[7] *See* ***Riviera III*** (Citizens' appeal of the circuit court order that allowed Riviera to use a portion of the property as proposed under the Riverway zoning ordinance).

whether to issue a conditional use permit to Riviera at the 1999 proceeding. Therefore, we consider both decisions and the accompanying record[8] in light of the current arguments on appeal.

DISCUSSION

I. CITIZENS' PROCEDURAL BAR

¶15 Riviera argues that in order for Citizens to challenge the board's authority to issue the conditional use permit, Citizens had to appeal the land management committee's decision to issue the permit. Riviera claims that the ordinance provides for an appeal to the board and, similar to an appeal to this court, the board reviews only those issues identified in the appeal. Riviera asserts that because Citizens did not appeal the committee's decision to grant a conditional use permit, it is barred from addressing the issue both at the circuit court and on appeal.

¶16 Citizens contends that it had no obligation to appeal the land management committee's decision because the board conducts a de novo hearing, thus supplanting all committee decisions. Citizens further argues that, under WIS. STAT. § 59.694(10), it is "a person aggrieved" by the board's decision and may therefore seek certiorari review. Citizens asserts that it is aggrieved because a "private airport, judicially declared to be unlawful in January 1997, would be able to continue operating in [its] neighborhood."

[8] The board incorporated the land management committee record into its own. In its 1998 decision, the board stated, "The record of the Land Management Committee's decision and new testimony were accepted at the public hearing."

¶17 WISCONSIN STAT. § 59.694(10)[9] gives Citizens the right to appeal an adverse board decision. Citizens claims that it is aggrieved by the permit grant. If the board dealt with the threshold issue whether the permit should be granted as well as considering individual conditions, then Citizens would be aggrieved and would not be procedurally barred from appealing the permit grant.

¶18 The record shows that the board considered both whether a permit should be issued and the conditions that should attach. At the beginning of the July 1998 board hearing, the board's chair, Lorne Hanson, announced, "The issue before the Board of Adjustments is to decide whether the Land Management Committee had any error in issuing the permit, and, specifically, should the conditional use permit have been issued. And if so, should the conditions be deleted, added or amended." Therefore, Citizens meets the requirements under WIS. STAT. § 59.694(10).

¶19 Riviera contests the board's application of "de novo review" as directed by ***Riviera II***, No. 98-2135, slip op. at 4-5. The board discussed at length the meaning of "de novo review," and the parties have presented arguments

---

[9] WISCONSIN STAT. § 59.694(10) provides in part:

> CERTIORARI. A person aggrieved by any decision of the board of adjustment, or a taxpayer, or any officer, department, board or bureau of the municipality, may, within 30 days after the filing of the decision in the office of the board, commence an action seeking the remedy available by certiorari. … If necessary for the proper disposition of the matter, the court may take evidence, or appoint a referee to take evidence and report findings of fact and conclusions of law as it directs, which shall constitute a part of the proceedings upon which the determination of the court shall be made. The court may reverse or affirm, wholly or partly, or may modify, the decision brought up for review.

All references to the Wisconsin Statutes are to the 1997-98 version unless otherwise noted.

disputing how that term should apply to a board of adjustment review. The board resolved that it would "review and see what decisions [the committee] made were appropriate, and if not, to make changes where we feel necessary."

¶20 Riviera challenges the way the board applied the term "de novo" in order to limit circuit and appellate court review to the conditions only and preclude review of the permit grant. The board determined anew that the permit should be granted; therefore it was an issue decided by the board and could have been appealed to the circuit court. We ultimately conclude that the record and law support a grant of a conditional use permit. Accordingly, we do not need to resolve whether the board properly interpreted "de novo" or whether granting the conditional use permit, independent of considering the conditions, was properly appealed to and considered by the board. Therefore, we conclude that Riviera fails to establish a procedural bar to challenging the conditional use permit grant.

II. AUTHORITY TO GRANT AND EVIDENCE TO SUPPORT THE PERMIT

¶21 The circuit court held that the board lacked authority under the zoning ordinances to issue the conditional use permit to Riviera. In arriving at this conclusion, it relied exclusively on the ordinance that concerns airstrips.[10] PIERCE COUNTY, WIS. ZONING ORD. § 18.36.040,[11] however, authorizes the board to issue a conditional use permit for recreational uses. Upon our review of the

[10] The trial court concluded that the record supported a determination that Riviera is a private airstrip. The court interpreted the ordinance to permit only public or semipublic airstrips, and therefore held that the board lacked authority under the airstrip ordinance to grant the permit.

[11] PIERCE COUNTY, WIS. ZONING ORD. § 18.36.040 (1972) pertains to agricultural zone conditional uses: "Conditional uses in the A district shall be: recreation uses" and other uses not relevant to our discussion. This ordinance is less restrictive than the recreation conditional use ordinance that in the St. Croix Riverway zoning ordinance.

record, it appears that the board heard evidence supporting the conclusion that the airstrip constituted a recreational use under § 18.36.040. We therefore conclude that the board had authority to issue the conditional use permit.

¶22 The board's decision to grant a conditional use permit is discretionary in nature. *See* ***Village of DeForest***, 211 Wis. 2d at 816. We will search the record to uphold a discretionary determination. *See* ***Looman's v. Economy Fire & Cas. Co.***, 38 Wis. 2d 656, 662, 158 N.W.2d 318 (1968). The standard of review, recited above, strongly favors the board. The board's findings of fact will be upheld if substantial evidence supports its decision, even if substantial evidence also supports the opposite conclusion. *See* ***CBS***, 219 Wis. 2d at 568 n.4. We next review the record to determine if it supports issuance of a permit for a recreational use. *See* ***id.***

¶23 Testimony from the committee hearing supports a permit based on the airstrip constituting a recreational use. Audrey Halverson, an individual opposed to the airstrip, testified to the committee that, "this is their hobby. And I'm sure it's fun. [T]hey just don't seem to understand that their hobby is disrupting our hobbies, and our enjoyment of our land, when they go around and around." Todd Stedtfeld, a member of Citizens, told the committee, "[Riviera] serves nothing but a -- a handful, at this time, of hobbyists." Charles Hermann, who "lives on the airpark" but who does not have an airplane or airplane hangar, spoke in support of Riviera. He told the committee that Riviera's use is compatible with the surrounding area because the airstrip has "a state park on either end of our airstrip, … a golf course right next door, … a commercial ski area just northwest of [Riviera], and a river running alongside, which is used largely for recreation, all of these are recreational uses, as is our airport."

¶24 Further, testimony presented at the board hearing also supports a recreational use. Howard Glenna, president of Riviera, stated, "Our use is definitely recreational, because that was made very clear a long time ago. That was the original intent." Larry Dodge testified to the board that he owned property near the airstrip and towed his plane to it in order to fly. He testified that he was either the highest or second highest user of the airstrip. "It is my hobby … I bought the property, invested a lot of money in it for that purpose." John Mondus, a pilot who has lived at the airpark since 1987, also testified. He contended, "What we do is recreational flying. There is no [sic] commercial operations on that airport. There never will be. It's not in our covenants. Every time that we take off, it's just for our own pleasure, our own flying, and most of the time, we're going someplace."

¶25 Furthermore, chairperson Lorne Hanson reminded the other board members during their deliberations, "This is a recreational, this isn't a commercial airstrip. It's strictly recreation." He compared Riviera's use to motorhomes, yachts on the riverway, and snowmobiles. Later, board member John Leo reiterated the chairman's comments, "We're talking about recreation now." The record supports a finding that Riviera's use is recreational.

¶26 As a final note on recreational use, Citizens argued at oral arguments that to fall within a recreational use conditional use permit under § 18.36.040, the use must be 100% recreational. Citizens offers no authority for this proposition. On its face, the proposition is dubious at best and, therefore, without the support of authority, we reject the contention. *See* ***State v. Shaffer***, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370 (Ct. App. 1980) (a party must support contentions with authorities to be considered).

¶27 While Citizens is not procedurally barred from challenging the grant of the conditional use permit, we nevertheless affirm the board's conclusions. Because the ordinance grants the board authority to issue a conditional use permit for recreational uses and because the evidence supports the board's conclusions, Citizens has failed to show that the board acted contrary to law, that its action was arbitrary, oppressive or unreasonable, or that the decision represented its will rather than its judgment.

III. WHETHER BOARD ERRED WHEN IT MODIFIED A CONDITION IN ITS 1999 DECISION

¶28 We next consider the conditions applied to that permit. Riviera argues that the board did not err when it struck a condition requiring Riviera to purchase the lots located at the southeast end of its runway to insulate the runway for safety reasons and, instead, only required the runway markers be placed to achieve certain setbacks. It argued that the lot purchase condition was arbitrary because there was no reason to order it.[12] It accepts the board's requirements of a 300-foot setback from roadways, which it concedes is required by state law, and a 700-foot setback from 846th Avenue on the southwest end of the airstrip. It contends that resetting the runway markers consistent with the board's limitations satisfies and exceeds the mandatory safety requirements for private airstrips.

[12] Riviera argues that the board was preempted by the Federal Aviation Act from ordering that the airstrip be realigned. *See* 49 U.S.C. § 40101. However, "[f]ederal preemption of the airspace under the Act does not limit the right of local governments to designate and regulate aircraft landing areas …." ***Gustafson v. City of Lake Angelus***, 76 F.3d 778, 790 (6th Cir. 1996). "Moreover, the [FAA] regulation indicates that environmental impact and land use compatibility are matters of local concern and will not be determined by the FAA." ***Id.*** at 785. It appears that the Act does not affect our analysis. Nevertheless, we rely on other grounds for affirming the board.

¶29 Citizens argues that safety requires a 1000-foot buffer zone on each end of the airstrip, citing recommendations from the Wisconsin Department of Transportation Aeronautics Division. It also argues that a twenty to one approach trapezoid safety area is appropriate for all airports. Although it concedes that a 300-foot setback from public roads is the only mandated requirement,[13] Citizens contends that Riviera failed to show that 1000 feet is unnecessary to protect public safety. Citizens criticizes the board for basing its decision on a finding that lot purchase was a hardship. Citizens argues that hardship is an inappropriate factor when the board is considering public health and safety. Furthermore, Citizens asserts that Riviera cannot claim hardship when it failed to protect its approach zones when it had an opportunity to do so. Citizens urges this court to consider the difference between "What is mandated?" and "What is safe?"

¶30 Because the board conceded that the runway realignment condition was arbitrarily set, we reverse that condition. The record supports the board's conclusion that the setback requirements will protect public safety and we affirm that determination.

¶31 The board rejected the lot purchase condition in its 1998 decision. In its August 1999 decision, the circuit court questioned striking the lot purchase condition and specifically directed the board to revisit the issue on remand. The circuit court also remanded the case to the board to consider how its decision finding that Riviera could use the property in the Riverway district as an airstrip affected the realignment condition.

[13] Three hundred feet satisfies the twenty to one approach trapezoid requirement.

¶32 In its 1999 decision, the board continued to conclude that the lot purchase requirement was not necessary. It added a requirement that the runway markers should be repositioned to allow a safety zone of 300 feet on one end and 700 feet on the other. It modified the condition requiring runway realignment by making it an optional means of achieving the safety zone. If the runway markers could be adequately repositioned to ensure safety, then realignment would not be necessary.

¶33 The case was returned to the circuit court for further review per the court's August 1999 order. The circuit court was dissatisfied with the board's November 1999 determination. It concluded that the record did not support the board's decision to strike the condition requiring the lot purchase and add the runway marker repositioning. The court held that this added condition was "erroneously and arbitrarily" revised. Riviera asks this court to reinstate the board's determination.

¶34 We turn first to the default condition of runway realignment. Although Riviera's brief does not challenge the realignment condition in the event it cannot meet the setback requirements, the parties extensively discussed this condition at oral argument. We have discretion to consider arguments first presented at oral arguments. *See* ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 493, 588 N.W.2d 285 (Ct. App. 1998) (waiver is a rule of administration only). It is fundamentally fair to do so because the argument is advanced under an aspect of certiorari review generally at issue with regard to a condition, i.e. whether the board acted arbitrarily. *See* ***Schroeder v. Dane County Board of Adjust.***, 228 Wis. 2d 324, 330, 596 N.W.2d 472 (Ct. App. 1999). Further, we review the board's decision, not the circuit court's. Finally, Citizens had ample chance to respond. The parties were under no time limitations at oral

argument and were invited to speak to any issue until they deemed the subject exhausted. Runway realignment, as modified by the board in 1999, was required only in the event that the runway marker setbacks could not be achieved. Even so, because the board conceded at oral argument that the condition was arbitrarily set, we reverse this condition.

¶35 The committee may impose conditions "upon its finding that [they] are necessary to fulfill the purpose and intent of [the zoning] title." PIERCE COUNTY, WIS., ZONING ORD. § 18.44.010C. The board, reviewing a committee decision, "shall either affirm, reverse, vary or modify the order …." ***Id***. at § 18.68.030.C. The purpose of the zoning ordinance title 18 is "to promote the health, safety, prosperity, aesthetics, and general welfare of this community." ***Id***. at § 18.04.030. The intent of the title is to regulate and restrict the use of land to secure safety, "prevent overcrowding; avoid undue populations concentration[;] … stabilize and protect property values; further the appropriate use of land and conservation of natural resources; preserve and promote the beauty of the community; and implement the community's general plan or plan components." ***Id.*** at § 18.04.040.

¶36 However, the board conceded that realignment was imposed for none of the above reasons. The board agreed with Riviera at oral argument that the realignment was ordered not as a safety measure, but merely as a compromise to placate the airstrip's opponents. Realignment would only shift the approach to the airstrip from over a portion of one private lot to over a portion of two other private lots, with nothing gained. It moved the safety zone away from an opponent's property. We therefore reverse this condition.

¶37 We sustain the board's findings if the record supports them. *See* ***Snyder***, 74 Wis. 2d at 476. The staff report recommended that the board set a requirement to "[r]eposition runway end markers so the NW end of the runway is 300 feet from 850th Avenue and the SW runway end is 700 feet from 846th Avenue. Permitting 2,200 feet of runway (compared to 1,600 feet on the original permit) will maintain a proper distance from residential structures." A representative from the Department of Transportation testified that the twenty-to-one ratio applies to setbacks from roadways, and 300 feet satisfies that setback. *See* WIS. STAT. § 114.134(2) (referring to federal aviation requirements). The board extensively discussed what requirements were necessary to protect public safety. The board reasonably relied on the staff report and the other testimony to set its conditions. The record supports striking the lot purchase condition and adding the setback requirements. We therefore affirm the board on this issue.[14]

IV. WHETHER THE BOARD PROPERLY MODIFIED TWO OTHER CONDITIONS IN ITS 1998 DECISION

a. Limiting flights to eighty per month

¶38 Riviera argues that there had to be evidence to support the precise number the board set as a takeoffs-per-month limit in condition four. It offers no authority for this position. Riviera cannot use the airstrip as a matter of right in an area zoned agricultural. *See* PIERCE COUNTY, WIS., ZONING ORD. § 18.04.120. The determination of reasonable conditions of such use is left to the board's discretion. *See* ***Delta***, 160 Wis. 2d at 910.

[14] Whether Riviera can meet these guidelines after ***Riviera III*** is not before us. *See* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground ….").

¶39 Riviera asked the board to set the number of flights at two per lot or owner per week, tabulated annually. Guests using the strip would count against the member hosting the guest. Board member Ed Hanson determined that Riviera's request would total 2,808 flights per year.

¶40 The record contains evidence regarding the limitation on the number of flights. Mark Schroeder, representing the land management committee, testified to the board:

> That level of [airstrip] use was given by the applicants as six to nine operations per day and a good weather weekend, which extrapolated out 26 to 39 takeoffs per month. The limit of 40 takeoffs per month therefore exceeded the current level of use by the airport. In this regard, I go back to the requirement that the burden is on the applicant to justify the application. And the two numbers that the committee had before it were the existing level of use, from which they got the 40 takeoffs per month, and the applicant's requested unlimited number of takeoffs and landings. And the committee did not receive evidence from the -- or suggestions from the applicant at anything less than unlimited use. ... The choice the committee made, given that evidence, or the lack of -- lack of evidence, as you may see, would be to limit it to 40 takeoffs per month.

Riviera submitted evidence that supports his statement in part.[15]

¶41 The neighbors complained of noise. Margaret Kenneally submitted a letter in opposition to Riviera's "activities." She stated:

> There was a great deal of peace and quiet in this area before they arrived with low level flights, aerobatic dives and spins, fly ins, 6 a.m. flights, and circling our home in

[15] In a letter dated March 26, 1997, to Mark Schroeder, Howard Glenna explained that "For example I do not believe an aircraft has landed or taken-off in the past three to four weeks. On good weather weekends the average may be six to nine operations a day." However, Schroeder's extrapolated figures assume operations on only one weekend day per week.

> continuous circles. ... One should be able to enjoy the Kinnikinnic Park without low flying aircraft overhead. Perhaps if Riviera pilots had taken off and left the area, there would not be so much opposition from neighbors.

Audrey Halverson, opposing Riviera's use, testified that the airplanes disturb the area. "[I]f you have the river full of boats, and if one airplane comes down, it drowns out all those noises." Ed Hanson acknowledged that "I guess the noise is partly what has riled all the neighbors there …."

¶42 During their discussion after the public hearing, the board members compared Riviera's use to snowmobiling or boating, but also noted some distinguishing features. Ed Hanson asserted that snowmobiles and boats "aren't doing aerobatics and over our yard or anything." He stated, "you can certainly save up -- you know as well as I do that there are many times when they can't fly. There are many weeks or sometimes an entire week will go by in the wintertime that I doubt if that airport is used much in the wintertime." Further, he expressed concern that because the number of airplanes was substantially less than the number of lots, "that's an unlimited number for the planes that are in there."[16] Adopting Riviera's proposal really was "no restriction at all."

¶43 The board doubled the number of flights the committee allowed under the permit. Eighty flights per month exceed the pre-permit usage Riviera reported to the committee. Riviera has not shown, in light of the evidence before the board, that limiting the number of takeoffs per month to eighty is unreasonable or arbitrary.

[16] Glenna told the board that the members had thirteen airplanes at the time of application and that the high was sixteen airplanes "or something like that," while he requested flight rights for 27 lots.

b. The permit's two-year term

¶44 Riviera argues that condition twelve, which provides that the permit shall be valid for two years, is "arbitrary, unreasonable, and oppressive and contrary to the law." The ordinance provides: "Conditional uses and their accessory uses are considered as special uses requiring review, public hearing, and approval by the county zoning committee." PIERCE COUNTY, WIS., ZONING ORD. § 18.04.120C. Further, there is no guaranteed right to a conditional use permit, which is discretionary in nature. *See* ***Village of DeForest***, 211 Wis. 2d at 816. Riviera offers no authority to support its contention that because people make financial decisions in reliance on a limited-term conditional use permit, the term limitation is therefore arbitrary, unreasonable, oppressive or contrary to law.[17]

¶45 Moreover, the record demonstrates that the time limitation was designed to serve a legitimate purpose: to monitor Riviera's compliance with the permit conditions. This purpose was confirmed by the board's attorney at oral argument. Ed Hanson noted:

> This is a two-year …. If some of these things work out the way they're supposed to, there is no reason some of these [conditions] can't be relaxed. I think we want to be pretty positive, because this has not been the -- in love with the

[17] Riviera cites ***State ex rel. A. Hynek & Sons Co. v. Board of Appeals***, 267 Wis. 309, 315f, 64 N.W.2d 741, *vacated on reh'g,* 267 Wis. 315a, 64 N.W.2d 623 (1954), to support its contention that it has a vested right to continue its conditional use permit once granted, or in other words that it has a claim of equitable estoppel against Citizens and the board. However, ***Hynek***'s precedential value has been subsequently questioned. *See* ***State ex rel. Brookside Poultry Farms v. Jefferson County Bd. of Adjust.***, 131 Wis. 2d 101, 108, 388 N.W.2d 593 (1986). "If ***Hynek*** has any precedential value, the holding of the case applies only when a board seeks to revise a permit on its own motion after the appeal time has elapsed." ***Id.*** at 109. "Typically equitable estoppel is claimed when the action or inaction of one party induces reasonable reliance to another party's detriment." ***Id.*** at 109 n.3. Here, by validating the permit for two years, the board notifies all parties that it will review the permit and conditions in two years. Unlike ***Hynek***, it is not *sua sponte* reevaluating the permit issuance without notice.

> entire operation around there, the entire rest of the community.

When voting on one of the conditions, board chair Lorne Hanson said, "I feel that that's a starting point and obviously a conditional use permit is reviewable ... at the end of two years." The board stated at oral arguments that the conditional use permits granted in Pierce County frequently have two-year renewable terms. Riviera has not shown that the two-year term is arbitrary, unreasonable, oppressive or contrary to law.

CONCLUSION

¶46 The ordinances and record support the board's decision of August 6, 1998, as modified by its decision of November 16, 1999, to grant a conditional use permit to Riviera as well as the conditions imposed, with the exception of the condition requiring runway realignment. We reverse the circuit court and affirm the board, with that exception.

By the Court.—Order reversed.

Not recommended for publication in the official reporters.