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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-2083**

Brian Winczewski,
Relator,

vs.

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

Osage Sportsmen's Club, Inc.,
Respondent.

**Filed September 5, 2017
Reversed and remanded
Stauber, Judge***

Becker County Board of Commissioners

James H. Perkett, Law Office of James Perkett, P.L.L.C., Park Rapids, Minnesota (for relator)

Tammy L. Merkins, Becker County Attorney, Detroit Lakes, Minnesota; and

Scott T. Anderson, Rupp, Anderson, Squires & Waldspurger, Minneapolis, Minnesota (for respondents Becker County Board of Commissioners, et al.)

Matthew J. Enger, Thomason, Swanson & Zahn, PLLC, Park Rapids, Minnesota (for respondent Osage Sportsmen's Club, Inc.)

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

Considered and decided by Reyes, Presiding Judge; Reilly, Judge; and Stauber, Judge.

UNPUBLISHED OPINION

STAUBER, Judge

Relator, who lives near respondent shooting range, argues that respondent county board's decision to grant a conditional use permit (CUP) to harvest trees for expansion of the shooting range was unsupported by evidence in the record and arbitrary and capricious. Because the county board did not make articulable findings that reflect full consideration of zoning ordinance and statutory noise standards, we reverse and remand for further proceedings.

FACTS

Relator Brian Winczewski challenges the decision of respondent Becker County Board of Commissioners to grant a conditional use permit (CUP) to respondent Osage Sportsmen's Club, Inc. for tree clearing in conjunction with the expansion/reconfiguration of the club's shooting range in Osage Township. In October 2015, the club applied for an initial CUP for timber harvesting in order to increase the number of trap shooting lanes from one to four, add accompanying trap houses, rearrange the rifle range, add a parking area, and eventually add a new club house and warming house. The club had already cleared trees for this purpose in the summer of 2015 and then discovered that a CUP was needed. In October 2015, the club also purchased an additional parcel of land to the north of the original parcel, intending to use the new parcel as a buffer for the expanded activities.

Club members indicated that the expansion related, in part, to the club's use by the Park Rapids High School trapshooting team. A number of neighbors, including Winczewski, testified at the planning commission meeting against the expansion based on increased noise, safety concerns with ricocheting bullets, extended hours, and a possible nuisance and decrease in their property values. One planning commission member stated that it appeared that the concerns related not to the high school trap shooting, but to extended hours of operation for pistol and rifle shooting.

The planning commission voted to recommend approval of the CUP under the Becker County Zoning Ordinance (BCZO) (2015), and the county board summarily approved the CUP without making written findings on the basis for its approval. In the summer 2016, the club also cleared additional trees from its newly acquired north parcel, and a portion of the new trapshooting lanes were constructed on that parcel.

On certiorari appeal, this court reversed for insufficient findings, concluding that it could not ascertain from the record whether the county could reasonably find that the requirements for the CUP in the zoning ordinance were met. *Winczewski v. Becker Cty. Bd. of Comm'rs*, No. A15-1911, 2016 WL 4067729, at *4 (Minn. App. Aug. 1, 2016). We expressly declined to address whether the club's expansion was permissible under the nonconforming use section of the zoning ordinance, noting that, "[b]ecause Becker County argues that a CUP is not required for the Club's expansion, and we find nothing in the ordinance plainly allowing the Club to obtain a CUP for its proposed uses, additional fact finding on remand would be useless." *Id.*

After the reversal of its initial CUP determination, the county board obtained advice from counsel that the shooting range was an existing nonconforming use, so that its use before the 2015 tree clearing was protected, but that the tree harvesting itself required a CUP. The county board presented the club with the options of reforesting the land or applying for a new CUP specifically for tree harvesting. The club then applied for a new CUP, requesting permission only for the tree harvesting. At a planning commission meeting, commission members expressed that “the board has to look at the [CUP] as if the club does not exist,” and that “they are only looking at the [CUP] to clear timber in the Shore Impact Zone and not as a shooting range.” The planning commission moved to recommend approval of the CUP, with proposed findings.

The county board took public comments on the proposed CUP, which included numerous concerns from neighboring property owners about decreased safety and increased noise levels since the trees had been removed. A club representative stated that the club had replanted 400 trees and changed the direction of the shooting. The board approved the CUP with specific findings. These included that: the club had an approved storm water pollution prevention plan, a permit from the MPCA, and a letter of approval from the DNR; the tree clearing did not encroach on neighboring properties and so would not affect them; the tree clearing did not extend to the public water of the adjoining lake, and no future structure would be visible from the lake. The county board also incorporated in its findings a planning commission staff report, which indicated that adequate measures had, or would be, taken, to prevent or control offensive fumes, odor, dust, noise, or vibration, and to control lighting to avoid disturbing neighboring properties. The report

also stated, “The appropriate permits for clearing trees have already been obtained by the Sportsmen’s club and those permits require the owners to control the dust and noise from these activities. None of the other suggested nuisances are possible with the proposed activities.” Finally, the county board found that adequate utilities, access roads, drainage, parking, and other necessary facilities had been provided. The county therefore issued the CUP for the tree harvesting.

Winczewski has filed this certiorari appeal.

D E C I S I O N

The county has discretion to approve or deny a conditional-use-permit application. *Zylka v. City of Crystal*, 283 Minn. 192, 195-96, 167 N.W.2d 45, 48-49 (1969). An appellate court independently reviews a county’s decision regarding a CUP to determine whether the decision had a reasonable basis, “or whether the county acted unreasonably, arbitrarily, or capriciously.” *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). To make this assessment, the court must first determine whether the reasons given by the county for its decision were legally sufficient. *RDNT, LLC, v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015). If they were sufficient, we then determine whether the reasons were supported by a factual basis in the record. *Id.* at 76. This court interprets existing statutes and ordinances de novo and “review[s] the record to determine whether there was legal evidence to support the zoning authority’s decision.” *Id.* at 76 (quotation omitted). Winczewski claims that the county board’s decision was legally insufficient because it did not fully address the relevant zoning ordinance and statutory criteria and did not provide a sufficient legal and factual basis for granting the CUP.

At the outset, we note the county's position that, because the club is an existing nonconforming use, the club properly applied for a CUP only for tree harvesting. Although the county may constitutionally prohibit the creation of nonconforming uses, existing nonconforming uses "must either be permitted to remain or be eliminated by use of eminent domain." *County of Freeborn v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (1972). It is undisputed that the club has been operating, at least on a small scale, since the 1950s, and its establishment preceded the adoption of the zoning ordinance in 1971. Therefore, the club is an existing nonconforming use. And although the county has authority to restrict by ordinance the expansion of a nonconforming use, *see* Minn. Stat. § 394.36, subd. 2 (2016), the zoning ordinance does not contain such a restriction, other than shoreland mitigation requirements, which were addressed in granting the CUP. *See* BCZO ch. 3§§1-11(2015).

We also recognize that the requirements of the Minnesota Shooting Range Protection Act apply to the club's expansion of its facilities. *See* Minn. Stat. §§ 87A.01-.10 (2016).¹ Under that act, an existing shooting range that is a nonconforming use, shall be allowed to conduct additional shooting activities, providing that it complies with shooting-range performance and noise standards specified in that act. Minn. Stat. § 87A.03, subd. 2. Therefore, because the club is a nonconforming use, it properly applied

¹ This act was passed in 2005. *See* Minn. Laws ch. 105, §§ 1-8, at 589-93 (2005). Among other provisions, it prohibits nuisance actions for damages or equitable relief against a shooting range that is otherwise in compliance with shooting range performance standards and limits permanent injunctions against shooting ranges to situations in which a court finds the range or its activities constitute a "clear and immediate safety hazard." *See* Minn. Stat. §§ 87A.06, .07.

only for a CUP relating to harvesting trees to facilitate the expansion of the gun range on its property. *See id.*

Nonetheless, an applicant for a CUP has the burden to show that “the standards and criteria stated in the [relevant] ordinance will be satisfied.” Minn. Stat. § 394.301, subd. 1, (2016). This includes both general conditional-use requirements and “insofar as practicable, requirements specific to each designated conditional use.” *Id.* Thus, in granting the CUP, the county board was required to show that the club’s proposal satisfies each condition for CUP approval in the zoning ordinance. *See Schwardt*, 656 N.W.2d at 389; *see also* Minn. Stat. § 87A.08, subd. 1 (providing that a local zoning authority may enforce applicable ordinances that are consistent with that chapter). Under that ordinance, when considering whether to grant a CUP, the county board must address: (1) the effect on surrounding property; (2) the effect on orderly, consistent development; (3) whether adequate facilities exist; (4) whether adequate parking exists; (5) whether a nuisance would be created; and (6) additional criteria for shoreland areas, including the prevention of pollution, limited visibility from public waters, and adequate utilities. BCZO ch. 8, § 11.

Here, the county board found that each of these requirements was met. Nonetheless, in order for this court to fully consider the county board’s decision, the findings of the county board must be adequate for judicial review. *In re Block*, 727 N.W.2d 166, 179 (Minn. App. 2007). And we do not defer to a governing body’s decision when it has not taken a “hard look” at the problems involved. *Id.* at 180.

We conclude that although the county board made specific findings addressing the CUP requirements, those findings are not legally sufficient to support its decision on the

current record. First, the zoning ordinance relating to a CUP in shoreland areas requires that adequate measures be taken to protect those areas, such as obtaining a permit from the MPCA and a stormwater pollution prevention plan, adherence to DNR forestry best management practices, and an erosion control and sedimentation plan approved by the county soil and water conservation district. *See* BCZO ch. 6, §§ 7, 13; ch. 8, § 11(F)(6)(a). But the county board did not indicate whether its findings on this point relate to the tree harvesting that occurred in 2015, before the prior CUP was reversed, or the harvesting that occurred in 2016, which is the subject of this CUP. Any consideration of this issue is further complicated by the parties' disagreement on the acreage covered by the 2016 harvesting, which is also unclear from the record. And although the club alleges that the tree harvesting allowed reconfiguration of the shooting range, so that shooting no longer would occur over the adjoining lake, the record does not clearly specify the layout of the new shooting lanes, whether they would be extended, or whether they would merely be rearranged. The county board made no findings on the reconfiguration or how it would affect the board's consideration of the standards in the ordinance.

Further, no evidence was presented to the county board on whether the club's expansion complied with statutory noise standards for shooting ranges. *See* Minn. Stat. § 87A.05 (providing specific noise standards for shooting ranges). The record contains no indication that noise measurements were taken in conformity with these standards. *See id.* A number of neighboring landowners who opposed the CUP alleged that noise levels from the shooting range had increased following the tree harvesting; Winczewski asserted that when high powered rifles were shot on the property, he recorded decibel readings of

100dbs. We recognize that general neighborhood opposition is an insufficient basis for permit denial. *See Yang v. County of Carver*, 660 N.W.2d 828, 833 (Minn. App. 2003). But we have noted that the effects of noise from a shooting range may be relevant to a county board's decision to grant a CUP, even when the noise level would not exceed MPCA limits. *August v. Chisago Cty. Bd. of Comm'rs*, 868 N.W.2d 741, 748 (Minn. App. 2015), *review denied* (Minn. Dec. 15, 2015). Here, more specific noise measurements would assist the county board in determining whether, after the trees were harvested, the statutory noise standards were exceeded. Although the county board found that adequate noise-control measures had been taken, it addressed only measures taken to control noise from the act of tree clearing itself, not measures to control any increased noise that may occur from shooting activities once the CUP was approved. This narrow focus is legally insufficient to show that the county board took a "hard look" at the problem, as required for granting a CUP. *See Block*, 727 N.W.2d at 180. For all of these reasons, we conclude that a remand is appropriate so that the parties may more fully develop the record and provide the county board with adequate evidence on which to base an informed decision on granting the CUP. *See id.* at 182 (reversing and remanding for reconsideration of application for CUP, allowing all parties an opportunity to present evidence).

Finally, we note Winczewski's argument that, even though the county board minutes reflect that the parties stipulated to reforestation of the cleared area, no provision to that effect was included in the CUP as issued. We agree that any such stipulation should be memorialized because a CUP controls the rights of any owner of the land. *See Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (stating that a

CUP is a protected property right that runs with the affected land). And the county would not have unilateral authority to modify the terms of the CUP at a later date. *Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d 184, 190 (Minn. App. 2009). Therefore, should the county board on remand determine to grant the CUP, it also should appropriately memorialize any such agreement on the recorded CUP.

Reversed and remanded.