STATE OF MINNESOTA
IN COURT OF APPEALS
A10-2246

In the Matter of an Application by
Robert and Ann Hennen for an Amended Conditional Use Permit

Filed September 26, 2011
Reversed and remanded; motion granted
Stoneburner, Judge

Morrison County Board of Commissioners
Doc. No. 502825

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Considered and decided by Klaphake, Presiding Judge; Stoneburner, Judge; and Wright, Judge.

U N P U B L I S H E D O P I N I O N

STONEBURNER, Judge

In this certiorari appeal, relators challenge respondent county's denial of a conditional-use permit (CUP) to expand a feedlot, arguing that (1) the record does not support findings that expansion would create unreasonable adverse effects due to odor and is not compatible with surrounding properties and (2) even if the county's decision is not unreasonable, the record supports a grant of limited expansion of the feedlot. Because the record does not support the county's findings and conclusions, we reverse

denial of the CUP and remand with instructions to grant the CUP with reasonable conditions that may include specific requirements to be met before relators may implement any incremental increase in animal units. The motion to strike portions of relators' appellate brief is granted.

FACTS

Relators Robert and Ann Hennen operate several feedlots, including Silverstreak Dairy, a 115-acre commercial dairy feedlot in Buckman Township, Morrison County (the county). Silverstreak is located near Coon Lake, in a district zoned Agriculture. More than seventy percent of Morrison County's acreage is used for agricultural purposes and the county has the third largest number of milk-producing farms in the state. Section 604.1 of Morrison County's Land Use Control Ordinance (the ordinance) states that "agricultural activities shall be given precedence over other land uses [in an agricultural zone]." Minnesota Pollution Control Agency (MPCA) rules prohibit feedlot expansion within 1,000 feet of the ordinary high-water mark (OHWM) of Coon Lake.

Morrison County's Land Use Control Ordinance establishes several categories, or "tiers," of feedlots based on the number of animal-units allowed. In 2007, the county granted Silverstreak's application for a CUP to classify Silverstreak as a Tier IV feedlot, with the condition that the site be limited to 1,499 animal units, rather than the 1,500 animal units permitted by the 2007 ordinance for Tier IV feedlots. The CUP contained other conditions, including, in relevant part, that relators would install new manure-management equipment that would keep the manure basin at least 1,000 feet from the protected waters of Coon Lake. Because Silverstreak was permitted to have more than

1,000 animal units, it became subject to regulation by the National Pollution Discharge Elimination System (NPDES), which requires compliance with relevant state and national regulations and regular inspections by the Minnesota Pollution Control Agency (MPCA). In relevant part, Silverstreak had to adhere to a MPCA air-quality rule stating that it is a violation to emit hydrogen sulfide in an amount greater than 30 parts per billion, in certain situations. Emissions can be assessed with a handheld tool called a Jerome Meter, which produces a preliminary measurement of the hydrogen sulfide concentration in the air.

In 2008, the county amended the ordinance to increase the Tier IV maximum-animal-unit capacity to 2,500 animals, provided that any increase must be implemented without encroachment on an existing nonconforming setback. The amendment also required that "[n]ew feedlots or new construction on existing feedlots shall meet a 91% annoyance free rating to the nearest non-feedlot dwelling" as measured by an odor-assessment rating known as OFFSET (Odor From Feedlots Setback Estimation Tool).

In June 2010, relators applied for a CUP that would remove the 1,499-animal-unit limit on their Tier IV feedlot. The plan submitted with the application proposed construction of a cattle barn to house an additional 41 animal units. Soon after relators submitted their application, the Morrison County Soil and Water Conservation Department (SWCD) proposed a redetermination of the OHWM of Coon Lake.

While the permit application was pending before the county zoning authority, the county and the MPCA conducted a joint inspection of Silverstreak and concluded that the operation was in compliance with the terms of the 2007 CUP, the ordinance, and all

MPCA regulations. The inspection found no apparent environmental problems. OFFSET measurements indicated that Silverstreak's current operation is 85% annoyance free to its closest nearby non-feedlot dwelling, but Silverstreak's proposed addition would be 98% annoyance free to its closest nearby non-feedlot dwelling, and odors from the proposed addition would be "nearly negligible." Jerome-meter readings of the existing operation showed that hydrogen sulfide was present in an amount between 0 to 2 parts per billion, significantly less than the impermissible level of 30 parts per billion.[1]

Buckman Township recommended approval of relators' CUP application to the county's planning and zoning commission. The county's planning and zoning commission held a public hearing at which the commissioners discussed various interpretations of the ordinance's OFFSET provision. Some commissioners noted that, despite the language stating that OFFSET is to be applied only to "new construction," it was "common sense" to measure and consider the odor emanating from the entire operation. Some Commissioners and members of the public complained about the odor currently emanating from Silverstreak. The commission postponed ruling on the application because it was not certain whether Silverstreak would be impacted by the proposed relocation of the OHWM of Coon Lake.

The Minnesota Department of Natural Resources (DNR) subsequently redetermined the OHWM of Coon Lake. The SWCD then concluded that much of Silverstreak's current operation is now located within 1,000 feet of the OHWM and that,

[1] If a Jerome-meter reading indicates that a hydrogen sulfide problem may exist, a continuous air monitor (CAM) can be set up to take a more accurate reading. A CAM was not set up at Silverstreak during the assessment.

under the ordinance, the proposed feedlot expansion could not be built within this 1,000-foot setback area. Relators amended their proposal to include a different layout and off-site manure disposal, and the SWCD determined that the amended expansion plan complied with the new OHWM setback requirements.

When the planning and zoning commission reconvened to consider relator's permit, the commissioners expressed concerns that the OHWM placed much of Silverstreak's current operation within the shoreline-setback area. The commissioners again expressed concerns about the existing odor. In considering the OFFSET provision in the ordinance, the commissioners again discussed whether they should consider only the impact of new additions or the measurement for the whole operation. One commissioner indicated that the measurement should only apply to new construction as it was not the commission's intent to retroactively apply the OFFSET requirements to all county livestock operations, many of which, the commissioner speculated, may not be in compliance with the new OFFSET provision. Another commissioner stated that "the Jerome meter means nothing" and that if Silverstreak does not fail the OFFSET test, "then someone is lying." Members of the public complained about the existing odor. The mayor of the nearby city of Buckman complained that residents of Buckman had "concerns" about property values and marketability of their homes being affected by the odor.

The county attorney suggested granting a permit with the condition that relators could increase the size of the feedlot only by their proposed 41 animal units, without totally removing the animal-unit restriction. Hennen stated that he disagreed with this

suggestion. The commissioners did not consider granting a CUP with conditions for expansion beyond the currently planned addition of 41 animal units.

The planning commission recommended denial of relator's permit, and the county board of commissioners adopted the planning commission's findings and recommendations to deny the permit application. The board concluded that (1) the request to remove the animal-unit cap will "create an unreasonable adverse [effect] because of noise, odor, glare or general unsightliness;" (2) "the request is not compatible with the surrounding area and will significantly depreciate near-by properties;" and (3) "the 1,499 animal-unit limitation remains necessary to protect the health, safety and welfare of the community."

Relators filed this certiorari appeal. The county moved to strike a portion of relator's brief that discusses an unpublished opinion of this court involving another feedlot operated by relators in which the court noted the bias of one commissioner against relator Robert Hennen.

D E C I S I O N

I. Denial of the permit

A. Standard of review

Relators argue that denial of their CUP application was arbitrary because Silverstreak's application meets all of the standards specified by the ordinance for CUP approval and because the reasons given by the board of commissioners for the denial have no factual basis in the record. Quasi-judicial zoning decisions, such as the denial of an application for a CUP, are reviewable by writ of certiorari. *Interstate Power Co. v.*

Nobles Cnty. Bd. of Comm'rs, 617 N.W.2d 566, 574 (Minn. 2000).

An appellate court will affirm a county's decision to approve or deny a CUP unless de novo review of the record indicates that the decision was arbitrary, capricious, or unreasonable. *Schwardt v. Cnty. of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). Denial of a CUP is arbitrary when the applicant establishes that all of the requirements specified by the zoning ordinance as conditions of granting the permit have been met. *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969). A denial is also improper when the applicant meets the burden of demonstrating to this court that the denial was not based on facts in the record. *See Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982).

B. Findings regarding odor

Feedlots are conditional uses in the county's agricultural districts. The ordinance states that, when considering a CUP application, the board must consider the proposed use's "effect . . . upon the health, safety, morals, and general welfare of occupants of surrounding lands and water bodies." Morrison County, Minn., Land Use Control Ordinance §507.2 (2008). The board supported its conclusion that the request to remove the animal-unit cap would create unreasonable adverse effects with seven findings, all relating to odor.[2] Relators argue that these findings are not supported by the facts in the record. We agree.

[2] One finding relates to the board's dismissal of the Jerome Meter readings as "scientifically insignificant." On appeal, the county concedes that the board erroneously thought that the Jerome Meter, which measures only hydrogen sulfide particles, measured odor.

First, relators challenge these findings on the basis that the board relied on the "generalized, speculative, and vague" comments of its own members and local citizens. Vague concerns for public health and welfare, whether expressed by the public or the board members themselves, are not legally sufficient bases for denial. *See Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (stating that denial of a CUP "must be based on something more concrete than neighborhood opposition and expressions of concern for public safety and welfare"); *see also C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981) (explaining that vague concerns of the board members themselves are an improper basis for denial of a permit).

In *Yang v. Cnty. of Carver*, 660 N.W.2d 828, 836 (Minn. App. 2003), this court reversed a denial of a CUP based on speculative opposition from local residents about problems the CUP might cause, stating, "[A] city may consider neighborhood opposition only if based on concrete information." *Yang*, 660 N.W.2d at 833 (citing *Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 728 (Minn. App. 1988), *review denied* (Minn. Mar. 23, 1988)). Relators argue that, as in *Yang*, "the findings do not establish a causal link between the intensity of the operation and the degree of disturbance the operation will cause." *Id*. at 834.

We agree that the record does not support finding such a causal link. The planned 41-animal-unit expansion was found to be within the OFFSET requirements of the ordinance and there is only speculation that further expansion will exceed those requirements. Several residents and several commissioners testified that odor from the

current, permitted use is a problem that will "logically" be exacerbated by the planned expansion. But the evidence in the record is undisputed and supports only a finding that the planned expansion will have a "negligible effect" on odor. And there is no evidence in the record establishing that future incremental increases in the number of animal units will have an effect on odor because, as relators asserted at oral argument, without concrete expansion plans (which do not exist at this time) that effect cannot be measured or even estimated.

The county's findings and conclusions were based on the fact that granting relators' application could result in expansion up to the 2,500-animal-unit limit for Tier IV operations as permitted by the ordinance. But the county erroneously considered the OFFSET report for the existing, conforming portions of the operation. The ordinance states, in relevant part, that "new construction on existing feedlots shall meet a 91% annoyance free rating to the nearest non-feedlot dwelling as determined by the OFFSET odor evaluation model[]." Relators' only planned expansion meets this requirement.[3] Because the record only supports a finding that the proposed increase of 41 animal units will have a negligible effect on odor, the evidence is insufficient to support the board's findings that if the CUP is granted the anticipated odor will create an unreasonable adverse impact on the community.

[3] The commissioners also erred in relating the Jerome Meter readings to odor. The Jerome-meter measures hydrogen sulfide emissions.

C. Property values and compatibility of surrounding property

The mayor of Buckman stated that the existing odor impacts the residents of Buckman City who are "concerned about their property values." The board found that this testimony was "credible and reliable." But the mayor's comments were only vague assertions of general concern that do not establish a link between increased size of the operation and increased harm to surrounding properties. We conclude, and counsel for the county conceded at oral argument, that the speculative comments about property values do not support the board's findings that granting the CUP will affect property values. Silverstreak is in an agricultural district, where, as the ordinance states, "agricultural activities shall be given precedence over other land uses [within that zone]." Morrison County, Minn., Land Use Control Ordinance, § 604.1 (2008). The county argues that the proximity of the city of Buckman is evidence that residents of non-agriculture districts will be affected by the proposed expansion. But absent concrete evidence of a link between the proposed expansion and property values, the mere proximity of the city to Silverstreak is not sufficient to support the board's findings.

D. The high-water mark

The board concluded that the proposed expansion is not compatible with the surrounding area based, in part, on its finding that the majority of the current, permitted operation is now within 1,000 feet of the OHWM of Coon Lake. The findings do not explain the relationship between the current operation and the proposed expansion, which, the evidence shows, would be in a different part of relators' property and compliant with setbacks for the new OHWM. Both parties conceded at oral argument,

and we agree, that the fact that the OHWM was relocated is irrelevant to relators' CUP application. It was also conceded at oral argument that any subsequent expansion of Silverstreak will have to comply with all relevant setback requirements. While the county's findings regarding the determination of the OHWM on the existing operation are supported by the record, the findings do not support the conclusion that the proposed expansion is therefore "not compatible with the surrounding area and will significantly depreciate near-by properties."

II. Alternative of restricted permit

Relators argue, for the first time on appeal, that even if denial of the CUP application was reasonable, the county board should have issued a CUP with conditions that would assure compliance with the ordinance. Relators cite *Trisko v. City of Waite Park*, for the proposition that "[e]vidence that a municipality denied a conditional use permit without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary." 566 N.W.2d 349, 357 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997). Relying on *Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee*, 303 Minn. 79, 85, 226 N.W.2d 306, 309 (1975), relators also assert that a zoning authority must attempt to compromise. In *Svee*, the court noted that "there was no attempt made, either by the opponents or the council, to suggest or to impose conditions which would insure proper landscaping, setbacks, or ingress and egress." *Id.* at 85–86, 226 N.W.2d at 309.

Although the board suggested several different odor-control methods for the existing operation, these suggestions are irrelevant to future expansion. Except for a

suggestion to grant a CUP, there were no suggestions and no discussion regarding other reasonable conditions that could be imposed on the CUP to address the county's concerns about the effect of incremental increases in the operation up to the 2,500 animal units permitted by the ordinance.

On this record, relators' currently planned expansion meets all of the requirements of the ordinance and the record does not support a conclusion that expansion up to the maximum permitted animal units for Tier IV operations would, under appropriate conditions, violate the ordinance. We conclude that the county's denial of relators' application was arbitrary and unreasonable. We reverse denial of the CUP and remand for the county board to issue the CUP with appropriate reasonable conditions that address the county's concerns for further incremental increases in the number of animal units.

III. County's motion to strike

Because we did not consider the materials that are the subject of the county's motion to strike in reaching this decision, we grant the motion to strike the material from the record.

Reversed and remanded; motion granted.