STATE OF MINNESOTA
IN COURT OF APPEALS
A06-2305

The Big Lake Association,
Relator,

vs.

Saint Louis County Planning Commission, et al.,
Respondents,

Big Lake Properties, LLC,
Defendant,

John A. Swenson,
Respondent,

Sheryl L. Swenson,
Defendant,

George P. Nall,
Respondent.

Filed March 11, 2008
Affirmed
Halbrooks, Judge
Concurring specially, Minge, Judge

St. Louis County Planning Commission

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Considered and decided by Minge, Presiding Judge; Halbrooks, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

HALBROOKS, Judge

In this appeal, relator Big Lake Association challenges respondent St. Louis County's grant of a conditional use permit (CUP) to Big Lake Properties, LLC. Relator argues that the county's decision to grant the CUP was arbitrary and capricious and requests that we reverse the grant of the CUP and remand this case to respondent St. Louis County Planning Commission for further hearings. Because the county's grant of the CUP was not unreasonable or arbitrary and capricious, we affirm.

FACTS

Big Lake is located in a remote area of respondent St. Louis County on the Echo Trail adjacent to Ely and the Boundary Waters Canoe Area Wilderness. A public boat launch maintained by the forest service provides public access to Big Lake, and motor boats are allowed on the lake. Other than the public boat launch, there is limited public land on the lake. The area is zoned shoreland mixed use (SMU). Planned unit developments are authorized in SMU districts. St. Louis County, Minn., Ordinance 46, art. V, § 5.04 (1998).

The Big Lake Wilderness Lodge (resort) was operated by previous owners on land leased from the forest service until 2001, when the land was transferred to the county.

Respondents George Nall and John Swenson purchased the resort from St. Louis County in the winter of 2005-06. The resort currently consists of 13 rental cabins ranging in size from 282 to 684 square feet, a 3,148 square foot main lodge, and various other buildings that provide services and utilities to guests.

Like other resorts in the area, the resort has suffered from cash-flow problems. As a result, Nall and Swenson sought to improve its economic viability by changing the ownership structure to one that they have used successfully in other resorts they own. Under the proposed structure, the existing and some newly constructed cabins would be sold to individual owners. The owners would receive time at the resort and rental income from their cabins in exchange for their investment. All owners would be required to participate in a rental program. With the anticipated increase in income, Nall and Swenson intend to improve the property by restoring the lakeshore, upgrading the buildings, and reducing air and noise pollution through renewable-energy sources.

Nall and Swenson submitted a CUP application for expansion of the resort to a planned community on September 5, 2006. The application proposed the construction of 11 new units, seven of which are to be located directly on the shore of Big Lake. The new units range in size from 480 to 1,100 square feet in size. The application stated that "[t]raffic should remain approximately the same" under the proposed use.

In addition to the CUP application, Nall and Swenson submitted a concept statement and proposed declarations for their CUP. The declarations, which are required by the zoning ordinance, were in draft form when submitted, subject to review and modification during the approval process. The declarations indicated that the units would

be "used for both single-family residential dwellings and for transient, hotel, commercial, business or other purposes, in accordance with each Unit Owner's wishes and the regulations set forth in Section 7 [in the proposed declarations] of the Rules and Regulations." The declarations also provided for a "Resort Managing Agent" who is

> hired by the Association to conduct the day-to-day management and maintenance activities of Big Lake Wilderness Retreats. Such activities shall include, but are not limited to, maintenance of the Common Elements and provision of business and accounting services for the Association. The Resort Managing Agent may, but is not required to, provide the following additional services: application and maintenance of a resort license (if so directed by the Association Board) and administration of rental management program.

Business uses and/or ownership that involves time-sharing are prohibited by the declarations.

The county delegates its land-use decisions to the St. Louis County Planning Commission according to Minn. Stat. §§ 373.02, 394.01-.37 (2006). The St. Louis County Planning Department evaluated Nall and Swenson's CUP application and prepared a report for the county planning commission. The report addressed each of the criteria of the applicable zoning ordinance, reaching the following conclusions:

> *1. The use conforms with the land use plan:* There is no land use plan for the area.
>
> *2. The use is compatible with the existing neighborhood:* The historic use of the property is a commercial resort. The proposal represents an expansion and continuation of that use with a change in the type of ownership and operation. The access road leading to the property is 14-18 feet in width and should be upgraded to accommodate the 11 new rental units.

> *3. The use will not impede the normal and orderly development and improvement of the surrounding area:* No. The only adjacent private properties are the six lots located within the Plat of Big Lake Point, and the goals of the expansion are to retain the operation of a commercial resort.
>
> *4. The location and character of the proposed use is considered consistent with a desirable pattern of development:* Yes. Family resorts are an asset to the county and many have closed and have been divided into residential lots. The proposed intent is to continue the operation of a commercial resort under a new form of ownership.

Based on its review, the planning department recommended that the planning commission approve the CUP with 14 specified conditions.

The planning commission scheduled a public hearing to address this matter on October 12, 2006. Notice of the public hearing was sent on September 29, 2006, to the home addresses of nearby landowners identified by the property taxpayer list. Not all of the addresses were located on Big Lake. On October 2, 2006, a landowner named Stephen Snyder sent an e-mail to the planning department. Snyder's e-mail provided a list of additional landowners whom he felt should receive notice of the public hearing. In response, the planning department sent out additional notices.

Jim Plummer, a member of the Physical Planning Division of the planning department, testified at the hearing about the planning department's evaluation and its conclusion that the proposed CUP with conditions meets the requirements of the zoning ordinance. Plummer stated, "[The] commercial formula that applies to a CIC,[1] a commercial CIC or a resort, is quite liberal. It does allow a fair amount of density.

[1] "Common Interest Community" as defined by Minn. Stat. § 515B.1-103 (2006).

There's no question about it. But, of course, we've been through that formula; and this proposal meets the terms of the ordinance."

Rich Hyrkas, from the county health department, testified that he had visited the resort and conducted 26 soil tests. Hyrka's conclusion was that there was more than adequate area for the proposed expansion and replacement of the septic system.

Nall testified that

> [a]long with saving Big Lake Resort, we also hope to decrease—decrease the impact it is having on the environment. We agree with many of the concerns that our neighbors have about the impact the resort has on the lake. The beauty and pristine qualities of Big Lake are what drew us to the property in the first place, and we hope to preserve them as well. Those qualities are what keep guests coming back year after year.
>
> . . . To be clear, Big Lake will continue to operate as a resort; and we will stay on as owners for the long-term. Unit owners will be required to participate in the rental program permanently.

Landowners opposing the CUP were allowed to testify next. Snyder voiced his concern that proper notice regarding the hearing was not provided because some landowners did not receive notice until October 6, 2006. But according to the planning-commission secretary, all notices were sent out within ten days of the hearing, as required by statute. Snyder also expressed his concern about a petroleum contamination on the site of the proposed CUP, asserting that Swenson and Nall were aware of the matter but failed to disclose it to the county.

The contamination was discovered in 1999 (before Swenson and Nall purchased the property), when gasoline and diesel-fuel contamination that originated from above-

ground storage tanks on the site was detected. The Minnesota Pollution Control Agency (MPCA) worked with the then-owners of the resort, specifying testing and cleanup activities to remediate the contaminated soil and requiring installation of a shallow bedrock well to gauge for product or gross contamination in the source area bedrock. At the conclusion of the cleanup efforts, the MPCA wrote a letter to the resort owners on February 5, 2002, that stated, in part:

> The Minnesota Pollution Control Agency (MPCA) staff has determined that your investigation and cleanup has adequately addressed the petroleum tank release at the site listed above. Based on the information provided, the MPCA staff has closed the release site file.
>
> Closure of the file means that the MPCA staff does not require any additional investigation and/or cleanup work at this time or in the foreseeable future. Please be aware that file closure does not mean that all of the petroleum contamination has been removed from this site. However, the MPCA staff has concluded that the remaining contamination does not appear to pose a threat to public health or the environment under current conditions.
>
> The MPCA reserves the right to reopen this file and to require additional investigation and/or cleanup work if new information, changing regulatory requirements or changed land use make additional work necessary. If you or other parties discover additional contamination (either petroleum or nonpetroleum) that was not previously reported to the MPCA, Minnesota law requires that the MPCA be immediately notified.

Snyder testified that he had spoken to an MPCA employee who informed him that further construction on the land "could and probably will release [the] contamination again." Snyder requested that a decision on the CUP application be postponed until the MPCA could review and approve a cleanup proposal. Following Snyder's statements,

other landowners who objected to the CUP were allowed to speak. The landowners voiced their concerns regarding density, lights, septic-system design and potential overuse of Big Lake.

Nall and Swenson were then allowed to respond to the concerns raised by Snyder and the other landowners. Nall produced the letters from the MPCA and testified that he had considered contamination to be a resolved issue because the MPCA

> went through a pretty detailed notification process for local area residents and collected feedback, weighed the feedback, and also waited through the—the appeal time for any—for what their findings were. So, in our opinion, one of the reasons that we eliminated it as a potential risk of buying this property was because we felt like the problem had been thoroughly and adequately dealt with and wouldn't be something that would pose problems for us. As you might have guessed, when you get into these environmental studies, they are extremely lengthy in time and extremely costly. So we would not have moved forward if we didn't have a high degree of confidence with what occurred.

Nall also testified that the specific site of the contamination was not going to be disturbed in the work associated with the proposed development of the resort.

The planning commission concluded the opportunity for public comment at the hearing after Nall's responsive testimony. After returning to the record to discuss the conditions recommended by the planning department, the planning commission voted to approve the CUP with the conditions. The planning commission also sent notice of its decision to the MPCA because "if they need to do anything, they've been notified." This certiorari appeal follows.

D E C I S I O N

Quasi-judicial decisions by a county board regarding a CUP are reviewable by certiorari to this court. *Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 574 & n.5 (Minn. 2000); *Picha v. County of McLeod*, 634 N.W.2d 739, 741 (Minn. App. 2001). The standard of review is deferential because counties have wide latitude in making decisions about special-use permits. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). Further, we give more deference to a decision approving a CUP than to a decision denying one. *Id.* at 389 n.4.

An appellate court will "review a county's decision to approve a CUP independently to see whether there was a reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously." *Id*. at 386. Counties may approve a CUP if it satisfies the standards set out in the county ordinance. Minn. Stat. § 394.301, subd. 1 (2006). A valid CUP must meet all the requirements listed in the ordinance. *Schwardt*, 656 N.W.2d at 387. An order granting a CUP must illustrate the county's conclusion that the proposed CUP has satisfied each of the ordinance's conditions for approval. *Id.* at 389. Counties need not prepare formal findings of fact, but the reasons for their decisions must, at a minimum, be recorded or put in writing in more than a conclusory fashion. *Picha*, 634 N.W.2d at 742. To show that the planning commission acted unreasonably, relator must establish that the CUP did not meet one of the standards set out in the ordinance and that the grant of the CUP was an abuse of discretion. *See In re Block*, 727 N.W.2d 166, 177-78 (Minn. App. 2007) (stating that, "[f]or a challenge to a CUP to succeed, there must be a showing that the proposal did not

meet one of the standards set out in the [county] [o]rdinance and that the grant of the CUP was an abuse of discretion" (quotation omitted)).

Here, the county ordinance governing CUPs requires that

> 1. The use conforms to the land use or comprehensive plan of the County, if any.
>
> 2. The use is compatible with the existing neighborhood.
>
> 3. The use will not impede the normal and orderly development and improvement in the surrounding area of uses permitted by right in the zone district.
>
> 4. The location and character of the proposed use is considered to be consistent with a desirable pattern of development for the area.

St. Louis County, Minn., Ordinance 46, art. VIII, § 3.06 (1998).

We next address the requirements in the CUP ordinance to determine whether or not the planning commission abused its discretion in its approval of the CUP. With respect to the first criterion, the ordinance contemplates that a CUP need only conform to a land-use plan or comprehensive plan if one exists. It is undisputed that there is no comprehensive plan or land-use plan for the land where the resort is located. The planning commission noted the absence of any such plan and therefore properly concluded that the first requirement for a CUP is met.

Second, the use proposed by the CUP must be compatible with the existing neighborhood. The planning commission concluded that "[t]he historic use of the property is a commercial resort. The proposal represents an expansion and continuation of that use with a change in the type of ownership and operation." Relator argues that the

proposed use is not truly commercial in nature but, instead, a means of subdividing the property into residential usage that will exceed the permitted density for the lakeshore. Relator also suggests that the CUP application itself indicates that Big Lake Properties intend the resort to be a residential development and not a commercial one.

In support of its argument, relator relies on *Yeh v. County of Cass*, 696 N.W.2d 115 (Minn. App. 2005), *review denied* (Minn. Aug. 16, 2005). Relator argues that, as in *Yeh*, Nall and Swenson misled the planning commission by stating that their development is commercial in nature. Drawing a comparison to *Yeh*, relator suggests that the developers' actual purpose here is residential and that by failing to recognize that, the planning commission has acted arbitrarily. But *Yeh* is factually distinguishable from this matter. In *Yeh*, the developer initially requested a CUP to turn a commercial development into an expanded residential development. 696 N.W.2d at 119-20. Appellant withdrew that request after conferring with the county's environmental services division. *Id.* at 120. The developer then sought and received building permits for additional structures and checked a box indicating the expansion was commercial. *Id.* Because the development was already commercial, no public hearing was required. *Id.* After completing the expansion, the developer began to advertise the majority of the development for sale as permanent residences, leaving three of the fourteen total units for rental. *Id.* at 128. The developer asserted that it remained commercial because it met the minimum of three structures for a commercial "resort" as defined by the applicable ordinance. *Id.* at 127-28. But this court concluded that appellant's reasoning led to the absurd result that could allow a development to be called a "resort" with any number of

units to be sold as permanent residences so long as three units remained for rental. *Id.* at 128-29.

Here, the CUP application indicated that the previous use was "Resort/Campground/B&B" and the proposed use will be "Residential Seasonal." But Nall testified that, "Big Lake will continue to operate as a resort; and we will stay on as owners for the long-term. Unit owners will be required to participate in the rental program permanently." The CUP conditions require that all units be permanently included in a rental pool. Unlike *Yeh*, all units here will be available for rental; there is no evidence otherwise. Further, Plummer testified that the development meets all the density requirements for a commercial development.

Relator argues on appeal that the resort does not conform to the dimensional requirements for minimum lot size, minimum lot width, maximum lot coverage, setbacks, density and septic system impacts. But relator did not raise the issue, as now framed, to the planning commission. Because the issue was not raised and the planning commission had no opportunity to address it, it is waived. *See In re Application of Minnegasco*, 565 N.W.2d 706, 713 (Minn. 1997) (stating that failure to raise an issue at an administrative hearing before the Minnesota Public Utilities Commission waived the issue). The evidence before the planning commission supports its conclusion that this CUP is compatible with the surrounding neighborhood as a planned commercial development.

The third criterion is that the CUP should not impede normal and orderly development in the area. The planning commission determined that "[t]he only adjacent private properties are the six lots located within the Plat of Big Lake Point, and the goals

of the expansion are to retain the operation of a commercial resort." As a result, the planning commission concluded that there would be no impediment to normal and orderly development of the area due to the proposed expansion. We note that relator does not directly challenge this aspect of the CUP, and there is ample support in the record for the planning commission's conclusion.

The final criterion from the ordinance is that the CUP must be consistent with a desirable pattern of development. The planning commission concluded that "[f]amily resorts are an asset to the county and many have closed and have been divided into residential lots. The proposed intent is to continue the operation of a commercial resort under a new form of ownership." The testimony provided by Nall and Swenson along with the conditions of the CUP support the planning commission's conclusion. There is no reason for this court to substitute our judgment for that of the planning commission when the record provides a reasonable basis for its conclusions.

In addition to its argument that the CUP application does not meet the zoning-ordinance criteria, relator contends that the decision to grant the CUP was arbitrary and capricious because the planning commission failed to adequately investigate the issue of soil contamination. When the planning commission fails to make a reasonable inquiry into one of the required criteria for approval of a CUP, the grant of a CUP is arbitrary or capricious. *See Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm'rs*, 713 N.W.2d 817, 838 (Minn. 2006) (finding that the failure to address all the requisite criteria when performing an environmental impact statement made the county's decision arbitrary and capricious).

Here, the ordinance states,"[w]hen in the opinion of the Planning Commission a Conditional Use Permit *may* result in a material adverse effect on the environment, the applicant *may* be requested by the Planning Commission to demonstrate the nature and extent of the effect." St. Louis County, Minn., Ordinance 46, art. VIII, § 3.06 (1998) (emphasis added).

The planning commission heard testimony about the contamination from Nall and Swenson as well as the concerns from Snyder and other landowners. Relator raised concerns that Big Lake provides drinking water to the local residents. According to Snyder, he was told by the MPCA that the contamination was caused by "leaded gasoline and diesel fuel; and it contaminated the soil. It had reached the bedrock, and there was free product within the ground water itself." Snyder also stated that the MPCA project manager for Big Lake contamination told him that "improvements on these cabins will—could and probably will release this contamination again."

The planning commission was provided with letters from the MPCA addressing this matter that stated that the "remaining contamination does not appear to pose a threat to public health or the environment under current conditions." Contrary to relator's argument and Snyder's testimony, the MPCA does not assume that the contamination will increase if the site is developed as proposed. Instead, the MPCA letter suggests that if "future development of this property or the surrounding area is planned, it should be assumed that petroleum contamination may still be present." Nall and Swenson do not suggest that all contamination has been removed but testified that they have no plans to disturb the location of the contamination. Further, as a result of the county's

communication, the MPCA is aware of the plans to develop the property. Presumably, the agency will monitor the changes and any impact on the current stable conditions.

The planning commission considered testimony and the letters from the MPCA and did not request any further information from Big Lake Properties regarding the contamination. The ordinance gives the planning commission discretion to determine when to require applicants to provide further information regarding potential environmental harm. Contrary to relator's argument, the evidence before the planning commission did not require a further investigation. *Cf. Citizens Advocating Responsible Dev.*, 713 N.W.2d at 838 (reversing an administrative decision that an environmental impact statement was not needed where "[t]he county's determination does not appear to be based on any real examination of the question"). Nall and Swenson testified that the area of the contamination would not be the site of any new construction. The planning commission heard both sides of the issue and concluded that the MPCA conclusions were sufficient. The evidence before the planning commission was not so "one-sided as to render the approval [of the CUP] arbitrary." *Schwardt*, 656 N.W.2d at 389. The record supports the decision of the planning commission, particularly in light of the MPCA's determination that the contamination was considered "adequately addressed." The ordinance does not require the planning commission to conduct any further investigation of the issue. As a result, we conclude that the planning commission acted within its discretion.

Affirmed.

MINGE, Judge (concurring specially)

I concur in the opinion of the panel. I note that the decision of the St. Louis County Planning Commission approving the conditional use permit did not give significant consideration to the question of soil contamination from the earlier petroleum spills and the risk that new construction will precipitate spread of that contamination to the waters of Big Lake. Although the sites for proposed new construction are not at the location of the spills, there is evidence in the record that petroleum may have migrated to the vicinity of the proposed construction.

As our opinion states, the developers knew of the spills, the remediation efforts, and the action by the Minnesota Pollution Control Agency. They did not notify the planning commission. This problem was first brought to the attention of the commission when raised by relator at the hearing. As a result, the commission's staff did not have an opportunity to evaluate the matter and make recommendations to the commission. Although a continuation of the hearing to permit an investigation may have been prudent, the commission is not required to determine the environmental impact. Furthermore, I note that before any construction can proceed that would disturb the soil and possibly aggravate lingering and latent problems related to the contamination, building permits must be obtained. Because there will be an opportunity to further address the contamination question before or as a part of issuance of permits and inspection of the site during construction and to request any appropriate review by the Minnesota Pollution Control Agency, I join in the opinion and do not dissent.