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**STATE OF MINNESOTA
IN COURT OF APPEALS
A12-1078**

VONCO IV Austin, LLC,
Relator,

vs.

Mower County, et al.,
Respondents.

**Filed February 19, 2013
Affirmed
Klaphake, Judge***

Mower County Board of Commissioners
File No. CUP #778

Jack Y. Perry, Jason R. Asmus, Briggs & Morgan, P.A., Minneapolis, Minnesota (for relator)

Kristen Marie Nelsen, Mower County Attorney, Austin, Minnesota; and

Scott T. Anderson, John P. Edison, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondents)

Considered and decided by Chutich, Presiding Judge; Hudson, Judge; and Klaphake, Judge.

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

UNPUBLISHED OPINION

KLAPHAKE, Judge

In this certiorari appeal, relator VONCO IV Austin, LLC challenges the decision of the Mower County Board of Commissioners to deny its conditional use permit (CUP) to dispose of friable asbestos at its landfill facility. Because we conclude that Mower County's decision to deny the CUP request was not arbitrary and capricious, we affirm.

DECISION

The issue in this case is whether the Mower County Board of Commissioners properly denied relator's request for a CUP that would permit relator to dispose of friable asbestos at its facility. We will affirm the decision of a county board to deny a CUP so long as the decision is reasonable and neither arbitrary nor capricious. *Yang v. Cnty. of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003).

Relator argues that the board's decision was arbitrary and capricious because the board failed to make findings of fact contemporaneously with its decision to deny the CUP request, and because the findings of fact were adopted after the board passed the resolution, without using motion, second, and majority vote procedures. Minn. Stat. § 15.99 (2010) provides that a board must adopt written findings contemporaneously with its decision to deny a CUP request, or at the latest at "the next meeting following the denial of the request but before the expiration of the time allowed for making a decision." Minn. Stat. § 15.99, subd. 2(c). "[T]he failure of the [county board] to record any legally sufficient basis for its determination at the time it acted ma[kes] a prima facie showing of arbitrariness." *Zylka v. City of Crystal*, 283 Minn. 192, 198, 167 N.W.2d 45, 50 (1969).

But, “as long as the necessary record is prepared within a reasonable time of a zoning decision, a municipality should not be presumed to have acted in an arbitrary manner.” *R.A. Putnam & Assoc., Inc. v. City of Mendota Heights*, 510 N.W.2d 264, 267 (Minn. App. 1994), *review denied* (Minn. Mar. 15, 1994).

We conclude that the county board adopted its findings within a reasonable time following its decision to deny the CUP permit. In denying the permit, the board passed Resolution #28-12, which set forth the factual basis for its decision. The factual basis as stated in the resolution was nearly identical to the board’s findings of fact, which were adopted at the same meeting. Following a discussion by the board, the findings of fact were reduced to writing and signed by the vice-chairperson. Although the findings of fact were not adopted by motion, second, and majority vote, we conclude that the findings were nonetheless adopted in a manner consistent with the requirements of section 15.99. Even if this was a procedural defect, the doctrine of substantial compliance applies to the requirement that the board adopt written findings, and therefore such a defect alone does not render a civilian board’s decision arbitrary and capricious. *See Manco of Fairmont, Inc. v. Town Bd. of Rock Dell Twp.*, 583 N.W.2d 293, 296 (Minn. App. 1998), *review denied* (Minn. Oct. 20, 1998).

Relator further argues that the record was insufficient to support the board’s stated reasons for its denial of the CUP. The burden is on relator to show that “the reasons for the denial are either legally insufficient or had no factual basis in the record.” *Yang*, 660 N.W.2d at 832. “A county’s denial of a conditional use permit is arbitrary where the applicant establishes that all the standards specified by the zoning ordinance as conditions

of granting the permit have been met.” *Id.* Relator asserts that there is insufficient evidence in the record from which to conclude that there would be a problem with asbestos dust, and that such a problem would negatively impact property values and development. We disagree. The record contains testimony that strong southerly winds tend to blow dust and other debris from relator’s landfill onto neighboring properties, including one farm and residence located a mere 1000 feet from the landfill site. Notes from county staff members indicated that friable asbestos poses a particular risk of becoming airborne, and that this risk is especially dangerous because any exposure to asbestos dust creates a serious health risk. One county commissioner testified that he believed the addition of friable asbestos would negatively impact property values, based on his experience as a professional real estate appraiser. County officials have sufficient expertise to determine matters such as likely impacts on property values. *White Bear Docking and Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 177 (Minn. 1982). Therefore, we conclude that the evidence was sufficient to support denial of the CUP request.

Relator also argues that the evidence in the record is insufficient because some of the evidence was in the form of neighbor testimony. The county board “may consider neighborhood opposition only if based on concrete information.” *Yang*, 660 N.W.2d at 833. Vague “concerns” or “doubts” are not a sufficient basis upon which to deny a CUP request. *C. R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981). However, neighbor testimony that is concrete, describes current conditions, and includes information based on scientific reports provides a sufficient factual basis to deny a CUP

request. See *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 261 (Minn. App. 2004); *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 268 (Minn. App. 1995), *review denied* (Minn. Jan. 5, 1996).

Here, the Rythers, owners of an adjoining property, testified that the prevailing winds frequently blow dust and debris from relator's property onto their property, that a recent fire at relator's site caused their home to be inundated with dust and ash, and that these conditions make it unlikely that relator would be able to prevent friable asbestos from escaping. The Rythers also provided the county board with copies of complaints, enforcement actions, and orders from the EPA and MPCA regarding relator's improper disposal of materials, including asbestos. Because the Rythers' testimony was sufficiently concrete and not limited to mere "concerns," we conclude that this evidence was sufficient to support denying the CUP request.

Finally, relator contends that the county board's decision is arbitrary and capricious because the board failed to consider reasonable conditions before denying the CUP. "Evidence that a municipality denied a conditional use permit without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary." *Trisko v. City of Waite Park*, 566 N.W.2d 349, 357 (Minn. 1997) (citation omitted), *review denied* (Minn. Sept. 25, 1997). The board's meeting notes show that the board considered more than thirty recommended conditions. Because the board considered the possibility of approving the CUP with conditions, we

conclude that it was not arbitrary and capricious for the board to find these conditions insufficient and deny the CUP request.

Affirmed.