

MINNESOTA STATE BAR ASSOCIATION
NO. A05-2124

State of Minnesota
In Court of Appeals

JEFF BARTHELD and
DANA BARTHELD,

Relators,

vs.

COUNTY OF KOOCHICHING, et al.,

Respondents.

RESPONDENTS' BRIEF AND APPENDIX

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LEGAL ISSUES

1. Was it reasonable and authorized by law for the Koochiching County Board of Commissioners to adopt a moratorium on conditional use permit applications for bed and breakfast establishments?

The County Board adopted a moratorium to develop guidelines for consideration of bed and breakfast applications.

2. Was it reasonable and supported by a rational basis for the Koochiching County Board of Commissioners to deny Relators' application for a conditional use permit to convert their residence into a bed and breakfast?

The County Board unanimously denied Relators' application.

STATEMENT OF THE CASE AND FACTS

Relators Jeff and Dana Bartheld (“Relators”) are owners of a residence located at 3069 Town Road 225, International Falls, Koochiching County, Minnesota. The property is located alongside Rainy Lake. On or about June 6, 2005, Relators submitted an application for a Conditional Use Permit (“CUP”) to convert the residence into a bed and breakfast (“B&B”) operation, which would consist of five rental units in addition to Relators’ living quarters. App. 1-2. The application was later reduced to two rental units, with the possibility of expanding to include a third unit. App. 8.

Relators’ property is in a district classified as Residential-Recreational (“RR-1”) on the County zoning map. App. 10. The County Zoning Ordinance (“Ordinance”) does not list home occupations in general, or B&Bs in particular, among the permitted or conditional uses in an RR-1 district.¹

On August 11, 2005, the County Planning & Zoning Commission recommended approval of Relators’ CUP application. App. 10. Prior to this hearing, however, a group of eight owners of properties adjoining Relators’ property submitted a petition expressing their specific concerns regarding the proposed B&B. App. 7. These concerns were:

1. There was insufficient parking for the proposed B&B.
2. There was insufficient dock space for the proposed B&B.
3. Relators intended to erect an eight-foot fence around their property.
4. There was no way to verify the number of B&B units actually in operation.

¹ The Ordinance defines “home occupation” as “use of [a] non-residential nature conducted entirely within the dwelling or accessory building carried on only by the inhabitants thereof, which use is clearly incidental and secondary to the use of the dwelling for residential purposes.” It is unclear from the record whether the 5-unit B&B originally proposed by Relators fell under this definition.

5. The increased noise level was a concern, in light of a history of police calls to Relators' property.
6. The sewer system currently in place would be inadequate, and the proposed B&B would negatively affect other property owners "upline".
7. The proposed B&B would decrease the value of adjoining properties.
8. The proposed B&B would increase traffic on an already stressed road.
9. The environmental impact of the proposed B&B on Rainy Lake had not been considered.
10. The proposed B&B would bring more strangers to the neighborhood.
11. The density of development in the area should not be increased.
12. Relators had prematurely begun advertising their B&B on the internet.
13. Because of its location on Rainy Lake, the proposed B&B would actually be more like a resort hotel, with guests staying for up to a week.

App. 7.²

At the Planning & Zoning Commission hearing, one of the neighbors who had signed the petition, Bobbi Ready, was asked to elaborate on item #5. App. 9. Ready stated that the police had been called on several recent occasions due to noise created by Relators. App. 9. As to item #3, another neighbor who had signed the petition, Steven Gunberg, stated that the eight-foot fence would be an "eyesore" and would block others' views of the lake. App. 9. One of the Commission members, Charles Lepper, acknowledged that there was already considerable traffic congestion in the area of Relators' property. App. 9.

On August 17, 2005, the County's Environmental Services Director, Richard Lehtinen, submitted a request to the County Board of Commissioners ("County Board") for action on Relators' CUP application. App. 12. Lehtinen advised the County Board

² Concerns over parking, traffic, noise, and declining property values echoed the objections set forth in letters submitted by area residents at the first Planning & Zoning hearing on July 14, 2005. App. 3-6.

that the project was “controversial” and that many neighbors opposed it due to “road congestion, neighborhood incompatibility and other factors.” App. 12.

A hearing was held before the County Board on August 23, 2005. App. 13-14. Reference was made at the hearing to another petition opposing the proposed B&B, this one with 60 signatures. App. 13. Board members also stated that had received numerous telephone calls from neighbors opposing a B&B in the area. App. 13. During public comment, Bobbi Ready stated that she was specifically concerned regarding the additional noise and traffic congestion that would be created by the proposed B&B. Steven Gunberg also commented on the threat of congestion. App. 13. Another area resident, Jim Nelson, opined that the road would need to be improved before any businesses were added to the area. App. 14.

Nelson also pointed out the ambiguity in the zoning ordinance regarding B&Bs and recommended that the County establish guidelines for the location of B&Bs, so that there would be parameters to ensure that future applications were handled in a uniform manner. App. 14. After weighing this recommendation, the County Board voted unanimously to deny Relators’ CUP application and to place a moratorium on all B&B applications, pending the establishment of guidelines for the operation of such businesses in the County. App. 14.

ARGUMENT

I. STANDARD OF REVIEW

The standard of review is the same for all land use matters, namely, whether the local government authority’s action was reasonable. VanLandschoot v. City of Mendota

Heights, 336 N.W.2d 503, 508 (Minn. 1983); Honn v. City of Coon Rapids, 313 N.W.2d 409, 417 (Minn. 1981); St. Croix Development, Inc. v. City of Apple Valley, 446 N.W.2d 392, 397-98 (Minn. App. 1989). A municipality's land use decision is entitled to great deference and will be disturbed on appeal only where the decision has no rational basis. Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 207 (Minn. 1993); White Bear Docking & Storage v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn. 1982). Appellate courts defer to a municipality's decision when the factual basis for that decision has even the "slightest validity". White Bear Docking, 324 N.W.2d at 176. A court will not reverse a land use decision that has a rational basis, even if the decision is debatable. Id; BECA of Alexandria, L.L.P. v. County of Douglas, 607 N.W.2d 459, 463 (Minn. App. 2000); SuperAmerica Group, Inc. v. City of Little Canada, 539 N.W.2d 264, 266 (Minn. App. 1996)(rev. denied); Larson v. County of Washington, 387 N.W.2d 902, 905 (Minn. App. 1986)(rev. denied).

In cases regarding the granting or denial of CUPs (also known as a "special use" permits), reasonableness is measured by the standards set out in the particular local land use ordinance. Honn, 313 N.W.2d at 417. Inquiry focuses on whether the proposed use is contrary to the general welfare as already established in the ordinance. Id. In making this determination, however, municipalities have broad discretion. Barton Contracting Co., Inc. v. City of Afton, 268 N.W.2d 712, 718 (Minn. 1978); Zylka v. City of Crystal, 167 N.W.2d 45, 49 (Minn. 1969); Haen v. Renville County Board of Commissioners, 495 N.W.2d 466, 471 (Minn. App. 1993). A decision to approve or deny a CUP will be upheld unless a court determines the decision to be arbitrary, capricious or unreasonable.

Schwardt v. County of Watonwan, 656 N.W.2d 383, 386 (Minn. 2003); Yang v. County of Carver, 660 N.W.2d 828, 832 (Minn. App. 2003). Weighing evidence is not the Court's function in such cases. Barton Contracting, 268 N.W.2d at 718. If the decision is supported by legally sufficient reasons, the Court may not substitute its judgment, even if it would have reached a different conclusion. St. Croix Development, 446 N.W.2d at 398; BECA of Alexandria, 607 N.W.2d at 463.

Moreover, where the Record contains reasons provided by the municipality for its decision to grant or deny a CUP, the Court should limit its review to the legal sufficiency and factual basis for those reasons. Barton Contracting, 268 N.W.2d at 717; Corwine v. Crow Wing County, 244 N.W.2d 482, 485-86 (Minn. 1976)(overruled on other grounds by Northwestern College v. City of Arden Hills, 281 N.W.2d 865 (Minn. 1979)); Haen, 495 N.W.2d at 471. The party seeking review bears the burden of demonstrating that the municipality's reasons are legally insufficient, or that there is an absence of Record support for the reasons. Yang, 660 N.W.2d at 832; Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757, 763 (Minn. 1982); Corwine, 244 N.W.2d at 486.

II. THE COUNTY PROPERLY EXERCISED ITS AUTHORITY TO PLACE A MORATORIUM ON B&B APPLICATIONS

In placing a moratorium on B&B applications, the County Board was acting pursuant to Minn. Stat. § 394.34. This statutory provision provides, in pertinent part:

If a county is conducting, or in good faith intends to conduct studies within a reasonable time . . . for the purpose of considering a comprehensive plan or official controls or an amendment, extension, or addition to either, . . . the [county] board in order to protect the public health, safety, and general welfare may adopt as an emergency measure a temporary

interim zoning map or temporary interim zoning ordinance, the purpose of which shall be to classify and regulate uses and related matters as constitutes the emergency.

The case law interpreting this provision is very slim. In analyzing a similar provision applicable to cities, Minn. Stat. § 462.355, Subd. 4, the Court of Appeals has recognized that a moratorium on development is a valid exercise of a municipality's police powers. Semler Constr., Inc. v. City of Hanover, 667 N.W.2d 457, 465 (Minn. App. 2003)(citing Wedemeyer v. City of Minneapolis, 540 N.W.2d 539, 542 (Minn. App. 1995)), rev. denied. Even where a moratorium is adopted while a land use application is already pending, the moratorium should be upheld if it represents a good-faith effort to accomplish goals relating to the growth and quality of the community, and if it is not arbitrary, capricious or unreasonable. Almquist v. City of Marshan, 245 N.W.2d 819, 825 (Minn. 1976); Duncanson v. Board of Supervisors of Danville Township, 551 N.W.2d 248, 250 (Minn. App. 1996).

Furthermore, although the statute refers to the adoption of a "temporary interim zoning ordinance," Minn. Stat. § 394.34, the Court of Appeals has found that a municipality may impose a moratorium without following the formal notice and hearing procedures required under state law for adoption of an ordinance. Wedemeyer, 540 N.W.2d at 542-43; Duncanson, 551 N.W.2d at 250. The statute authorizing an interim ordinance is "is permissive; it does not prohibit less formal approaches." Wedemeyer, 540 N.W.2d at 542. The Court explained the public policy reasons for this procedural flexibility:

“Policy concerns weigh heavily in favor of permitting municipalities to enact interim stays on conditional use permit applications. [Appellant] argues that a [municipality] must formally pass an ordinance amending its zoning plan. . . . Under that system, a [municipality] would need to anticipate all future, and perhaps harmful, uses for property and enact formal ordinances before any applications were submitted or else it would be effectively estopped from rejecting or even delaying those applications. Zoning decisions require time and attention. Upholding only moratoria that take effect after the adoption of a formal moratorium ordinance would be ‘like locking the stable after the horse is stolen.’”

Id. (quoting Downham v. City Council, 58 F.2d 784, 788 (E.D.Va. 1932)(other internal citations omitted).

In the present case, the County zoning ordinance contains no reference whatsoever to B&Bs, and therefore is ambiguous as to how B&B applications should be handled and what locations are appropriate for the establishment of B&Bs. The record shows that the County Board made a good-faith decision to resolve this ambiguity by amending its official controls – that is, by adopting guidelines for B&B applications -- which necessitated a moratorium on such applications. This clearly fell within the County’s statutory authority under Minn. Stat. § 394.34.³ While the moratorium admittedly was

³ Relators may rely on Medical Services, Inc. v. City of Savage, 487 N.W.2d 263 (Minn. App. 1992), for the proposition that a moratorium may not be imposed to prevent a single project from going forward. However, Medical Services is distinguishable for several reasons. First, the city council in that case enacted its moratorium after a closed session, two years after the appellants’ application, and only after the appellants had commenced their legal action. 487 N.W.2d at 267. Here, the County voted on the moratorium in a public session, approximately two and a half months after Relators’ application, and prior to the lawsuit. Second, the Court of Appeals in Medical Services concluded from its analysis of the city ordinance that the appellants’ proposed use (the construction of an infectious waste processing facility) was a permitted (i.e., non-conditional) use, and that the appellants were entitled to a building permit as a matter of right upon compliance

adopted without the formal proceedings for amendment of the zoning ordinance, the Wedemeyer and Duncanson cases establish that such proceedings are not required under these circumstances.⁴ The moratorium was a reasonable exercise of the County's police powers, and the application of the moratorium to Relators' B&B proposal should be upheld.

III. THE DECISION TO DENY RELATORS' CUP APPLICATION WAS REASONABLE AND SUPPORTED BY THE RECORD

As discussed supra, review of a municipality's decision to deny a CUP focuses on the standards set forth the local land use ordinance. Honn, 313 N.W.2d at 417. Here, Section 5.12 of the County's zoning ordinance provides as follows:

A Conditional Use Permit shall be granted if it is found that:

- (1) The conditional use will 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, or neighborhood, nor [will it] substantially diminish and impair property values within the surrounding neighborhood;
- (2) The establishment of the conditional use will not impede the normal and orderly development and improvement of surrounding property for uses predominant in the area;
- (3) The location and character of the proposed development are considered to be consistent with the desirable pattern of development for the locality in general;

with the ordinance's performance standards. Id. at 266-67. Here, it is undisputed that the establishment of a B&B on Relators' property is a conditional use. The moratorium was enacted to enable the County to develop guidelines for the consideration of such CUP applications.

⁴ Again, these cases pertain to the exercise of a city's interim zoning powers under Minn. Stat. § 462.355, Subd. 4. There is no reason why the Court should not extend the same reasoning to counties.

- (4) The proposed development and/or land use [is] consistent and in keeping with the spirit and intent of this ordinance.

Prior to and at the County Board's August 23, 2005 hearing, evidence was presented which allowed the County Board to conclude that the proposed B&B would be detrimental to the use and enjoyment of the adjoining properties and the surrounding area. This included evidence of a history of noise complaints arising from Relators' property, Relators' plans to obstruct neighbors' view of the lake by erecting a fence, and the threat of traffic congestion.

Relators contend that "generalized community opposition" to their B&B proposal is not a sufficient basis to deny their CUP application. This is true – but it misrepresents the facts on the record. The concerns raised by area residents were not "generalized," but rather highly specific and based on personal observations.

In this way, this case resembles the SuperAmerica Group line of cases. In SuperAmerica Group, Inc., a Division of Ashland Oil, Inc. v. City of Little Canada, 539 N.W.2d 264 (Minn. App. 1996), the Court of Appeals upheld the city's denial of a CUP for operation of a gas station and convenience store. The underlying decision was based largely on testimony by local residents and business owners, who opposed issuance of the CUP due to probable increases in traffic congestion, crime and pollution. 539 N.W.2d at 266. The Court found that these residents had "expressed more than a vague concern about future neighborhood problems" and had described "concrete, current observations" about "existing, daily traffic problems." Id. at 268. Accordingly, it was permissible for the city to credit this testimony and to deny the application. Id. Similarly, in Cemetery v.

City of Roseville, 689 N.W.2d 254 (Minn. App. 2004), the Court upheld the denial of a CUP to build a crematorium, where the record showed that local residents had presented research regarding the pollutants likely to be emitted from the proposed crematorium. 689 N.W.2d at 260. Most recently, in In re Cities of Annandale and Male Lake, 2005 WL 14915 (Minn. App.), the Court upheld a condition that effluent from a wastewater treatment plant be pumped through a pipe to a river several miles away. This condition was based on neighbors' written submissions and testimony regarding "concrete, specific observation of flooding and drainage problems." 2005 WL 14915, *6.⁵

The records shows that, in applying the standards set forth in the zoning ordinance, the County Board had more than an adequate rational basis to deny Relators' CUP application. The challenged decision was reasonable and should not be disturbed.

IV. IF THE COURT DETERMINES THAT THE COUNTY BOARD MADE INSUFFICIENT FINDINGS, THE MATTER SHOULD BE REMANDED

As discussed above, the decision to deny Relators' B&B application had a rational basis and was supported by evidence in the record. Relators assert that the County Board failed to make factual findings, which they allege is a prima facie showing of arbitrariness. Relators' Brief at 11. However, even if the Court determines that the record is not sufficient to rule on the reasonableness of the decision to deny the

⁵ The SuperAmerica Group, Cemetery and City of Annandale cases all stand for the proposition that specific testimony by non-expert local residents can be sufficient to rebut testimony by an expert testifying on behalf of a permit applicant. Here, Relators did not present any expert testimony at the County Board hearing. This distinction cuts in favor of the County: if testimony by local residents is sufficient to overcome expert testimony to justify denial of a CUP, then the opinions of local residents should carry even more weight in the absence of an expert witness.

application, the proper remedy would be to remand to the County Board for further findings on that issue. Earthburners, Inc. v. County of Carlton, 513 N.W.2d 460, 462-63 (Minn. App. 1994). See also In Matter of Grant of Variance by Kandiyohi County Bd. of Adjustment, 1995 WL 34850, *2 (Minn. App.)(remand for further findings regarding criteria for grant of variance).

The alternative would be for the Court to order issuance of the CUP. Such a result would require the Court to exercise its judgment to determine that the proposed B&B would be consistent with the general welfare of the County. As discussed supra, such judgments are outside the proper scope of an appellate court's inquiry in land use cases.

CONCLUSION

For the foregoing reasons, the County Board's determinations must be upheld in its entirety. The imposition of a moratorium on B&B applications was a valid exercise of the County Board's powers. In the alternative, the determination to deny Relators' CUP application was made based on legally sufficient reasons supported by Record facts.

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STATE OF MINNESOTA
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**CERTIFICATE OF
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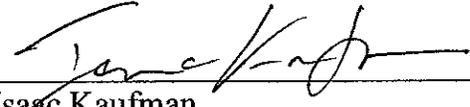
County of Koochiching, et al.,

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I hereby certify that this Brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subs. 1 and 3, for a brief produced with a monospaced font. The length of this Brief is 277 lines, 2,874 words. This Brief was prepared using Microsoft Word.

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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).