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STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0504

Minnesota Solar, LLC,
Relator,

vs.

Carver County Board of Commissioners,
Respondent.

Filed December 18, 2017
Affirmed
Smith, Tracy M., Judge

Carver County Board of Commissioners
File No. PZ20160028

Karla M. Vehrs, Gretchen L. Gurstelle, Lindquist & Vennum LLP, Minneapolis, Minnesota (for relator)

Jay T. Squires, Michael J. Ervin, Rupp, Anderson, Squires & Waldspurger P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Kirk, Presiding Judge; Reilly, Judge; and Smith, Tracy M., Judge.

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

SMITH, TRACY M., Judge

On certiorari appeal from respondent-board's denial of a conditional use permit (CUP) for a large solar-energy system, relator argues that the decision was arbitrary, capricious, and unreasonable. Relator contends that (1) the reasons cited for denial were

not based on the ordinance or supported by the evidence and (2) the decision to deny the CUP violated its equal protection rights. Relator also asks us to rule on the propriety of ex parte communications in quasi-judicial proceedings, arguing that the issue is capable of repetition yet evading review. We affirm.

FACTS

Relator Minnesota Solar LLC submitted an application to the Carver County Land Management Department for a CUP to construct and operate a four-megawatt large solar-energy system (solar garden) on 35 acres of land in Watertown Township, Carver County.

The application came before the Carver County Planning Commission during a public meeting, at which the planning commission heard testimony from representatives of Minnesota Solar as well as from members of the public who would be affected by the proposed project. Two members of the public opposed the project over concerns that, among other things, stray voltage would affect their dairy farms. At the close of the meeting, one of the planning commissioners expressed concern about the project based on his experience with stray voltage and its negative effect on his family's dairy farm. Based on the possibility of stray voltage, he moved to deny the request. The planning commission voted unanimously to recommend denying Minnesota Solar's application request.

Minnesota Solar's application then came before respondent Carver County Board of Commissioners (the board) at two public meetings. The board heard testimony and received materials from Minnesota Solar. The board also heard testimony from members of the public, who again expressed various concerns about the project, including the effects

of stray voltage on the neighboring dairy farms. At the end of the second meeting, the board voted three-to-two to deny Minnesota Solar's CUP.

The board subsequently issued its findings and order supporting the decision. In the findings and order, the board explained that an order for the issuance of a CUP can be adopted only if the ten standards set forth in Carver County, Minn., Code of Ordinances § 152.251 (2016) are satisfied. The board then determined that four of those standards were not satisfied.

Minnesota Solar filed a petition for a writ of certiorari and moved this court to compel the board "to file a complete record on appeal including any and all communications between individuals and Commissioners regarding Minnesota Solar's [CUP] application." Minnesota Solar claimed that one or more board commissioners received and considered communications from individual members of the public about the CUP application, and that any such communications should be included in the record on appeal. We determined that Minnesota Solar's request was premature because Minnesota Solar had not identified specific documents that were omitted from the record. Minnesota Solar also claimed that, outside of public hearings, any communications with commissioners about the CUP application were improper ex parte communications. But we determined that, although Minnesota Solar's assertion may apply to the merits of the appeal, it does not inform our analysis of the proper scope of the record. We, therefore, denied Minnesota Solar's motion.

D E C I S I O N

I. The board's denial of the CUP was not arbitrary, capricious, or unreasonable.

Minnesota Solar challenges the board's decision, arguing that it was arbitrary, capricious, and unreasonable because (A) "each of the reasons cited for the decision was either legally insufficient, factually unsupported, or both"; and (B) the decision violated its equal protection rights.

A. Reasons for the decision

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 CUP 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's decision to grant or deny a CUP is a quasi-judicial act. *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). We "will reverse a governing body's decision regarding a [CUP] application if the governing body acted unreasonably, arbitrarily, or capriciously." *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015). A decision is arbitrary and capricious if it represents the decision-maker's will rather than its judgement, or if it is "based on whim or is devoid of articulated reasons." *Perschbacher v. Freeborn Cty. Bd. of Comm'rs*, 883 N.W.2d 637, 643 (Minn. App. 2016) (quotation omitted).

There are two steps in determining whether the county acted unreasonably, arbitrarily, or capriciously. *RDNT*, 861 N.W.2d at 75. We first determine whether the reasons given by the county were legally sufficient. *Id.* at 75-76. Second, if the reasons

were legally sufficient, we must determine whether "the reasons had a factual basis in the record." *Id.* at 76.

Minnesota Solar challenges the board's decision on several grounds. But it is well settled that "[n]ot all of the reasons" for the denial of a CUP "need be legally sufficient and supported by facts in the record." *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 765 n.4 (Minn. 1982). Rather, a denial of a CUP is not arbitrary when at least one of the reasons given for the denial has a rational basis. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997).

Legally sufficient reasons

In denying Minnesota Solar's CUP application, the board determined that the standards set out in subparts (B), (D), and (I) of section 152.251 of the Carver County Code of Ordinances were not satisfied due to the potential for stray voltage. Subpart (B) requires that the CUP "will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted"; subpart (D) requires that the effect of the CUP "will not be detrimental to the health, safety and welfare of Carver County or to the occupants of the immediate neighborhood"; and subpart (I) requires that the CUP be "compatible with the land uses in the neighborhood." The supreme court has "long held that a city may deny a [CUP] application if the proposed use endangers the public health or safety or the general welfare of the area affected or the community as a whole." *RDNT*, 861 N.W.2d at 76 (quotation omitted). The standards established in the identified subparts of the ordinance reasonably relate to the health, safety, and welfare of the community and are legally sufficient reasons to deny a CUP.

Reasonable factual basis

Minnesota Solar also challenges the factual basis for the board's determination that these standards were not met. With respect to stray voltage specifically, Minnesota Solar argues there is "no factual support for a denial based on alleged concerns about stray voltage and corresponding 'incompatibility' with agricultural land use in the area."

Stray voltage is "a phenomenon in which an electrical current—voltage that returns to the ground after powering an appliance—passes through an object not intended as a conductor." *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 276 (Minn. 2011). This court has recognized that stray voltage can be "problematic to the animals," including dairy cows. *See ZumBerge v. N. States Power Co.*, 481 N.W.2d 103, 107 (Minn. App. 1992) (quotation omitted), *review denied* (Minn. Apr. 29, 1992).

The board found that concerns about the proposed solar garden "include the increase in stray voltage potential for properties and dairy operations, because the proposed project would be located near the end of the Xcel Energy transmission line." The board also found that "[t]estimony received . . . indicates neighboring property owners' concerns with the delay in notification of stray voltage and that this delay in notification would be detrimental to the welfare of their dairy farm business." Moreover, the board found that "the interconnection infrastructure would be located adjacent to the dairy operation and would be controlled by Xcel Energy, which would not be subject to [Carver] County's land use regulations or stray voltage monitoring condition(s)." Thus, the board determined that, "[b]ased on public testimony," Minnesota Solar's requested CUP "may be injurious to the use and enjoyment of other property in the immediate vicinity for purposes already

permitted including animal agriculture, residential homes, and farms." The board further determined that, because Minnesota Solar "has not submitted an adequate or clear plan for mitigating the potential for stray voltage or for compensating neighbors in the event that stray voltage became a problem," Minnesota Solar "would not be able to guarantee that the [solar farm] would not be detrimental to the neighboring farm(s)."

We review the record to determine whether it is sufficient to reasonably support the board's findings. Two neighboring dairy farmers testified at either the planning commission or board hearings about their stray-voltage concerns and the negative effect that it can have on dairy cows. Similarly, at the planning commission meeting, one of the commissioners, who is a former dairy farmer, recalled his experience with stray voltage, stating that stray voltage affects the cows because "[y]ou can't get [them] bred," they can be "jittery," and "[m]ilk production takes a pretty good squat downward." The negative effect of stray voltage was acknowledged by Minnesota Solar's expert, an electrical engineering manager at Westwood. Although Minnesota Solar's expert asserted that a solar garden "is no more likely to cause stray voltage than any other type of building connected to that same distribution system," he acknowledged that "for dairy farmers especially, stray voltage is definitely a concern" because it "can impact their dairy milk production." And the expert from Westwood acknowledged that, with these solar gardens, "[t]here is always going to be [a] minimal amount of stray voltage." Minnesota Solar's expert's testimony is consistent with an email from Xcel Energy, which states that "[a] solar garden is not inherently any more, *or less*, likely to develop [stray voltage] issues than any other customer." (Emphasis added.) The potential for stray voltage associated with

solar gardens, along with the evidence depicting the devastating effect stray voltage can have on dairy farms, two of which are located adjacent to the proposed solar garden, supported the board's decision declining to find that the effects of the proposed use would not be detrimental to the health, safety, and welfare of Carver County or to the occupants of the immediate neighborhood.

Minnesota Solar argues, however, that the board's decision was arbitrary because it rejected the expert testimony that Minnesota Solar submitted and was not based on concrete information. Minnesota Solar relies on *Trisko*, in which this court reversed the denial of a CUP when the board based its decision on neighbors' fears of an increase in respiratory problems due to quarry dust, based on unscientific speculation, and not medical fact. 566 N.W.2d at 356-57. In that case, unrebutted expert testimony established that the exposure level for dust surrounding quarries is "one-quarter of the level that is considered safe," which would create "essentially no risk." *Id.* at 356. But here, although Minnesota Solar insisted that its design, construction, and maintenance would prevent it, the potential for stray voltage was acknowledged and the harmful effect of stray voltage on dairy farms was not disputed.

This case is more like two other cases in which this court affirmed denial of a CUP. In *SuperAmerica Grp., Inc. v. City of Little Canada*, this court determined that, in denying a request for a CUP to construct a service station, a city council had not improperly rejected expert testimony that the station would cause little traffic congestion in favor of concerns by residents and business owners that the station would aggravate existing traffic congestion. 539 N.W.2d 264, 266-68 (Minn. App. 1995) (stating that CUP may be denied

"if the proposed use would adversely affect the general welfare," that neighborhood opposition may be considered "if based on concrete information," and that "residents expressed more than a vague concern about future neighborhood problems"), *review denied* (Minn. Jan. 5, 1996). Similarly, in *Perschbacher*, this court concluded that the county board's decision to deny a livestock producer's CUP for a large swine barn was not arbitrary and capricious where neighbors spoke of their "actual" experiences living near existing livestock operations and their inability to enjoy the outdoors at certain times of the day or when the wind is blowing in a certain direction. 883 N.W.2d at 644-45. Here, members of the pubic who testified had experience with stray voltage and knowledge of its impact on dairy farms.

Minnesota Solar argues that, despite any concerns about stray voltage, it "offered to adhere to a host of conditions in order to put stray-voltage-related concerns to rest." Indeed, the supreme court recently recognized that, "[i]f a conditional use permit applicant demonstrates to the governing body that imposing a reasonable condition would eliminate any conflict with the ordinance's standards and criteria, it follows that the governing body's subsequent denial would be arbitrary." *RDNT*, 861 N.W.2d at 78. But, despite Minnesota Solar's argument to the contrary, the record demonstrates that the board *did* adequately consider the conditions suggested by Minnesota Solar. The board considered Minnesota Solar's plan for a third-party system monitoring stray voltage and determined that the monitoring system was insufficient to quell the stray-voltage concerns. The board also considered the condition that $35,000 be placed in escrow in case stray voltage occurred, but determined that the amount was insufficient and that farmers would have problems

accessing that money if problems arose. Additionally, the board considered whether the $35,000 escrow account would be replenished if it were depleted. And the board determined that the conditions applicable to Minnesota Solar would not be applicable to Xcel Energy, which controlled the interconnection infrastructure. Therefore, the record demonstrates that the board had a reasonable basis to determine that Minnesota Solar's proposed conditions would not alleviate the stray-voltage concerns.

While our standard of review of a denial of a CUP is less deferential than that of a grant, *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 389 n.4 (Minn. 2003), appellate review is nevertheless "limited and deferential." *Perschbacher*, 883 N.W.2d at 644. We acknowledge that this is a very close case. Minnesota Solar candidly acknowledged the potential for stray voltage as a result of its operations, but tried to assure the board that the design, maintenance, and operation of its solar farm would prevent the occurrence of stray voltage and suggested a number of conditions to mitigate problems should stray voltage occur. But in the end, the board determined that the risk of stray voltage from the solar garden, when situated so close to dairy operations as here, did not satisfy the standards required for a CUP. Its findings were sufficiently supported by the record. Because a denial of a CUP is not arbitrary when at least one of the reasons given for the denial is valid, we need not address Minnesota Solar's additional legal and factual challenges to the board's decision. *See Trisko*, 566 N.W.2d at 352 (stating that a denial of a CUP is not arbitrary when at least one of the reasons given for the denial is valid).

B. Equal-protection guarantees

Next, we consider whether the board's decision was arbitrary and capricious because it violated Minnesota Solar's right to equal protection. The United States and the Minnesota Constitutions guarantee citizens equal protection of the laws. U.S. Const. amend. XIV, § 1; Minn. Const. art. I, § 2. "Disparate treatment of two similarly-situated property owners may be an indication that the local government is acting unreasonably or arbitrarily." *Billy Graham Evangelistic Ass'n v. City of Minneapolis*, 667 N.W.2d 117, 126 (Minn. 2003). We review an equal-protection claim de novo. *Thul v. State*, 657 N.W.2d 611, 616 (Minn. App. 2003), *review denied* (Minn. May 28, 2003).

An equal-protection challenge requires an initial showing that "similarly situated persons have been treated differently." *State v. Cox*, 798 N.W.2d 517, 521 (Minn. 2011) (quotation omitted). In determining whether two groups are similarly situated, we focus on "whether they are alike in all relevant respects." *Id.* at 522. Appellate courts routinely reject equal-protection claims of parties who fail to establish that they are similarly situated to those from whom they contend to be treated differently. *See Schatz v. Interfaith Care Ctr.*, 811 N.W.2d 643, 656 (Minn. 2012). The burden is on Minnesota Solar to establish an equal-protection violation. *See Thul*, 657 N.W.2d at 616.

Relying heavily on the board's approval of a CUP application for a different solar garden (GreenMark CUP), Minnesota Solar argues that that the board violated its equal-protection rights by treating Minnesota Solar differently than other applicants. We acknowledge that we can take judicial notice of the GreenMark CUP public records that Minnesota Solar filed in this court. *See Eagan Econ. Dev. Auth. v. U-Haul Co. of Minn.*,

787 N.W.2d 523, 530 (Minn. 2010) (stating that appellate court may take judicial notice of public records even if they were not presented in district court because appellate courts "have the inherent power to look beyond the record where the orderly administration of justice commends it") (quotation omitted).

Public records indicate that the board granted the GreenMark CUP application for a solar garden despite the stray-voltage concerns of a dairy farmer whose farm was located "across from the site." But the relative distance between the dairy farm and the proposed GreenMark CUP site is unclear when compared to the distance between the farms and the proposed site in this case. Moreover, the number of dairy farmers expressing concerns about stray voltage appears to be higher in this case than in the GreenMark CUP. And the record is unclear whether the conditions imposed in the GreenMark CUP for alleviating concerns about stray voltage are similar to the conditions proposed in this case, as Minnesota Solar did not provide us the final decision by the board in the GreenMark case. In addition, Minnesota Solar's claim that it is similarly situated to successful CUP applicants in another solar-garden appeal currently pending before this court is unpersuasive because not only was stray voltage not one of the primary concerns raised in that case, but the farmer that did raise the stray-voltage concern owned an equestrian farm. Minnesota Solar has not established that the effects of stray voltage on an equestrian farm are similar to the effects associated with a dairy farm. Minnesota Solar thus fails to establish that it is alike in all relevant respects to the other cases. It is therefore unable to establish that its equal protection rights were violated.

II. We do not give an advisory opinion on the question of "ex parte communications."

Finally, Minnesota Solar urges us to rule on the propriety of "ex parte communications" in quasi-judicial proceedings, arguing that the issue is capable of repetition yet evading review. "The mootness doctrine demands appellate courts hear only live controversies, and they may not issue advisory opinions." *Farm Bureau Mut. Ins. Co. v. Schwan*, 687 N.W.2d 388, 391 (Minn. App. 2004). Generally, we will dismiss a case that is moot. *Limmer v. Swanson*, 806 N.W.2d 838, 839 (Minn. 2011). A reviewing court will not, however, dismiss an issue as moot if it is capable of repetition and likely to evade review. *Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005).

Minnesota Solar contends that this court's special term order deferred a question regarding the scope of the board's obligation in compiling and submitting the record, which "effectively rendered the issue moot" because, "to the extent any improper ex parte communications about its application did occur, a decision about . . . their relationship to the record on appeal *after* briefing and argument are complete means that neither the parties nor the Court will have the ability to consider and address their implications for the case." But Minnesota Solar misconstrues our special term order because the order did not "defer" the issue. With respect to Minnesota Solar's contention that board members engaged in improper ex parte communications regarding the CUP application, we determined that Minnesota Solar's "assertion may apply to the merits of the appeal, but [it] does not inform our analysis of the proper scope of the record." Our order stated that Minnesota Solar "is not precluded from bringing a motion to supplement the record in the event that it identifies

specific documents that were submitted to or considered by the board and have been omitted from [the board's] itemized list of the contents of the record."

After the special term order was filed, Minnesota Solar did not bring a motion to supplement the record or otherwise identify documents not contained in the record on appeal that were submitted to or considered by the board. As a result, the issue is moot. And we are not persuaded that the question is capable of repetition yet likely to evade review. If Minnesota Solar had identified specific documents that were considered by the board but are not contained in the record, it could have moved to supplement the record. Based on a supplemented record, Minnesota Solar could have argued that such communication was improper and rendered the board's decision unreasonable, arbitrary, or capricious. Such a motion could also be brought in another case if documents supporting a claim of improper communication were identified or produced. Therefore, we need not issue an advisory opinion on the propriety of "ex parte communications" in quasi-judicial proceedings.

Affirmed.