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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0099

In re Order Approving the Application by DG Minnesota CSG 2, LLC
for a Conditional Use Permit

Carver County Board of Commissioners
File No. PZ20160033

Filed December 26, 2017
Affirmed
Ross, Judge

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Considered and decided by Connolly, Presiding Judge; Ross, Judge; and Schellhas, Judge.

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

ROSS, Judge

The Carver County Board of Commissioners granted DG Minnesota CSG 2 LLC a conditional-use permit to construct a solar farm in an area of the county zoned as "Agricultural/Shoreland Overlay District." Neighboring landowners argue in this certiorari

appeal that a large solar energy system is a prohibited use in the district and that the board abused its discretion by finding that the permit application met the requirements established by ordinance. Because Carver County reasonably interpreted its zoning ordinance to include a large solar energy system as a conditionally permitted use in the district, and because evidence supported the county's decision to grant the permit, we affirm.

FACTS

DG Minnesota CSG 2 LLC applied to Carver County in May 2016 for a conditional-use permit (CUP) to construct a "large solar energy system" (LSES) on about 22 acres of farmland owned by nonparty Bruce Lenzen. The proposed solar-farm site is located in the county's Agricultural/Shoreland Overlay Zoning District near rural residences, agricultural operations, Buck Lake Stables (an equestrian business), and Buck Lake. An "Agricultural/Shoreland" area is a specific portion of an agricultural district adjacent to designated bodies of water.

DG Minnesota's CUP application described the solar-farm project. It detailed the reasons for selecting the site, anticipated the project's possible environmental effects, proposed solutions to mitigate adverse effects, provided a glare-hazard analysis, and discussed the project's impact on the terrain. The county's planning commission convened a public hearing on the application. Local landowners participated and complained that the project would diminish the rural scenery, misuse prime agricultural land, and decrease property values. DG Minnesota responded by proposing to modify its plan.

The planning commission held a second hearing at which DG Minnesota announced its modifications. It would screen the operation by moving the project boundary 490 feet

from an adjacent road, planting foliage, and erecting a tall fence. It responded to the landowners' concerns about glare, saying that solar panels reflect less than two percent of light, which, it maintained, is much less than a mirror reflects. DG Minnesota predicted that property values would not diminish, asserting that factors typical to commercial development—ongoing noise, odors, traffic, and drainage challenges—would not occur at the site. It promised that the site would be permanently vegetated, maintaining water absorption. DG Minnesota also addressed concerns about possible stray voltage, explaining that the project would be well-grounded using new materials and wiring. Finally, DG Minnesota emphasized that the project would be temporary under a 35-year-lease period after which the land would be returned to agricultural use. Opponents renewed their objections.

The planning commission held a third public hearing. DG Minnesota and the project's opponents presented competing interpretations of the zoning ordinance. A consequent vote evenly divided the commission, which made no recommendation to the county's board of commissioners.

The board of commissioners held its own hearing and received many of the same arguments presented to the planning commission. The board initially directed its staff to draft an order denying the CUP. It then held a second hearing and decided to continue its final decision for another 60 days. The board eventually granted the CUP under the renewable energy provision of the zoning ordinance, finding that all information in the record had been duly considered and that the requirements in the controlling ordinance provisions were either met or mitigated by conditions imposed on the permit.

Some of the opponents challenge the county's decision issuing the CUP in this appeal by certiorari.

D E C I S I O N

Relators are 27 landowners who ask us to reverse the county's decision granting the conditional-use permit to DG Minnesota for the solar-farm project. "We 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." *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). We will affirm the decision so long as its basis is even slightly valid. *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d. 254, 259 (Minn. App. 2004).

The relators' broadest argument concerns whether the county properly found that the CUP meets the requirements of section 152.251 in light of the LSES's potential adverse effects on the environment, existing and planned land use, storm-water runoff, the development of surrounding property, a neighboring equestrian facility, the use and enjoyment of neighboring property, and the LSES's compatibility with the county comprehensive plan. *See* Carver County Zoning Ordinance (Ord.) §§ 152.251(A)-(E), (H)-(I) (2016). Relators argue that the county's findings of fact failed to adequately address their objections to the CUP application. We review the board's decision only to ensure that reasonable evidence in the record supports it. *See Billy Graham Evangelistic Ass'n v. City of Minneapolis*, 667 N.W.2d 117, 124 (Minn. 2003). To show that the board acted unreasonably, relators must establish that the proposal did not meet one of the standards in

the ordinance and that granting the CUP reflects an abuse of discretion. *Schwardt*, 656 N.W.2d at 387.

The relators fail to carry their burden on appeal. The county had sufficient basis to credit DG Minnesota's representations about limited future environmental effects and the company's plan to mitigate any adverse effects. The board was also aware that DG Minnesota relocated the proposed project boundary further from the road and would limit the view into the area using foliage and fencing. It learned too that DG Minnesota had presented a glare-hazard study, a property-valuation report, and a report representing the project's low impact on surface-water migration. DG Minnesota had responded substantively to concerns about stray voltage and assured the county that its solar farm would last no more than 35 years. Because the evidence and explanations reasonably support the board's determination that the section-152.251 factors were either met or could be mitigated by conditions placed on the permit, we see no abuse of discretion and must defer to the county's decision.

Relators' most forceful contention rests on legal interpretations. They contend that an LSES is disallowed as a matter of law in the shoreland overlay district because establishing a solar farm is an "industrial use," which the county's ordinance categorically prohibits in the district. The county and DG Minnesota argue that the relators forfeited this contention by failing to raise it in the county proceedings. It is true that parties may not litigate issues on certiorari review that were not raised before the local zoning authority. *Big Lake Ass'n v. Saint Louis Cty. Planning Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009). But whether a zoning issue was properly raised before the local authority is not always

easily determined. *Id*. Although parties need not frame issues in precise legal terms, they must present them specifically enough to give fair notice of the nature of the challenge so the zoning authority can consider and address it. *Id*. The opposing landowners repeatedly objected to the LSES on the grounds that the solar farm was essentially an industrial use. They did not frame the challenge in precise legal terms, but the challenge was clear enough to inform the board of the industrial-use issue. The issue was therefore preserved, and we will consider the merits of the relators' contention.

The relators direct us to section 152.115 of the zoning ordinance, which provides that "industrial uses" are prohibited in shoreland areas. They insist that an LSES is an "industrial use" and that the project therefore fails. The canons guiding our construction of statutes also guide us when construing ordinances. *Yeh v. Cty. of Cass*, 696 N.W.2d 115, 128 (Minn. App. 2005). We first determine whether the ordinance is clear and unambiguous on its plain language. *See Brua v. Minn. Joint Underwriting Ass'n*, 778 N.W.2d 294, 300 (Minn. 2010). We also construe zoning ordinances strictly in favor of a property owner's right to choose how to use the land, requiring land-use restrictions to be clearly expressed. *Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984). With this guidance, we must decide whether the proposed solar project is an "industrial use," because the ordinance expressly prohibits industrial uses in shoreland districts.

The ordinance nowhere defines an "industrial use," and it defines an LSES without expressly describing it as industrial. A county ordinance defines a "Large Solar Energy System" only as a "solar farm, where the primary land use of the parcel is for a solar array"

and where the apparatus includes "multiple solar panels on multiple mounting systems (poles or racks) . . . generally hav[ing] a direct current (DC) rated capacity greater than 100 kilowatts." Ord. § 152.010. The ordinance's express language therefore does not carry the relators' argument, so if the argument prevails it does so only on inference.

The relators ask us to infer that an LSES is an industrial use. They rely on a Minnesota administrative rule that defines industrial use as the use of land to produce commodities, and they also cite two cases that acknowledge electricity as a commodity. *See* Minn. R. 6120.2500, subp. 7b (2016) ("'Industrial use' means the use of land or buildings for the production, manufacture, warehousing, storage, or transfer of goods, products, commodities, or other wholesale items."); *N. States Power Co. v. Minn. Pub. Utils. Comm'n*, 344 N.W.2d 374, 382 (Minn. 1984) ("We acknowledge that electricity is a fungible commodity."); *S. Minn. Mun. Power Agency v. City of St. Peter*, 433 N.W.2d 463, 467 (Minn. App. 1988) (characterizing electricity as an "essential commodity"). Because an LSES uses land to produce electricity, the relators conclude, the cited rule and caselaw would have us deem an LSES an industrial use.

The relators have formed a logical inference; but it is not the only inference, and our interpretive role is restrained. We accord some deference to civil authorities in routine zoning matters, honoring separation-of-powers restraints. *Big Lake Ass'n*, 761 N.W.2d at 491. And in applying this deference, we give some weight to a county's interpretations of its zoning provisions. *Chanhassen Estates Residents Ass'n*, 342 N.W.2d at 340.

The county implicitly rejected the relators' theory that an LSES is an industrial use, and this rejection is sufficiently supported. The county board approved the CUP

specifically "pursuant to . . . County Code, Section . . . 152.052." The county's ordinances include a distinct provision for LSESs, stating, large solar energy systems "shall be permitted with the issuance of a CUP pursuant to § 152.052." Ord. § 152.039 (B)(2)(b). The county argues reasonably that, because LSESs are not identified as permitted or conditional uses in any of the six zoning or overlay districts in the county's zoning scheme but are identified as permitted uses under a CUP, the county intended to authorize LSESs specially, independent of the other conditional-use authorizations. We assume that the county intended none of the provisions in its ordinance to be superfluous, *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000), and the language we have quoted from section 152.039 (B)(2)(b) would mean nothing if the county did not intend for LSESs to constitute a conditional use. Accepting the county's argument also maintains consistent treatment because, as the county points out without dispute, it has considered other solar projects under the same ordinance provisions that it applied here.

Relators also argue that the ordinance prohibits a CUP for an LSES in any agricultural district. They direct us to section 152.075, which states, "Land in the agricultural district may be used for any of the following purposes only upon the issuance of a conditional use permit." Relators argue that we should infer that an LSES is prohibited in the agricultural district, because an LSES is not listed among "the following purposes." We are not certain that the drafters intended those listed purposes in section 152.075 to be exclusive uses. If they intended to allow in the agricultural district only those conditional uses listed, they presumably would have more clearly expressed this intent, as they did for the Residential Cluster District. *See* Ord. § 152.177(B) (providing a list of uses for which

a CUP may be issued and adding expressly that "[n]o other conditional or interim use permits are permitted"). But we can resolve the argument on the same basis on which we have rejected the no-industrial-uses argument in land zoned as shoreland. That is, overcoming the presumed exclusivity of purposes referenced in section 152.075 and the lack of any reference to solar farms in that section, section 152.039 (B)(2)(b) expressly declares that LSESs "shall be permitted with the issuance of a CUP pursuant to § 152.052." We repeat that a zoning ordinance detours from the common law and should be construed strictly in favor of the property owner's right to choose how to use the land. *Chanhassen Estates Residents Ass'n*, 342 N.W.2d at 340. Effective land-use restrictions therefore must be unambiguous. *Id*. Without an express, unambiguous provision excluding an LSES as a conditional use in the agricultural district, we cannot say that the county acted unreasonably, arbitrarily, or capriciously in applying the provision of its ordinance that apparently authorizes the use.

Relators also argue that permitting the LSES offends state law because it will produce considerably more than one megawatt of energy and Minnesota Statutes section 216B.1641 generally limits solar-farm capacity to no more than one megawatt. The argument overlooks the Minnesota Public Utilities Commission's order, adopted on August 6, 2015, allowing any solar garden for which a program application was submitted before September 25, 2015, to have an aggregate capacity of up to five megawatts. *See In re N. States Power Co.*, 2016 WL 3043122, at *1–2, *9 (Minn. App. May 31, 2016) (affirming validity of order enforcing settlement agreement), *review denied* (Minn. Sept. 20, 2016). A properly promulgated rule carries the full "force and effect of law."

Minn. Stat. § 14.38, subd. 1 (2014). DG Minnesota submitted its solar-farm application to Xcel Energy before September 2015, and its greater-than-one-megawatt output is therefore not prohibited by section 216B.1641.

Affirmed.