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BY THE COURT:

DATE SIGNED: April 4, 2024

Electronically signed by Daniel J. Tolan
Circuit Court Judge

STATE OF WISCONSIN CIRCUIT COURT POLK COUNTY

**ST. CROIX SCENIC COALITION, INC,
ET AL,**

Plaintiff/Petitioner,

DECISION & ORDER

v.

Case No. 23 CV 207

VILLAGE OF OSCEOLA, ET AL,

Defendant/Respondent.

Plaintiffs/Petitioners St. Croix Scenic Coalition, Inc., a Wisconsin nonstock corporation (“SCSC”), Tyler Norenberg, Elizabeth Kremser, Deborah Borek, Earl Wiseman, Thomas Caravelli, Peter Paidar, Victoria Nelson, and Thomas Killilea (hereinafter collectively referred to as “Petitioners”) seek review, reversal and remand of two decisions made by the Village of Osceola (hereinafter the “Board”) related to the Osceola Bluffs Development Project.

The Osceola Bluff Development project (hereinafter “the project”) being proposed by Gaughan Developers (hereinafter “developer”) is a mixed-use apartment building consisting of 99-units with two commercial spaces and 177 parking spaces. The project is to be constructed on the site of the former Osceola Medical Center at 301 and 206 River Street in Osceola. The developer proposes to remove the old hospital structure and construct the project upon the old building footprint with modification and expansion. The project site is located on the River Bluff on the Lower St. Croix River, which has been designated as a wild river and scenic river under federal law and confirmed by state law within the St. Croix National Scenic Riverway, on the St. Croix River Bluff and in the Osceola Historical District.

On July 11, 2023, the Board reversed the Historical Preservation Commission’s (hereinafter “HPC”) denial of a Certificate of Appropriateness (hereinafter “COA”) as applied for by the developers. On July 25, 2023, the Board unanimously approved the developer’s final site plans for the Osceola Bluff Development Project. The Petitioners seek certiorari review of both decisions.

Certiorari Procedural Background

June 6, 2023: The Planning Commission held a public meeting which, in part, included a vote of recommendation for approval of the developers' requested conditional use permits ("CUP") related to first floor residential use in mixed-use buildings, filling and grading activities involving the disturbance of 10,000 square feet of land outside of slope preservation zones, and maximum structural height of up to 45 feet. The planning Commission recommended approval of the first floor residential mixed use and filling and grading CUPs, the Planning Commission reached a tie vote on a motion to deny the height CUP. Johnson Aff. Ex. 9, at 1-72, December 8, 2023.

June 13, 2023: The Village Board held a public meeting which, in part, included the Board's approval of all three of the developers' requested CUP's. Johnson Aff. Ex. 10, at 1-55, December 8, 2023.

June 14, 2023: The Village Historical Preservation Commission ("HPC") denied the developers' application for a Certificate of Appropriateness ("COA"). Johnson Aff. Ex. 14, at 59-60, December 8, 2023.

July 11, 2023: The Board reversed the HPC's denial of a COA and granted the COA. Johnson Aff. Ex. 16, at 22-23, December 8, 2023.

July 20, 2023: The Planning Commission held a special meeting to review the developers' final site plans and provide a recommendation to the Board. Johnson Aff. Ex. 17, at 1-55, December 8, 2023.

July 25, 2023: The Village Board conducted a final review of the Project's proposed site plans. Johnson Aff. Ex. 18, at 1-11, December 8, 2023.

August 10, 2023: Petitioners filed their original Complaint for Writ of Certiorari, challenging the Board's July 25, 2023 final approval of the site plans as premature due to a series of remaining questions regarding the Project's compliance with Wisconsin law and local ordinances.

August 23, 2023: Petitioners filed an Amended Complaint for Writ of Certiorari with additional Petitioners and additional grounds for challenging the Board's July 25, 2023 final approval of the site plans.

November 8, 2023: Respondents submitted the record for the court's review. R. of Proceedings. at 1-76, November 8, 2023.

December 8, 2023: Petitioners filed their Motion to Supplement the Record. Petitioner's motion was accompanied by the Affidavit of James R. Johnson which identified 32 proposed exhibits to supplement the record. Pet'r's Mot. Suppl. R. at 1-22, December 8, 2023.

February 16, 2023: The Court issued its oral ruling regarding Petitioners' Motion to Supplement the Record, granting the motion in part and denying the motion in part. The Court accepted Petitioners' Proposed Exhibits 7-10; Exhibits 12-18; Exhibit 20; and Exhibit 32, also known as the

developers' drone footage presented to the Board on June 13, 2023. Order Granting Mot. and Setting Filing Dates. at 1-2, February 26, 2024.

The timeframe the Court accepted supplemental evidence, ranges from June 6, 2023 through July 25, 2023, although pursuant to the Court's oral ruling, it will not reverse the Board's decision approval of all three CUPs on June 13, 2023.

Issues

- I. Do the provisions contained in Osceola Vill. Code § 217 and Wis. Admin. Code NR § 118 apply through final site plan approval?
- II. Did the Respondent's violate Osceola Vill. Code and Wis. Admin. Code NR § 118 when they approved the final site plans?
- III. Does the record support the Boards reversal of the HPC for the COA?

Legal Standard

Wis. Stat. § 781.10 governs this certiorari action. The court may reverse or affirm the determination brought up for review or remand to the political subdivision for further proceedings consistent with the court's decision or take any other action that the court deems appropriate in the interests of justice that is consistent with judicial review of an action in certiorari. Wis. Stat. § 781.10(2)(d)(4) (2023).

"The court's review is limited to: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented it's will and not it's judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 35, 332 Wis. 2d 3, 22–23, 796 N.W.2d 411, 420.

"Wisconsin courts have repeatedly stated that on certiorari review, there is a presumption of correctness and validity to a municipality's decision." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 48, 332 Wis. 2d 3, 28, 796 N.W.2d 411, 423. "It does not follow, however, that affording the municipality a presumption of correctness eviscerates meaningful review. A court's acknowledgement of a presumption does not mean that the presumption will never be overcome." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 51, 332 Wis. 2d 3, 29, 796 N.W.2d 411, 424. "On certiorari review, the petitioner bears the burden to overcome the presumption of correctness." *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 50, 332 Wis. 2d 3, 28, 796 N.W.2d 411, 423.

Courts apply the substantial evidence test to determine whether the evidence is sufficient to support the decision by reviewing the record in context. *Koenig v. Pierce Cnty. Dep't of Hum. Servs.*, 2016 WI App 23, 367 Wis. 2d 633, 644, 877 N.W.2d 632, 637. "Quantitatively, substantial evidence is less than a preponderance of the evidence, *Smith v. City of Milwaukee*, 2014 WI App 95, ¶22, 356 Wis.2d 779, 854 N.W.2d 857, but "more than 'a mere scintilla' of evidence and more than 'conjecture and speculation.'" *AllEnergy Corp. v. Trempealeau Cnty. Env't & Land Use Comm.*,

2017 WI 52, ¶ 76, 375 Wis. 2d 329, 366–67, 895 N.W.2d 368, 386–87. Substantial evidence is evidence of such convincing power that reasonable persons could reach the same decision as the board. As the substantial evidence test is highly deferential to the board's findings, the Court may not substitute their view of the evidence for that of the board when reviewing the sufficiency of the evidence. *Clark v. Waupaca Cnty. Bd. of Adjustment*, 186 Wis. 2d 300, 304, 519 N.W.2d 782, 784 (Ct. App. 1994).

Pursuant to Wis. Stat. § 781.03 the respondents were responsible for filing the record with the court. Respondents filed Document No. 45 on November 8, 2023 containing the Index of Proceedings and consisting of 2 pages. Respondents filed Document No. 46 on November 8, 2023 containing the Record of Proceedings consisting of pages 1-76. Petitioners moved the court for good cause to supplement the record on December 8, 2023. The court granted petitioner's request to supplement the record and received Exhibits 7-10; Exhibits 12-18; Exhibit 20; and Exhibit 32, also known as the developers' drone footage presented to the Board on June 13, 2023.

Court's Analysis and Opinion

Petitioners do not allege that the governing body acted outside its jurisdiction. They do however, allege that the respondents proceeded on an incorrect theory of law. They further allege that the respondent's actions were arbitrary, oppressive or unreasonable and as such represented the will of the Board and not its judgment. Finally, the petitioners allege that the evidence was not such that the Board might reasonably make the decision that it did in approving the final site plan.

I. OSCEOLA VILL. CODE § 217 AND WIS. ADMIN. CODE NR § 118 APPLY TO THE FINAL SITE PLAN APPROVAL.

The project is located in the Lower St. Croix River which has been designated as a wild and scenic river under 16 U.S.C. § 1274(a)(9) and is subject to the provisions of the Wild and Scenic Rivers Act contained in 16 U.S.C. § 1271, et seq. A scenic river is generally free of impoundments with shorelines or watersheds still largely primitive and shorelines largely undeveloped, but accessible in places by roads. 16 U.S.C. § 1273(b)(2).

The purpose of a wild and scenic river designation is to guarantee the protection of the wild, scenic and recreational qualities of the river for present and future generations. 16 U.S.C. §1271 (2018). Consistent with federal code provisions contained within the Act, Wisconsin recognizes the Lower St. Croix River as part of the national wild and scenic rivers system. Wis. Stat. § 30.27(1) (2024).

Wis. Stat. § 30.27 declares "the preservation of this unique scenic and recreational asset is in the public interest and will benefit the health and welfare of the citizens of Wisconsin." And, Wis. Stat. § 30.27(2)(a)(1) prohibits "new residential, commercial and industrial uses, and the issuance of building permits therefor, where such uses are inconsistent with the purposes of this section."

Wis. Stat. § 30.27(2) requires the DNR to "adopt, by rule, guidelines and specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River." Wis. Stat. § 30.27(3), in turn, requires all affected municipalities to adopt ordinances at least as restrictive as those adopted by the DNR. In accordance with those requirements, Wis.

Admin. Code NR § 118 and Osceola Vill. Code § 217 were adopted. Wis. Admin. Code NR § 118.09(1)(a) requires that villages and towns located in the Lower St. Croix national scenic riverway implement the provisions of Wis. Admin. Code NR § 118.

Wis. Admin. Code NR § 118.02 (3) requires Counties, cities, villages and towns within the Lower St. Croix national scenic riverway boundaries to adopt zoning ordinances as required by Wis. Stat. § 30.27 unless the County has an ordinance that has adopted the same. The Village of Osceola adopted Wis. Stat. § 30.27 by Osceola Vill. Code § 217-2. This chapter also incorporates by reference the Standards for the Lower St. Croix national scenic riverway and mandates that it shall be administered in strict conformity with Wis. Admin. Code NR § 118.

Osceola Vill. Code § 217-1 and Wis. Admin. Code NR § 118.01 contain the same language related to their purpose, which is to “reduce the adverse effects of overcrowding and poorly planned shoreline and bluff area development, to prevent pollution and contamination of surface waters and groundwaters and soil erosion, to provide sufficient space on lots for sanitary facilities, to minimize flood damage, to maintain property values, and to preserve and maintain the exceptional scenic, cultural and natural characteristics of the water and related land of the Lower St. Croix riverway in a manner consistent with the national wild and scenic rivers act (P.L. 90-542), the federal Lower St. Croix river act of 1972 (P.L. 92-560) and the Wisconsin Lower St. Croix river act (s. 30.27, Stats.)”

Osceola Vill. Code § 219-91 provides the criteria to be analyzed by the Plan Commission and Board for site plan reviews. Osceola Vill. Code § 219-92 provides the plan requirements. Final development plan reviews are to be conducted by both the Plan Commission and the Village Board. Osceola Vill. Code § 219-92(D) (2014). The final project plan review requires a site plan, building plan, and fees. Osceola Vill. Code § 219-92(D)(1-3) (2014). In addition, Code 219-92(E)(3) requires Developers to be aware of existing requirements including, but not limited to Projects within the boundaries of the National Scenic Riverway: Osceola Vill. Code § 217, Wis. Admin. Code NR § 118. These laws provide the guidelines and restrictions in furtherance of goals to preserve the aesthetic scenic and recreational values of the Lower St. Croix River. As such, both Codes apply to the final project plan reviews and both must be considered when approving the final project plan. And, it is against this backdrop that the court must determine whether the Board’s approval was reasonable and whether they violated code.

II. THE BOARD’S DECISION TO APPROVE THE FINAL SITE PLAN WAS UNREASONABLE BECAUSE IT VIOLATED OSCEOLA VILL. CODE AND WIS. ADMIN. CODE § NR 118.

The Lower St. Croix Riverway is divided into 5 management zones. Osceola Vill. Code § 217-5(A) (2007) and Wis. Admin. Code NR § 118.04 (2006). The subject property is located in a River Town Management Zone and is subject to provisions in Osceola Vill. Code 217-5(A)(1) and Wis. Admin. Code NR § 118.04(1)(b)(3).

Wis. Admin. Code NR § 118.06(1)(d)(1) sets the maximum height of not more than 45 feet for the river town management zone. Osceola Vill. Code § 217-7(A)(4) states that, “In the River Town Management Zone, the maximum structure height shall be 35 feet...” However, “a conditional use

permit may be granted for a maximum structure height up to 45 feet.” Both codes provide that the maximum structure height shall be measured between the average ground elevation and the uppermost point of the structure, excluding chimneys.

On June 13, 2023, Village Engineer Popenhagen explained how she made the calculations. Johnson Aff. Ex. 10, at 19-21, December 8, 2023. Popenhagen indicated that the height of the structure was calculated by dividing the perimeter into 3 sections. First, the west perimeter at an elevation of 809.75. Second, the north and south perimeter at ranges in elevation from 809.75 to 820.96 for an average of 815.355. Third, the east perimeter with an elevation of 820.96. The three proportions were then calculated into lengths, this achieved an average ground elevation of entire perimeter of the building elevation in engineering standards to be calculated at 816.65. Johnson Aff. Ex. 10, at 12-13, December 8, 2023. Popenhagen, using the average ground elevation and the upper parapet on the architectural drawing, determined the building height to be 44-6 $\frac{3}{4}$ feet. Johnson Aff. Ex. 10, at 14, December 8, 2023. Therefore, the height calculation is deemed appropriate under code.

Additionally, on June 13, 2023, the Board was read the criteria for the conditional use permit under Osceola Vill. Code § 217-8 (E), Wis. Admin. Code NR § 118.09(2)(d), and Osceola Vill. Code § 217-12 before discussion. Johnson Aff. Ex. 10, at 17-18, December 8, 2023. Ultimately, the developers were granted a CUP to disturb more than 10,000 square feet with conditions that they follow SHPO for any burial excavations, replace any trees as required by the DNR, and provide a maintenance log of drainage to the Board. Johnson Aff. Ex. 10, at 19, December 8, 2023. The plain language of Wis. Admin. Code NR § 118.07(5)(b) and Osceola Vill. Code § 217-8(E)(1-2) indicate that multiple permits are not required.

The plain language of both Wis. Admin. Code NR § 118.07(5) and Osceola Vill. Code § 217-8(E) contain exactly the same language pertaining to uses and conditions, and further state “a” conditional use permit, in the singular, may be issued. This plain meaning interpretation is supported by the fact that the exact same conditions are required regardless of where the work is being performed. Wherefore, it is deemed an additional CUP is not necessary.

The Board was provided with the site plan, engineer’s report, the photos from the developer, the Aerial overlay, site line drawings and renderings, and more to assist in their determination that the structure was visually inconspicuous, as defined in Wis. Admin. Code NR § 118.03(50) and Osceola Vill. Code § 217-4. However, one of the key factors that influenced and essentially moved “the needle” was the drone footage that was played at the June 13, 2023 board meeting. After viewing the drone video and discussing “visually inconspicuous” for the Height CUP. Board Member Lutz emphasized this when he stated “And I think that bears understanding, because at no time am I aware that either NPS [National Park Service] or the DNR [Department of Natural Resources] has indicated this will be conspicuous. I think that they have asked us to consider what’s in front of us, what the plan entails, and be aware that, based on some of these assumptions, that it may be conspicuous. And I think the needle on that may have moved a little bit with the evidence that’s been presented today.” Johnson Aff. Ex. 10, at 14, December 8, 2023.

At the June 13, 2023 Board Meeting, the developers played the drone footage, depicting tree height of the canopy and the potential height of the Project at various degrees of elevation and visibility

of the river above the tree canopy. The average ground elevation is calculated pursuant to code and was calculated at 816.65 feet. The ground take-off elevation of the drone was at 803 feet. The height of the roof top on the proposed building would be at an elevation of 861.25 feet, which ultimately means that all of the drone footage that was shown to the Board was 6 to 13 feet lower than it would have been, had they used the average ground elevation; thus portraying the views of the river inaccurately. Johnson Aff. Ex. 10, at 19-21, December 8, 2023.

Furthermore, at the June 13, 2023 Board Meeting, the issue of whether or not the Project would be visually inconspicuous was addressed by multiple people, all essentially expressing that the drone video was what helped them believe that the Project would be visually inconspicuous:

Mr. Gilliland: "I think the drone footage was pretty inclusive. And if you can't see the river from there, the river can't see the building, pretty much. So whatever is going to be seen is through the canopy cover of the tress, which isn't going to be a whole lot. So I think it meets the requirement." Johnson Aff. Ex. 10, at 21, December 8, 2023.

Mr. Maki: "I think I want to say, you know, we get one chance to make sure we do this right with the river. And we've heard all the objections, you know, reasons why this shouldn't pass. And I'm feeling like Gaughan has met every objection, including showing us video [drone] that this is not a conspicuous building." Johnson Aff. Ex. 10, at 22, December 8, 2023.

Mr. Lutz: "...with this individual's understanding that there was, potentially, going to be a portion of the building that was above the treetops. And based on the drone footage that we've seen today, it looks like that may not necessarily be the case." Johnson Aff. Ex. 10, at 23, December 8, 2023.

Mr. Mahler: "...I think, to the board in terms of what visually inconspicuous was and what information they had before them. They didn't have this -- this video that we've seen tonight." Johnson Aff. Ex. 10, at 23, December 8, 2023.

Ms. Rose: "I will say I wish we had the video much sooner than tonight." Johnson Aff. Ex. 10, at 23, December 8, 2023.

Mr. Gilliland: ... "but better late than never, because it is a very constructive piece. It takes all the guesswork out of it maybe, will be, whatever. You can see it with your own two eyes. You can't see the river from 45 feet, which means you won't see the building from the river, at least the top of it won't stick out." Johnson Aff. Ex. 10, at 23, December 8, 2023.

Mr. Lutz: ... "I guess you got to pull back and just think about, this is about height, and that's it." Johnson Aff. Ex. 10, at 26, December 8, 2023.

The final site plans could not have reasonably been approved, as the drone footage provided an inaccurate visual representation of the view of the river. The drone footage clearly shows open views of the river at various heights varying from Point 1: 41 feet (viewable downstream) and Point 2: 50 feet (both upstream and downstream). The footage was shown at heights varying 6-13

feet lower than the average elevation for the project. Ultimately, it was the drone video that was the deciding factor in determining visually inconspicuous, which was a fundamental error in their decision and was unreasonable.

In addition, the record contains a surrogate balloon test conducted by St. Croix Scenic Coalition which indicates that anything taller than 26.6 feet would be above the tree canopy. R. of Proceedings. at 11, November 8, 2023. At the June 13, 2023 during the public comment section of the Board Meeting, Mr. Paidar represented to the Board that he had conducted a balloon test above another building in Osceola at 40 feet. He provided pictures to the Board with a balloon set at 40 feet to give the board some idea of the height. He went on further to say "...It gives you kind of an indication on how tall this new building will be. And I think that, kind of, one of the things I've seen throughout the course of all the meetings is that, I guess, size matters." Johnson Aff. Ex. 10, at 3, December 8, 2023. The implication being that the project would be visually conspicuous.

Furthermore, there are procedural safeguards that are put in place to ensure protection, preservation, and goals of the National Wild and Scenic Rivers Act, Wis. Admin. Code and Village Ordinances are met. One of the procedural requirements is found in Wis. Admin. Code NR § 118.09(2)(a). That code requires the Board to file all application materials for CUPs with the DNR 30 days prior to the hearing. Pursuant to Wis. Admin. Code NR § 118.09(2)(b)(1)(e) includes a requirement of photos to be taken from the river slightly upstream, slightly downstream of the property, and directly off shore. The purpose of the photos is to give the governing body the perspective of the Bluff line and the tree canopy at the site location from all three perspectives. The site lines that were shown to the board, were directly offshore from the building, which is why the site lines alone were insufficient. The required photos help the governing body fulfill their obligations to the Lower St. Croix Riverway under the statutes and codes. The record provided establishes this requirement was not met.

On May 30, 2023 the Village of Osceola Plan Commission, received correspondence from NPS Superintendent, Craig Hansen, that indicated "the NPS's review of the provided documentation indicates that the proposed height of the structure may make it visible from the St. Croix River and from Osceola Landing, the most heavily used NPS landing on the St. Croix River, potentially impacting the scenic-aesthetic values of the Riverway. The developer asserts that it will not be visible from the river and Osceola Landing during leaf-on condition, however scenic impacts extend beyond leaf-on condition." Johnson Aff. Ex. 7, at 2, December 8, 2023.

On June 6, 2023 the Planning Commission did not recommend to the Board, approval of the 45 foot CUP. Johnson Aff. Ex. 9, at 45, December 8, 2023.

After the Board approved the 45 foot height CUP on June 13, 2023, the NPS wrote a second letter raising concerns. On July 19, 2023 NPS Superintendent, Craig Hansen, indicated, "The NPS believes the scenic-aesthetic quality of the Riverway may be degraded due to the proposed project. Renderings provided indicate the top of the proposed building will be visible above the tree canopy when viewed from the St. Croix River. The straight roofline will be in stark contrast to the organic shapes, lines, and colors of the tree tops...If allowed to proceed as planned, the proposed building may negatively impact the scenic-aesthetic values of the Riverway." R. of Proceedings. at 39-40, November 8, 2023.

Furthermore, pursuant to Osceola Vill. Code § 219-91, “In the review of site plans, the Plan Commission and Village Board shall analyze such of the following criteria as may be relevant to the proposed development for the purposes of ascertaining its compliance with all applicable Village ordinances, the Village's Official Map and Comprehensive Plan, the health, welfare, and safety of residents of the Village, as well as with respect to its compatibility with and impacts upon existing land uses surrounding the development property and in the same general neighborhood and zoning district.” The record from the July 20, 2023 Planning Commission Meeting and the July 25, 2023 Board Meeting, in which they approved the final site plans, are both lacking any discussion of the Comprehensive Plan, which is required as part of the analysis.

Finally, Osceola Vill. Code § 219-92(D)(2)(a) requires building plans and detailed elevations to be provided to the Plan Commission and Village Board. The Board did not require the Developers to provide the necessary information for the Board to comply with its review requirements before it approved the final site plans at the July 25, 2023 Board Meeting. This requirement ensures that the purpose and goals of the Act, Statutes and Code are met.

For the reasons stated, the presumption of correctness has been overcome by substantial evidence that the Board’s finding of visually inconspicuous and approval of the final project plan was unreasonable. The board could not have reasonably have come to the conclusion that this Project could preserve the aesthetic scenic and recreational values of the Lower St. Croix River.

III. THE RECORD DOES SUPPORT THE BOARD’S REVERSAL OF THE HPC FOR THE COA

As noted earlier in this decision the Board’s decision is entitled to a presumption of correctness. A certiorari court may not substitute its view of the evidence for that of the municipality. On certiorari, a court will sustain a municipality's findings of fact if any reasonable view of the evidence supports them. *Ottman v. Town of Primrose*, 2011 WI 18, ¶ 53, 332 Wis. 2d 3, 29–30, 796 N.W.2d 411, 424.

Osceola Vill. Code § 130-5(B)(1) states, “no owner or person in charge of an historic structure, historic site or structure within an historic district shall reconstruct, alter or demolish all or any part of the exterior of such property or construct any improvement upon such designated property or properties or cause or permit any such work to be performed upon such property or demolish such property unless a certificate of appropriateness has been granted by the Historic Preservation Commission” (hereinafter “HPC”). The HPC is required to grant a certificate of appropriateness (hereinafter “COA”) upon application unless there is a basis to deny the application under Osceola Vill. Code § 130-5(B)(2)(a-e). In this case the HPC denied the developer’s application for COA based upon Osceola Vill. Code § 130-5(B)(2)(b) which provides:

“In the case of the construction of a new improvement upon an historic site or within an historic district, the exterior of such improvement would adversely affect or not harmonize with the external appearance of other neighboring improvements on such site or within the district.”

On June 14, 2023, the HPC heard the developer's application for the COA. At the end of the HPC meeting the commission voted unanimously to deny the COA. During the meeting, the HPC was unsure of exactly how to apply Osceola Vill. Code § 130-5(B)(2)(b) because it had not previously considered the construction of a new building in the downtown area of the historic district. Johnson Aff. Ex. 14, at 23, December 8, 2023. Ultimately, the HPC denied the COA because the overall size of the building did not *harmonize* with the Historic District based upon 130-5(B)(2)(b). Johnson Aff. Ex. 14, at 58, December 8, 2023.

On July 11, 2023, the Board heard the Appeal of the HPC decision to deny the COA and reversed the HPC decision. Johnson Aff. Ex. 16, at 1-25, December 8, 2023. At the beginning of the hearing, the Board was read Osceola Vill. Code § 130-5(B)(2)(b and c). Johnson Aff. Ex. 16, at 4, December 8, 2023. The Board determined that the exterior was no longer an issue as the style, color and materials being offered by the developer were acceptable to the HPC. Johnson Aff. Ex. 16, at 18, December 8, 2023. The Board addressed the HPC's difficulty with the word *harmonize*. Johnson Aff. Ex. 16, at 16, December 8, 2023. Ms. Rose who is both on the Board and the HPC told the Board that "there is no way to quantify *harmonize*." *Id.* She further indicated, that to the HPC, "the word *harmonize* was less about being compatible with other buildings down there and was used for size."

On June 14, 2023 and July 11, 2023, the developer provided similar presentations regarding the detail of the structures located within 200 feet of the proposed project showing that the buildings in the Historic District are diverse with no consistency. These buildings included the Grace Apartments, the Methodist Church and the Bed and Breakfast. Johnson Aff. Ex. 14, at 2-5, December 8, 2023. At the July 11, 2023 Board Meeting, the Board noted that there was really no consistency in the architectural design of the buildings in the Historic District and focused on harmony:

Mr. Gilliland: "Just the pictures we saw tonight. There's not a lot of harmony. There's some really distinctly different buildings downtown in that district. A white former gas station. And come on, that's as bad as utilitarian buildings you can get." Johnson Aff. Ex. 16, at 16, December 8, 2023.

Mr. Gilliland: "I think maybe just one other thought about the size of the building if it was sitting right on Cascade. I can see massive applying, but it's sitting behind a block away and it's got a bunch of buildings in front of it, some of which are quite a few of them are two storey." Johnson Aff. Ex. 16, at 20, December 8, 2023.

Mr. Gilliland:... "it's a nebulous criteria to say harmony to me, if it's not going to overwhelm something that's harmonious, harmonious is playing well with others. Does it play well with the other buildings, the other resident buildings in that section? I think it does." Johnson Aff. Ex. 16, at 20, December 8, 2023.

Mr. Kline: "I think that the lack of quantifiable, definitive checklist, sort of understandings of what harmonious means or anything else renders the decision one of aesthetics... And I think the other thing, and not to be cheeky, but harmony implies that the music still plays. And I think that I would have heartburn. I think if efforts on the part of a developer to

arrive at a more aesthetically pleasing outcome still resulted in the project not proceeding on the basis of a disagreement over aesthetics, I think that that puts development in a difficult place.” Johnson Aff. Ex. 16, at 19, December 8, 2023.

The Board’s interpretation of harmonize was consistent with its definition. Harmonize is defined as, “to be combined or go together in a pleasing way.” “Harmonize.” *Britannica.com*. 2024. <https://www.britannica.com/dictionary/harmonize> (2 April 2024). Mr. Chantelois summed this up best at the July 11, 2023 Board Meeting:

Mr. Chantelois: “My opinion is that when I see the pictures, the colored pictures of the building, the way it's, the rendered pictures, I think you guys did a great job of, of blending it in. I mean, I don't see what the complaint is at all.” Johnson Aff. Ex. 16, at 21, December 8, 2023.

Applying its interpretation of harmonize, the Board made a finding of fact that the project did harmonize within the historical district. Wherefore, the petitioners have failed to demonstrate that no reasonable view of the evidence supports that finding.

FINDINGS OF FACT

1. The Village of Osceola (“the Village”) and the development site fall within the boundaries of the Lower St. Croix River way, and within the portion of the Village designated as a “River Town” by Wis. Admin. Code NR § 118.04(1)(b)(3).
2. The Osceola Bluff Development project is a mixed-use apartment building consisting of 99-units with two commercial spaces and 177 parking spaces. The project is to be constructed on the site of the former Osceola Medical Center at 301 and 206 River Street in Osceola. The developer proposes to remove the old hospital structure and construct the project upon the old building footprint with modification and expansion.
3. The project site is located on the River Bluff on the Lower St. Croix River, which has been designated as a wild river and scenic river under federal law and confirmed by state law within the St. Croix National Scenic Riverway, on the St. Croix River Bluff and in the Osceola Historical District.
4. The Project is subject to compliance with Osceola Vill. Code and the Wisconsin Admin. Code.
5. The Developers applied for three conditional use permits (“CUP”), including approval of development in the Village’s B1 zoning district; approval of filling and grading activity to disturb more than 10,000 square feet of land; and approval of the Project’s height to exceed 35 feet and up to 45 feet.
6. The Board considered the Developer’s CUP application at its June 13, 2023 public meeting.

7. The Developers captured drone video footage of the tree height and river views from the Project site.
8. On June 13, 2023, the Developers presented the drone video footage to the Board in anticipation of the Board's review and approval or denial of the CUPs.
9. The drone footage clearly shows open views of the river at various heights varying from Point 1: 41 feet (viewable downstream) and Point 2: 50 feet (both upstream and downstream). The footage was shown at heights varying 6-13 feet lower than the average elevation for the project.
10. On June 13, 2023, Ms. Rose read Wis. Admin. Code NR § 118.09(2)(d) criteria to the Board while addressing the CUP related grading and filling.
11. On June 13, 2023, Ms. Rose read Osceola Vill. Code § 217-12 to the Board while addressing the CUP related to grading and filling.
12. On June 13, 2023, Ms. Rose read Osceola Vill. Code § 217-7(A)(4)(a) to the Board prior to addressing the CUP to exceed 35 feet up to 45.
13. On June 13, 2023, Angela Popenhagen, explained to the Board how she calculated average ground elevation and compared that to architectural plans finding the building height to be 44-6 $\frac{3}{4}$ feet.
14. The average ground elevation of the project based on engineering standards is 816.65 feet.
15. The height of the roof top on the proposed building would be at an elevation of 861.25 feet.
16. The drone footage that was shown to the Board was 6 to 13 feet lower than it would have been, had they used the average ground elevation
17. The surrogate balloon test conducted by St. Croix Scenic Coalition indicates that anything taller than 26.6 feet would be above the tree canopy.
18. The Board did not comply with Wis. Admin. Code NR § 118.09(2)(b)(1)(e) requiring photos to be taken from the river slightly upstream, slightly downstream of the property, and directly off shore.
19. On June 13, 2023, the Board voted unanimously to approve all three CUPs.
20. Based upon the July 19, 2023 NPS correspondence, the top of the proposed building will be visible above the tree canopy when viewed from the St. Croix River.

21. Also, based upon the July 19, 2023 NPS correspondence, the straight roofline will be in stark contrast to the organic shapes, lines, and colors of the tree tops.
22. The Petitioner's have overcome the presumption of correctness by substantial evidence that demonstrates the Board's finding of visually inconspicuous was reasonable.
23. The Board's finding that the project was visually inconspicuous was unreasonable.
24. The Board did not comply with Osceola Vill. Code §219-92(D)(2)(a) which requires building plans and detailed elevations to be provided to the Plan Commission and Village Board.
25. The Petitioner's have overcome the presumption of correctness by substantial evidence that the Board's finding of approval of the final project plan was reasonable.
26. The development site is located within the Historical District of Osceola pursuant to Osceola Vill. Code § 130-5.
27. Under Osceola Vill. Code, an owner of a structure within an historic district is prohibited from constructing any improvement on the site unless a Certificate of Appropriateness ("COA") is issued by the Village's Historical Preservation Commission.
28. On June 14, 2023, the Village Historical Preservation Commission ("HPC") reviewed the Project for approval or denial of a COA pursuant to Code §§130-5.
29. The Developer's review of the buildings within 200 feet of the proposed development site revealed another apartment building, an historic church, a bed and breakfast, and other commercial buildings.
30. Osceola Vill. Code requires the HPC Commission to approve the COA application unless certain criteria is met.
31. The HPC stated on the record that it was unsure of exactly how to apply Osceola Vill. Code § 130-5(B)(2)(b) because it had not considered the construction of a new building in the downtown area of the historic district.
32. The HPC did not take issue with the exterior of the proposed building, including the color and materials that were presented by the Developer.
33. The HPC unanimously denied the COA due to the project not harmonizing due to its size under Osceola Vill. Code § 130-5(B)(2)(b).
34. The developers subsequently appealed the denial to the Board. The Developer made a similar presentation that it did to the HPC, noting the variety of building styles within the historic district.

35. On July 11, 2023, the Board heard the Developer's appeal of the HPC denial of the COA.
36. After the Developer's presentation, the Board examined the standard under which the HPC denied the COA and heard from Ms. Rose, who explained the difficulty in applying the standard.
37. On July 11, 2023, the Board voted to reverse the HPC's denial and granted the COA, finding that the project did harmonize within the historical district.
38. The Board's interpretation and definition of harmonize was reasonable.
39. On July 25, 2023, the Developer presented the final site plan to the Board at a special meeting.
40. On July 25, 2023, the Board unanimously approved the final site plans.
41. The Board's approval of the final site plan was unreasonable.
42. On August 10, 2023, Petitioners filed their Petition for Writ of Certiorari challenging, inter alia, the Board's reversal of the HPC's denial of a COA on July 11, 2023 and the Board's approval of the final site plans on July 25, 2023 pursuant to Wis. Stat. § 781.10 (2023).
43. On August 23, 2023, Petitioners filed their Amended Petition for Writ of Certiorari to include additional petitioners impacted by the Board's approval of the final site plans on July 25, 2023.
44. On November 8, 2023, Respondents filed the record for the Court's review pursuant to Wis. Stat. § 781.03 (2024).
45. On December 8, 2023, Petitioners filed a motion to supplement the record submitted by Respondents pursuant to Wis. Stat. § 781.10(2)(d)(2) (2023).
46. On February 16, 2024, the Court granted in part and denied in part Petitioner's Motion to Supplement the Record. The Court accepted Petitioners' proposed Exhibits 7-10; Exhibits 12-18; Exhibit 20; and Exhibit 32, also known as the developers' drone footage presented to the Board on June 13, 2023.

CONCLUSIONS OF LAW

1. On certiorari, the court's review is limited to (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its

- judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question.
2. On certiorari, courts apply the substantial evidence test to determine whether the evidence is sufficient to support the decision under certiorari review.
 3. On certiorari, courts afford a presumption of correctness to the decision maker's determination.
 4. The decision maker's determination will not be disturbed if any reasonable view of the evidence sustains it.
 5. The petitioner therefore bears the burden of showing that the decision maker's findings related to the determination are unreasonable.
 6. Substantial evidence demonstrates Petitioners have satisfied their burden to overcome the presumption of correctness regarding the Board's decision on July 25, 2023 to approve the Project's final site plan.
 7. The substantial evidence supports that the Board could not have reasonably approved the final site plan on July 25, 2023, because the project will not be visually inconspicuous. The Board's finding of visually inconspicuous was contrary to the drone footage, surrogate balloon test, failure to comply with Code, and public outcry.
 8. The substantial evidence supports that the Board could not have reasonably approved the final site plan on July 25, 2023, because they didn't comply with Wis. Admin. Code NR § 118.09(2)(b)(1)(e) or Osceola Vill. Code § 219-92(D)(2).
 9. The substantial evidence demonstrates Petitioners have not satisfied their burden to overcome the presumption of correctness regarding the Board's decision on July 11, 2023 to reverse the HPC's unanimous denial of a COA on June 14, 2023.
 10. The Board correctly reviewed the HPC's denial of a COA to the Developer under Osceola Vill. Code § 130-5.
 11. The record reflects that the Board applied the standard under which the HPC denied the Developer's application for a COA as set forth in Osceola Vill. Code § 130-5(B)(2)(b).
 12. The substantial evidence demonstrates the record submitted by Respondents on November 8, 2023 failed to satisfy the requirements of Osceola Vill. Code § 219-92(D)(2) for a building plan with elevations.

Based on the foregoing, **IT IS HEREBY ORDERED:**

1. Petitioner's request for a Writ of Certiorari is *GRANTED* with regard to final site plan approval.
2. The Board's decision on July 25, 2023 to approve the final site plan is *REVERSED AND REMANDED* to the Board for further review for compliance with the requirements of Osceola Vill. Code and Wis. Admin Code NR § 118.
3. The Board's decision on July 11, 2023 to reverse the HPC's denial of a COA is *AFFIRMED*.
4. The injunction issued by this court due to a finding of irreparable harm continues to allow the parties to appeal this decision. The injunction shall terminate upon further order of this court or the court of appeals