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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0529**

Pierre duCharme, et al.,
Relators,

vs.

Otter Tail County Board of Commissioners,
Respondent.

**Filed June 30, 2009
Reversed and remanded
Kalitowski, Judge**

Otter Tail County Board of Commissioners

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

UNPUBLISHED OPINION

KALITOWSKI, Judge

Respondent Otter Tail County Board of Commissioners (the county board) denied relators Pierre and Mary duCharme's application for a conditional use permit for development of a 30-unit recreational vehicle (RV) park on their real property, finding that (1) the potential cumulative density is too great given the sensitive characteristics of

the West Arm of Star Lake; (2) the potential increase in traffic has the potential to create safety hazards on the land and on the water; (3) the site currently lacks sufficient vegetation to adequately screen the proposed RV park from the highway; and (4) Star Lake's classification as a general development lake is inadequate to address relators' proposal. Relators challenge the county board's denial of their application, arguing that the denial was arbitrary, capricious, and unlawful. We reverse and remand.

D E C I S I O N

On October 24, 2007, relators applied for a cluster development and conditional use permit (CUP) from respondent Otter Tail County. Relators' initial proposal requested approval for a 45-unit RV park on their real property that included lake access and 19 boat slips. The proposed RV park would rest on a 22-acre site and include approximately 1,600 feet of lakeshore on the West Arm of Star Lake, which by Otter Tail County ordinance is classified as a "General Development" (GD) lake. Under the applicable Otter Tail County ordinance, an application for an RV park qualifies as a cluster development and a cluster development located on a GD lake requires a CUP.

Relators' application was first considered by the Otter Tail County Planning Commission (the planning commission) at a public hearing on November 14, 2007. At this hearing, the planning commission and Otter Tail County residents expressed concerns regarding the compatibility of relators' proposed 45-unit RV park with the surrounding area, density, environmental impact on the lake, vegetation screening, traffic, dust, noise, and lighting. In order to allow relators to address the above-listed concerns,

the planning commission tabled relators' application and directed them to reduce the number of proposed RV units from 45 to 30.

At a hearing on January 9, 2008, the planning commission considered relators' amended application, which reduced the number of RV units from 45 to 30, and reduced the number of boat slips from 19 to 8. Relators argued that their proposal was compatible with the surrounding area because their proposed site would be located next to an existing RV park. Relators stated that they would mitigate the unsightliness of the RV park by planting vegetation to screen the site from the nearby highway. Relators also stated that they would address traffic, parking, and dust concerns by modifying the route into and out of the RV park.

County residents and the planning commission expressed continuing concerns at this hearing that the proposed RV park "wouldn't fit" on the West Arm and would cause a troublesome increase in boat traffic. Another concern was that the density of units in the RV park would adversely impact the environment. A Department of Natural Resources (DNR) representative opined that relators' 30-unit proposal would have "cumulative impacts on this body of water," and stated that this "particular arm of the lake screams for natural environment classification," as opposed to the current GD classification. The DNR representative concluded that "this 300 acre body of water cannot handle that kind of boat traffic or development on the lake."

At the close of the January 9, 2008 meeting, the planning commission voted to recommend that the county board deny relators' CUP/cluster-development proposal for the following four reasons: (1) the potential cumulative density is too great, given the

sensitive characteristics of the West Arm of Star Lake; (2) the increased traffic has the potential to create safety hazards, on land and on water; (3) the site currently lacks sufficient vegetation to adequately screen it from the highway; and (4) the GD standard is inadequate to guide development on the proposed RV park site.

On January 15, 2008, the county board considered the planning commission's recommendation to deny relators' application. At this meeting, relators further modified their proposal, agreeing to eliminate all boat slips. The county board voted to refer relators' amended application back to the planning commission for reconsideration.

The planning commission convened for a third time on February 20, 2008, to consider relators' newly modified application, which (1) removed all lake access directly from the RV park; (2) removed all previously proposed boat slips; and (3) prohibited any docking on the property's shoreline. Relators argued that the planning commission's density concerns were unfounded due to inaccurate calculations, and that an additional 30 RV units would not cause safety or traffic issues. At this hearing, the planning commission again heard testimony and read letters from citizens of the surrounding area expressing the same compatibility, traffic, safety, density, lighting, screening, and environmental concerns. Following two failed motions, the matter was sent to the county board without a recommendation.

The county board convened on February 26, 2008, and voted to deny relators' CUP application based on the four reasons given by the planning commission following the commission's January 9, 2008 hearing.

On appeal, relators argue that respondent's decision to deny their CUP application was arbitrary, capricious, and unsupported by a rational basis. Relators contend that their modified application satisfied all of the standards set forth in the Otter Tail County Shoreland Management Ordinance.

Because CUP denials are held to a less deferential standard than approvals, an applicant challenging the denial of a permit faces a lighter burden on appeal than one challenging a permit approval. *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) (citing *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 389 n.4 (Minn. 2003)). The permit applicant has the burden of persuading a reviewing court that the reasons for the permit denial are either legally insufficient or without factual basis in the record. *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982).

A reviewing court will uphold the denial of a CUP unless an independent review of the record shows that the decision was unreasonable, arbitrary, or capricious. *Schwardt*, 656 N.W.2d at 386. A denial may be found arbitrary when the evidence presented to the municipal governing body establishes "that the requested use is compatible with the basic use authorized within the particular zone and does not endanger the public health or safety or the general welfare of the area affected or the community as a whole." *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969). Accordingly, 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). And the denial of a land-use permit is not arbitrary when at least one

of the supporting reasons provides a rational basis for the denial. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997).

A county may grant a CUP upon the order of the county board or the planning commission as designated by ordinance. Minn. Stat. § 394.301, subd. 2 (2008). “Conditional uses may be approved upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied.” *Id.*, subd. 1.

Relators’ land is located on Star Lake, which is classified as a GD lake under the Shoreland Management Ordinance of Otter Tail County, Minnesota (the ordinance). The purpose of the ordinance is “to regulate the use and orderly development of shorelands in Otter Tail County, to prevent and eliminate pollution of public waters and to maintain historic values of significant historic sites in unincorporated areas of Otter Tail County, and to preserve and enhance our natural resources.” Otter Tail County, Minn., Shoreland Mgmt. Ordinance § I(2) (2004).

Section IV(10)(A) of the ordinance requires consideration of the “suitability” of the proposed development, including the land’s

susceptibility to flooding, existence of wetlands, soil and rock formations with severe limitations for development, severe erosion potential, steep topography, inadequate water supply or sewage treatment capabilities, near-shore aquatic conditions unsuitable for water-based recreation, important fish and wildlife habitat, presence of significant historic sites or *any other feature of the natural land likely to be harmful to the health, safety or welfare of future residents of the proposed subdivision or of the community.*

(Emphasis added.) Section IV(11) of the ordinance contains provisions specific to the cluster development proposed by relators, stating that even the “most restrictive requirements do not assure approval by the Planning Commission.” *Id.* at § IV(11)(C)(1). Under this section, the planning commission “shall first take into account the effects on the health, safety and welfare of the general public and the environment to determine whether the area surrounding the proposed site is compatible with a cluster development.” *Id.*

Finally, the ordinance contains standards pertinent to CUPs. The planning commission shall first consider the environmental impact of the proposal, and the density and location of a development when determining whether “the area surrounding the proposed site is compatible with the intended use.” *Id.* at § V(3)(I). And if the use is found to be compatible with the area, the planning commission shall consider whether there will be adequate traffic control, any lighting issues, and “[a]ny other possible adverse effects of the proposed Conditional Use Application and what additional requirements may be necessary to prevent such adverse effects.” *Id.*

Boat traffic and density concerns

Two of the four reasons the county board cited for denial of relators’ amended application were that relators’ proposal would result in an undesirable increase in boat traffic on the West Arm and an increase in density on the lake. But the record indicates that at the February 26, 2008 meeting, the county board merely adopted the reasons given by the planning commission prior to relators’ amended proposal. The board failed to consider the changes made to relators’ amended proposal and whether these changes

would mitigate the planning commission's previous concerns regarding boat traffic and density.

“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*, 566 N.W.2d at 357. Here, relators specifically responded to the planning commission's traffic and density concerns by (1) reducing the number of RVs permitted on the site; (2) eliminating all boat slips; (3) eliminating the initially proposed driveway and trail from the RV site that would provide lake access; (4) maintaining a buffer zone between the RV site and the West Arm over which RV residents would not be permitted to cross to reach the lake; and (5) agreeing to prohibit the residents of the RV site from accessing the lake from their property.

The record indicates that although the planning commission heard testimony about relators' mitigation efforts during the public hearings, the county board did not address the effect of these efforts or impose any other traffic and density mitigation requirements as conditions of granting the CUP. Moreover, the DNR representative, who had raised concerns at the January 9 hearing, did not give an opinion as to how relators' amended proposal, which eliminated all lake access, would affect the traffic, density, or the environment of the West Arm. These facts compel us to conclude that the county board's denial on traffic and density grounds was arbitrary because the denial was based on relators' prior proposal, and not the amended proposal.

Sufficient vegetation

Relators argue that respondent's third basis for denial—that the site currently lacks sufficient vegetation to adequately screen the proposal from the nearby highway—is arbitrary and capricious because their proposal included a plan to plant trees to screen the RV park. Relators contend that the board failed to explain why relators' proposal was inadequate and what additional actions would constitute adequate screening.

Relators concede that currently the plot of land on which they propose to develop the RV park “is an alfalfa field with nothing on it.” But at the planning commission hearings, relators testified that they would plant vegetation to shield the RV park in response to the planning commission's concern that the RV park would be too visible and relators submitted documentation in support of this testimony. And relators' revised proposal indicates that they planned to plant blue spruce trees to shield the RV park from the road. Relators also proposed to place seedless ash trees by each campsite and to separate the campground from existing development in the surrounding area in order to “enhance the beauty” of the campground, and “reduce noise.”

Here, the county board failed to point to any particular evidence that relators' proposal was unsuitable for the area due to the lack of screening from the nearby road, given relators' proposed mitigation efforts of planting trees for screening purposes.

In *Trisko* and *Yang*, two cases in which the municipality's decision to deny a CUP was reversed, the applicants presented evidence that the concerns at issue would be controlled and mitigated. In *Trisko*, the court concluded that the denial of a CUP was arbitrary where the applicant presented evidence and expert testimony that dust and

vibrations would not be a nuisance and agreed to certain conditions to mitigate the dust and the city based its denial solely on neighborhood opposition and expression of concern for public safety. 566 N.W.2d at 355-57. In *Yang*, the court held that the denial of a CUP was arbitrary because there was no evidence to support the allegations of excessive traffic. 660 N.W.2d at 833-34.

Here, relators showed that they would mitigate the unsightliness of the RV park by planting trees. But the county board gave no reason as to why it found the proposed mitigation efforts insufficient to alleviate the aesthetic problem or what further efforts could be required in a CUP. Therefore, we conclude that the county board acted unreasonably in determining that because the site currently lacks adequate vegetation to screen the site, the site is unsuitable and incompatible with the surrounding area.

Inadequacy of the general development standard

Relators argue that respondent's fourth basis for denial—that the “General Development standard is inadequate to address this proposal”—is legally insufficient, unreasonable, and arbitrary and capricious. We agree.

Both parties agree that Star Lake, including its West Arm, is currently classified as a GD lake. During the hearings, concerns were raised that the West Arm should be classified as a Natural Environment lake due to its sensitive environmental attributes. But this concern is not relevant to relators' CUP application because the reclassification of a lake under the ordinance is a separate proceeding. We thus conclude that it is unreasonable for respondent to deny relators' proposal on this basis.

In conclusion, the record indicates that the county board failed to make adequate findings as to why relators' proposed mitigation efforts and agreed-to conditions would not alleviate the concerns about traffic, density, and screening. We therefore reverse this matter and remand it to the county board to address relators' amended application.

Reversed and remanded.