This opinion is nonprecedential except as provided by Minn. R. Civ. App. P. 136.01, subd. 1(c).

STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0383

In the Matter of Application Number 2020-006782,
Conditional Use Permit.

Filed January 31, 2022
Affirmed; motion denied
Smith, John, Judge[*]

Aitkin County Planning Commission
File No. 2020-006782

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Considered and decided by Ross, Presiding Judge; Segal, Chief Judge; and Smith, John, Judge.

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

NONPRECEDENTIAL OPINION

SMITH, JOHN, Judge

We affirm respondent county planning commission's decision to grant respondent motorcycle club's conditional use permit (CUP) for an "outdoor and off-highway recreation area" because the relators forfeited classification claims by not raising them before the planning commission and the decision of the planning commission was not arbitrary or capricious.

FACTS

Relators Brian Zimmerman, Erica Zimmerman, Zimmerman Holding LLP, Sandee Schultz, and Craig Schultz (collectively "the neighbors") own property in rural Wagner Township in Aitkin County (the county). Brian Zimmerman, who passed away during the pendency of this appeal, grew up on the Zimmerman property and was a military veteran who suffered from post-traumatic stress disorder (PTSD) and valued the land for its quiet and solitude. The Schultz's also moved to their property to enjoy its solitude and outdoor recreation opportunities. A 180-acre parcel of land—the subject of the dispute in this case—separates the Zimmerman and Schultz properties.

Prior to 2019, the land between the Zimmerman and Schultz properties was used for logging. However, respondent Norsemen Motorcycle Club, Inc. (the Norsemen) purchased the land from the logging company in 2019. The Norsemen are a group of "passionate outdoor enthusiasts, promoting responsible motorcycle and other non-motorcycle recreation in Minnesota." They purchased the land so that club members could use it for outdoor recreation—most notably single-track motorcycle riding, but also hiking and other

activities. The Norsemen state that they do not intend to host races or "motocross" events on the land, and instead plan to use it as a place for members to simply enjoy nature and ride motorcycles.

The Norsemen did not immediately apply for a CUP for their motorcycle riding. Beginning in August 2019, the neighbors observed motorcycle riding and heavy equipment use occurring on the property. On September 27, after multiple complaints to the county sheriff, the neighbors' attorney sent a letter to the county zoning director alleging "unlawful land use." In the letter, the neighbors argued that the Norsemen's motorcycle riding was a conditional use requiring a CUP. They further argued that the county must complete an Environmental Assessment Worksheet (EAW) before approving any such permit.[1] On November 5, the neighbors sent a second letter to the county attorney, alleging additional violations and urging enforcement action. The next day, the county sent the Norsemen a

[1] The Minnesota Environmental Policy Act (MEPA), Minn. Stat. §§ 116D.01-.11 (2020), requires responsible governmental units (RGUs) to analyze the "significant environmental effects" of their major actions (such as granting certain permits). Minn. Stat. § 116D.04, subd. 2a(a). An EAW is the first step in the MEPA review process. It is "a brief document which is designed to set out the basic facts necessary to determine" whether additional environmental review is required. *Id.*, subd. 1a(c). In practice, that means a form in question-and-answer format that a project proposer (here, the Norsemen) typically provides responses for. If the EAW process shows that a project has the "potential for significant environmental effects," the RGU must complete a more detailed environmental impact statement (EIS). *Id.*, subd. 2a(a). Otherwise, the RGU may issue a "negative declaration," meaning that no significant effects are anticipated, and no further review is required. *Id.*, subd. 2b(2). Under Minn. R. 4410.4300, subp. 37(D) (2019), an EAW is required for "an off-highway vehicle recreation area of 80 or more acres, on agricultural land or forested or other naturally vegetated land."

cease-and-desist order. The order stated that the Norsemen must obtain a CUP for a "motorcycle race track" in order to resume riding motorcycles on their land.

After the cease-and-desist order but before applying for a CUP, the Norsemen began the environmental review process. In July 2020, the county completed an EAW for the proposed recreation area based on the Norsemen's submissions. The EAW describes the site as primarily wooded, with some wetland areas and tree clearings. The EAW explains that the Norsemen propose to use the site to ride motorcycles, as well as for hiking, hunting, camping, and other outdoor activities. According to the EAW, these activities would be for the Norsemen's members only, would not include events or "motocross" activities, and would be "sporadic, intermittent, and ephemeral." The EAW further explains that construction would be limited to clearing and grading existing logging trails, and that the Norsemen would not ride in wetlands. It also notes that the Norsemen sought to rectify stormwater issues originating from the prior logging of the property, following Minnesota Pollution Control Agency (MPCA) recommendations.

A key issue in the EAW—and the primary subject of this appeal—was noise. The EAW describes a sound test that the Norsemen conducted in January 2020, "when sound travels greater distances due to lack of leaf cover." The Norsemen measured the sound from two motorcycles at 0, 50, 500, 3,200, and 6,600 feet from the source. They found noise levels of 104.9, 85, 65, 64.6/61.4, and <60 decibels (dB), respectively. The EAW compared these results with typical noise levels from roadway construction equipment and concluded that "the proposed site use will have a reduced noise volume when compared to the previous logging use." The EAW also noted that the Norsemen require members to

comply with muffler specifications and that they "regularly conduct[] sound level monitoring of their motorcycles."[2]

The county received 18 written comments on the EAW during a 30-day public comment period. A representative of the MPCA commented regarding the EAW's discussion of water resources and noise.[3] Regarding noise, the MPCA stated:

> Based on the information provided in the EAW, including the number of expected users at any time, member-only access, no events, and the strict muffler requirements of the motorcycle club, it is not expected that the described use of this site would cause any issues with the state noise standards. If concerns arise after the motorcycle club begins actively using the site, those concerned may contact the MPCA.

However, several community members—including the neighbors—submitted fifteen comments questioning the EAW's description of environmental impacts and noise levels. The neighbors and other community members generally questioned the methodology of the Norsemen's sound test and remarked on the quiet and peaceful nature of the area. In particular, the neighbors submitted a report from an engineer, Dr. David Braslau,[4] critiquing the noise section of the EAW. Dr. Braslau opined that the Norsemen's "response to [the noise section] of the EAW lacks the relevant analysis and criteria required to provide

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[2] Minnesota has regulatory noise and muffler standards for off-highway motorcycles. Minn. R. 6102.0040, subp. 4 (2019). It also has general outdoor noise standards. Minn. R. 7030.0040 (2019); *see also* Minn. Stat. 116.07, subd. 2(c) (2020).

[3] The county also received comments on the EAW from the Department of Natural Resources (DNR) and the Army Corps of Engineers.

[4] Dr. Braslau has a Ph.D in engineering and an M.Sc. in civil engineering and is the president of a firm, David Braslau Associates, Inc., that "address[es] environmental noise, acoustics, and vibration problems."

meaningful information regarding the noise impact on adjacent residential properties." He stated that a proper noise study should measure background noise levels, identify nearby sensitive receptors, use modeling to evaluate conformance with state noise standards, and identify measures to mitigate the impacts of noise. Because of these and other alleged shortcomings, the neighbors requested that the county complete an EIS for the Norsemen's project.

On October 6, 2020, the county issued its findings of fact, conclusions, and order regarding the need for an EIS. The county provided detailed responses to each of the comments it received. In these responses, the county agreed with the MPCA that based on the Norsemen's response to the EAW form, "it is not expected that noise from the use of the site as the club intends will create noise levels that exceed the state minimum standards." However, the county did note in response to the neighbors that "[i]t will be the recommendation that an independent party conduct a noise study as part of a CUP application, if one is applied for." The county also stated that, while "some people may consider the noise produced by single track [off-highway motorcycles] 'annoying', . . . [the Norsemen do not] believe that anticipated noise levels will constitute a 'nuisance' under state law." And it noted that the MPCA and Aitkin County would enforce state noise standards at the site as needed. Based on the EAW and comments received, the county concluded that "[t]he identified environmental effects of the project are minor and /or temporary," and that therefore no further environmental review of the Norsemen's proposal was required. The neighbors did not appeal the county's decision not to require further environmental review.

Following the county's decision, the Norsemen engaged an acoustic engineer, Alex Bub of OHV Acoustics LLC, to conduct an additional noise study.[5] Mr. Bub performed his study on October 17 with a Wagner Township supervisor present. He measured background noise with no vehicles running at three of the Norsemen's property boundaries as well as at a fourth site "a few miles away." He also measured noise at each of those four test sites from off-highway vehicle use on the property. And he measured the stationary sound of ten vehicles and an ATV at a distance of 20 inches from each vehicle. Mr. Bub measured the background noise at the test sites at 40.3-44.4 A-weighted decibels (dBA)[6] L10 and 40.4-42.2 dBA L50.[7] He found that the use of the vehicles was quieter than Minnesota's outdoor noise standards at all four test sites (46.9-58.6 dBA L10 and 41.8-49.1 dBA L50). *See* Minn. R. 7030.0040 (setting outdoor noise standards). And at 20 inches, he measured each of the eleven vehicles tested at between 83.4 and 95.8 dBA,

[5] The neighbors allege "possible bias" by Mr. Bub, citing a public comment by Craig Schultz. According to the neighbors, Mr. Bub "is an owner and trainer at Wisconsin Off Road Adventures and has been a strong advocate of allowing off-road access." Mr. Bub did not provide any information about his own background or qualifications.

[6] The unit here, dBA, differs from the unit used in the EAW, dB. While the record does not fully clarify the difference, Dr. Braslau gave the following explanation in his memorandum addressing the EAW: "specifying a sound level in 'decibels' is incomplete. The state noise standard contains reference to A-weighted decibels." Unlike the EAW, both Mr. Bub and Dr. Braslau used dBA in their writing and analysis.

[7] Per the MPCA's regulations, L10 "means the sound level, expressed in dB(A), which is exceeded ten percent of the time for a one-hour survey, as measured by test procedures approved by the commissioner." Minn. R. 7030.0020, subp. 7 (2019). Similarly, L50 "means the sound level, expressed in dB(A), which is exceeded 50 percent of the time for a one-hour survey, as measured by test procedures approved by the commissioner." *Id.*, subp. 8 (2019).

below Minnesota's vehicle sound limits. *See* Minn. R. 6102.0040, subp. 4(B) (incorporating "SAE J1287" standards for off-highway vehicle noise). Based on these measurements, Mr. Bub opined that "[t]he Norsemen property passed all required Minnesota State regulatory noise levels."

The neighbors also engaged their own expert to obtain further measurements. On October 24, Dr. Braslau traveled to the Schultz property and conducted additional noise testing. While Dr. Braslau was not able to measure the noise from the Norsemen's motorcycles, he did measure background noise at two locations near the Schultz residence. Dr. Braslau measured significantly lower background noise than Mr. Bub and concluded that "the ambient background level without snow cover, is probably less than 25 dBA."[8] Dr. Braslau also wrote a memorandum responding to Mr. Bub's study. He suggested that his lower noise measurements meant that Mr. Bub's study was "conducted under unusually noisy background conditions."[9] He also noted that Mr. Bub did not explain "the locations or tracks of the vehicles during the test, whether the vehicles were dispersed or grouped together, or whether the vehicles were operated under relaxed or competitive conditions." Therefore, Dr. Braslau opined that Mr. Bub's test results "do not withstand questions

[8] The significance of a lower background noise level would be in the difference between the background noise and increased noise. According to Dr. Braslau, "[i]ncreases of over 15 dBA above background are considered 'serious impacts.'"

[9] In a public comment to the county, the neighbors alleged that Mr. Bub's test was "conducted under questionable circumstances." These "questionable circumstances" allegedly include "dump trucks continuously driving back and forth on the road adjacent to their properties, . . . at least one stationary pick-up truck continuously revving engines while testing was occurring," and the fact that no one from the county attended the test.

related to the reliability, confidence, or verification of the test results and therefore do not support the claim of compliance with state noise standards."

On November 30, 2020, the Norsemen submitted a CUP application to respondent Aitkin County Planning Commission (the commission) for the proposed outdoor recreation area. The application stated that the use of the land would be "to allow [the Norsemen's] limited members in good standing to use their [l]and for private, outdoor recreation," including "single-track riding of motorcycles." The application also stated that "use of the [l]and will be limited to daylight hours during spring, summer, and fall only." The Norsemen included a link to Mr. Bub's noise study as part of their application.

The commission scheduled a meeting to consider the Norsemen's application for January 25, 2021. In advance of the meeting, the commission received dozens of comments related to the Norsemen's application, including a petition with more than 200 signatures in opposition. Several members of the club, as well as one of the club's former neighbors, wrote in favor of the application. Numerous community members, including both part-time and full-time residents, expressed concerns over the impact the Norsemen's riding could have on noise levels, property values, and the local environment. The neighbors submitted lengthy comments both individually and through counsel, also discussing noise, property values, and the potential impact of the noise on Brian Zimmerman's PTSD condition. The neighbors submitted Dr. Braslau's background noise measurements and critique of the Norsemen's noise study as part of these comments.

At the January 25 meeting, county staff explained the Norsemen's application, the EAW, and twelve proposed conditions that could accompany a CUP. County staff also

read most of the written comments into the record. The Norsemen's counsel and some of their members then presented their proposal to the commission; and as part of that presentation the commission asked the Norsemen questions about the application and Mr. Bub's sound study. The commission then heard public comments for and against the Norsemen's proposal; again, both the commission and county staff asked questions of some of the commenters. Because of the volume of information submitted, the commission asked if the Norsemen would agree to an extension of the commission's decision so that the commission could consider all the comments. The Norsemen agreed, and the commission scheduled a second meeting on the application for February 22, with final comments by the Norsemen and the neighbors due in advance.

Between the meetings, the commission gathered more information about the project. In particular, one commissioner reached out to the MPCA for its perspective on Mr. Bub's noise study. An MPCA staff member responded: "I don't see anything that changes the MPCA noise comments on the EAW. It sounds like the County has the information it needs going into the [CUP] hearing." In response to a follow-up question, the MPCA staff member stated, "I didn't have any concerns about the study." The same commissioner also contacted the county assessor's office for more information about certain property values. In particular, the commissioner asked about the impact of a different ATV riding area on neighboring property values. The county assessor responded: "[w]e haven't put any reduction on values in that area due to noise or other factors related to the ATV area. I have not heard of taxpayers requesting a value reduction due to this either." Finally, the neighbors and the Norsemen submitted their final comments on the application, which

included their positions on the proposed conditions. The neighbors offered to facilitate a site visit. The Norsemen's comments included a statement from Mr. Bub responding to Dr. Braslau's noise study critiques,[10] and a letter from a residential appraiser opining that "I believe a statement that assumes a property has declined because of a noise issue is nothing more than [a] personal unsupported opinion."

The commission discussed the application at length at their February 22 meeting. Four commissioners noted that they had personally visited the site, and the commission chair stated that she had not but had "reviewed the property on the County's GIS map." The chair described the additional information received related to the noise study and property values. The commission discussed changes to the proposed conditions on the CUP. Finally, the commission walked through each of the seven findings required by the county zoning ordinance (the ordinance) to grant a CUP. *See* Aitkin County, Minn., Zoning Ordinance § 11.03 (2019) (requiring the commission to make certain findings before granting a CUP). Each commissioner shared their views on each of the seven findings, discussing the comments and evidence in the record. Ultimately, the commission voted 3-1 to approve the Norsemen's CUP application, subject to ten conditions.

The commission made the following seven findings as required by section 11.03 of the ordinance:

[10] Mr. Bub refuted the neighbors' allegations of "questionable circumstances," noted that the neighbors were invited to attend the October 17 noise test but declined, critiqued Dr. Braslau's background noise analysis, and stated that Dr. Braslau's report was "informative but has no merit to the question [of the Norsemen's compliance with Minnesota noise standards]."

> 1. The proposed use will not be injurious to the use and enjoyment of the environment or of other property in the immediate vicinity, nor impair property values within the surrounding neighborhood. [4 votes yes, 1 vote no] . . .
> 2. The proposed use will not increase local or state expenditures in relation to costs of servicing or maintaining neighboring properties. [5 Yes] . . .
> 3. The location and character of the proposed use are considered to be consistent with a desirable pattern of development for the locality in general. [4 Yes, 1 No] . . .
> 4. The proposed use conforms to the comprehensive land use for the County. [5 Yes] . . .
> 5. Proper notice has been given to those people required under Minnesota Statutes, Chapter 394, of the proposed use and of the hearing before the Planning Commission. [Yes] . . .
> 6. That other applicable requirements of this ordinance, or other ordinances of the County have been met. [5 Yes] . . .
> 7. The proposed use is not injurious to the public health, safety and general welfare. [4 Yes, 1 No] . . .

See Id. The county also imposed the following ten conditions on the Norsemen, as allowed by section 11.04 of the ordinance, which were modified from the original twelve conditions proposed by county staff:

> 1. Must comply with all local, state and federal regulations that pertain to this type of operation.
> 2. The use of this property under the terms of this conditional use permit (CUP) is limited to Norseman Motorcycle Club members only.
> 3. All off-highway vehicles must meet the requirements of Minnesota Rules 6102.0040, subp. 4.
> 4. A 25 foot non-mowed/cut/trimmed vegetated buffer remain between any wetland and trails and 50 feet between any springs and trails, excluding any trails that presently exist.
> 5. A 100 foot non-mowed/cut/trimmed vegetated buffer remain between the trails and property lines, excluding any trails that presently exist.
> 6. No off-highway vehicle sanctioned competitive events are allowed.
> 7. No operation during October 25th thru November 25th.

> 8. Hours of operation are during the daylight hours 8:00 a.m. to 8:00 p.m. or sunset, whichever occurs first.
> 9. The number of camping sites must comply with the Aitkin County Zoning Ordinance and with the MHP and Recreational Camping Areas Ordinance.
> 10. No new trails are allowed to be created.

See Aitkin County, Minn., Zoning Ordinance § 11.04 (2019) (allowing the commission to impose conditions on a CUP). In accordance with these findings and subject to these ten conditions, the county issued the Norsemen a CUP. The CUP allows the Norsemen to "utilize the project area for an outdoor and off-highway recreation area, in an area zoned open, with 10 conditions." The neighbors now appeal the commission's decision.

DECISION

In general, a county zoning authority may grant a CUP "upon a showing by an applicant that standards and criteria stated in the [county zoning] ordinance will be satisfied." Minn. Stat. § 394.301, subd. 1 (2020).[11] A zoning authority's decision to grant or deny a CUP is a quasi-judicial act reviewable by writ of certiorari. *Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). "[C]ounties have wide latitude in making decisions about [CUPs]." *Schwardt v. Cnty. of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). This court reviews the record independently, but reviews county decisions under a deferential standard, looking at "whether the county acted

[11] The neighbors' brief cites to similar language in Minn. Stat. § 462.3595, subd. 1 (2020) regarding when a "governing body" may grant a CUP. However, that statute applies to municipal governments, not county governments, and therefore does not apply in this appeal. *See* Minn. Stat. § 462.352, subd. 11 (2020) ("'Governing body' in the case of cities means the council by whatever name known, and in the case of a town, means the town board.").

unreasonably, arbitrarily, or capriciously." *Id.*; *see also RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015).[12] This deference is heightened when the zoning authority approves, rather than denies, a CUP. *Big Lake Ass'n v. Saint Louis Cnty. Plan. Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009). To determine whether the commission's decision was unreasonable, arbitrary, or capricious, this court examines (1) "the reasons given by the [county] were legally sufficient" and (2) whether "the reasons had a factual basis in the record." *RDNT*, 861 N.W.2d at 75-76.

Here, the neighbors argue that the county erred by granting a CUP for an "outdoor and off-highway recreation area" when that use is not one of the uses listed in Appendix A of the ordinance. And they argue that the commission's decision was arbitrary and capricious because it failed to properly consider the Norsemen's prior behavior on the property, the proposal's noise impacts, public opposition to the application, and Brian Zimmerman's PTSD condition. We address each argument below.

I. The neighbors forfeited their challenge to the commission's decision to grant a CUP for a use not specified in the ordinance.

The neighbors first argue that the commission erred by granting a CUP for an "outdoor and off-highway recreation area," when such use is not listed in Appendix A of

[12] The neighbors' brief cites standards of review from the Minnesota Administrative Procedure Act (MAPA), Minn. Stat. § 14.69 (2020), as well as caselaw interpreting that statute. Those standards, however, only apply to "agency" decisions. *Id.* Under MAPA, an "agency" is "any state officer, board, commission, bureau, division, department, or tribunal, other than a judicial branch court and the Tax Court, having a statewide jurisdiction and authorized by law to make rules or to adjudicate contested cases." Minn. Stat. § 14.02, subd. 2 (2020). MAPA therefore does not apply to the county zoning decision in this appeal.

the ordinance. Appendix A consists of a table listing numerous potential land uses (e.g., "Amusement Park," "Animal Hospital," or "Antique Sales"). Aitkin County, Minn., Zoning Ordinance Appendix A (2019). For each listed use, the table identifies whether that use is (a) "permitted," (b) "not permitted," or (c) requires a CUP in a given zoning district.[13] *Id.* The Appendix states that "[f]or uses not included on this list, application shall be made to the Board of Adjustment for interpretation." *Id.* An "outdoor and off-highway recreation area" is not one of the uses listed in Appendix A. Therefore, the neighbors argue, the commission erred by granting a CUP without obtaining an interpretation from the board of adjustment. The commission and the Norsemen respond that the neighbors forfeited this argument by not raising it previously before the commission.[14] We agree that this issue was not properly raised, and therefore decline to interpret what Appendix A of the ordinance requires.

In general, this court does not address issues on appeal that were not raised before a county zoning authority. *Big Lake*, 761 N.W.2d at 490-91; *see also Graham v. Itasca Cnty. Plan. Comm'n*, 601 N.W.2d 461, 468 (Minn. App. 1999). "To allow parties to litigate an issue on certiorari review that was not raised before the local zoning authority would encroach on the county's broad authority in making quasi-judicial decisions." *Big Lake*, 761 N.W.2d at 491. However, "the question of whether a zoning or land use planning

[13] The property at issue here is zoned "Open."

[14] Respondents use the term "waiver" in their briefs. But "[while] forfeiture is the failure to make the timely assertion of a right, waiver is the intentional relinquishment or abandonment of a known right." *State v. Beaulieu*, 859 N.W.2d 275, 278 (Minn. 2015) (quotation omitted). It appears that respondents' arguments relate more to forfeiture.

issue was properly raised is not always easily determined." *Id.* The issue need not be "framed in precise legal terms," but the zoning authority must have "fair notice of the nature of the challenge" so that it may address the issue. *Id.* In *Big Lake*, for example, a lake association challenged a CUP, arguing that the application should have been considered "as a residential, rather than commercial, planned unit development." *Id.* at 489. The supreme court held that this issue was not fairly raised before the zoning authority. It noted that "[t]he notice of public hearing clearly stated that [the commission] was considering a proposal for 'a commercial planned unit development.'" *Id.* at 491. And it determined that public comments expressing "doubts about the true intentions of the resort owners" or "generalized complaints regarding the density of the proposal" did not give the commission fair notice of an argument that the development should be considered residential. *Id.* at 492.

In this case, the neighbors assert that they "told [the commission] that a [CUP] was required," and "should not be further required to remind [the commission] of the application process." They also argue that while *Big Lake* involved an alleged analytical error within the proper process, the issue here was one of "required procedure." We are not persuaded. Much like in *Big Lake*, while the neighbors made generalized complaints about the Norsemen's proposal, they never raised a need for the board of adjustment to interpret the proposed use. The Norsemen's CUP application, which was submitted on a county form, did not specify a use from the table in Appendix A and instead referred generally to "private, outdoor recreation" and "single-track riding of motorcycles." In December 2020, the county issued a public notice of its upcoming meeting regarding the

Norsemen's application for a CUP, which described the use as "an outdoor and off-highway recreation area, in an area zoned Open." The neighbors did not question this description of the proposed use or call for board of adjustment interpretation in their public comments, nor was the classification issue raised at either commission hearing. The commission used identical language in its permit issued February 22.

Based on these facts, we conclude that the neighbors have forfeited their classification argument. While the neighbors could not have known how the use would be "classified" until the permit was actually issued, they had written notice ahead of the commission meetings that the application was being considered as an "outdoor and off-highway recreation area," and they did not contest this description. Had they done so, the commission would have had an opportunity to consider whether another classification or board of adjustment interpretation was necessary.[15] Because the neighbors did not raise it, we decline to determine whether the commission erred by not seeking such interpretation. We note, however, that the purpose of Appendix A is to determine whether a proposed use is permitted, not permitted, or requires a CUP. Although the neighbors assert that the

[15] Alternatively, the commission and the Norsemen argue that the neighbors forfeited the issue by not appealing the commission's CUP decision to the board of adjustment. Under section 10.08.a of the ordinance, "[a]ppeals may be taken by any person aggrieved, or by any officer, department, board, or bureau of a town, municipality, county, or state," and must be taken "within thirty (30) days by filing with the Board of Adjustment a notice of appeal specifying the grounds thereof." Aitkin County, Minn., Zoning Ordinance § 10.08.a (2019). Because we conclude that the neighbors failed to properly raise the classification issue at all, we need not reach this argument. However, we note that Minn. Stat. § 394.27, subd. 5 (2020)—which mirrors section 10.08.a of the ordinance here—does not "grant[] a county board of adjustment authority to review a county board's CUP decisions." *Molnar v. Cnty. of Carver Bd. of Comm'rs*, 568 N.W.2d 177, 180 (Minn. App. 1997).

commission failed to assign a proper label to the Norsemen's proposal, they do not actually assert that the use is not permitted. In fact, they have consistently maintained that the Norsemen's use requires a CUP—the process that the commission followed here.[16]

II. The commission's decision to grant the CUP was not unreasonable, arbitrary, or capricious.

The neighbors next argue that the commission's approval of the CUP was arbitrary and capricious for four reasons. This court undertakes an independent review of the commission's record to determine whether its decision was unreasonable, arbitrary, or capricious. *Schwardt*, 656 N.W.2d at 386. In doing so, this court defers to a CUP decision "when the factual basis for the [decision] has even the slightest validity." *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. App. 2004) (quotation omitted). On appeal, the neighbors carry the burden to "establish that the [Norsemen's] 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." *Schwardt*, 656 N.W.2d at 387. We address each of the neighbors' four arguments in turn.

A. The Norsemen's ability to comply with zoning requirements

First, the neighbors argue that the commission's decision was arbitrary and capricious because the Norsemen "did not show the ability to comply with standards."

[16] The neighbors initially sent two letters to the county asserting that a CUP was required. Their September 2019 letter asserted that "[t]here are at least two possible [Appendix A] classifications that would likely fit the Norseman's [sic] use of the Norseman Property: 'Assoc. (Clubs, Lodges) private' and 'Race Track.'" Their November 2019 letter used similar language.

Here, the neighbors do not point to a specific ordinance standard that the Norsemen cannot comply with. Instead, they point to letters and public comments complaining about the Norsemen's behavior prior to the CUP application process. According to the neighbors, the Norsemen's behavior was "intolerable to local residents" and the Norsemen disregarded private property marked with "no trespassing" signs. The Norsemen dispute these allegations, pointing to evidence that they do comply with rules—for example, the facts that they complied with the cease-and-desist order and followed MPCA recommendations to correct stormwater issues. The Norsemen also question the credibility of the public comments criticizing them and point to a different public comment that calls the Norsemen "good stewards of the land" and "just normal people."

The record certainly reflects that this CUP application was a contentious issue in the community. Many commenters cited concerns about the Norsemen and the environmental and social impacts of their proposed recreation area. However, the record also contains comments from the Norsemen about their desire to be good environmental stewards and good community members. An appellate court's function in reviewing a land-use decision is "not to weigh the evidence, but to review the record to determine whether there was legal evidence to support the zoning authority's decision." *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 718 (Minn. 1978). And the commission imposed a series of conditions on the Norsemen to lessen the potential adverse impacts of their riding, including a ban on competitive events, a ban on operating during the peak of hunting season, and a requirement that the Norsemen only ride during daylight hours. If the Norsemen violate these conditions, section 11.05 of the ordinance provides a remedy—the

commission may revoke a CUP for "good cause," including "any violation of the agreed upon conditions." Aitkin County, Minn., Zoning Ordinance § 11.05 (2019). On this record, we cannot conclude that the neighbors' concerns about the Norsemen's prior behavior are sufficient to render the commission's decision arbitrary or capricious.

B. The sufficiency of noise studies

The neighbors next argue that the noise study that the commission relied on was insufficient. Citing public comments as well as Dr. Braslau's memoranda, they contend that Mr. Bub's study was (1) biased, (2) insufficient to demonstrate compliance with state noise standards, and (3) conducted under suspiciously high background noise conditions. Although the neighbors do not point to a particular finding or ordinance standard, noise concerns are relevant to the commission's findings that the Norsemen's proposal "will not be injurious to the use and enjoyment of the environment or of other property in the immediate vicinity," is "consistent with a desirable pattern of development for the locality in general," and is "not injurious to the public health, safety and general welfare." Notably, the neighbors and many other community members submitted comments addressing the importance of quiet to their use and enjoyment of the environment and their property. Nonetheless, the neighbors' noise concerns do not render the commission's CUP decision arbitrary or capricious, considering our deferential standard of review and the steps the commission took to discuss, analyze, and weigh conflicting evidence on this issue.

In general, "courts should ordinarily defer to a [zoning authority's] judgment on conflicting evidence." *RDNT,* 861 N.W.2d at 76. In particular, "[w]ith expert witnesses, [appellate courts] do not attempt to weigh the credibility of conflicting experts, but instead

review the record to ensure that the decision had support in the record." *Id.* (quotation omitted). The record in this case contains conflicting evidence regarding the noise impacts of the project. Some evidence supports the Norsemen's permit. For example, information in the EAW suggests that the Norsemen's proposal would comply with state noise standards. Based on the EAW, the MPCA commented that "it is not expected that the described use of this site would cause any issues with the state noise standards." And the Norsemen's expert (Mr. Bub) similarly opined that the proposed recreation area would comply with relevant state outdoor and vehicle noise standards. Other evidence supports the neighbors' position. In particular, the neighbor's expert (Dr. Braslau) cast legitimate doubt on the credibility of the EAW's analysis and Mr. Bub's noise study. However, Mr. Bub responded to some—though not all—of Dr. Braslau's concerns. And an MPCA staff member reviewed Mr. Bub's study and stated that she "didn't have any concerns about the study."[17] The commission chair stated during deliberations that the MPCA's response was to her "the final decision-making point on that topic," and that she did not find "any discrepancies in the sound study that was presented by the petitioner." While discussing the commission's findings of fact, the chair again cited the Norsemen's noise evidence as a reason for her position, and three commissioners agreed.

[17] The neighbors argue that the commission's decision to send Mr. Bub's report to the MPCA, but not Dr. Braslau's report, was also indicative of arbitrary and capricious decision-making. However, there was no requirement that the commission obtain MPCA analysis of either study.

On this complicated record, the commission might well have reached a different conclusion—in fact, one commissioner voted against the Norsemen's application because of concerns over noise. However, "this court may not substitute its judgment, if there is a legally sufficient reason for [a CUP] decision, even if it would have reached a different conclusion." *BECA of Alexandria, L.L.P. v. Cnty. of Douglas ex rel. Bd. of Comm'rs*, 607 N.W.2d 459, 463 (Minn. App. 2000). "County zoning authorities have wide latitude in making decisions on CUPs," and "except in rare cases where there is no rational basis for the decision, it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in routine zoning matters." *Big Lake*, 761 N.W.2d at 491 (quotations omitted). Under this deferential standard of review, the commission's findings on noise had sufficient factual basis in the record and its decision was not arbitrary or capricious. *See RDNT*, 861 N.W.2d at 75-76.

C. Public opposition to the CUP

The neighbors' third contention is that the commission erred by disregarding "overwhelming public input against issuing the CUP." In general, "[c]ommunity opposition to a landowner's desire to use his property for a particular purpose is not a legally sufficient reason for denying a [CUP]." *Scott Cnty. Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 728 (Minn. App. 1988), *rev. denied* (Minn. Mar. 23, 1988); *see also BBY Invs. v. City of Maplewood*, 467 N.W.2d 631, 635 (Minn. App. 1991), *rev. denied* (Minn. May 23, 1991). However, "neighborhood feeling . . . may still be taken into account." *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988). In particular, a zoning authority "may consider neighborhood opposition if based on concrete

information." *SuperAmerica Grp., Inc. v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. App. 1995), *rev. denied* (Minn. Jan. 5, 1996). And non-expert comments may be sufficient to rebut expert testimony. *Id.*; *BBY*, 467 N.W.2d at 635. Here, while community opposition to the CUP was significant and concrete, the record indicates that the commission considered that opposition, and we do not find its decision arbitrary or capricious.

Several facts in the record indicate that the commission considered the comments it received from the public. For example, at the commission's January 25 meeting, the commission "agreed to skip the Board comment period in order to hear the public's testimony." During that meeting, the commission and county staff asked questions of both the Norsemen and the commenters opposed to the project. Additionally, the commission sought to extend its decision timeline specifically in order to "take into consideration all of the information received" at the meeting. The commission then sought additional information in response to public comments received at the meeting. And the commission's conditions barring races and limiting hours and dates of operation reflect community concerns over the impacts of motorcycle noise. Because the commission considered the neighbors' comments and incorporated them into the factual basis for its CUP decision, we cannot conclude that it disregarded community opposition or reached an arbitrary or capricious decision.

D. Relator Brian Zimmerman's PTSD

Finally, the neighbors contend that the commission's decision was arbitrary and capricious because it showed "disregard" for Brian Zimmerman's PTSD condition.[18] We disagree, because the record shows that the commission considered the impacts of the proposed use on neighboring properties and the record supports its conclusion. Given both the general evidence in the record about motorcycle noise and Brian Zimmerman's specific concerns about his own property and health, the commission could reasonably have concluded that the Norsemen's use would affect the "use and enjoyment" of the Zimmerman property. However, as discussed above, "this court may not substitute its judgment, if there is a legally sufficient reason for [a CUP] decision, even if it would have reached a different conclusion." *BECA of Alexandria*, 607 N.W.2d at 463. At the commission's February 22 meeting, the chair acknowledged concerns over "whether or not [the proposal] would be affecting a resident who has served our armed services and has a condition based upon that service and whether or not this would cause him some personal harm." She stated, however, that "as much as I respect and honor those that have served in our service for our country, I do not find that that would be a legitimate reason to deny

[18] After Brian Zimmerman's death, the Norsemen filed a motion to "dismiss an issue as moot and strike the related portion of relators' brief" on October 27, seeking dismissal of the neighbors' arguments related to Brian Zimmerman's PTSD. "An appeal should be dismissed as moot when a decision on the merits is no longer necessary or an award of effective relief is no longer possible." *Dean v. City of Winona*, 868 N.W.2d 1, 5 (Minn. 2015). Here, the Norsemen have not shown that a decision is unnecessary or that relief is no longer possible—four relators continue to assert that the commission's decision to grant a CUP was arbitrary and capricious, and relief is still possible. Thus, we deny the Norsemen's motion and consider the neighbors' argument.

this permit." The commission concluded from conflicting evidence, including the noise studies discussed above, that the Norsemen's use would not be injurious to "the use and enjoyment . . . of other property in the immediate vicinity" or "the public health, safety, and general welfare." The record contains sufficient evidence to support these conclusions, including as they applied to Brian Zimmerman. We therefore do not find the commission's decision arbitrary or capricious.

Affirmed; motion denied.