STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1824

In the Matter of the Application of Tillman Infrastructure LLC,
Norman Westerlund, and Laurie Westerlund
for a Conditional Use Permit.

Filed August 3, 2020
Reversed
Connolly, Judge

Aitkin County Planning Commission
File No. 2019-005021

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Considered and decided by Connolly, Presiding Judge; Segal, Chief Judge; and Kirk, Judge.*

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

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

CONNOLLY, Judge

In this certiorari appeal, relator challenges a decision of respondent Aitkin County Planning Commission (the planning commission) granting a conditional-use permit (CUP) to construct a telecommunications tower. Because the planning commission's decision was arbitrary and capricious by failing to consider or apply section 7(B)(4) of the Aitkin County Tower Ordinance (the tower ordinance), we reverse.

FACTS

In August 2019, a CUP application was filed with the planning commission on behalf of respondent Tillman Infrastructure, LLC (Tillman) for approval to construct a 260-foot telecommunications tower (the Tillman tower) on respondents Norman and Laurie Westerlund's property. The Westerlunds own real property near 310th Avenue in Aitkin County zoned for farm-residential use. Relator SBA Towers VII, LLC owns another telecommunications tower (the SBA tower) located a half-mile from the proposed location for the Tillman tower.

Once the CUP application was received, Aitkin County staff reviewed it. After review, the county scheduled a hearing on the application at the planning commission's September 16, 2019 meeting. But the planning commission failed to secure a quorum at this meeting, and so it rescheduled the hearing to October 21 after obtaining the Westerlunds' agreement to extend the statutorily mandated 60-day decision deadline.

During the CUP application process, Verizon Wireless (Verizon) sent two letters to the planning commission expressing its support for the Tillman tower. In the first letter,

Verizon explained that it was a current tenant on the SBA tower, but wanted to relocate its equipment to the Tillman tower for economic reasons. As justification for this proposed switch, Verizon explained that relator's monthly fees were between 30% and 40% higher than Tillman's monthly rates. In the second letter, a Verizon engineer requested that the proposed tower have an antenna height of 250 feet above ground.

At the October 21 planning commission hearing, Tillman's representative asked the planning commission to approve the CUP, citing Verizon's first letter to assert that it was not economically feasible for Verizon to remain on the SBA tower. A representative appeared for relator at this hearing and opposed granting the CUP. This representative also expressed relator's willingness to negotiate rates with Verizon.

After hearing these comments and discussing the matter, the three planning commission members unanimously approved the CUP application. The planning commission's approval required that the CUP "comply with all local, state and federal regulations" and "be painted red and white with [a] slow pulsing red light at night."

This certiorari appeal follows.

D E C I S I O N

Minnesota law authorizes counties to carry out planning and zoning activities to promote the health, safety, morals, and general welfare of the community. Minn. Stat. § 394.21, subd. 1 (2018). A CUP is a zoning tool that 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 board's ruling on a CUP application constitutes a quasi-judicial decision, reviewable through writ of certiorari. *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 & n.5 (Minn. 2000). When an appellate court reviews a quasi-judicial decision, separation of powers principles impose a deferential standard of review. *Big Lake Ass'n v. St. Louis Cty. Planning Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009). And when, as here, we review a zoning authority's grant of a CUP, we apply a more deferential standard of review. *Id.*; *see also Schwardt v. County of Watonwan*, 656 N.W.2d 383, 389 n.4 (Minn. 2003) (noting that the supreme court has usually applied a more deferential standard of review to CUP approvals). Yet we do not give boundless deference to county zoning authorities. Instead, we will reverse a governing body's decision if it acted unreasonably or arbitrarily and capriciously when considering a CUP application. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015); *cf. Builders Ass'n of Twin Cities v. Minn. Dep't of Labor & Indus.*, 872 N.W.2d 263, 270 (Minn. App. 2015) (declaring agency's rule invalid under the arbitrary-and-capricious standard when the record contained "no reasoned determination of how [the agency] arrived at the [exception to the rule]"), *review denied* (Minn. Dec. 29, 2015).

"For a challenge to a CUP to succeed, there must be a showing that the proposal did not meet one of the standards set out in the [o]rdinance and that the grant of the CUP was an abuse of discretion." *In re Block*, 727 N.W.2d 166, 177-78 (Minn. App. 2007) (quotation omitted). To make this determination, appellate courts first consider whether the zoning authority provided legally sufficient reasons to support its decision. *RDNT, LLC*, 861 N.W.2d at 75-76. Courts use statutory-interpretation principles when

interpreting zoning ordinances. *Eagle Lake of Becker Cty. Lake Ass'n v. Becker Cty. Bd. of Comm'rs*, 738 N.W.2d 788, 792 (Minn. App. 2007).

The parties dispute the planning commission's application of the tower ordinance, which aims to protect Aitkin County's "unique and diverse landscapes" by establishing standards for the design and location of tower facilities. Aitkin County, Minn., Tower Ordinance § 1 (2002). These standards seek to "[e]ncourage the use of existing towers and buildings to accommodate commercial wireless telecommunication service antennas in order to minimize the number of towers needed to serve the county." *Id.* § 1(D). And the tower ordinance contains additional factors beyond those in the Aitkin County Zoning Ordinance that the planning commission "shall consider" when evaluating a CUP application. *Id.* § 13(a)-(j) (2002).

Section 7, titled "Co-Location Requirements,"[1] lists five mandatory requirements for tower facilities located or constructed in Aitkin County. *Id.* § 7(A)-(E) (2002).[2] This section requires "[d]ocumentation that the communications equipment planned for the proposed tower cannot be accommodated on an existing or approved tower or building within the search ring of the service area due to one or more of the following reasons[.]" *Id.* § 7(B). Before the planning commission, Tillman relied on the following language to assert that it had satisfied this requirement: "Other unforeseen reasons that make it

[1] The tower ordinance defines "co-location" as "[t]he placement of wireless telecommunication antenna by two or more service providers on a tower, building or structure." Aitkin County, Minn., Tower Ordinance § 3 (2002).

[2] Section 7 applies to the Tillman tower because its proposed location is within two miles of the SBA tower.

infeasible to locate the planned telecommunications equipment upon an existing or approved tower or building." *Id.* § 7(B)(4).[3]

Here, the record includes a checklist listing the planning commission's findings and a transcript of the planning commission's hearing on the CUP application. But the record contains no finding that the CUP application has satisfied the tower ordinance's co-location requirement. The planning commission argues that because it checked a box stating that "[the] other applicable requirements of this ordinance, or other ordinances of the County have been met," it implicitly decided that the requirements of section 7(B)(4) were met. We reject this argument.

The planning commission never specifically referenced the tower ordinance during the hearing, let alone indicated what subsection of section 7(B) allowed approval of the Tillman tower. Nor did it discuss why it believed the higher rates and fees constituted an "unforeseen reason" that made co-location on the SBA tower "infeasible." At one point, a member of the planning commission stated:

> So if – if some rare – you know, they come to some condition, then maybe the [Tillman] tower wouldn't be built, but if – and if there ain't, then maybe they'll go ahead and build, you know. I mean, *I have no idea what the rates are, if they're $5 or 5,000 a month*.

(Emphasis added.)

This reflects that the planning commission did not even know what the rental rates were, let alone determine that they were unforeseen rendering co-location infeasible.

[3] No other reason is applicable.

Therefore, the planning commission acted in an arbitrary and capricious manner when it granted the CUP.

In urging a different result, respondents cite the supreme court's decision in *Schwardt*, which affirmed a zoning authority's use of a checklist as "a sufficient expression of the board's conclusion that the conditions for approval have been met." 656 N.W.2d at 389. But *Schwardt* does not hold that the use of a checklist will always compel a conclusion that the zoning authority has not acted unreasonably or arbitrarily and capriciously. Here, the planning commission never found that the CUP satisfied section 7(B)(4), a prerequisite for proposed tower facilities in Aitkin County that have another tower within their search ring, and we cannot make this finding for the planning commission. *See Wright Elec., Inc. v. Ouellette*, 686 N.W.2d 313, 324 (Minn. App. 2004) (stating that "this court cannot serve as the fact-finder" (citing *Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966))), *review denied* (Minn. Dec. 14, 2004).

Reversed.