

## **Judge Upholds Waypoint Permit Denial**

**By Rick Olivo**

June 13, 2012

Ashland County Circuit Court Judge Robert Eaton, hearing a Bayfield County case, has ruled that the Bayfield County Board of Adjustment acted within its jurisdiction and according to law when they reversed the granting of a conditional use permit by Bayfield County for the proposed Waypoint fly-in development in northern Bayfield County.

The proposal for a private airport and associated condominium development in the Town of Russell had formerly been known as "Shadow Wood Landing" and proposed to build a 4,000-foot landing strip and hangers on a 380-acre tract of land.

The plan received approval by the County's Zoning Committee and full county board despite determined opposition by a group of adjacent landowners organized as The Bayfield Committee for Responsible Land Use, which took the matter to the County's Board of Adjustment.

The Board of Adjustment found that noise, drainage and topographic issues as well as the development's incompatibility with tourism and orchard operations in the area justified denying the application for a conditional use permit.

Following the decision of the Board of Adjustment last year, the developers, Minneapolis-based CFS LLC, sought a certiorari review of the decision by the Circuit Court.

A certiorari review could have resulted in the records of the case being brought to the court for review, under certain circumstances.

According to Eaton, those circumstances include questions about jurisdictions, whether that body had acted according to law, whether the decision was arbitrary or unreasonable, whether the evidence was such that the board could reasonably make the order in question.

Eaton ordered that the matter was within the jurisdiction of the Board of Appeals, and that the Board had heard both sides of the issue.

"The court is satisfied the Board acted according to law, if the evidence considered was of the nature it could be reasonably relied upon to make a decision," he wrote in his memorandum opinion and order released on June eighth.

Eaton also ruled that the Board's action in denying the Conditional use Permit was not arbitrary, oppressive or unreasonable if in fact it was entitled to rely on everything that was said to it.

"The real issue in this case is whether the evidence was such that the Board could reasonably make the order in question. The Board's decision must be supported by substantial evidence," Eaton continued, noting that the court does not decide issues of credibility of witnesses or the weight to be given to their testimony.

“This court is required to defer to the decision of the Board unless it is unreasonable or without a rational basis... thus the findings of the board may not be disturbed if any reasonable view of the evidence sustains them,” he said, quoting case law in the matter.

Eaton noted that the Board had relied on the expertise of Robert William Van Sant, a former chief operating officer and director at Cessna Aircraft Company with a BS and MS degree in mechanical engineering, a man with some 30 years of flying experience.

He testified that aircraft taking off and landing at the CFS facility would be very loud and would disrupt the peaceful rural setting of the northern Bayfield Peninsula. He also noted that the board had heard the testimony of Robert J. Krumenaker, Superintendent of the Apostle Islands National Lakeshore, who described the park as a “noise-sensitive area” and expressed concerns about aircraft going in and out of the airstrip planned by CFS. Also testifying about the impact of noise was orchard operator Eric Carlson.

Eaton said Krumenaker’s and Carlson’s testimony was “somewhat speculative” given that they predicted events that had not yet occurred, but said Van Sant’s testimony was not.

“His background, knowledge experience and education give him superior knowledge over an ordinary lay person as to the amount of noise generated by turboprop or jet aircraft,” Eaton wrote. “The Court concludes that (The Board of Appeals) could reasonably rely on the affidavit of Mr. Van Sant to conclude that the proposed runway at the CFS site would generate excessive noise. The board was then able to rely on the statements of Mr. Carlson and Mr. Krumenaker as to the impact of excessive noise on land uses in the surrounding area.”

In discussing the testimony of soil scientist Ulf Gafvert, the court similarly ruled that his knowledge, education, experience and training on the issues of soil, topography, drainage and impact on wetlands were such that the Board could reasonably rely on his judgment about the impacts of the development on the area.

“Clearly there was evidence in the record competing with the affidavits of Mr. Van Sant and Mr. Gafvert on the issues of noise and topography. However the court reiterates that it is not the function of the court to second-guess the Board on issues of credibility and weight of evidence. If there is conflicting evidence on an issue, the Court does not substitute its view for that of the Boards.”

Eaton went on to say that the Board functioned much like a jury in a civil case.

“Findings of fact, decisions on credibility and the weight of evidence is solely the province of the Board,” he wrote.

Eaton concluded that substantial evidence in the record supported the findings of the Board, again noting that the Board acted within it’s jurisdiction, that it acted according to law, that it’s actions were not arbitrary, oppressive or unreasonable.

“Although the evidence is conflicting, the evidence was such that the board might reasonably decide to deny the application of CFS for a conditional use permit,” he wrote.