STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0195

In re SSTS Soil Dispute Resolution.

Filed October 4, 2021
Affirmed
Hooten, Judge

Arthur Township
File No. RES-12142020

Gary R. Leistico, Jayne E. Esch, Aaron P. White, Rinke Noonan, Ltd., St. Cloud, Minnesota (for relators)

Jessica E. Schwie, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for respondent)

Considered and decided by Hooten, Presiding Judge; Smith, Tracy M, Judge; and Halbrooks, Judge.*

NONPRECEDENTIAL OPINION

HOOTEN, Judge

In this certiorari appeal, relators challenge the decision of respondent township resolving a disagreement which arose during relators' purchase of a resort by determining that the resort's septic system was in compliance with Minnesota law. Relators argue that the township lacked the authority to resolve the disagreement because it failed to follow the procedure set forth in Minn. R. 7082.0700, subp. 5(A) (2019), and the township's

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

resolution does not meet the requirements of Minn. R. 7082.0700, subp. 5 (A)(4). We affirm.

FACTS

In 2019, James and Diana Dahl hired Amy Thompson to inspect the septic system of Fish Lake Resort, a campground resort owned by the Dahls in Mora, Minnesota. Thompson inspected the septic system in November 2019 and issued a notice of noncompliance. The notice of noncompliance indicated, among other things, that the system's drainfield did not meet the requirements set forth in Minn. R. 7080.1500 (2019), which provides that septic systems are not to be installed at depths or in soils that put the system in close proximity to, or at risk of contaminating, groundwater. Kanabec County Ordinance #6, Article III, sect. 2.03 (2019) indicated that the drainfield must have a three-foot vertical separation between the bottom of its infiltrative surface or rock bed and periodically saturating soils, with no more than a 15 percent reduction in this separation distance to account for "settling of sand or soil, normal variation of separation distance measurements and interpretation of limiting layer characteristics." Minn. R. 7080.1500, subp. 4(F), and Kanabec County Ordinance #6, Art. III, sect. 2.03, provide that the vertical separation measurement must be measured outside the area of system influence in an area of similar soil. Thompson, after completing a vertical soil boring, found that the drainfield did not meet this requirement.

In early 2020, the Dahls entered into an agreement to sell the resort to relators Merle and Laura Mauer.[1] As part of the purchase agreement the Dahls agreed to bring the septic system at the resort into compliance with Minnesota law. The Dahls hired Robert Whitmyer of MATRIX Soil & Systems, Inc. to perform a second inspection of the septic system in June 2020. Whitmyer conducted two site visits and determined that the septic system's drainfield was in compliance with Minnesota law. Whitmyer explained in his report that the regulations required that the system's drainfield have a minimum of 31.5 inches of "consistently unsaturated permeable soil though which discharged septic tank effluent passes" under Minn. R. 7082.0700, subp. 5 (2019), and that the current drainfield, which had 37 inches of consistently unsaturated permeable soil, met this requirement.

Thompson and Whitmyer completed their inspections of the resort's septic system as part of licensed Subsurface Sewage Treatment System (SSTS) businesses. Because of their conflicting reports regarding the compliance of the septic system's drainfield, the inspectors were required under Minn. R. 7082.0700, subp. 5(A)(2), to "meet at the disputed site in an attempt to resolve differences." Thompson and Whitmyer met and inspected the septic system at the resort on November 20, 2020. Brian Koski of Septic Check, who was retained by the Mauers, and Troy Winterfield, the Arthur Township Zoning Administrator and licensed SSTS inspector, were also present for the site visit. At the conclusion of the site visit, Thompson and Whitmyer were unable to resolve their difference in opinion as to the compliance of the septic system's drainfield.

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[1] Mauer Properties, LLC, is also a relator. We will collectively refer to relators as "the Mauers."

On December 1, 2020, Winterfield submitted a letter to respondent Arthur Township Board of Supervisors (the board) concerning the soil dispute. Winterfield stated that he was offering his opinion as the "Arthur Township SSTS Professional" to satisfy Minn. R. 7082.0700, subp. 5(A)(3), which specifies the procedure that must be followed when there is a documented discrepancy between SSTS inspectors and a meeting of the disputing inspectors fails to resolve the disagreement. Winterfield opined that the report prepared by Whitmyer was accurate and that the drainfield was in compliance with Minn. R. 7080.1500, subp. 4(D).

On December 14, 2020, the board met and discussed the soil disagreement. The board considered the reports from Thompson and Whitmyer, the written opinion from Winterfield, and a soil boring log prepared in 2008 by J.B. Inspection, LLC, which also indicated that the drainfield was in compliance in 2008. The board adopted an SSTS soil dispute resolution that determined that the report prepared by Thompson was not an accurate description of the soils in the area outside of the area of influence, and therefore, it did not satisfy Minn. R. 7080.1500, subp. 4(F). The board concluded that the report prepared by Whitmyer and the 2008 soil boring log satisfied Minn. R. 7080.1500, subp. 4(F), and that, based on these documents, the septic system of the resort is in compliance with Minn. R. 7080.1500. The Mauers now appeal by writ of certiorari.

DECISION

The Mauers argue that the record does not support the board's determination that the septic system was in compliance with Minn. R. 7080.1500. Because no Minnesota statute authorizes judicial review of such a decision, review is limited to review by

certiorari. *Township of Honner v. Redwood County*, 518 N.W.2d 639, 641 (Minn. App. 1994), *rev. denied* (Minn. Sept. 16, 1994).

> On certiorari appeal from a quasi-judicial agency decision not subject to the [Minnesota] Administrative Procedure Act, we examine the record to review questions affecting the jurisdiction of the agency, the regularity of its proceedings, and, as to the merits of the controversy, whether the order or determination in a particular case was arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any evidence to support it.

Anderson v. Comm'r of Health, 811 N.W.2d 162, 165 (Minn. App. 2012), *rev. denied* (Minn. Apr. 17, 2012) (quotation omitted).

The Mauers argue that the board did not have the authority to resolve the SSTS soil dispute because the proper procedure was not followed. As discussed above, Minn. R. 7082.0700, subp. 5, establishes the procedure that must be followed when licensed SSTS inspectors disagree "on the depth of the periodically saturated soil." The disputing parties must meet and attempt to resolve their differences. Minn. R. 7082.0700, subp. 5(A)(2). If the inspectors are unable to resolve their differences, the rule specifies that one of the following resolution methods that must be employed:

> (a) Obtain an opinion from a qualified employee of the local permitting authority with jurisdiction, if the local permitting authority is willing to provide an opinion [;]
>
> (b) Obtain an opinion from an SSTS technical evaluation committee, if a committee has been developed for this purpose and is available and willing to render an opinion. The committee must be created in cooperation with the commissioner [; or]

> (c) Obtain an opinion from a Minnesota licensed professional soil scientist who is a certified SSTS designer or inspector and who is independent of, and agreed upon by, both parties.

Id., subp. 5(A)(3). If the dispute remains unresolved, then "all initial and follow-up documents and information generated must be submitted to the local unit of government," which "shall take into consideration all information and opinions rendered and make a final judgment." *Id.*, subp. 5(A)(4).

Here, Thompson and Whitmyer disagreed as to whether the drainfield was in compliance with the regulatory requirement. The inspectors then met at the site of the septic system, attempted to resolve their differences, and were unable to do so. Winterfield then offered his opinion as the "Arthur Township SSTS Professional" to satisfy Minn. R. 7082.0700, subp. 5(A)(3).[2] Only then did the board review the soil dispute and render a judgment. Accordingly, we conclude that the board had the authority to consider and resolve the soil dispute under Minn. R. 7082.0700, subp. 5(A)(4).

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[2] The Mauers argue that Winterfield is not a "qualified employee" under Minn. R. 7082.0700, subd. 5(A)(3)(a) because he is an "intermediate inspector" and is therefore not certified to inspect septic systems with a design flow of greater than 2,500 gallons per day. Winterfield's letter indicates that he is offering his opinion to satisfy Minn. R. 7082.0700, subp. 5(A)(3). But, as argued by respondent, the Mauers did not challenge Winterfield's qualifications until this review, and as a result, the record does not contain information regarding Winterfield's certification level or the design flow of the resort's septic system. The Mauers ask this court to find that the design flow is greater than 2,500 gallons per day based on the number of campsites visible in an aerial photograph of the resort. To do so would require us to make factual findings, which is outside the province of this court. *Kucera v. Kucera*, 146 N.W.2d 181, 183 (Minn. 1966). Moreover, in the context of a certiorari review of a county board decision, we cannot consider issues or evidence raised for the first time before our court. *In re Block*, 727 N.W.2d 166, 178-79 (Minn. App. 2007) (citing *Thiele v. Stich*, 425 N.W.2d 580, 582-583 (Minn. 1988).

The Mauers next argue that the record does not support the board's determination because the board improperly relied on a soil boring log from an expired certificate of compliance. The Mauers argue that this reliance renders the decision on the soil dispute arbitrary and capricious. The board considered four soil profiles when addressing the soil dispute: one prepared in 2008 by JB Inspections, one prepared by Thompson, and two prepared by Whitmyer. The board determined that the soil borings prepared by JB Inspections and Whitmyer provided accurate descriptions of the soil in the immediate area of the septic system but not under the area of effluence as required by Minn. R. 7080.1500, subps. 4(D), (F), but the soil boring prepared by Thompson did not.

Under Minn. R. 7082.0700, subp. 4(b)(2) (2019):

> A soil separation compliance assessment must be completed by a licensed inspection business or a qualified employee inspector with jurisdiction. Compliance must be determined either by conducting new soil borings or by prior soil separation documentation made by two independent parties. The soil borings used for system design or previous inspections are allowed to be used. If the soil separation has been determined by two independent parties, a subsequent determination is not required unless requested by the owner or owner's agent or required according to local regulations.

Thus, soil borings from previous inspections are explicitly allowed to be considered. And although the Mauers are correct that a soil separation compliance assessment may only be based on prior soil borings prepared by two independent parties, the board did not rely solely on the 2008 soil boring. The board also determined that the new soil borings prepared by Whitmyer were accurate. Because compliance may be determined "either by conducting new soil borings or by prior soil separation documentation made by two

independent parties," the new soil borings prepared by Whitmyer are independently sufficient to support the board's compliance determination.

Finally, the Mauers argue that the soil dispute resolution adopted by the board is inadequate as a matter of law. Under Minn. R. 7082.0700, subp. 5(A)(4), if a documented dispute as to SSTS compliance is not resolved and is to be submitted to the local unit of government

> all initial and follow-up documents and information generated must be submitted to the local unit of government. The local unit of government shall take into consideration all information and opinions rendered and make a final judgment. The local unit of government shall render findings of fact, conclusions of law, and findings setting forth the reasons for any final decisions it renders.

The Mauers argue that three documents[3] were not mentioned in the resolution, and therefore the board failed to satisfy the requirement that they "take into consideration all information and opinions." However, the Mauers do not cite to any legal support for the proposition that the board's resolution was required to explicitly address every piece of information that was submitted and considered. Rather, a board's decision must generally be accompanied by a sufficient articulation of the reasons for the board's decision. *See Zylka v. City of Crystal*, 167 N.W.2d 45, 50 (Minn. 1969). This is consistent with the above-stated requirement that the local unit of government must set "forth the reasons for any final decision it renders." Minn. R. 7082.0700, subp. 5(A)(4).

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[3] Specifically, the Mauers assert that a notice of noncompliance prepared by Thompson following the November 20, 2020 inspection, an opinion letter from Koski, and an opinion letter from Whitmyer refuting the conclusions of Thompson and Koski were submitted to the board but not considered as part of the final judgment.

Here, the findings of fact set forth the procedural history and indicate that the board considered the four soil profiles and the "Fact Find" prepared by Winterfield, which contained "adequate exhibits, documents and MN Rule references that were examined" by the board to reach its final decision. In the resolution and findings of fact, the board explains that the soil profile prepared by Thompson was not an accurate record of the soil surrounding the septic system because it was taken within five feet of the system, and therefore within the area of system influence. Under Minn. R. 7080.1500, subp. 4(F), the soil separation measurement "must be measured outside the area of system influence in an area of similar soil."

The Arthur Township Resolution accepted the findings of fact by Winterfield, the township's SSTS Professional, that the soil borings of Whitmyer and JB Inspections were accurate representations of the vertical separation between the bottom of its infiltrative surface or rock bed and periodically saturating soils and that the soil boring taken by Thompson was not an accurate representation because it was taken outside the area of system influence. We conclude that, under these circumstances, the board provided a sufficient articulation for its decision that the drainfield was in compliance with Minnesota law.

Affirmed.