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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1302**

City of Odin,
Relator,

vs.

County of Watonwan,
Respondent.

**Filed May 19, 2009
Reversed
Stoneburner, Judge**

Watonwan County Board of Commissioners

Steve R. Sunde, Sunde, Olson, Kircher and Zender, 108 Armstrong Boulevard South,
St. James, MN 56081 (for relator)

Thomas P. Carlson, Nigel H. Mendez, Carlson & Associates, Ltd., 1052 Centerville
Circle, Vadnais Heights, MN 55127 (for respondent)

Lori Swanson, Attorney General, Carla Heyl, Assistant Attorney General, 900 Bremer
Tower, 445 Minnesota Street, St. Paul, MN 55101-2127 (for amicus curiae Minnesota
Pollution Control Agency)

Considered and decided by Stoneburner, Presiding Judge; Bjorkman, Judge; and
Muehlberg, Judge.*

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

UNPUBLISHED OPINION

STONEBURNER, Judge

Relator city challenges respondent county's denial of city's application for a conditional-use permit to construct and maintain a municipal wastewater treatment stabilization pond on agricultural land. Because we conclude that the decision was arbitrary and capricious, we reverse.

FACTS

Relator City of Odin (the city) is required by the Minnesota Pollution Control Agency (MPCA) to take corrective actions to bring its wastewater treatment system into compliance with the law by 2010.¹ After seeking an appropriate site for a stabilization pond for wastewater treatment, the city obtained an option to purchase a parcel of suitable land (the site) in a district zoned "agricultural" by Watonwan County (the county).

The county zoning ordinance designates municipal water and wastewater treatment facilities as conditional uses in an agricultural zone without any special setback requirements. The site is within one-half mile of nine residences and a church, all located in the agricultural district. The nearest structure is a residence 0.3 miles from the border of the site. The facility would be set back 50 feet from the site's border. All of these

¹ MPCA has cited the city for violating the following statutes and rules by discharging inadequately treated sewage into the Watonwan River: Minn. Stat. §§ 115.061 (duty to notify and avoid water pollution); .07, subd. 1 (duty to obtain disposal system permit); Minn. R. 7001.1030, subp. 1 (requiring National Pollutant Discharge Elimination System permit); 7050.0210, subp. 1 (prohibiting discharge of untreated sewage into state waters); 7050.0210, subp. 3 (prohibiting discharge of inadequately treated sewage into state waters).

residences are downstream of the site of the city's discharge of raw sewage into the Watonwan River.

Residents of the area attended the planning commission's hearing on the city's petition to oppose the conditional-use permit (CUP) based on their suspicions that the facility would create odors and decrease the value of nearby homes. A person from California stated that she and her husband had been interested in buying a property near the site but would not consider purchasing it if the CUP were granted.

The city produced evidence that the only odor associated with the proposed stabilization pond would be a "musty smell" that would occur for 3–10 days in the spring, similar to an odor emanating from area lakes. Proper operation of the facility includes an odor control plan designed to prevent and eliminate any other odors associated with the stabilization pond. Operation of the facility is highly regulated by the MPCA, which recommends, but does not mandate, that the facility be set back at least one-quarter mile from residences.

Members of the planning commission discussed setback requirements for animal-manure lagoons and speculated about why the code does not contain similar setbacks for stabilization ponds. An engineer working with the city explained that animal-manure lagoons consist entirely of animal waste whereas a stabilization pond consists of 99.8% water and only 0.2% waste. One planning commission member commenting on the required half-mile setback for manure lagoons, stated: "to me, manure's manure, it doesn't matter whether it's from a feedlot or from a human being."

The planning commission voted to recommend denial of the CUP. To establish a record of the reasons for the denial, the planning commission members voted on some of the CUP-approval conditions contained in the county zoning ordinance.² Specifically, to support denial of the application, the planning commission members found, without elaboration, that (1) the conditional use will be “injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted,” and (2) that the establishment of the use will “impede the normal and orderly development and improvement of surrounding vacant property for predominant uses in the area.” Notably, despite discussion of concerns about possible odor, the planning commission found by a vote of 6-1 that “adequate measures have been taken or will be taken to prevent or control offensive odor, fumes, dust, [and] noise . . . in such a manner that no disturbance to neighboring properties will result.”

At the subsequent county board meeting where the CUP was discussed, the city argued against adoption of the planning commission’s recommendation based on (1) the immediacy of its need to address wastewater treatment; (2) the lack of objective evidence to support the planning commission’s findings that the stabilization pond would be injurious to the enjoyment of nearby property or impede development; and (3) equal protection based on the board’s recent grant of a CUP for a stabilization pond to the city

² The ordinance provides that no CUP shall be recommended unless the commission finds 11 listed factors. Here, the planning commissioners voted on six factors; found some factors not applicable; and did not address the remaining factors which included the demonstrated need for the proposed use.

of Lewisville. The city reminded the board that the requested use is a conditional use in the zoning code which does not contain any setback requirements for such use.

Objectors again raised concerns about possible odor and diminution of property values and placed in the record a letter from the potential California buyers who spoke at the planning commission hearing stating that they would not consider buying the property if the CUP were granted. Three commissioners reported on their recent visits to a stabilization pond where they found clear, odor-free water with wildlife. One of these commissioners reported that he had stopped at several residences within one-quarter mile of the pond, and the owners reported no concerns or problems with the proximity of the pond to their residences. A letter from Lisa Thorvig of the MPCA was placed in the record. Thorvig's letter described the difference between animal-manure lagoons and wastewater treatment ponds, noting that the latter involve an odorless process except for 3–10 days following spring "ice out." Thorvig noted that more than 300 of the wastewater treatment systems in Minnesota are stabilization pond systems: one of the oldest, most-proven forms of wastewater treatment. Thorvig discussed the serious problem posed by the discharge of raw sewage into the Minnesota River Basin, affecting the health and welfare of all downstream users in the Watonwan River Watershed and the Minnesota River Basin.

One commissioner argued that the stabilization pond needed to be set back similarly to animal-manure lagoons, asserting that the set-back standard applied to "odor solutions" not just manure lagoons. Another commissioner characterized the city's discharge of raw sewage into the Watonwan river as "a trickle" and opined that the

“pending sale of a house depends on the outcome of the petition” and that “[t]he house value will depreciate if the pond is built on the proposed site.”

The county board voted 3-2 to deny the CUP and, by consensus, decided that the findings of fact from the planning commission were sufficient to support the denial.³ This certiorari appeal followed.

D E C I S I O N

“We review a county’s decision to approve [or deny] a CUP independently to see whether there was a reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously.” *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). When a zoning ordinance expressly authorizes the proposed use by CUP, denial of an application must be for reasons relating to public health, safety, and general welfare. *Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 726–27 (Minn. App. 1988), *review denied* (Minn. Mar. 23, 1988). We review the legal sufficiency of the stated reasons for denying a CUP application and the adequacy of the factual basis for the stated reasons. *Id.* at 727.

The reasonableness of the denial of a CUP is determined with reference to the applicable ordinance. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981). The permit applicant has the burden of persuading a reviewing court that the reasons for

³ A transcript of the county board meeting does not indicate that any reasons for denial were agreed on, but the official minutes of the meeting reflect that, “[b]y general consensus, it was decided that the Findings of Fact from the Planning Commission were sufficient for denial of the application.” The transcript does not reflect that the planning commission’s findings of fact were presented to or discussed by the county board.

the permit denial are either legally insufficient or have no factual basis in the record. *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982). Reversal is warranted “if the reasons are legally insufficient or if the decision is without factual basis.” *Bartheld v. County of Koochiching*, 716 N.W.2d 406, 411 (Minn. App. 2006).

To facilitate judicial review, a zoning body must “have the reasons for its decision recorded or reduced to writing.” *Honn*, 313 N.W.2d at 416. Here, the board accepted the planning commission’s findings that the use will be “injurious to the use and enjoyment of other property in the immediate vicinity” and will “impede the normal and orderly development and improvement of surrounding vacant property for predominant uses in the area.” The record, however, does not contain a factual basis for these findings.

The commissioners who voted to deny the application discussed a concern about odor, but nonetheless adopted the planning commission’s finding that odor issues were adequately addressed in the application. And the discussion about odor focused primarily on an unwarranted comparison of stabilization ponds to animal-manure lagoons and the legally unsupportable assertion that the stabilization pond must meet a half-mile setback requirement that does not exist in the ordinance.

To the extent that the findings that the pond would be injurious to nearby property and impede development in the area have any support at all in the record, that support consists solely of neighbors’ expressions of concern about odor and property values. But denial of a CUP must be based on “something more concrete than neighborhood opposition and expressions of concern for public safety and welfare.” *Chanhassen Estates Residents Assoc. v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984).

There is no evidence in the record that any of the objectors had personally observed any problems with stabilization ponds that would affect property values or impede development. *See SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 268 (Minn. App. 1995) (upholding the denial of a CUP for a gas station based on neighbors' "concrete" observations concerning existing daily traffic problems), *review denied* (Minn. Jan. 5, 1996). The only evidence remotely related to property values was testimony at the planning commission meeting and a letter to the board stating that one potential buyer would not purchase property near the pond. But there is no evidence that this buyer's declaration of intent is based on any factual information about the effect of the pond on the involved property. Neither the planning commission nor the board received evidence of the current property values or the effect that a stabilization pond would have on properties within one-quarter to one-half mile.

Because no evidence supports the findings relied on by the county to deny the application, the decision was arbitrary and capricious. We therefore reverse denial of the CUP without reaching the city's arguments that it is exempt from the county ordinance and was denied equal protection. The matter is remanded to the county board with instructions to grant the CUP. Because the MPCA thoroughly regulates the operation of stabilization ponds, and because the board has found odor-control measures in the application adequate, the CUP shall be granted without conditions.

Reversed.