
**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.

RESPONDENT'S BRIEF AND SUPPLEMENTAL APPENDIX

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STATEMENT OF THE CASE

In June of 2004, Relators B&B Aggregates (B&B) and Veit Co. (Veit) submitted an application to Respondents Lake County, Minnesota through its Planning Commission (County) seeking to add “blasting & quarrying” to an existing Conditional Use Permit (CUP) originally issued in 2000. (Rel. App. 1-2A.) A hearing was held on August 16, 2004, which was tape recorded and transcribed (Rel. App. 191-245).

At the end of the August 16, 2004 hearing, the County hand delivered a written Notice that Relators application was denied. (Rel. App. 112). On or about October 6, 2004, a Denial of Conditional Use Order was filed with the Lake County Recorder, which attached written findings contained in resolution PCR-04-036. (Supplemental Appendix (SA 1-2). Veit and B&B were provided with the Denial of Conditional Use Order on or about October 15, 2004.

The written denial notice provided to Relators on August 16, 2004 and the verbatim transcript of the hearing provide a sufficient “written statement” to satisfy case law and the provisions of Minnesota Statute section 15.99. A review of the record will show that Relators were given an extensive hearing with lengthy discussions on Relators’ application. The record supported the denial of Relators’ application.

STATEMENT OF THE ISSUES AND RESULTS BELOW

A. TIMELINESS ISSUE UNDER MINNESOTA STATUTE SECTION 15.99

1. Whether the County's issuance of a written Denial notice on August 16, 2004, in conjunction with a verbatim transcript of the proceedings satisfied the requirements of Minnesota Statute section 15.99.

Result below: The County found compliance.

2. Whether Relators met their burden of proof that the County's reasons for denial of Relators Application to add quarrying and blasting to an existing Conditional Use Permit were impermissible.

Result below: The County held Relators did not meet their burden of proof.

STATEMENT OF FACTS

Relators argue that B&B has been subjected to a gauntlet of permits to operate its commercial gravel operation (Rel. Br. at 5) but a closer review of the record finds that Relators have sought to change a commercial gravel operation into a quarrying and blasting operation through a series of CUP applications. A review of the prior applications confirms B&B's intention to quarry and blast as well as County efforts to have B&B abide by the CUPs.

A. B&B'S JULY 2000 "COMMERCIAL GRAVEL OPERATION" CUP APPLICATION.

B&B applied for a CUP for a "commercial gravel operation" on July 2, 2000. (2000 CUP) (Rel. App. 118-19). Relators characterize the application as not restricting blasting and quarrying, (Rel. Br. at 5) depending in part upon the Affidavit of Rudolph Hoagberg, a geologist hired by B&B. (Rel. App. 123). However, the Minnesota Court of Appeals previously denied this argument by B&B when it held:

B&B's arguments presuppose that the July 2000 conditional use permit included permission for quarrying and blasting.

...

B&B also relies on its expert's opinion that mining includes blasting and quarrying and that B&B's operation is ineffective without them. But the district court, acting on its conclusion that as a matter of law blasting and quarrying are not necessary elements of a mining operation, determined that if B&B's mining operation requires blasting and quarrying, it must specifically apply for such a permit. We agree.

B&B Aggregates v. Lake County, C2-01-1570, 2002 WL 453231, at *2, *4 (Minn. Ct. App. Mar. 26, 2002)(Rel. App. 179-181). In fact, the July 17, 2000 Planning

Commission minutes note concerns about use of the property and placed a number of conditions to the permit including a setback requirement that stated:

Creek – 150' (Little Knife) depending on wetlands could be more plus any restoration required for what has already been damaged and wetlands to be studied in the area, and mitigated as required. Any mitigation and fines are to be taken care of prior to the start of any gravel mining and no mining on the south side of the creek.

(Rel. App. 122) (emphasis added).

B. FEBRUARY 6, 2001 B&B AMENDED CUP APPLICATION

B&B next applied for an amendment to the 2000 CUP to add “aggregate crushing” including “mining and screening” by a February 6, 2001 application to amend the July 2, 2000 CUP. The resulting CUP Crushing Permit dated April 2, 2001 and incorporated resolution (Crushing Permit) contained findings that:

- 6) Throughout the process Applicants have performed operations without prior approval from appropriate governmental agencies and have acted with apparent indifference to conditions imposed by the Planning Commission.
- 7) Applicants violated the intent of Planning Commission when they removed vegetation, including mature trees, from setback area, which was created to ensure the use would not be injurious to the use and enjoyment of the environment, or detrimental to the rightful use and enjoyment of other property in the immediate vicinity, nor substantially diminish or impair values within the vicinity.
- 8) If the operation continues and includes crushing, a berm and trees will provide a minimum replacement buffer, in the area where vegetation was removed, to ensure the use will not be injurious to the use and enjoyment of other property in the immediate vicinity, nor substantially diminish or impair values within the vicinity.

(Rel. App. 158-59). Such facts do not support Relators characterization that the Crushing Permit was granted due to an “overwhelming and uncontradicted record.” (Rel. Br. at 6).

C. B&B'S JUNE 12, 2003 APPLICATION TO ADD "BLASTING AND QUARRYING" TO THE 2000 CUP.

B&B next applied to add "blasting and quarrying" to the 2000 CUP on June 12, 2003 (2003 Application). (Rel. App. 183-86). Although Relators argue that the County's denial of the 2003 Application was not legally sufficient, they did not challenge or appeal the resulting order and have submitted the documents related to the 2003 Application as part of their appendix. (Rel. App. 183-90).

The resulting minutes state that the motion to deny B&B's 2003 Application was based upon the fact that Lake County Zoning Ordinance 26.03(G) (currently codified as 25.03(G)) (SA 4) could not be satisfied, which stated "The proposed use or development will not be detrimental to the rightful use and enjoyment of other property in the immediate vicinity, nor substantially diminish or impair values with[in] the vicinity." (Rel. App. 189). The denial of the 2003 Application was followed by the current application.

D. RELATORS' JUNE 15, 2004 APPLICATION TO ADD "BLASTING AND QUARRYING" TO THE EXISTING CUP.

Veit Company joined B&B in Relators' current application (2004 Application), which again sought to add "blasting and quarrying" to the existing CUP. (Rel. App. 1-2A). Don Boyd, one of the partners of B&B, was present at the hearing and acknowledged that the first permit issued for the property was in 1976. (Rel. App. 200). Mr. Boyd also stated that he had been before the Planning Commission "... six times now on this project. And quite frankly, I'll come back again along (sic) as I'm alive." (Rel. App. 207). Relators submitted extensive documents to the Lake County Land Use

Department including a "Permit Tutorial" in excess of 100 pages. (Rel. App. 3 - 111). However, Mr. Boyd stated at the hearing "unfortunately the people who do the drilling and blasting are not here tonight." (Rel. App. 195). Relators made a presentation and there were extensive questions and answers between Relators' representatives and Commission members.

Among the concerns stated were those of an unidentified speaker addressing the past compliance of B&B and prior damage to the property who stated:

But there are also issues as far as bulldozing in the clearing and the buffer zones that were put in place after the fact. The clearing was already there and then decided at meetings. I mean, it was all brought up then.

There were supposed to be trees planted because of violations. A year after the violations – you know, within that year the ditching got done and the seeding got done and everything looked pretty. And hence the permits were issued, you know, after the fact.

(Rel. App. 231).

Mr. Richter, a neighboring landowner, submitted a letter in opposition to the application including a table on noise exposure from the University of Minnesota and case law from Wisconsin and Maine concerning land use issues. (SA 7-24). At the hearing Mr. Richter had an extended discussion regarding his noise concerns. (Rel. App. 214-222). In particular, Relators' representative at the hearing could not state whether the noise level would be within the 60 decibel requirement stating: "I do not have that data, but it's our belief that you can. I mean, all – all the new equipment that's coming out is rated at 80 decibels and that's to operate in any type of environment." (Rel. App. at 217).

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).

Mr. Nixon, another adjoining landowner, stated his concern that adding quarrying and blasting would increase the intensity of the operation, particularly stating: "And a lot of the rock that we've got there is a softer rock that they could dig up. It crushes nicely and it works well. But the quarry is just so different. And that's the scary thing about it. That's why we're worried." (Rel. App. at 226).

Planning Commission member Blank summarized the concerns:

But one of the concerns, and one of the reasons that I put the limitation for no blasting and quarrying on this process was the intensity of the project.

Not having anything to do with whether you could blast quietly or not, but there was a lot of concern expressed previously about traffic, the amount of truckloads hauling. And it's obvious, and when we're talking, and I read through the tutorial, and, you know, you're talking about two million dollars worth of equipment. So you're not talking about a penny operation. This is a big operation. This is going to result in a lot of stone.

Also, somewhere in here, and I can't find my highlighting right now, we talk about hauling out larger blocks. The building dimension stone, if that were produced. That's not, in my opinion, an aggregate.

(Rel. App. 197). Considerable discussion occurred between Relators' representatives, the Commission members, and members of the general public. Commission member Blank made the following motion:

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.

The language used by Commission member Blank conforms to the language of the Lake County Zoning Ordinance regarding Conditional Use Permits, section 25.03(F) and (G), which places the burden upon the applicant to prove:

F) The proposed use will not create potential health and safety, environmental, lighting, noise, signing, or visual problems.

G) The proposed use or development will not be detrimental to the rightful use and enjoyment of other property in the immediate vicinity, nor substantially diminish or impair values within the vicinity.

(SA 4). A written Notice of denial dated August 16, 2004 (Rel. App. 112) was given to John Pippert, a Vice President of Veit. (Rel. App. 113). The hearing was transcribed and is contained in the record (Rel. App. 191-245).

The repeated CUP applications to add blasting and quarrying to the 2000 CUP, prior appellate review on a similar issue, the written notice given to Mr. Pippert, and the verbatim transcript of the August 16, 2004 hearing are sufficient to support the denial of Relators' current CUP application.

ARGUMENT

I. STANDARD OF REVIEW

Relators have appealed the County's decision by writ of certiorari. "[T]he standard of review is the same for all zoning matters, namely, whether the zoning authority's action was reasonable." Honn v. City of Coon Rapids, 313 N.W.2d 409, 416-17 (Minn. 1981). Appellate review of a zoning authority's denial of a conditional use permit is limited to determine whether the decision was "unreasonable, arbitrary or capricious." Id. at 417. A denial based on a legally sufficient reason supported by a factual basis is not unreasonable, arbitrary or capricious. C.R. Invs., Inc. v. Village of Shoreview, 304 N.W.2d 320, 325 (Minn. 1981). A zoning authority's denial of a land use request is not arbitrary so long as one stated reason is legally sufficient. Trisco v. City of Waite Park, 566 N.W.2d 349, 352 (Minn. Ct. App. 1997).

A zoning authority's review of a conditional use permit is a quasi-judicial review. White Bear Docking & Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn. 1982). Appellate review defers to the zoning authority's conditional use permit decision when the factual basis for the denial has the "slightest validity." Id. The permit applicant bears the burden of persuasion that the reasons stated by the zoning authority for denial "are either without factual support in the record or are legally insufficient." Hubbard Broad., Inc. v. City of Afton, 323 N.W.2d 757, 763 (Minn. 1982).

II. THE COUNTY'S AUGUST 16, 2004 WRITTEN DENIAL FORM ALONG WITH A VERBATIM TRANSCRIPT OF THE HEARING COMPLY WITH CASE LAW AND MINNESOTA STATUTE SECTION 15.99.

A. The County has Complied with the Intent of Minnesota Case Law Prohibiting *Post Hoc* Justifications for Conditional Use Permit Denials.

Minnesota case law requires that a zoning authority's denial of a conditional use permit be supported by the record. "By failing to do so, it runs the risk of not having its decision sustained." Honn, 313 N.W.2d at 416.

[T]he factual basis and reasons for the denial must be in some manner recorded contemporaneously with its action. Without such a safeguard, a council may arbitrarily deny a permit and later, after the denial is challenged, state reasons which are completely unconnected with the actual basis for the denial.

Metro 500 Inc. v. City of Brooklyn Park, 297 Minn. 294, 300, 211 N.W.2d 358, 362 (1973).

Here, the County did not engage in *post hoc* justifications. The August 16, 2004 hearing was tape recorded and transcribed. (Rel. App. 191-245). The transcript contains the handwritten notations of Mr. Van Den Heuvel, the interim Land Use Administrator, noting the speakers. (SA 25). The motion to deny the application referred to sections 25.03(F) and (G) pertaining to conditional uses which require the applicant to prove:

F) The proposed use will not create potential health and safety, environmental, lighting, noise, signing, or visual problems.

G) The proposed use or development will not be detrimental to the rightful use and enjoyment of other property in the immediate vicinity, nor substantially diminish or impair values within the vicinity.

(SA 4) The record and hearing transcript provide sufficient justification that Relators did not prove compliance with the above sections. B&B had a past history of non-

compliance. The 2000 CUP findings noted that wetlands had been damaged. (Rel. App. 122). Findings made regarding the 2001 Crushing Permit found that B&B had “performed operations without prior approval from appropriate governmental agencies and have acted with apparent indifference to conditions imposed by the Planning Commission.” (Rel. App. 158-59). The prior noncompliance was noted at the hearing. (Rel. App. 231). Relators could not answer Mr. Richter’s concerns whether the 60 decibel limit would be met. (Rel. App. at 217). Mr. Boyd acknowledged traffic concerns when discussing an easement to avoid further traffic on Westover Road. (Rel. App. 198-199). Mr. Nixon noted the increased intensity that quarrying and blasting would add to a gravel operation. (Rel. App. 226). Relators were given a written denial notice on August 16, 2004. (Rel. App. 112). Relators received a Denial of Conditional Use Order on or about October 15, 2004 that was filed with the county recorder on October 6, 2004, which stated the following reasons for denial.

1. Health and safety issues;
2. Detrimental to the use of the property in the neighborhood;
3. There is a difference in this gravel pit and the others in the area.

(SA 1-2). These findings were supported by the record. In response to these facts, Relators rely upon a formalistic interpretation of Minnesota Statute section 15.99 to argue that their application should be approved because completed, contemporaneous written findings were not provided to them the same evening of the hearing. However, such an interpretation would place form over function and defeat the intention of avoiding *post hoc* justifications.

B. Relators' Interpretation of Minnesota Statute Section 15.99 would lead to Absurd Results.

Relators cite to Minnesota Statute section 15.99, subd. 2 which requires a written statement of reasons for denial within sixty days of an application. Relators apparently argue that their application is automatically approved because a denial similar to the Denial of Conditional Use Order filed with the county recorder on October 6, 2004 was not presented to them on August 16, 2004. However, Relators were given a written denial form on August 16, 2004 (Rel. App. 112) and a transcript of the proceedings confirms the reasons for denial

The Minnesota Court of Appeals recently stated "Given the decisive effect of section 15.99, we are not inclined to expand its operation beyond its clear meaning . . ." Yeh v. County of Cass, ___ N.W.2d ___, No. A04-1454, 2005 WL 1154169 at *13 (Minn. Ct. App. May 17, 2005)(SA 36). In addition, "the legislature does not intend a result that is absurd, impossible of execution, or unreasonable." Minn. Stat. sec. 645.17(1). Relators argue that the hearing was purposely held late on the last night of the sixty-day period but present no authority for such an assertion. (Rel. Br. at 1). Hearings on the sixtieth day can easily occur given publication requirements, planning commission schedules, and notice requirements. In such a situation it is unreasonable to expect volunteer Planning Commission members to provide a written document giving a factual summary of a long hearing where voluminous information was submitted and extensive testimony heard. It is unreasonable to expect such findings to be made under such circumstances. The type of detailed findings Relators claim is mandatory is simply not

possible in such circumstances and Minnesota Statutes do not provide for such results elsewhere.

For instance, district court judges are given 90 days to submit written findings after a hearing. Minn. Stat. sec. 546.27.

When district court findings are not adequate for appellate review, remand for the limited purpose of making adequate findings is allowed. In re N.T. K., 619 N.W.2d 209, 211-12 (Minn. Ct. App. 2000).

It would be an absurd result that state employed judges, learned in the law, have 90 days to compile written findings whereas volunteer planning commission members would be expected to address, analyze and compile extensive written findings the same night they hear an application.

Furthermore, the written denial provided on August 16, 2004 and the verbatim transcript conforms to the written statement requirement of section 15.99.

C. The County's August 16, 2004 Denial and Verbatim Transcript are a Sufficient "Written Statement" Pursuant to Minnesota Statute Section 15.99.

The recent unpublished case of Omann v. Stearns County Board of Commissioners addressed a similar issue and found a transcript of the proceedings pertinent to the requirement of written findings. In Omann, an applicant appealing the denial of a preliminary plat argued that the county board's findings were not made in compliance with Minn. Stat. sec. 15.99, but the Minnesota Court of Appeals stated:

While contemporaneous findings are required, findings may be issued after the decision is made as long as they are based on the record and are not simply a post hoc justification for the decision already made. Hurrie, 594 N.W.2d at 250. Here, there was a full transcript of the relevant hearings with testimony by experts and

evidence of the high probability of nitrates in the area and on the proposed site in particular. The findings are tied to this evidence and are set out in the resolution signed by the board less than one week after the last of two public hearings. There is no indication that the findings were based on anything other than the evidence before the county board.

Omann v. Stearns County Board of Commissioners, No. A03-2047, 2004 WL 2094585, at *5 (Minn. Ct. App. Sept. 21, 2004) (SA 43). “The form of the finding is not material.” Von Glahn v. Sommer, 11 Minn. 203 (1866) (ordering judgment to plaintiff “as prayed for in his complaint” complied with statutory requirement for stated conclusions of law). Here, the transcript supports the denial of the conditional use permit application.

Relators argue that “simultaneous, written reasons for a denial are mandatory and not directory.” Demolition Landfill Services, LLC, v. City of Duluth, 609 N.W.2d 278, 282 (Minn. Ct. App. 2000).

However, the Demolition Landfill case has unique facts. An applicant sought a permit for a landfill and the time period for review under section 15.99 expired on April 16, 1999. Demotion Landfill, 609 N.W.2d at 280. A hearing was held on April 12, 1999 and a resolution to grant the permit application was proposed but the resolution failed to pass. Id. No written findings were made as part of the April 12, 1999 hearing and no further action was taken until a May 24, 1999 hearing at which time a resolution to deny the permit was voted on, which resolution passed, supported by written findings. Id. at 280-81.

On these unique facts the Minnesota Court of Appeals found that “we cannot conclude that the council’s rejection of the resolution granting the permit [the April 12 hearing] equated to a denial of the permit application.” Id. at 281. The Minnesota Court

of Appeals found that the May 24, 1999 resolution was controlling, which occurred well after the April 16, 1999 deadline set by section 15.99. Id. Unlike the Demolition Landfill case, the County made a motion to deny Relators application and that motion carried, all within the 60-day time period set by section 15.99 and the record supports the denial of the application to amend the CUP.

It appears likely that Minn. Stat. sec. 15.99, subd. 2(b) was specifically drafted to avoid the result of Demolition Landfill because that section states “When a vote on a resolution or properly made motion to approve a request fails for any reason, the failure shall constitute a denial of the request provided that those voting against the motion state on the record the reasons why they oppose the request.” Minn. Stat. sec. 15.99, subd. 2(b) (2003).

This subdivision gives further evidence that Relators’ interpretation of section 15.99 would lead to absurd results. If the motion made at the August 16, 2004 hearing had been to approve the application and the motion had failed, the reasons stated by Commissioner Blank would appear to comply with section 15.99, subd. 2(b). It would be an anomalous result if the form of the motion should decide the merits of the application.

The cases of Honn, Metro 500, and Hurrle, all seek to avoid *post hoc* justifications for a zoning authority’s decision.

Ultimately, the validity of a zoning authority’s decision relies upon the record and in this case the record supports the denial of Relators CUP application.

III. RELATORS FAILED TO PROVE THAT THEIR CUP APPLICATION SHOULD BE GRANTED.

A. The Verbatim Transcript and August 16, 2004 Written Denial for the Basis for a Decision that was not Presumptively Arbitrary.

Again, Relators bear the burden of proof that the zoning authority's denial was without factual support or was legally insufficient. Hubbard Broad., Inc. v. City of Afton, 323 N.W.2d 757, 763 (Minn. 1982). Relators cite City of Barnum v. County of Carlton, 386 N.W.2d 770, 775-76 (Minn. Ct. App. 1986) to support an inference that references to CUP factors are not legally sufficient. However, the Barnum court specifically cited language from the Honn case that a zoning authority must:

at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion. By failing to do so, it runs the risk of not having its decision sustained.

Barnum, 386 N.W.2d at 775 (quoting Honn, 313 N.W.2d at 416) (emphasis added). 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.

Relators also cite extensively to the unpublished case of In re Livingood, No. C2-98-262, 1998 WL 531759 (Minn. Ct. App. Aug. 25, 1998) as support for their claim that denial of Relators' CUP was vague and arbitrary. (Rel. Br. at 19).

What the In re Livingood court found was that the county "has provided no evidence in support of its claim of a health risk to O'Neill's son other than O'Neill's

extremely brief statement at the planning commission hearing.” In re Livingood, at *4. However, the same case stated: “The supreme court has also considered the sufficiency of a finding in the context of the ‘cumulative effect’ of the testimony and discussion on the record.” Id. (quoting Earthburner’s Inc. v. County of Carlton, 513 N.W.2d 460, 463 (Minn. 1994)).

Here, the extensive hearing on the application contained multiple bases for denying Relators application: noise, traffic and intensity of use. See, Respondent’s Brief, supra, pp. 5 through 8.

B. Testimony of Members of the General Public was Based on Concrete Observations and was not Merely Fear or Speculation.

Relators cite case law that generalized neighborhood opposition is not sufficient to deny a conditional use permit but do acknowledge that such concerns are an allowable basis if based on concrete information. (Rel. Br. at 23). A zoning authority “is free to disregard an expert’s opinions when it is presented with conflicting non-experts’ opinions, including those of area residents, so long as the reasons are concrete and based on observations, not merely on fear or speculation.” Roselawn Cemetery v. City of Roseville, 689 N.W.2d 254, 260 (2004).

In Roselawn, a city council could disregard expert testimony supporting the addition of a crematorium to a cemetery and give credence to residents concerns about dioxins based on EPA data, a resident’s own calculations of mercury emissions, and another resident’s concern that cremated remains would emit radioactive particles. Roselawn, 689 N.W.2d at 260. Likewise, area resident concerns about traffic were found

to be concrete when based upon their observations of existing traffic problems.

Superamerica Group, Inc., v. City of Little Canada, 539 N.W.2d 264 (Minn. Ct. App. 1995). In addition area residents can have sufficient competency and personal knowledge to establish certain facts. Id. at 268 (citing See Corwine v. Crow Wing County, 209 Minn. 345, 361, 244 N.W.2d 482, 491 (1976) overruled in part on other grounds by Northwestern College v. City of Arden Hills, 281 N.W.2d 865 (Minn. 1979)).

In the current case, the testimony at the August 16, 2004 hearing was more than fear or speculation. In addition, it was Relators' burden to prove compliance with the CUP requirements, not the neighbors' burden to prove non-compliance.

1. Relators did not prove that decibel requirements were met.

The hearing contained an extensive discussion concerning noise, in particular a discussion between a neighbor, Mr. Richter, and Relators' representatives. Mr. Richter questioned whether the blasting and quarrying would meet the requirements of Minn. R. 7030.0040, subp. 2, requirement of decibel levels of 50 – 60 decibels. (Rel. App. 214-22). Mr. Richter relied upon Mine Safety and Health Administration (MSHA) research and a table from a University of Minnesota article on noise exposure in mines. (SA 9-10). For instance, Mr. Richter questioned whether machinery designed for 80 decibels would meet 60 decibels on his property and was told "I do not have that data, but it's our belief that you can." (Rel. App. 217).

The people who would do the drilling and blasting were not present at the meeting. (Rel. App. 195). The record does not contain any reference to particular experts testifying on behalf of Relators. Relators did submit a Permit Tutorial that

included a section on experts which appears to consist of the 2001 GME Consultants, Inc., letter (Rel. App. 38-41), a 2001 letter from Hoover Construction concerning whether aggregate mining included “blasting” (Rel App. 42-43), an Affidavit of Rudolph Hoagberg regarding “mining”, “quarrying,” “crushing,” and “blasting” (Rel. App. 44-45), and two letters from the Lake County Highway Department noting that crushed rock from the pit could be used for bituminous mixtures and crushed materials for road construction. (Rel. App. 47-48).

Of these documents, only the 2001 GME Consultants Inc., letter addresses the monitoring of blasting projects and it was concerned mostly with seismic activity. (Rel. App. 39). In addition, the report assumed that the nearest structures were located 700 feet from the pit and the nearest residence was 1500 feet from the pit. However, Mr. Richter stated that his home was only 550 feet from the pit. (Rel. App. 216).

With no answers to the issue of noise, the Planning Commission acted in the best interests of the general public in finding that Relators failed to prove that the use would not create potential noise problems.

2. The record supports findings of traffic problems and an increased intensity to the use.

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.

Likewise, the record supports the conclusion that adding blasting and quarrying would add to the intensity of an operation. The record stated that three gravel pits operated “within rock-throwing distance” but did not blast in a quarry. (Rel. App. 198). Another landowner, Mr. Gels specifically stated his concern that “it’s the scale of this thing. It’s not – it’s not Gunner’s pit. It’s not Osmon’s pit. It’s a big, huge quarry operation.” (Rel. App. 238). As Planning Commission member Blank stated, “you’re talking about two million dollars worth of equipment. So you’re not talking about a penny operation. This is a big operation. This is going to result in a lot of stone.” (Rel. App. 197).

Relators argue that the proposed pit being different from the existing pits is not an issue but the above facts prove that there is a difference. It is important to note that Relators already have a 2000 CUP allowing for a commercial gravel operation and a 2001 Crushing Permit for the property. The property is zoned R-1 (Rel. App. 2) and has become increasingly residential (Rel. App. 244). Although gravel pits are an allowed conditional use in the R-1 district there must be some limit to the intensity of such a use. The incremental addition of increasingly intrusive CUP amendments has reached a point where such amendments become detrimental to the rightful use and enjoyment of

surrounding properties. The County simply determined that the record did not support Relators request to add quarrying and blasting to the existing CUP.

CONCLUSION

Respondents Lake County, Minnesota and its Planning Commission properly denied Relators' application to amend an existing CUP to add blasting and quarrying, the County's written denial on August 16, 2004 along with a verbatim transcript met the requirements of case law and Minnesota Statute section 15.99, and Relators failed in their burden of proof that they met the requirements to issue an amendment adding blasting and quarrying to an existing CUP. Respondents respectfully request that the Court deny Relators' appeal in its entirety and uphold the County's denial of Relators application to add blasting and quarrying to an existing CUP.

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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).