

*This opinion is nonprecedential except as provided by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
A21-0498**

In re: County Board action notice on interim use permit request to
operate a kennel on Parcel Number R35.14.20.300.020.

**Filed March 7, 2022
Reversed and remanded
Gaïtas, Judge**

Blue Earth County Board of Commissioners

Jacob M. Birkholz, Michelle K. Olsen, Birkholz & Associates, LLC, Mankato, Minnesota
(for relators Rick DeMartini and Angela DeMartini)

Patrick R. McDermott, Blue Earth County Attorney, Susan B. DeVos, Assistant County
Attorney, Mankato, Minnesota (for respondent Blue Earth County Board of
Commissioners)

Considered and decided by Gaïtas, Presiding Judge; Smith, Tracy M., Judge; and
Slieter, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

In this certiorari appeal, relators Angela and Rick DeMartini challenge the denial of
their application for an interim use permit (IUP) to operate a commercial dog kennel on
their property. Because respondent Blue Earth County Board of Commissioners
unreasonably denied the application, we reverse and remand for approval of the IUP
subject to reasonable conditions.

FACTS

The DeMartinis own property in an area of rural Blue Earth County that is zoned for agricultural use. They operated a commercial dog kennel on their property, which was not a permitted use under the county's zoning laws. In October 2020, the DeMartinis applied to the county for an after-the-fact variance so that they could continue to operate and expand the business. After a public hearing, where neighbors complained of excessive barking and trespassing dogs, the Blue Earth County Board of Adjustment denied the variance request.

In December 2020, the DeMartinis applied to the county for an IUP.¹ Their IUP application proposed a new facility that they would build in a different area of their property. The DeMartinis also submitted a business plan for the kennel, which explained their intention to create a new facility for up to 12 adult dogs and their puppies and detailed mitigation measures to address past concerns about noise and trespassing dogs. Those measures included the addition of sound-proof walls, privacy fencing, garage-style doors, and new trees, as well as using bark collars for the dogs.

¹ An IUP allows a property owner to temporarily use their land in a manner not otherwise permitted under the applicable zoning ordinance. *See* Minn. Stat. § 394.303 (2020) (defining “interim use” as a “temporary use of property until a particular date, until the occurrence of a particular event, or until zoning regulations no longer permit it,” and describing authority of governing body to grant IUPs); Blue Earth, Minn., Code of Ordinances (BCO) § 24-3(b) (2020) (defining an “[i]nterim use permit” as “a permit issued by the board of commissioners for a temporary use of a property in accordance with procedures specified in this chapter which would enable the board of commissioners to assign site specific conditions to a proposed use”).

County staff recommended approval of the DeMartinis' application and proposed 23 conditions. Then, the application was forwarded to the Blue Earth Planning and Zoning Commission. The planning commission took public comments and considered the IUP application at two public meetings. There are detailed minutes from both meetings. According to those minutes, five neighbors opposed the IUP application, complaining that the DeMartinis had not been able to control barking in the past and that dogs continued to trespass onto their properties. Neighbors also noted an increase in road traffic and expressed concern about their property values. And some neighbors referenced a text message that the DeMartinis allegedly sent to a neighbor after the hearing on their variance application. The message purportedly "indicated that five previous County actions were overturned in recent years" and that the DeMartinis "would be taking legal action."

After considering Blue Earth County ordinances and staff's proposed findings, the planning commission voted four to one to recommend denial of the IUP to the county board because the application failed to satisfy three factors under the county ordinance.² The planning commission members who voted to recommend denial concluded that (1) the interim use would be injurious to neighbors' use and enjoyment of their property, (2) there were insufficient measures to prevent or control offensive noise and dust from vehicles accessing the property, and (3) "[t]he protection of the public's health, safety, morals and general welfare have **NOT** been addressed through the required performance standards for

² A county ordinance requires the planning commission to consider 15 factors before forwarding a recommendation to approve an IUP to the county board. BCO § 24-47(f)(1) (2020).

this type of interim use and in the [proposed] conditions.” They observed that the DeMartinis had previously failed to address barking and trespassing dogs, which showed “an unwillingness . . . to take these matters seriously and keep dogs under control, and a lack of regard for the neighboring property owners.” They noted that “there is additional dust from vehicles accessing the property from the township road with no attempts at dust control.” And at least one member of the planning commission stated that he was troubled by the alleged text message sent by the DeMartinis. Although one planning commission member observed that the IUP application “looks good on paper” and “it looks like a fantastic plan, well thought out and expensive,” the commission generally agreed that the DeMartinis’ “past actions” in using their land for a kennel without county approval and failing to control their dogs warranted denial.

At a public meeting on February 18, 2021, the county board voted three to two to deny the IUP. On March 1, 2021, county staff prepared a letter notifying the DeMartinis of the decision. The letter stated:

The Blue Earth County Board of Commissioners held a public hearing on the request on February 16th. Following a public comment period and discussion by the Board, a motion was made to deny the request. By roll call vote, the Board voted three in favor to two opposed to pass the motion thereby denying the request.

The letter ordered the DeMartinis to discontinue operating a kennel on their property.

By writ of certiorari, the DeMartinis appeal the county’s decision.

DECISION

The DeMartinis ask us to reverse the county's decision denying their IUP application. Appellate courts narrowly review municipal land-use decisions using a rational-basis standard. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 179-80 (Minn. 2006). Because local authorities have wide discretion in land-use decisions, “we will reverse only when a decision lacks a rational basis or the city’s actions are arbitrary, capricious, discriminatory, or illegal.” *Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804 (Minn. 2005) (quotation omitted), *rev. denied* (Minn. July 19, 2005). “An agency decision is arbitrary and capricious if it is an exercise of the agency’s will, rather than its judgment” *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 565 (Minn. App. 2001), *rev. denied* (Minn. Nov. 13, 2001). To obtain reversal, the applicant must show “that the reasons for the denial either are legally insufficient or had no factual basis in the record.” *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003).

Preliminarily, we note that the record of the county board’s decision-making process is limited. There is no transcript of the proceedings before the county board.³ There are

³ For appellate review by certiorari, a relator may order a transcript of audiotaped proceedings from the governing body and make financial arrangements for transcription. Minn. R. Civ. App. P. 115.04, subd. 2. Then, the governing body must arrange for transcription and the reporter must file the transcript. *Id.* The DeMartinis requested a transcript from the county. But according to the DeMartinis, the county responded that “they do not obtain transcripts of the hearings and do not have a reporter that would be assigned to this task.” Apparently unaware that the county was obligated to arrange for transcription of any audiotaped proceedings, the DeMartinis attempted to retain a private court reporter to no avail. Eventually, they gave up on the prospect of obtaining a transcript and filed a proposed statement of the proceedings with this court’s permission. *See* Minn.

no meeting minutes. And the letter to the DeMartinis informing them of the denial does not detail why their IUP application was denied. “Governmental bodies must take seriously their responsibility to develop and preserve a record that allows for meaningful review by appellate courts.” *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999).

The DeMartinis do not challenge the county’s development or preservation of a record of the county board’s decision. Instead, the parties agree that the board effectively adopted the planning commission’s rationale for denying the IUP. They ask us to consider the planning commission’s reasons for recommending denial.

The DeMartinis contend that the board’s decision was arbitrary, capricious, and unreasonable. They argue that the planning commission recommended denial based solely on their prior history and failed to consider the concrete proposals they submitted in their IUP application to address those concerns. The county responds that the board followed

R. Civ. App. P. 110.03 (providing that appellant may file a statement of proceedings within 14 days of filing the notice of appeal when “no report of all or any part of the proceedings at a hearing or trial was made, or if a transcript is unavailable”); Minn. R. Civ. App. P. 101.02, subd. 4 (“‘Trial court’ means the court or agency whose decision is sought to be reviewed.”). This court later ordered the county to either accept the DeMartinis’ statement of the proceedings or provide a modified version. Minn. R. Civ. App. P. 110.03 (providing that respondent may file objections or proposed amendments to appellant’s statement of proceedings). The county provided its own statement of the proceedings, which states in part:

On February 16, 2021, the Blue Earth County Board of Commissioners considered the DeMartinis’ interim use permit application. The Board heard comments from the DeMartinis’ attorney and numerous neighboring property owners who opposed the application. The Board extensively discussed the application and ultimately voted to deny the application by a vote of 3-2.

county ordinances and provided a reasoned decision to deny the IUP application that has a sufficient basis in the planning commission's factual record.

As noted, the planning commission provided three reasons for recommending denial of the DeMartinis' IUP application. The first stated reason was the impact of the DeMartinis' kennel on neighbors. Under the applicable Blue Earth County ordinance, the planning commission must address whether "the proposed use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted." BCO § 24-47(f)(1)(j). At the public meetings, several neighbors told the planning commission that the DeMartinis' existing kennel was a source of uncontrolled barking and occasional trespassing dogs. These neighbors were convinced that the DeMartinis would never be able to control these problems. One neighbor suggested that if bark collars were used and barking was controlled, the IUP would not pose a problem; however, the neighbor stated that the DeMartinis "are unable to control the barking." Another neighbor noted that for five years, the DeMartinis "have done nothing but put up a fence." And a third neighbor suggested that the DeMartinis "find another place to raise their dogs and not . . . keep dragging everyone through this process." The planning commission concluded that the IUP would impact neighbors' use and enjoyment of their property because the DeMartinis' prior actions "show an unwillingness . . . to take these matters seriously and keep dogs under control, and a lack of regard for the neighboring property owners."

“Community opposition to a landowner’s desire to use his property for a particular purpose is not a legally sufficient reason for denying a conditional use permit.”⁴ *Scott Cnty. Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 728 (Minn. App. 1988), *rev. denied* (Minn. Mar. 23, 1988). The decision-making body may consider neighborhood opposition when it is based on concrete observations and information. *See Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 260 (Minn. App. 2004) (“A city council is free to disregard an expert’s opinion when it is presented with conflicting non-experts’ opinions, including those of area residents, so long as the reasons are concrete and based on observations, not merely on fear or speculation.”); *SuperAmerica Grp., Inc. v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. App. 1995) (identifying cases where nonexpert, landowners’ opinions were preferred over expert opinions), *rev. denied* (Minn. Jan. 5, 1996). In addition to generalized opposition to the DeMartinis’ kennel, a few neighbors offered concrete information about past incidents when they were bothered by barking and trespassing dogs. But the neighbors’ concerns about the IUP—which would relocate the kennel on the property and would include specific new measures to address barking—were purely speculative. They surmised that the DeMartinis would never be able to control barking, but this was based on assumptions that the DeMartinis would not address the problem and not on any of the proposals included in the IUP application. In

⁴ Under Blue Earth County ordinances, the application process for conditional use permits (CUPS) and IUPs is the same. BCO § 24-47(e). The primary distinction between these permits is that a CUP “shall be valid as long as the conditions attached are met,” *id.* (e)(8)(a), whereas an IUP is “for temporary use of a property,” BCO § 24-3.

turn, the planning commission's finding that the DeMartinis were "unwilling" to address problems affecting the neighbors was merely conclusory.

Moreover, in basing its finding on neighbors' complaints about historical events, the planning commission failed to meaningfully address the numerous measures that the DeMartinis had proposed to address these concerns, including building an entirely new facility, installing a privacy fence, planting trees, and using bark collars. The denial of a conditional-use application is arbitrary if the applicant established that a reasonable condition is available to eliminate the basis for denial. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 78 (Minn. 2015). And a governing body acts arbitrarily if it simply ignores the applicant's proposed conditions. *C.R. Invs., Inc. v. Village of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981). Here, although the planning commission observed that the IUP application "look[ed] good on paper" and was "a fantastic plan," it did not consider whether the DeMartinis' specific proposals, in conjunction with the proposed conditions, would eliminate excessive barking and trespassing. We therefore conclude that the denial of the IUP based on neighbors' concerns was arbitrary.

The planning commission's second reason for recommending denial of the IUP was that the DeMartinis "have not taken the necessary measures to contain their dogs or to control offensive noise from barking dogs. In addition, there is additional dust from vehicles accessing the property from the township road with no attempts at dust control." This reason related to the factor requiring the planning commission to consider whether "adequate measures have been or will be taken to prevent or control offensive odor, fumes, dust, noise and vibration, so that none of these will constitute a nuisance, and to control

lighted signs and other lights in such a manner that no disturbance to neighboring properties will result.” BCO § 24-47(f)(1)(l). To the extent this reason again relied on generalized neighbor complaints about the DeMartinis’ past conduct without addressing the proposed conditions to eliminate these concerns, it lacks a factual basis and is arbitrary.

As to the concern about dust, the record reveals that neighbors claimed that “the kennel creates a lot of traffic” and that one neighboring family “applied calcium chloride to the road to control dust at a cost of \$600.” But the planning commission found that “[i]t is unlikely the limited increase in traffic will create traffic congestion or hazards on the township road.” And beyond the neighbor’s claim about taking measures to control dust, the record contains no other factual information about a dust problem and does not reference any ordinances or regulations concerning dust in an agricultural zone. Finally, the planning commission disregarded the DeMartinis’ discussion of traffic in their business plan, which states that “there will be less than 10 cars in a four-day period coming to the kennel to pick up and view puppies.” Given the factual record—which contains one unspecific statement about a neighbor using a chemical to control dust—it was unreasonable of the planning commission to deny the IUP application based on dust. *See Yang*, 660 N.W.2d at 832 (stating that zoning decisions are unreasonable when they have no factual basis in the record).

Finally, the planning commission recommended denial of the IUP because “the protection of the public’s health, safety, morals and general welfare have **NOT** been addressed through the required performance standards for this type of interim use and in the [proposed] conditions.” The planning commission was required to consider whether

an IUP includes “specific conditions and such other conditions . . . as required for the protection of the public’s health, safety, morals and general welfare.” BCO § 24-47(f)(1)(o). But the planning commission did not provide any factual or legal basis for its conclusion on this factor, and we can find none in the record. Thus, it was unreasonable for the planning commission to deny the IUP application on this ground.

As our standard of review recognizes, we are reluctant to interfere with a county’s land-use decisions. *See PTL, L.L.C. v. Chisago Cnty. Bd. of Comm’rs*, 656 N.W.2d 567, 571 (Minn. App. 2003) (emphasizing narrow scope of appellate review of local land-use decisions). But here, where the planning commission’s decision to deny the IUP application was based primarily on speculation that the DeMartinis would not comply with an IUP and not based on their IUP application, the decision was arbitrary, capricious, and unreasonable.

Generally, “when a governmental body denies a permit with such insufficient evidence that the decision is arbitrary and capricious, the court should order issuance of the permit.” *Livingood*, 594 N.W.2d at 895. Accordingly, we reverse and remand to the county board to approve the IUP application subject to reasonable conditions.

Reversed and remanded.