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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1801**

Thomas Davison, et al.,
Relators,

vs.

Waseca County Board of Commissioners, et al.,
Respondents,

Bio Wood Processing, LLC,
Respondent,

Marie Borglum,
Respondent.

**Filed July 17, 2017
Affirmed
Peterson, Judge**

Waseca County Board of Commissioners

Bradley A. Kletscher, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for relators)

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Bio Wood Processing, LLC, LeCenter, Minnesota (respondent)

Marie Borglum, Kasota, Minnesota (pro se respondent)

Considered and decided by Peterson, Presiding Judge; Connolly, Judge; and Smith,

Tracy M., Judge.

UNPUBLISHED OPINION

PETERSON, Judge

Relators challenge respondent county board's decision allowing issuance of a conditional-use permit (CUP) to respondent wood-processing company, arguing that the county planning commission acted arbitrarily and capriciously by refusing to accept additional comments and submissions after holding a hearing on the company's CUP application, and that the county board acted arbitrarily and capriciously by issuing the CUP. We affirm.

FACTS

Respondent Bio Wood Processing LLC applied to the Waseca County Planning and Zoning Office for a CUP to operate a facility that recycles wood products into mulch and animal bedding. Respondent Marie Borglum owns the 27-acre property where the facility will be located. Relators are neighboring property owners. Bio Wood proposed to construct a new 15,000 square-foot building on the Borglum property and use existing buildings to operate the recycling facility. Bio Wood also will operate its retail and wholesale activities, shop, office, and trucking fleet out of the Waseca site. Bio Wood estimated that there will be an additional 20 to 30 trucks per day entering and leaving the site.

In support of the CUP application, Bio Wood submitted soils and drainage information, photographs of the site, site-plan maps, and construction plans. Bio Wood also submitted drain-tile and impervious-surface maps, buffering and screening plans, and

a sound-level chart for the rotochopper, which is equipment that will be operated at the site.

The Waseca County Planning and Zoning Commission (planning commission) held a public hearing on Bio Wood's CUP application on August 4, 2016. Before the hearing, planning-and-zoning staff prepared a report on Bio Wood's application, which addressed the governing ordinances in relation to the Borglum property and nearby properties. The Borglum property is zoned A-1 agriculture protection district, which requires a CUP to operate natural-resources processing and landfill/recycling facilities. The report notes that the recycling facility will emit noise from the processing, loading, and trucking of materials, including noise from back-up beepers on loading equipment. The report states that noise is already prevalent on the site from the operation of a concrete-recycling facility and welding shop and due to the site's location next to Highway 13. The report states that dust will result from the processing of materials and be spread by the hauling trucks traveling on the gravel part of the access road. The report states that Bio Wood will be required to obtain an air emissions permit from the Minnesota Pollution Control Agency (MPCA) and recommends use of a dust suppressant on the gravel road.

Area residents submitted letters raising a variety of concerns about the proposed Bio Wood project. Relator Vickie Hill submitted a letter expressing concern that the term "recycling" is broad and recommending that if a CUP is granted, it should specifically define the items to be recycled. Relators Larry and Cherie Jacobson submitted a letter opposing operation on a 24/7 basis and recommending that the facility be located in an industrial park rather than at the proposed site. The Jacobsons expressed concerns about

Bio Wood's ordinance violations and violations of its Rice County CUPs, including air-quality violations and failure to control noise levels. The letter states that Larry Jacobson traveled to Faribault and Medford, where Bio Wood operates recycling facilities, and talked to about ten people in those communities, and all but two of them described Bio Wood representatives as "bullies and masters of intimidation." The other two had not had direct dealings with Bio Wood "but had not heard good things about them." Two realtors told the Jacobsons that the Bio Wood facility would cause neighborhood property values to go down significantly.

Relators Thomas and Monica Davison expressed similar concerns in a letter written by their attorney. The Davisons also objected to the drawings submitted by Bio Wood as being inadequate "rough hand-drawing[s]" and asserted that the plans were inadequate because they did not identify the building materials that would be used to prevent noise pollution and did not address how contaminant pollution would be prevented. The Davisons referred to a 2014 medical study that found increased health risks to neighbors of industrial mulch-processing facilities, including "an increase in infectious agents (fungi and bacteria), wood dust increasing allergic and muscocal effects, [and] wood dust increasing cancer." Attached to the Davisons' letter were articles about other mulching facilities and their neighbors' complaints about them, which include dust, noise pollution, and increased truck traffic, and a petition filed with the United States Environmental Protection Agency objecting to the renewal of a mulching facility's operating permit. Also attached to the Davisons' letter were exhibits regarding consideration of Bio Wood's Rice County CUP applications and information about a 2015 MPCA enforcement action against

Bio Wood. The Davisons also raised a safety concern due to a fire and explosion at Bio Wood's Rice County facility.¹

In addition to area residents, two government agencies submitted written comments regarding the CUP application. A Waseca County water-resource specialist submitted a letter stating that, under a 2011 decision by the Board of Water and Soil Resources Board of Appeals, the proposed activities at the Bio Wood facility were exempt from Wetland Conservation Act replacement requirements. A hydrologist for the Minnesota Department of Natural Resources (DNR) sent an e-mail stating that the proposed activities could have negative impacts on nearby Whitewater Creek and that Bio Wood should document anticipated water use so that the DNR could make an appropriation-permit decision, which would be required if the facility used more than 10,000 gallons of water per day or 1,000,000 gallons per year.

At the August 4, 2016 public hearing, the planning-and-zoning administrator gave an overview of the CUP application that addressed noise, dust, and traffic resulting from the facility, monitoring and mitigation of noise and dust, other industrial uses in the area, and concerns raised in the written submissions. Joe Barna, an owner of Bio Wood, spoke

¹ The Rice County facility has been the subject of four appeals before this court. *State v. Halvorson*, No. A16-1191, 2017 WL 84146, at *1 (Minn. App. Jan. 9, 2017) (affirming dismissal of all but two charges against Bio Wood owner alleging violations of CUP conditions); *Sammon v. Halvorson*, No. A15-1261, 2016 WL 1175197, at *1 (Minn. App. Mar. 28, 2016) (affirming harassment restraining order against Bio Wood owner); *Bio Wood Processing, LLC v. Rice Cty. Bd. of Comm'rs*, No. A15-0961, 2015 WL 7202504, at *1 (Minn. App. Nov. 16, 2015) (affirming denial of application for amended CUP on remand); *Bio Wood Processing, LLC v. Rice Cty. Bd. of Comm'rs*, No. A14-0990, 2015 WL 1608793, at *1 (Minn. App. Apr. 13, 2015) (reversing and remanding denial of application for amended CUP because county failed to make required findings).

about the proposed facility, explaining that Bio Wood recycles wood products used in the area, such as pallets, to make mulch and animal bedding, which are safe and environmentally-friendly products. He stated that, to comply with United States Department of Agriculture product standards, the wood used is free from chemicals, such as paint, stain, and varnish.

In addressing concerns expressed by those who objected to the proposed facility, Joe Barna stated that Bio Wood's Rice County facility meets MPCA standards for noise levels. The standards require a decibel reading of 82 or less at 82 feet, and the Rice County facility has a reading of 82 decibels at 40 feet. The MPCA made five visits to the Rice County facility, four of which were unannounced, and the facility met state noise standards each time. Joe Barna stated that noise would be mitigated at the Waseca site because the proposed facility is located behind a hill.

Joe Barna informed the planning commission that the proposed facility would be subject to MPCA dust permitting. The MPCA requires annual repermitting and daily documentation of dust-collector readings. Joe Barna stated that the proposed facility will use dust screening and install a secondary dust collector if necessary. Joe Barna stated that the MPCA permit prohibits dust from traveling across property lines, and that has not occurred at the Rice County facility.

Joe Barna stated that the proposed facility will use less than 10,000 gallons of water per day because the recycled product needs to have a moisture content less than ten percent. He stated that a drainage study showed the required compliance.

Joe Barna stated that Bio Wood has never been issued a citation from Rice County Planning and Zoning. He stated that Bio Wood received a letter from Rice County in 2012 regarding an overstorage of wood that occurred during a turkey flu epidemic, which caused a decreased demand for animal bedding. Joe Barna noted that a concrete-recycling facility has been operated on the Borglum property for many years and stated that the Bio Wood facility would not be a significant change from the current use.

Richard Borglum, co-owner of the Borglum property, noted that the existing concrete-recycling facility creates truck traffic. He stated that the concrete facility existed before neighboring residents moved into the area and, therefore, the Bio Wood facility would not likely cause property values to decrease. Bio Wood employee Kris Reuvers said that neighbors who complain about the Rice County facility have unfairly targeted Bio Wood.

Bio Wood owner Benita Barna stated that a recent fine assessed against the Rice County facility by the MPCA was due to late paperwork. Benita Barna stated that all dust “charges” against the Rice County facility had been dismissed and acknowledged that Bio Wood had admitted to two violations of operating outside of its business hours. Benita Barna explained that trucks are backed up to a door for loading, so the door is mostly blocked and little dust escapes from the facility. Benita Barna asserted that Rice County newspaper articles were biased because they reflected only neighbors’ complaints.

Other individuals spoke in opposition to the CUP application, reiterating the concerns raised in written submissions.

At the end of the public hearing, the planning-commission chair stated:

I just want to make something clear about after I close the public hearing that this is the end of the information portion of this. We're not going to take any documents after this or any comment, that that was the opportunity to give information for the public hearing, and that is now closed.

The planning commission then discussed the evidence presented and criteria for assessing the CUP application and the findings and conditions recommended in the staff report. The commission passed a motion to table the decision to allow for more time to consider the application and later scheduled the application for consideration at a September 1, 2016 meeting. The commissioner who moved to table the decision stated that part of the motion was that no additional paper or information would be accepted and that the additional time was for the commission to conduct its own research with the aid of county staff.

Notice of the September 1 meeting was sent to neighboring property owners; the notice stated that written submissions would be accepted before the meeting and that public comments would be allowed at the meeting. The planning commission did not accept any additional information received from supporters or opponents of Bio Wood's CUP application, and no public comments were allowed at the September 1 meeting. Ultimately, the commission recommended approval with 12 conditions to mitigate adverse impacts.

At a September 20, 2016 meeting of the Waseca County Board of Commissioners (board), the board addressed the concerns raised at the planning-commission meeting and ways to mitigate adverse impacts, including noise and dust. The board approved Bio Wood's CUP application and adopted the planning-commission's findings, which are

detailed and address all of the criteria for issuance of a CUP. The CUP allows grinding 24 hours a day, seven days a week, but requires that the production building's overhead doors be closed between 10:00 p.m. and 7:00 a.m. and prohibits loading and dumping during those hours and on Sundays. The CUP requires Bio Wood to work with the Waseca County Soil and Water District to address soil erosion and plant screening. The CUP requires unpaved parking and traffic areas to be treated as necessary for dust control and prohibits trucks from using engine braking systems when entering or leaving the Bio Wood facility.

Relators initiated this certiorari appeal.

D E C I S I O N

Counties are authorized to carry out planning and zoning activities for the purpose of promoting the health, safety, morals, and general welfare of the community. Minn. Stat. § 394.21, subd. 1 (2016). As a zoning tool, a conditional use 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 (2016).

A county board's decision on whether to issue a CUP is quasi-judicial and reviewable by an appellate court by writ of certiorari. *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). The standard of review is deferential, as counties “have wide latitude in making decisions about special use permits.” *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). Appellate courts traditionally have given more deference to a decision approving a CUP than to a decision denying one. *Id.* at 389 n.4. An appellate court will “review a county's decision to approve a CUP

independently to see whether there was a reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously.” *Id.* at 386.

To show that the county acted unreasonably, relators must show that the county did not follow the zoning-ordinance standards and that granting the CUP was an abuse of discretion. *In re Block*, 727 N.W.2d 166, 177–78 (Minn. App. 2007). In determining whether the county acted unreasonably, an appellate court follows a two-step process: first we determine whether the reasons given by the county were legally sufficient; second, if the reasons were legally sufficient, we must determine whether “the reasons had a factual basis in the record.” *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75–76 (Minn. 2015).

I.

Relators argue that, because the neighboring property owners received a notice of the September 1, 2016 meeting that stated that the planning commission would accept further submissions and allow public comment, the commission acted arbitrarily by not accepting submissions made after August 4, 2016, and by not allowing public comment at the September 1, 2016 meeting. The rejected submissions included an August 22, 2016 letter from the Minnesota Department of Transportation (MnDOT) stating that a bypass lane is required on a highway when a site has 20 or more truck trips per day. Also rejected were letters from Rice County to Bio Wood, which relators claim included information about the dust at the Rice County facility being highly combustible and posing a fire risk, and photographs that relators claim depict dust escaping during loading at the Rice County facility. Relators also unsuccessfully sought to submit “[d]ocumentation from realtors and

a retired appraiser” estimating that property values could decline by 50% or more. These submissions were returned to relators by the county and are not part of the record on appeal.

Failure to follow procedural requirements can indicate that a municipality acted arbitrarily. *Amcon Corp. v. City of Eagan*, 348 N.W.2d 66, 75 (Minn. 1984). “Procedural requirements are considered by the courts to be safeguards against the arbitrary exercise of power. Failure to comply with such procedural requirements has been regarded not only as an ultra vires act on the part of municipal legislators, but also as a denial of due process of law.” 1 Patricia E. Salkin, *American Law of Zoning* § 8:3 (5th ed. 2017).

A county board is required to hold at least one public hearing on a CUP application. Minn. Stat. § 394.26, subd. 1 (2016); *see also* Minn. Stat. § 394.26, subd. 3a (2016) (county board may assign responsibility to conduct public hearing to planning commission). Consistent with this statute, the Waseca Unified Development Code (UDC) art. 3, § 7(3)(a) (2016), provides: “The Planning Commission shall hold at least one (1) public hearing on each application for a Conditional Use Permit prior to any final decision by the County Board. Such public hearings may be continued and additional hearings may be held.” The planning commission accepted written submissions until its August 4, 2016 hearing and allowed public comment at that hearing. At the end of the August 4 hearing, the planning-commission chair stated that the public record was closed and that no more submissions or public comment would be allowed.

“Quasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings. The due-process rights required are simply reasonable notice of a hearing and a reasonable opportunity to be heard.” *In re N. Metro Harness*,

Inc., 711 N.W.2d 129, 136 (Minn. App. 2006) (quotation and citation omitted), *review denied* (Minn. June 20, 2006). Relators received notice of the August 4, 2016 hearing and were allowed to comment and make written submissions. The planning commission complied with due-process requirements and did not act arbitrarily in rejecting submissions made after August 4, 2016, and by not allowing public comment at the September 1, 2016 planning-commission meeting.

Relators also appear to assert a governmental-estoppel claim. Estoppel is not freely applied to the government. *Mesaba Aviation Div. of Halvorson of Duluth, Inc., v. County of Itasca*, 258 N.W.2d 877, 880 (Minn. 1977). A party “seeking to estop a government agency has a heavy burden of proof.” *Brown v. Minn. Dep’t of Pub. Welfare*, 368 N.W.2d 906, 910 (Minn. 1985). The party must prove that (1) the agency “made representations or inducements,” (2) the party reasonably relied on those representations, (3) there is some element “of fault or wrongful conduct” on the part of the agency, and (4) the party will suffer harm if estoppel is not applied. *Id.* (quotation omitted).

Relators received a notice that stated that they could submit evidence before the September 1, 2016 meeting but their submissions were rejected. Their claim is that the county should not be allowed to reject additional submissions after notifying people that they could submit evidence. This argument fails to meet at least two elements of estoppel: the planning commission’s act was only negligent, and relators were not prejudiced because they already had an opportunity to submit evidence.

Relators also object to the lack of a recording of the September 20, 2016 board meeting. They cite no requirement that the meeting be recorded, and Minn. Stat. § 394.26,

subd. 3a, specifically allows the board to assign the responsibility to conduct public hearings to the planning commission. The procedure followed by the county complied with ordinance requirements. *See* UDC art. 3, § 7 (2016).

II.

To recommend a CUP, the planning commission must determine the following:

(a) Will the proposed use have an impact (adverse) on the health, safety, and general welfare of the occupants in the surrounding neighborhood?

(b) Will the proposed use have an impact (adverse) on traffic conditions including parking?

(c) Are there adequate public utilities, public services, roads, and schools to support the proposed use of the property?

(d) Will the proposed use have an effect (adverse) on property values or future development of land in the surrounding neighborhood?

(e) Is the proposed use of the property consistent with the goals and policies adopted in the Comprehensive Plan?

(f) Does the proposed use meet the standards of the Zoning Ordinance including that the use is allowed with a Conditional Use Permit in the designated zoning district in which it is proposed?

(g) Will the proposed use have an effect (adverse) on the environment, including pollution and including impacts on groundwater, surface water and surface water runoff, and air quality?

(h) Will the proposed use have an effect (adverse) on existing natural, historic, or scenic views or features in the surrounding neighborhood?

(i) Are there other provisions within the Unified Development Code, Minnesota State Law or Federal Law that will impact the approval of the Conditional Use Permit?

UDC art. 3, § 7(5).

Relators argue that dust pollution will create a health hazard. Bio Wood presented evidence that dust will be controlled by using a dust-collection system in the facility and dust screening outside the facility. The facility will be subject to an MPCA permit that requires annual repermitting and daily dust-collection readings and prohibits dust from traveling beyond the property. Benita Barna's testimony before the planning commission addresses this issue and supports issuance of the CUP. Benita Barna told the planning commission that, although dust is generated when trucks are being loaded, the dust is contained by Bio Wood's practice of requiring its trucks to be backed up to the loading door. She explained that the building configuration and truck-loading procedure prevent crosswinds that could carry dust outside. Benita Barna also testified that all charges regarding violations of dust conditions in Rice County were dismissed.

Relators argue that a fire risk adversely impacts the safety of neighboring property. Bio Wood presented evidence that a fire-suppressant system would be used in the facility. The nearest neighboring residence is 1,609 feet from the Waseca site. The fact that a fire occurred at the Rice County facility does not demonstrate that the proposed facility creates a fire hazard.

Relators argue that excessive noise from grinding, truck loading, and back-up beepers will adversely impact neighboring properties. These properties are already impacted by the existing concrete-recycling facility and highway noise. The grinding will

be done inside the production building, and its doors must remain closed between 10:00 p.m. and 7:00 a.m. Bio Wood presented evidence that the noise generated by the grinding is below MPCA standards. Also, the natural environment of the Borglum property, which includes a hill and plant screening, will mitigate noise.

Relators argue that the evidence does not support the finding that the proposed use will not adversely impact property values. The concerns raised by relators about property values relate to noise and dust pollution, and the CUP includes conditions to mitigate those effects.

Relators argue that the Bio Wood facility is not consistent with the county's comprehensive plan because the purpose of an agricultural district is to enhance and encourage agricultural operations within the county. Relators argue that "spot commercial development" is not an intended use of an agricultural district. But there is already a commercial operation at the site, and one of the uses of the Bio Wood product is animal bedding. Recycling facilities are allowed in agricultural districts with a CUP, and the county found that the Bio Wood facility would promote two economic-growth goals: diversity and employment.

Relators argue that the facility will have an adverse environmental impact. Relators did not present to the county the issue of whether an environmental impact statement or an environmental assessment worksheet was required. Relators' environmental-impact argument is based on noise and dust pollution and increased water runoff. As already addressed, the CUP contains conditions that mitigate noise and dust pollution, and the water runoff is less than the amount that triggers MPCA permitting requirements.

Relators challenge the finding that the facility will not have an adverse impact on traffic conditions. The UDC requires information about site access and parking and requires the planning commission to consider traffic impacts. UDC art. 3, § 7(2)(b)(iv)(3), 7(5)(b). The record contains site maps and photographs showing access roads and parking and also contains traffic studies and information about Highway 13. About 2,800 vehicles travel past the Borglum property daily on Highway 13, and the Bio Wood facility will add only 20 to 30 vehicles a day. Highway 13 is a state highway, and the CUP requires Bio Wood to comply with all MnDOT requirements, including payment of assessed costs for any additional MnDOT road changes.

The reasons stated by the board for issuing the CUP are legally sufficient and are supported by a factual basis in the record.

Affirmed.