STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1053

In the Matter of an Application by Gary McDuffee
For a Conditional Use Permit.

Filed June 24, 2008
Affirmed; motion granted
Worke, Judge
Dissenting, Lansing, Judge

Morrison County Board of Commissioners
File No. 23680-001

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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

WORKE, Judge

On appeal following remand in this conditional-use-permit (CUP) dispute, relators challenge the county board's grant of a CUP for a dog-breeding facility, arguing that the board acted unreasonably, arbitrarily and capriciously in granting the CUP. We affirm.

FACTS

The background facts of this matter are set forth in *In re Block*, 727 N.W.2d 166 (Minn. App. 2007). In January 2006, respondent Morrison County Board of Commissioners granted a conditional-use permit (CUP) to respondent Gary McDuffee for a professional dog-breeding facility. A certiorari appeal was filed challenging the issuance of the CUP. We reversed and remanded the matter to the board for reconsideration of the CUP application. *Block*, 727 N.W.2d at 182. We concluded that "[t]he decision of the county board to include a limited debarking condition, based on the scarcity of information provided before January 10, 2006, was arbitrary and capricious." *Id.* Further, "[t]he alteration of the CUP, based on the consideration of late-arriving information on debarking, did not follow the correct procedure for issuance of an amended CUP." *Id.*

On March 26, 2007, the board held a public hearing to reconsider the CUP. On April 5, 2007, the board unanimously voted to approve the CUP based on seven findings. The board found that the requested use (1) would not create an unreasonably excessive burden on the existing roads or other utilities, (2) is compatible with the surrounding area and will not significantly depreciate nearby properties, (3) shall have an appearance that

will not have an unreasonably adverse effect on nearby properties, (4) is reasonably related to the existing land use and environment, (5) is consistent with the Morrison County Land Use Control Ordinance, (6) is not in conflict with the Morrison County Comprehensive Plan, and (7) will not create an unreasonably adverse effect because of noise, odor, glare or general unsightliness for nearby property owners. The board also imposed the following special conditions:

> 1. All feces generated by the dogs on site must be double bagged and hauled to the Morrison County Landfill.
>
> 2. Adequate supervision and monitoring of the site must be continuously maintained. This may be accomplished by someone living on the site and/or through electronic monitoring which, at a minimum, means monitoring for power outages, fire, and temperature.
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> 3. A fifty (50) foot buffer strip of conifer trees will be planted within one year of approval of the [CUP] and maintained on the north and east side of the property as recommended by the Morrison Soil and Water Conservation District.
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> 4. All wash water from the kennel must go through the onsite septic system.
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> 5. County staff will conduct an inspection of the site on an annual basis with 24 hours notice for compliance with the [CUP] and special conditions of the permit.
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> 6. If an outdoor exercise area is provided it must be located on the west side of the present building. Hours of outdoor exercise will be limited to the hours of 8:00 AM to 5:00 PM.
>
> 7. No dogs shall be debarked. No shock collars will be used to control barking.

> 8. One-sixth (1/6) of the total indoor building area will be set aside for an exercise area for the dogs.
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> 9. The number of adult dogs permitted onsite is 500. An adult dog is defined as four (4) months of age or older.
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> 10. Removal of dead dogs from the site must be done through a cremation or rendering service.
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> 11. The owner of the dog breeding facility at this site must be in compliance with all federal, state, and county statutes related to the operations of this dog breeding facility. If at any time the owner of this dog breeding facility is convicted of any violation of such statutes, the Morrison County Board of Commissioners shall hold a hearing to consider the revocation of the [CUP], at which time the owner shall be allowed to be heard on the issue.
>
> 12. The USDA kennel license must be maintained at all time.
>
> 13. The [CUP] is non-transferable without prior [board] approval.

Relators Roger and Deborah Nelson and Jeremy and Sara Dickmann seek review of the issuance of the CUP. The board moved to strike portions of relators' reply brief and supplemental appendix pertaining to veterinarian Linda Wolf's report dated December 28, 2006, because the report was not provided to or considered by the board.

D E C I S I O N

> When reviewing a county board's decision on a writ of certiorari, the court's inquiry is limited to questioning whether the board had jurisdiction, whether the proceedings were fair and regular, and whether the board's decision was unreasonable, oppressive, arbitrary, fraudulent, without evidentiary support, or based on an incorrect theory of law.

BECA of Alexandria, L.L.P. v. County of Douglas by Bd. of Comm'rs, 607 N.W.2d 459, 462 (Minn. App. 2000). This court "gives great deference to a county's land use decision and will overturn such decisions only when there is no rational basis for them." *Id.* at 463. A county has broad discretion in granting or denying a conditional-use permit (CUP). *Id.* Further, "[a] county's decision to grant or deny a CUP is a quasi-judicial decision." *Sunrise Lake Ass'n v. Chisago County Bd. of Comm'rs*, 633 N.W.2d 59, 61 (Minn. App. 2001). "The decision will be upheld unless it was unreasonable, arbitrary, or capricious." *Id.*

Relators first argue that bypassing the Morrison County Planning Commission on remand constitutes a procedural problem that renders the process defective. The planning commission is required to complete the initial evaluation of a CUP application. Morrison County, Minn., Ordinances §§ 507.4, 507.5 (1995). This issue was not raised before the board on remand. We generally only address issues that were presented and considered below. *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988). This principle applies in review of a quasi-judicial decision. *Graham v. Itasca County Planning Comm'n*, 601 N.W.2d 461, 468 (Minn. App. 1999). Therefore, we decline to address it here. We note, however, that the ordinance does not require a rehearing by the planning commission following a remand, and we remanded the matter to the "Morrison County Board for reconsideration of the application for the [CUP]", not the planning commission. *See Block*, 727 N.W.2d 182.

Relators next argue that the board's failure to postpone the public hearing until a protective order sealing a report in a separate district court proceeding was lifted was

unreasonable, arbitrary, and capricious. In a district court action seeking declaratory and injunctive relief to stop the construction and operation of McDuffee's dog-breeding facility, veterinarian Linda Wolf filed a report regarding an inspection of the facility. The report was subject to a protective order filed in the district court case on December 1, 2006. We remanded this matter to the board on February 6, 2007, a public hearing on the CUP was held on March 26, and the board approved the CUP on April 3. The district court hearing on the motion to lift the protective stay was not heard until May 7, and the district court did not issue a ruling lifting the protective order until August 6, subject to a 30-day stay. There is nothing in the record to show that at the time of the public hearing, the protective order in the separate district court action would be lifted soon, if ever.[1] Further, the board was required by the land-use ordinance to make a decision within 60 days. Morrison County, Minn., Ordinances § 509.5(b) (1995). Even if the board had postponed the hearing, there was no guarantee that the protective order would be lifted in time. The board's decision to proceed without the benefit of the Wolf report was not unreasonable, arbitrary, and capricious.

[1] The dissent states "Approximately a month after the board decision, a newly assigned district court judge heard [a motion to lift the protective order] and ultimately issued an order to make the report available." The protective order was not lifted until August 6, 2007, subject to a 30-day stay, which was four months after the board decision. This case is a writ of certiorari from the county board's decision to approve the CUP, not the district court matter regarding the dog-breeding facility. The order referenced in the dissent was filed after the board approved the CUP following our remand and was not considered by the board. The order and report are not part of the record on appeal.

Relators further contend that the fact that the Wolf report is no longer suppressed warrants remand and further review by the board. We are only able to review the evidence available to the board at the time of its decision. The record shows that Wolf testified before the board generally about issues associated with dog-breeding facilities, and the board gathered substantial evidence and extensively discussed the criteria set forth in the land-use ordinance in making its decision. *See* Morrison County, Minn., Ordinances § 507 (1995). We should also note that the information contained in the Wolf report focuses on operational aspects of the facility and, therefore, goes to the regulation of the dog-breeding facility rather than whether a CUP should have been granted. If the report contains allegations of possible state or federal regulation violations, the violations should be investigated and the board can take appropriate action, if necessary.

Relators next argue that the board's failure to require that the dogs be removed from their cages for at least 20 minutes of exercise per day, as required under Minnesota law, was unreasonable, arbitrary, and capricious. *See* Minn. Stat. § 346.39, subd. 5 (2006) ("All dogs and cats must be provided the opportunity for periodic exercise, either through free choice or through a forced work program, unless exercise is restricted by a licensed veterinarian."). Because periodic exercise is regulated by state law, it was not necessary for the board to specifically address this issue. *See Yang v. County of Carver*, 660 N.W.2d 828, 835 (Minn. App. 2003) ("Where state standards are set and enforced by state agencies and where a conditional use permit applicant informs the board of commissioners of his intention to comply with all applicable standards, the board need not resolve specific compliance issues prior to granting a conditional use permit."). In

addition, even though the board was not required to resolve this issue in granting the CUP, two restrictions address exercise—one addresses the location and hours of use of an outdoor-exercise area if one is provided, and the other requires 1/6 of the total indoor building area to be set aside for an indoor exercise area. The CUP also required McDuffee to "be in compliance with all federal, state, and county statutes related to the operations of this dog breeding facility. If at any time [McDuffee] is convicted of any violation of such statutes, the [board] shall hold a hearing to consider the revocation of the [CUP.]" Therefore, while there is no separate requirement in the CUP that McDuffee provide daily exercise for the dogs, McDuffee is strictly required to comply with federal, state, and county statutes. If McDuffee fails to comply with all federal, state, and county statutes related to the operation of dog-breeding facilities, the CUP provides for revocation. Consequently, the fact that the board did not specifically require at least 20 minutes of exercise per day was not unreasonable, arbitrary, and capricious.

This same reasoning applies to relators' arguments that the board's failure to address the noise concern, cage size and capacity, inspection, and staffing shortage issues was unreasonable, arbitrary, and capricious. The board recognized that McDuffee must be in compliance with all applicable federal, state, and county statutes or be subject to revocation of the CUP. A dog breeder is only issued a license if the dealer has "demonstrated that his facilities comply with the standards promulgated by the Secretary [of Agriculture] pursuant to section 2143 of this title[.]" 7 U.S.C. § 2133 (1995). Minnesota also has laws governing dog breeders in the care and management of animals or facilities. Minn. Stat. §§ 346.39, 347.32 (2006). The board's deference to state and

federal regulations regarding noise, cage size and capacity, inspection, and staffing issues was not unreasonable, arbitrary, and capricious. *See Yang*, 660 N.W.2d at 835.

Next, relators argue that the board's failure to further limit the number of dogs was a misapplication of the law. It is unclear what law relators believe has been misapplied as they fail to cite any law regulating the number of dogs allowed at a breeding facility. There is also nothing in the land-use ordinances regarding a limit on the number of dogs allowed at the facility. Further, relators also cannot argue that the board failed to address this issue. The board engaged in a lengthy discussion on whether the number of adult dogs permitted should be decreased from 600—the number previously approved—to 500 or even 400. Although the number does not include puppies, the CUP defines a four-month-old dog as an adult dog, thereby providing some limitations on the possible number of puppies permitted. Based on the record, the board's failure to limit the number of dogs was not a misapplication of the law, and was not unreasonable, arbitrary, or capricious.

Relators also argue that the board's failure to make findings in support of its legal conclusion that the breeding facility will not significantly depreciate nearby properties was unreasonable, arbitrary, and capricious. A condition for granting a CUP is that the proposed "use will be sufficiently compatible or separated by distance or screening from adjacent agricultural or residentially zoned land so that existing homes will not be depreciated in value." Morrison County, Minn., Ordinances § 507.2(a)(2). The board found that the proposed use will not significantly depreciate nearby properties.

The record shows that the board considered evidence from both sides regarding the diminution of nearby property values. Relators presented evidence that there was depreciation in property values of ten to 17 percent, according to an appraisal report. At the hearing, the board questioned relators' attorney regarding inconclusive information contained in the appraisal. The board questioned how the appraiser could conclude that property values had decreased ten to 17 percent based on only one comparable property. Evidence was also presented that property owners that live much closer to other breeding facilities have seen their property values go up rather than down. Community opposition alone is not a legally sufficient reason to deny a CUP. *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 718 (Minn. 1978). The board concluded that the evidence did not support relators' argument that there had been a diminution in property values. Based on the record, the board's failure to make specific findings of fact in support of its legal conclusion that the breeding facility would not significantly depreciate nearby properties was not unreasonable, arbitrary, and capricious.

Relators also argue that the board failed to make specific findings concerning the CUP as required by land-use ordinance section 507.2. To facilitate judicial review, a zoning body must "have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion." *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981). Land-use ordinance section 507.2 provides that the planning commission must make findings, where applicable, regarding whether: (1) there is any "excessive burden on existing parks, schools, public roadways and other public facilities and utilities"; (2) the use is "sufficiently compatible or separated by distance or screening

from adjacent agricultural or residentially zoned land so that existing homes will not be depreciated in value and there will be no deterrence to development of vacant land"; (3) the "structure and site [will] have an appearance that will not have an adverse effect [on] adjacent properties"; (4) the "use is reasonably related to the existing land use and the environment"; (5) the "use is consistent with the purposes of the Zoning Ordinance and the purposes of the zoning district [where] the applicant intends to locate the proposed use"; (6) the "use is [] in conflict with the Comprehensive Plan of the county"; and (7) the "[e]xisting occupants of nearby structures will [] be adversely affected because of curtailment of customer trade brought about by intrusion of noise, odor, glare or general unsightliness." Morrison County, Minn., Ordinances § 507.2.

Each of these issues was specifically addressed in the board's findings. The board found that the requested use (1) would "not create an unreasonably excessive burden on the existing roads or other utilities"; (2) "is compatible with the surrounding area and will not significantly depreciate near-by properties"; (3) "shall have an appearance that will not have an unreasonably adverse effect on near-by properties"; (4) "is reasonably related to the existing land use and environment"; (5) "is consistent with the Morrison County Land Use Control Ordinance"; (6) "is not in conflict with the Morrison County Comprehensive Plan"; and (7) "will not create an unreasonably adverse affect because of noise, odor, glare or general unsightliness for near-by property owners." While it appears that the board's written findings are conclusory, "a reviewing court may look to the evidence in the record, and, absent a showing that the proposed use would be detrimental to public health, safety, or welfare, then the governmental decision must be upheld." *Bd.*

of Supervisors v. Carver County Bd. of Comm'rs, 302 Minn. 493, 500, 225 N.W.2d 815, 819 (1975). There is nothing in the record to show that the CUP would be detrimental to public health, safety, or welfare; therefore, despite the board's lack of specific findings concerning the CUP, the record is sufficient for judicial review and supports the board's conclusion.

The board moved to strike those portions of relators' reply brief and supplemental appendix pertaining to the Wolf report. The basis for the motion is that the report was not provided to or considered by the board because it was subject to a protective order. "The papers filed in the [district] court [or agency], the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01; *see also* Minn. R. Civ. App. P. 115.04, subd. 1 (record on review by certiorari). Relators argue that we should consider the Wolf report because we have "inherent power to look beyond the record where the orderly administration of justice commends it." *Crystal Beach Bay Ass'n v. County of Koochiching*, 309 Minn. 52, 56-57, 243 N.W.2d 40, 43 (1976). However, the board did not use the Wolf report in reconsidering the CUP on remand and cannot now be used to reverse the board's decision. Therefore, the board's motion to strike is granted.

Finally, we note that while we are affirming the board's issuance of the CUP, "[t]he function of the court of appeals is limited to identifying errors and then correcting them." *Sefkow v. Sefkow*, 427 N.W.2d 203, 210 (Minn. 1988). This court also may not "substitute its discretion for that of the county board." *Amdahl v. County of Fillmore*, 258 N.W.2d 869, 876 (Minn. 1977). Our review is "limited . . . to whether the county

board has acted unreasonably or arbitrarily." *Id.* Further, "[w]hile we may reach a conclusion different from the county board based upon the evidence considered, we cannot substitute our judgment for that of the county board absent a determination of arbitrariness or failure to sufficiently consider the duties and responsibilities of the office in question." *Id.* We previously remanded this matter to the board to reconsider the seriousness of issuing the CUP, which the board did. If the alluded to violations of federal and state law exist, or if possible justifications exist in the Wolf report to revoke the CUP, we assume that those allegations and violations will be investigated, and the board's provision regarding revocation of the CUP would be considered.

Affirmed; motion granted.

LANSING, Judge (dissenting)

By delegating zoning power to the counties, the legislature placed land-use decisions in the hands of officials who are accountable to those affected. *See* Minn. Stat. § 394.21, subd. 1 (2006) (authorizing counties to conduct planning and zoning). The county has the power not only to enact zoning ordinances but also to permit exceptions to those ordinances by, for example, issuing conditional-use permits. *See* Minn. Stat. § 394.301, subd. 1 (2006) (authorizing county to issue conditional-use permits). But the county's power to grant exceptions to the zoning configuration is not unlimited—the county must specify in advance the conditions under which a conditional-use permit will be issued. *Id.*

The county's decision to issue a conditional-use permit is quasi-judicial and is therefore appealed to this court by certiorari. *Bartheld v. County of Koochiching*, 716 N.W.2d 406, 411 (Minn. App. 2006). On certiorari appeal, we review the record to determine whether proper procedures were followed and whether the decision was "arbitrary, oppressive, unreasonable, fraudulent, under an erroneous theory of law, or without any supporting evidence." *Tischer v. Hous. & Redev. Auth. of Cambridge*, 693 N.W.2d 426, 429 n.3 (Minn. 2005).

In this case, the Morrison County Board of Commissioners issued a conditional-use permit for a dog-breeding facility located in an agricultural zone outside of Little Falls. In issuing the permit, however, the board relied on two mistakes of law.

First, the board misinterpreted the county's standards for issuing conditional-use permits. The interpretation of a county ordinance involves an issue of law, which we

review de novo. *County of Morrison v. Wheeler*, 722 N.W.2d 329, 334 (Minn. App. 2006), *review denied* (Minn. Dec. 20, 2006). In granting a conditional-use permit, the county must consider "the effect of the proposed use upon the health, safety, morals and general welfare of occupants." Morrison County, Minn., Land Use Control Ordinance § 507.2 (1995). In granting a conditional-use permit, the county has the power to impose "additional conditions" that it "considers necessary to protect the best interest of the surrounding area or the community as a whole." *Id.* § 507.3 (1995).

Despite these standards, the board improperly considered itself bound to issue a conditional-use permit for a facility with a 500-adult-dog cap and no cap for the number of puppies. As one commissioner stated, "I'd love to get it to 400 . . . but I don't think we can go there." The statements of the county administrator and an attorney advising the county also suggested an undisclosed limitation. The administrator began his comments by saying there would be a "rational" basis for decreasing the number of dogs from 600 to 500 and the attorney cautioned that "there ought to be a very strong reasonable basis for any reduction in the numbers." Other comments by board members suggested that they erroneously believed that they could not impose conditions on the treatment of the animals. Two commissioners indicated that they understood that it was not their job to regulate the health and welfare of the animals and the statements by the county administrator and the advising attorney appear to have reinforced their beliefs. These statements communicated to the commissioners that animal-cruelty laws are distinct from land-use matters; that the board's power was limited to restating state and

federal regulations; and that, even if the commissioners decided to require inspections, the inspectors would not look into animal treatment.

This restrictive position is not supported by the statute or the ordinance that permits denial of a conditional-use permit when granting the application would adversely affect the health, safety, morals, or general welfare of the county's occupants. *See* Minn. Stat. § 394.301, subd. 2 (2006) (stating that, in connection with ordering issuance of conditional-use permit, county board may "impose such additional restrictions or conditions as it deems necessary to protect the public interest"); Morrison County, Minn., Land Use Control Ordinance § 507.2 (stating that in granting conditional-use permit, the county "shall consider the effect of the proposed use upon the health, safety, morals and general welfare of occupants").

Second, the county failed to consider relevant information because of its incorrect belief that it needed to issue a decision within sixty days. The board did not consider the detailed report of Dr. Linda Wolf, an expert witness, who is an experienced veterinarian and who inspected the facility and conducted testing. This report, which was generated in related litigation involving environmental issues and a nuisance action, had been restricted under a protective order obtained by McDuffee and the county. Although the neighbors attempted to obtain release of the information through a motion to modify the protective order, McDuffee and the county opposed the motion. The neighbors' motion to obtain the report for the board's consideration was scheduled for hearing two weeks before the board's public hearing. But the hearing on the motion was delayed because

the district court judge who was scheduled to hear the motion recused shortly before the hearing.

Approximately a month after the board decision, a newly assigned district court judge heard the motion and ultimately issued an order to make the report available. The board, however, declined to wait until the resolution of the protective-order issue. The county board argues that they were advised that they must move quickly to avoid the effect of the sixty-day rule that would result in automatic issuance of the permit. *See* Minn. Stat. § 15.99 (2006) (requiring agency to approve or deny written request related to zoning within sixty days but permitting sixty-day extension). Complying with statutory time limits is important, but the statute does not indicate that the sixty-day rule applies to a remand from a court decision. Even if the requirement applies, the county has offered no reason that explains why the county did not invoke its automatic extension for the additional sixty days. As a result of this mistake of law, the county failed to consider Dr. Wolf's report and failed to give this case the "hard look" this court previously ordered. *See In re Block*, 727 N.W.2d 166, 180, 182 (Minn. App. 2007) (reversing Morrison County's previous grant of conditional-use permit).

In addition to being incorrect, the county's interpretation of the law impeded the county board from exercising the fundamental decision-making powers with which they are entrusted. The board may have the power to authorize this "kennel," but their hands are not tied. The commissioners had a choice. Because the board incorrectly concluded that it was required to permit 500 dogs at the site, that it could not impose conditions relating to the treatment of the animals, and that it could not wait for Dr. Wolf's report, I

would conclude that its decision was affected by an error of law and I would reverse. I therefore respectfully dissent.