STATE OF WISCONSIN | CIRCUIT COURT BRANCH 1 | DANE COUNTY

DEAN JOHNSON and
SIGNE GRONBECK-JOHNSON,

Petitioners,

v.

DANE COUNTY BOARD OF SUPERVISORS,
DANE COUNTY ZLR COMMITTEE,
DANE COUNTY,
TOWN BOARD OF ALBION,
YAHARA MATERIALS INC.,
and
CRAZY ACRES INC.,

Respondents.

Decision and Order
Case No. 14-CV-2917

INTRODUCTION

Petitioners Dean Johnson and Signe Gronbeck-Johnson ("the Johnsons") are property owners seeking judicial review of the grant of a conditional use permit (CUP) to allow mineral extraction on a neighboring plot of land in the Town of Albion in Dane County, Wisconsin. The Johnsons operate a horse-breeding business and participate in other permitted agricultural uses of their property. Respondent Yahara Materials ("Yahara"), a quarry operator, applied to Dane County for CUP #2260 on behalf of landowner Crazy Acres, Inc. Petitioners wished to challenge approval of CUP #2260 on the basis that the quarry would interfere with the use and enjoyment of their property.

After the Town of Albion ("the Town") and the Dane County Zoning and Land Regulation Committee (ZLR) approved the CUP, petitioners appealed to the Dane County Board of Supervisors ("the Board"), which affirmed. Petitioners then brought this certiorari

action claiming violations of due process and fair play, and that the Town's and County's decision-making was arbitrary and capricious, and not reasonable based on the evidence before them.

FACTS

On or about December 15, 2013, Crazy Acres, Inc. by its named agent, Yahara Materials, Inc., submitted a Dane County Conditional Use Permit Application to build a quarry for mineral extraction "west of 983 STH 73." *See* Dane County Record, "Dane County Conditional Use Permit Application," Dec. 16, 2013. This parcel adjoins the land where the Johnsons reside. Aff. of Dean Johnson in Supp. of Mot. for Summ. J. ¶¶ 3-5, Jan. 11, 2016; Aff. of Signe Gronbeck-Johnson in Supp. of Mot. for Summ. J. ¶¶ 3, 6-7, Jan. 4, 2016. The existing zoning district was A-1 Exclusive Agriculture. *See* Dane County Record, "Dane County Planning & Development Conditional Use Application," Dec. 12, 2013. Petitioners engage in horse-breeding and other agricultural business on their property. Petition for Writ of Certiorari, ¶¶1-2, Oct. 20, 2014. Yahara failed to label zoning district boundaries in the immediate area, including neighboring properties as part of its application site plan, however. *See* Dane County Record, "Dane County Planning & Development Conditional Use Application," Dec. 12, 2013; "Dane County Conditional Use Permit Application," Dec. 16, 2013; Hunt Aff. ¶ 6, Ex. B at 271:15-22.

On January 7, 2014, the Town of Albion held a Town Planning Commission Meeting to discuss the request for a conditional use. Hunt Aff. ¶ 6, Ex. B. at 2:2-5. Notice of the meeting was published in the town paper. Hunt Aff. ¶ 6, Ex. B. at 128:25. Yahara also sent letters notifying neighbors within 500 feet of the proposed quarry of the meeting on December 23, 2013. *See, e.g.,* Hunt Aff. ¶ 7, Ex. C. However, the December 23 letters did not include the date

of the hearing, only a time. *Id.* On December 27, 2013, Yahara sent correction letters, but these were not sent by certified mail. Hunt Aff. ¶ 8, Ex. D, ¶ 11, Ex. G at 26:2-4.

Only one person who was not on the Town Zoning Committee or Town Board was present at the January 7 meeting—Tim Geoghegan, a representative of Yahara. Hunt Aff. ¶ 6, Ex. B at 2:12, ¶ 11, Ex. G at 28:28-29:11. The Town Planning Commission engaged in a back-and-forth question-and-answer session with Mr. Geoghegan, eliciting extensive information about the proposed conditional use. Hunt Aff. ¶ 6, Ex. B at 2:2-68:21. Afterwards, the Town Board voted unanimously to approve the CUP. Hunt Aff. ¶ 6, Ex. B at 68:23-69:11, ¶ 9, Ex. E. No one else was present to offer rebuttal or public comment. On March 4, Dean Johnson attended a Town of Albion Board meeting to ask the Town to reconsider its decision and to register complaint that he and other neighbors had not received timely notice of the January 7 meeting. Hunt Aff. ¶ 6, Ex. B at 122:8-10, 122:13-23, 125:19-126:4, 128:17-130:9. The Town Board replied that it had made its decision and would not reconsider it. Hunt Aff. ¶ 6, Ex. B at 122:11-12, 130:19-21.

On March 11, the Dane County Zoning and Land Regulation Committee held a work meeting, during which the committee addressed CUP #2260. Hunt Aff. ¶ 10, Ex. F at 4. In response to public opposition and complaints about the untimely notice at the Town level, the ZLR unanimously voted to postpone action on CUP #2260 until the "Town of Albion Board [had] an opportunity to review the prepared staff conditions and evaluate public concerns." Hunt Aff. ¶ 10, Ex. F at 4, ¶ 11, Ex. G at 35:34-36:3. Committee member Bollig's motion explicitly intended for the "Town to review this again and allow the residents to speak at their meeting." Hunt Aff. ¶ 11, Ex. G at 36:3.

On March 24, the Town Board of Albion held a special meeting to review CUP #2260. Hunt Aff. ¶ 12, Ex. H. Seventy-three concerned citizens attended. *Id.* at 2. Speakers were limited to three minutes and told at the outset to "try to address new issues, not stuff that has already been talked about." Hunt Aff. ¶ 6, Ex. B at 137:25-138:4. The Town Board once again voted unanimously to approve the CUP. Hunt Aff. ¶ 13, Ex. I. In its Town Board Action Report of March 25, 2014, the Board checked the box indicating that CUP #2260 had been approved, but it also checked the box indicating that the application had not satisfied the conditions of the Dane County Code of Ordinances ("DCCO") § 10.123(3)(a); then, on the next page, "Findings of Fact for *Denied* Conditional Use Permits," the Town checked the boxes indicating that all of the conditions were satisfied. Hunt Aff. ¶ 13 Ex. I (emphasis added). The Town also added as a condition that Yahara had to "draw in an extraction line for the materials and label all adjoining properties (neighbors) on the map." *Id.* On May 13, the ZLR once again took up CUP #2260. It approved the application with twenty-three conditions. Hunt Aff. ¶ 14, Ex. J at 4.

On or around July 11, petitioners filed an appeal to the Dane County Board of Supervisors. Hunt Aff. ¶ 16, Ex. L. The Board held a hearing on September 18, 2014. Hunt Aff. ¶ 17, Ex. M at 7. Out of thirty-seven supervisors, twenty-one voted in favor of the appeal and sixteen voted against. Petitioners needed a three-quarter vote of those present to overturn approval of the application, however. *Id.* at 10.Thus, despite garnering over half the votes, petitioners could not meet the three-quarter threshold and the CUP's approval stood. *Id.* at 10-11. Petitioners filed for certiorari review on October 20, 2014.

STANDARD OF REVIEW

Certiorari is a mechanism by which a court may test the validity of a decision rendered by a municipality, an administrative agency, or an inferior tribunal. *Ottman v. Town of*

Primrose, 2011 WI 18, ¶ 34, 332 Wis. 2d 3, 22, 796 N.W.2d 411, 420. A reviewing court is limited to determining whether the municipality kept within its jurisdiction, whether it acted according to law, whether the action was arbitrary, oppressive or unreasonable and represented its will and not its judgment, and whether the evidence was such that it might reasonably make the order or determination in question. *State ex rel. Meeks v. Gagnon*, 95 Wis. 2d 115, 119, 289 N.W.2d 357, 361 (Ct. App. 1980) (internal citations omitted). Whether the municipality acted according to law includes the question whether due process of law was afforded. *State ex rel. Ball v. McPhee*, 6 Wis.2d 190, 199, 94 N.W.2d 711 (1959). Judicial review also looks to whether the municipality has followed its own rules governing the conduct of its hearings. *Meeks*, 95 Wis. 2d at 119 (citing *Vitarelli v. Seaton*, 359 U.S. 535, 539-40, 79 S.Ct. 968, 972-73, 3 L.Ed.2d 1012 (1959)).

On certiorari review, the circuit court does not take evidence on the merits of the case and the scope of review is limited to the record presented to the body whose decision is being reviewed. *State ex rel. Brookside Poultry Farms, Inc. v. Jefferson Cnty. Bd. of Adjustment*, 131 Wis. 2d 101, 119, 388 N.W.2d 593, 600 (1986). A petitioner in certiorari has the burden of showing the court that the action complained of was not only erroneous, but that it was actually or probably prejudicial to a material degree, and why and wherein. *State ex rel. Gregersen v. Bd. of Review of Town of Lincoln*, 5 Wis. 2d 28, 36, 92 N.W.2d 236, 241 (1958). The court is hesitant to interfere with administrative determinations, thus an administrative body's findings may not be disturbed if any reasonable view of the evidence sustains them. *State ex rel. Morehouse v. Hunt*, 235 Wis. 358, 367, 291 N.W. 745, 749 (1940). The court may not substitute its discretion for that committed to an agency by the legislature. *Snyder v. Waukesha Cnty. Zoning Bd. of Adjustment*, 74 Wis. 2d 468, 476, 247 N.W.2d 98, 103 (1976).

DISCUSSION

Petitioners assert that the grant of CUP #2260 was the result of consequential violations of due process and fair play, and that the Board's decision to affirm CUP #2260 was ultimately arbitrary and capricious. Respondents argue that petitioners received adequate due process, and that the Board's decision was reasonable and based on substantial evidence in the record. Before discussing the merits of these claims, however, I will address preliminary issues the respondents raised in their briefs about the court's subject matter jurisdiction, statutory authority, and the parties.

I. The action was timely commenced and the court has subject matter jurisdiction.

First, respondent Town Board of Albion argues (over a year-and-a-half into this litigation) that the court does not have subject matter jurisdiction over the Petition for Certiorari Review because it claims petitioners did not file the action timely. Petitioners filed their "petition" on October 20, 2014—within the thirty-day period from the Board's final determination on September 18, 2014. This petition served the same purpose as a complaint to notice the other parties of claims for relief. *See State ex rel. Dep't of Nat. Res. v. Walworth Cty. Bd. of Adjustment,* 170 Wis. 2d 406, 417, 489 N.W.2d 631, 635 (Ct. App. 1992). In accord with Wis. Stat. § 801.02(5), petitioners engaged in the same "complaint and order" procedure, which the Court of Appeals recently upheld in *Koenig v. Pierce County Department of Human Services*. 2016 WI App 23, ¶ 26, 367 Wis. 2d 633, 650, 877 N.W.2d 632, 640. The court signed an order permitting petitioners to serve their Petition and the Order on Respondents pursuant to section 801.02(5) by December 19, 2015, and they complied. This was sufficient to commence the action timely and the court does have subject matter jurisdiction.

II. The County's delegation of zoning authority to the Town is constitutionally valid.

Second, respondent Yahara Materials argues that the Town's actions are irrelevant in this certiorari review because the County cannot give towns veto power over conditional use permits, as an impermissible delegation of its statutorily-granted authority. Yahara claims, "Albion's approval, or even veto, of a conditional use application . . . cannot be decisive, notwithstanding Dane County's Zoning Ordinance, because controlling state law only authorizes counties to approve or reject conditional uses." Resp. Br. of Yahara Materials on Certiorari Review, 3, April 21, 2016 (emphasis added). Yahara continues, "[n]o such authority subsides in Wis. Stat. § 59.69, or elsewhere, for such a delegation of authority." *Id.* at 4.

To the extent that Yahara is attempting to make a constitutional challenge to DCCO § 10.255, this issue was not a focus of the litigation and the parties did not brief it in detail. But, Yahara's reading of and conclusions about Wisconsin law on this topic are incorrect. Wisconsin has a strong tradition of home rule established in article XI, section 3 of our Constitution:

> (1) Cities and villages organized pursuant to state law may determine their local affairs and government, subject only to this constitution and to such enactments of the legislature of statewide concern as with uniformity shall affect every city or every village. The method of such determination shall be prescribed by the legislature.

Yahara cites no Wisconsin law that limits a county's ability to delegate decision-making authority on zoning matters. In fact, section § 60.23, Stats., granting miscellaneous powers to Town Boards, explicitly states:

> The town board may:
> ***
> **(5) Cooperation in county planning.** Cooperate with the county in rural planning under ss. 27.019, 59.54(4)and (4m) and 59.69.

And, under Wis. Stat. § 59.69(2)(c), "the county zoning agency may adopt such rules and regulations governing its procedure as it considers necessary or advisable." Further, a county

zoning ordinance under section 59.69 "shall not be effective in any town until it has been approved by the town board." Wis. Stat. § 59.69(5)(c).

In short, the Wisconsin Constitution and legislature have codified a preference for local rule and respondents have not pointed to any state-wide legislation limiting counties' ability to delegate zoning authority to towns. Thus, the Town's approval of CUP #2260 was a valid exercise of authority, based on the Dane County Ordinances and state law, and the Town's decision is relevant to this certiorari review.

III. The Town's approval was an initial determination for the purposes of certiorari review, and the Town is properly a party.

Third, respondent Town Board of Albion argues that the Town is not properly joined in the certiorari review and should be dismissed as a party because Dane County made both the initial and final determinations in this case, not the Town. The Town asserts that though it has the power essentially to "veto" a CUP under the ordinance, the Town's approval is merely a recommendation to the ZLR to issue the CUP. Resp't Town Board of Albion's Br. in Opp'n to Pet'rs' Certiorari Br., 11, April 19, 2016. Because the ordinance states that failure to act on the part of the Town constitutes a default approval of a CUP, they argue that only "a denial [by the town], but not an approval is appealable to the County Board." *Id.* at 12; *see also* DCCO § 10.255(c)(2). I disagree. The plain language of the ordinance is to the contrary.

Section 10.55(2)(b), DCCO, gives authority to the county zoning committee to grant conditional uses, but states in relevant part, "[n]o permit shall be granted when the zoning committee or applicable town board determines that the standards are not met." The ordinance continues:

> **(c)** *Town/zoning committee action.* **1.** The town board of the town where a conditional use is proposed shall be given notice and opportunity to approve or disapprove a conditional use. . . .

> **2.** Either the town board or the zoning committee may deny an application for conditional use permit. If the town board action is denial no further action by the zoning committee is required. The zoning committee may approve or deny a conditional use permit without town action if the town board fails to act within the time period set forth in sub. 1. above. All such decisions may be appealed to the county board under sub. (2)(j).
> ***
> **(j)** *Appeal.* Any person aggrieved by the grant or denial of a conditional use permit . . . may appeal the decision of the town board or zoning committee to the county board.

DCCO § 10.255(2)(c)(1)-(2), (2)(j) (emphasis added). A plain reading of the ordinance simply does not support the conclusion that only a town's denial of a CUP is appealable. Granted, if the Town denied the CUP, it would never make it to the ZLR for further review, but the language of the ordinance in no way forestalls review of the Town's approval at the County Board level; neither does the fact that inaction on the part of the Town constitutes a default approval. That is only the case *if the Town chooses not to act.* In this case, the Town did take action and conducted public hearings on the CUP, which became a part of the record. Both legally and factually, the Town's approval of CUP #2260 was a predicate for the County Board's final determination; thus the Town's approval was an initial determination for the purposes of certiorari review.

IV. Certiorari Review

Petitioners complain that respondents did not act according to law, that their decision-making was arbitrary and capricious, and that the approval of CUP #2260 was not a reasonable determination based on the evidence before the Board. Ultimately, it is the Board's final determination that is under review in this case. *Cohn v. Town of Randall*, 2001 WI App 176, ¶ 24, 247 Wis. 2d 118, 133, 633 N.W.2d 674, 682 (quoting *State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n,* 54 Wis. 2d 535, 539, 196 N.W.2d 742 (1972) ("Certiorari lies only to review a final determination.")). It is difficult, however, to formulate a straightforward view of

the record that was before the Board. The record is confusing, disorganized, and potentially incomplete.

Nevertheless, petitioners have adequately demonstrated that a series of procedural defects plagued their efforts to contest the application for CUP # 2260—particularly at the Town level—and that these errors frustrated their right to be heard at a meaningful time and in a meaningful way in defense of their own property interests. These defects began at a critical point, when the Town had the opportunity to veto the permit application, but it denied petitioners a fair opportunity to be heard. Therefore, the later stages of the permitting process, and even the Board's and this court's review, rely upon and are tainted by a flawed procedure and evidentiary record.

First, Yahara's initial application for CUP #2260, which the Town initially approved on January 7, 2014, was incomplete. The Dane County Zoning Ordinance requires as part of an application for conditional use that all zoning district boundaries in the immediate area be labeled as part of the site plan, and that "[a]ll districts on the CUP property and on all neighboring properties must be clearly labeled." § 10.255(2)(e)(1)(f) (emphasis added). In *Weber v. Town of Saukville*, the court held that an application must be complete at the time that notice is given of the last public hearing, unless an ordinance expressly permits a later submission of information. 209 Wis. 2d 214, 240, 562 N.W.2d 412, 422 (1997). Yahara did not satisfy this requirement and no party has argued that such an ordinance applies in this case.

At the March 24, 2014 Special Meeting of the Town Board, the board discussed this deficiency and added a condition to require Yahara to label neighboring properties on its site plan. Hunt Aff. ¶ 6, Ex. B at 271:5-24. Section 10.255(2)(b), DCCO, states in part, however:

> Prior to granting or denying a conditional use, the zoning committee shall make findings of fact based on evidence presented and issue a determination whether

> the prescribed standards are met. No permit shall be granted when the zoning committee or applicable town board determines that the standards are not met.

(emphasis added). One of the "standards" requires a finding "that the uses, values and enjoyment of other property in the neighborhood for purposes already permitted shall be in no foreseeable manner substantially impaired or diminished by the establishment, maintenance or operation of the conditional use." DCCO § 10.255(2)(h)(2). While town board members claimed to "know the zoning" of the surrounding area, without the neighboring properties being labeled on the site plan, the town board could not have made the requisite findings *based on the evidence in the record* at both its January 7 and March 24, 2014 meetings. Hunt Aff. ¶ 6, Ex. B at 232:13-233:3. Thus, the board acted outside of its authority in granting the permit.

Second, the Application for Conditional Use Permit stated that the proposed site for the quarry is in an A-1 exclusive agricultural zoning district. Pursuant to DCCO § 10.123(3)(a), a non-metallic mining extraction operation must meet the definition of an agricultural accessory use before a conditional use permit may be granted for it in this zoning district. This means that in addition to the requirements of § 10.255(2)(h), the zoning committee had to find that standards (a)-(e) under DCCO § 10.123(5) were met before approving the CUP.

In its somewhat confusing Town Board Action Report of March 25, 2014, the Town stated that all standards under DCCO § 10.123(3)(a) had not been satisfied on the first page, but then marked that they were all satisfied on the second page. Hunt Aff. ¶13, Ex. I. But, neither the Town nor the County made specific reference to the DCCO § 10.123(5)(a)-(e) standards in the record. In *Keen v. Dane County Board of Supervisors*, the court of appeals held that "a record devoid of any reference to the agriculture district factors under DCCO § 10.123(5) does not satisfy the requirements of DCO § 10.123(3)(a), and such findings may not be implied because it would "eviscerate[ ] the special consideration that [the town] opted for when it

became an agriculture district." 2004 WI App 26, ¶¶ 6, 9, 269 Wis. 2d 488, 494, 676 N.W.2d 154, 158. Similarly, here, the Town's and County's failure to refer to these standards throughout the record evidences a lack of consideration for the Town of Albion's particular zoning plan and the neighboring residents', including petitioners', interest in preserving the agricultural use and character of their property. The application should not have been granted without either the Town or the County making specific findings that DCCO § 10.123(5) standards had been satisfied.

Third, there is some general uncertainty about whether the record that was before the ZLR, the County Board, and which is currently before this court is, in fact, complete. Petitioners allege that they and other neighbors submitted additional evidence and documentation at various stages of the application process, which were never incorporated into the record by Town or County officials. Gronbeck-Johnson Aff. ¶ 62. During a January 5, 2016, hearing before me, Assistant Corporation Counsel Gault acknowledged, "my understanding is I think the zoning Administrator was exercising some discretion as to what was going into the official record before the County Board." Hr'g. Tr. Jan. 5, 2016, at 10:7-11. Likewise, during an appearance before the County ZLR on May 13, 2014, Zoning Administrator Lane summarized conclusions about the prospects for wetland protection contained in a letter from Yahara's environmental consultant, Stantec, which he had reviewed. Hunt. Aff. ¶ 15, Ex. K at 1:15-39. The first page of the letter became a part of the record—but for some reason, the second page was never submitted. This puzzling omission coupled with the knowledge that Lane was exercising discretion in compiling the record on appeal bolsters concerns about how and which information was presented to the Board.

This knowledge also presents an additional level of difficulty for making relevant determinations on the basis of this record. I provided petitioners an opportunity to supplement the record, which respondents did not oppose. The Wisconsin Supreme Court has held, however, that the concept of fair play in administrative proceedings includes the "right to present competent evidence." *Osterhues v. Bd. of Adjustment for Washburn Cty,* 2005 WI 92, ¶ 32, 282 Wis. 2d 228, 244, 698 N.W.2d 701, 708. And, in *State ex rel. Lomax v. Leik*, the court of appeals discussed that minimal due process and fair play standards require that "some form of comprehensible and adequate record should be kept and provided for purposes of review." 154 Wis. 2d 735, 740, 454 N.W.2d 18, 20–21 (Ct. App. 1990). The court elaborated:

> if an agency on certiorari fails to return a record sufficient to demonstrate that the proceedings before it were procedurally proper, we may vacate the agency's decision. We would otherwise invite an agency subject to certiorari review to evade judicial review of their procedural violations. Evasion would be simple. The agency could hide its procedural violations by failing to develop the record regarding them.

Id. That is a concern. I do not need to make a finding about the sufficiency of the record because I conclude that other procedural violations tainted the approval of CUP #2260. However, I believe there remains a question of whether petitioners were able to present all of their relevant evidence before the County Board.

Fourth, the Town violated petitioners' due process rights when it failed to provide them adequate notice and a meaningful opportunity to be heard on the issue of how CUP #2260 would affect their use and enjoyment of their property. *See Wilke v. City of Appleton*, 197 Wis. 2d 717, 726–28, 541 N.W.2d 198, 202 (Ct. App. 1995) ("It is clear that due process is satisfied if the statutory procedures provide an opportunity to be heard in court at a *meaningful time* and in a *meaningful manner*.") (internal citations omitted) (emphasis added). In this case, petitioners missed a pivotal opportunity to make arguments against CUP #2260 prior to its

approval by the Town because of deficient notice, and the Town failed to provide a fair and impartial review even after the County instructed it to review its determination.

The Town did not adhere to its own notice requirements when it held Zoning Committee and Town Board meetings, and voted to approve CUP #2260 on January 7, 2014. A municipality's compliance with rules it has promulgated is a factor in determining whether there was compliance with due process. *State ex rel. Riley v. Dep't of Health & Soc. Services*, 151 Wis. 2d 618, 623, 445 N.W.2d 693 (Ct. App. 1989). During the County Board's September 18, 2014 hearing to review CUP #2260, Zoning Administrator Roger Lane testified that, "[t]he Town of Albion has a unique ordinance. Everybody within a half a mile of any rezone needs to be notified." Hunt Aff. ¶ 18, Ex. N at 53:19-37. The record establishes that the first attempt at notifying the neighbors, a December 23, 2013 letter, failed to include the date of the meeting. Likewise, the second attempt, a December 27, 2013 letter, was not sent by certified mail, and petitioners claimed that they and other neighbors never received it.

On January 7, the Town Board granted CUP #2260 without any public comment. Yahara's representative essentially had the floor to offer as much information about the proposed use as possible without challenge. At the March 11 ZLR meeting, the ZLR committee members questioned members of the Town Board about this unusual occurrence. The Town Board members indicated it was usual practice to notify neighboring residents by letter and elaborated that the Town's zoning committee meetings typically have around twelve non-committee/non-board members in attendance. Hunt Aff. ¶ 11, Ex. G at 23:9-33, 26:8-12, 28:1-29:21. On January 7, there was only one other person in attendance—Yahara's representative. This fact was concerning enough to the ZLR to postpone action on CUP #2260 until the Town had reviewed its initial determination:

> BOLLIG: There seem to be a number of unanswered questions and concerns revolving around the issue, you know, related to notices and not being able to attend the town meeting or the town planning board meetings. And I have this letter here from Tim Zick where he had three pages of concerns. And being in favor of local control, town control, in this case, I'm going to move that we postpone this back to the town and move this back to the town for their further action.
>
> MILES: Okay, it's a motion to postpone and request the town to . . .
>
> BOLLIG: Town to review this again and allow the residents to speak at their meeting.
>
> MILES: Okay. So for the opportunity for the town to hold another meeting on it if they so choose.
>
> BOLLIG: Right. I mean, by the town officials here, by their own admission, their town board members would be interested to hear what's been said tonight.

Hunt Aff. ¶ 11, Ex. G at 35:34-39, 39:9.

Rather than simply adjourn and await the Town's response, however, the ZLR also added fifteen new conditions to the CUP to be sent back for the Town's consideration. Hunt Aff. ¶ 6, Ex. B at 182:11-21. This confused matters, such that the Town Board apparently misunderstood the County's purpose in requesting a review of CUP #2260. At the Town Board's March 24 Special Meeting, the public was immediately instructed only to comment on "new issues, not stuff that has already been talked about." *Id.* at 137:24-138:4. The Town Board intended only to address the County's added conditions, not to reconsider the entire CUP:

> UNIDENTIFIED: The board – this is not a public hearing. This is a – to reconsider this proposal under the county's added conditions. This went past us, went to the county board, county board sent it back to us to say *We've added 18 conditions or actually 15, three of our own were already on it.* They said *Okay. Readdress it with all of our conditions.* And that's what we're reviewing at this meeting. But we did choose to let the public speak.

Id. at 182:11-21 (underlining added). Thus, even though the County referred CUP #2260 back to the Town for review, and the public had an opportunity to comment, the Town declined to

take public opinion into account to reconsider its approval of CUP #2260. The Town Board only considered additional conditions, but did not give the public an opportunity to speak against the CUP's approval.

Fifth, in addition to defective notice at the town level, the record indicates that some members of the Town Board may have created an impermissibly high risk of bias while assessing CUP #2260. In *Marris v. Cedarburg*, the court held that when a member of a municipal board prejudges the facts or the application of the law to a zoning decision, a petitioner's right to an impartial decision-maker has been violated. 176 Wis. 2d 14, 26, 498 N.W. 2d 842 (1993). After the Town approved CUP #2260 without public comment on January 7, the Town Board refused to consider alternative views. On March 4, Dean Johnson attended a town meeting to request reconsideration of the CUP. A town board member replied, "I think that decision has already been made." Hunt Aff. ¶ 6, Ex. B at 122:8-12. Johnson pled his case and a board member again replied, "[t]he board has made the decision. We're not changing our mind. Thank you." *Id.* at 130:19-21.

Certainly, at the March 24 Special Meeting of the Town Board, there was an opportunity to cure the procedural defects of the January 7 meeting; instead, the Town Board said it would allow public comment, but "it [was] not a public hearing"; the County had moved on to the next step and the Town would not be reconsidering its initial approval. *Id.* at 182:11-21. Thus, the Town did not heed the County's instruction for the Town to "hear" public comment and review its initial determination. The Town clearly indicated it had predetermined the outcome and would not reconsider approval of the CUP based on any evidence or comments the public might present—it would only take input on the County's additional proposed conditions.

When the County Board considered petitioners' appeal of CUP #2260, several supervisors expressed their concern, based on the record before them, that the Town had not given any consideration to public opinion. For example, Supervisor Stubbs commented on how many residents participated at the County level to register their disagreement with the Town's approval of the CUP:

> Look at the number of residents that came out tonight to speak and actually feel that they have an opportunity to talk to us as county board supervisors. And in fact, their opinion is valued. I must say that I'm a bit concerned about the Town of Albion, in fact, reading the memo that we received where, in fact, it didn't even seem as if, though, they considered or even valued their vote.

Hunt Aff. ¶ 18, Ex. N at 77: 9-13.

Not only did the Town seem to ignore residents' input, representatives of the Town also attempted to prejudice the views of County zoning officials who would likely testify before the County Board during pendency of the appeal. Supervisor De Felice highlighted certain comments that a Town Board representative made to the Zoning Administrator:

> You know, I'd like to say also that I don't think this was handled very well by some of the officials – the local officials. You know, as part of the file here, we got an email to Roger Lane from Julie Hanwell, and she's on the Albion town board – Albion planning commission. And she wrote an email to Mr. Lane. It says the Town of Albion unanimously feels that this [appeal] is ridiculous and a waste of the county board's time. And furthermore, she goes on to say, we made this decision knowing all taxpayers in our township would benefit financially.
>
> Well, you know, I think to call this process ridiculous is ridiculous. If you're an elected official, you've got to hear all the testimony and weigh it. You don't just dismiss it. I mean, there were four lines in this email. She thought it was ridiculous. Why? Why is it ridiculous? Nothing was mentioned.
>
> And then she bases it on financial consideration. Well, here again is the box we're in. Because it makes financial sense – you know, it's going to provide some taxpayer money – property taxpayer money to the town – it makes perfect sense.
>
> So there isn't enough emphasis on what this does to people that live right around here. People have a business there. There are – these are taxpayers, too, that get impacted by this.

Id. at 70:34-71:11.

Based on the foregoing, I conclude that the Town Board of Albion prejudged the facts and application of law and declined to provide a fair opportunity for petitioners to be heard at a meaningful time. The complication, of course, is that the CUP did proceed through subsequent ZLR meetings and the County Board appeal, where the substantive zoning issues were thoroughly addressed. But this thorough review of the substantive considerations by the County ZLR did not cure the earlier procedural defects. By the time of the County Board's September 18 hearing on appeal, the Town had approved the CUP unanimously twice. This was discussed at the hearing for the appeal. *Id.* at 49:11-24. Furthermore, Yahara presented very little rebuttal evidence over the course of the County Board's September 18 hearing, which several county board members also remarked upon. With over half of the County Board voting in favor of the appeal, the dearth of testimony from Yahara, and the overlooked evidentiary and procedural gaps in the record, I cannot conclude that the County Board's final determination was reasonably based on the substantial evidence in the record.

The appeal required a three-quarters vote of thirty-seven individuals at the County Board level to overturn what was initially a unanimous decision of four Town Board Members. In *Marris v. Cedarburg*, the court emphasized the important interests at stake in zoning decisions and the danger of failing to scrutinize local decision-makers for signs of impermissible bias:

> In determining whether Marris was afforded due process and fair play, we recognize that zoning decisions implicate important private and public interests; they significantly affect individual property ownership rights as well as community interests in the use and enjoyment of land. Furthermore, zoning decisions are especially vulnerable to problems of bias and conflicts of interest because of the localized nature of the decisions, the fact that members of zoning boards are drawn from the immediate geographical area, and the adjudicative, legislative and political nature of the zoning process. Since biases may distort judgment, impartial decision-makers are needed to ensure both sound fact-finding

> and rational decision-making as well as to ensure public confidence in the decision-making process.

176 Wis. 2d at 25–26. Had the County ZLR remanded CUP #2260 back to the Town in its entirety, without added conditions, and with instructions to give all parties a fair opportunity to speak, perhaps the deficiencies of the January 7 meeting would have been cured. But, the totality of the record shows that the County ZLR tacitly accepted the Town's initial approval, and petitioners were never given a fair opportunity to challenge CUP #2260 at the town level, where it could have been vetoed before progressing to the ZLR stage.

The ordinances do not require the Town to hold a hearing, but once it chooses to do so, the hearing should be fair and provide a meaningful opportunity for all parties to represent their interests. This was not the case here. The way the Town approved the CUP frustrated both the petitioners' ability to challenge the application, as well as the ordinance's intent and preference for local rule. *See, e.g., Wilke v. City of Appleton*, 197 Wis. 2d at 728 ("the ordinance provided Wilke with the opportunity to contest the abatement procedure in a meaningful time and in a meaningful manner"). The ordinances presume that individuals will have the best opportunity to challenge incursions on their property rights within their own communities. If a town declines to provide a fair opportunity for the public to challenge an application for a conditional use permit, then the veto power DCCO § 10.255(2)(c)(2) grants to towns in Dane County is meaningless.

CONCLUSION

Fundamentally, this case is about what power members of the public have to persuade their local zoning authorities not to grant a conditional use that will affect their interests in their own property. In this case, the Town did not follow its own rules to give petitioners an adequate opportunity to challenge the CUP at a pivotal stage in the zoning procedure. At the point where

the County instructed the Town to review the CUP, Town Board Members indicated that the outcome was predetermined and public testimony would have no impact on their decision. Thus, the Town violated petitioner's due process rights to a fair hearing before an impartial tribunal and petitioners lost the opportunity to challenge CUP #2260 at the most local level.

The County's subsequent review at the ZLR and County Board stages did not remedy these defects because the County proceeded to work towards the ultimate outcome of molding the form of the approval, rather than ensuring all parties had received due process. Cumulatively, these errors, coupled with uncertainty about the sufficiency of the record, render the Board's final determination arbitrary and capricious. And, these are not errors the circuit court can adequately address upon certiorari review. Petitioners were entitled to a fair opportunity to present evidence about how CUP #2260 would affect the use and enjoyment of their property at a point where their local officials might hear their concerns, regardless of whether they would make the same choice again. For these reasons, the Board's approval of CUP #2260 is vacated. This decision is final for the purpose of appeal.

BY THE COURT:

Dated August 30, 2016

John W. Markson
Circuit Court Judge

cc: Attys Jeanne Marie Armstrong, Nicholas C. Watt, David Ray Gault, Lori M. Lubinsky, Richard L Bolton, Michael James Lawton, Mitchell Robert Olson, Charles V. Sweeney.