STATE OF MINNESOTA
IN COURT OF APPEALS
A18-0111

In re An Order Finding Certain Facts and
Ordering the Denial of a Conditional Use Permit
United States Solar Corporation, et al.,
Relators,

vs.

Carver County Board of Commissioners,
Respondent.

Filed December 24, 2018
Reversed and remanded
Reyes, Judge

Carver County Board of Commissioners
File No. PZ20170032

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Considered and decided by Florey, Presiding Judge; Ross, Judge; and Reyes, Judge.

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

REYES, Judge

Relators United States Solar Corporation and USS Westeros Solar LLC challenge the denial by respondent Carver County Board of Commissioners (the county) of their conditional-use-permit (CUP) application, arguing that the decision was arbitrary,

capricious, and unreasonable. Relators assert that (1) the reasons cited for denial were not supported by evidence in the record and (2) the decision to deny the CUP violated their equal-protection rights. Because the county's decision lacked factual support in the record, it was unreasonable, arbitrary, and capricious. We reverse and remand.

FACTS

In July 2017, relators submitted an application for a CUP to construct and operate a one-megawatt large solar energy system (solar garden) on eight to nine acres of land in San Francisco Township, Carver County. The application came before the Carver County Planning Commission (the commission) during a public meeting on September 19, 2017. At the hearing, the commission heard testimony from relators as well as members of the public who might be affected by the proposed solar garden. Several members of the public voiced their opposition to the project for various reasons, including the negative impact it would have on the natural beauty of the area and the proximity of the proposed solar panels to a dairy farm. At the end of the hearing, one of the commissioners moved to deny the request for a CUP "based on the proximity of the personal residence being 200 feet or less away and the dairy operation that's in the vicinity." The commission then voted unanimously to deny relators' application request.

Following the commission's recommendation, relators' application came before the county at public meetings on December 12, 2017 and January 2, 2018. The county heard testimony and received materials from relators, who modified the project design to address some of the issues that were raised at the commission hearing. The county also heard testimony from members of the public, who again expressed various concerns about the

project, including the effects stray voltage from the solar garden could have on the neighboring dairy farm.

At the end of the meeting on January 2, 2018, the county voted three to two to deny relators' CUP application. The county then issued its findings and order supporting the decision. The county explained that an order for the issuance of a CUP must satisfy the ten conditions set forth in Carver County, Minn., Code of Ordinances (CCO) § 152.251 (2016). In its findings, the county held that four out of the ten ordinance conditions were not satisfied by relators' application.

By writ of certiorari, relators appeal the county's decision.

D E C I S I O N

I. Standard of Review

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 (2018). 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 (2018).

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). 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). 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 judgment, 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). A CUP denial is arbitrary when an applicant shows that all the zoning-ordinance standards required for a permit are met. *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003).

"The permit applicant has the burden of persuading this court that the reasons for the denial either are legally insufficient or had no factual basis in the record." *Id*. Relators face a lighter burden with a CUP denial than if they were challenging a CUP approval. *Id*; *see also Schwardt*, 656 N.W.2d 383, 386 n.4 (Minn. 2003) (stating CUP denials are held to less deferential standard of review than CUP approvals).

II. The county's decision to deny relators' request for a CUP lacked factual support in the record.

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*, 861 N.W.2d at 75-76.

A. Legally sufficient reasons

In denying relators' CUP application, the county determined that Carver County Ordinance § 152.251 subparts (B) and (I) were not satisfied due to the potential for stray voltage. These subparts require that:

> (B) The conditional or interim use will not be injurious to the use and enjoyment of other property in the immediate vicinity for purposes already permitted.
>
> . . . .
>
> (I) The use or development is compatible with the land uses in the neighborhood.

CCO § 152.251(B) and (I).

The Minnesota 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). Here, the legal basis for the county's decision resides in the ten conditions set out in the ordinance. Because subparts (B) and (I) reasonably related to the health, safety, and general welfare of the community, the county had a legally sufficient basis for its decision.

B. Factual basis

Relators argue that the county's decision was unreasonable, arbitrary, and capricious because the five grounds stated as the basis for denying the CUP lacked factual support in the record. We agree.

These five grounds included: (1) stray voltage; (2) inadequate screening; (3) decreased property values; (4) inconsistencies with the township chapter of the comprehensive plan; and (5) traffic.

The county conceded at oral argument, and we agree, that besides stray voltage, the other four grounds lacked the factual basis necessary to support the county's denial of the

CUP. The main issue on appeal therefore, is whether adequate factual support exists in the record for the county to find stray voltage as the reason for holding the ordinance subparts (B) and (I) unmet, and we need not address the other bases for the county's decision.

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 animals," including dairy cows, because:

> A cow's hooves provide an excellent contact to the earth while standing on wet concrete or mud, while at the same time the cow is contacting the grounded-neutral system consisting of items such as metal stanchions, stalls, feeders, milkers, and waterers. The current simply uses the cow as a pathway in its eventual return to the substation.

Poppler v. Wright Hennepin Co-op Elec. Ass'n, 834 N.W.2d 527, 534 (Minn. App. 2013) (quotation omitted), *aff'd*, 845 N.W.2d 168 (Minn. 2014).

The county found that "based on *concerns* regarding the *potential* for stray voltage, the proposed use would not be compatible with the adjacent dairy operations." (emphasis added). It also found that "the applicant 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." The county therefore held that "[b]ased on public testimony, the request may be injurious to the use and enjoyment of other properties in the immediate vicinity for purposes already permitted, including animal agriculture (feedlots), residences, and farms."

The county points to eight items in the record that it alleges supports its stray-voltage findings:[1] (1) the *Minnesota Solar* case; (2) the Westwood expert letter; (3) the Westwood expert opinion; (4) the Westwood expert testimony; (5) an Xcel Energy letter; (6) Schmidt's testimony; (7) the Minnesota Stray Voltage Guide and; (8) the commissioner's experience.[2] Each of these items are addressed in turn.

1. The *Minnesota Solar* case

The county relies heavily on a previous case, *Minnesota Solar, LLC v. Carver Cty. Bd. of Comm'rs*, in which this court affirmed the county's denial of a solar garden CUP. No. A17-0504, 2017 WL 6418179, at *1 (Minn. App. Dec. 18, 2017). As an unpublished decision, this case is not precedential and has no binding effect on this court. Furthermore, that case was factually different from this one in several key respects. Significantly, in that case, the electrical interconnection infrastructure for that proposed solar garden would be *adjacent* to a dairy farm. *Id*. at *3. Here, the nearest dairy operation is over a mile away from, not adjacent to, the point of interconnection of the proposed solar garden. The *Minnesota Solar* case does not support the county's decision to deny this CUP based on concerns over stray voltage.

[1] The county alleged these items at oral argument. While not explicitly structured in its brief in this way, the county nevertheless addressed these eight items, and we will therefore consider them.

[2] At oral argument, the county raised a ninth item that it alleged supported its decision: statements made in relators' brief. However, that argument will not be considered for two reasons: (1) it was not raised in the county's brief to this court and is therefore forfeited and (2) the brief was not a part of the record before the county when it considered the CUP application.

2. Westwood expert letter

The county argues that a letter containing an expert opinion provided to the county by Douglas Mutcher, an electrical engineering manager at Westwood Professional Services (Westwood), supports its findings concerning stray voltage. Relators hired Westwood to provide an expert opinion regarding the proposed solar garden and the possibility of stray voltage. In the letter, Mutcher concludes that "it is the firm opinion of Westwood Professional Services that any concerns associating solar [photovoltaic] PV plants with increased risk of stray voltage are baseless."

This letter directly contradicts the county's findings that stray voltage would be injurious to neighboring properties. The county argues that, because this letter is identical to a letter written by Westwood in *Minnesota Solar*, this court should accept the county's findings as it did in that case. But *Minnesota Solar* is a different case. In addition, the letter submitted in that case is not a part of this record. The Westwood letter that is part of the record before the county in this case clearly states that a solar garden does not increase any risk of stray voltage. The letter does not support the county's decision to deny the CUP because of stray voltage.

3. Westwood expert opinion

The county further argues that the Westwood engineer's expert opinion supports its decision because the engineer admits that it is theoretically possible for the solar garden to cause stray voltage because a neutral to earth voltage (NEV) "can exist to some degree near any utility circuit."

However, there is nothing in the expert opinion that suggests that anything specific to solar gardens poses an increased risk of stray voltage. In fact, the expert explains that "the contribution of a properly designed and constructed solar PV plan to instances of NEV in normal operation is inherently almost non-existent" and that a different type of facility, such as a barn or residential development would "be more likely to have the potential to create stray voltage than a solar PV plant, given that they are more prone to exhibiting many of the common causes of stray voltage such as unbalanced or single phase loads, while often lacking the same attention to maintenance." The Westwood engineer's expert opinion does not support the county's decision.

4. Westwood testimony

The county argues that the testimony of the Westwood professional engineer in *Minnesota Solar* also supports the board's findings. However, no Westwood engineer testified in any of the hearings in this case. The testimony heard in *Minnesota Solar* is not a part of this record, and therefore cannot support the county's findings concerning stray voltage.

5. Xcel Energy letter

The county also points to a letter from Xcel Energy concerning the potential for stray voltage as evidence supporting the county's findings. But again, that letter was part of the record in *Minnesota Solar*. It is not a part of the record here. This letter therefore does not support the county's findings.

6. Schmidt testimony

The county argues that the testimony of Kellen Schmidt supports its denial of the CUP because of stray-voltage concerns. At the commission hearing on September 19, 2017, Schmidt testified that, as a lineman, he had experience working on solar projects similar to this one. He testified that the companies who build these solar gardens want their bids to come in "cheap and under budget," and therefore may use cheap parts. Schmidt testified that he was concerned about this project because he did not know how these cheap parts may affect "stray voltage issues."

In *Trisko v. City of Waite Park*, this court determined that, in denying a request for a CUP to operate a granite quarry, a city council had "improperly discounted" expert evidence that the quarry would not produce dust that posed a health risk "in favor of neighbors' unsubstantiated concerns" that the quarry would produce harmful dust. 566 N.W.2d 349, 356 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997). We stated that, "because the neighbors based their fears of an expected increase in respiratory problems on unscientific speculation, not medical fact, the city acted arbitrarily by ignoring [the CUP applicant's] expert evidence."

Similarly here, Schmidt's testimony is based on mere speculation that relators *may* use cheap parts based on his past experience on similar projects. Schmidt did not testify about any actual firsthand knowledge of relators using cheap parts to manufacture the proposed solar garden, nor did he provide any facts to support his claim. And importantly, Schmidt did not state that cheap parts would lead to stray voltage, he just testified that "we don't know."

Relators, in contrast, provided an expert opinion from an engineer who explained that solar gardens do not increase the risk of stray voltage. Relators also agreed to the condition that if any stray voltage did occur as a result of some sort of manufacturing defect, they would be responsible for remediating it. Schmidt's testimony, which is unsupported speculation that is directly contradicted by expert evidence, does not support the county's findings.

7. Minnesota Stray Voltage Guide

The county also considered the Minnesota Stray Voltage Guide (the guide) when making its decision, and the county argues that it supports its findings that stray voltage from the proposed solar garden could negatively impact the local dairy farm. This is not persuasive for three reasons: (1) this is a general guide about stray voltage; (2) it says nothing about stray voltage with respect to solar gardens and; (3) it says nothing specific about stray voltage with regards to *this* solar garden.

First, the guide was created as a reference tool for farmers and electrical contractors that outlines steps they can take to discover and resolve stray-voltage concerns on livestock farms. The guide lists common causes of stray voltage, which can be on or off-farm, and include "damaged neutral conductors or conductor insulation," "improper grounding and bonding of electrical systems and equipment," and "unintentional ground fault connections at neighboring properties." The common causes of stray voltage, as outlined by the guide, are focused on damaged conductors or equipment that is not functioning properly. Relying on this guide could therefore be used to deny any solar garden CUP application.

Second, the guide does not reference solar gardens at all, and makes it clear that stray voltage can occur from a variety of sources, usually relating to old wiring or improper grounding. This is corroborated by the Westwood engineer's expert opinion in this case, which explained that, because solar plants have protection systems in place to "isolate faults within the facility and contribute balanced three-phase power to the grid, they do not exacerbate any of these risk factors for stray voltage."

Third, the guide does not address the specific solar garden at issue in this case. In its order, the county only references the guide to state that relators' proposed plan included tests to "verify whether or not stray voltage is occurring according to the threshold defined by the *MN Stray Voltage Guide*." The guide provides a standard for how to look out for stray voltage. But in its own order, the county apparently acknowledged that relators were doing everything right to make sure that stray voltage did not become a problem, in accordance with the guide's standards. The guide therefore does not provide a factual basis for the county, specific to relators' proposed solar garden, to deny the CUP based on concerns over stray voltage impacting the dairy operation.

8. Commissioners' experience

The county argues that the commissioners who served on the board in this case used their past knowledge and experience learned in the *Minnesota Solar* case as a basis for their decision here. As stated before, that case is not precedential and has no binding effect on this court. However, the county argues that, because this board was made up of the same people who served on the Minnesota Solar application, the board relied on "its collective

knowledge and past experience in considering and ruling on Minnesota Solar's CUP application as a basis for its decision in this case."

Minnesota courts have accepted reliance on collective knowledge and past experience in different contexts. *See, e.g.*, *Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006) (affirming decision "based on the collective knowledge and experience of the county road superintendents"); *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 660 (Minn. 2004) (affirming school's reliance on "collective expertise and professional judgment to make discretionary operational decisions"); *Commc'ns. Props., Inc. v. County of Steele*, 506 N.W.2d 670, 672 (Minn. App. 1993) (noting "city officials may rely on their general knowledge").

Even if this principle applies to a county's denial of a CUP, there still needs to be factual evidence in the record that the commissioners relied on this past experience. The county provided none. The county's position is purely speculative, arguing that the record "suggests" the commissioners relied on their past experience. However the record is devoid of any evidence that demonstrates that the commissioners actually relied on their past knowledge and experience in making their decision in this case. The record fails to support this argument.

In sum, none of the eight items provide support for the county's findings or decision to deny the CUP. Instead, the record is comprised of facts that contradict the county's findings. The Westwood engineer explained that any concerns about the relationship between stray voltage and a solar plant are "baseless." Public testimony revealed that neighbors, including one dairy farmer, are "concerned" about the potential for stray

voltage. However no testimony went beyond unsubstantiated concerns. The one dairy farmer who testified stated that his concern was about who would be testing for stray voltage, not that it could occur in the first place. Relators addressed these concerns from neighbors by agreeing to a plan having permit conditions requiring them to test for stray voltage and holding them responsible for any damages related to stray voltage.

In making its decision, a board may not "reject expert testimony without adequate supporting reasons." *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. App. 1995), *review denied* (Minn. Jan. 5, 1996). "Non-experts can supply adequate reasons to counter or reject expert opinions, but those reasons must be concrete and based on observations, not merely on fears or speculation." *BECA of Alexandria, L.L.P. v. Cty. of Douglas by Bd. of Comm'rs*, 607 N.W.2d 459, 463 (Minn. App. 2000).

Here, the county based its findings on public testimony, ignoring scientific evidence that solar gardens do not increase the risk for stray voltage. That public testimony was comprised only of vague concerns about the potential for stray voltage rather than reasoning based on fact or experience. Because the county improperly discounted expert evidence in favor of generalized public concern, it lacked factual support for its decision, and we therefore conclude that the county acted arbitrarily and capriciously. Because of that conclusion, we need not address relators' equal-protection claims.

We reverse the county's decision and remand with directions that the county issue the CUP subject to reasonable conditions.

Reversed and remanded.