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**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-2054**

Tri-City Paving, Inc.,
Relator,

vs.

Cass County Planning Commission/Board of Adjustment,
Respondent.

**Filed October 1, 2012
Reversed
Ross, Judge**

Cass County Planning Commission/Board of Adjustment
File Nos. 45-015-1100; 45-015-1200

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Considered and decided by Stoneburner, Presiding Judge; Ross, Judge; and
Connolly, Judge.

UNPUBLISHED OPINION

ROSS, Judge

Tri-City Paving, Inc., applied to renew its conditional use permit for a gravel pit
and to extend its pit operations to an adjacent parcel. The Cass County Planning
Commission and Board of Adjustment denied the application after both a motion to

approve the application and a motion to deny the application failed in tie votes. Tri-City appeals by writ of certiorari, arguing that the county's decision to deny the conditional use permit was arbitrary because the stated reasons for the denial are legally insufficient and lack factual support in the record. Because the board's reasons for denial are conclusory and factually unsupported, we reverse.

FACTS

Tri-City Paving, Inc., operates a gravel pit from which it extracts, processes, and transports aggregate material. Tri-City obtained a conditional use permit (CUP) to operate the 40-acre pit in Cass County in 1984, and it has extracted gravel intermittently since then. Tri-City applied in July 2010 to renew its CUP for extraction and to enlarge its gravel pit to an adjacent parcel. The two subject parcels total 70 acres. One of the parcels is zoned shoreland-commercial while the other is zoned shoreland-residential. Extraction in these zones is a use that requires a CUP. The parcels are near Hanson Lake and sit within a quarter mile of 25 privately-owned properties, 18 of which have residences.

The Cass County Planning Commission and Board of Adjustment (board) met to consider Tri-City's CUP application four times during 2010 and 2011. Throughout the application process, property owners near the gravel pit objected, citing concerns about noise, traffic, decreased property values, hours of operation, and wetland and groundwater protection. The property owners gave examples supporting their objections. Dennis King told the board that trucks pass at "ridiculous" speeds; Emerson Stahl stated that the trucks run every three minutes and produce dirt and noise 24 hours a day; and

Patrick Humphrey reported that he had been awakened by the noise of trucks and the rock-crushing operation. The DNR questioned whether the pit is compatible with nearby land uses, particularly residential use. And the Minnesota Pollution Control Agency feared that Tri-City operations might penetrate the water table.

In February 2011, Cass County prepared, published, and distributed an environmental assessment worksheet (EAW). The EAW states that “the project will not likely affect groundwater or nearby wetlands because: (1) wetlands will be physically avoided, (2) mining is not proposed below the water table, and (3) surface runoff from lands disturbed by mining will be retained within the depressions of the gravel mine.” Addressing traffic concerns, the EAW states that only up to 20 trucks per hour and 260 trucks per day will run when the site is at its maximum capacity. The EAW assumes that Tri-City would use measures to minimize the impact of dust and noise. Excavation, crushing, and hauling operations would be limited to between 6 a.m. and 7 p.m., topsoil berms would be created, there would be a minimum 50-foot setback from property lines, and crushing would occur only at low elevations. The EAW also states that the project is subject to and compatible with the Cass County Comprehensive Plan, zoning map, and water plan and that it does not raise significant environmental concerns.

The board met in June 2011 to review the EAW, comments, and Tri-City’s responses. The board determined that an environmental impact statement was not necessary and that the EAW, with supplemental information, satisfactorily addressed all issues raised and comments received. Tri-City was permitted to supplement its CUP

application to address issues that had been discussed. It provided a new traffic plan, a spill plan, a more detailed mining plan, a post-mining plan, and a delineation report.

At an August 2011 meeting, the board received public comments and discussed at length issues of dust, noise, safety, and groundwater, as well as 16 conditions that could be included in the CUP. At a September board meeting, Tri-City indicated that it agreed to all 16 of the conditions the board contemplated for the CUP. A motion to deny the CUP failed on a 3-3 vote with one abstention. A motion to approve the CUP with 36 conditions¹ included seven proffered findings. Among other conditions were these: mining activities would have limited hours; no more than 20 outbound trips would occur in any hour; truck traffic could not exceed 40 miles per hour; Tri-City must maintain the roads for damage and dust control; a drill and bore must be conducted to determine the water table before mining; and the floor of any excavation must not be closer than 10 feet from the water table.

This motion to approve also failed on a 3-3 vote with one abstention. Tri-City's application for a CUP was therefore denied under Minnesota Statutes section 15.99, subdivision 2(b), which states that "[w]hen a vote on a resolution or properly made motion to approve a request fails for any reason, the failure shall constitute a denial of the request." The board adopted the findings for the motion to deny as its reasons for denial.

Tri-City appeals by writ of certiorari. *See Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000).

¹ Some inconsistency appears in the record; an error in the numbering of the conditions seems to result in 36 rather than 33 conditions.

DECISION

Tri-City challenges Cass County's decision to deny its CUP request. A local government's land-use decisions are entitled to our deference. *SuperAmerica Grp., Inc. v. City of Little Canada*, 539 N.W.2d 264, 266 (Minn. App. 1995), *review denied* (Minn. Jan. 5, 1996). We review a planning commission's denial of a CUP to determine whether, based on our independent review of the record, the decision was unreasonable, arbitrary, or capricious. *Yang v. Cnty. of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003). We will affirm a planning commission's determination so long as it provides at least one reason for its decision to deny the CUP that is not arbitrary or capricious. *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. App. 2004). And we defer "to a municipality's decision when the factual basis for the denial has even the slightest validity." *Id.* (quotation omitted).

A planning commission's decision is arbitrary if it does not provide reasons for denial contemporaneous with its action. *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 717 (Minn. 1978). If the planning commission provides reasons for its decision, whether its decision was arbitrary depends on whether the reasons are legally sufficient and have a factual basis. *Id.* The burden is on the permit applicant to persuade the court that the county's reasons for denial are legally insufficient or do not have a factual basis in the record. *Yang*, 660 N.W.2d at 832. The applicant's burden in challenging a denial is less than that in challenging an approval. *Id.* Where, as here, the proposed use is expressly authorized by the land-use ordinance, a CUP may be denied only "for reasons relating to public health, safety, and general welfare." *Id.* (quotation

omitted). The reasonableness of a planning commission's decision depends on the "standard set out in the particular local ordinance." *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981).

Under the Cass County Land Use Ordinance, extraction is an authorized use that requires a CUP. The ordinance provides that when reviewing an application for a CUP, the board must consider the following criteria: evaluation of water bodies, rivers, and wetlands including the prevention of soil erosion or other pollution of public water; the application of the Cass County wetland model to the proposed use; the consistency of the use with the Cass County comprehensive plan and all county ordinances; the compatibility of the proposed use with existing uses in the area; the ability of existing transportation and utility infrastructure to support the proposed use; and the impact of the proposed use on natural, scenic, or historic features. Cass County, Minn., Land Use Ordinance § 705.2 (2010). The board may attach conditions to a CUP to fulfill the purposes of the ordinance. *Id.* § 705.3. In addition to the protection under sections 705.2 and 705.3, section 1107.3 provides specific review criteria for extractive use permits, including the ability of roads to handle traffic related to the pit; air quality, dust and noise control measures and the ability to limit the impact on nearby residential properties; groundwater protection; public safety; control of erosion and sedimentation; the impact on the watershed; the daily hours of operation; and the ability of the permit holder to implement the requirements of the ordinance. *Id.* § 1107.3.

Tri-City contends that the board's decision is arbitrary because its stated reasons for denial do not satisfy the requirements of Minnesota Statutes section 15.99,

subdivision 2(b), the reasons are legally insufficient, and the reasons do not have a factual basis in the record. The argument is persuasive. Section 15.99, subdivision 2(b), requires that when a CUP is denied, “those voting against the motion [must] state on the record the reasons why they oppose the request.” And the zoning authority “must, at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion. By failing to do so, it runs the risk of not having its decision sustained.” *Honn*, 313 N.W.2d at 416.

Tri-City asserts that the board’s stated reasons for denial were conclusory statements that do not rely on reason, reference to the evidence, or provisions of the ordinance. The board denied the CUP based on the following five findings, which we will address in turn:

1. Expansion into this residential area and an area of increasing residential development is not consistent with the Comprehensive Plan because it results in conflict with existing and future residential development due to noise, dust, and vehicle operations; because it has an adverse impact to public health, safety and welfare resulting from the same; and because it is not compatible with the residential nature of the neighborhood.
2. Contaminate and sediment run-off from the extractive use activity, which will occur regardless of best management practices, will adversely affect Hanson Lake (NE).
3. Spills, which will occur regardless of best management practices, will contaminate ground water in the area which will adversely affect the water well quality of area properties and the water quality of Hanson Lake (NE).
4. Real estate professionals have concluded that the extractive use activity will adversely affect property values within the general vicinity of the extractive use activity.

5. Real estate professionals have concluded that the extractive use activity will depress sales including commercial property along TH #200 due to the extractive use activity.

First Finding

Tri-City argues that the first finding is not supported by the record. Tri-City is correct. The finding states that the use is not consistent with the county's comprehensive plan, but there is no reference to any provision of the plan the use does not comply with. The finding also states that the area around the pit is an area of increasing residential development, but the EAW describes the area as "primarily forest land" with "[s]cattered large lot single-family homes and recreational properties [that] exist to the east and north," and the "Chippewa National Forest land is located to the south." The board's finding appears to lack evidentiary support in the record.

Tri-City also contends that the first finding is merely a conclusory statement repeating the general objections of neighbors. Neighborhood opposition alone is not a legally sufficient reason to deny a CUP, *Barton*, 268 N.W.2d at 718, but a local government may consider neighborhood opposition if it is based on concrete information. *SuperAmerica*, 539 N.W.2d at 267. The objecting residents presented concrete information, based on personal observations, of the dust, noise, and truck operations of the gravel pit. But the board's findings fail to discuss any of the proposed permit conditions that purport to resolve these concerns. *See Scott Cnty. Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 727–28 (Minn. App. 1988) (holding that the city's denial of a CUP to operate a gravel pit was not supported by legally sufficient reasons in part

because the proposed permit carried numerous conditions to alleviate dust, noise, and traffic problems), *review denied* (Minn. Mar. 23, 1988). Tri-City agreed to all 16 original conditions and to 20 additional conditions that would have restricted its operations further if the CUP had been approved. Those conditions would tend to mitigate the negative effects of the noise, dust, and trucks, including a 40 mile-per-hour speed limit, road management for damage and dust, and operation within limited hours. Because the board's first finding does not address how the proposed CUP conditions would not satisfy the stated concerns in the finding and because the finding is otherwise not supported by the record, we must deem the finding arbitrary.

Second Finding

Tri-City challenges the board's second finding that contaminant and sediment runoff will result from Tri-City operations regardless of whether Tri-City employs best practices. Tri-City's response to the EAW (which incorporates the EAW's original provision) states the following about the runoff concern:

As required and overseen by the Minnesota Pollution Control Agency (MPCA), Tri-City Paving operates mining activities under NPDES permit number MNG490039. During active operations this permit requires: (1) management of stormwater discharges during mining operations, (2) use of Best Management Practices (BMPs) to control erosion, and (3) inspection of erosion controls at least once every month and a log is kept of all inspections. In addition, the project will need to adhere to the requirements of Cass County. With the implementation of the above BMPs, potential adverse effects from extraction-related sediment and erosion on water quality will be minimized to the extent practical. The BMPs will include stabilizing all open slopes that slope away from the pit, and shaping the active pit areas so all runoff drains into the pit area and no runoff from open areas leaves the pit

area. Tri City Paving does their own SWPPP inspections with oversight and spot inspections conducted by the MPCA.

The EAW also states that “surface runoff from lands disturbed by mining will be retained within the depressions of the gravel mine.” And it concludes that Tri-City will not discharge water from the site, observing also that for water to flow from the site into the nearby wetland, the water would have to first flow *uphill* and through vegetation. The board’s finding does not address this apparent impossibility and Cass County does not point to any evidence to refute Tri-City’s assertion that the record indicates that runoff cannot occur. This second finding is arbitrary because it is conclusory and unsupported by the record.

Third Finding

Tri-City next contends that the board’s third finding, that groundwater contamination will occur regardless of whether Tri-City engages in best management practices, is also not supported by the record. The EAW states that “the project will not likely affect groundwater” and adds the following:

The potential for groundwater contamination as a result of the proposed project is *estimated to be low* because various precautions will be taken with vehicle fuels and lubricants as described under Item 20c. The project geology indicates the potential for groundwater contamination *could be fairly high* because the coarse aggregate soils will be exposed and the mining will lower the ground surface so that it is closer to the groundwater level. Sensitivity of groundwater systems to pollution is related to the approximate time it takes water to infiltrate the land surface and percolate to groundwater. Although the infiltration and percolation time may be relatively short, the potential for spilling possible groundwater contaminants is relatively low.

(Emphasis added.) According to the EAW, despite the geologically based risk of groundwater contamination, the potential for contamination is low. The record includes evidence that Tri-City has taken precautionary measures to ensure that the groundwater is not contaminated, including developing a spill prevention and clean-up plan, not storing hazardous liquids or materials on site, and allowing only small quantities of oil, gasoline, diesel fuel, and other machinery fluids on site. The conditions that would accompany the CUP include similar restrictions, and they also require drilling and boring to determine the water table before mining and the floor of all excavation to be at least 10 feet from the water table. The board's finding that the groundwater will be contaminated regardless of best practices appears unfounded in light of the conditions, and the county does not direct us to any support for the finding in the record.

Fourth and Fifth Findings

Tri-City also challenges the board's finding that the gravel pit will adversely impact property values and sales. This finding lacks real support. The board was provided with a letter from Eric Wolff, a real estate broker. Wolff stated that he had listed a single home for sale in 2008 near a gravel pit with rock crushers and rock-hauling trucks and that the home's asking price dropped from \$325,000 to \$269,000 over the next two years and it eventually sold for \$239,000. Wolff asserts that he received negative feedback from prospects because of the gravel pit activities. The board also received an email from Rick Schaefer, a realtor with 38 years of experience. Schaefer opined that the "noise, truck traffic, road dust, and related commotion" caused by the gravel pit operation would

adversely affect residential and commercial property values in the area. He asserted that only industrial uses would not be severely affected.

Tri-City contends that these two communications are not sufficient evidence to deny the CUP. It accurately points out that the statements are in some points merely conclusory and that they take no account of the conditions that would be imposed on the CUP to mitigate negative effects of the gravel pit. This is accurate, and the board's findings likewise do not address whether property values will be adversely affected if Tri-City abides by all conditions.

Tri-City Has Met Ordinance Criteria

Tri-City argues also that the denial of its CUP must be overturned because it has met all of the standards and conditions imposed by the ordinance. The denial of a CUP is arbitrary when "the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met." *Yang*, 660 N.W.2d at 832. And "[c]onditional uses may be approved upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied." Minn. Stat. § 394.301, subd. 1 (2010).

Based on the record, Tri-City satisfied the criteria laid out in the Cass County Land Use Ordinance. The EAW, Tri-City's responses to the EAW, the supplemental information provided, and the original and additional conditions that would be imposed on the CUP address the ordinance criteria, including water protection, erosion, traffic, dust and noise, and hours of operations. If the board's findings were specific and factually supported in consideration of the conditions, its reasons for denial would

survive our deferential review. But on this record, we agree with Tri-City that they are conclusory and arbitrary.

Because the board's findings are conclusory and unsupported by the record, and because Tri-City has established that it will satisfy the criteria of the ordinance, the board acted arbitrarily by denying Tri-City's application for a CUP.

Reversed.