STATE OF MINNESOTA
IN COURT OF APPEALS
A11-725
A11-726

Ed Mutsch, et al.,
Respondents,

vs.

The County of Hubbard, et al.,
Appellants (A11-725),
Respondents (A11-726),

Daniel J. Rehkamp, et al.,
Respondents (A11-725),
Appellants (A11-726).

Filed April 30, 2012
Affirmed in part, reversed in part, and remanded
Collins, Judge[*]

Hubbard County District Court
File No. 29-CV-10-363

Brian S. McCool, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondents)

Scott T. Anderson, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for appellants and respondents County of Hubbard et al.)

James W. Reichert, Reichert Law Offices, Maple Grove, Minnesota (for respondents and appellants Rehkamp, et al.)

Katherine A. Roek, Lindquist & Vennum P.L.L.P., Minneapolis, Minnesota (amicus)

---

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

Considered and decided by Peterson, Presiding Judge; Larkin, Judge; and Collins, Judge.

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

COLLINS, Judge

In these consolidated appeals, appellants Hubbard County (the County), the Hubbard County Board of Adjustment (BOA), and Daniel and Donna Rehkamp challenge the district court's summary judgment reversing a decision by the BOA to grant a variance to the County's Shoreland Ordinance. Appellants argue that the district court erred by ruling that (1) the BOA's decision was arbitrary and capricious and (2) the BOA's findings are unsupported by the record. The Rehkamps also argue that respondents lacked standing to bring this claim in district court. In a cross-appeal, respondents Ed Mutsch (a resident on Fifth Crow Wing Lake), Hubbard County Coalition of Lake Associations, and The Middle Crow Wing Lake Association argue that the district court erred by declining to determine whether the variance at issue is an area variance or a use variance. Respondents argue that, as a matter of law, the variance is a use variance; appellants disagree, arguing that the variance is an area variance. The Rehkamps also argue that respondents waived this issue by not properly raising it at any stage in the County's underlying proceedings. Because (1) respondents have standing, (2) respondents waived the issue that the variance is a use variance, (3) the BOA's decision was premature, not necessarily arbitrary and capricious, and (4) the BOA's findings are supported by the record, we affirm in part, reverse in part, and remand to the BOA.

FACTS

The facts in this case are largely undisputed. In March 2005, the Rehkamps purchased property on Fifth Crow Wing Lake in Hubbard County. This property was operated as a resort and had multiple docks with a total of 11 boat slips. In November 2009, the Rehkamps applied to the County for a conditional use permit (CUP) to convert the resort into a residential planned unit development (PUD). After the Rehkamps submitted a preliminary plat for the PUD, showing 11 residential units, the County conducted several public meetings and hearings regarding the proposed development, including two properly noticed public hearings before the County Planning Commission, one properly noticed hearing before the BOA, and two meetings of the County Board of Commissioners.[1]

During this process, the Board of Commissioners initially approved the Rehkamps' CUP and preliminary plat with three permanent boat slips and one access dock, as permitted by the County's Shoreland Ordinance. Because the Rehkamps wished to retain the property's 11 permanent boat slips, the Board of Commissioners recommended that the Rehkamps apply to the BOA for a variance. The Rehkamps did so, and the BOA granted the variance for 11 slips. The Board of Commissioners then approved the Rehkamps' final plat with the variance and, by April 9, 2010, both the variance and the final plat were filed with the Office of the County Recorder.

[1] It is undisputed that none of the respondents appeared or participated at any of the County's public hearings or meetings regarding the Rehkamps' proposed development. One individual, a fishery supervisor, commented at the BOA public hearing and two property owners on the lake sent the BOA a joint letter; the letter was read into the record during the public hearing.

On April 14, 2010, respondents filed a complaint in Hubbard County District Court, contesting the variance granted by the BOA. Appellants moved for summary judgment, and the district court, concluding that the BOA's decision was arbitrary and capricious and not according to law, ordered summary judgment vacating and reversing the BOA's grant of the variance. In doing so, the district court did not specifically address whether the variance was an area variance or a use variance. These appeals followed, consolidated by order of this court.

D E C I S I O N

I.

The Rehkamps argue that respondents lack standing to appeal to the district court. "Whether a party has standing to sue is a question of law, which we review de novo." *Schiff v. Griffin*, 639 N.W.2d 56, 59 (Minn. App. 2002). "Standing focuses on whether the plaintiff is the proper party to bring a particular lawsuit." *Citizens for Rule of Law v. Senate Comm. on Rules & Admin.*, 770 N.W.2d 169, 174 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Oct. 20, 2009). In the context of zoning decisions, standing is statutorily granted. *Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 18 (Minn. App. 2003). The statute provides:

> All decisions by the board of adjustment in granting variances or in hearing appeals from any administrative order, requirement, decision, or determination shall be final except that any aggrieved person or persons, or any department, board or commission of the jurisdiction or of the state shall have the right to appeal within 30 days, after receipt of notice of the decision, to the district court in the county in which the land is located on questions of law and fact.

Minn. Stat. § 394.27, subd. 9 (2010). When construing statutes, the goal of this court is to ascertain and give effect to the legislature's intent. Minn. Stat. § 645.16 (2010). When a statute's language is plain and unambiguous, we do not engage in further construction. *Mavco, Inc. v. Eggink*, 739 N.W.2d 148, 153 (Minn. 2007). A statute is ambiguous when the language "is subject to more than one reasonable interpretation." *Amaral v. Saint Cloud Hosp.*, 598 N.W.2d 379, 384 (Minn. 1999).

The Rehkamps argue that, because respondents failed to participate in the County's underlying proceedings, respondents are precluded from challenging the County's decision by appeal to the district court. In other words, the Rehkamps argue that respondents waived their potential standing as "aggrieved persons" by not participating in the County's hearings and meetings on the variance. We disagree. The applicable statute explicitly provides that "*any* aggrieved person or persons" has the right to appeal to district court from a decision by a board of adjustment. Minn. Stat. § 394.27, subd. 9 (emphasis added). The plain meaning of this language does not require an aggrieved person to participate in an underlying proceeding in order to preserve a right to appeal to the district court. Therefore, we conclude that respondents did not waive their potential statutory standing by failing to participate in the County's hearings.

Because standing is statutorily granted to *any* aggrieved person or persons, we conclude that when addressing whether a person appealing to the district court from the decision of a board of adjustment is, in fact, aggrieved, the district court may consider evidence beyond that presented to the board of adjustment. Here, the district court was presented with evidence that respondent Mutsch is a property owner on Fifth Crow Wing

Lake and that the additional boat slips permitted by the variance will cause damage to the lake and, ultimately, a decrease in Mutsch's property value. On this record, the district court properly regarded respondents as aggrieved persons with standing to appeal the BOA's variance decision. *See Citizens for a Balanced City*, 672 N.W.2d at 18.[2]

II.

The parties raise multiple issues regarding whether the variance is, as respondents argue, a use variance, requiring a showing of "particular hardship" or is, as appellants argue, an area variance, requiring a showing of "practical difficulties." Further, the Rehkamps argue that respondents waived their argument that the variance is a use variance because the argument was not properly raised in the County's proceedings.

The decision to grant a zoning variance is a quasi-judicial decision. *Big Lake Ass'n v. Saint Louis Cnty. Planning Comm'n*, 761 N.W.2d 487, 490 (Minn. 2009). Generally, judicial review of a quasi-judicial decision is limited to an examination of the record made by the local government body. *Id.* Thus, we will not consider issues that were not properly raised before the local government body. This approach is rooted in the separation of powers principles. *Id.* at 491. The Minnesota Supreme Court has acknowledged that "the question of whether a zoning . . . issue was properly raised is not always easily determined." *Id.* To answer this question, we:

[2] Through "associational standing," an association has the right to "sue to redress injuries to itself or injuries to its members." *State by Humphrey v. Philip Morris Inc.*, 551 N.W.2d 490, 497-98 (Minn. 1996). Because Mutsch is a member of The Middle Crow Wing Lake Association (MCWLA), and MCWLA is a member of the Hubbard County Coalition of Lake Associations (COLA), Mutsch's alleged injuries convey standing on MCWLA and COLA as well.

> review the record to determine whether the issue was fairly raised for consideration by the zoning authority. The issue does not need to be framed in precise legal terms, but there must be sufficient specificity to provide fair notice of the nature of the challenge so that the zoning authority has an opportunity to consider and address the issue.

Id. "[G]eneralized complaints" regarding common concerns do not give the local zoning authority fair notice. *Id.* at 492.

Here, the BOA was presented with public comment in the form of live testimony from the area fishery supervisor and a letter from two Fifth-Crow-Wing-Lake property owners. These individuals asserted general environmental and safety concerns stemming from increased boat traffic on the lake, as well as a fear of opening a "flood gate of other people that would like to have access to the lake" for development projects. In our view, none of these comments gave the BOA fair notice of respondents' argument that the variance is a use variance, and we conclude that the issue was not properly raised. Therefore, we decline to reach this question, and we analyze the variance as an area variance.

III.

Appellants argue that the district court erred by determining the BOA's decision to be arbitrary and capricious. On appeal from a district court's order in such case, we independently review the local board of adjustment's decision without giving deference to the district court's findings and conclusions. *Town of Grant v. Washington Cnty.*, 319 N.W.2d 713, 717 (Minn. 1982). A local board of adjustment "has broad discretion to grant or deny variances, and we review the exercise of that discretion to determine

whether it was reasonable." *Kismet Investors, Inc. v. Cnty. of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000), *review denied* (Minn. Nov. 15, 2000). To do this, we must "determine whether the zoning authority was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and . . . whether the evidence could reasonably support or justify the determination." *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (quotation omitted). If there is evidence in the record supporting the decision, we may not substitute our own judgment for that of the zoning authority, even if we would have reached a different conclusion. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983).

Here, the district court determined the BOA's decision to be arbitrary and capricious because the BOA failed to consider all of the factors required by law. An area variance by a county zoning authority is legally permissible when the applicant shows "practical difficulties" in carrying out the strict letter of any official control. *Stadsvold*, 754 N.W.2d at 331; Minn. Stat. § 394.27, subd. 7 (2010).[3] The Minnesota Supreme Court has articulated the following factors for consideration when applying the "practical difficulties" standard:

> (1) how substantial the variation is in relation to the requirement; (2) the effect the variance would have on government services; (3) whether the variance will effect a

[3] In 2011, in response to *Stadsvold*, the legislature amended Minn. Stat. § 394.27, subd. 7 (2010). *See* H.F. 52 Bill Summary (Feb. 17, 2011) (stating that the bill to amend Minn. Stat. § 394.27, subd. 7 was "in response to" *Stadsvold* and a related opinion). The effective date of the resulting amendment of the statute was May 6, 2011. 2011 Minn. Laws ch. 19, § 1, at 106. Because the BOA granted the variance before May 6, 2011, the amended version of Minn. Stat. § 394.27, subd. 7 does not apply to this case, and we need not consider it here.

> substantial change in the character of the neighborhood or will be a substantial detriment to neighboring properties; (4) whether the practical difficulty can be alleviated by a feasible method other than a variance; (5) how the practical difficulty occurred, including whether the landowner created the need for the variance; and (6) whether, in light of all of the above factors, allowing the variance will serve the interests of justice.

Stadsvold, 754 N.W.2d at 331. In addition to considering these six factors, a county zoning authority must apply the practical difficulties standard to the relevant provisions of the zoning ordinance and "articulate the reasons for its ultimate decision." *See id.* at 332 (quotation omitted). Here, the County's Shoreland Management Ordinance No. 17 provides that "[w]here there is unnecessary hardship in carrying out the provisions of this Ordinance, an application may be made, and a variance may be granted by the Hubbard County Board of Adjustment. Such variance request may be granted consistent with Minnesota Statutes chapter 394 provided that: [nine factors, designated A-I, are met]." Hubbard County, Minn. Shoreland Management Ordinance No. 17 § 104 (2010).

Appellants advance two discrete arguments. First, the County argues that, after *Stadsvold*, section 1104 of the Shoreland Ordinance does not apply to area variances because the "unnecessary hardship" standard of section 1104 is synonymous with the *Stadsvold* standard for use variances.[4] Recognizing a distinction between "unnecessary

[4] Respondents argue that the County waived this argument because it was not raised before the district court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). Although the County did not specifically argue that *Stadsvold* has made section 1104 of the County's Shoreland Ordinance irrelevant to area variances, the County did argue that the practical difficulties standard was appropriate for this variance and applied only the six factors articulated in *Stadsvold*. We conclude that the County is merely refining its argument on appeal and has not waived it. *C.f. Jacobson v. $55,900 In U.S. Currency*,

hardship" and "particular hardship," we reject the County's argument and conclude that *Stadsvold* does not render section 1104 inapplicable to area variances. However, insofar as section 1104 includes factors that *Stadsvold* states are applicable to use variances and situations of "particular hardship," we will not apply those factors here, but we make no comment on their applicability under the amended version of Minn. Stat. § 394.27, subd. 7.

Next, the Rehkamps argue that the BOA "melded" the *Stadsvold* and section 1104 factors. Although the BOA has broad discretion regarding zoning matters, the BOA is required to "articulate the reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance." *See Statsvold*, 754 N.W.2d at 332 (quotation omitted). If it fails to comply with this requirement, "it is difficult if not impossible for a reviewing court to determine whether the [BOA's] decision was proper, was predicated on insufficient evidence, or was the result of the [BOA's] failure to apply the relevant provisions of the zoning ordinance." *Id*. On review, these questions are crucial because a "decision predicated on insufficient evidence or arising from a failure to apply relevant provisions of the ordinance would be arbitrary and capricious." *Id.*

Here, the BOA utilized a worksheet addressing each of the six *Stadsvold* factors. As to these factors, we find the BOA's articulation legally sufficient. *See Schwardt v. Cnty. of Watonwan*, 656 N.W.2d 383, 389 (Minn. 2003) (holding that local board's use of checklist constituted sufficient articulation of board's conclusion). After addressing the

---

728 N.W.2d 510, 523 (Minn. 2007) (explaining that, on appeal, refining an argument made it to the district court is not raising a new argument).

Stadsvold factors, the BOA stated that the facts supporting their answers "are hereby certified to be the Findings of the Board of Adjustment. This is in accordance with Section 1104 of the Hubbard County Shoreland Management Ordinance." Because the *Stadsvold* factors on which the BOA explicitly made findings do not completely mirror the factors listed in section 1104, on which the BOA did not explicitly make findings, we conclude that the BOA did not sufficiently articulate its reasons for ruling that the section 1104 factors were satisfied. Consequently, we conclude that the BOA's decision is premature, not necessarily arbitrary and capricious. *See Stadsvold*, 754 N.W.2d at 333. Therefore, we remand to the BOA to allow further consideration of the variance application. *See id.* On remand the BOA shall have discretion to reopen the record or not, and shall make findings explaining that decision. But to prevent unfairness, the BOA shall "confine its inquiry to those issues raised in earlier proceedings before the planning commission and county board." *Id.* (quotation omitted).

IV.

Finally, appellants argue that the district court erred by determining that not all of the BOA's findings regarding the *Stadsvold* factors are supported by the record. Again, we independently review a local board of adjustment's decision without giving deference to the district court's findings and conclusions. *Grant*, 319 N.W.2d at 717.

Here, as to the first *Stadsvold* factor, the BOA found that the request was a substantial variation from the requirements of the zoning ordinance because the variance would more than triple the number of boat slips permitted on the Rehkamps' property. This finding is clearly supported by the record because, at the public hearing before the

BOA, Daniel Rehkamp acknowledged that the "request was for an additional eight dock spaces to accommodate the 11 total in the association." As to the second *Stadsvold* factor, the BOA found that the variance would have no impact on governmental services. The record contains no evidence that the variance may impact such services, and we conclude that this finding is, on this record, reasonable. Addressing the third *Stadsvold* factor, the BOA found that if the Rehkamps' resort were converted to a PUD, the property's impact on neighboring properties would decrease and the variance would not cause a substantial change in the character of the neighborhood. The record contains evidence that lake residents have less of an impact on the lake than do periodic renters of lakeshore properties. The record also shows that the Rehkamps currently have 11 boat slips on the property and the neighboring property has 11 boat slips as well. Therefore, the BOA's findings regarding the proposed variance's effect on the neighborhood are supported by substantial evidence.

As to the fourth *Stadsvold* factor, the BOA found no feasible method to alleviate the need for a variance. The record shows that the BOA questioned the use of floating docks, as an alternative, but evidence of safety concerns and negative impact on the shoreline was presented. We conclude that the BOA's finding is supported by the record. Regarding the fifth *Stadsvold* factor, the BOA found that the Rehkamps did not create the need for the variance; rather, state law limited the Rehkamps "to have only one dock per unit in the first tier." The record contains evidence that more than half of the Rehkamps' lakefront is wetlands and, but for the wetlands, the Rehkamps' PUD could include "a lot more" units in the first tier; if this were the case, the Rehkamps would be allowed more

boat slips. In light of the property's geography, the BOA's finding is supported by substantial evidence. Finally, as to the sixth *Stadsvold* factor, the BOA found that denying the variance would not serve the interests of justice, as granting the variance would allow equal access to the lake for each owner within the PUD. Again, the BOA's finding is supported by substantial evidence.

Because we conclude that the BOA's findings on each of the six *Stadsvold* factors are supported by substantial evidence, we reverse the district court's conclusion to the contrary.

Affirmed in part, reversed in part, and remanded.