

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 6, 2012**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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

**Appeal No. 2011AP1698**

**Cir. Ct. No. 2010CV342**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT III**

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**DELBERT E. JOHNSON AND NANCY L. JOHNSON,**

**PETITIONERS-APPELLANTS,**

**V.**

**PIERCE COUNTY ZONING BOARD OF ADJUSTMENT,**

**RESPONDENT-RESPONDENT.**

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APPEAL from a judgment of the circuit court for Pierce County:  
JOSEPH D. BOLES, Judge. *Affirmed.*

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

¶1 PER CURIAM. Delbert and Nancy Johnson appeal a judgment that affirmed, on certiorari review, a Pierce County Zoning Board of Adjustment decision upholding the revocation of the Johnsons' land use permit. The Johnsons argue the Board proceeded on an incorrect theory of law, the evidence did not

support the Board's conclusion, and the Board's action was arbitrary, oppressive and unreasonable. We reject the Johnsons' arguments and affirm.

## **BACKGROUND<sup>1</sup>**

¶2 The Johnsons own real estate in Pierce County. Their property abuts the Mississippi River and is located in a floodplain. There were three structures on the property: a mobile home, a screened-in porch, and a deck. It is undisputed that these structures were nonconforming uses under Pierce County's floodplain zoning ordinances. *See* PIERCE COUNTY, WIS., CODE § 238-24A (Sept. 15, 2004) (habitable structures prohibited in floodplain);<sup>2</sup> *see also Columbia Cnty. v. Bylewski*, 94 Wis. 2d 153, 170 n.9, 288 N.W.2d 129 (1980) (A nonconforming use is a use that violates a zoning regulation but is nevertheless legal because it predates the regulation.).

¶3 On April 19, 2010, the county zoning administrator, James Kleinhans, issued the Johnsons a land use permit to floodproof the structures on their property. The permit consists of an application form, a materials list, a hand-drawn plan of the construction project, and a "plot plan." Kleinhans signed the

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<sup>1</sup> The Johnsons' statement of the case contains virtually no citations to the record, in violation of WIS. STAT. RULE 809.19(1)(d). We will not consider unsupported assertions of fact. *Dieck v. Antigo Sch. Dist.*, 157 Wis. 2d 134, 148 n.9, 458 N.W.2d 565 (Ct. App. 1990); *see also Nelson v. Schreiner*, 161 Wis. 2d 798, 804, 469 N.W.2d 214 (Ct. App. 1991) (court of appeals need not sift the record for facts to support an appellant's contentions).

Additionally, we note that the Johnsons' brief refers to the parties by party designation, rather than by name, in violation of WIS. STAT. RULE 809.19(1)(i), making navigation through the brief cumbersome.

All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

<sup>2</sup> All references to the Pierce County Code are to the September 15, 2004 version.

bottom of the application form, indicating that he approved the application and issued the permit. The materials list is entitled “Staff analysis for floodproofing costs.” The plot plan contains a diagram showing both the existing structure on the property and the “proposed construction.” The plot plan also states, “See plans for elevating existing building.” The hand-drawn plan depicts the existing mobile home, screen porch, and deck raised off the ground and surrounded by some new construction.

¶4 On June 3, 2010, Kleinhans inspected the Johnsons’ property after receiving complaints about the construction. Kleinhans concluded the construction work went beyond what was allowed under the permit. According to Kleinhans, the permit allowed the Johnsons to “elevate the existing deck, screen porch and mobile home and contain them in a new shell” atop a new concrete foundation. Instead, Kleinhans asserted the screen porch was “sitting on the ground” and the new structure “[did] not even vaguely resemble a manufactured home or the preexisting deck.” Kleinhans therefore rescinded the permit and issued a stop work order.

¶5 The Johnsons appealed Kleinhans’ decision to the Board, arguing they had not exceeded the scope of construction allowed by the permit. At a hearing on the matter, Delbert Johnson testified that, before Kleinhans issued the permit, the existing mobile home had been destroyed by a flood. He testified Kleinhans knew the mobile home had been destroyed before issuing the permit and knew the Johnsons could not elevate the mobile home in its ruined state. He also testified Kleinhans knew the Johnsons intended to elevate individual pieces of the mobile home, rather than elevating the entire structure. Johnson stated he had tried to incorporate as much of the old mobile home as possible into the new

structure, including the windows, some siding, and some paneling. However, he confirmed he had not elevated the entire mobile home, porch, or deck.

¶6 Kleinhaus testified the Johnsons' permit allowed them to floodproof their mobile home, porch, and deck by elevating those structures atop a new foundation. Because the Johnsons wanted to build a foundation that was larger than the existing structures' footprint, the permit allowed them to use some new materials in the construction process. However, Kleinhaus testified that, when he inspected the property on June 3, 2010, the construction exceeded the permit's scope. He stated, "[T]he screen porch was still on the ground, the deck wasn't there and the mobile home wasn't there and [the structure] was all framed in with new materials." Kleinhaus further asserted that, had he known the Johnsons would not be elevating the existing mobile home, he would not have issued the permit.

¶7 The Board voted to uphold the revocation of the Johnsons' permit. The Board made several findings of fact, including: (1) that the Johnsons applied for a land use permit to floodproof an existing, nonconforming structure; and (2) that the Johnsons "only utilized pieces of the preexisting residential mobile home and did not incorporate the screen porch or deck for floodproofing[,] thereby constructing a substantially different building." Accordingly, the Board concluded the Johnsons "used [the] permit for new construction" in violation of the permit's intent and the Pierce County Code. The Johnsons sought certiorari review, and the circuit court affirmed the Board's decision.

## DISCUSSION

¶8 On certiorari review, we review the Board's decision, not the circuit court's. *Board of Regents v. Dane Cnty. Bd. of Adj.*, 2000 WI App 211, ¶10, 238

Wis. 2d 810, 618 N.W.2d 537. Like the circuit court, we limit our review to: (1) whether the Board kept within its jurisdiction;<sup>3</sup> (2) whether it proceeded on a correct theory of law; (3) whether the evidence was such that the Board might make the decision it did; and (4) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment. *Id.* Additionally, a zoning board’s decision is accorded a presumption of correctness and validity, and a court “may not substitute its discretion for that of the board[.]” *State ex rel. Ziervogel v. Washington Cnty. Bd. of Adj.*, 2004 WI 23, ¶13, 269 Wis. 2d 549, 676 N.W.2d 401.

### **I. The Board proceeded on a correct theory of law**

¶9 The Johnsons first contend the Board erred by proceeding on an incorrect theory of law. “A board proceeds on a correct theory of law when it relies on the applicable ordinances and cases and applies them properly.” *Edward Kraemer & Sons, Inc. v. Sauk Cnty. Bd. of Adj.*, 183 Wis. 2d 1, 8-9, 515 N.W.2d 256 (1994). Here, we conclude the Board properly relied on and applied Pierce County’s floodplain zoning ordinances to affirm the revocation of the Johnsons’ permit.

¶10 The Pierce County Code prohibits the use of habitable structures in a floodplain. PIERCE COUNTY, WIS., CODE § 238-24A. The Johnsons’ mobile home, screened-in porch, and deck violated this provision, but they were legal as nonconforming uses, subject to certain restrictions. *See* PIERCE COUNTY, WIS., CODE § 238-32B. These restrictions exist because nonconforming uses are an

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<sup>3</sup> The Johnsons do not contend the Board acted outside its jurisdiction.

anomaly that Wisconsin law regards as suspect. See *Waukesha Cnty. v. Pewaukee Marina, Inc.*, 187 Wis. 2d 18, 29, 522 N.W.2d 536 (Ct. App. 1994). “[T]he spirit of zoning is to restrict a nonconforming use and to eliminate such uses as quickly as possible.” *Waukesha Cnty. v. Seitz*, 140 Wis. 2d 111, 116, 409 N.W.2d 403 (Ct. App. 1987).

¶11 The Pierce County Code requires a property owner to obtain a land use permit before undertaking any repair or floodproofing of a structure in a floodplain. See PIERCE COUNTY, WIS., CODE §§ 238-37, 238-46A. Additionally, the Code provides that “[n]o modification or addition shall be allowed to any nonconforming structure ... in a floodway area” unless the modification or addition has “been granted a permit or variance which meets all ordinance requirements.” PIERCE COUNTY, WIS., CODE § 238-33A(1). The modification or addition may not, over the life of the nonconforming structure, exceed fifty percent of the structure’s present equalized assessed value. PIERCE COUNTY, WIS., CODE § 238-32B(4).

¶12 Once the zoning administrator has issued a land use permit, any alteration to a nonconforming structure must comply with the permit’s terms. PIERCE COUNTY, WIS., CODE §§ 238-10, 240-73F. “If a use or structure does not comply with the issued land use permit ... the permit shall be terminated by the Zoning Administrator.” PIERCE COUNTY, WIS., CODE § 240-73F.

¶13 The interpretation of zoning ordinances presents a question of law that we review independently. *Fabyan v. Waukesha Cnty. Bd. of Adj.*, 2001 WI App 162, ¶12, 246 Wis. 2d 851, 632 N.W.2d 116. If the meaning of an ordinance is plain, we apply that plain meaning to the facts at hand. *Board of Regents*, 238 Wis. 2d 810, ¶14. Under the Pierce County Code, any modification of a

nonconforming structure in a floodplain, including floodproofing, requires a land use permit. *See* PIERCE COUNTY, WIS., CODE §§ 238-33A, 238-37, 238-46. If the landowners fail to comply with the permit’s terms, the permit “shall” be terminated. PIERCE COUNTY, WIS., CODE § 240-73F. Thus, the Code’s plain language required the Johnsons to obtain a land use permit before floodproofing the structures on their property and to comply strictly with the permit’s terms. The Board concluded the Johnsons exceeded the permit’s terms by constructing a new structure on their property, rather than floodproofing the existing structures. As we will discuss below, substantial evidence supported the Board’s conclusion.<sup>4</sup> *See infra*, Section II. Accordingly, the Board proceeded on a correct theory of law when it upheld the revocation of the Johnsons’ permit.

¶14 Furthermore, when interpreting ordinances, we must do so in a way that avoids absurd results. *See Tesker v. Town of Saukville*, 208 Wis. 2d 600,

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<sup>4</sup> In the argument section of their brief, the Johnsons contend the Board proceeded on an incorrect theory of law because it is “uncontroverted” that Kleinhans was aware when he issued the permit that the Johnsons’ mobile home was damaged and could not be elevated. The Johnsons do not provide a record citation for this factual assertion, in violation of WIS. STAT. RULE 809.19(1)(e). We do not consider unsupported assertions of fact. *Dieck*, 157 Wis. 2d at 148 n.9. More importantly, our review of the record shows that Kleinhans testified he would not have issued the permit had he known the Johnsons did not intend to elevate the mobile home.

To the extent the Johnsons are arguing that the Board erred by concluding the Johnsons violated the terms of the land use permit, we address that argument below and conclude substantial evidence supported the Board’s decision. *See infra*, Section II.

The Johnsons suggest, but do not explicitly state, that the Board should be equitably estopped from revoking their permit because Kleinhans knew when he issued the permit that the mobile home was ruined and could not be elevated. However, the Johnsons do not develop an equitable estoppel argument, and we will not abandon our neutrality to develop an argument for them. *See Industrial Risk Insurers v. American Eng’g Testing, Inc.*, 2009 WI App 62, ¶25, 318 Wis. 2d 148, 769 N.W.2d 82. Furthermore, estoppel may not arise against a municipality for the unauthorized acts of its officers. *Snyder v. Waukesha Cnty. Zoning Bd. of Adj.*, 74 Wis. 2d 468, 476-77, 247 N.W.2d 98 (1976). A building permit cannot confer the right to violate an ordinance, and mere statements of a zoning administrator cannot confer that right. *See id.* at 477.

611, 561 N.W.2d 338 (Ct. App. 1997). Requiring permit approval before construction may begin is a preventative measure that allows Pierce County to regulate construction in the floodplain. This preventative measure is rendered superfluous if a landowner can unilaterally exceed the scope of work authorized by a permit. A superfluous permitting process is an absurd result.

¶15 Additionally, zoning ordinances must be interpreted in light of their purpose. See *Ziervogel*, 269 Wis. 2d 549, ¶20. The Board argues its decision in this case promoted two purposes of the Pierce County floodplain zoning ordinances: preventing the perpetual existence of nonconforming structures, and advancing the public trust doctrine. See *Seitz*, 140 Wis. 2d at 116 (spirit of zoning is to eliminate nonconforming uses as quickly as possible); see also *Lake Beulah Mgmt. Dist. v. Department of Natural Res.*, 2011 WI 54, ¶18, 335 Wis. 2d 47, 799 N.W.2d 73 (under public trust doctrine, state has a duty to preserve navigable waters and the underlying beds for public use). The Johnsons do not dispute that the Board's decision served these purposes.

¶16 Instead, the Johnsons' appellate brief focuses on whether Pierce County's floodplain zoning ordinances comply with WIS. STAT. §§ 59.69 and 59.692. However, the Johnsons did not raise this argument before the Board. To preserve an issue for judicial review, a party must raise it before the administrative agency. *State v. Outagamie Cnty. Bd. of Adj.*, 2001 WI 78, ¶55, 244 Wis. 2d 613, 628 N.W.2d 376. Failure to raise an argument before the administrative agency generally constitutes a forfeiture of the right to raise that argument on appeal. *Id.* The issue before the Board was whether the Johnsons' construction exceeded the scope of their land use permit, thereby justifying the permit's revocation. The Board concluded the Johnsons had exceeded the permit's scope, and it therefore upheld the revocation.



¶17 Moreover, the Johnsons contend that ch. 238 of the Pierce County Code “directly conflicts” with WIS. STAT. §§ 59.69 and 59.692 and, consequently, the Board’s reliance on ch. 238 was improper. Yet, the Johnsons also rely on ch. 238, arguing that their construction was permissible because it complied with that chapter’s fifty-percent assessed value threshold for modifications to nonconforming structures. *See* PIERCE COUNTY, WIS., CODE § 238-32B(4). The Johnsons cannot have it both ways—they must choose whether the Board may or may not rely on ch. 238’s rules.

¶18 Additionally, the Johnsons assert the Board proceeded on an incorrect theory of law because the structure they ultimately built was “substantially similar” to the original structure on their property. However, as discussed above, the Pierce County Code requires landowners to comply with a permit’s terms. PIERCE COUNTY, WIS., CODE §§ 238-10, 240-73F. The Johnsons do not cite any legal authority for the proposition that construction that goes beyond a permit’s terms should nevertheless be allowed if the structure ultimately built is substantially similar to the original structure. We will not consider arguments unsupported by legal authority. *See State v. Pettit*, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992).

## **II. Based on the evidence before it, the Board could reasonably conclude the Johnsons violated their permit**

¶19 The Johnsons next argue the evidence did not support the Board’s decision that the Johnsons violated their permit. On certiorari review, we apply the highly deferential substantial evidence test to determine whether sufficient evidence supports the Board’s decision. *See Clark v. Waupaca Cnty. Bd. of Adj.*, 186 Wis. 2d 300, 304, 519 N.W.2d 782 (Ct. App. 1994). We must uphold the

Board's decision as 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. "Substantial evidence means credible, relevant and probative evidence upon which reasonable persons could rely to reach a decision." *Id.* The Board is the sole judge of the weight and credibility of the evidence presented. *See id.* The substantial evidence test is a "significant hurdle" for an appellant to overcome. *Id.*, ¶10.

¶20 Here, substantial evidence supports the Board's decision that the Johnsons violated their permit. Kleinhans testified the permit he issued allowed the Johnsons to floodproof the mobile home, porch, and deck on their property by elevating those structures atop a new foundation. However, Kleinhans testified that, when he inspected the property, the Johnsons had not elevated these structures, and the structure atop the new foundation was "all framed in with new materials." Kleinhans stated that "this wasn't consistent with what I permitted." He testified, "The whole idea of flood proofing is to elevate the existing development to get it out of harm[']s way. So, basically what I saw was new development."

¶21 Delbert Johnson confirmed the Johnsons had not elevated the mobile home, stating, "I never put the trailer house up because it was ruined." Johnson also confirmed that the new structure did not include the preexisting porch and deck, and he did not dispute Kleinhans' testimony that the Johnsons were actually attempting to sell the porch. Additionally, the record contained photographs of the original mobile home, porch, and deck, as well as photographs of the structure the Johnsons built atop the new concrete foundation. Based on these photographs,

along with Kleinhans' and Johnson's testimony, the Board could reasonably conclude the Johnsons exceeded the permit's scope.

¶22 The Johnsons contend the Board improperly disregarded Delbert Johnson's testimony that he told Kleinhans the existing structures could not be elevated because of flood damage and the Johnsons instead planned to floodproof salvageable pieces of the structures. However, Kleinhans testified he would not have issued the permit had he known the Johnsons did not plan to elevate the existing structures. The Board apparently found Kleinhans' testimony more credible than Johnson's. The Board, not this court, is the proper judge of witnesses' credibility. *See id.*, ¶11.

¶23 The Johnsons also argue the Board could not rely on Kleinhans' testimony because he was never sworn in. *See* WIS. STAT. § 906.03 (Before testifying, every witness must declare by oath or affirmation that he or she will testify truthfully.). The rules of evidence do not apply in administrative proceedings. *See State ex rel. Hodge v. Town of Turtle Lake*, 180 Wis. 2d 62, 73-74, 508 N.W.2d 603 (1993); *Bowen v. Labor & Indus. Review Comm'n*, 2007 WI App 45, ¶17 n.5, 299 Wis. 2d 800, 730 N.W.2d 164. The Board could properly rely on Kleinhans' testimony.

¶24 Moreover, even without Kleinhans' testimony, there was evidence supporting the Board's conclusion that the Johnsons violated their permit. The record before the Board contained a letter Kleinhans sent to the Johnsons on June 3, 2010, in which Kleinhans wrote:

On April 19, 2010, this office issued a land use permit to you for floodproofing the existing improvements located on your property in the Mississippi River floodway. Your land use permit ... was issued after a great deal of review and discussion for what I believed you understood could

elevate the existing deck, screen porch and mobile home and contain them in a new shell above a floodproofed footing. Today I observed you have far exceeded the permit restrictions .... You indicated you intend to sell the screen porch that is sitting on the ground, and the improvements inside the new structure do not even vaguely resemble a manufactured home or the preexisting deck.

Kleinhans' testimony at the hearing largely duplicated the contents of this letter.

¶25 The record also contained the Johnsons' permit application, which included a plot plan that depicted the location and dimensions of the existing structures, as well as the proposed new construction. The plot plan states, "See plans for elevating existing building." The permit application also contained a hand-drawn plan for the project that clearly depicted the mobile home, porch, and deck as being elevated and surrounded with some new construction. However, both Delbert Johnson's testimony and the photographs in the record confirmed that the mobile home, porch, and deck were never elevated. Thus, the Board could reasonably conclude the Johnsons did not comply with the permit's terms.

¶26 The Johnsons next argue the materials list attached to their permit application proves that Kleinhans authorized new construction. At the hearing, Kleinhans admitted that the permit allowed some new construction because the new foundation's footprint was slightly larger than that of the existing structures. Before issuing the permit, Kleinhans had to determine whether this new construction was permissible by calculating whether it satisfied the fifty-percent valuation threshold set forth in PIERCE COUNTY, WIS., CODE § 238-32B(4). Thus, the materials list Kleinhans prepared included one column listing "floodproofing costs," another column listing "new construction" costs, and a comparison of the new construction costs with fifty percent of the existing structures' assessed value. The materials list is entitled, "Staff analysis for floodproofing costs."

Accordingly, while the materials list shows that the permit authorized some new construction, it also shows that the primary purpose of the permit was to allow floodproofing of the existing structures. The materials list does not prove that the permit allowed the Johnsons to construct a new structure entirely without elevating the existing mobile home, porch, and deck. In light of the other evidence, the list does not undermine the Board’s conclusion that the Johnsons violated the terms of the permit.

### **III. The Board’s decision was not arbitrary, oppressive, or unreasonable**

¶27 Finally, the Johnsons contend the Board’s decision was arbitrary, oppressive, and unreasonable. A decision is arbitrary if it is “unreasonable or without a rational basis.” *Snyder v. Waukesha Cnty. Zoning Bd. of Adj.*, 74 Wis. 2d 468, 476, 247 N.W.2d 98 (1976). In other words, an arbitrary decision is “an unconsidered, wilful and irrational choice of conduct and not the result of the ‘winnowing and sifting’ process.” *Donaldson v. Board of Comm’rs*, 2004 WI 67, ¶63, 272 Wis. 2d 146, 680 N.W.2d 762 (quoting *Olson v. Rothwell*, 28 Wis. 2d 233, 239, 137 N.W.2d 86 (1965)).

¶28 The Johnsons first argue the Board’s decision was arbitrary because it was based on an incorrect theory of law and was unsupported by the evidence. We have already rejected these arguments. *See supra*, Sections I and II. Similarly, the Johnsons argue that “it would be unreasonable and oppressive to not allow [the Johnsons] to complete their construction, which is in compliance with applicable regulations and has been carried out in accordance with their permit and dialogue with the Zoning Administrator.” Again, we have already rejected the Johnsons’ argument that their construction complied with the terms of the permit. *See supra*, Section II.

¶29 The Johnsons next contend the Board’s decision was arbitrary because it “decimates” their ability to use their property and renders the property “virtually worthless,” even though their property tax assessment recently increased. The Johnsons do not provide any evidentiary support for these assertions. Furthermore, as the Board points out, the Johnsons never argued before the Board that their property had become “virtually worthless” or that their property taxes had increased. *See Outagamie Cnty. Bd. of Adj.*, 244 Wis. 2d 613, ¶55 (argument generally not preserved for judicial review unless raised before the board). Additionally, even assuming the Johnsons’ property is now virtually worthless, the Johnsons do not explain why that fact should allow them to exceed the scope of construction authorized by their permit.

¶30 The record shows that the Board appropriately considered the evidence before it, and its decision was not “an unconsidered, wilful and irrational choice of conduct[.]” *See Donaldson*, 272 Wis. 2d 146, ¶63. The Board heard testimony from both Kleinhans and Delbert Johnson and also considered documentary evidence. The Board then issued a written decision, which included findings of fact and conclusions of law. The Board specifically found that the Johnsons had not elevated the existing mobile home, porch, or deck and had instead constructed “a substantially different building.” Accordingly, the Board determined the Johnsons had exceeded the scope of their permit, which had been issued “for the floodproofing of an existing nonconforming ... structure[.]” The Board’s conclusion was reasonable and did not lack a rational basis. *See Snyder*, 74 Wis. 2d at 476.

*By the Court.*—Judgment affirmed.

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

