STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0041

Cory Axelson,
Relator,

vs.

Goodhue County Board of Commissioners,
Respondent.

Filed August 13, 2012
Reversed
Cleary, Judge

Goodhue County Board of Commissioners

Steven V. Rose, Brian N. Niemczyk, Mansfield, Tanick & Cohen, P.A., Minneapolis, Minnesota (for relator)

Joseph J. Langel, Courtney R. Sebo, Ratwik, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Rodenberg, Presiding Judge; Cleary, Judge; and Willis, Judge.*

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

CLEARY, Judge

Following a hearing, the Goodhue County Board of Commissioners revoked relator's conditional-use permit to operate Hidden Valley Campground. Relator appeals,

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

arguing that the board did not have substantial evidence that a condition of the permit had been violated and that evidence was submitted during the hearing in violation of his right to due process. Because we hold that the board did not have substantial evidence of a violation of the permit, we reverse.

FACTS

Relator Cory Axelson is the owner and operator of Hidden Valley Campground, which is located in Goodhue County. The campground operates under a conditional-use permit (CUP), issued in 1982, which permits 20 mobile-home sites and 200 campsites. Under the CUP, the campground may "not encompass any further area."[1]

In 2008, Axelson sought an amendment to the CUP for a "campground expansion of up to 100 new campsites" (later amended to 49 new sites, apparently to avoid a mandatory Environmental Assessment Worksheet required for an expansion of 50 or more sites). This amendment was denied, in part because of concerns regarding a noncompliant septic system and new flood-plain guidelines.

In August 2010, the director of the county's Land Use Management Department (LUMD), sent Axelson a letter that raised several concerns regarding the campground. The letter stated, "Your existing [CUP] is for 200 campsites. It appears from past events this summer that you have exceeded your capacity due to the number of people at the campground." The letter also noted that none of the campsites were marked by a

[1] The Axelson family originally received approval for a campground and mobile-home park in 1972. They sought a CUP in 1981 (granted in 1982) so that they could obtain a license from the Minnesota Board of Health. At that time, the application represented that they had 20 mobile-home sites and 200 campsites "without encompassing any further area."

number, causing confusion for campers and law enforcement. After receiving this letter, Axelson provided the county with a map of the campground on which numbers had been written. This map showed fewer than 200 campsites although, in a subsequent e-mail to other county employees, the director of the LUMD stated, "There are more campsites on the ground than on the map he sent to us; there is also evidence of walking/atv trails past the last campsite indicating that it expands beyond what he shows on the map."

In August 2011, the county conducted a zoning inspection of the campground and numerous violations were noted, many of them related to health, safety, and environmental concerns. A report containing the results of the inspection noted that there was no confirmation that the campground was in compliance with the requirement that it maintain a register of the owner and occupants of each campsite, and that there was no compliance with the requirement that the corners of each lot be clearly marked. The report did not mention how many campsites were discovered in the campground or whether there appeared to be more than 200 campsites.

In September 2011, the LUMD sent Axelson a notice that stated that it was in the process of revoking the campground's CUP and that the matter would be brought before the county's Board of Commissioners. The notice stated, "Onsite inspections have shown that you have continued to exceed the maximum number of campsites allowed under your current CUP. Your failure to clearly identify all the campsites on a map and on the ground, after repeated requests and E911 calls indicates your unwillingness to comply with the CUP." The notice also stated that the campground was not in compliance with several safety and sanitation requirements, including the requirements

that individual campsites be identified and that a register of the occupants of each campsite be maintained.

In anticipation of the hearing before the board, the LUMD prepared a report that highlighted the concerns associated with the campground. These concerns included failure to properly identify individual campsites and failure to maintain a register of the occupants of each campsite, but the report did not mention the number-of-campsites issue. The report listed three alternatives available to the board "to address the range of ordinance compliance and public safety concerns." These included revocation of the CUP; addition of conditions to the CUP (which would involve a public hearing and review of the existing CUP by the Planning Advisory Commission and consideration by the board); and issuance of an "enforcement order from the County requiring compliance with all applicable local and state rules, regulations and permitting requirements March 31, 2012 [sic]. Such an enforcement order would need to be specific with failure to comply resulting in CUP revocation." The report stated:

> Revocation of the [CUP] based upon failure to comply with key campground health and safety requirements in addition to other campground performance standards would include an order to cease campground operation. If the CUP is revoked reestablishment of a campground on the current [campground] property would be subject to approval of a new CUP including compliance with all current zoning ordinance standards . . . .

The matter came before the board at its November 2011 hearing (revocation hearing). During the revocation hearing, the director presented the LUMD's report to the board and did not mention the number-of-campsites issue. Axelson's attorney had the

opportunity to make comments. He mentioned that Axelson did maintain, and would be willing to provide, a register of the occupants of the campground, but he did not comment on the number of campsites contained in the campground. He acknowledged that Axelson would need to address the campground's health issues to receive a renewal of a license to operate from the Department of Health.[2] The county attorney spoke and stated:

> [T]here is only one real condition on this existing [CUP] which predates all of our regulation and establishes this as a — as a prior nonconforming use that has allowed to proceed even though it wouldn't be allowed to exist in its current status under current regulations.
>
> So, the condition that is imposed in [the CUP] is that he have no more than 200 campsites. And I would suggest that before the board consider[s] a motion [to revoke the CUP], that you add a tenth provision [to the reasons for revocation of the CUP] alleging that there's a failure to maintain a limit of 200 campsites as documented in the sheriff's department and county staff reports, and basically referring to the failure to have them numbered in spite of numerous requests, the inability to identify existing campsites where campers are located, and the numerous reports about random site selection where people were told go and pick your own spot and we'll come around later, and it seems that there is a substantial record of the lack of consistency in the number of sites.

There was significant discussion throughout the revocation hearing regarding the campground's safety and sanitation problems; no board member specifically discussed

[2] In 2009, the Minnesota Pollution Control Agency (MPCA) approved a plan submitted by Axelson for a septic system to effectively dispose of sewage from the campground. That plan has only been implemented in part with the installation of sewage lines and holding tanks. A drainfield and pumping equipment have not been installed, according to Axelson's attorney.

the number-of-campsites issue. At the close of the hearing, the board voted to revoke the CUP. This certiorari appeal follows.

D E C I S I O N

When reviewing a decision of an administrative agency, a court may reverse or modify the decision if substantial rights may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are in violation of constitutional provisions, in excess of the statutory authority or jurisdiction of the agency, made upon unlawful procedure, affected by other error of law, unsupported by substantial evidence in view of the entire record, or arbitrary or capricious. Minn. Stat. § 14.69 (2010). "Substantial evidence" means "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *In re Request of Interstate Power Co. for Auth. to Change its Rates for Gas Serv. in Minn.*, 574 N.W.2d 408, 415 (Minn. 1998) (quotation omitted). When applying the substantial-evidence test, the reviewing court should determine "whether the agency has adequately explained how it derived its conclusion and whether that conclusion is reasonable on the basis of the record." *Minn. Power & Light Co. v. Minn. Pub. Utils. Comm'n*, 342 N.W.2d 324, 330 (Minn. 1983).

"A conditional use permit shall remain in effect for so long as the conditions agreed upon are observed, provided that nothing in this section shall prevent the board from enacting or amending official controls to change the status of conditional uses." Minn. Stat. § 394.301, subd. 3 (2010); *see also* Minn. Stat. § 462.3595, subd. 3 (2010) (containing nearly identical language); *Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d 184, 187 (Minn. App. 2009) (stating that a CUP is "perpetual in

nature" and remains in effect as long as the conditions of the CUP are observed); *Dege v. City of Maplewood*, 416 N.W.2d 854, 856 (Minn. App. 1987) (stating that a CUP "remains in effect until its provisions are violated"). The conditions imposed by the campground's CUP are that the campground may contain 20 mobile-home sites and 200 campsites and may not encompass any further area.

In this case, a view of the entire record shows that the board did not have substantial evidence that the campground had violated the CUP by containing more than 200 campsites. The documentation for the "tenth provision" for the revocation, the "failure to maintain a limit of 200 campsites" was inadequate. The "sheriff's department and county staff reports" detail problems at the campground but do little to shed light on the number-of-campsites issue. The county admitted during oral argument that a physical count of campsites was never conducted. In fact, because Axelson did not provide a register of the occupants of campsites, the boundaries of campsites were not clearly delineated, and campsites may not have been adequately marked with numbers, the county could never be sure exactly how many campsites the campground contained. Although reports in the record indicate that the campground may have contained well over 1,000 people on at least one occasion, that alone does not indicate how many campsites were present.[3]

From the report prepared by the LUMD in anticipation of the revocation hearing and the discussion during the hearing, it appears that the primary concerns of the county

[3] It is not clear to this court why the CUP was not amended earlier to provide additional conditions such as specific delineation and numbering of all campsites in a manner approved by the LUMD.

were the campground's health and sanitation problems. However, health and sanitation conditions were not part of the CUP, and any health and sanitation problems that the campground had were not legitimate reasons to revoke the CUP. The number-of-campsites issue was not discussed by board members during the revocation hearing, and the board did not find or conclude that the campground contained in excess of 200 campsites. There was not substantial evidence that the campground had violated a condition of the CUP, and therefore revocation of the CUP was not justified.

It should be noted that another alternative recommended by the LUMD, adding conditions to the CUP through the proper procedure, still remains. Moreover, the existence of the CUP does not prevent the Department of Health from taking action regarding the campground's licensing, as it appears that the campground is not in compliance with health and sanitation requirements. The failure to fully comply with the 2009 MPCA-approved plan was acknowledged by Axelson's attorney at the revocation hearing and confirmed at the oral argument before this court.[4]

Reversed.

[4] Given that we reverse the revocation of the CUP, we need not address Axelson's argument that his right to due process was violated during the revocation hearing.