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A06-0387

STATE OF MINNESOTA
IN COURT OF APPEALS

IN THE MATTER OF AN APPLICATION BY
HARVEY BLOCK AND GARY MCDUFFEE FOR
A CONDITIONAL USE PERMIT

REPLY BRIEF OF RELATOR
MINNESOTA FEDERATED HUMANE SOCIETIES

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INTRODUCTION

The central premise of the Respondents' briefs -- that the issuance of a conditional use permit is reasonable if all criteria in the CUP ordinance are met -- is fundamentally flawed because the permit actually issued in this case goes beyond the CUP criteria and affirmatively imposes an additional condition -- debarking -- that is not found within the CUP criteria. It is the imposition of that additional condition that makes the issuance of the permit arbitrary and capricious. The additional debarking condition was imposed by the Board without much, if any, evidence, without consideration of Minnesota's well-established anti-animal cruelty laws, and without an understanding of the nature and the extent of the debarking condition that it was requiring.

The record in this case does not support the imposition of the debarking condition. In fact, after the County issued the permit, the County Board and the County Administrator came to the conclusion that debarking is not a humane practice and is disapproved of by veterinarians across the county. Thus, in light of its own admissions about the impropriety of debarking all dogs that will go outside of the building, there is a lack of substantial evidence in the record to support the debarking condition in the permit and the issuance of the permit accordingly was arbitrary and capricious.

ARGUMENT

I. THE DEBARKING CONDITION IS ARBITRARY AND CAPRICIOUS, AND NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

Respondents argue that the County Board's issuance of a CUP could only be unreasonable if the CUP did not meet the standards set out in the Ordinance. (McDuffee

Br. 22; County Br. 13–22.) Respondents argue that the County Board considered the criteria set forth in the ordinance and, therefore, its decision was reasonable. (McDuffee Br. 22; County Br. 13–22.) However, that misses the real point. The County Board went beyond the Ordinance and its criteria by imposing the debarking condition on the CUP. Nothing in the CUP ordinance addresses a debarking condition for a CUP. The County was acting on its own accord by affirmatively imposing the additional debarking condition in the CUP, and thus must be able to demonstrate that the decision to do so was supported by substantial evidence in the record, was consistent with Minnesota’s animal protection laws and otherwise was reasonable. It is not enough simply to say that the stated criteria in the CUP ordinance were met when, in fact, the real issue in this case involves the imposition of an affirmative condition that is not one of the criteria in the CUP ordinance.

Before the County Board can affirmatively impose a new condition in a permit, it must take a “hard look” at the condition and it must provide a reasonable basis for its decision to impose the condition. See Citizens Advocating Responsible Dev. v. Kandiyohi County. Bd. of Comm’rs, 713 N.W.2d 817, 832 (Minn. 2006) (explaining that the court’s role in reviewing agency action is to “determine whether the agency has taken a ‘hard look’ at the problems involved”). A county board must adequately consider, and must have a reasonable basis for, any condition it imposes on a CUP. See BECA of Alexandria v. County of Douglas, 607 N.W.2d 459, 463–64 (Minn. Ct. App. 2000) (refusing to uphold a condition imposed by the county board because “the declared bases for the condition are vague and overbroad,” the condition was “based solely on

unscientific concerns rather than factual data,” and “there was no basis in the record to support” the condition). Failing to do so renders the grant or denial of a CUP arbitrary, capricious, and unreasonable. See Citizens Advocating Responsible Dev., 713 N.W.2d at 832.

Here, the County Board failed to adequately consider the debarking condition it imposed. Indeed, the record reveals only one instance where the County Board mentioned the debarking condition. In passing, the County Board stated simply that debarking the dogs would eliminate any concerns about noise. (01/10/06 Tr. at 7.) No other mention was made or question was asked by the County Board. The County Board failed to consider myriad issues related to debarking—e.g., how debarking would be done, whether debarking would violate Minnesota’s statutes concerning animal cruelty and inhumane treatment, or whether there were alternatives to debarking. As a result, the County Board did not adequately consider the debarking condition.

Nor is there substantial evidentiary support in the record for the propriety of a condition requiring that any and all of the 600 dogs who hope to go outside must first be debarked. Respondents point to comments from Charles Extrand in the record; however, these comments do not satisfy the “hard look” that the County Board must take. First, Extrand, a self-described veterinarian, has never presented his credentials to the County Board.¹ Second, Extrand did not discuss the same condition as the one the County Board

¹ Moreover, Extrand’s statements are not credible because he represented that McDuffee’s kennel is *and always has been* in compliance with USDA regulations. (Nelson App. 62.) As the County Board’s transcript and letter from February 7, 2006, indicate, McDuffee’s previous kennel had numerous USDA violations.

imposed. Extrand spoke about *surgical debarking* generally; the condition imposed by the County Board in the CUP allows *debarking by any means*. Indeed, the CUP does not specify how “debarking” is to occur. Third, Extrand’s testimony was anecdotal because it did not directly relate to McDuffee’s current dog breeding facility or his application for a CUP. See *Yang v. County of Carver*, 660 N.W.2d 828, 833–34 (Minn. Ct. App. 2003) (explaining that anecdotal evidence that does not tie in to the specific problem at hand is insufficient to substantiate a county board’s finding). The potentially massive scale of the debarking for the 600 breeding dogs on site is unprecedented, and apparently beyond the scope of Extrand’s experience.

Most importantly, Extrand’s comments cannot serve as “substantial evidence” to support the County’s issuance of the debarking condition in the CUP because the County itself expressly rejected any statement by Extrand that debarking is a humane procedure that is accepted by the veterinary community. In a letter dated February 7, 2006, the County advised Mr. McDuffee that it “learned that surgical debarking is overwhelmingly disfavored within the veterinary community” and is believed to be inhumane by many veterinarians. (Nelson App. at 4) (emphasis added.) If the County itself did not believe Extrand’s statements, those statements cannot be substantial evidence supporting the County’s decision.

II. THE COUNTY BOARD FAILED TO ADEQUATELY CONSIDER THE CONDITION REQUIRING A 600 ADULT DOG CAP.

The County Board arbitrarily conditioned McDuffee’s CUP application on a cap of 600 adult breeding dogs. The source for this condition was McDuffee’s statement to

the Morrison County Planning Commission that he wanted a cap of 600 adult breeding dogs. (McDuffee Br. 10.) However, no evidence exists to support the 600-dog cap. The County Board failed to analyze whether a cap of 600-dogs was appropriate given the size limitations of McDuffee's facility. (See Nelson App. 55–61.)

Moreover, the County Board entirely failed to consider the total number of dogs McDuffee would have at his facility when puppies are accounted for. McDuffee explained to the County Board that in addition to the 600 adult dogs he would have about 500 puppies in his first year of operation and an apparently unlimited number later. (Id.) Thus, McDuffee could conceivably have 1,100 dogs at the facility during the first year and an unlimited number of dogs in the future. The County Board failed to consider the fact that the hundreds, and even thousands, of puppies would also require exercise, shelter, food, water, feces removal, etc. See, e.g., 9 C.F.R. 3.6(c) (“Additional requirements for dogs--(1) Space. (i) Each dog housed in a primary enclosure (including weaned puppies) must be provided a minimum amount of floor space . . .”). Because younger dogs cannot be sold by a dealer like McDuffee until they are eight weeks of age, the space, exercise, and feces removal issues should have been considered by the County Board with regard to the puppies as well as the adult dogs. See 7 U.S.C. § 2132(f); 9 C.F.R. § 2.130. Because it failed to consider such issues, the County Board's decision was arbitrary, capricious, and unreasonable for this reason as well.

III. THE MINNESOTA FEDERATED HUMANE SOCIETIES DID NOT “WAIVE” ITS CHALLENGE TO THE IMPROPER DEBARKING CONDITION.

Respondents argue that Minnesota Federated Humane Societies waived its right to challenge the issuance of the CUP because Minnesota Federated Humane Societies did not raise its concerns to the County Board. However, the Minnesota Federated Humane Societies, by statute, has unique standing to “assist in the enforcement of the laws for the prevention of wrongs to animals” and to aid “in the enforcement of the laws for the prevention of wrongs to animals which may now or hereafter exist, and to promote the growth of education and sentiment favorable to the protection of animals.” Minn. Stat. § 343.01. As such, it has the standing to challenge a conditional use permit which contains an affirmative condition that would result in inhumane and cruel treatment of animals.

This unique standing to challenge practices (including the issuance of conditional use permits) which promote inhumane and cruel treatment of animals cannot be “waived.” In particular, the Minnesota Federated Humane Societies does not receive notices for land use decisions that are considered by counties and municipalities across the state, and has no way to attend all such hearings in order to ensure that improper “conditions” are not inserted into the decisions made by counties and municipalities. The fact that the Minnesota Federated Humane Societies did not receive notice of the proceedings before Morrison County and did not make an appearance at the Planning Commission hearing is of no consequence. No “waiver” of its right to challenge

improper conditions in conditional use permits occurs by reason of lack of formal notice or its inability to attend all such hearings.

Moreover, whether or not the Minnesota Federated Humane Societies appeared before the Morrison County Planning Commission or the Morrison County Board in no way affects the duty of the Morrison County Planning Commission members and the Morrison County Board members to consider Minnesota's well-established laws to prevent cruel treatment of animals. It is the responsibility of all persons in Minnesota, and in particular, all governmental leaders, to refrain from engaging in practices -- or in this case, mandating practices -- that may result in cruel treatment of animals. Minnesota laws preventing cruel treating of animals exist at all times -- not just the times when the Minnesota Federated Humane Societies appear before governmental bodies. No "waiver" has occurred here.

IV. ENFORCEMENT OF MINNESOTA'S ANIMAL CRUELTY PREVENTION LAWS CANNOT BE DEFERRED TO A FEDERAL AGENCY.

A repeated theme throughout Respondent McDuffee's brief is that the manner in which he intends to operate his facility is relevant to whether the issuance of the CUP by the County was arbitrary and capricious, and not supported by substantial evidence in the record. However, how Mr. McDuffee operates his facility after the CUP is issued is not relevant to the question of whether the CUP was properly issued in the first instance, and whether on its face, it contains improper conditions.

Similarly, Relator McDuffee argues that the United States Department of Agriculture will inspect his facility to determine whether it meets all applicable federal

regulations. That is irrelevant to the issue of whether the County Board had the necessary substantial basis in the record for imposing the debarking condition in the Conditional Use Permit. Relator Minnesota Federated Humane Societies challenges the debarking condition as improper under Minnesota's animal cruelty prevention laws. The USDA has no role in interpreting or applying Minnesota's animal cruelty laws. Instead, that is the obligation of the elected officials who make decisions that will affect animals in the state. The failure of the County Board to consider whether the debarking condition that it imposed would be illegal under Minnesota law renders the CUP arbitrary and capricious, and that fact is not changed by any actions taken by McDuffee or the USDA after the CUP is issued.

V. MCDUFFEE CANNOT UNILATERALLY MOOT ISSUES THROUGH HIS CURRENT METHOD OF OPERATING THE DOG BREEDING FACILITY.

McDuffee similarly argues that the debarking issue and the overcrowding issues are “moot” because his current operation includes “substantially less than 600 adult breeding dogs” and that all dogs are kept inside. (McDuffee Br. 16, 28.) He contends that because he “has decided not to allow any dogs outside, the debarking issue is moot.” (*Id.* at 35.)

McDuffee, however, cannot unilaterally moot this issue. The issue before the Court is whether the County Board engaged in an appropriate inquiry of the debarking condition. That McDuffee is not currently debarking dogs does not change the fact that the CUP requires debarking for all dogs that go outside. Under the CUP, McDuffee could have 600 adult dogs. Whether he does either of these things, however, is irrelevant

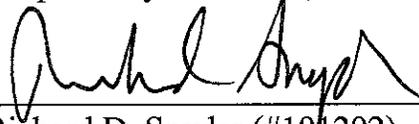
to the reasonableness of the County Board's decision to attach such conditions to the CUP.

VI. BECAUSE OF THE SCANT ADMINISTRATIVE RECORD REGARDING THE DEBARKING CONDITION, A REMAND TO THE COUNTY BOARD TO RECONSIDER THE DEBARKING ISSUE IS APPROPRIATE.

The County Board's failure to adequately consider the conditions imposed in the CUP requires this Court to remand the case back to the County Board for further consideration of the debarking, noise control, and overcrowding issues. The Minnesota Supreme Court has held that a remand is appropriate when the record of a decision is so inadequate that judicial review is impossible. Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs, 617 N.W.2d 566, 577 (Minn. 2000). Because the County Board entirely failed to discuss the legality and practicality of the debarking and dog limit conditions, judicial review of the issues is impossible. Thus, the County Board's decision to attach conditions to the CUP was arbitrary, capricious, and unreasonable. As such, this Court should reverse and remand the case.

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Respectfully submitted,



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