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**STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1958**

Buberl Recycling & Compost, Inc., et al.,
Relators,

vs.

Chisago County Board of Commissioners,
Respondent.

**Filed September 1, 2009
Reversed and remanded
Schellhas, Judge**

Chisago County Board of Commissioners
Resolution # 080716-1

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Considered and decided by Larkin, Presiding Judge; Schellhas, Judge; and
Muehlberg, Judge.*

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

UNPUBLISHED OPINION

SCHELLHAS, Judge

By writ of certiorari, relators appeal respondent's decision denying relator's application for a conditional use permit. Relators argue that the denial was arbitrary and capricious. Because respondent's findings are legally insufficient to support the denial and are not supported by the record, we reverse and remand.

FACTS

Relators Buberl Recycling & Compost, Inc. and Robert Buberl (collectively "relator") intended to operate a composting facility on land in Chisago County. A county zoning ordinance required relator to obtain a conditional use permit (CUP) to operate the facility on the proposed site. Relator applied to Nessel Township for a CUP on May 1, 2008. The township approved relator's application without conditions but informed them that the CUP would be subject to the recommendations of the Chisago County Planning Commission.

On June 5, 2008, the planning commission held its first public hearing on relator's application. After the hearing, a concerned landowner notified the planning commission of reported problems at relator's composting facility in Cady, Wisconsin. Nessel Township subsequently withdrew its approval of relator's application and, approximately three weeks later, the county received a citizens' petition requesting that the county order an environmental assessment worksheet (EAW) for relator's proposed facility. The planning commission considered the evidence presented by the petitioners and found that relator's proposed facility would not present "significant potential for harmful

environmental effects” and did not necessitate an EAW. The county board adopted the planning commission’s finding that “[t]here is no significant potential for harmful environmental effects because the County can impose conditions upon the [CUP] and require a sufficient performance bond to prevent said effects” and denied the petition requesting an EAW.

On June 17, 2008, prior to the citizens’ petition requesting an EAW, the county’s Interim Solid Waste Administrator, Lisa Thibodeau, visited relator’s composting facility in Cady, Wisconsin. Thibodeau explained in a written report that the facility was operated “early in [relator’s] composting” experience and that the Wisconsin Department of Natural Resources (WI DNR) had found relator to be in noncompliance with his operating plan because he failed to screen out plastic bags in the beginning of the composting process and because relator’s method of disposing of leachate, which is rainwater that percolates down through the piles of compost and picks up nutrients. As required by the WI DNR, relator planned to keep the rainwater on the site and to funnel it into a series of stepped settling ponds so that the water would be cleaned up as it slowly flowed through the pond system. But the fifth and last pond was never completed because the WI DNR determined that low land on which it was to be built constituted a navigable waterway and prohibited relator from building the pond on the land. Ultimately, the leachate overflowed the berms in the ponds, and the WI DNR found that relator “was periodically illegally pumping [the leachate] over the banks of the pond and into the low area that eventually lead [sic] to the intermittent beginnings of the trout stream.” As a result of relator’s noncompliance, a Wisconsin court prohibited relator

from accepting additional compost for a period of time and required relator to clean up the site.

Thibodeau also visited relator's Ramsey County composting facility and reported that "[t]he site was beautiful," that "[t]he compost looked great," and that there appeared to be no similar problems. Thibodeau stated that she had seen "the worst and the best composting situations in the same day from the same company." Her "overall impression of the Cady site was that it was a mess but it was being cleaned up." Thibodeau concluded that relator had "evolved in [its] way of making compost and now has a better process tha[n] when [it] started at the Cady site And [it] now knows how to make excellent finished compost." In conclusion, Thibodeau said, "Enforceable conditions to these effects would have to be placed on [relator's] CUP and License, and the County staff (Steve-CUP, Lisa-License) would have to visit [relator] often in order to make sure [relator] is staying in compliance and that things don't get out of control over time."

In late July, the county planning commission obtained an independent review of relator's stormwater management plan for the proposed facility. The review noted that the county did not have "specific water quality or stormwater management standards," and that therefore the review would simply provide a "brief analysis of the technical merit of the information submitted for the site." The review concluded that relator should revise its stormwater management plan to accommodate the detention of water run-off in ponds for a longer period of time and to address the likelihood of excessive phosphorous in the water.

In early August, the planning commission tabled relator's application to "have more time to look at the data." Later that month, the Chisago County Soil and Water Conservation District (SWCD) administrator, Craig Mell, reported that he had visited the site of relator's proposed composting facility and had particular concerns that the accumulation of compost and an invasive species of grass found on the site would threaten the wetland mitigation process. Additionally, Mell recommended regrading the site in phases to address sediment transportation.

On September 4, the county's environmental services director proposed 30 conditions for consideration by the planning commission in the event it voted to approve relator's CUP application. The planning commission met the same day to consider relator's application, and relator and his engineering consultant informed the planning commission about how relator planned to address Mell's concerns. Planning commission member Tim O'Keefe then proposed 10 findings to support the denial of the CUP, and other planning commission members stated that they believed that the compost facility would have a negative impact on the area. Relator objected to O'Keefe's proposed findings, and one of the findings was removed because it improperly pertained to relator's past behavior or history. The planning commission then voted on a motion to recommend denial of relator's CUP based on 13 findings, and the motion passed by a margin of 5-2.

In mid-September the county board modified the planning commission's findings, leaving six findings of fact to support the denial of relator's CUP application, and voted

unanimously to deny the application. By writ of certiorari, relator appeals from the CUP denial.

D E C I S I O N

An appellate court reviews a county's decision to deny a CUP independently to see whether there was a reasonable basis for the decision or whether the county acted unreasonably, arbitrarily, or capriciously. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). While a county "has broad discretionary power to deny an application for a special-use permit, it cannot do so arbitrarily." *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969). CUP denials are held to a less deferential standard of review than CUP approvals. *Schwardt*, 656 N.W.2d at 389 n.4. But when a CUP is denied, the applicant has the burden of persuading a reviewing court that "the reasons for the denial either are legally insufficient or had no factual basis in the record." *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) (citing *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982)).

If the conditional use is expressly authorized by ordinance, the county may only deny the CUP "for reasons relating to public health, safety, and general welfare." *C.R. Invs., Inc. v. Village of Shoreview*, 304 N.W.2d 320, 324 (Minn. 1981). Here, relator's CUP application was accepted as one for a "resource recovery facility," which is authorized by ordinance as a "conditional use." *See Chisago County, Minn., Zoning*

Ordinance § 5.06(C)(9) (1997)¹ (defining “[r]efuse areas, resource recovery facilities, and sanitary landfills” as conditional uses).

“A county may approve a [CUP] ‘upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied.’” *Big Lake Ass’n v. Saint Louis County Planning Comm’n*, 761 N.W.2d 487, 490 (Minn. 2009) (quoting Minn. Stat. § 394.301, subd. 1 (2008)). Accordingly, “[a] county’s denial of a [CUP] is arbitrary where 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. The county zoning ordinance defines eight standards for issuance of a CUP:

The Planning Commission shall consider possible [effects] of the proposed conditional use. Its judgment shall be based upon (but not limited to) the following general factors and any other requirements set forth in this Ordinance.

1. The Comprehensive Plan and development policies of the County.
2. The use will not create an excessive demand on existing parks, schools, streets and other public facilities and utilities which serve or are proposed to serve the area.
3. The use will be sufficiently compatible or separated by distance or screening from adjacent development or land so that existing development will not be depreciated in value and there will be no deterrence to development of future land.
4. The structure and site shall have an appearance that will not have an adverse effect upon adjacent properties.

¹ The 1997 version of the ordinance is the applicable ordinance in this case. We note that the ordinance was amended in December 2008.

5. The use in the opinion of the County is reasonably related to the overall needs of the County and to the existing land use.
6. The use is consistent with the purposes of the zoning ordinance and the purposes of the zoning district in which the applicant intends to locate the proposed use.
7. The use will not cause traffic hazard or congestion.
8. Existing nearby businesses will not be adversely affected because of curtailment of customer trade brought about by intrusion of noise, glare or general unsightliness.

Chisago County, Minn., Zoning Ordinance § 8.05(C) (1997). Relator argues that the proposed composting facility met these eight standards and that the county's six findings are either legally insufficient or not supported by the facts on the record.

The county's first finding states that the composting facility "could cause an *excessive* demand upon public services, particularly zoning and code enforcement to monitor initial construction, mitigation of wetlands and general project oversight, along with fire departments in the event of a fire or hazardous spillage, seepage, or runoff into the surrounding wetlands or adjacent Rush Creek." (Emphasis added.) Although the record indicates that the county's code enforcement office, along with the state pollution control agency, would be engaged in monitoring the site, nothing in the record indicates that such monitoring would create an *excessive* demand on public services. Moreover, the record contains no evidence that relator's proposed composting facility would create a likelihood of fire, spillage, seepage, or runoff, or impose an *excessive* demand upon public services such as fire departments. We conclude that this finding has no factual basis in the record.

The county's second finding states that "[t]he proposed location is environmentally irresponsible because of proximity and potential impact to Rush Creek, Rush Lake and other impaired waters, which run into the St. Croix River." The evidence in the record that might best support this finding are the report from the SWCD administrator and the independent review obtained by the county of relator's stormwater management plan. Although these two reports identified several areas of concern, they also proposed mitigating actions to address the concerns. As such, they do not support the county's finding that relator's proposed composting facility was "environmentally irresponsible." Instead, the reports describe actions that could have been taken to mitigate potential environmental problems. Furthermore, when the county board rejected the citizen petition for an EAW, it did so after adopting the planning commission's finding that there was "no significant potential for harmful environmental effects because the County can impose conditions upon the [CUP] and require a sufficient performance bond to prevent said effects." We conclude that the county's second finding also lacks factual support in the record.

We also observe that, despite the mitigating actions described in the SWCD report and the stormwater management plan review, the county voted to deny relator's application rather than approve it with conditions. The record indicates that county staff proposed a list of conditions to apply to relator's CUP, some of which addressed surface water drainage and stormwater management, but the record is silent as to whether the county actually considered approving relator's CUP with these conditions. The fact that the county apparently ignored conditions that could have brought the composting facility

into compliance with zoning ordinances suggests that the denial of relator's CUP was arbitrary. *See Trisko v. City of Waite Park*, 566 N.W.2d 349, 357 (Minn. App. 1997) (“Evidence that a municipality denied a [CUP] without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary.”), *review denied* (Minn. Sept. 25, 1997).

The county's third finding states that:

The use in the opinion of the County is not reasonably related to the overall needs of the County and to the existing land use because the majority of the material processed at this facility will not be generated in Chisago County. Record states most material is imported to the [C]ounty and the finished product would leave the [C]ounty.

Here, the finding that most of the material would be accepted from, and most of the compost would be delivered to, locations outside the county is supported by the record.² And a municipality may not base its denial on unreasonably vague or unreasonably subjective standards. *Id.* at 353; *see also C.R. Invs.*, 304 N.W.2d at 327 (ruling that requiring an applicant to show that the proposed use “constitutes an improvement on the [comprehensive] plan and is consistent with the plan's general intent and purpose” was unreasonably vague and subjective). In *Trisko*, as in this case, the proposed use was specifically contemplated by the municipality's zoning ordinance. 566 N.W.2d at 353. The *Trisko* court determined that the basis for the municipality's denial of the CUP, that the use would impede “normal and orderly development,” was unreasonably vague and

² Conversely, the record also includes relator's testimony to the county that it would accept material from, and make compost available to, local residents and that he would hire employees and purchase his fuel within the county.

subjective and therefore legally insufficient. *Id.* In this case, we observe that the county does not identify the overall needs or the existing land use to which it refers nor does it specify how relator's proposed composting facility fails to reasonably relate to them. Accordingly, we conclude that this finding, "absent stronger and more specific language," *id.*, is not a legally sufficient basis for the denial of relator's CUP.

The county's remaining findings lack factual support in the record. The fourth finding states that "[t]he use will not be sufficiently compatible or separated by distance or screening from adjacent development or land so that existing development will not be depreciated in value and there will be no deterrence to development of vacant land." The fifth finding states that "[f]uture and existing nearby businesses will be adversely affected because of curtailment of customer trade brought about by intrusion of noise, glare or general unsightliness." The transcripts of the public hearings and meetings in which relator's CUP application was discussed reveal that odor was the primary concern of nearby businesses and development. The transcripts reveal that neither glare nor noise was mentioned, and unsightliness was mentioned only with regard to relator's promise to plant trees to provide adequate screening. In fact, one of the proposed conditions for relator's CUP was that relator be required to "plant trees, and provide fencing as buffer and screening in order to secure the site from illegal dumping, reduce blowing trash, and provide aesthetic benefit." The county's sixth finding states that "[c]ommercial composting facilities are relatively new and there is limited data research and data on contaminants, such as mercury, lead and arsenic." The stormwater management plan obtained by relator states only that "there are limited literature values regarding sediment

and phosphorous loading from compost facilities.” Nothing in the record indicates that commercial composting facilities, such as relator’s, are relatively new, that research data on such facilities is limited, or whether there is any likelihood that such facilities would release mercury, lead or arsenic into the environment.

We conclude that the county acted arbitrarily in denying relator’s application, and we therefore reverse the decision of the county board and remand with directions that the county issue the permit, subject to reasonable conditions.

Reversed and remanded.