STATE OF MINNESOTA
IN COURT OF APPEALS
A06-1374
A06-1850
A07-1231

In re: The Conditional Use Permit and Preliminary Planned Unit Development Applications of Living Word Bible Camp (A06-1374):
C. Robert Baker and Holly Newton, petitioners,
Appellants (A06-1850, A07-1231),

vs.

County of Itasca,
State of Minnesota,
Respondent (A06-1850, A07-1231),
Living Word Bible Camp,
Respondent (A06-1850, A07-1231).

Filed June 3, 2008
Affirmed in part, reversed in part, appeal dismissed in part, and remanded
Stoneburner, Judge

Itasca County Planning Commission
Itasca County District Court Nos. 31CV062637; 31CV063866;
31CV062861; 31CV062954

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Considered and decided by Lansing, Presiding Judge; Stoneburner, Judge; and Worke, Judge.

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

STONEBURNER, Judge

In these consolidated appeals,[1] two citizens of respondent Itasca County challenge the county's issuance of, and the district court's approval of, conditional-use and planned-unit-development permits that will allow the construction of a facility for use as a children's bible camp and year-round adult-retreat center on Deer Lake in Itasca County. By notice of review, respondent Living Word Bible Camp, a Minnesota nonprofit corporation, challenges the district court's ruling that an environmental assessment worksheet (EAW) was required for the project and the district court's dismissal of the camp's malicious-prosecution and abuse-of-process claims against appellants.

With regard to the writ of certiorari (A06-1374) asking this court to reverse the county planning commission's issuance of the permits, we affirm the planning commission's use of the 1998 ordinance to consider the permit applications, but hold that the remaining challenges are premature in light of the need for the planning commission to reconsider its approvals after completion of the EAW. We therefore dismiss the remaining issues raised in the writ of certiorari without prejudice.

Because in file A07-1231 the district court correctly determined that an EAW was necessary for this project and did not err in dismissing the camp's claims against

[1] The parties agree that issues raised in appeal A06-1850 were rendered moot by the September 26, 2006, order of this court holding that the district court lacks jurisdiction to issue a writ of certiorari and confirming that the only method of judicial review of the county's quasi-judicial decisions is by writ of certiorari to this court.

appellants, we affirm the district court in part. Because the county must consider the EAW before it approves the permits, we reverse the district court's approval of the permits and remand for a redetermination of those permits after completion of the EAW.

FACTS

Holly Newton and C. Robert Baker (appellants) are citizens of respondent Itasca County (the county) who oppose construction of a children's summer bible camp and year-round adult-retreat center (the project) on Deer Lake by respondent Living Word Bible Camp (the camp).

By writ of certiorari, appellants challenge the county's approval of the camp's CUP and PUD applications, arguing that the approval was arbitrary, capricious, and unreasonable, not supported by the record, without legally appropriate findings of fact, and premised on misconceptions of law and unfair proceedings.

By direct appeal, appellants challenge the district court's refusal to revoke the county's approval of the camp's CUP and PUD applications and require reconsideration after the preparation of the EAW. By notice of review, the camp challenges the district court's ruling that an EAW was required for the project and the district court's dismissal of its counterclaims against appellants.

Because the underlying facts and procedural history of this lengthy dispute are well known to the parties, we will address specific facts only as they relate to the decisions in these consolidated appeals.

D E C I S I O N

I. The district court did not err in holding that the project requires an EAW.

Minnesota law provides that an EAW shall be prepared for a proposed action "whenever material evidence accompanying a petition . . . demonstrates that, because of the nature or location of a proposed action, there may be potential for significant environmental effects." Minn. Stat. § 116D.04, subd. 2a(c) (2006). Appellants' EAW petition was forwarded to the county board of commissioners, as the responsible governmental unit, and the board determined that an EAW was not necessary. Appellants appealed to the district court. The district court held that an EAW is necessary for the project and remanded to the board for preparation of an EAW. The camp argues that the board's refusal to order an EAW was reasonable and that the district court erred in reversing the board's decision. Specifically, the camp argues that appellants' EAW petition did not provide "material" evidence of potential for "significant" environmental effects.

The standard of review that we apply to a district court's review of an agency decision depends on the role of the district court:

> Where the [district] court reviewing an agency decision makes independent factual determinations and otherwise acts as a court of first impression, this court applies the clearly erroneous standard of review. Where, on the other hand, the [district] court is itself acting as an appellate tribunal with respect to the agency decision, this court will independently review the agency's record.

In re Hutchinson, 440 N.W.2d 171, 175 (Minn. App. 1989) (quotation and citation omitted), *review denied* (Minn. Aug. 9, 1989). In this case, the district court was acting

as an appellate tribunal with respect to the board's decision. Therefore we independently review the record before the board to determine whether its decision "was unreasonable, arbitrary, or capricious, without according deference to the district court's review." *Watab Twp. Citizen Alliance v. Benton County Bd. of Comm'rs*, 728 N.W.2d 82, 89 (Minn. App. 2007), *review denied* (Minn. May 15, 2007).

> An agency's decision is arbitrary or capricious if the agency . . . entirely failed to consider an important aspect of the problem . . . offered an explanation for the decision that runs counter to the evidence, or [] rendered a decision so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Id. From our review of the record, we conclude that the board's refusal to order an EAW was arbitrary and capricious because appellants' petition for an EAW contained material evidence demonstrating that "because of the nature or location of a proposed action, there *may be potential for* significant environmental effects." Minn. Stat. § 116D.04, subd. 2a(c) (emphasis added).

The petition included evidence from three limnologists on the potential for the project to have significant impact on water quality. Limnologist and environmental planner Dick Osgood noted the project's lack of a stormwater-management plan and opined that directing stormwater into a wetland might not mitigate the impacts of stormwater runoff and may directly impact the wetlands. Osgood opined that the project may have possible shore-related effects, noting the susceptibility of vegetation that provides muskellunge-spawning habitat. Limnologist Jack Jones described how construction of the project would have a greater impact on the lake than moderate

development and a small increase in nutrients from additional waste water generated from the shore can cause a dramatic decrease in lake transparency.

Further, limnologist and aquatic biologist William Downing noted that "Itasca County lakes are very sensitive to degradation." He recommended against any "PUDs or other high density uses in lake watersheds," cautioning that once there is measurable degradation "it is likely too late to restore water quality." Downing stated that septic systems set back from the lake only delay the time it takes the phosphorus to reach the lake.

The petition also contained evidence from Minnesota Department of Natural Resources Area Fisheries Supervisor Christopher Kavanaugh that the project was in close proximity to a significant muskellunge-spawning area, that muskellunge-spawning habitats are sensitive and easily disturbed, and that increased surface-water use "at any time of the year could potentially affect the suitability of spawning the following spring." Kavanaugh described the fish and wildlife habitat at Deer Lake as "unique and valuable" and opined that although any development will have a negative effect on these resources, the proposed development was "likely to have a much greater negative impact than single family homes."

We conclude, as did the district court, that this evidence is material and addresses the potential for significant environmental effects. Because the petition contained material evidence of the potential for significant environmental effects, an EAW is required by law, and the district court did not err in remanding the matter and requiring the board to order the preparation of an EAW.

II. Because the county failed to require an EAW, approval of the CUP and PUD was unreasonable.

Appellants and the county argue that the district court should have vacated the CUP and PUD and remanded to the county for reconsideration after the EAW is completed. We agree.[2]

Minnesota law and the county's zoning ordinance mandate completion of the EAW prior to final approval of a project for which an EAW is required. Minn. Stat. § 116D.04, subd. 2b (2006); Itasca County, Minn., Zoning Ordinance § 9.33 (1998). Because completion of the environmental review process must occur prior to approval, we reverse the planning commission's approval of the CUP and PUD and remand for reconsideration of the camp's applications after the EAW is completed.

III. Application of the 1998 zoning ordinance to the CUP/PUD applications is appropriate.

Because we are reversing and remanding the planning commission's approval of the CUP and PUD, consideration of appellants' numerous arguments challenging the planning commission's approval is now premature. But, in the interest of judicial economy, we will address appellant's challenge to the planning commission's use of the 1998 ordinance. We dismiss the remaining claims in appeal A06-1374, without prejudice, as premature. On remand, the planning commission may in its discretion revisit and reopen the record to address any of the issues raised by appellants.

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[2] The district court concluded that "[i]f the CUP is upheld on appeal and no further appeal is taken and the EAW process indicates that an EIS is not needed and that there are no other issues raised in the EAW that would warrant modification of the PUD, then the approval of the final PUD was reasonable."

Appellants assert that the planning commission erroneously applied the 1998 ordinance to the camp's CUP and PUD applications. Generally, appellate courts apply the law as it exists at the time they rule on a case, except when doing so would result in manifest injustice. *Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 575 (Minn. 2000). The general principle of applying the most current law unless it affects vested rights applies to zoning matters. *Id.* In a previous decision related to the zoning for the camp, we concluded that application of the current zoning ordinance would have created a manifest injustice to the camp, and on remand, we directed the district court to enter judgment affirming the county's application of the 1998 zoning ordinance to its land reclassification determination. *Newton v. County of Itasca*, No. A05-879, 2996 WL 771719, at *3, *5-*6 (Minn. App. Mar. 28, 2006), *review denied* (Minn. June 20, 2006).

The camp argues that the county was merely following this court's instructions in applying the 1998 ordinance to the CUP/PUD applications. Appellants assert that *Newton* did not command the application of the 1998 zoning ordinance for all purposes but only for land-district reclassification purposes. We agree with appellants. No CUP/PUD applications were pending at the time that *Newton* was decided.

But the camp argues that being forced to proceed under the current (2005) zoning ordinance would constitute a manifest injustice because, unlike the 1998 ordinance, the current ordinance does not contain a "seasonal residential zone" that applies to camps. As we previously determined in *Newton*, the camp has been precluded from timely proceeding with the CUP/PUD process because of continued litigation. We agree with

the camp that, as in *Newton*, application of the current ordinance would result in a manifest injustice, and the county correctly applied the 1998 ordinance, even though the camp withdrew its prior CUP/PUD applications and applied after the current ordinance was in effect.

IV. The district court did not err in dismissing the camp's counterclaims.

The camp asserts that the district court erred in granting summary judgment to appellants and dismissing the camp's counterclaims for malicious prosecution and abuse of process. We disagree. On appeal from summary judgment, this court determines whether there are any genuine issues of material fact and whether the district court erred in its application of the law. *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990).

In 1994, the Minnesota legislature enacted an anti-SLAPP (Strategic Lawsuits Against Public Participation) statute "[t]o protect citizens and organizations from lawsuits that would chill their right to publicly participate in government." *Marchant Inv. & Mgmt. Co. v. St. Anthony W. Neighborhood Org., Inc.*, 694 N.W.2d 92, 94-95 (Minn. App. 2005); *see* 1994 Minn. Laws ch. 566, at 895 (describing act as "protecting citizens and organizations from civil lawsuit for exercising their rights of public participation in government"). Under the statute, a party may bring a motion to dismiss a claim on the ground that the claim "materially relates to an act of the moving party that involves public participation." Minn. Stat. § 554.02, subd. 1 (2006). Public participation is defined as "speech or lawful conduct that is genuinely aimed in whole or in part at procuring favorable government action." Minn. Stat. § 554.01, subd. 6 (2006). The district court must grant a party's motion to dismiss the claim "unless the court finds that

the responding party has produced clear and convincing evidence that the acts of the moving party are not immunized from liability under section 554.03." Minn. Stat. § 554.02, subd. 2(3) (2006).

In this case, the district court concluded that appellants' claims were "genuinely aimed at procuring favorable government action and do not constitute torts or violate the constitutional rights of [the camp]" and therefore determined that the appellants are immune from the camp's claims of malicious prosecution and abuse of process. We agree. There is no clear and convincing evidence in this record that appellants' acts are not immune from liability under section 554.03.

The camp asserts that its counterclaims were compulsory to preserve the issue, and because the claims are dependent on additional discovery and/or the outcome of the decisions that are the subject of this appeal, the district court erred in not delaying its decision on appellants' motion until after this appeal. We disagree.

The Minnesota Rules of Civil Procedure state that "[a] pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction that is the subject matter of the opposing party's claim." Minn. R. Civ. P. 13.01. The word "occurrence" was intentionally omitted from the rule, which refers only to "transaction." *House v. Hanson*, 245 Minn. 466, 472, 72 N.W.2d 874, 877-78 (1955). And the supreme court has held that "the word 'transaction' as used in Rule 13.01 does not embrace claims in tort" and therefore tort counterclaims are not compulsory and may be asserted in an independent action. *Id.* at 472-73, 72 N.W.2d at 878. The Restatement (Second) of Torts identifies

the camp's claims as tort claims. *See* Restatement (Second) of Torts §§ 653, 674, 682 (1977) (sections for malicious prosecution, wrongful use of civil proceedings, and abuse of process).

Additionally, a counterclaim is compulsory only when it is ripe, i.e., when "a cause of action exists for which a lawsuit may properly be commenced and pursued." *Leiendecker v. Asian Women United of Minn.*, 731 N.W.2d 836, 841 (Minn. App. 2007), *review denied* (Minn. Aug. 7, 2007). A party claiming malicious prosecution must demonstrate that

> (1) the suit [was] brought without probable cause and with no reasonable ground on which to base a belief that the plaintiff would ultimately prevail on the merits; (2) the suit [was] instituted and prosecuted with malicious intent; and (3) the suit [was] ultimately terminat[ed] in favor of the defendant.

Jordan v. Lamb, 392 N.W.2d 607, 609 (Minn. App. 1986) (quotation omitted), *review denied* (Minn. Oct. 29, 1986). The camp concedes that its claims are not ripe and that further court action and additional evidence is needed to support its counterclaims. The camp's argument that the district court erred in dismissing its claims and should have delayed ruling on the claims is without merit.

Affirmed in part, reversed in part, appeal dismissed in part, and remanded.