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**STATE OF MINNESOTA
IN COURT OF APPEALS
A20-0449**

Knife River Corporation-North Central,
Appellant,

vs.

Whited Township,
Respondent.

**Filed December 28, 2020
Affirmed
Jesson, Judge**

Kanabec County District Court
File No. 33-CV-19-182

Rob A. Stefonowicz, Bryan J. Huntington, Larkin Hoffman Daly & Lindgren Ltd.,
Minneapolis, Minnesota (for appellant)

Jason J. Kuboushek, Iverson Reuvers Condon, Bloomington, Minnesota (for respondent)

Considered and decided by Jesson, Presiding Judge; Larkin, Judge; and
Reilly, Judge.

UNPUBLISHED OPINION

JESSON, Judge

Appellant Knife River Corporation applied for a conditional use permit to mine within respondent Whited Township's limits. After the Township Board met to discuss the permit and hear from the public, the Board denied the permit. Knife River argues that the Board failed to follow adequate procedures, resulting in the permit being approved as

a matter of law. By notice of related appeal, the Township challenges the district court’s determination that Knife River’s permit application was a “request,” triggering the 60-day deadline under Minnesota Statute section 15.99 (2018). Because the application was subject to the 60-day rule, but the Board followed the proper statutory and local requirements in processing and issuing a decision on the permit, we affirm.

FACTS

On October 22, 2018, Knife River Corporation–North Central submitted a letter requesting a conditional use permit to mine within Whited Township. The Township received the letter, scheduled a public hearing, and published notice of the hearing. But in the process, the Township misidentified the application for a conditional use permit as an application for an “Interim Use Permit.”¹

The Township Board convened on December 6, 2018, to discuss Knife River’s “Interim Use Permit.”² At the meeting, the Board heard from residents and a representative from Knife River. Residents expressed several concerns about the proposed project, including the hours of operation, truck and machinery traffic, noise produced by machinery, environmental effects, and the impact on home values. Some residents with children living along the road were concerned by the potential safety hazard of additional truck traffic. Residents also described their prior experiences with Knife River, explaining that while working on an earlier project on the same property, Knife River “tore up” the

¹ The Township does not issue interim use permits, only conditional use permits.

² The Board does not record its meetings, so we rely on the meeting minutes as a record of what occurred.

road and failed to repair it. When the Board invited Knife River's representative to respond to the residents' concerns, he was unable to provide concrete information about the number of trucks that would use the road, the environmental impact of the project, or the timeline for restoration.

After listening to residents and Knife River's representative, the Board looked to three sections of the Whited Township Zoning Ordinance for further guidance on the Township's policies regarding conditional use permits. Section 12, subdivision 1(E)(1) directs the Board to consider potential adverse effects of a proposed project, including whether the project will place excessive demands on existing public services or cause traffic hazards and congestions. Whited Township, Minn., Zoning Ordinance (WZO) § 12, subd. 1(E)(1) (1990). Section 12, subdivision 2(f) and (g) instructs the Board to evaluate the project in terms of road use and maintenance. WZO § 12, subd. 2(f), (g) (1990). Finally, section 9, subdivision 10 asks the Board to address whether the project would constitute a nuisance to the public health, safety, or welfare of the Township and its residents. WZO § 9, subd. 10 (1990).

Upon considering the relevant sections of the zoning ordinance and after hearing from residents and Knife River's representative, all Board members voted to deny the permit on December 6, 2018.

Three months later, Knife River demanded the Township issue the requested conditional use permit. According to Knife River, the Township was required to act on its initial request within 60 days—by December 21, 2018. Minn. Stat. § 15.99, subd. 2(a). Knife River asserted that because the Board voted on an “Interim Use Permit,” it did not

deliver a decision on the conditional use permit within the 60-day period. And if the Board's denial was timely, Knife River argued, the denial was improper because it was neither accompanied by a written explanation for denial nor properly submitted to the planning commission before being considered by the Board.³ These procedural failures, Knife River contends, meant the application was approved by operation of law on December 21, 2018.

In response, the Township adopted Resolution 562. The resolution detailed the conclusions of law made by the Board in denying the request, stating that the project was "not in harmony with the purposes and intent" of the zoning ordinance. Knife River was unsatisfied with this response and filed a complaint with the district court, requesting that the court order the Township to issue the conditional use permit and declare that the denial was arbitrary and capricious. Both parties filed motions for summary judgment.

The district court granted the Township's motion and denied Knife River's motion for summary judgment.

Both parties appeal.

D E C I S I O N

Knife River argues that the district court erred in granting the Township's motion for summary judgment for three reasons. First, the Board failed to follow the statutory and local procedural requirements for processing conditional use permit applications. Knife

³ The zoning ordinance requires permit requests to be sent to the Town Planning Commission before being considered by the Board. WZO § 12, subd. 1. But in 1989, the Township voted to combine the Town Planning Commission with the Township Board, so the Board may act in both capacities when considering zoning requests.

River asserts that it submitted a proper request under the statute, but the Board failed to issue a valid decision on the application within 60 days. Second, even if the Board's denial was valid under the 60-day rule, the decision was arbitrary and capricious. Finally, Knife River contends that its due-process rights were violated because the Board failed to follow proper procedure. In its notice of related appeal, the Township challenges the district court's determination that Knife River's application was a request, triggering the 60-day deadline under Minnesota Statute section 15.99.

We review the grant of summary judgment de novo. *Montemayor v. Sebright Prods., Inc.*, 898 N.W.2d 623, 628 (Minn. 2017). In conducting our review, we look to whether any genuine issues of material fact exist and whether the district court erred in applying the law. *Id.* When "reasonable persons might draw different conclusions from the evidence presented," there is a genuine issue of material fact. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 66 (Minn. 1997). We address each of the parties' arguments in turn.

I. The Board followed proper procedure when it denied Knife River's permit.

To determine whether the Board followed the proper procedural requirements we look to Minnesota Statute section 15.99. Under the statute, the Board must either approve or deny written requests relating to zoning within 60 days of receiving the request. Minn. Stat. § 15.99, subd. 2(a). But as an initial matter, we must first address the Township's argument that Knife River's application was not a "request" that triggered the 60-day rule. Because we conclude Knife River did make a valid request within the meaning of the statute, we then turn to whether the Board followed the procedural requirements of section 15.99 and the zoning ordinance when it processed Knife River's request.

Knife River's Request for a Conditional Use Permit

To properly submit a zoning request, applicants must complete a written application. *Id.*, subd. 1(c). If a township has its own application form, the request must be submitted on that form. *Id.* The Township has an official application form. WZO § 12, subd. 1(A). Requests that are not in compliance with these requirements are not considered properly made, and the 60-day rule does not apply.⁴ *Id.*

Here, it is undisputed that Knife River did not complete the Township's application form. Instead, Knife River sent a letter that included "information for a Whited Township Conditional Use Permit." The letter provided details about the proposed use of the land, the site plan, end use plan, and maps of the parcel. The Township argues that the request was incomplete and the 60-day rule did not apply.

While we defer to local zoning authorities' decisions on conditional use permits, on appeal we will not consider issues that were not raised at the December Board meeting. *Big Lake Ass'n v. St. Louis County*, 761 N.W.2d 487, 491 (Minn. 2009) ("To allow parties to litigate an issue on review that was not raised before the local zoning authority would encroach on the county's broad authority in making quasi-judicial decisions."). The issue does not need to be raised formally, but "there must be sufficient specificity to provide fair notice of the nature of the challenge" so that concerned parties have an opportunity to address the issue. *Id.*

⁴ The 60-day period will restart *only* if the local zoning authority sends the applicant written notice of the deficiencies within 15 days of receiving the request. Minn. Stat. § 15.99, subd. 3(a).

Here, the Board gave no notice that it considered Knife River’s application incomplete until after it had issued its denial. The issue was not “fairly raised for consideration” at the December meeting, so Knife River did not have the opportunity to address whether its application was properly completed. *Id.* Thus, by accepting Knife River’s application and failing to notify Knife River of deficiencies within 15 days, the Township waived its argument that the request was incomplete.⁵ *See also N. States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925 (Minn. App. 2002) (stating that the agency, not the applicant, has the burden to act within the statutory deadline when it has received and is processing a request).

In sum, the Township waived its argument that the request was incomplete when it failed to notify Knife River of deficiencies in its application within 15 days of receiving the request. Accordingly, the 60-day rule applied.

Procedural Requirements of the 60-day Rule

When the Township received Knife River’s permit request on October 22, 2018, it had 60 days to deliver its decision. Minn. Stat. § 15.99, subd. 2(a). Knife River argues that because the Township violated the procedural requirements of section 15.99 when it issued a decision on an interim use permit—as opposed to a conditional use permit—its request was approved as a matter of law on December 21, 2018.

⁵ We further note that although the Board “may reject as incomplete” requests not submitted on the Township’s official form, it may only do so if the request “does not include information required by the agency.” Minn. Stat. § 15.99, subd. 1(c). Knife River’s application included all of the information required by the zoning ordinance. WZO § 9, subd. 4(A) (1990). And if the Board believed the request was incomplete, it had 15 days to notify Knife River of its deficiencies. Minn. Stat. § 15.99, subd. 3(a). It did not do so.

Our review of the record reflects that the Board’s denial was valid. When the Board denied Knife River’s request, voting against the permit, it made a decision within the 60-day period. The minutes show that, despite misidentifying the request, the Board considered the request as one for a conditional use permit. While discussing the request, the Board only referred to sections of the zoning ordinance *related to conditional use permits*. In fact, the zoning ordinance does not recognize interim use permits, only conditional use permits.

Furthermore, Knife River knew of the misidentification of their application, both before and during the meeting, and did not correct the mistake. If it had raised the nomenclature issue the Board could have corrected the mistake. Because Knife River neglected to do so, the argument was waived. *Big Lake Ass’n*, 761 N.W.2d at 491–92. As a result, the Board’s denial of the interim use permit request on December 6, 2018, was a valid, timely denial of Knife River’s conditional use permit request.

To attempt to persuade us otherwise, Knife River asserts that the Board failed to follow appropriate procedures by not issuing written reasons for its denial.⁶ Minn. Stat. § 15.99, subd. 2(a). But the written-reasons requirement in the governing statute is distinct from the default permit-approval clause. *Johnson v. Cook County*,

⁶ Knife River asserted at oral argument that the Board’s failure to issue findings of fact at the December meeting violated the zoning ordinance. But this argument was not adequately briefed by Knife River. *Schoepke v. Alexander Smith & Sons Carpet Co.*, 187 N.W.2d 133, 135 (Minn. 1971) (“An assignment of error based on mere assertion and not supported by any argument or authorities . . . will not be considered on appeal.”). Even if it had been properly raised, the meeting minutes act as the Board’s “findings of fact” and meet the procedural requirements of the zoning ordinance.

786 N.W.2d 291, 295-96 (Minn. 2010) (“[T]he time deadline requirement in the second sentence and the written-reasons requirement in the third sentence of subdivision 2 are separate requirements.”). Unlike the 60-day provision, the Board is *directed* to issue the reasons for its decision, but not *required* to do so. *Id.* at 296. And the failure to issue written reasons does not result in the automatic approval of the permit request.⁷ *Id.*

In sum, there are no genuine issues of material fact and no indication that the district court misapplied the law in addressing the Township’s argument about the validity of Knife River’s application. We conclude that the Township waived its argument that Knife River’s request was invalid. As such, the 60-day rule applied and the Board had until December 21, 2018, to issue a decision. Because the Board issued a timely denial, the permit was not approved as a matter of law.

II. The Board’s decision was not arbitrary or capricious.

While the Board’s decision was procedurally proper, we next turn to address the substantive decision itself. Knife River asserts that the Board’s denial of its request was arbitrary and capricious. While the Board was not required to issue written reasons for its decision, “when a zoning authority fails to record legally sufficient reasons for the denial of a zoning request that are factually supported in the record, a prima facie case of arbitrariness is established.” *Id.* To determine whether the Board’s denial was arbitrary and capricious, we review the meeting minutes for evidence that the Board’s decision was

⁷ For purposes of section 15.99, we need not reach the issue of whether the minutes are sufficient or whether Resolution 562 is adequate because of the directory language of the statute.

supported by the record. *C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981). And in reviewing the record we consider the information available to the Board at the December 6, 2018 meeting. *Big Lake Ass’n*, 761 N.W.2d at 491. At that meeting, the Board had before it the concerns raised by residents, information provided by Knife River’s representative, and Knife River’s written request. Thus, our review is confined to the information available in those sources.

Turning first to the residents, the minutes reflect that they expressed numerous concerns about the project, including the potential noise, increased truck traffic, damage to the existing road, and impact on home values. Residents also provided insight on their previous experiences with Knife River when the company worked on a different project on the same land. According to residents, Knife River “tore up” the access road, and—despite promising to do so—failed to restore the road once the project was complete. These concrete examples of residents’ previous experience with Knife River and their first-hand knowledge of the area are an appropriate basis for the Board’s denial. They are far from “vague reservations” about the project generally. *Compare C.R. Invs.*, 304 N.W.2d at 325 (explaining that the council could not support its denial with the “vague reservations” of residents and commission members), *with RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 77 (Minn. 2015) (finding that residents’ experience with ongoing construction was “concrete” enough to support the city’s denial of a conditional use permit).

Nor did Knife River’s representative or the permit application itself provide information that suggested the residents’ concerns were unfounded. In its application,

Knife River did not provide specific information about what residents could expect in terms of noise, dust, environmental impacts, traffic, and efforts to mitigate negative impacts on property values. And Knife River's representative could not answer questions at the hearing about the number of trucks that would be using the road, for example.

After hearing from residents and Knife River's representative, the Board then tied these concerns to sections of the zoning ordinance regarding conditional use permits. First, the Board identified the project's demand on public services, the need for proper screening to reduce negative impacts on adjacent land values, the overall needs of the town, existing land uses, and traffic hazards or congestion as having potential adverse effects. WZO § 12, subd. 1(E)(1). The Board also considered whether the project would cause a nuisance with regard to traffic or require excessive improvements or maintenance. *Id.*, subd. 2(f). Having heard from Knife River's representative that the company would not pave the roads, but would "treat it for dust," the Board noted that the ordinance required all project-related roads to be surfaced to control dust. *Id.*, subd. 2(g). Finally, the meeting minutes reflect that the Board highlighted the project's potential to create noise, vibration, and smoke that could qualify as being a nuisance. WZO § 9, subd. 10.

When considered as a whole, the record supports the Board's findings that the project could negatively impact the Township and its residents. The parties did not raise genuine issues of material fact over what was discussed at the meeting. Nor did the district court misapply the law when it considered the Board's actions in denying the permit. As such, the Board's decision was not arbitrary and capricious.

III. Knife River's due-process rights were not violated.

The purpose of procedural due process is to ensure that the parties have notice of the claims made against them and a “meaningful opportunity to present their case.” *Sweet v. Comm’r of Human Servs.*, 702 N.W.2d 314, 320 (Minn. App. 2005) (quotations omitted). Knife River asserts its due-process rights were violated when the Board incorrectly identified the request as an interim use permit and failed to have the request considered by a planning commission before going to the Board for a final decision.

The record does not support Knife River's argument. Knife River was given proper notice and the opportunity to make its case before the Board at the December meeting. At least two notices were published indicating when and where the Board would be considering Knife River's request. The meeting was open to the public, and Knife River sent a representative there to speak on its behalf. Although the Board named the request incorrectly, it properly reviewed the request as a conditional use permit. Moreover, the misidentification did not fundamentally change Knife River's ability or opportunity to defend its position to the Board.⁸ Therefore, the Board did not violate Knife River's due-process rights.

In sum, there are no genuine issues of material fact and no indication that the district court misapplied the law in its review of the parties' motions for summary judgment. Based on our review of the record, we conclude that Knife River submitted a valid request for a

⁸ Nor do we believe that the Board was required to send the request to a planning commission first. The Township approved a decision to combine the Town Planning Commission with the Township Board in 1989, and as such could act in both capacities when it denied the permit.

conditional use permit and the Township timely issued a decision when it denied the request within 60 days of receiving the request. The record supports the Board's decision to deny the request, and the decision was neither arbitrary nor capricious. In making its decision, the Board met the procedural requirements of Minnesota Statute section 15.99 and the Whited Township Zoning Ordinance and did not violate Knife River's due-process rights.

Affirmed.