STATE OF MINNESOTA
IN COURT OF APPEALS
A11-552

Concerned River Valley Citizens, Inc., et al.,
Relators,

vs.

Chisago County,
Respondent,

AT&T,
Respondent,

Gerald Vitalis,
Respondent,

Constance Vitalis,
Respondent.

Filed October 31, 2011
Affirmed
Bjorkman, Judge

Chisago County Board of Commissioners

Douglas G. Sauter, Karen K. Kurth, Barna, Guzy & Steffen, Ltd., Minneapolis, Minnesota (for relators)

Paul D. Reuvers, Jason J. Kuboushek, Iverson Reuvers, Bloomington, Minnesota (for respondent Chisago County)

William E. Flynn, Karla M. Vehrs, Lindquist & Vennum, P.L.L.P., Minneapolis, Minnesota (for respondents New Cingular Wireless PCS, LLC d/b/a AT&T Mobility, and Gerald and Constance Vitalis)

Considered and decided by Larkin, Presiding Judge; Connolly, Judge; and Bjorkman, Judge.

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

BJORKMAN, Judge

Respondent Chisago County granted a conditional use permit (CUP) to respondent New Cingular Wireless PCS, LLC d/b/a AT&T Mobility (AT&T)[1] to build a communications tower. Relators argue that the county acted unreasonably, arbitrarily, and capriciously in granting the CUP because the county failed to adequately consider certain criteria for issuance of a communications-tower CUP, erred in its findings as to the visual impact of the tower, and failed to giver proper notice of the CUP proceedings. We affirm.

FACTS

On or about November 23, 2010, Steve Trueman, acting on behalf of AT&T, submitted application materials to the county seeking a CUP to construct and operate a wireless communications tower on the property of respondents Gerald and Constance Vitalis. The Vitalis property is zoned agricultural and is located in Franconia Township on Highway 95, near Highway 8, and west of the St. Croix River. The property also is near the Franconia Sculpture Garden. AT&T proposed a 150-foot monopole (single-shaft) tower, designed to accommodate two additional wireless service providers in the future. AT&T explained that there was a "significant gap" in cellular coverage in the

[1] AT&T indicates in its statement of the case that it should be identified as New Cingular Wireless PCS, LLC d/b/a AT&T Mobility.

area and that the tower would provide "vastly improved" wireless coverage within a two-mile radius of the proposed site.

Upon receipt of the application, the county's zoning department prepared a report noting the ordinances that govern CUPs for communications towers and recommending approval of the application. The county planning commission held a meeting on January 6, 2011, to hear public comment and discuss the application. After hearing from Trueman, the Franconia Township Supervisor, a nearby resident, and the owner of the Franconia Sculpture Park, the planning commission voted to recommend approval to the county board based on the findings of the zoning department.

After the planning commission's meeting, the county received correspondence from nearby residents, the St. Croix River Association, and the National Park Service (NPS), expressing concern about the visual impact of the proposed tower, particularly on the St. Croix River. Most of the correspondence also posed the possibility of an alternative design to lessen the visual impact.

On January 19, the county board of commissioners met to vote on the CUP application. The board discussed a proposed resolution to condition approval of the application on AT&T's use of a "stealth" design that was intended to minimize the visual impact of the tower by camouflaging it as a tree. The board ultimately rejected the proposal and granted the CUP based on the findings of the zoning department. This certioriari appeal follows.

D E C I S I O N

A county has broad discretion to approve, deny, or amend a CUP. *See 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). We review the county's decision to determine whether it has a reasonable basis in the record, or whether the county acted unreasonably, arbitrarily, or capriciously. *Schwardt v. Cnty. of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). An agency's decision is arbitrary or capricious if

> the agency relied on factors the legislature never intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

In re Block, 727 N.W.2d 166, 178 (Minn. App. 2007) (quotation omitted). The party challenging the grant of a CUP bears the burden of establishing that the CUP proposal did not comply with the applicable ordinances and that the grant of the CUP was an abuse of discretion. *See Corwine v. Crow Wing Cnty.*, 309 Minn. 345, 352, 244 N.W.2d 482, 486 (1976).

There are two ordinances applicable to AT&T's CUP application: Chisago County, Minn., Zoning Ordinance (CCZO) §§ 7.28, 8.04 (2008). Section 7.28 specifically governs communications towers and antennae, and section 8.04 generally governs the issuance of CUPs. Relators argue that the county (1) failed to consider the specific requirements in CCZO § 7.28 regarding colocation of a communications tower and the use of alternative designs to minimize the visual impact of a communications

tower, (2) made erroneous findings as to the expected visual impact of the proposed tower under CCZO § 8.04, and (3) disregarded procedural requirements under CCZO § 8.04 by failing to provide notice of the proceeding. We address each argument in turn.

I. The county properly considered AT&T's application under CCZO § 7.28.

Relators first argue that the county acted arbitrarily and capriciously because it did not make findings addressing whether AT&T had satisfied the requirements of CCZO § 7.28 regarding colocation and alternative design. Relators contend that the absence of findings reflects a failure to "consider an important aspect of the problem." *See Block*, 727 N.W.2d at 178. To facilitate judicial review, a zoning body must "have the reasons for its decision recorded or reduced to writing," *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981), but the absence of detailed findings of fact is not fatal if the record contains substantial evidence to support the board's decision. *Graham v. Itasca Cnty. Planning Comm'n*, 601 N.W.2d 461, 467 (Minn. App. 1999).

Colocation

The CCZO requires that new communications towers or antennae be

> located on existing structures in the County, unless it can be documented that it is impractical to co-locate on an existing structure because of technical performance, system coverage or system capacity, an existing structure cannot support collocation from a structural engineering standpoint, or the lease rate of an existing structure is not "rate reasonable." . . . The determination that location on an existing structure is not practical, because of technical performance, system coverage or system capacity, shall be supported by findings from a qualified engineer.

CCZO § 7.28.B. Our review of the record reveals adequate compliance with and consideration of this requirement.

AT&T acknowledged the colocation requirement from the beginning of the CUP process and endeavored to comply with it. In his letter to the county that accompanied the CUP application, Trueman explained that the proposal was to build a tower to "provid[e] vastly improved coverage for a 2 mile radius from the proposed tower" site and that "[a] thorough search of the area seeking any existing towers, water towers, or any tall structures to collocate antenna on was unable to produce any candidates within a 2 mile radius of this area." AT&T also designed the proposed tower with an eye toward supporting future colocation.

The county considered AT&T's compliance with section 7.28 at multiple points in the CUP process. The zoning department noted in its report to the planning commission that "[t]his matter was reviewed as is customary by the CUP Review Committee, and was found to be compliant with the provisions contained in Section 7.28 of the [CCZO] which regulates communication towers." Then the planning commission specifically addressed the colocation issue at its January 6 meeting. One of the planning-commission members noted that the county had previously issued a CUP for a communications tower two miles south of the proposed location and asked Trueman about colocating on that tower. Subsequent discussion revealed that the approved tower never was built. Trueman also explained that "two miles would probably be too far away from where we're looking to try to connect up." He went on:

> [B]ecause jurisdictions don't want towers everywhere, these carriers have been forced to be somewhat flexible in designing their network so that they can use whenever possible existing towers, and it's a whole lot easier and a whole lot cheaper for us to initially try to use any kind of a tall structure. It doesn't have to be a tower. It could be a water tower. It could be a tall building. In this particular case, in this particular area, there just isn't anything out there.

After considering this information, the planning commission voted to recommend approval of the CUP application. None of the correspondence or other information the county board received after the planning commission's vote voiced any concern about the colocation requirement.

Relators argue that the county's approval of the CUP was arbitrary in the absence of findings from a "qualified engineer" that colocation was not feasible. We disagree. There is nothing in the record that indicates the county had reason to doubt AT&T's representation that there were no structures in the area where it needed to build that would support colocation. To the contrary, it is undisputed that the area around the proposed site is agricultural land with few buildings, most or all of which are private residences.[2] Moreover, CCZO § 7.28.B, by its terms, requires an engineer's findings only when colocation is not practical due to "technical performance, system coverage or system capacity." Where, as here, colocation is impractical because there is no existing

[2] Relators argue that "there is nothing in the written record or the transcript that even states how tall a structure would need to be in order to support co-location." We disagree. Trueman explained that AT&T looked for "any kind of a tall structure," and the county's own colocation requirements also are instructive, insofar as the county does not require a communications tower of less than 100 feet to support colocation. *See* CCZO § 7.28.C. Nothing in the record indicates that any nearby structures meet these requirements.

structure at all, the ordinance does not require findings from a qualified engineer to establish that colocation was not feasible.

Relators also assert that the county's grant of a CUP to AT&T is inconsistent with its previous denial of a CUP to a competing communications company based, in part, on concerns about that company's failure to adequately pursue colocation options. Even if we consider this other CUP request, which is not part of the record on appeal, that process is distinguishable in numerous respects. First, the prior process occurred in 2000, fully ten years before AT&T's CUP application. Second, although the site of the proposed tower in the 2000 proceeding was near the site of the proposed AT&T tower, it was not the same, and it was a site that now is within a protective scenic overlay where no CUPs are permitted. *See* CCZO § 6.05.E (2008). Third, colocation was a concern in the 2000 proceeding because it was specifically raised by a nearby city that opposed the CUP—a circumstance not present here. We conclude that the county's denial of the CUP in 2000 does not undermine its decision to grant AT&T's CUP.

In sum, our review of the record reveals that AT&T addressed the colocation requirement and that the county gave due consideration to this largely uncontested issue.

Alternative design

The CCZO requires that new communications towers or antennae be

> located and designed to blend into the surrounding environment to the maximum extent possible. Towers shall be of a monopole design unless it is determined that an alternative design would be appropriate for the particular site or circumstances. All towers shall be painted in a color best determined by the County to blend into the particular environment.

CCZO § 7.28.D. Relators argue that the county acted arbitrarily because it did not adequately consider the idea of a "stealth" tower as an alternative design to lessen the visual impact of the tower. We disagree.

The record plainly indicates that the county considered the merits of an alternative design. Indeed, in evaluating the planning commission's recommendation, the board expressly considered and rejected a proposed resolution that conditioned approval of the CUP on use of a stealth design. The proposal included a series of recitals concerning the visual impact of the tower and resolved that the CUP be granted "provided the tower and antenna mounts shall be of a stealth design using a simulated white pine tree design with simulated tree trunk, simulated bark and simulated evergreen tree branches." The minutes of the county board meeting are limited but reflect that the proposed resolution was seconded, the second was withdrawn after discussion, the proposal was seconded again, and the second was withdrawn again after further discussion. Thus, it is apparent that the board considered and rejected an alternative to the proposed monopole design.

Moreover, the record supports the board's approval of the monopole design. A stealth tower, as discussed in public comments and in the rejected resolution, would be limited in height to no more than 15 feet taller than "the tallest natural tree on the development parcel." Although that height is not specifically identified, relators agree that "[t]here is no indication in the record that any person or group advocated for a 150-foot tower disguised as a pine tree." But AT&T explicitly stated that a 150-foot tower was "as low as we can go while still building it tall enough so that it can still

accommodate two additional carriers, so that you don't have [another company] coming here and in six months asking to build a pole, you know, within a half a mile of this pole." *See* CCZO § 7.28.C (providing that communications towers of less than 100 feet need not support colocation). Faced with this explanation, the county approved the presumptively reasonable monopole design.

Relators also point again to the 2000 CUP proceeding, arguing that the county's denial of that CUP request, based in part on concerns regarding visual impact, is inconsistent with its decision here. We are not persuaded. Not only is the earlier proceeding distinguishable for the general reasons noted above, but the visual concerns present in that proceeding were far more significant than those present here. That proceeding involved a 185-foot proposed tower constructed in a lattice design and situated in an area close enough to the river that it now is a protected scenic overlay where CUPs are not allowed. This proceeding involves a proposed 150-foot tower that is constructed in a monopole design, situated outside any protected areas, and is significantly less visible from the river. Accordingly, the county's denial of the CUP in 2000 does not undermine its decision to grant AT&T's CUP as proposed.

We conclude that this record adequately establishes compliance with the requirement for consideration of design alternatives to minimize visual impact, and the county did not act arbitrarily or capriciously by approving a CUP for a 150-foot monopole communications tower rather than the shorter stealth-tower alternative.

II. The record supports the county's findings as to visual impact.

Relators also argue that the county made unsupported findings as to the visual impact of the proposed tower on the St. Croix River. The CCZO requires consideration of the "possible effects of the proposed conditional use," including whether the proposed use is "sufficiently compatible or separated by distance or screening from adjacent development or land so that existing development does not suffer undue negative impact and there will be no significant deterrence to future development." CCZO § 8.04.C.

Relators assert that the county's finding that "there is sufficient buffering from the heavily forested perimeter to the south and east that there will be no undue negative [visual] impact" from the tower is erroneous because it is contrary to the comments that the county received prior to the county board meeting, particularly NPS's indications that the tower would be visible from the river. We disgree. The county did not find that the tower will not be visible from the river. The county found that the visibility of the tower would not unduly impact the river. That finding is consistent with the ordinance and the record.

The ordinance does not preclude approval of a CUP for a communications tower that will be visible from the surrounding area. Rather, the ordinance requires consideration of the tower's visual impact. Relators argue that the fact that the surrounding area includes protected land changes the way the county must consider visual impact. This is true but does not have the preclusive effect that relators suggest. When read in context, the ordinance contemplates that the potential negative visual

impact of a communications tower can be minimized by "distance or screening" or other factors that mitigate the visibility of the tower.

That is the case here. It is undisputed that there is a forested area between the tower site and the river, which provides natural screening. And there is no evidence in the record that the tower will be visible from the parts of the river nearest the tower site. The only evidence that the tower will be visible from the river—the NPS letter—indicates that it likely will be visible from parts of the river south of the tower site where the monopole tower would be at least one mile away. On this record, we conclude that the county's finding that the forested areas between the tower and the river provide "sufficient" screening to prevent any "undue negative impact" on that area is not erroneous.

III. The county adequately complied with the applicable notice requirements.

Relators argue that the county failed to send "[w]ritten notice of [the planning commission's] public hearing . . . to the governing bodies of the affected township and any municipality located within two (2) miles of the affected property," which failure reflects unreasonable decision-making.[3] *See* CCZO § 8.04. Specifically, relators argue that the county was required to but failed to provide notice to the City of Taylors Falls, Franconia Township, and Shafer Township. The record does not substantiate these asserted notice failures.

[3] Both respondents object to relators' notice argument on standing grounds. This objection is not responsive to relators' argument. Relators do not claim a violation of their due-process rights (they received notice) but argue that the failure to fully comply with this requirement "show[s] the unreasonableness of the County Board's decision under all the relevant circumstances." Accordingly, standing is not an issue.

First, the record indicates that notice was sent to Taylors Falls, and we will not disregard that uncontroverted evidence based on relators' description of extra-record statements that Taylors Falls did not receive the notice. Second, the transcript of the planning commission's meeting indicates that Franconia Township considered the CUP application and sent a representative to the planning commission's meeting to support the application, so any failure to send the written notice required under the ordinance had little or no impact on the reasonableness of the proceedings before the county. Third, the ordinance did not require notice to Shafer Township because it is not the "affected township" or a "municipality located within two (2) miles of the affected property." Relators essentially concede as much in their reply brief.[4]

Because the record reflects that the county published notice of the planning commission's meeting, sent out numerous notices of the meeting, and entertained public comment at and after the meeting, we conclude that the county's compliance with the notice requirement was sufficient to permit reasoned consideration of the impact of the tower on nearby townships and municipalities.

Affirmed.

[4] Relators also argue that the county was required to send notice to the City of Shafer and failed to do so. Because relators failed to raise this argument in their initial brief, we decline to address it. *See Fontaine v. Steen*, 759 N.W.2d 672, 676 (Minn. App. 2009) (stating that "issues not raised or argued in appellant's brief cannot be raised in a reply brief").