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Minn. Stat. § 480A.08, subd. 3 (2010).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A11-765**

Concerned River Valley Citizens, Inc., et al.,
Appellants,

vs.

Chisago County,
Respondent,
Lent Township,
Respondent,
Sunrise River Energy, LLC,
Respondent.

**Filed December 19, 2011
Affirmed
Stoneburner, Judge**

Chisago County District Court
File No. 13CV10761

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Considered and decided by Hudson, Presiding Judge; Larkin, Judge; and
Stoneburner, Judge.

UNPUBLISHED OPINION

STONEBURNER, Judge

Appellants, a group of citizens and a land owner opposed to construction of a natural-gas-fired power plant, challenge dismissal of their declaratory judgment action seeking a declaration that a Development Agreement signed by the developer, county, and township is unlawful and unenforceable. We affirm.

FACTS

Appellant Concerned River Valley Citizens, Inc., is a Minnesota non-profit organization formed in 1995 to promote the development of the St. Croix River Valley area while protecting and preserving its environment. Appellant Fred Willard Carlson lives in North Branch and owns 19 lots in a residential development called “Sunrise Trails,” located near the current substation in respondent Chisago County (county) and respondent Lent Township (township). Respondent Sunrise River Energy, LLC (SRE) is an affiliate of LS Power Group (LS Power), an independent power producer engaged in the ownership, development, management, and operation of power-generation facilities in the United States.

In February 2008, LS Power submitted a request to the Midwest Independent Transmission System Operator for a proposed electric-generation station (power plant) to be located next to the existing substation. LS Power also met with county officials to discuss the proposal. County residents were informed in 2008 that LS Power was pursuing construction and operation of a power plant in the township with SRE acting as the developer.

LS Power and SRE approached the Minnesota Legislature to obtain legislation allowing a personal-property-tax exemption for the proposed power plant. In May 2009, the legislature enacted Minn. Stat. § 272.02, subd. 92, granting the requested property-tax exemption with 11 conditions, including that construction must begin after March 1, 2010, and before March 1, 2014. Also included in the conditions are the requirements that, at the start of construction, the facility must have (1) a signed development agreement with the county board, adopted by a two-thirds vote of the board, with specified provisions ensuring that the facility is designed to use effluent from a wastewater treatment facility as its preferred water source with all processed wastewater discharge colocated with the outfall of a wastewater treatment facility and (2) a signed development agreement with the township board, adopted by a two-thirds vote of the board, containing provisions ensuring that noise and visual impacts of the facility are mitigated.

It is undisputed that the county and township cannot approve construction of a power plant under their existing land-use regulations at the proposed location, which is zoned “agricultural.” It is also undisputed that the power plant cannot be constructed until the developer obtains a “certificate of need” and a “site permit” from the Minnesota Public Utilities Commission (MPUC). If issued, a MPUC site permit will preempt all local zoning laws.

Soon after legislation was passed, and prior to seeking a certificate of need and site permit from the MPUC, SRE submitted a proposed Development Agreement (agreement) to the county and township boards. In December 2009, the township board

approved the agreement by the required majority. In March 2010, the county board also approved the agreement by the required majority. SRE signed the agreement on March 30, 2010. The agreement includes SRE's obligations pursuant to Minn. Stat. § 272.02, subd. 92, and provides that "no construction on the Project will begin until Developer [SRE] has obtained all necessary preconstruction permits and approvals, including but not limited to those required by the [MPUC]." The agreement specifically states that it does not constitute "local approval in lieu of a MPUC site permit" and precludes SRE from using an option provided in Minn. Stat. § 216E.05 to seek a site permit from local units of government with jurisdiction over the site rather than a MPUC site permit.

In June 2010, appellants initiated a declaratory judgment action seeking a declaration that the agreement is "unlawful and unenforceable" and "null and void" because it violates county zoning ordinances and comprehensive plans, and constitutes an *ultra vires* act by the county and township boards whose actions are arbitrary and capricious. Appellants assert that the county and township are precluded from entering into an agreement until after the MPUC has issued a site permit because the agreement violates local zoning and land-use regulations. The county, township and SRE each moved to dismiss the complaint for failure to state a claim. The district court granted the motions, dismissing the complaint with prejudice. This appeal followed.

DECISION

I. Standard of review.

“When reviewing a case dismissed pursuant to Minn. R. Civ. P. 12.02(e) for failure to state a claim on which relief can be granted, the question before this court is whether the complaint sets forth a legally sufficient claim for relief.” *Hebert v. City of Fifty Lakes*, 744 N.W.2d 226, 229 (Minn. 2008) (citing *Barton v. Moore*, 558 N.W.2d 746, 749 (Minn. 1997)). “The reviewing court must consider only the facts alleged in the complaint, accepting those facts as true and must construe all reasonable inferences in favor of the nonmoving party.” *Bodah v. Lakeville Motor Express, Inc.*, 663 N.W.2d 550, 553 (Minn. 2003) (citing *Marquette Nat’l Bank v. Norris*, 270 N.W.2d 290, 292 (Minn. 1978)). The standard of review is de novo. *Id.*

II. Appellants failed to establish that the county and township are precluded from entering into a development agreement prior to MPUC’s issuance of a site permit.

Appellants argue that because the local zoning laws are not preempted until the MPUC issues a site permit, the development agreement must be declared unlawful and unenforceable because it allows for a proposed use (the power plant) that is not a permitted use under local zoning ordinances.

Minn. Stat. § 216E.10, subd. 1 (2010) provides:

To assure the paramount and controlling effect of the provisions herein over other state agencies, regional, county, and local governments, and special purpose government districts, the issuance of a site permit or route permit and subsequent purchase and use of such site or route locations for large electric power generating plant and high-voltage transmission line purposes shall be the sole site or route

approval required to be obtained by the utility. Such permit shall supersede and preempt all zoning, building, or land use rules, regulations, or ordinances promulgated by regional, county, local and special purpose government.

Because the agreement is contingent on SRE obtaining the required MPUC approval, there is logic to appellants' argument that the power plant cannot be constructed (and therefore the agreement cannot be enforced) unless and until the MPUC issues a site permit, but there is no merit to appellants' claim that they are entitled to declaratory judgment holding that the county and township cannot enter into such a contingent agreement before the site permit is issued. Nothing in Minn. Stat. § 216E.10 or Minn. Stat. § 272.02, subd. 92 (2010), mandates that a site permit precede a development agreement, and nothing in the local ordinances precludes the county or township from entering into an agreement that is contingent on issuance of a MPUC site permit which would preempt current zoning restrictions.¹

III. The county and township did not act *ultra vires* by entering into the agreement.

Appellants argue that approval of the development agreement was an *ultra vires* act because it violated county and township zoning and land-use ordinances. *Ultra vires* acts "are those acts that lie outside the scope of the authority of the governing body."

Ketterer v. Indep. Sch. Dist. No. 1 of Chippewa County, 248 Minn. 212, 222, 79 N.W.2d 428, 436 (1956). This argument has no merit. There is no *ultra vires* act here because

¹ Appellants' assertion that SRE could seek site approval from local authorities under Minn. Stat. § 216E.05, and thereby avoid the protections appellants seek under the MPUC permitting process is meritless because the agreement specifically precludes SRE from seeking a site permit from local authorities and specifically provides that the agreement does not constitute site approval.

the development agreement is contingent on SRE's compliance with the MPUC permitting process, and because Minn. Stat. § 272.02, subd. 92 authorizes the county and township to enter into a development agreement, mandates some of the terms of the agreement, and requires that the agreement be in place before construction of the power plant can begin. Minn. Stat. § 272.02, subd. 92 (a) (9), (10).

IV. Appellants' due-process rights were not violated by the timing of the agreement.

Appellants' due-process argument consists of speculation that the county and township approval of the agreement before issuance of a MPUC site permit could be viewed by other parties as government authorization of the project, prejudicing all future evaluation of the project. They also assert that the agreement precludes the public from having an opportunity to participate in the discussions regarding siting of the power plant in their community. In support of its argument, appellants argue that the agreement is a "permit" under Minn. R. 4410.0200, subp. 58 (2009), defining "permit" to include an "entitlement for use or permission to act that may be granted or issued by a governmental unit, or the commitment to issue or the issuance of a discretionary contract" But even if the agreement is a permit under this definition, it is not a MPUC site permit or a MPUC certificate of need, and MPUC procedures for granting a certificate of need and a site permit require environmental review, public hearings, and extensive evaluation regarding feasibility, necessity and adverse impact. *See* Minn. Stat. §§ 216B.243, subd. 4 (2010) (describing the process for obtaining a MPUC certificate of need); 216E.03, subds. 3–11 (2010) (detailing the process for obtaining a site permit). To survive

dismissal on the pleadings, the complaint must allege *facts* that support a legally sufficient claim for relief. *See Bodah*, 663 N.W.2d at 553 (stating that, on review of dismissal on the pleadings, the reviewing court considers only the facts alleged in the complaint). We conclude that appellants' speculation about the effect of respondents having entered into the agreement prior to SRE's having obtained required MPUC approval does not set forth a legally sufficient claim for relief.

Affirmed.