**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A11-2061**
**A11-2113**

WCA Appeal of Exemption and No Loss Determinations Waseca County
WCA Appeal of Restoration Order Waseca County.

**Filed July 30, 2012**
**Affirmed**
**Schellhas, Judge**

Minnesota Board of Water and Soil Resources
File No. 11-2 and 11-3

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Considered and decided by Schellhas, Presiding Judge; Kalitowski, Judge; and Chutich, Judge.

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

**SCHELLHAS**, Judge

Relators Waseca County Soil and Water Conservation District (the district) and Minnesota Department of Natural Resources (DNR) appeal by certiorari a Minnesota

Board of Water and Soil Resources (the board) decision reversing the district's denial of respondent-landowners' approved-development-exemption application and requesting that DNR rescind its order that respondents restore or replace wetlands impacted by respondents. We affirm.

## FACTS

The Minnesota Wetlands Conservation Act (WCA) generally prohibits draining wetlands unless the wetlands are replaced by wetlands of equal or greater public value. Minn. Stat. § 103G.221, subd. 1 (2010); *accord* Minn. R. 8420.0105, subp. 1 (2011).[1] But at the relevant time—June 1987 through April 2007—an approved-development exemption from this prohibition applied to property if it was subject to a development approval issued within five years before July 1, 1991, and satisfied several preconditions. Minn. Stat. § 103G.2241, subd. 8 (2006); Minn. R. 8420.0122, subp. 8 (2005).[2]

[1] We apply the law as it exists today where it does not affect vested rights, result in manifest injustice, and is not contrary to the legislature's statutory direction or legislative history. *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000).

[2] We note that the legislature repealed the approved-development exemption on May 9, 2007, "the day following final enactment" of the bill. 2007 Minn. Laws. ch. 57, art. 1, § 170(b) at 415, 489 (noting that the governor signed the bill on May 8, 2007); *see* Minn. Stat. § 645.01, subd. 2 (2010) ("'Final enactment' or 'enacted finally' for a bill passed by the legislature and signed by the governor means the date and time of day the governor signed the bill."). But the district and the board applied the exemption to the Borglums' approved-development-exemption application because the Borglums submitted their initial application in April 2007. *Cf. Eagle Lake of Becker Cnty. Lake Ass'n v. Becker Cnty. Bd. of Comm'rs*, 738 N.W.2d 788, 790 (Minn. App. 2007) ("Because we conclude that the county has the authority to consider [conditional-use-permit] applications pursuant to the zoning ordinance existing at the time of the application and did not abuse its discretion in making its determination under that ordinance, we affirm that exercise of the county's authority."). On appeal, the parties do not dispute that decision.

Respondents Richard and Marie Borglum applied to the district for an approved-development exemption in April 2007 to comply with a cease-and-desist order issued by DNR requiring the application, basing their application on a 1987 conditional-use permit that they held on their 11-acre property (the property). This appeal centers on the Borglums' 1987 conditional-use permit and 2007 approved-development-exemption application.

In June 1987, the Waseca County Board of Commissioners issued to Mr. Borglum a conditional-use permit authorizing him to use the property for the following purposes: "Shop for land improvement business and storage of equipment and materials. Construction and excavation for a wildlife pond." In 1995, the district issued Ms. Borglum a "certificate of exemption" for "cleaning of existing drainage ditch" on the property pursuant to the approved-development exemption, based on the 1987 conditional-use permit. Also in 1995, the Waseca County Board of Commissioners issued a second conditional-use permit for the property to Ms. Borglum for the "[o]peration and sales of a concrete rock crushing business." In August 2010, the Waseca County Board of Commissioners passed a non-binding resolution that stated that it "supports the idea" that it granted the 1987 and 1995 conditional-use permits with "an implied consent" that the "storage" authorized by the permits included storage "outside of a building structure." Shortly afterwards, Mr. Borglum signed an affidavit in which he stated that "[d]uring the public hearing" for the 1987 conditional-use permit "[i]t was understood that use of the site for parking equipment and stockpiling material would require adding fill, grading or leveling the site, and tiling the property to prevent it from flooding."

In March 2007, Marla Watje of the district noted in an e-mail to Chris Hughes that she did not believe that Ms. Borglum could obtain a third conditional-use permit on the property for, among other purposes, "an armored vehicle recreational facility," "a driving course," and "an indoor and outdoor shooting range, including related retail sales." Watje wrote, "[M]y understanding [is] that . . . this does not fall under the original [conditional-use permit, and] the wetland is not exempt." In April 2007, Hughes noted in an e-mail to Watje that he believed, based on the minutes about the 1995 conditional-use permit, that neither the 1987 nor 1995 permits permitted the Borglums to "fill wetland." Hughes further noted: "If wetland has been filled since [October 1995] or will be filled WCA does apply and a [cease-and-desist order] should be issued so this gets figured out once and for all to protect the landowner and before any more wetland damage occurs."

On April 4, 2007, DNR issued a cease-and-desist order requiring the Borglums "immediately to cease and desist any activity draining, filling or excavating the wetland" on the property. The order further provided that, pursuant to Minn. R. 8420.0290, the Borglums may be required to restore any wetlands damage if they did not "immediately" apply for and obtain an exemption authorizing the wetland destruction.[3] The Borglums applied for an approved-development exemption in late April 2007, based on their 1987 conditional-use permit. On December 15, 2010, after a complex but immaterial procedural posture, the district's board of supervisors denied that application, and, on

[3] Minn. R. 8420.0290, subps. 2–3 (2005), authorized DNR to issue cease-and-desist orders requiring landowners to apply to the district for a wetlands exemption and required DNR to issue a restoration-or-replacement order if the district denied the application.

January 14, 2011, DNR ordered Ms. Borglum to replace or restore wetlands on the property.

The Borglums appealed the district's decision and DNR's order to the board. The board's Dispute Resolution Committee, consisting of five members,[4] unanimously recommended to the board's 15-member board that it reverse the district's decision. On October 26, 2011, the board[5] unanimously reversed the district's decision and "request[ed]" that DNR rescind its restoration order.

This consolidated certiorari appeal by the district and DNR follows.

**D E C I S I O N**

A board decision is subject to certiorari review by this court under Minn. Stat. §§ 14.63–.69 (2010). Minn. Stat. § 103G.2242, subd. 9(d) (2010); *In re Valley Branch Watershed Dist.*, 781 N.W.2d 417, 420 (Minn. App. 2010). We therefore review the record to determine whether the board's decision is in excess of its statutory authority or jurisdiction, the product of an unlawful procedure, affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 14.69 (2010). Agency decisions enjoy a "presumption of correctness." *In re Review of 2005 Annual Automatic Adjustment*, 768 N.W.2d 112, 119 (Minn. 2009). We will not disturb an agency's factual findings if the evidence substantially sustains them. Minn. Stat.

[4] The five members of the dispute resolution committee were Paul Brutlag, Gerald Van Amburg, Louise Smallidge, LuAnn Tolliver, and Quentin Fairbanks.

[5] The board members were Paul Brutlag, Gerald Van Amburg, Louise Smallidge, LuAnn Tolliver, Brian Napstad, Chris Elvrum, Christy Jo Fogarty, Rebecca Flood, Todd Foster, Paul Langseth, Tom Loveall, Keith Mykleseth, David Schad, Rob Sip, and Gene Tiedemann.

§ 14.69(e) (2010); *see In re Denial of Eller Media Co.'s Applications*, 664 N.W.2d 1, 7 (Minn. 2003) ("We will not disturb an agency's decision as long as the agency's determination has adequate support in the record as required by the substantial evidence test."). We review de novo an agency's errors of law that arise from the meanings of words in statutes, *Greene v. Comm'r of Minn. Dep't of Human Servs.*, 755 N.W.2d 713, 721 (Minn. 2008), and give "no deference" to the agency's interpretation of a regulation that is clear and unambiguous, even if the regulation is the agency's own, *In re Alexandria Lake Area Sanitary Dist. NPDES/SDS Permit No. MN0040738*, 763 N.W.2d 303, 310 (Minn. 2009). But we defer to an agency's reasonable interpretations of unclear and ambiguous regulations when the agency promulgated the regulation being interpreted; the agency is legally required to enforce the regulation; and the regulation's subject matter is within the agency's technical training, education, and experience. *In re Cities of Annandale & Maple Lake NPDES/SDS Permit Issuance*, 731 N.W.2d 502, 516 (Minn. 2007); *Alexandria*, 763 N.W.2d at 312–13.

"Public waters wetlands may not be drained, and a permit authorizing drainage of public waters wetlands may not be issued, unless the public waters wetlands to be drained are replaced by wetlands that will have equal or greater public value." Minn. Stat. § 103G.221, subd. 1 (2010); *accord* Minn. R. 8420.0105, subp. 1 (2011) ("Wetlands must not be impacted unless replaced by restoring or creating wetland areas of at least equal public value."). The WCA authorized during the relevant time the following approved-development exemption:

> A replacement plan for wetlands is not required for development projects and ditch improvement projects in the state that have received preliminary or final plat approval or have infrastructure that has been installed or has local site plan approval, conditional use permits, or similar official approval by a governing body or government agency, within five years before July 1, 1991.

Minn. Stat. § 103G.2241, subd. 8 (2006). The Minnesota Rules incorporated those terms of the approved-development exemption verbatim and added to them:

> Subdividers who obtained preliminary plat approval in the specified time period, and other project developers with one of the listed approvals timely obtained, provided approval has not expired and the project remains active, may drain and fill wetlands, to the extent documented by the approval, without replacement. Those elements of the project that can be carried out without changing the approved plan and without draining or filling must be done in that manner. If wetlands can be avoided within the terms of the approved plan, they must be avoided.

Minn. R. 8420.0122, subp. 8 (2005).

On appeal, the district and DNR do not argue that the Borglums' 1987 conditional-use permit did not exist within the five-year window or that it expired before the Borglums' April 2007 application. Therefore, the issues on appeal are whether, consistent with our standard of review, the board erred by determining that (1) the conditional-use permit "remains active"; (2) the conditional-use permit "documented" wetlands impact; and (3) the Borglums' use of the property is within the scope of the conditional-use permit and cannot be carried out without impacting wetlands.

***Whether Project Remained Active***

The approved-development exemption does not apply unless "the project remains active." Minn. R. 8420.0122, subp. 8 (2005). The Borglums' 1987 conditional-use permit (CUP) authorized the Borglums to use the property for "Shop for land improvement business and storage of equipment and materials. Construction and excavation for a wildlife pond." The district's board of supervisors found, "The Borglums never constructed any structure authorized by the CUP on the parcel of land described in the CUP." The board agreed that the Borglums "did not build a shop" on the property but concluded that the district "incorrectly applied the law to the facts when it determined the project is no longer 'active,'" reasoning that the Borglums "use[d the property] for outside storage of materials, including materials used in their concrete recycling business . . . beg[inning] in 1987."

On appeal, the district argues that the board committed reversible error by failing to defer to the district's finding that the Borglums' project was inactive, thus violating the board's standard of review, which requires the board to affirm factual findings unless they are "clearly erroneous." The district further argues that whether the project remains active is "purely a fact question" because "either a project is active, or it is not." We agree that the board misstated the standard of review but disagree that this misstatement constitutes reversible error.

Agency decisions enjoy a "presumption of correctness." *2005 Annual Automatic Adjustment*, 768 N.W.2d at 119. We may reverse or modify an agency's decision "if the substantial rights of the petitioners may have been prejudiced because the administrative

finding, inferences, conclusion, or decisions are: . . . affected by other error of law." Minn. Stat. § 14.69(d) (2010). The board's standard of review requires it to "affirm . . . if [the district's] findings of fact are not clearly erroneous" but requires no deference when determining whether the district "correctly applied the law to the facts." Minn. R. 8420.0905, subp. 4(G) (2011). Whether "the project remains active" requires both a legal and factual inquiry. Determining what constitutes "the project" requires applying law to fact because Minn. R. 8420.0110, subp. 35 (2005), defines "project." But determining whether the project "remains active" is a purely factual inquiry because no relevant authority defines those terms. Because the board was required to apply clearly erroneous deference to the district's factual finding regarding whether the project "remains active," the board erroneously stated that the standard of review was whether the district properly "applied the law to the facts."

But we are not persuaded that the board's erroneous statement of the standard of review prejudiced the district's and DNR's substantial rights. *See* Minn. Stat. § 14.69 (2010) (noting that reversal depends not only on the existence of error but also on whether the error prejudiced substantial rights). "[W]e will consider the agency's expertise and special knowledge when reviewing an agency's application of a regulation when application of the regulation is primarily factual and necessarily requires application of the agency's technical knowledge and expertise to the facts presented." *Annandale & Maple Lake*, 731 N.W.2d at 515 n.9 (quotation omitted). The board determined that "[t]he record reflects" that "[t]he Borglums did . . . use the [property] for outside storage of materials . . . beg[inning] in 1987" and "continue to do so." Moreover,

Watje of the district admitted in a March 2007 e-mail that the Borglums had been "operating with a Conditional Use Permit (CUP) [on the property] since June of 1987 for . . . storage of equipment and materials."

We conclude that the board's misstatement of the standard of review does not warrant reversal.

***Whether 1987 Conditional-Use Permit Documented Wetlands Impact***

The approved-development exemption only permits a person to drain wetlands without replacement "to the extent documented by the approval." Minn. R. 8420.0122, subp. 8 (2005). The district's board of supervisors found that "the 1987 CUP does not document any approval by the County of the filling of wetlands." The board disagreed, concluding that the necessary documentation was implied in the 1987 conditional-use permit, express documentation is unnecessary because requiring express documentation would be "inconsistent with the purpose of the exemption," and the Borglums are "entitled to impact wetlands to the extent necessary to carry on the business approved in the 1987 CUP."

On appeal, the district argues that the board erred because the documentation provision clearly and unambiguously requires express documentation. We disagree.

We review de novo as a question of law "an agency's interpretation of its own regulations." *Annandale & Maple Lake*, 731 N.W.2d at 516. Determining whether to give deference to an agency's interpretation requires us to consider several factors. *Id.* "These factors include [(1)] whether the agency is legally required to enforce and administer the regulation under review and [(2)] whether the meaning of the words in the regulation is

clear and unambiguous or is unclear and susceptible to different reasonable interpretations—ambiguous." *Id.* If we conclude that the regulation is clear and unambiguous, we "need not defer to the agency's interpretation and may substitute [our] own judgment for that of the agency." *Id.* If we conclude that the regulation is unclear and ambiguous, "we will defer to the agency's expertise and special knowledge when the agency's interpretation . . . is reasonable under the circumstances of *this case*" if the regulation is the agency's "own regulation" and "the subject matter of the regulation is within the agency's technical training, education, and experience." *Alexandria*, 763 N.W.2d at 312–13 (quotations and citation omitted).

In this case, the documentation provision is part of the board's own regulation, which the board is legally required to enforce and administer. *See* Minn. Stat. § 103G.2242, subd. 1 (2010) (noting that "[the board], in consultation with the commissioner, shall adopt rules governing . . . public waters work permits affecting public waters wetlands under section 103G.245"); *Drum v. Minn. Bd. of Water & Soil Res.*, 574 N.W.2d 71, 74 (Minn. App. 1998) ("[The board] is charged with the ultimate responsibility for implementing the [WCA]. . . ." (citing Minn. Stat. § 103G.2242, subd. 9 (1996))); *see also Annandale & Maple Lake*, 731 N.W.2d at 512 ("[T]he agency decision-maker is presumed to have the expertise necessary to decide technical matters within the scope of the agency's authority, and judicial deference, rooted in the separation of powers doctrine, is extended to an agency decision-maker in the interpretation of statutes *that the agency is charged with administering and enforcing*." (quotation omitted)). We must therefore first determine whether the documentation

provision in the approved-development exemption is unclear and ambiguous and, if it is, second determine whether we should defer to the board's interpretation.

*Unclear and Ambiguous*

We first consider whether the documentation provision is clear and unambiguous, in light of "the apparent purpose of the regulation as a whole," or unclear and ambiguous due to it being "susceptible to more than one reasonable interpretation." *Alexandria*, 763 N.W.2d 303, 310–11 (quotations omitted) ("[O]ur determination of whether words or phrases are ambiguous does not depend on a reading of those words or phrases in isolation, but relies on the meaning assigned to the words or phrases in accordance with the apparent purpose of the regulation as a whole." (quotation omitted)). No binding authority defines the verb form of "document." *Black's Law Dictionary* defines it as "[t]o support with records, instruments, or other evidentiary authorities" and "[t]o record; to create a written record of <document a file>." *Black's Law Dictionary* 520 (8th ed. 2004). The Borglums argue that the board's interpretation that documentation is implied is reasonable, arguing that in 1987 they could not have documented the impact their activities would have on wetlands under the WCA because the WCA had not yet been enacted. *See* Minn. R. 8420.0100, subp. 3 (2011) ("The [Minnesota] Wetland Conservation Act became effective on January 1, 1992 . . . ."). The district counters that, although the WCA was not in force in 1987, the county did have zoning regulations in 1987 that regulated wetlands and required a person to obtain a conditional-use permit before "fill[ing] or reclaim[ing] . . . wetland," thereby rendering inclusion of express mention of wetlands in conditional-use permits reasonable. Both arguments have merit.

We conclude therefore that the documentation provision is susceptible to at least two different reasonable interpretations and is, consequently, ambiguous.

*Deference*

We second consider whether we should defer to the board's interpretation that documentation may be implied in this case. "[W]e will defer to the agency's expertise and special knowledge when the agency's interpretation . . . is reasonable under the circumstances of *this case*" if the regulation is the agency's "own regulation" and "the subject matter of the regulation is within the agency's technical training, education, and experience." *Alexandria*, 763 N.W.2d at 312–13 (quotations and citation omitted). It is undisputed that the regulation is the board's own regulation and that the approved-development exemption is within the board's technical training, education, and experience. *See Drum*, 574 N.W.2d at 74 (noting that the board "is charged with the ultimate responsibility for implementing the [WCA]"). The remaining inquiry is therefore whether the board's interpretation of the regulation is reasonable in *this case*. *See Alexandria*, 763 N.W.2d at 313.

Agency decisions enjoy a "presumption of correctness." *2005 Annual Automatic Adjustment*, 768 N.W.2d at 119. The board interpreted the documentation provision to permit implied documentation in this case to avoid being "inconsistent with the purpose of the exemption," reasoning that "[a]t the time the Borglums received their 1987 CUP, there were no wetlands regulated under [the] WCA." The board acknowledged that the county's 1987 zoning ordinance did define wetlands at the relevant time but discounted its impact on the board's outcome because, in this case, "the Waseca County Office of

Planning informed the Borglums on March 10, 1987, that the County did not consider the 'low area' on their property to be a wetland." We conclude therefore that the board's interpretation of "to the extent documented by the approval" to permit implied documentation was reasonable in this case and, consequently, defer to it.

***Whether Wetlands are Avoidable within Scope of 1987 Conditional-Use Permit***

The approved-development exemption provides: "Those elements of the project that can be carried out without changing the approved plan and without draining or filling must be done in that manner. If wetlands can be avoided within the terms of the approved plan, they must be avoided." Minn. R. 8420.0122, subp. 8 (2005). The district's board of supervisors found that "Borglum can continue the use approved in the 1987 CUP without additional impacts to wetlands." The board disagreed, finding that "[r]equiring [the Borglums] to avoid wetland impacts within the six acre portion of the parcel subject to their application is simply not consistent with the 'terms of the approved plan'" because "the 1987 CUP allows the Borglums to use the entire 11 acre parcel for outside storage of materials."

*Unclear and Ambiguous*

We first consider whether the avoidance provision is unclear and ambiguous. The district argues that the board's decision is not entitled to deference because the avoidance provision "clearly requires developers to avoid wetlands, if possible, while carrying out the activities authorized by their official approval." The district's argument is unpersuasive. We agree that the avoidance provision clearly and unambiguously requires some level of wetland avoidance. But the avoidance provision is unclear and ambiguous

regarding the degree of avoidance required, conditioning that determination on evaluating the feasibility of carrying out the project's elements while avoiding wetlands "without changing the approved plan" and "within the terms of the approved plan." Minn. R. 8420.0122, subp. 8 (2005).

*Deference*

We second consider whether we should defer to the board's interpretation of the avoidance provision that the terms of the Borglums' 1987 conditional-use permit could permit them to not avoid wetlands on the property. Agency decisions enjoy a "presumption of correctness." *2005 Annual Automatic Adjustment*, 768 N.W.2d at 119. We may consider an agency's "expertise and special knowledge" when determining whether "an agency's interpretation of a regulation is reasonable." *Annandale & Maple Lake*, 731 N.W.2d at 505. In this case, the board promulgated and is required to enforce the avoidance provision. Understanding the feasibility of the project and the scope of its approval with respect to wetlands impacts are within the board's expertise. In light of the board's expertise, it was reasonable for the board to determine that a conditional-use permit authorizing outdoor storage of equipment and materials throughout the entire property required impacting the wetlands throughout the property. We therefore defer to the board's interpretation of the avoidance provision.

The district challenges the reasonableness of the board's interpretation on three grounds. First, the district argues that the board's interpretation "effectively reads the avoidance clause out of" the rule, but we disagree because the regulation conditions wetland avoidance on "the terms of the approved plan," signaling that the terms of an

approved plan could permit development without wetland avoidance. Second, the district argues that the Borglums' conduct shows that they can avoid the wetlands within the terms of the conditional-use permit because they did so "for the 20 years prior to the December 2007 hearing in this matter," but the district's argument is unpersuasive. Merely because the Borglums previously avoided the wetlands does not mean that they can continue to do so within the terms of the 1987 conditional-use permit. Third, the district argues that the board's interpretation is not reasonable because it "leads to the absurd result that any CUP issued in the relevant time frame permits all drainage and fill activities." We disagree. "[R]easonableness is necessarily determined using a case-by-case inquiry." *Id.* at 525. Simply because the board's interpretation of the avoidance provision in this case permits the Borglums to conduct their business on the property without avoiding wetlands does not mean that it would be reasonable to interpret another authorization's terms as broadly.

Because we defer to the board's determination that the Borglums satisfied the approved-development exemption, we do not reach the Borglums' arguments that the district should be equitably estopped from denying the board's approved-development exemption and arguments specifically contesting DNR's restoration-or-replacement order.

**Affirmed.**