STATE OF MINNESOTA
IN COURT OF APPEALS
A21-1708

Lawrence J. Culligan, et al., Trustees of Lawrence J. Culligan Revocable Trust under Agreement dated June 21, 2001, as amended,
Respondents,

vs.

The City of Mendota Heights,
Appellant.

Filed July 25, 2022
Reversed
Hooten, Judge[*]

Dakota County District Court
File No. 19HA-CV-21-527

Mark W. Vyvyan, Christian V. Hokans, Fredrikson & Byron, P.A., Minneapolis, Minnesota (for respondents)

James J. Thomson, Michelle E. Weinberg, Kennedy & Graven, Chartered, Minneapolis, Minnesota (for appellant)

Considered and decided by Bjorkman, Presiding Judge; Segal, Chief Judge; and Hooten, Judge.

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

NONPRECEDENTIAL OPINION

HOOTEN, Judge

Appellant-city asks this court to reverse the district court's determination that the city council's denial of respondents' development application was arbitrary and capricious. Because we conclude, based upon the record, that the city council's denial of respondents' application was not arbitrary and capricious, we reverse.

FACTS

Respondents Larry and Mary Culligan own property in the City of Mendota Heights (the City). The property is 6.76 acres, zoned as low-density/one-family residential and located in the Mississippi River Corridor, a Critical Area Overlay District. The Culligans, who had previously developed adjacent property in the area, proposed to subdivide the remaining property that they owned located on a bluff above Mendota. Under the appellant City's code, the developer in a Critical Area Overlay District is required to have a critical area permit (CAP) and a conditional use permit (CUP) for development on slopes between 18% and 40%. The proposed property contains slopes exceeding 18%.

On June 29, 2020, the Culligans sought the City's approval of their plan to subdivide the property and to obtain a CAP, a CUP, and approval of variances for a roadway to the property and retaining walls. The Culligans worked with Loucks, Inc., a civil engineering firm, in preparing the application. Loucks prepared a stormwater management report, a slope analysis, and a grading plan sheet to support the Culligans' application. The Culligans also worked with the City's engineer, Ryan Ruzek, and the City's community development director, Tim Benetti.

Benetti prepared a staff report for the City's planning commission about the Culligans' June 29 application. The planning commission recommended to the city council whether to approve or deny applications. The city council then voted on whether to grant or deny the permits. Benetti commented on the detailed nature of the slope analysis plan and the grading plan. Benetti concluded "the proposed development meets the[] objectives" required for a CAP because the development application "does not impact shoreline or bluff areas." At the July 28, 2020, public hearing, however, Benetti recommended that the planning commission "table" making any recommendation on the application pending additional review of the application by the Parks and Recreation Commission and further consideration by Benetti and Ruzek following "a full soil report with boring analysis for city staff to review." The planning commission heeded Benetti's advice and tabled any recommendation until after hearing the Culligans' presentation and other public comments.

On October 5, 2020, the Department of Natural Resources (the DNR) sent a memorandum to the planning commission about the Culligans' application. The memorandum outlined the DNR's concerns that "[t]he exposed rock and sediment in bluff complexes along the Mississippi River Corridor are naturally vulnerable to failure." The DNR also noted the City's definition of "bluffs" as slopes greater than 40% while the statewide definition included slopes greater than 18%.

On October 8, 2020, the Culligans again presented their initial application along with recent soil borings and stability analyses performed by Braun Intertec. The planning commission expressed concerns regarding the DNR memorandum. The planning commission also heard from a hydrogeologist, Kelton Barr, who was retained by a group

of neighbors opposed to the development. Barr prepared a preliminary report and agreed his main "impediment to rendering any real opinion on this [matter was] the lack of deeper borings." At the conclusion of the hearing, the planning commission unanimously voted to recommend denying the whole application.

After the October 8 hearing, the Culligans developed an amended development application designed to address the concerns expressed during the hearing and by the DNR memorandum. These changes included an additional boring analysis, reduced the number of lots from eight to five, and eliminated the need for variances. While the amended application removed the need for variances, the application still required a CAP and a CUP.

Following the Culligans' amended application, Benetti prepared a second supplemental staff report for the planning commission. Benetti recommended, in compliance with a DNR request, that the Culligans grant a conservation easement on the property to ensure no trees be removed "at or below the contour line" to "maintain stability and minimize erosion on the bluff and to retain visual quality of the Critical Area." Benetti still concluded "the proposed development meets" the objectives of a CAP. Benetti added, about granting a CUP, that the application "appears to be in general conformance with the spirit and intent of the critical area district and comprehensive plan" and the application "appears to meet the findings required [] to issue a conditional use permit."

On November 24, 2020, the Culligans presented the amended application to the planning commission. The planning commission expressed concern over the slope grades on the proposed lots because the slope must be under 18% for a structure to be built, but each proposed lot had slope grades over 18%. Benetti explained that the future landowners

may need to apply for a "separate critical area permit" and show the area was "buildable." One member of the planning commission commented that this would be "kicking the proverbial can down the road as respects to the buildable area test." The Culligans stated they believed future permits would not be required. Neighbors of the proposed subdivision challenged the Culligans' application, including the former mayor of Mendota, Bob Bruestle. Former mayor Bruestle lives below the pond that is "supposed to capture the water for the Culligan addition." Bruestle provided testimony about the current water runoff from the Culligan property causing flooding in his basement. After hearing testimony, the planning commission unanimously voted to recommend the city council deny the Culligans' application.

The City retained Barr Engineering[1] as an independent evaluator of Braun's analysis in the Culligans' application. The City received Barr Engineering's written report on November 24, 2020. Barr Engineering found Braun's analysis was "generally consistent with the standard of care for a preliminary geotechnical evaluation" and the soil borings were "consistent with Federal Highway Administration guidelines." The report, however, noted the placement of the proposed stormwater pond could "contribute to slope instability if not appropriately considered in design."

On December 1, 2020, the city council considered the Culligans' application. The council split 2-2 on approval of the proposed project. Council members stated concerns about the stormwater pond, as raised in Barr Engineering's report, as well as the slope

[1] Barr Engineering is not affiliated with the hydrologist Kelton Barr.

grade on the lots, as raised by the planning commission. A council member raised the issue that 100-year storm events are occurring much more frequently and that the safeguards in place are inadequate to handle multiple 100-year storm events in a short period of time because the stormwater pond is "built based on a hundred-year storm event." The city council tabled the decision until December 15, 2020, when a council member would be elected to fill a vacant seat on the council.

At the December 15 city council meeting, the Culligans presented their application and answered the council's questions. Council members questioned the possibility of the stormwater pond leaking because of a small channel underneath the pond, as had occurred in one other situation, and about the placement and depth of the boring analysis, because a recent project in the area failed. The current mayor of Mendota, Brian Mielke, commented on being the "downhill neighbors of th[e] potential development" and testified that "water issues" began after previous Culligan developments and now "water comes through in the soil [from the bluffs] 365 days a year." One council member also commented that if the Culligans "can't tell [him] with 100 percent certainty yet that it's not gonna fail, [he's] worried about it." After the Culligans' experts addressed these concerns, the mayor of Mendota Heights responded that "a hundred percent guarantee on anything is totally unrealistic." Three of the five council members voted to deny the Culligans' amended application.

On February 24, 2021, the Culligans filed a complaint against the City in district court. Both parties moved for summary judgment. In a November 5, 2021, written order, the district court reasoned the city council acted arbitrarily and capriciously in denying the

Culligans' application for a CAP and CUP because the application met the criteria for a CUP and the city council's "reliance on the health and safety of public" to deny the permits is "based solely on unsubstantiated worries." The district court, therefore, denied the City's motion for summary judgment, granted the Culligans' motion for summary judgment, and awarded the Culligans fees and costs.

The City appeals.

DECISION

"Our standard of review is a deferential one" in reviewing "decisions about special use permits." *Schwardt v. Cnty. of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). "We will reverse a governing body's decision regarding a conditional use permit application if the governing body acted unreasonably, arbitrarily, or capriciously." *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015) (citations omitted). We use a two-step test to determine "whether a city's denial was unreasonable, arbitrary, or capricious. First, we must determine if the reasons given by the city were legally sufficient. Second, if the reasons given are legally sufficient, we must determine if the reasons had a factual basis in the record." *Id.* The challenger has the burden to demonstrate that a city council's decision is arbitrary and capricious. *Bill Graham Evangelistic Ass'n. v. City of Minneapolis*, 667 N.W.2d 117, 123 (Minn. 2003).

"We do not give any special deference to the conclusions of the [district] courts, but rather engage in an independent examination of the record and arrive at our own conclusions as to the propriety of the city's decision." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006). "As a reviewing court, we will not

retry facts or make credibility determinations, and we will uphold the decision if the lower tribunal furnished any legal and substantial basis for the action taken." *Staeheli v. City of St. Paul*, 732 N.W.2d 298, 303 (Minn. App. 2007) (quotation omitted).

For the city council's denial of the Culligans' application to be upheld, the decision must be "legally sufficient." *See RDNT*, 861 N.W.2d at 75-76. Here, the framework we use to determine legal sufficiency is an analysis of the City Code. Under the City Code to grant a CUP, the city council must make four findings: (1) the proposed use is consistent with the intent of the critical area and the city's comprehensive plan; (2) the proposed use is compatible with uses in the immediate vicinity; (3) the proposed use is allowed under the applicable ordinances of the City; and (4) the requesting party notifies the DNR for review and comment. Mendota Heights, Minn., City Code (MHCC) § 12-3-16 (2003). The City Code also states that the intent of the Mississippi River corridor is to "prevent and mitigate irreversible damage" and to "promote orderly development of the residential" area and that preservation in "furtherance of the health, safety, and general welfare of the city" is a priority. MHCC §§ 12-3-1, 2.

MHCC § 12-3-14 describes the "process for construction on property within the critical area." First, the City Code requires a CAP to build any structure or for any alteration to the land. City Code requires a CUP for activity requiring a CAP if the activity is on slopes greater than 18% but less than 40%. For new subdivisions, the City Code states, "the subdivider shall be required to demonstrate that any newly created parcel will be able to support a buildable area consistent with the underlying zoning regulations, on grades less than eighteen percent (18%)."

The city council relied on nine findings to support its decision to deny the Culligans' application. Because all requirements of the ordinance must be satisfied to grant a CUP, a supported factual finding that any requirement is *not* satisfied is sufficient for denial. *See RDNT*, 861 N.W.2d at 75-76. We consider the city council's first finding that:

> The grading and heavy construction activity necessary to achieve buildable areas on grades less than eighteen (18) percent on the proposed lots endangers the safety and welfare of adjoining properties as well as those below the proposed development. There is an unjustifiable risk that erosion, landslides, or other hydrological instability may occur.

The City correctly notes that preservation and "mitigation of irreversible damage" is an intent of the Critical Area Overlay District. MHCC § 12-3-8(F)(1) states that risk of unjustifiable risk of erosion and landslides makes a proposed subdivision "unsuitable." Because such a result would conflict with the "intent of the critical area," granting a CUP would violate MHCC § 12-3-16. Granting a CAP would conflict with MHCC § 12-3-14(E), which requires that a subdivision shows a buildable area on grades lower than 18%. Thus, the city council's first finding is legally sufficient for denying the Culligans' application.

The city council's finding is also supported by facts in the record. Its decision relied on the unanimous recommendation of the planning commission, the report and testimony by Barr, neighbor testimony expressing safety concerns about instability of the bluff, testimony from University of Minnesota Professor Otto Strack, an expert in "soil mechanics and groundwater flow mathematics," and the DNR report expressing concern about the project. While the record also contains expert testimony stating the application should be granted, when reviewing expert witness testimony, we 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." *Billy Graham Evangelistic Ass'n*, 667 N.W.2d at 124.

The City aptly analogizes the legal analysis to *RDNT*, 861 N.W.2d at 77. In *RDNT*, the supreme court decided Bloomington had a factual basis for denying a CUP because of harm to "public health, safety, and welfare" based on conflicting evidence. *Id.* at 76. Bloomington denied RDNT's application to expand due to concerns about traffic and street capacity. *Id.* Neighbors in the area RDNT wanted to expand presented "testimony about how the [traffic] increase would exacerbate existing traffic conditions." *Id.* at 77. Experts in *RDNT* presented conflicting evidence. *Id.* at 76. The supreme court concluded that because of the "traffic studies," the expert testimony, and "the neighborhood testimony," Bloomington had an adequate factual basis to deny the CUP application. *Id.* at 77.

The Culligans argue *RDNT* is distinguishable. The Culligans' argument, however, depends on making credibility determinations between the experts. They contend the experts in *RDNT* provided information specific to the intersection in question; while here, the opposing experts provided only general analysis because they "did not perform any analysis on the Property itself." But our review of the record is limited to looking for support of the decision made rather than weighing the credibility of expert testimony. *Billy Graham Evangelistic Ass'n*, 667 N.W.2d at 124.

Here, the City's legal argument is much like that in *RDNT*. The Culligans provided expert testimony from Braun and Loucks which demonstrated the lots contained "buildable areas" which presented low risk. However, the concerns raised by Barr and Professor

Strack, the neighbors' testimony, and the memorandum from the DNR create a conflict in the evidence. Barr's report challenged the placement and depth of the stormwater pond which could lead to "instability." Professor Strack commented on the "high-risk area" and that there was still a lack of information necessary about soil stability to "make [the application] safe" and that "a lot more data and a lot more sophisticated analysis" was still needed. While Strack admitted he was "super conservative" in his approach, his testimony still provides a factual basis contesting the expert testimony from the Culligans about the needed preparation before beginning development.

Neighbors provided comments at hearings on the application expressing safety concerns, specifically about "slope slide occurring that will affect [] homes" because of "the many slope slides that have occurred in the region that contain the same soil mix and plat formations" as the property. One neighbor questioned the methodology of the Culligans because it failed to include "technologies out there that . . . provide . . . better information that will answer the questions" raised about the proposed development. The neighbor cited the Braun report presented by the Culligans does not consider "the potential for deep-seated failure, failures that are based in the spring horizon and affect all of the glacial sediment above it. Those kinds of failures have occurred along the river valley." Mayor Mielke of Mendota also testified there is "water coming from the ground to the point where [people] can stick hoses in there and then water their plants with that kinda water, . . . and that wasn't like that before the Culligan development."

The DNR was concerned that "[t]he exposed rock and sediment in bluff complexes along the Mississippi River Corridor are naturally vulnerable to failure." While the DNR

stated it "is not in a position to evaluate [the Culligans' expert] reports," the DNR advised the city council to "carefully consider" the expert reports prepared by both the Culligans and the group of neighbors. The DNR's concern stemmed from a 2015 study which "found that bluff failures occurred where slopes had been modified for building foundations, stormwater management facilities, or road construction, and that these modifications contributed to the failures." The DNR also expressed concern over nearby bluff failures in 2014. The City's definition of bluff also differed from the statewide definition, as pointed out by the DNR memo. The planning commission commented on this difference and noted that the current city definition of bluff as a 40% grade is an "antiquated ordinance" which will be "requested or mandated" to change to comply with statewide definition of "bluff" as an 18% grade. The planning commission commented that "common sense . . . would dictate" making decisions against "best-known practices," but until the City adopted the new standard, they were "obligated to follow the code that they have in place."

In discussing the conflict between experts in *RDNT*, the supreme court explained that "regardless of which [expert] estimate is more accurate, there [was] a factual basis in the record" to support the City of Bloomington's decision. *Id.* at 76. Here, the Culligans' and neighbors' expert reports create a similar factual basis for the city council's denial of the Culligans' application.

The Culligans argue the correct burden of proof to apply for the factual basis requires the finding to be "likely." This argument is unpersuasive. The Culligans rely on City Code § 12-3-8(F)(1), which states:

> No land shall be subdivided which is found to be unsuitable for reason of flooding, inadequate drainage, soil and rock formations with severe limitations for development, severe erosion potential, unfavorable topography, inadequate water supply or sewer disposal capabilities or any other feature likely to be harmful to the health, safety or welfare of the future residents of the proposed subdivision or the community.

The enumerated risks in the code include flooding, erosion, and unfavorable topography before stating, "or any other feature likely to be harmful." The "likely" language modifies that catch-all provision of "or any other feature likely to be harmful." "Likely" is not placed before "unsuitable," which would modify the entire enumerated list. Because the city council found the "land to be subdivided . . . unsuitable for reason of flooding," the city council properly considered the factual burden.

The Culligans also argue the district court was correct in noting that denial of the application cannot depend only on "concerns," "doubts," or "vague reservations." *See C.R. Inv., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981). *C.R.*, however, is distinguishable. As noted in *RDNT*, the evidence in *C.R.* was limited to "'the statement of one council member that he had been told of a problem existing at one intersection and his opinion that additional housing units might aggravate the problem.'" *RDNT*, 861 N.W.2d at 77 (quoting *C.R.*, 304 N.W.2d at 325). In this case, the concrete expert testimony, as well the testimony from neighbors and the report from the DNR, created a conflict with the Culligans' expert testimony that was more than the "concerns," "doubts," or "vague reservations" present in *C.R. See id.*

The city council's finding that the proposed development presents "an unjustifiable risk" is, therefore, both legally sufficient and factually sufficient. Because we determine the city council's first finding is legally sufficient and the record contains facts supporting the finding, we need not address the remaining findings by the city council.

However, if we were to address the additional findings, the same facts supporting the city council's first finding support the other findings. For example, the city council found that the proposed "plat development is found to pose a threat and could cause potential irreversible damage to this heavily wooded, natural and unique local area." This finding is legally sufficient because a subdivision that poses a threat of irreversible damage is not a "proposed use [that] is consistent with the intent of the critical area and the city's comprehensive plan." There are also facts in the record supporting this finding because of the detailed testimony from neighbors and Professor Strack, and the reports from the DNR and Barr Engineering. Thus, the city council's finding that the proposed development is inconsistent with the "intent of the critical area" would be legally and factually sufficient to deny the Culligans' application.

In conclusion, the Culligans did not meet their burden of demonstrating the city council's decision to deny their application for a CAP and CUP is arbitrary and capricious

because the city council's findings were both legally and factually sufficient to deny the Culligans' application.[2]

Reversed.

[2] The City also initially challenged the district court's award of attorney fees to the Culligans. Respondents' brief, however, stated that the district court "revers[ed] its decision [on the fee award] after the City filed this appeal." In the City's reply brief, the City acknowledged the district court "reversed its initial decision" on attorney fees, and the City noted its "request that this [c]ourt reverse the District Court's attorneys' fee award is now moot." An issue on appeal is moot and need not be reached by a reviewing court "when, pending appeal, an event occurs that makes a decision on the merits unnecessary." *App. Of Minnegasco*, 565 N.W.2d 706, 710 (Minn. 1997). "The mootness doctrine, therefore, implies a comparison between the relief demanded and the circumstances of the case at the time of the decision in order to determine whether there is a live controversy that can be resolved." *Id.* Here, as acknowledged by both parties, the district court reversed the challenged fee award, rendering our review of the initial decision unnecessary. *See id.*