STATE OF MINNESOTA
IN COURT OF APPEALS
A13-0776

Lowell D. Berg, et al.,
Relators,

vs.

Motokazie, Inc.,
Respondent,

Rice County Board of Commissioners,
Respondent.

Filed April 14, 2014
Affirmed
Peterson, Judge

Rice County Board of Commissioners
Resolution #13-030

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Considered and decided by Peterson, Presiding Judge; Hudson, Judge; and Stauber, Judge.

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

PETERSON, Judge

In this certiorari appeal from a county board's negative declaration on the need for an environmental impact statement (EIS), relators argue that (1) documents that were not submitted to the board should be struck from the record on appeal, (2) the board miscalculated the project site's crop equivalency rating (CER), (3) the board did not assign sufficient weight to a sound study and a soil survey submitted by relators, and (4) the findings are insufficient to support the board's determination that the project does not have the potential for significant environmental effects. We affirm.

FACTS

Respondent Motokazie, Inc., is a corporation engaged in the business of promoting motorsports racing and has proposed a motorsports park to be located in Rice County. Relators Lowell D. and Flavia F. Berg own property adjacent to the proposed project site. Rice County is the responsible government unit (RGU) for the project. Minn. R. 4410.0200, subp. 75 (defined); 4410.1100, subp. 5 (2013) (providing process for RGU designation). Respondent Rice County Board of Commissioners is charged with exercising the county's powers. Minn. Stat. § 373.02 (2012) (stating that "[t]he powers of the county as a body politic and corporate shall only be exercised by the county board or in pursuance of a resolution adopted by the county board").

In June 2011, Motokazie began negotiating to buy the proposed project site, a 134-acre parcel of property in Wells Township, Rice County. Motokazie submitted an application for a zoning text amendment to bring the motorsports park within permitted

uses for the property. The proposed amendment failed, the district court denied Motokazie's request for a writ of mandamus and declaratory relief, and this court affirmed. *Motokazie! Inc. v. Rice Cnty.*, 824 N.W.2d 341 (Minn. App. 2012).

On January 4, 2013, Motokazie submitted applications to Rice County Environmental Services (RCES) for three conditional-use permits (CUPs), the first to operate a motorsports park, the second to operate a campground, and the third to permit grading and filling. RCES Director Julie Runkel returned the CUP applications to Motokazie because the applications included uses prohibited by Rice County zoning ordinances and because supporting documentation needed clarification. Motokazie resubmitted the CUP applications on January 16, 2013, and February 4, 2013.

On February 12, 2013, the board passed a resolution initiating an environmental assessment worksheet (EAW) for the project. On February 25, 2013, the county issued a draft EAW for the project for public comment. The county held a public hearing on the EAW on March 7, 2013, and received 28 oral and written comments on the EAW during the comment period.

On April 23, 2013, the board adopted a resolution finding that the project does not have the potential for significant environmental effects and, therefore, no EIS is required. The board found:

> 1. The EAW and permit processes related to the Motokazieland Recreational Park have generated information which is adequate to determine if the proposed project has the potential for significant environmental effects.
>
> 2. The EAW identifies environmental issues that can be mitigated and the contributions from the project are not significant. Impacts on deciduous forest are not adverse.

> 3. Environmental effects associated with the project will be further controlled by the County and other regulatory authority to a sufficient extent so as not to become significant.

This certiorari appeal followed.

D E C I S I O N

I.

Relators request that this court strike numerous documents from the record on appeal. "The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01; *see also* Minn. R. Civ. App. P. 115.04, subd. 1 (providing that, in the context of certiorari appeals, references to "the trial court" shall be read as references to the decision-making body). "The record for judicial review must be confined to the record before the administrative body at the time it made its decision." *Buss v. Johnson*, 624 N.W.2d 781, 788 (Minn. App. 2001) (quotation omitted).

The documents that relators ask us to strike include CUP applications with supporting documentation and a proposed project schedule submitted to the county by Motokazie; correspondence between Runkel and Motokazie and between Motokazie and other county staff; notes of a meeting between RCES staff and Motokazie regarding the CUP applications and need for an EAW; correspondence between Runkel, Motokazie, and a firm that prepared a background/ambient noise assessment for Motokazie; and correspondence and a news release relating to publication of and decision on the EAW. Citing *Buss*, relators argue that these documents were not submitted to the county board

members at the April 23, 2013 board meeting and, therefore, may not be considered by this court.

In *Buss*, this court granted relator's motion to strike from the record "a number of land use studies, meeting minutes, and other evidence of respondent's land-use history that were not submitted to or considered by the board of commissioners" in granting respondent a CUP. *Id.* The *Buss* opinion does not explain how the disputed documents became part of the record, but the reference to "respondent's land-use history" suggests that the documents were not gathered during the CUP application process at issue.

Relators also cite *Trout Unlimited, Inc. v. Minn. Dep't of Agric.*, 528 N.W.2d 903, 907-08 (Minn. App. 1995), *review denied* (Minn. Apr. 27, 1995), in which this court considered whether the commissioner of agriculture was permitted to consider documents other than the EAW and the comments received during the comment period when determining the need for an EIS. This court concluded that "[i]f the disputed documents were available and in the possession of the [department of agriculture], they are part of the record as defined by the statute, and should have been considered by the Commissioner when determining whether an EIS was necessary."

The authority cited by relators does not support the position that evidence must be placed in the possession of the board members to become part of the record. Also, Minn. R. 4410.1700, subp. 3, provides that, "[t]he RGU shall base its decision regarding the need for an EIS on the information gathered during the EAW process and the comments received on the EAW." The documents that relators ask us to strike were gathered during the EAW process and, therefore, were properly included in the record on appeal.

II.

Relators argue that the board erred by failing to consider whether the project is compatible with Rice County Zoning Ordinance (RCZO) § 507.05, (I) (2013), which governs organized motor sports and requires that "[t]he majority of the land occupied by the use shall be land with a Crop Equivalency Rating (CER) of 65 or less." CER is defined as

> [t]he weighted average per quarter-quarter section of land that represents the relative net economic return per acre of soil as reflected by the differences in productivity between soils, as determined by the University of Minnesota and adopted by the Board of County Commissioners.

RCZO § 502.03 (2013). A "quarter-quarter" is defined as "[a] square measure of approximately forty (40) acres being one quarter of a quarter section and lying wholly within a single section." *Id.*

In the EAW, the county determined that the CER "for the Project site ranges from 43 to 73, averaging 60.25 across the site." In response to relators' comment that the EAW failed to properly calculate the CER for the project site, the county stated that "CER ratings for each qtr qtr has been determined by Rice County and are available on the County's website on the Beacon map." Relators argue that, under section 507.05, the CER should have been calculated using only the 130.8 acres "occupied by the use." Relators' argument ignores the definition of CER in section 502.03, which provides that the CER is calculated based on "[t]he weighted average per quarter-quarter section of land" and defines a "quarter-quarter" as "[a] square measure of approximately forty (40) acres." Although RCZO § 507.05, (I)(1), refers to "the land occupied by the use," it does

not provide for a calculation of the CER based only on "the land occupied by the use." The CER is calculated for each quarter-quarter, and the result of that calculation applies to each acre in the quarter-quarter.

Relators further argue that calculating the CER based only on "the land occupied by the use" is necessary to promote "the underlying policy goal of [section 507.05], which is to prevent land which is fertile and very productive from being used for purposes that are not agricultural." CERs

> are intended to reflect the relative net economic return per acre of soil when managed for cultivated crops, permanent pasture, or for forestry, whichever use is computed as giving the highest net return. An effort is made to express dollar equivalence in net return for the most commonly grown crops. A net return is derived for all soils of interest and the soils are then ranked using 100 as equivalent to the highest rating. Thus the CER is a rating of the soil's potential or suitability to aid decisions about what land should be kept in agricultural use, what the intensity of soil management should be, what the cash unit or purchase value should be, and what might be considered as a basis for equalizing assessed valuation.

Lamping v. County of Freeborn., 374 N.W.2d 169, 171 (Minn. 1985) (quotations and citation omitted). Relators have failed to show how these concerns are relevant to the project's potential for significant environmental effects.

Because the county calculated the CER for the project site according to ordinance requirements and relators have failed to show that the calculation did not adequately address environmental effects, there is no basis for this court to conclude that the county's response to relators' comment about the calculation of the CER for the project site was inadequate. *See Midway Ctr. Assocs. v. Midway Ctr., Inc.*, 306 Minn. 352, 356,

237 N.W.2d 76, 78 (1975) (stating that to prevail on appeal a party must show error and that error caused prejudice).

III.

A party challenging an RGU's decision has the burden of proving that the RGU's findings are unsupported by the evidence as a whole. *Friends of Twin Lakes v. City of Roseville*, 764 N.W.2d 378, 381 (Minn. App. 2009). This court "evaluate[s] whether the RGU took a 'hard look' at the salient issues, but defer[s] to the RGU's decision unless the decision reflects an error of law, is arbitrary and capricious, or is unsupported by substantial evidence." *Id.* An agency decision is supported by substantial evidence "when it is supported by (1) such relevant evidence as a reasonable mind might accept as adequate to support a conclusion; (2) more than a scintilla of evidence; (3) more than some evidence; (4) more than any evidence; or (5) the evidence considered in its entirety." *Minn. Ctr. for Envtl. Advocacy v. Minn. Pollution Control Agency*, 644 N.W.2d 457, 464 (Minn. 2002).

Motokazie submitted a background/ambient noise assessment prepared by Carlson McCain, Inc., an environmental, engineering, and land-surveying firm. Based on this assessment, the EAW determined that "the State of Minnesota residential L10 or L50 standards would not be exceeded at any of the potential receptors and Motokazie can operate the facility within State of Minnesota standards without the need for additional sound mitigation measures." Relators submitted a report by Professional Engineer Anthony J. Baxter of ESI Engineering, Inc., questioning the methodology used by Carlson McCain.

The factfinder determines the weight and credibility of expert testimony. *Shymanski v. Nash*, 312 Minn. 304, 308, 251 N.W.2d 854, 857 (1977). This court defers to the factfinder's determination of weight and credibility. *State v. Triplett*, 435 N.W.2d 38, 44 (Minn. 1989). The ESI report created an issue of weight and credibility of the expert testimony for the board to resolve, and we defer to the board's decision to credit the Carlson McCain report.

Relators also submitted a report to support their calculation of the project site's CER. But, as already discussed, relators do not explain how the project site's CER impacts environmental concerns.

Substantial evidence supports the board's determination that the project's noise potential and CER rating did not require an EIS.

In the facts section of their brief, relators list additional concerns, including waterways, topography, wetlands, hazardous waste, wildlife species, and tree removal. Because relators make no argument regarding these concerns, any issues relating to them are waived. *See State v. Modern Recycling, Inc.*, 558 N.W.2d 770, 772 (Minn. App. 1997) (stating that an assignment of error in a brief based on mere assertion and unsupported by argument or authority is waived unless prejudicial error is obvious on mere inspection).

IV.

Relators argue that comments by commissioners at the hearing on the need for an EIS show that additional information was needed for the board to make an informed decision. Relators note Runkel's involvement in the EAW process but assert that the

board was not "privy to the substance of Runkel's involvement in the EAW process." The board's findings, however, refer to the information generated during "[t]he EAW and permit processes related to the Motokazieland Recreational Park" and state that this information is adequate to determine if the proposed project has the potential for significant environmental effects. Relators also argue that the lack of in-depth discussion at the meeting regarding the project's potential environmental effects renders the board's decision arbitrary, capricious, and unsupported by substantial evidence. But the lack of in-depth discussion does not show that the board failed to consider the documentary evidence relevant to the determination of the need for an EIS. Because substantial evidence supports the board's determination that no EIS was required based on noise potential or the CER rating, the lack of more detailed findings is not a basis for reversal. *See Graham v. Itasca Cnty. Planning Comm'n*, 601 N.W.2d 461, 467 (Minn. 1999) (upholding denial of variance when board found only that applicant failed to show hardship but denial was supported by substantial evidence in the record).

Affirmed.