STATE OF MINNESOTA
IN COURT OF APPEALS
A12-0132

Joseph Roach, et al.,
Appellants,

vs.

County of Becker,
Respondent,

Thomas Alinder, et al.,
Respondents.

Filed December 10, 2012
Reversed
Hooten, Judge

Becker County District Court
File No. 03-CV-09-1799

John H. Erickson, Erickson & Aanes Law Offices, PLLC, Brainerd, Minnesota (for appellant)

Jay T. Squires, Ratwick, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondent county)

Robert B. Stock, Vogel Law Firm, Fargo, North Dakota (for respondent Alinders)

Considered and decided by Hooten, Presiding Judge; Peterson, Judge; and Stauber, Judge.

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

HOOTEN, Judge

Appellants challenge the district court's denial of their appeal from respondent Becker County Board of Adjustment's (BOA) decision to affirm on remand a land alteration permit (LAP) issued to respondent landowners. Appellants argue that the BOA arbitrarily and capriciously considered only those land alterations performed subsequent to issuance of the permit, that the BOA's decision is predicated on insufficient and improper evidence, and that the BOA erred in construing the applicable county ordinances. We reverse.

FACTS

Appellants Joseph and Jennifer Roach own a home located adjacent to real property owned by respondents Thomas and Sandra Alinder on Lake Melissa near Detroit Lakes. The Alinders began construction of a home on their real property in 2003. During the course of construction, Joseph Roach noticed that the Alinders used fill to elevate their property higher than the adjoining properties on either side, whereas it had been lower than the adjoining properties prior to the construction. Appellants filed a zoning complaint asserting that this difference in property elevations caused increased runoff to adjacent properties, including that owned by appellants, and that such action was directly contrary to county zoning ordinances. Invoices produced by the Alinders showed that they had brought in 846 cubic yards or 85 truckloads of fill, causing their property to be raised an average of 1.8 feet and in some places, as high as 2 feet. The

Alinders did not obtain an LAP prior to making these substantial changes in the elevation of their lot.

Respondent Becker County inspected the property and sent the Alinders a letter dated September 8, 2004, which stated that the Alinders' lot had "been raised higher than the neighboring properties," causing increased runoff in violation of county ordinances. The letter required that the Alinders prepare and implement a plan to retain the increased runoff on their property. On October 15, 2004, the county zoning administrator sent the Alinders a second letter to confirm a telephone conversation in which the administrator advised the Alinders that their land alteration required an LAP. The letter further provided: "No land alteration permit will be granted for any land alteration that will result in . . . increased runoff to adjacent properties."

On August 23, 2005, at about the same time they completed the construction of their home, the Alinders submitted a storm-water management plan to the county, which stated that "the increased volume of water flowing between the lots is more than can be attributed to the lots themselves. . . . [T]he excess water is coming from offsite sources, namely the hill to the west and the township road." As a result, this plan addressed the water flow from offsite sources and proposed a neighborhood-wide approach that included using a portion of appellants' property to allow for drainage. Appellants objected, claiming that the water flow from these offsite sources had previously drained through the Alinders' lot prior to their unapproved land alterations. Appellants also objected to the proposal on the basis that it involved taking a portion of their property by creating a permanent easement for water flow from the offsite sources.

On November 30, 2005, the zoning administrator sent a letter to the Alinders indicating that it was "necessary to review the plan subject to your property and the neighborhood drainage problems." The zoning administrator requested that the Alinders' professional "limit the scope of the plan and documentation to your property, before and after construction" and noted that "documentation should include specific data verifying the land alteration completed on your property does not increase . . . runoff to adjacent properties." This directive prompted the Alinders to commission a second plan, which included a retaining wall between their property and appellants' property, a berm on the other side of the Alinders' property, several retention areas, and a re-grading of the driveway to redirect runoff. Appellants objected to this plan, asserting that the retaining wall and elevation difference would create a dam between the Alinders' property and the adjacent properties and increase water runoff to the adjacent properties.

Notwithstanding appellants' objections, the Alinders applied for an LAP for these alterations on May 23, 2006, which the zoning administrator granted. Following the denial of appellants' request for a restraining order, the Alinders built the retention area, the retaining wall, berm, and re-graded the driveway. On June 20, 2006, appellants appealed the grant of the LAP to the BOA, again arguing that the land alterations resulted in increased runoff, in violation of county ordinances.

At a BOA hearing on appeal, appellants offered expert testimony that the land alterations resulted in increased runoff, primarily because the use of fill to elevate the Alinders' property disrupted the previous flow of runoff and caused water to settle on appellants' property rather than flowing through the Alinders' property. The Alinders

presented no evidence at the hearing, but the zoning administrator stated that she granted the permit because the proposed land alterations "contain[ed] the water that is coming from the Alinders' property" and she was "not going to comment" upon appellants' allegation that the Alinders had created a dam and caused water to pool on appellants' lot. After some discussion, the BOA affirmed the LAP issuance because the administrator "issued the permit in good faith and based on professional information she received." The BOA's written decision indicated that appellants did not provide a basis for the reversal of the grant and that the administrator's decision was "reasonable and in fair and correct interpretation of" the ordinances.

Appellants appealed that decision to this court. *In re Decision of Becker Cnty. Zoning Adm'r*, No. 07-1580, 2008 WL 4224508 (Minn. App. Sept. 16, 2008) (*Zoning Adm'r*). In its decision, this court referenced the following applicable ordinances:

> [N]o land alterations shall be made in a shoreland area until a land alteration permit has been obtained from the Becker County Zoning Administrator unless the changes will result in the movement of less than 10 cubic yards of material on steep slopes or within shore or bluff impact zones or the movement of less than 50 cubic yards of material in other areas[.] . . . No land alteration permit will be granted for any land alteration that will result in:
>
> . . . .
>
> 4. Increased runoff to adjacent properties[.]

Becker County, Minn., Zoning Ordinance § 12, subd. 7(A) (2002).

> The Zoning Administrator may require, and for a land alteration within the shore impact zone or a bluff impact zone shall require, an applicant to provide certification from a landscape architect or professional engineer that the

> requirements of this subdivision and the requirements of Section 12, subdivision 7, have been followed.

Becker County, Minn., Zoning Ordinance § 18, subd. 5(11) (2002).

> Land alterations pursuant to a site permit issued under this section or pursuant to a land alteration permit issued under Section 12, subdivision 7, shall be subject to the following regulations:
>
> . . . .
>
> 3. Land alterations shall not be allowed unless the use is incidental to a permitted or conditional use and does not adversely affect adjacent or nearby properties.

Becker County, Minn., Zoning Ordinance § 18, subd. 5 (2002).

In reversing the BOA's decision and remanding for further findings, this court concluded that the BOA's stated reasons for upholding the administrator's decision—that it was based on "good faith" and "professional information"—were not adequate reasons because they were not "elements found in the Becker County ordinances for consideration of whether to grant an LAP." *Zoning Adm'r*, 2008 WL 4224508, at *4. This court noted that the relevant ordinance "does not require consideration of whether the alteration will contain water coming from the subject property or whether the alteration will change pre-alteration flow so that the subject property no longer 'holds' the neighborhood water." *Id.* at *5. Rather, the ordinance only required consideration "of whether the alterations would result in an increased runoff to adjacent properties," and to the extent that the BOA relied on the former interpretation rather than the latter, it had erred. *Id.*

Finally, this court held that the BOA erred in failing to consider the "unrefuted expert testimony that the additional runoff on [appellants'] property could result in increased mold in their house, warping of their floors, and damage to their foundation and concrete slab" and whether "the alteration in effect resulted in a dam on the Alinders' property" that would adversely affect appellants' property. *Id.* This court also was critical of the zoning administrator's refusal to "comment on the claim that the alteration in effect resulted in a dam on the Alinders' property" and the BOA's failure to address whether the Alinders' land alterations caused increased runoff to the adjacent property. *Id.* "Because the BOA incorrectly interpreted the ordinance and did not make the necessary findings or provide reasons for its decision with specific reference to the ordinances at issue," this court held that the decision of the BOA was arbitrary and capricious. *Id.* at *6. This court remanded to the BOA "to apply the standards of the ordinance as discussed in this opinion to the facts it finds in order to determine whether to affirm the grant of permit and to provide specific reasons for its decision." *Id.*

On remand, notices were sent to the parties with the following directive:

> This matter is on Remand from the Court of Appeals for the purpose of reconsideration and the adoption of findings as directed by the Court. **No additional or new evidence will be considered.** The affected parties, however, will be allowed to state their positions to the Board of Adjustment. The hearing may then be continued to allow the parties to offer proposed findings to the Board of Adjustment for the adoption at a subsequent meeting.

The BOA held a hearing on remand on April 9, 2009, at which the parties presented their arguments to the BOA. Appellants' attorney emphasized that the LAP was issued "after

the fact," noting that the elevation of the Alinders' property, along with its accompanying water runoff issues, had already occurred by the time the LAP was issued. The Alinders' attorney asked the BOA to provide additional reasons in support of its previous decision and argued that the evidence on the record did not support a decision to reverse the administrator's grant of the permit. After the parties each made statements, one board member stated his belief that the permit did not address the initial alterations made in the elevation of the Alinders' property but only the alterations covered by the LAP. Following the hearing, the parties each submitted memoranda and proposed findings of fact for consideration at a follow-up deliberation meeting on June 11, 2009. Notice of this hearing was again sent to the parties, with an indication in bold type that "[n]o additional or new evidence will be considered."

At the meeting on June 11, 2009, the BOA attorney stated "that the particular appeal in this case relates only to the land alteration activities, which were undertaken pursuant to the May 23, 2006 LAP . . . [the scope of which] was the construction of a retaining wall, a berm, and then some onsite water retention areas." Thus, the discussion was limited to whether "there was increased runoff from the 2006 storm water improvements or there wasn't, and why that would be the case," as well as whether those same land alterations adversely affected the adjacent properties.

During the deliberation, the BOA members stated their opinions. These were based primarily on site visits by the BOA members prior to the June deliberation meeting to inspect the alterations made pursuant to the LAP. One board member stated that, during that viewing, water was not pooled up against the retaining wall so as to indicate a

pooling or damming effect from the wall. Similarly, another member noted that there was standing water on appellants' property in the "southeast corner of their lot," that the "Alinder property was soggy" but did not contain standing water, and that it had not rained for several days prior to the visit. This board member then speculated that the standing water on appellants' property may have originated from other properties or from the water table. A third member stated that the area was in a "wet cycle," and that all of the lakes in the area were above their usual levels. The BOA attorney summarized the comments of the board members by saying "that if, in fact, water that may have flowed from [appellants'] property to the Alinders' was inhibited by some sort of dam, it would have been inhibited by the filling that occurred, or alleged filling, in 2003, 2004." Ultimately, the BOA voted to approve the findings of fact presented by the BOA attorney.

These findings of fact state that the improvements made

> pursuant to the May 23, 2006 LAP did not 'increase runoff to adjacent properties,' for the following reasons:
>
> a. During the site visit, there was no observation of water at the wall that would suggest that the wall was having a damming effect.
> b. No concrete evidence exists in the record to support a conclusion of increased runoff from the May [2]3, 2006, permit improvements, but only an indication by the Roaches' engineer that they probably wouldn't help.
> c. The containment of water on the Alinder property by the '06 improvements contributes to less runoff being able to flow onto the Roach property.

Similarly, the BOA found that these improvements

> did not 'adversely affect adjacent or nearby properties' for the following reasons:
>
> a. The observation of water pooling on the Roach property in the absence of rain suggests a source other than superficial runoff.
> b. The lack of concrete evidence in the record that suggests that the '06 improvements themselves would adversely affect or cause a problem on the Roach property.

Further, in response to appellants' request that the Alinders restore their property to its original state by removing the home, the BOA noted that it did not have the authority to do so. The BOA also executed an Order of Variance, which stated that the decision to grant the LAP

> was based on the findings of fact that the LAP issued did not increase runoff, the improvements did not have a damming effect, did not adversely affect the Roach property, and the containment of water on the Alinder property by the '06 improvements contributes to less runoff being able to flow onto the Roach property with the observation of water pooling on the Roach property, in the absence of rain, suggests a source other than surficial runoff.

Appellants challenged the BOA's decision in the district court, which upheld the BOA decision in a summary order and judgment. This appeal follows.

D E C I S I O N

"[T]he standard of review to be applied to the BOA's determination is whether, on the evidence before it, the BOA made a reasonable decision. And this court is required to review the BOA's decision independent of the findings and conclusions of the district court." *Yeh v. Cnty. of Cass*, 696 N.W.2d 115, 124–25 (Minn. App. 2005) (citations omitted), *review denied* (Minn. Aug. 16, 2005); *see also VanLandschoot v. City of*

Mendota Heights, 336 N.W.2d 503, 508 (Minn. 1983) ("Our duty in considering zoning cases is to review the decision of the city council independent of the findings and conclusions of the district court."). "[T]his court's reasonableness inquiry must be tempered by a substantial degree of deference." *Yeh*, 696 N.W. 2d at 125.

In reviewing a decision of a county zoning authority, a court must "determine whether the zoning authority was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and . . . whether the evidence could reasonably support or justify the determination." *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (quotation omitted). This court assesses the reasonableness of the decision against the standards indicated by the ordinance. *Id.* This court focuses on the reasons given by the BOA for its decision; in order for this court to assess the reasonableness of the decision, adequate findings must be made. *Id.* at 332 (requiring the zoning authority to "articulate the reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance" (quoting *Earthburners, Inc. v. Cnty. of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994))). The inquiry into evidentiary support does not include weighing the credibility of evidence, rather it is simply a "review [of] the record to ensure that the decision was 'legally sufficient,' i.e., had support in the record." *Billy Graham Evangelistic Ass'n v. City of Minneapolis*, 667 N.W.2d 117, 124 (Minn. 2003). In contrast to a reasonable decision, "[a] decision predicated on insufficient evidence or arising from a failure to apply relevant provisions of the ordinance would be arbitrary and capricious." *Stadsvold*, 754 N.W.2d at 332.

This court previously held that the BOA erred both by not properly addressing the ordinance prohibiting an LAP with an adverse effect on neighboring property and by failing to provide adequate reasons for its decision. *Zoning Administrator*, 2008 WL 4224508, at *3–6. Appellants now argue that the BOA impermissibly narrowed the scope of its review to only those land alterations made subsequent to the issuance of the LAP. On appeal, Becker County argues that appellants "clearly indicated they were appealing the May 23, 2006 LAP" and that the Alinders' LAP application "sought approval for only the storm water improvements involving the berm, wall, and ponding."

Having reviewed the entire record, we conclude that the BOA, in approving the Alinders' LAP application, erred by failing to follow this court's instructions on remand and by refusing to consider the effect of the initial fill to raise the property. The county inspector notified the Alinders on September 8, 2004, that "a plan to retain your runoff on your property" was required because their "lot has been raised higher than the neighboring properties." In response to an inquiry about the issue, the zoning administrator sent the Alinders another letter stating that "the land alteration, which occurred on the above referenced property, did require a land alteration permit." When the first plan to deal with the changes to water flow created by the initial fill was rejected, the administrator asked for a new plan that did not alter adjacent properties and requested documentation that included "specific data verifying the land alteration completed on your property does not increase . . . runoff to adjacent properties." Each of these letters references the already-completed fill of the property, clearly indicating that the LAP was intended to address the land alterations undertaken in conjunction with the construction

of the home. The LAP process began because appellants complained about the Alinders' use of fill to raise their property to a level that altered the water drainage from an adjoining hill and the street. The county's subsequent enforcement of the zoning ordinance is required by the zoning ordinance itself, which places a duty to "[e]nforce and administer" the zoning ordinance on the zoning administrator. Becker County, Minn., Zoning Ordinance § 19, subd. 1(B)(1) (2002).

The remedial nature of the LAP was reinforced during the April 9, 2009 BOA hearing on remand, when the zoning administrator stated that

> the land alteration permit[] was the remedial permit that was issued to correct the situation on the property. . . . [T]he Alinders filled their property . . . under the site permit application [for building the home] . . . but then they went outside the parameters of their site permit, so the land alteration permit that was issued was to remedy the fill that was placed on that property. So the work was . . . permitted, and then the work was completed by the Alinders[.]

In response, Becker County notes a statement of appellants' former counsel that this case did not regard the failure of the Alinders to get an LAP for the initial fill of the property. Indeed, it could not have, as this case alleges that the county failed to appropriately require runoff limitations for an LAP that covers the initial fill of the property. Becker County further argues that appellants "have initiated a separate but parallel lawsuit that specifically challenges the propriety of the 2003 home construction and attendant filling that may have occurred on the Alinder property." Not having that case before it, this court does not have an adequate record on which to decide whether that is true. Moreover, even if it is true, a challenge to the failure to get a permit for an activity is

different from an appeal alleging that a permit for that activity was granted arbitrarily. The LAP was required by the county to address the original fill of the land; when the LAP was issued in a fashion that appellants did not believe adequately addressed their concerns with the original fill, they challenged it. This suit, then, addresses whether Becker County correctly decided that the land alterations addressed by the permit, which include the use of fill to raise the site, do not result in increased runoff to adjacent properties.

Having determined that the LAP was meant to address all land alterations to the site made by the Alinders, this court inquires as to whether the reasons stated by the BOA support the decision to grant the permit. We conclude that they do not. In making its decision, the BOA stated the following:

> 8. The construction of the retaining wall, berm, and water retention areas on the Alinder property pursuant to the May 23, 2006, LAP did not 'increase runoff to adjacent properties,' for the following reasons:
>
> a. During the site visit, there was no observation of water at the wall that would suggest that the wall was having a damming effect.
> b. No concrete evidence exists in the record to support a conclusion of increased runoff from the May [2]3, 2006, permit improvements, but only an indication by the Roaches' engineer that they probably wouldn't help.
> c. The containment of water on the Alinder property by the '06 improvements contributes to less runoff being able to flow onto the Roach property.
>
> 9. The construction of the retaining wall, berm, and water retention areas on the Alinder property pursuant to the May 23, 2006, LAP did not 'adversely affect adjacent or nearby properties' for the following reasons:

a. The observation of water pooling on the Roach property in the absence of rain suggests a source other than superficial runoff.
b. The lack of concrete evidence in the record that suggests that the '06 improvements themselves would adversely affect or cause a problem on the Roach property.

In addition to these written findings, the bases for the decision can be gleaned from the BOA's discussion of evidence at the deliberation meeting. That discussion focused on the observations of the BOA members from a site visit conducted after the first hearing on remand. One member indicated that he independently calculated the amount of fill that was used; another member noted that all the lakes in the area were high because the area was in a "wet cycle," that the water on the land was not runoff, and that it came from the water table; a third member noted that prior to the site visit, it had not rained for several days, so the standing water on the property could not have been runoff. But that site visit was not a fact-finding mission, as evidenced by the statement on the notice of the hearing that no new evidence would be considered. Thus, that evidence was not part of the record and was not properly considered where the parties stipulated to a closed record of the evidence submitted to the BOA for its first decision.

The Alinders argue that this case is similar to cases in which a municipal board accepted the opinions of neighbors over those of submitted experts. *See, e.g.*, *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 260 (Minn. App. 2004); *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 267–68 (Minn. App. 1995), *review denied* (Minn. Jan. 5, 1996). But these cases are easily distinguishable because they involve a board accepting statements offered by neighbors during hearings about

proposed uses; they do not involve board members using their own independent and extra-record observations and investigations about the post-construction effects of the LAP. Because that evidence was not in the record at the time the LAP was issued, the findings that pertain to extra-record evidence (8.a and 9.a) cannot support the BOA's decision.

Further, the other findings are too narrow to support the decision to grant the LAP where the LAP process was intended to address and mitigate the negative consequences of the initial fill of the site. The county required the Alinders to apply for an LAP because they had undertaken land alterations without a permit. But the reasons stated by the BOA for the issuance of the LAP do not take into account the land alterations that prompted the requirement that the Alinders seek the LAP in the first place. Even if the BOA is correct that there is no evidence that the 2006 land alterations were detrimental to appellants' property, there is significant evidence that the changes to the Alinder property as a whole increased runoff to appellants' property. This comes from appellants' expert, and from the first plan commissioned by the Alinders, which indicates that, in order to address the runoff from the road that was redirected to appellants' property, a larger solution was needed. Further, in stating that the 2006 improvements did not detrimentally affect appellants' property, the BOA failed to consider the full scope of the issues with the Alinders' property. Whether the 2006 improvements themselves were detrimental is not at issue, rather, the proper inquiry for the BOA was whether the land alterations as a whole were detrimental to the adjacent properties. By ignoring the proper scope of the inquiry, the BOA acted arbitrarily and capriciously.

We note that the BOA granted a variance order as a result of its decision. This variance did not result from an application for such a variance by the Alinders and there is nothing on the record indicating that the BOA considered the required variance criteria much less that the variance criteria were satisfied. *See Stadsvold*, 754 N.W.2d at 328–29 (discussing the "practical difficulties" and "particular hardship" standards); Becker County, Minn., Zoning Ordinance, § 20, subd. 3 (A) (2002) ("Variances shall only be permitted if . . . there are practical difficulties or particular hardship in the way of carrying out the strict letter of this ordinance[.]"). Further, it is not clear what the variance is for, as it does not appear to be a variance for use or area. *See Stadsvold*, 754 N.W.2d at 329 ("There are two types of variances: use variances and area variances."). The variance order was clearly arbitrary and capricious. As a result, we reverse and vacate the variance order.

Because the BOA failed to consider the effect of all the Alinders' land alterations, which caused increased water runoff upon appellants' real property and because the BOA considered new, and improper, evidence that was not available at the time the LAP was granted, we reverse the BOA's decision to grant the permit. This court previously remanded this dispute and required that the board make findings to support its decision. *Zoning Adm'r*, 2008 WL 4224508, at *5–6. We do not believe that the parties would benefit from the BOA having a third opportunity to give legally sufficient reasons for its decision. Rather, we simply reverse the decision to grant a permit so that the BOA may exercise its authority to remedy this situation unfettered by an attachment to its previous decision. *See BECA of Alexandria, L.L.P. v. Cnty. of Douglas ex rel Bd. of Comm'rs*,

607 N.W.2d 459, 464 (Minn. App. 2000) ("We are not required to remand where a zoning authority's decision is arbitrary because it is unsupported by legally sufficient reasons."). However, we note that the zoning administrator continues to have a duty to enforce and administer the zoning ordinance and must do so.

Reversed.