
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' OPENING BRIEF AND SEPARATE APPENDIX

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STATEMENT OF THE CASE

On June 15, 2004, Relators Veit Co. (Veit) and B&B Aggregates (B&B) (collectively, Relators) submitted an application to the Lake County, Minnesota Planning Commission (County) for a conditional use permit (CUP) to "add blasting & quarrying to approved 'CUP' C-01-003." Rel. App. 1-2A. County did not timely notify Relators in writing that the application was incomplete in order to toll the 60-day statutory deadline for it to approve or deny the request. *See* Minn. Stat. § 15.99, subd. 3(a). Nor did County timely notify Relators in writing that the 60-day statutory deadline had been extended. *See* Minn. Stat. § 15.99, subd. 3(f). As such, County was statutorily obligated to approve or deny Relators' requested CUP within 60 days of the June 15, 2004 submission, or by August 16, 2004. *See* Minn. Stat. § 15.99, subd. 2(a).

County delayed its hearing on Relators' requested CUP until late in the night of the very last possible day that it could timely approve or deny the CUP application. On the night of August 16, 2004, County held a Planning Commission hearing (Hearing) to consider Relators' CUP application. Despite the dearth of record evidence compelling an approval of Relators' requested CUP (Rel. App. 3-111), County denied the CUP at the Hearing. Rel. App. 112. At the conclusion of the Hearing, County provided Relators with a one-page form notice of decision (Notice). *Id.* Even though a blank line was provided for the handwritten insertion of the reasons for denial, the Notice contained no written statement of County's reasons for its denial. *Id.* Instead County merely checked the boxes marked "Denied" and "Given to applicant at hearing." *Id.* No other written documents or statements supporting the denial were given to Relators at the Hearing or

any time prior to the expiration of the 60-day statutory period. Rel. App. 113-17. This appeal followed.

County's denial of Relators' requested CUP for blasting and quarrying was untimely as a matter of law. To satisfy its obligations under Minn. Stat. § 15.99, subd. 2(c), County was required to both deny the requested CUP "within the statutory time limit" — *i.e.*, August 16, 2004 — and "provide [Relators] in writing a statement of the reasons for the denial . . . before the expiration of the time allowed for making a decision under this section" — *i.e.*, August 16, 2004. Moreover, under § 15.99, subd. 2(c), County's statutorily-required "written statement" of the reasons for the denial had to be "consistent with the reasons stated in the record at the time of the denial." Plus, § 15.99, subd. 2(c) added that the statutorily-required "written statement" of the reasons for the denial had to be "provided to the applicant upon adoption." But all that Relators were provided by August 16, 2004 was County's one-page form Notice, which did not contain the statutorily-required "written statement" of the reasons for the denial. County's denial failed each of § 15.99, subd. 2(c)'s three requirements to the writing mandate, and it was, as such, untimely as a matter of law.

County's denial was also arbitrary. Within the statutorily-prescribed 60-day deadline to do so, County utterly failed to provide a written statement of the reasons for its denial of the requested aggregate blasting and quarrying. County's denial was, therefore, by prior decisions of this Court "presumptively" arbitrary. Moreover, as set forth in the barely decipherable transcript of the Hearing, none of the four arguable concerns raised by the neighborhood opponents at the Hearing substantiated a reasonable

basis for denial. The neighbors' concern with noise levels was not a reasonable basis for denial because, among other things, noise levels are set by state statute, and they are otherwise adequately addressed by a CUP condition that Relators comply with all applicable state noise standards. The neighbors' concern with adverse property value impacts and truck traffic were likewise not reasonable bases for denial. Nothing in the record showed that the requested quarrying and blasting would have any adverse "incremental impact" from B&B's already authorized mining operation or that such impacts, if they existed, could not be adequately addressed by CUP conditions. And the neighbors' concern with the comparison of the requested quarrying and blasting to other County-approved mining operations was truly incomprehensible.

Issuance of Relators' requested CUP is thus compelled on timeliness and arbitrariness grounds.

STATEMENT OF THE ISSUES AND RESULTS BELOW

A. UNTIMELINESS ISSUES

1. Was County's denial of Relators' requested CUP untimely under § 15.99, subd. 2(c) because County failed to provide Relators with its statutorily-required "written statement" of the reasons supporting the denial "before the expiration of the time allowed for making a decision under this section"?

Result below: County held no.

2. Was County's denial of Relators' requested CUP untimely under § 15.99, subd. 2(c) because County's statutorily-required "written statement" of reasons supporting the denial was not "consistent with the reasons stated in the record at the time of the denial"?

Result below: County held no.

3. Was County's denial of Relators' requested CUP untimely under § 15.99, subd. 2(c) because County failed to provide Relators with its statutorily-required "written statement" of the reasons supporting the denial "upon adoption"?

Result below: County held no.

B. ARBITRARINESS ISSUE

1. Was County's denial of Relators' requested CUP arbitrary because, among other things: (1) County's form Notice failed to state any reasons for its denial; and (2) the neighborhood concerns stated at the Hearing were either unsubstantiated in the record or capable of being addressed by the imposition of reasonable conditions?

Result below: County held no.

STATEMENT OF FACTS

In order to fully appreciate the issues raised in this appeal, this Court must review at least some of the permitting gauntlet to which County has subjected B&B in order for it to operate its modest-sized mining operation.

A. B&B'S JULY 2, 2000 "COMMERCIAL GRAVEL OPERATION" CUP APPLICATION & ITS FEBRUARY 6, 2001 "CRUSHING" CUP APPLICATION

On July 2, 2000, B&B requested from County a CUP for a "commercial gravel operation." Rel. App. 118-19. On July 17, 2000, County approved B&B's application for a "commercial gravel operation" without any restriction as to crushing, blasting or quarrying (July 17, 2000 Mining Permit). Rel. App. 120-22. County's approval was consistent with B&B's uncontroverted expert testimony that, without any restrictions otherwise, a "mining" operation includes crushing, blasting and quarrying, and that crushing and blasting and quarrying would not impose any additional adverse environmental impacts. Rel. App. 123-34.

On December 22, 2000, County attempted to effectively revoke B&B's permit by *sua sponte* acting to exclude "crushing" from the July 17, 2000 Mining Permit. Rel. App. 135-36. County's after-the-fact crushing exclusion constituted an effective denial of the permit because the undisputed expert testimony confirmed that a "commercial gravel operation," notably B&B's operation, may not operate without crushing. Rel. App. 123-34.

In response to County's December 22, 2000 crushing exclusion, B&B filed a petition for writ of mandamus in district court, challenging the exclusion as both untimely under Minn. Stat. § 15.99 and arbitrary. Rel. App. 137-48. As a method of resolving the

crushing dispute, B&B submitted to County on February 6, 2001 a separate crushing application that was supported by considerable evidence — that is, (1) uncontradicted expert testimony regarding crushing; (2) references to Minnesota appellate cases deeming crushing to be inclusive of mining and/or the processing of aggregate; and (3) County's uniform approval of all requests for crushing as part of mining operations. Rel. App. 149-55.

Because of the overwhelming and uncontradicted record support for B&B's crushing application, County was forced to approve B&B's crushing permit on April 2, 2001 (April 2, 2001 Crushing Permit). Rel. App. 156-60. But, even though B&B had not submitted an application for blasting and quarrying, County inserted into the April 2, 2001 Crushing Permit that aggregate "blasting" and "quarrying" was specifically excluded. *Id.* Aggregate deposits with large rocks like those at B&B's site need blasting and quarrying in order to properly mine the aggregate. Rel. App. 123-34. Accordingly, County's April 2, 2001 blasting and quarry exclusion constituted another effective revocation of B&B's July 17, 2000 Mining Permit. Rel. App. 156-60. B&B thus amended its mandamus challenge to include this exclusion as untimely and arbitrary. Rel. App. 161-78.

B&B's challenge was ultimately heard by this Court. On March 26, 2002, this Court affirmed County's issuance of B&B's CUP for a commercial gravel operation. *See B&B Aggregates v. Lake County*, No. C2-01-1570, 2002 WL 453231 (Minn. App. Mar. 26, 2002) (Rel. App. 178-82). This Court also struck County's attempt to exclude blasting and quarrying from the CUP. *Id.* And, to the extent that it wanted to blast and

quarry, B&B was directed to submit an application explicitly for blasting and quarrying.

Id. B&B has since repeatedly done so.

B. B&B's JUNE 12, 2003 "BLASTING AND QUARRYING" CUP APPLICATION

On June 12, 2003, B&B submitted an application to County to "add blasting & quarrying to [the] previously approved 'CUP'." Rel. App. 183-86. In support of its application, B&B relied upon the uncontroverted expert testimony submitted as part of its previous CUP application, as well as additional expert testimony that: (1) the operation would comply with all of County's regulations, and (2) there would be no significant adverse impacts caused by noise, vibrations, trucks, dust and the like from blasting and quarrying, including no incremental adverse impact beyond that from the existing mining operations. Rel. App. 34-35 & 38-46. B&B further produced evidence that the aggregate material to be mined and quarried from the site would add to the quality of the crushed rock portion of bituminous mixtures in Lake County. Rel. App. 47-48.

Despite the record evidence compelling the approval of B&B's CUP request, County denied B&B's CUP application on August 18, 2003 without further explanation. Rel. App. 187. County's one-page form notice of decision provided a space for a handwritten statement of reasons for its denial, but the line was left blank. *Id.* The after-the-fact minutes of the August 18, 2003 Planning Commission meeting did not provide any further reasons or explanations to support County's denial. Rel. App. 188-90. And there was no written transcript of the meeting.

C. RELATORS' JUNE 15, 2004 "BLASTING AND QUARRYING" CUP APPLICATION

Rather than challenge County's August 18, 2003 denial as untimely and arbitrary, Relators gave County one more chance to do the right thing. On June 15, 2004, Relators submitted another CUP application to "add blasting & quarrying to approved 'CUP' C-01-003." Rel. App. 1-2A. In support of their application, Relators submitted to County on July 16, 2004 a complete package of information relative to the CUP application, including, among other things, expert opinions and reports submitted in connection with the previous permit requests. Rel. App. 3-111. As such, expert testimony in the record demonstrated that: (1) the blasting and quarrying would not impose any additional adverse environmental impacts beyond the mining that had already been approved; (2) the blasting and quarrying would comply with all of County's regulations; and (3) there would be no significant adverse impacts caused by noise, vibrations, trucks, dust and the like from blasting and quarrying, including no incremental adverse impact beyond that from the existing mining operations. *Id.*

The Hearing on the application was first heard very late in the evening on August 16, 2004. Rel. App. 191-245. Despite the overwhelming record evidence compelling an approval of Relators' requested CUP, County denied the CUP at the Hearing. *Id.* County's denial was set forth in its one-page form notice of decision (Notice), which was given to Relators at the Hearing on August 16, 2004. Rel. App. 112-15. County's Notice provided absolutely no reasons to support the purported denial; it instead merely checked boxes marked "Denied" and "Given to applicant at hearing." Rel. App. 112. The blank line for the handwritten insertion of "reasons" for denial was left

blank. *Id.* Neither at the Hearing nor at any time before the expiration of the 60-day statutory deadline for the County's decision on Relators' CUP application did County give Relators any other written document besides the Notice regarding County's denial. Rel. App. 113-17.

ARGUMENT

I. STANDARD OF REVIEW

A county board's denial of a CUP is reviewed by writ of certiorari to this Court. *Molnar v. County of Carver Bd. of Comm'rs*, 568 N.W.2d 177, 180 (Minn. App. 1997). This Court applies the same standards to a certiorari zoning appeal from county boards as are applied in a zoning appeal from district court. *Id.* at 181. A denial of a CUP is a quasi-judicial decision, requiring both a factual determination about the proposed use and an exercise in discretion in determining whether to permit the use. *Shetka v. Aitkin County*, 541 N.W.2d 349, 352 (Minn. App. 1995), *review denied* (Minn. Feb. 27, 1996). A reviewing court considers whether a quasi-judicial decision was "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it." *Molnar*, 568 N.W.2d at 181 (quotation omitted).

II. THE RECORD AND THE BASES FOR DENIAL ON APPEAL

The record on appeal in a zoning challenge is limited to that which was before the zoning body at the time of the decision. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981). Similarly, the bases for a zoning denial on appeal are either those reasons which were expressly stated on the record at the time of the denial or those reasons which were made within the statutorily-authorized deadline for such decisionmaking. *In re Livingood*, 594 N.W.2d 889, 894 (Minn. 1999).

This Court's decision in *Demolition Landfill Servs., LLC v. City of Duluth*, 609 N.W.2d 278, 281 (Minn. App.), *review denied* (Minn. July 25, 2000), and the 2003 amendments to Minn. Stat. § 15.99, subd. 2(c), are uniform on this issue. The only stated reasons for denial on appeal are those made within the 60-day statutory deadline. It

would be unprecedented to allow two separate sets of reasons for a zoning denial to be reviewed on appeal — that is, one set of reasons for review based on timeliness grounds and another set of reasons for review based on arbitrariness.

III. COUNTY'S DENIAL WAS UNTIMELY

A. Section 15.99, subd. 2(c)'s three requirements for the writing mandate

Minn. Stat. § 15.99, subd. 2 imposes a 60-day deadline on zoning determinations, as well as a severe consequence for noncompliance with the deadline — namely, automatic approval of the zoning request. This Court has ruled that, pursuant to § 15.99, subd. 2, "an agency must approve or deny within 60 days a written request relating to zoning' and '[f]ailure of an agency to deny a request within 60 days is approval of the request.'" *Gun Lake Ass'n v. County of Aitkin*, 612 N.W.2d 177, 180 (Minn. App.) (quoting § 15.99, subd. 2), *review denied* (Minn. Sept. 13, 2000). This Court clarified that "'[a]gency' includes a county." *Id.* This Court has further clarified that "[t]he governing statute requires the agency to provide written reasons for a denial 'at the time that it denies the request.'" *Demolition Landfill Servs.*, 609 N.W.2d at 281 (quoting § 15.99, subd. 2) (emphasis added). This Court added that, for purposes of § 15.99, "simultaneous written reasons for denial are mandatory and not directory." *Id.* at 282.

The most recent June 1, 2003 amendment to § 15.99, subd. 2(c) codifies and extends this Court's holdings. The 2003 amendment to § 15.99, subd. 2(c) provides:

If a multimember governing body denies a request, [1] 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 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.

Id. (emphasis & brackets added).

The Legislature has under § 15.99, subd. 2(c) not only reinforced the requirement for a "written statement" of denial but also imposed three specific requirements on the writing mandate. The first requirement that the written statement of reasons supporting the denial be given to the applicant before the expiration of the statutory period mandates strict compliance with § 15.99's 60-day deadline in all cases. In other words, while a multimember zoning body is not necessarily required to adopt the written statement of reasons supporting the denial at the time of the denial, it nonetheless must adopt and provide the applicant with the written statement within 60 days of the submission of the CUP application. The second requirement that the written statement be "consistent" with the reasons stated in the record prohibits the zoning body from changing after-the-fact the bases for its denial. "Consistent" is defined as "compatibility" between at least two different items. Rel. App. 246-47. Thus, to give the term "consistent" any meaning, the zoning body must state its reasons for its denial both on the record and in its "written statement." And finally, by mandating that the written statement of denial be given to the applicant "upon adoption," the third requirement attempts to preempt any notice issues that may arise.

These relatively minimal substantive requirements are critical to the applicant's fundamental right to timely know why its proposed land use is being denied and to any judicial review of such denials.

B. County failed to comply with any of the three requirements for the writing mandate

1. County did not provide Relators with a "written statement" of the reasons for the denial within the 60-day statutory deadline

Relators submitted their CUP application on June 15, 2004. Rel. App. 1-2A. County did not thereafter notify Relators that their application was incomplete or request an extension of time to make a decision. *See* Minn. Stat. § 15.99, subd. 3(a) & (f). Thus, County was required to approve or deny Relators' request within 60 days, or by August 16, 2004. *See* Minn. Stat. § 15.99, subd. 2(a).

County waited until the late hours of the last possible day to hold a hearing on Relators' CUP application. By doing so, County was required under § 15.99, subd. 2(c) to provide Relators' with the requisite written statement of the reasons supporting the denial the same night as the Hearing. County failed to do so.

After County voted to deny their request, Relators were given only the one-page Notice at the Hearing, which simply indicated their request had been "Denied." Rel. App. 112. No written reasons for the denial were stated in the Notice. *Id.* And Relators were not given any other written statement of the reasons supporting the denial at the Hearing or any time prior to the expiration of the 60-day statutory period. Rel. App. 113-17. County thus failed to satisfy its obligation under § 15.99, subd. 2(c) to adopt and provide to Relators a written statement "before the expiration of the time allowed for making a decision under this section."

Though decided by this Court four years before the 2003 amendments to § 15.99, subd. 2(c), *Demolition Landfill Servs.*, 609 N.W.2d 278, presents an analogous situation. In that case, the CUP applicant submitted its application to operate a landfill on

December 18, 1998. *Id.* at 279. Because Duluth obtained a statutorily-authorized 60-day extension to review the application, Duluth was allowed until April 16, 1999 to approve or deny the CUP. *Id.* at 280. On April 12, 1998, which was the Duluth City Council's last possible meeting date before the statutory deadline expired, Duluth considered and rejected a "resolution to grant" the applicant's CUP. *Id.* But Duluth did not at that time issue its written reasons for what it later claimed to be its effective CUP denial. Instead, Duluth delayed until May 24, 1999 (or 38 days after the statutory deadline expired) to pass a formal resolution denying the CUP. *Id.* This tardy resolution contained the written reasons for its CUP denial. *Id.* Even without the 2003 amendments to § 15.99, subd. 2(c), this Court held that Duluth's CUP denial was untimely under § 15.99, and it compelled Duluth's issuance of the requested CUP. *Id.* at 282. This Court explained:

The Duluth City Council's rejection of a resolution approving a special- use permit did not equate to a denial of the permit application. Minn. Stat. § 15.99, subd. 2 (1998), is unambiguous and mandatory. Absent a denial within the statutory time limit and simultaneous, written reasons for the denial, the permit application is approved.

Id. (emphasis added).

Similarly, here, County failed to satisfy its obligation under § 15.99, subd. 2 to provide Relators with written reasons supporting the denial within the statutory time period. Accordingly, Relators' requested CUP is compelled by operation of law. *See* Minn. Stat. § 15.99, subd. 2(a); *Demolition Landfill Servs.*, 609 N.W.2d at 281.

2. County failed to provide Relators with a "written statement" of the reasons for the denial that were "consistent with the reasons stated in the record"

The Notice is also deficient as a matter of law because it does not satisfy § 15.99, subd. 2(c)'s substantive requirement that the "written statement" of the reasons for the denial be "consistent with the reasons stated in the record at the time of the denial."

County's one-page form Notice simply contains a check-marked box that the request was "Denied." Rel. App. 112. No further explanation is provided. *Id.* Since this "written statement" contains no reasons whatsoever, it is impossible for County to show that its written reasons for denial are "consistent" with those stated in the record.

Additionally, County cannot assert that its audio tape of the Hearing constituted a "written statement" of the reasons for its CUP denial. The audio tape is not a "written statement." See Minn. Stat. § 15.99, subd. 2(c); *Demolition Landfill Servs.*, 609 N.W.2d at 281-82. A contrary reading of § 15.99, subd. 2(c) would eviscerate this requirement and allow a county to merely tape record a hearing. Had the Legislature intended such a requirement, it could have and presumably would have done so. *In re Miliona State Bank*, 414 N.W.2d 794, 800 (Minn. App. 1987) (if Legislature intends a result, it does so explicitly). Also, the Legislature would not have specifically included the language in § 15.99, subd. 2(c) that the written reasons "must be consistent with the reasons stated in the record at the time of the denial" had it intended to merely require a tape recording of the hearing.

Lest there be any confusion, County did not provide Relators with a transcript of the audio tape of the Hearing. Several days after the Hearing and, thus, several days after

the 60-day deadline expired, County simply gave Relators a copy of the tape recording of the Hearing. Relators then hired a court reporter, at their own expense, to transcribe the audio tape of the Hearing, and they provided County with a transcript in connection with this appeal. Rel. App. 191-245.

3. County failed to provide Relators with a written statement "upon adoption"

County failed, as well, to provide Relators with the requisite "written statement" of the reasons supporting the CUP denial "upon adoption," as required by § 15.99, subd. 2(c). County may attempt to argue that the requisite "written statement" of reasons supporting the denial is set forth either (1) in the Hearing resolution (Resolution) that was adopted by the County sometime after the Hearing and the expiration of the 60-day deadline, or (2) in the Hearing minutes (Minutes) that were also created after the Hearing and the expiration of the 60-day deadline. *See* LC000005-9. The Resolution and Minutes were not given to Relators within the 60-day time period. Rel. App. _____. In fact, Relators did not receive the Resolution and Minutes until October 15, 2004, or more than 124 days after the CUP application was submitted. *See* LC0000015. Of course, then, County did not provide the Resolution and Minutes to Relators "upon adoption," as is required by § 15.99, subd. 2(c).¹

Because County's purported written statement supporting its CUP denial is facially deficient, County failed to properly deny Relators' requested CUP within § 15.99's 60-

¹ Relators will object to and file a motion to strike any attempt by County to rely on or cite to the Resolution and Minutes, or any other document created after August 16, 2004, as part of the record on appeal.

day deadline. Relators are, therefore, entitled to have their CUP application granted. *See* Minn. Stat. § 15.99, subd. 2(a); *see also Kramer v. Otter Tail County Bd. of Comm'rs*, 647 N.W.2d 23, 26 (Minn. App. 2002).

IV. COUNTY'S DENIAL WAS ARBITRARY

A. The standard for arbitrariness

A local governing body typically has broad discretion in zoning matters. But, when the zoning authority considers a CUP application, it acts in a quasi-judicial capacity and is subject to more extensive judicial oversight. *City of Barnum v. County of Carlton*, 386 N.W.2d 770, 775 (Minn. App.), *review granted* (Minn. July 16, 1986), *aff'd*, 394 N.W.2d 246 (Minn. App.), *review denied* (Minn. Dec. 17, 1986); *Honn*, 313 N.W.2d at 416-17. Arbitrariness is measured by "the legal sufficiency of and factual basis for the reasons given." *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988). "If an entity's zoning ordinances specify 'standards to which a proposed [CUP] must conform, it is arbitrary as a matter of law to deny approval of a [CUP] which complies in all respects' with the ordinances." *Hurrle v. Sherburne County*, 594 N.W.2d 246, 250 (Minn. App. 1999) (quoting *National Capital Corp. v. Village of Inver Grove Heights*, 301 Minn. 335, 337, 222 N.W.2d 550, 552 (1974)).

Permit denials must be reviewed based on the stated reasons for denial. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App.), *review denied* (Minn. Sept. 25, 1997); *NBZ Enters., Inc. v. City of Shakopee*, 489 N.W.2d 531, 537 (Minn. App. 1992). "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*, 313 N.W.2d

at 416) (Rel. App. 248-52) (emphasis added), *aff'd* 594 N.W.2d 889 (Minn. 1999). The stated reasons for denial must, in turn, be supported by substantial evidence in the record. *Trisko*, 566 N.W.2d at 352. Effective review of a permit decision requires both a clearly articulated reason and a specific reference to a local ordinance. *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994). Bare references to the CUP factors in an ordinance are not sufficient. *See City of Barnum*, 386 N.W.2d at 775-76.

B. County's CUP denial without stated reasons is presumptively arbitrary

A lack of any findings at all creates a presumption of arbitrariness. *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). Indeed the Minnesota Supreme Court has held that the failure of a zoning authority to record any legally sufficient basis for its decision at the time it acted may make a prima facie showing of arbitrariness "inevitable." *Zylka*, 283 Minn. at 198, 167 N.W.2d at 50.

County's Notice simply states that Relators' CUP application is "Denied" without further explanation. Rel. App. 112. The Notice is the very epitome of vague and conclusory. The Notice "do[es] not adequately explain the reasons for its decision." *See Picha v. County of McLeod*, 634 N.W.2d 739, 742 (Minn. App. 2001). In fact, it does not explain anything at all. Because County's Notice 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").

C. Regardless, none of the neighbors' four concerns raised at the Hearing provide a reasonable basis to justify County's denial

Since County provided no written statement of reasons supporting the denial within the 60-day statutory time to do so (Minn. Stat. § 15.99, subd. 2(c)), the only source of purported reasons supporting County's denial is the largely unintelligible transcript of the Hearing. Rel. App. 191-245. As best as Relators can tell from the Hearing transcript, neighborhood opponents raised four concerns at the Hearing with respect to Relators' request to add blasting and quarrying to the existing CUP. First, neighbors raised concerns about whether the noise created by the blasting and quarrying activities would exceed state noise levels. Second, neighbors mentioned the possible adverse impact on property values that could be caused by Relators' proposed use. Third, neighbors briefly discussed traffic concerns. Finally, neighbors questioned whether Relators' proposed use was too "different" from other gravel pits in the area.

1. State law, not subjective neighborhood concerns, govern the noise levels pertaining to Relators' proposed CUP

By far, the primary concern expressed at the Hearing in opposition to Relators' requested CUP was the projected noise from the blasting and quarrying activities. One neighborhood opponent, Joe Richter, spoke at length at the Hearing about his perception

that Relators' proposed blasting and quarrying activities would exceed the applicable State noise standards. *See generally* Rel. App. 214-222.

Regarding the sound level parameters, the State sets the maximum permissible sound levels. Minn. R. 7030.0040, subp. 2. The maximum sound levels in a R-1 zone are as follows:

Noise Classification	Area	Daytime		Nighttime	
		L ₅₀	L ₁₀	L ₅₀	L ₁₀
1		60	65	50	55

Minn. R. 7030.0040, subp. 2 ("noise area classification" (NAC) 1 is for residential areas). This sound level is to be measured by the nearest sound receptors, not the nearest property line. Minn. R. 7030.0060, subp. 1 ("[m]easurement of sound must be made at or within the applicable NAC at the point of human activity which is nearest to the noise source"). These are objective standards which are readily measured for compliance.

County is legislatively barred from imposing a more stringent sound level than that implemented by the State. Minn. Stat. § 116.07, subd. 2 provides that the Pollution Control Agency sets the applicable noise standards, which may not be altered by local government units. Subdivision 2 states:

The Pollution Control Agency shall also adopt standards describing the maximum levels of noise in terms of sound pressure level which may occur in the outdoor atmosphere, recognizing that due to variable factors no single standard of sound pressure is applicable to all areas of the state. . . No local governing unit shall set standards describing the maximum levels of sound pressure which are more stringent than those set by the Pollution Control Agency.

(Emphasis added). Thus, the State of Minnesota has fully occupied the field of legislation pertaining to noise standards, and County is prohibited from adopting

additional regulations that conflict with state law. *See Mangold Midwest Co. v. Village of Richfield*, 274 Minn. 347, 356, 143 N.W.2d, 813, 819 (1966) ("a state law may fully occupy a particular field of legislation so that there is no room for local regulation, in which case a local ordinance attempting to impose any additional regulation in that field will be regarded as conflicting with the state law, and for that reason void, even though the particular regulation set forth in the ordinance does not directly duplicate or otherwise directly conflict with any express provision of the state law"); *see also Northern States Power Co. v. City of Granite Falls*, 463 N.W.2d 541, 544 (Minn. App. 1990), *review denied* (Jan. 14, 1990).

Because County is absolutely barred from implementing more stringent noise standards than the State provides, County has no basis to deny the CUP on noise grounds unless Relators refuse to abide by the state noise standards, which they did not do. As such, County's denial of Relators' CUP on the grounds of potential noise impacts is arbitrary as a matter of law.

In any event, County's noise concerns could be easily addressed by appropriate testing of the noise impacts and/or the imposition of reasonable conditions on the CUP. And, if a zoning body can address any concerns regarding the issuance of a CUP by imposing reasonable restrictions on the proposed use, then the zoning body must do so. Indeed this Court, as well as the Minnesota Supreme Court, has ruled that a zoning body's failure to properly consider reasonable restrictions supports a conclusion that it acted arbitrarily in denying the requested CUP. *See Trisko*, 566 N.W.2d at 357 ("the city's failure to propose additional measures to control dust and vibration or to identify its

specific concerns over these potential problems supports a conclusion that the city acted arbitrarily"); *Minnetonka Congregation of Jehovah's Witnesses v. Svee*, 303 Minn. 79, 85-86, 226 N.W.2d 306, 309 (1975) (same).

There was substantial discussion at the Hearing concerning the imposition of certain conditions on Relators' CUP that would have alleviated any noise concerns. In fact, a motion was made and seconded at the Hearing to allow Relators to conduct sound testing, at their own expense, to confirm that the proposed use complied with State noise standards. Rel. App. 232-33. The motion was thus carried. Rel. App. 238 & 242. Obviously, if Relators' blasting and quarrying activities exceed state noise standards, then Relators could not blast and quarry. Inexplicably, rather than allowing Relators to perform the testing approved at the Hearing, County proceeded to flatly deny Relators' CUP. Rel. App. 243-44. County's failure to permit Relators to perform the approved testing and otherwise consider other alternative conditions further highlights the arbitrariness of City's denial. *See Trisko*, 566 N.W.2d at 357.

2. The neighbors' concerns with adverse property value impacts are unsupported by record evidence

Another concern raised very briefly by neighbors at the Hearing was whether Relators' proposed blasting and quarrying activities would have any adverse impact on property values in the area. Mr. Richter conclusorily stated that:

You know, from looking – common sense says that our property value will be diminished dramatically. And the potential for me to build on that property will be diminished dramatically if this is a full-fledged quarrying, blasting, drilling operation. And there is no way to get around it.

Rel. App. 217; *see also* Rel. App. 221-22. This concern was, however, unsubstantiated in the record.

Neither the neighbors nor County submitted any expert appraisal testimony regarding any alleged devaluation of the neighboring property that would be caused by adding limited blasting and quarrying activities to B&B's existing gravel mining operation. Where, as here, none of the permit applicant's opponents presented scientific, technical or statistical evidence to substantiate their concern regarding an adverse impact on property values, the local permitting authority has no legally sufficient basis to deny the applicant a CUP based on alleged adverse impacts to property values. *See City of Barnum*, 386 N.W.2d at 775-76.

The property value concerns voiced at the Hearing were, moreover, improperly based just on general neighborhood opposition. County may consider such neighborhood opposition in making its decision, but only if it is based on concrete information. *Yang v. County of Carver*, 660 N.W.2d 828, 833 (Minn. App. 2003) (citing *Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 728 (Minn. App.), *review denied* (Minn. Mar. 23, 1988); *Swanson*, 421 N.W.2d at 313). Generalized neighborhood opposition, by itself, does not provide a legally sufficient reason for denial. *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (concluding denial of permit must be based on something more concrete than "non-specific" neighborhood opposition). Stated otherwise, a "municipality must base the denial of a conditional use permit on 'something more concrete than neighborhood opposition and expression of concern for public safety.'" *Trisko*, 566 N.W.2d at 355. Moreover, "[g]eneral objections of the opponents of the application are not competent evidence to support such a finding [that the proposed use would be inconsistent with the surrounding

land use]." *Minnetonka Congregation of Jehovah's Witnesses*, 303 Minn. at 85-86, 226 N.W.2d at 309; *see also City of Barnum*, 386 N.W.2d at 776. Accordingly, County's property value concerns, which are solely based on general neighborhood opposition and not supported by expert testimony, are insufficient to justify denial of the CUP.

Finally, even if sufficient evidence concerning adverse impacts to property values existed in the record, the question is not whether Relators' proposed blasting and quarrying could impact property values but rather whether Relators' proposed use will "incrementally impact" the neighbors' property values vis-à-vis the already approved impact from B&B's existing mining permit. *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). There is absolutely no record evidence to show that adding a limited number of controlled blasts and intermittent quarrying to the existing mining operation could cause an increased adverse impact on neighboring property values. Rel. App. 3-112 & 191-245.

3. County's traffic concerns similarly lack record support

The neighbors' third concern raised at the Hearing with regard to Relators' proposed use was the potential adverse impacts to existing traffic levels. Although the discussion on this issue at the Hearing was extremely limited, one neighbor asked about "the amount of truckloads hauling." Rel. App. 197. Others mentioned that the traffic issue was a concern "in the past." Rel. App. 198; *see also* Rel. App. 199-201.

Other than the neighbors' questions and unsupported statements about "past" traffic concerns, there is no evidence in the record to support or substantiate a denial

based on traffic levels. No specific traffic concerns were raised and, even for the general concerns voiced at the Hearing, no supporting evidence can be deduced from the record.

Moreover, as with the noise and property value concerns, the sole source of its traffic concerns was nothing more than general neighborhood opposition. But generalized neighborhood opposition, by itself, does not provide a legally sufficient reason for denial of a CUP. *Chanhassen Estates Residents Ass'n*, 342 N.W.2d at 340; *Trisko*, 566 N.W.2d at 355; *Minnetonka Congregation of Jehovah's Witnesses*, 303 Minn. at 85-86, 226 N.W.2d at 309; *City of Barnum*, 386 N.W.2d at 776. Thus, the neighborhood opposition to Relators' CUP application cannot substantiate County's denial.

Finally, as with the property value concerns, the operative question is not whether the proposed blasting and quarrying activities could have an impact on traffic but rather whether there is record evidence that Relators' proposed activities would have an "incremental impact" on traffic levels beyond those that presently exist with B&B's approved mining operation. *See Northern States Power Co. v. City of Sunfish Lake*, C4-02-6854, slip op. at 22 (Rel. App. 275). County submitted no expert or other testimony into the record to demonstrate that adding controlled blasts at pre-approved intervals to an existing commercial gravel operation would cause any increased traffic levels in the area. Rel. App. 3-112 & 191-245. Plus, to the extent that such concern was substantiated, the concern could be and thus had to be addressed through the imposition of reasonable CUP conditions rather than denial. *See Trisko*, 566 N.W.2d at 357. Thus, County's denial based on traffic concerns was arbitrary.

4. There is no record support for the stated concern that Relators' proposed use is different from other mining pits in the area

The final concern expressed at the Hearing was that Relators' proposed use was "different" than other gravel pits in the area. The concern expressed by neighbor Bill Nixon was as follows:

And I also just feel that, you know, the quarry just being so different from all the other pits that are out there, you know, they are not just digging stuff up. I'm talking about just digging it up and putting it into the crusher. And a lot of the rock that we've got there is a softer rock that they could dig up. It crushes nicely and works well. But the quarry is just so different. And that's the thing about it. That's why we're worried.

Rel. App. 25-26. The above-quoted language constitutes the entirety of the discussion at the Hearing on the "difference" issue. This concern is not based on any specific evidence or expert testimony, but rather it is based solely on generalized neighborhood opposition, which does not provide a legally sufficient reason for denial of a CUP. *Chanhassen Estates Residents Ass'n*, 342 N.W.2d at 340; *Trisko*, 566 N.W.2d at 355; *Minnetonka Congregation of Jehovah's Witnesses*, 303 Minn. at 85-86, 226 N.W.2d at 309; *City of Barnum*, 386 N.W.2d at 776.

Finally, whether Relators' proposed use is "different" from other pits in the area is neither an appropriate issue for consideration nor a valid basis for denial under § 24.03 of the Lake County Ordinance. Instead § 24.03 requires only that the proposed conditional use be "consistent with the overall Comprehensive Plan and within the spirit and intent of the provisions of the Ordinance" and "consistent with a desirable pattern of development in the area." Rel. App. 281-82. Both criteria are undisputedly met since commercial gravel operations are explicitly permitted under the Ordinance § 24.07. Rel. App. 283. Indeed the existence of other gravel pits in the area demonstrates that Relators' proposed

use is "consistent" both with the Comprehensive Plan and a desirable pattern of development in the area.

D. County's bare references to two Ordinance factors to justify denial is insufficient

After being improperly swayed by the neighborhood opposition and despite the complete lack of evidence to substantiate the neighbors' stated concerns, County voted at the Hearing to deny Relators' CUP application. Rel. App. 244. Desperately seeking to create some reasonable record basis for the denial, County resorted to the pedestrian tactic of simply listing two CUP factors from § 24.03 of the Ordinance as a basis for denial. The entirety of the discussion leading up to the vote at the Hearing was 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 that it won't.

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

Rel. App. 243-44. While the Planning Commission member apparently cited to the wrong portions of the Ordinance, paragraph B of § 24.03 provides that "the proposed use or development will not be injurious to the use and enjoyment of the environment, detrimental to the rightful use and enjoyment of other property in the immediate vicinity, nor substantially diminish or impair values within the vicinity." Rel. App. 281. And paragraph D of § 24.03 vaguely requires that the proposed use "be consistent with a desirable pattern of development for the area." Rel. App. 282. These bare references to these paragraphs of the Ordinance are insufficient as a matter of law. *See City of Barnum*, 386 N.W.2d at 775-76. Thus, County's denial was arbitrary.

E. County otherwise failed to consider imposing reasonable restrictions on Relators' requested CUP

No doubt mindful of its obligation to consider reasonable conditions in approving Relators' existing mining and crushing CUP, County has already imposed 16 conditions on Relators' existing gravel mining operations. Rel. App. 156-60. County's prior consideration and imposition of reasonable conditions demonstrates its knowledge of and ability to use conditions in order to alleviate any concerns raised concerning a CUP application. Yet, County failed without explanation to even consider the imposition of reasonable conditions in this case.

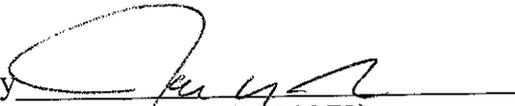
Relators proposed the imposition of several conditions at the Hearing, including the restriction of hours of operation, compliance with all applicable noise standards and limitation of visible emissions caused by blasting and quarrying. Rel. App. 213, 223 & 236-237. Relators also reminded County that it had previously placed 16 conditions on the existing permit and that Relators would accept any reasonable conditions placed on the requested CUP. Rel. App. 230. Despite Relators' proposal of and agreement to accept the imposition of reasonable conditions, County failed to even consider imposing conditions on Relators' requested CUP and did bring the matter up for a vote. Rel. App. 243-44. County's failure to apply such reasonable CUP conditions renders its CUP denial arbitrary. *See Trisko*, 566 N.W.2d at 357; *Minnetonka Congregation of Jehovah's Witnesses*, 303 Minn. at 85-86, 226 N.W.2d at 309.

CONCLUSION

This is not a close case. The controlling statutory language and case law precedent are clear. County's Notice facially fails § 15.99's minimal writing requirement, thereby mandating the approval of the CUP on untimeliness grounds. County also lacks any record basis to defend its arbitrary CUP denial. Issuance of Relators' requested CUP is thus compelled.

DATED: April 22, 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).