
STATE OF MINNESOTA
IN COURT OF APPEALS

NO. A04-1958

Veit Co. and B&B Aggregates,

Relators,

vs.

Lake County, Minnesota and its Planning Commission,

Respondents.

RELATORS' REPLY BRIEF AND SUPPLEMENTAL APPENDIX

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ARGUMENT SUMMARY

County's CUP denial was untimely. County's lead argument is that the three writing requirements of § 15.99, subd. 2(c), as amended, are "unreasonable." *See* Res. Br. at 12-13. But the new statutory requirements merely codify several prior appellate rulings. County alternatively argues that it substantially complied with § 15.99, subd. 2(c) by simply tape recording the hearing and providing Relators within the statutory deadline a one-page form notice of denial. *Id.* at 10-11 & 13-15. Besides being a mandatory requirement that necessitates strict compliance, County's substantial compliance argument is otherwise demonstrably invalid. A tape recording is no writing and the one-page form notice of denial contained no written reasons for denial.

County's CUP denial was, as well, arbitrary. Unless this Court wants to review different reasons for denial for an arbitrariness challenge than it reviews for an untimeliness challenge to determine whether a denial was arbitrary, only those written reasons for denial that are timely provided within § 15.99's statutory deadline should be reviewed. Here, the only written denial that was provided to Relators within the statutory deadline was County's one-page form notice, which contained absolutely no written reasons supporting the denial. Absent any stated written reasons for denial, County's denial was *per se* arbitrary. Regardless, each of County's three purported justifications for the CUP denial – *i.e.*, noise, traffic and intensity of use – was either unsubstantiated in the record or could have been addressed with reasonable CUP conditions.

ARGUMENT

I. COUNTY'S CUP DENIAL WAS UNTIMELY

Section 15.99, subd. 2(c), as amended in 2003, provides in its entirety as follows:

If a multimember governing body denies a request, it must state the reasons for denial on the record and provide the applicant in writing a statement of the reasons for the denial. If the written statement is not adopted at the same time as the denial, it [1] must be adopted at the next meeting following the denial of the request but before the expiration of the time allowed for making a decision under this section. [2] The written statement must be consistent with the reasons stated in the record at the time of the denial. [3] The written statement must be provided to the applicant upon adoption.

(Emphasis & brackets added).

In other words, the amended statute mandates that "the written statement [of denial] . . . must be" (1) "adopted . . . before the expiration of the time allowed for making a decision"; (2) "consistent with the reasons stated in the record at the time of the denial"; and (3) "provided to the applicant upon adoption." Because the express consequence for non-compliance with these three writing requirements is the automatic approval of the CUP, they are mandatory and thus strictly enforced. *Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278, 282 (Minn. App.), *review denied* (Minn. July 25, 2000).

County's August 16, 2004 denial of Relators' CUP failed to even arguably comply with § 15.99, subd. 2(c)'s three writing requirements. County's desperate argument to the contrary is two fold. County's threshold challenge is to the reasonableness of the three writing requirements. *See* Res. Br. at 12-13. Alternatively, County argues that it substantially complied with the three writing requirements. *Id.* at 10-11 & 13-15. Neither argument is serious.

A. County's reasonableness challenge is specious

County neither identifies a rule of statutory construction to challenge § 15.99, subd. 2(c)'s three writing requirements nor provides an alternative construction of § 15.99, subd. 2(c). Rather County's reasonableness challenge is essentially three fold. First, County inexplicably denies that "the hearing [on Relators' CUP] was held on the last night of the sixty-day period." *See* Res. Br. at 12. Second, County claims that the three writing requirements are "unreasonable." *Id.* at 13. And third, County pronounces that requiring written reasons for a CUP denial is "absurd" because written findings are not necessarily required for CUP approvals. *Id.* at 15. County's first argument is irrelevant and demonstrably false, while its latter two arguments barely warrant a response.

1. County's hearing was held on the last possible day

It is largely irrelevant when County held its hearing on Relators' CUP. County nevertheless quibbles with Relators' background assertion that County waited until "late on the last night of the sixty-day period" to hold its hearing on Relators' CUP application. *See* Res. Br. at 12 (citing Rel. Opening Br. at 1). But it is undisputed that County received Relators' CUP application on June 15, 2004. And County does not claim that it notified Relators that the application was incomplete as is required by § 15.99, subd. 3(a) to indefinitely extend the deadline or that it requested an up to 60-day extension of time to make a decision as is authorized by § 15.99, subd. 3(f). *See* Rel. Opening Br. at 13. The last day under § 15.99 for County to deny Relators' CUP was thus 60 days after

Relators submitted their CUP, or on August 16, 2004.¹ Moreover, County's own minutes from its August 16, 2004 hearing show that County denied the CUP at approximately "11:45 p.m." on this last day to do so. Rel. Supp. App. 303.

County whines that its own notice requirements precluded it from timely acting on Relators' application. Res. Br. at 12. But it is clear that County has no one to blame but itself for any such time crunch. Upon receiving Relators' application, County waited 38 days – until July 23, 2004 – before bothering to mail its "notice of public hearing" to the adjoining property owners. Rel. Supp. App. 304-05. County unilaterally chose the hearing date and then it elected not to extend the deadline as is specifically allowed under §15.99, subd. 3(f). *Id.* Thus, any notice requirements that allegedly precluded County from timely acting on Relators' CUP application were of County's own making.

2. The three writing requirements are reasonable

County argues that § 15.99, subd. 2(c)'s three writing requirements are "unreasonable." *See* Res. Br. at 12-13. But there is nothing unreasonable about the three writing requirements to the statutory deadline.

First, this Court and the Minnesota Supreme Court have uniformly enforced § 15.99's 60-day deadline against other counties and municipalities. *See, e.g., Kramer v. Otter Tail County Bd. of Comm'rs*, 647 N.W.2d 23, 26-27 (Minn. App. 2002); *American Tower, L.P. v. City of Grant*, 636 N.W.2d 309, 313 (Minn. 2001); *Moreno v. City of*

¹ August 16, 2004 was actually the 62nd day following Relators' submission of their CUP application but, because the 60th day fell on a Saturday, the deadline was automatically extended to the next business day — *i.e.*, Monday, August 16. *See Gun Lake Ass'n v. County of Aitkin*, 612 N.W.2d 177, 181 (Minn. App. 2000) (citing Minn. Stat. § 645.15).

Minneapolis, 676 N.W.2d 1, 6 (Minn. App. 2004); *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 926 (Minn. App. 2002); *Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278, 281 (Minn. App.), *review denied* (Minn. July 25, 2000); *Demolition Landfill Servs., LLC v. City of Duluth*, No. C7-00-81, 2000 WL 1015893, at *2 (Minn. App. July 25, 2000) (Rel. Supp. App. 306), *review denied* (Minn. Oct. 17, 2000); *Gun Lake Ass'n*, 612 N.W.2d at 181. Despite this precedent, County does not even try to explain why § 15.99, as amended, is unreasonable.

Second, § 15.99 is not the only 60-day deadline that applies to government decisionmaking. A like deadline applies to certain wetland decisions made by the Department of Natural Resources and Board of Soil and Water Resources. *See* Minn. Stat. § 103G.315, subd. 9 (requiring Commissioner of the Department of Natural Resources to make an order pursuant to a hearing on an application for a permit within 60 days after the completion of the hearing on application). A similar deadline applies to the Minnesota Office of Environmental Assistance's decisions regarding solid waste facility permits. *See* Minn. Stat. § 473.823, subd. 3(d) ("[w]ithin 60 days after the application and supporting information are received by the director, unless a time extension is authorized by the agency, the director shall issue to the agency in writing a determination whether the permit is disapproved, approved, or approved with conditions. If the director does not issue a determination to the agency within the 60-day period, unless a time extension is authorized by the agency, the permit shall be deemed to be in accordance with the policy plan"). Thus, there is nothing unique or overly burdensome about § 15.99's 60-day deadline.

Third, § 15.99, subds. 3(a) and (f) provide two ways to extend the 60-day deadline. If County deemed Relators' application to be incomplete, then County could have indefinitely extended its deadline by providing Relators with timely notice of the incompleteness. *See* Minn. Stat. § 15.99, subd. 3(a). County also could have unilaterally extended the deadline for up to an additional 60 days by providing Relators with notice at any time prior to the expiration of the initial 60-day statutory period. *Id.*, subd. 3(f). County does not even acknowledge these extension rights, let alone explain why — if it needed more time to draft detailed written findings to satisfy § 15.99's writing requirements — it failed to exercise its rights.

Fourth, even though this Court previously ruled that § 15.99 (without the 2003 amendment) requires "simultaneous written reasons for denial" (*Demolition Landfill Services*, 609 N.W.2d at 282), § 15.99, subd. 2(c), as amended, allows a multimember board, such as County, to adopt its written statement of reasons for denial at its next scheduled meeting.² But, again, County does not even acknowledge this right, let alone explain why — if it needed more time to draft and adopt detailed written findings for its denial as required by § 15.99 — it chose to forego this right.

Finally, § 15.99, subd 2(c)'s three writing requirements merely codify prior precedent. By requiring the local zoning body to provide the zoning applicant with

² This Court's April 19, 2005 decision in *Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804, 826-27 (Minn. App. 2005), upheld the *Demolition Landfill Servs.* mandate for "simultaneous written reasons for denial" under § 15.99 without the 2003 amendment. But, consistent with the 2003 amendment, this Court modified "simultaneous" to include all such written reasons that are made by the zoning body within the statutory deadline. *Id.*

timely written reasons for the denial, the amendment reinforces the statutory bar to overly long, delayed local decisionmaking. *See Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Township*, 583 N.W.2d at 296 ("the underlying purpose of Minn. Stat. § 15.99 is to keep government agencies from taking too long in deciding issues like the one in questions").³ The amendment also ensures the grant of procedural due process to the CUP applicant by apprising it well before the expiration of the 60-day writ of certiorari filing deadline of precisely why its CUP was denied. *See* Minn. Stat. § 606.01; *Picha v. County of McLeod*, 634 N.W.2d 739, 741 (Minn. App. 2001). The zoning applicant cannot very well assess its appeal rights without its receipt of such a timely written statement of denial. Similarly, the three writing requirements of § 15.99, subd. 2(c) improve judicial review of CUP denials. "To facilitate judicial review, a zoning body must 'have the reasons for its decision reduced to writing and in more than just a conclusory fashion.'" *In re Livingood*, No. C2-98-262, 1998 WL 531759, at *4 (Minn. App. Aug. 25, 1998) (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. App. 1981)) (Rel. App. 248-52) (emphasis added), *aff'd* 594 N.W.2d 889 (Minn. 1999). *See also Kehr v. City of Roseville*, 426 N.W.2d 233, 237 (Minn. App.) (failure to provide findings inhibits effective judicial review), *review denied* (Minn. Sept. 16, 1988). And the three writing requirements advance the appellate courts' strong disfavor of post hoc

³ In enacting § 15.99, the Legislature confirmed that "Minnesota citizens do have the right to receive a response to their requests in a timely manner and at the same time not be entangled in delays or squabbles." *See American Tower*, 621 N.W.2d at 41 (quoting House Floor Debate on H.F. No. 641 (Apr. 12, 1995)).

justifications for a denial. *R.A. Putnam & Assocs., Inc. v. City of Mendota Heights*, 510 N.W.2d 264, 267 (Minn. App. 1994).

3. The three writing requirements are not "absurd"

County's final argument is that § 15.99, subd. 2(c)'s three writing requirements are absurd because no such written reasons are required for a CUP approval. *See* Res. Br. at 15. But this Court has already recognized the clear distinction between CUP approvals and denials.

CUP approvals are presumed to be consistent with the relevant ordinance standards and, as such, no findings are necessary for a CUP grant. *See Haen v. Renville County Bd. of Comm'rs*, 495 N.W.2d 466, 471 (Minn. App.) ("[w]hen an application for a special use permit is approved, the decision-making body has implicitly determined that all requirements for the issuance of the permit have been met . . . [t]herefore, express written findings are unnecessary"), *review denied* (Minn. March 30, 1993); *see also Paper v. Trotter*, No. C2-00-1333, 2001 WL 345464 (Minn. App. Apr. 10, 2001) (Rel. Supp. App. 309) (reasons supporting an approval are presumed to be consistent with the county's ordinance).⁴ In stark contrast, a CUP denial is presumed to be arbitrary in the absence of sufficient written reasons to support the denial. *In re Livingood*, 1998 WL 531759, at *4 (Rel. App. 248-52). Thus, § 15.99, subd. 2(c)'s writing requirements for a CUP denial are necessarily more stringent than for a CUP approval.

⁴ A challenge to the approval of a CUP must meet a higher burden of proof than a landowner's challenge to a denial of a CUP. *Board of Supervisors v. Carver County Bd. of Comm'rs*, 302 Minn. 493, 499, 225 N.W.2d 815, 819 (1975). Likewise, a county's CUP approval is traditionally subject to more deferential review than CUP denials. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003).

B. County's substantial compliance argument is equally weak

Recognizing that its reasonableness challenge to the three writing requirements is a loser, County is forced to argue in the alternative that it substantially complied with § 15.99, subd. 2(c), as amended, by tape recording the hearing and providing Relators with the one-page conclusory denial form at the conclusion of the hearing. *See Res. Br.* at 13-15. This argument is a non-starter.

1. The three writing requirements are mandatory, thereby requiring strict compliance

The key to County's argument is its implicit contention that § 15.99, subd. 2(c)'s three writing requirements are not mandatory and, therefore, substantial — not strict — compliance is required. *See Res. Br.* at 14-15. But this Court has already determined several times that "simultaneous written reasons for denial are mandatory and not directory." *Demolition Landfill Servs.*, 609 N.W.2d at 282; *see also Concept Props.*, 694 N.W.2d at 826-27; *American Tower*, 621 N.W.2d at 43; *Manco of Fairmont, Inc.*, 583 N.W.2d at 295-96.

County conspicuously makes no attempt to distinguish *Concept Props.*, *American Tower* or *Manco of Fairmont*. And County's attempt to distinguish *Demolition Landfill Servs.* is unavailing. The two cases are very similar. In *Demolition Landfill Servs.*, Duluth, just like County here, voted to effectively deny a permit application within the statutory deadline. *Demolition Landfill Servs.*, 609 N.W.2d at 280. But, just like this case, Duluth made no written findings to support its permit denial with § 15.99's deadline to do so. *Id.* Although Duluth, like County, prepared a tardy resolution containing written reasons for its CUP denial, this Court held that the purported denial was untimely

because no "simultaneous written reasons" supporting the denial were presented to the applicant within § 15.99's deadline. *Id.* The only real distinction between the two cases is that in *Demolition Landfill Servs.* the required "simultaneous written reasons" for denial were court-imposed, while here they are also expressly statutorily imposed.

In its most recent § 15.99 decision, this Court confirmed that, even without the 2003 amendment, § 15.99 requires the written reasons for denial be provided to the applicant before the expiration of the 60-day statutory period. *See Concept Props.*, 694 N.W.2d at 826-27 (citing *Demolition Landfill Servs.*, 609 N.W.2d at 282). Thus, it is beyond dispute that § 15.99's writing requirements are mandatory and strict compliance is required.

2. In any event, County did not comply with the three writing requirements

a. County's admitted lack of strict compliance

By its non-response to Relators' contention (Rel. Opening Br. at 15), County admits that the tape recording of the hearing was not a "writing" and that the audio recording was not, in any event, provided to Relators within the 60-day deadline. *In re Bieganowski*, 520 N.W.2d 525, 529 (Minn. App.) (failure to address an argument in a brief waives that argument), *review denied* (Minn. Oct. 27, 1994). And County expressly admits that its October 6, 2004 Resolution and Minutes were not provided to Relators until October 15 (Rel. Supp. App. 313 & 319), which was two days after the expiration of § 15.99's maximum 120-day deadline, let alone the applicable 60-day deadline. Rel. Opening Br. at 15. Thus County effectively admits that the only writing provided to Relators within the statutory deadline was its one-page form notice of denial.

With regard to its one-page form notice of denial (Rel. App. 112), County concedes by its silence that its notice contained no stated reasons for denial. *In re Bieganowski*, 520 N.W.2d at 529. County similarly accepts by its non-response that the non-existent reasons for denial in the form notice are "[in]consistent" with its stated reasons for denial at the hearing. *See* Rel. Opening Br. at 15-16. Indeed how can unstated reasons for denial be "consistent" with any stated reasons for denial?

Tellingly, County nowhere states that it strictly complied with § 15.99, subd. 2(c)'s three writing requirements.

b. County's lack of substantial compliance

Given its constructive and actual admissions, County is forced to argue that it substantially complied with §15.99 by giving Relators (1) a tape recording of the hearing in which it denied the CUP; and (2) the one-page form denial at the close of this hearing. *See* Res. Br. at 13-15. County's arguments miss the mark.

The audiotape simply cannot satisfy any writing requirement because it is not a "writing." *See Demolition Landfill Servs.*, 609 N.W.2d at 281-82. Moreover, while County disingenuously suggests throughout its brief that it gave Relators a transcription of the August 16 hearing, it did no such thing. The untranscribed tape recording was not given to Relators until after the August 16 hearing, which Relators then had to hire a court reporter, at their own expense, to transcribe. Rel. Supp. App. 314. The transcription was not even complete until after the expiration of Relators' 60-day deadline to file their petition for certiorari. *Id.* As such, the tape recording cannot satisfy § 15.99, subd. 2(c)'s three writing requirements.

County's assertion that its one-page form notice satisfies § 15.99 is incredible. County does not deny that the notice contains no written reasons whatsoever. *See* Rel. App. 112. In the absence of any written reasons, the notice cannot possibly satisfy § 15.99, subd. 2(c)'s three writing requirements.

Finally, County's alleged "compliance" with one of the underlying purposes of § 15.99, subd. 2(c) – *i.e.*, avoiding post hoc justifications of CUP denials – is irrelevant to its compliance with the statute's writing requirements (*see* above) and ignores its non-compliance with the other purposes of § 15.99, subd. 2(c) (*see* above). Section 15.99, subd. 2(c)'s purposes go far beyond just the elimination of post hoc justifications for CUP denials.

II. COUNTY'S CUP DENIAL WAS ARBITRARY

A. This Court should review only § 15.99-compliant reasons for denial

The threshold issue with regard to Relators' arbitrariness challenge to County's CUP denial is the determination of which set of reasons for denial should be reviewed on appeal. Relators contend that this Court should review only those written reasons, if any, that were provided to Relators in compliance with § 15.99. *See* Rel. Opening Br. at 10-11. In contrast, County assumes without explanation that this Court should instead review the oral reasons for denial that are set forth in the tape recording of the hearing that was given to Relators after the expiration of § 15.99's statutory deadline. *See* Res. Br. at 13-14.

This precise issue has not been specifically addressed since the Legislature's 2003 amendment of § 15.99. But one of this Court's most recent zoning decisions recognizes (albeit implicitly) that the written reasons for denial that are to be reviewed under an

arbitrariness challenge must have been timely made as is required by § 15.99. In *Omann v. Stearns County Bd. of Comm'rs*, No. A03-2047, 2004 WL 2094585, at *5 (Minn. App. Sept. 21, 2004) (Rel. Supp. App. 315), the zoning applicant challenged the arbitrariness of the county's CUP denial. The county justified its denial based on the written reasons for denial in its resolution signed by the county board less than one week after the last of two public hearings, but before the expiration of §15.99's statutory deadline. While the applicant attacked the county's resolution as a post hoc justification, this Court held that the resolution was sufficiently "tied" to the record to be a basis under an arbitrariness challenge to support the board's decision. *Id.* This decision is consistent with § 15.99, subd 2(c), as amended, in that written reasons provided to applicants within the statutory deadline are reviewable; those provided after the deadline are not.

It ineluctably follows, then, that in the context of an arbitrariness challenge this Court should review only those written findings that were provided to the applicant within § 15.99's statutory deadline. Indeed it would be contrary to public policy, judicial economy and common sense to have two separate sets of reasons for denial reviewed on appeal – that is, one set of reasons for a § 15.99 untimeliness challenge and another set of reasons for an arbitrariness challenge.

More specifically, § 15.99, subd. 2(c), as amended, is intended, as discussed above, to (1) preclude untimely decisionmaking (*Manco of Fairmont, Inc.*, 583 N.W.2d at 296); (2) ensure procedural due process to the applicant (*Picha*, 634 N.W.2d at 741); (3) facilitate efficient judicial scrutiny of local zoning decisions (*In re Livingood*, 1998 WL 531759, at *4); and (4) bar after-the-fact justifications (*R.A. Putnam & Assocs., Inc.*,

510 N.W.2d at 267). These purposes are undermined if the zoning body is allowed to justify its zoning denial based on either oral reasons for denial that were provided to the applicant within the statutory deadline or written reasons for denial that were not provided to the applicant within the statutory deadline. Only those written reasons that were timely provided to Relators as required by § 15.99 should be reviewed.

This case presents a good example of the problems that would be caused if this Court held to the contrary. County denied Relators' CUP on August 16, 2004. *See* Rel. App. 112. By statute, Relators had to file their writ of certiorari to this Court within 60 days of that decision, or by October 13, 2004. Minn. Stat. § 606.01. But County's only written reasons for denial were its October 6, 2004 Resolution and Minutes, both of which were not provided to Relators until October 15. Rel. Supp. App. 319. Thus, Relators were forced to file their appeal two days before County first provided Relators with its written reasons for denial. Because of the absence of any written reasons for the denial in its one-page form notice, Relators had to decide whether to pursue an appeal based on Relators' recollection of County's oral reasons for denial stated at the August 16 hearing or Relators' quick expenditure of hundreds of dollars transcribing the tape recording of the hearing. Section 15.99, subd. 2(c)'s three writing requirements, as well as the case law from which these requirements sprang, were intended to eliminate this type of guesswork and expense.

B. There are no § 15.99-compliant reasons for denial, and County's only timely written denial is per se arbitrary

As discussed above, there are no § 15.99-compliant reasons for denial. And the only written document that County provided to Relators within the statutory deadline was

County's one-page form notice of denial. *See* Res. Br. at 13-14. But this notice, which lacks any written findings at all, is *per se* arbitrary. *Zylka v. City of Crystal*, 283 Minn. 192, 198, 167 N.W.2d 45, 50 (1969) ("where the governing body denies a special use permit without making findings or otherwise recording a reason or reasons for its action, the trial court must recognize that a *prima facie* case of arbitrariness has been established"); *Communications Props., Inc. v. County of Steele*, 506 N.W.2d 670, 672 (Minn. App. 1993) ("a lack of contemporaneous findings is per se arbitrary and capricious") (emphasis added).

C. Regardless, County's oral reasons for denial are arbitrary

1. County's motion for denial was presumptively arbitrary

County concedes that its reasons for the denial of Relators' CUP must be recorded "in more than just a conclusory fashion." Res. Br. at 16 (citing *City of Barnum v. County of Carlton*, 386 N.W.2d 770, 775 (Minn. App. 1986)). But County argues that its oral motion to deny Relators' CUP, which was made and passed at the hearing, was not conclusory. *Id.* County's motion to deny Relators' CUP request at the hearing was, nevertheless, the epitome of conclusory.

County's own presentation of its motion for denial is in full as follows:

Mr. Chairman, I move that we deny the request for the same reasons as previously. That's F. For (inaudible) rule I think creates potential health and safety environmental noise levels that we can't prove it won't.

And G, propose use or development will be detrimental to the use of property.

I believe when Mr. Boyd bought this in 1976 he may have had one idea, but he didn't do anything for 25 years. And the property changed around. And he got caught by that. And I think that's unfortunate for him. But I think

there are more residents now than anything else. And this is different than the other gravel pits in the area.

That's my motion. (Rel. App. 243). The motion was seconded and carried. (*Id.*)

See Res. Br. at 7-8 (emphasis added).

County's explanation for why its motion was not conclusory underscores the summary nature of the motion. *See* Res. Br. at 16. County justified its motion as follows:

As stated in the above arguments, the County did more than make conclusory remarks. The record reflects extensive discussion of the factors considered (e.g. traffic, intensity, noise) and the planning commissions conclusion that Relators did not meet their burden of proof that sections 26.03(F) and (G) of the Zoning Ordinance pertaining to conditional use permits had been met.

Id. (emphasis added). Even the briefest perusal of the hearing transcript reveals the absurdity of County's argument. No topic was "extensive[ly] discuss[ed]" at the hearing. Nor was there an "extensive discussion" of the zoning ordinance's conditional use factors. And the discussion that did take place emanated from public comments at the hearing and not from County's decisionmakers, who themselves said virtually nothing.

Simply put, the barely decipherable transcript "do[es] not adequately explain the reasons for its decision." *See Picha*, 634 N.W.2d at 742. In fact, it does not explain anything at all. Because the transcript – which County effectively concedes is its only written statement of reasons for the denial – is unmistakably vague and conclusory, County's denial of Relators' requested CUP is presumptively arbitrary and, therefore, void. *In re Livingood*, 1998 WL 531759, at *4 (citing *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 742 (Minn. 1986)) (Rel. App. 248-52). Issuance of

Relators' requested CUP is thus compelled. *In re Livingood*, 594 N.W.2d at 895 ("when a governmental body denies a permit with such insufficient evidence that the decision is arbitrary and capricious, the court should order issuance of the permit").

2. County's three purported oral reasons for its denial were otherwise unreasonable

County identifies its three supposed bases for denial of Relators' CUP as "noise, traffic and intensity of use." *See* Res. Br. at 17. These purported reasons are unreasonable because either they were wholly unsubstantiated in the record or they could have been adequately addressed by CUP condition, or both. County does not dispute the black letter law that CUP conditions must be imposed if such a condition can adequately address a concern that may otherwise support a denial of the requested CUP. *See Trisko v. City of Waite Park*, 566 N.W.2d 349, 357 (Minn. App.), *review denied* (Minn. Sept. 25, 1997); *Minnetonka Congregation of Jehovah's Witnesses v. Svee*, 303 Minn. 79, 85-86, 226 N.W.2d 306, 309 (1975).

a. County's purported noise concern could have been adequately addressed by a reasonable CUP condition

County does not dispute that State standards regarding noise trump local noise standards, thereby barring any attempt by County to impose noise standards that are more restrictive than State standards. *See* Minn. Stat. § 116.07, subd. 2; *Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 356, 143 N.W.2d, 813, 819 (1966). And, importantly, County does not dispute that, just prior to denying Relators' requested CUP, it passed a motion authorizing Relators to conduct on-site noise tests of their blasting and quarrying equipment to ensure compliance with State standards. *See* Rel. App. 232-33, 238 & 242.

Clearly, County's willingness to allow Relators to test the noise levels created by their proposed use demonstrates that at least one reasonable condition could have been placed on the CUP to adequately address County's — or, more appropriately, the neighbors' — noise concerns. County's denial based on noise was, therefore, unreasonable.

- b. County's purported traffic concern is unsubstantiated, and it could have been adequately addressed by a reasonable CUP condition

The lack of record support for traffic concerns as a supposed justification for County's CUP denial is striking. Indeed County's entire articulated support for the traffic concern is as follows:

Concerns were also raised about increased traffic on Westover Road, with Mr. Boyd of B&B conceding that although he was planning to get an easement that would address the traffic issue he had not done so at the time of the hearing. (Rel. App. 198-199).

* * *

The record contains a number of discussions about traffic. (Rel. App. 197-203). Planning Commission member Blank noted past concerns about traffic. (Rel. App. 198). Mr. Boyd specifically stated that he was seeking an easement to alleviate traffic and the pressure on the west end of Westover Road. (Rel. App. 198-99). The concerns about traffic were therefore not merely fear or speculation but, in fact, a documented problem. Other cases have upheld findings based on such testimony. For instance, citizen complaints about pre-existing traffic problems were found to be well documented in the record in *St. Croix Dev., Inc. v. City of Apple Valley*, 446 N.W.2d 392, 299 (Minn. Ct. App. 1989). Here, Mr. Boyd acknowledged the problem.

See Res. Br. at 7 & 19-20.

Conspicuously missing from County's argument is any record basis to claim that the proposed blasting and quarrying activities would increase traffic beyond that which is

already allowed by the existing mining operations. County's denial based on purported traffic concerns was thus arbitrary as a matter of law. *See Yang v. County of Carver*, 660 N.W.2d 828, 834 (Minn. App. 2003) (finding permit denial arbitrary because "neighbors' anecdotal comments contain no detail as to how the cars they witnessed might affect circulation or the general welfare" and comments were "insufficiently concrete to substantiate a finding that the proposed use would create excess traffic").

Moreover, County has not presented any evidence concerning how the proposed blasting and quarrying would cause an incremental increase in traffic impacts to the area. *Northern States Power Co. v. City of Sunfish Lake*, C4-02-6854, slip op. at 22 (Rel. App. 275), *aff'd on other grounds*, 659 N.W.2d 271 (Minn. App. 2003). County does not dispute the rationale underlying this non-precedential, but unassailably logical, district court decision. The relevant traffic issues have already been approved under Relators' existing mining permit. And there is no record evidence that the modification to the permit concerning the method for mining the aggregate will cause any incremental increase in traffic.

Regardless, County does not dispute that reasonable CUP conditions could be imposed to adequately address County's purported traffic concerns. For instance, traffic limits could be imposed, such as the diversion of traffic away from nearby residences and restricting the hours of operation. County's failure to even consider these reasonable conditions renders its denial on the basis of traffic concerns arbitrary. *Trisko*, 566 N.W.2d at 357; *Minnetonka Congregation of Jehovah's Witnesses*, 303 Minn. at 85-86, 226 N.W.2d at 309.

c. County's purported intensity concern is unsubstantiated

County's "intensity of use" rationale for its CUP denial is also unconvincing. Strikingly absent from County's stated objection to the "intensity of use" is any identification of any adverse health, safety or welfare impacts purportedly arising from the intensity of the proposed use. This lack of evidence is fatal.

The intensity of a use alone does not equate to adverse impacts to health, safety and welfare. *See Metro 500, Inc. v. City of Brooklyn Park*, 297 Minn. 294, 301-02, 211 N.W.2d 358, 363 (1973) (holding that "the limitation of the number of one type of use in a particular area does not bear a sufficient relationship to the public health, safety, or general welfare of a community and that the denial of a special-use permit for such a reason is therefore arbitrary"). Rather, to support a denial of a conditionally permitted use, County must substantiate the precise adverse health, safety or welfare impacts arising from the purportedly more intense use. *See Enright v. City of Bloomington*, 295 Minn. 186, 190, 203 N.W.2d 396, 399 (1973) ("[w]e are not impressed by the vague references in the council minutes to the 'health, welfare, and safety for the people of Woodbury' as justification for denying the permit without an articulation by the council of the factual basis and reasons for that determination").

CUP applicants cannot be denied their requested permit without an identification of those precise adverse impacts. *See Chanhassen Estates Residents Association v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) ("denial of a conditional use must be based on something more concrete than neighborhood opposition and expressions of concern for public safety and welfare"). Without an identification of those precise

adverse impacts, County cannot discuss, let alone impose, reasonable CUP conditions to adequately address these adverse impacts. Accordingly, County's CUP denial based on alleged "intensity" concerns is unreasonable.

CONCLUSION

County has no defense to Relators' challenge to County's denial of Relators' CUP. To begin with, County cannot substantiate its compliance with § 15.99, subd. 2(c)'s three writing requirements. County did not, within § 15.99's 60-day deadline, provide Relators with written reasons for its CUP denial that were consistent with the oral reasons stated on the record at the hearing. County's tape recording of the hearing wherein it denied the CUP was neither a writing nor given to Relators within the statutory deadline. And County's one-page form notice of denial, though provided to Relators on time, contained no written reasons for denial. As such, County's CUP denial was untimely as a matter of law.

County's CUP denial was, as well, arbitrary. The only statement of written reasons that should be reviewed by this Court are those that were timely provided to Relators within § 15.99's statutory deadline. County cannot dispute that the only document arguably fitting the bill is its one-page form notice of denial, which contains no reasons for the denial and is, as such, per se arbitrary. Even if this Court reviews the oral reasons for denial at the August 16, 2004 hearing, each of the three purported concerns raised at the hearing – *i.e.*, noise, traffic and intensity of use — either was unsubstantiated in the record or could have been adequately addressed by a CUP condition, or both.

This Court's issuance of Relators' CUP is thus compelled.

DATED: June 7, 2005

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).