STATE OF MINNESOTA
IN COURT OF APPEALS
A07-1580

In the Matter of the Decision of the Becker County Zoning Administrator
to Issue a Land Alteration Permit Dated May 23, 2006,
to Thomas and Sandra Alinder.

Filed September 16, 2008
Reversed and remanded
Halbrooks, Judge

Becker County District Court
File No. C2-06-1706

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Considered and decided by Connolly, Presiding Judge; Halbrooks, Judge; and Ross, Judge.

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

HALBROOKS, Judge

Appellants Joseph and Jennifer Roach challenge the decision of the Becker County Board of Adjustment (BOA) affirming the zoning administrator's issuance of a

land-alteration permit (LAP) to respondents Thomas and Sandra Alinder.[1] Because we conclude that the BOA erred in interpreting the Becker County zoning ordinances and failed to make adequate findings and provide reasons for its decision, we reverse and remand.

FACTS

Respondents Thomas and Sandra Alinder own property on the shoreline of Lake Melissa, near Detroit Lakes. Appellants Joseph and Jennifer Roach own property directly to the north of the Alinders, and John and Norma Finnie own property directly to the south of the Alinders.

In 2003, the Alinders applied for and received a permit to construct a new house. During construction, Joseph Roach called the county zoning office to complain about the amount of fill being used. On September 7, 2004, he filed a zoning complaint, asserting that as a result of the amount of fill placed on the Alinders' lot, it was now higher than the adjacent lots, resulting in runoff to the adjacent lots.

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

> A. Except for public roads, public ditches or public parking areas no 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; or unless exempted by reasons listed in Section 17. No land alteration permit will be granted for any land alternation that will result in:

[1] The Alinders in their brief join in the arguments made by the county.

. . . .

4. Increased runoff to adjacent properties[.]

Becker County, Minn., Zoning Ordinance § 18, subd. 5 (2002), states, in part:

> 11. 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.

An inspection by the county was conducted. By letter dated September 8, 2004, the supervisor of inspectors advised the Alinders that

> [a]n inspection was conducted of your property pursuant to a complaint. The complaint alleges that there is run off from your property onto the neighboring properties. During this inspection, it was noted that the lot has been raised higher than the neighboring properties. Pictures taken during this inspection were compared to pictures taken during the construction process, which concurred that the lot has been raised several inches.
>
> The Becker County Zoning Ordinance states that all storm water runoff must be retained on your property and cannot be discharged to neighboring properties. Since your property is located within the Pelican River Watershed, please contact the Watershed for help in preparing a plan to retain your runoff on your property. Please have this plan prepared and implemented within 30 days from the date of this letter.

The Alinders did so and reported to the supervisor that, according to the watershed district representative, they had already put in place many "best water management" practices, but that they would also implement two recommendations made by the watershed district to correct the problem.

In an October 15, 2004 letter, the zoning administrator advised the Alinders that an LAP was required for the land alterations that had already occurred. She warned them that a permit would not be granted if, in relevant part, it "increased runoff to adjacent properties." She also advised the Alinders that within 30 days they had to submit a certified storm-water-management plan for review to the zoning department and to the watershed district addressing these issues.

The Alinders commissioned a plan, which was submitted about a year later. The plan stated that the properties owned by the Alinders, the Roaches, and the Finnies suffered from runoff coming from an adjacent hill and road. It recommended addressing solving the problem on a "neighborhood" level by taking a number of steps, including making alterations to the Roaches' property. The zoning administrator was prepared to accept this plan, but the Roaches were strongly opposed to it because it involved taking a portion of their property and imposing a permanent easement for water flow.

On November 30, 2005, the zoning administrator asked the Alinders for a plan that was limited to the Alinders' property, with documentation that the changes would not, among other things, increase runoff to the adjacent properties. The Alinders commissioned a second plan, which called for building a retaining wall between their property and the Roaches' property, building a berm between the Alinders' property and the Finnies' property, adding several retention areas, and regrading the driveway to direct runoff to the retention areas. The Roaches objected to this plan as well, stating that it would "essentially create a dam between the Roach and Alinder property that will prohibit the flow of water and cause it to collect on the Roaches['] property." On May

23, 2006, the Alinders applied for an LAP based on the second plan, and the zoning administrator granted it. The Alinders proceeded to build the berm and retaining wall after a failed attempt by the Roaches to obtain a restraining order in district court.

On June 20, 2006, the Roaches appealed to the BOA the zoning administrator's decision to issue the LAP, contending that the land alterations resulted in increased runoff to their property and adversely affected it in violation of Becker County, Minn., Zoning Ordinance §§ 12, subd. 7, 18, subd. 5(3). They also asserted that the drainage plan lacked the required conditional-use permit. Becker County, Minn., Zoning Ordinance § 12, subd. 7(F).

At the hearing before the BOA, the Roaches' expert testified that before the alteration, water drained across the Roaches' and the Finnies' property and collected on the Alinders' property. After the Alinders brought in what the expert estimated to be at least 850 cubic yards of fill, the height of the Alinders' property was raised almost two feet. This essentially created a dam on the Alinders' property and disrupted the previous natural flow of surface water, causing water to back up on the Roaches' and the Finnies' properties. The Roaches' expert opined that the retaining wall probably made matters worse and that the increased moisture could lead to an increased risk of mold and warped floors in the Roaches' home, as well as damage to the foundation and concrete slab. The Alinders did not present any witnesses or additional evidence.

The zoning administrator testified that, as she interpreted section 12, subdivision 7, the Alinders had satisfied the criteria for the permit because they "are not increasing runoff to the adjacent properties. That plan is containing the water that is coming from

the Alinders' property . . . ." The zoning administrator stated that she was "not going to comment" upon the allegation that the Alinders had created a dam, causing water to pool on the Roaches' lot. The assistant county attorney advised the BOA that it would have to "look[] at the ordinance and whether this [LAP] increased, or effectively increased the runoff to the adjacent property." Further, in interpreting the ordinance, the BOA would "have to look at the unique circumstance of this area, which was that the Alinders held everybody's water."

After a short discussion concerning how much fill the Alinders could have moved onto their property without the permit and whether the Alinders' actions increased runoff to the Roaches' property, there was a motion to affirm the decision of the zoning administrator to issue the permit on the grounds that the zoning administrator "issued the permit in good faith and based on professional information she received at the Becker County Planning and Zoning office." All but one BOA member voted in favor of the motion. Shortly thereafter the BOA issued a written decision that stated:

> This decision is based in part on the fact that the [BOA] did not find the information provided by the Roaches/Finnies to form any basis for reversal of the Zoning Administrator's decision and the [BOA] finds the Zoning Administrator's decision to be reasonable and in fair and correct interpretation of the Becker County Zoning Ordinance based on the circumstances of the involved properties.

The Roaches appealed the decision of the BOA to district court, which affirmed. This appeal follows.

D E C I S I O N

I.

The first issue is whether the BOA's decision to affirm the zoning administrator's decision to grant the LAP was reasonable. By statute, a BOA has authority to "hear and decide appeals from and review any order, requirement, decision, or determination made by any administrative official charged with enforcing any ordinance." Minn. Stat. § 394.27, subd. 5 (2006); *see also* Becker County, Minn., Zoning Ordinance, § 20, subd. 4(F) (2002). When this court reviews a decision of the BOA, we determine de novo whether the BOA made a reasonable decision on the evidence before it. *Yeh v. County of Cass*, 696 N.W.2d 115, 124-25 (Minn. App. 2005), *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.").

A. Reasons for Decision

It has long been the rule that although formal findings of fact are not necessary, the municipal body "must, at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion. By failing to do so, it runs the risk of not having its decision sustained." *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981). Recently our supreme court reiterated these requirements and held that, when a BOA makes a zoning decision, it must "articulate the reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance."

In re Stadsvold, ___ N.W.2d ___, ___, 2008 WL 2445493, at *8 (Minn. June 19, 2008) (quoting *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994)).

> When the zoning authority fails to comply with this requirement, it is difficult if not impossible for a reviewing court to determine whether the zoning authority's decision was proper, was predicated on insufficient evidence, or was the result of the zoning authority's failure to apply the relevant provisions of the zoning ordinance.

Id. We must hold a decision based on insufficient reasons to be arbitrary and capricious. *Id.*

Here, the BOA provided only bare reasons for its decision. The only contemporaneous reasons given orally to support the motion to confirm the zoning administrator's decision were that the zoning administrator "issued the permit in good faith and based on professional information." The subsequent written reasons were similarly lacking—that because the Roaches had failed to provide information forming "any basis for reversal," the zoning administrator's decision was a "reasonable and in fair and correct interpretation of the Becker County Zoning Ordinance."

These are not adequate reasons. Neither "good faith" nor "professional information" are elements found in the Becker County ordinances for consideration of whether to grant an LAP. In the written findings, the BOA failed to reference sections of the ordinance or articulate specific reasons for its decision, as required by *Stadsvold* and *Earthburners*. Nor did the BOA decide important questions of fact, such as whether the additional fill and retaining wall created a damming effect, resulted in more runoff onto the Roaches' lot, or otherwise negatively affected the Roaches' lot or home. Despite the

opinions of the Roaches' expert at the BOA hearing, the board essentially closed the record based on the information that the zoning administrator presumably had when she made her decision. We therefore conclude that the BOA's decision was arbitrary and capricious and remand this matter to the BOA. *See Stadsvold*, ___ N.W.2d at ___, 2008 WL 2445493, at *8 (remanding a variance denial to a zoning authority for findings with respect to the standards applicable in variance cases).

B. Application of the Becker County Zoning Ordinance

Zoning matters may be either legislative or quasi-judicial. *Honn*, 313 N.W.2d at 416. The standard of review for both is that of reasonableness, but what is "reasonable" depends upon what is under review. *Id.* at 416-17. Here, the proceedings below were quasi-judicial. *See id.* at 416 (stating that whether to grant a variance or a special-use permit is a quasi-judicial decision); *see also Handicraft Block Ltd. P'ship v. City of Minneapolis*, 611 N.W.2d 16, 20 (Minn. 2000) (listing the indicia of quasi-judicial action as "(1) investigation into a disputed claim and weighing of evidentiary facts; (2) application of those facts to a prescribed standard; and (3) a binding decision regarding the disputed claim" (quotation omitted)). As such, reasonableness is measured by the standards set out in the ordinance. *Honn*, 313 N.W.2d at 417; *see also White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982).

Application of an ordinance to the facts of a case is for a court. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). The rules governing interpretation of a statute also apply to the interpretation of an ordinance. *Yeh*, 696 N.W.2d at 128. In considering this ordinance, we attempt to ascertain and effectuate the

intention of the authoring body. Minn. Stat. § 645.16 (2006). In order to do this, we consider the ordinance as a whole. *Van Asperen v. Darling Olds, Inc.*, 254 Minn. 62, 73-74, 93 N.W.2d 690, 698 (1958); *State v. Kelley*, 734 N.W.2d 689, 692 (Minn. App. 2007), *review denied* (Minn. Sept. 18, 2007).

The Becker County ordinance states that "[n]o land alteration permit will be granted for any land alteration that will result in . . . [i]ncreased runoff to adjacent properties." Becker County, Minn., Zoning Ordinance § 12, subd. 7 (2002). In its decision, the BOA stated that the Roaches did not show "any basis for reversal" of the zoning administrator's decision and that the decision was a "reasonable and fair and correct interpretation of the Becker County Zoning Ordinance." At the hearing, the zoning administrator acknowledged that under section 12, subdivision 7, the permit must not allow a plan that results in increased runoff to adjacent properties. But she stated that the plan under consideration did not do so, because it contained the water coming from the Alinders' property and did not increase runoff to the adjacent properties. Further, she stated that the Alinders were not required to "hold" the water for the neighborhood (referring to the fact that before the Alinders' alterations, their lot had been lower than the Roaches' and the Finnies' and runoff settled on the Alinders' lot). The zoning administrator also stated that the engineers and those who reviewed the documents assured the county that the plan would contain the water and follow the ordinance and would not increase runoff to adjacent properties.

But section 12, subdivision 7, 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. Instead, the plain reading of the ordinance only provides for consideration, in relevant part, of whether the alterations would result in an increased runoff to adjacent properties. Thus, to the extent that the BOA relied on the incorrect interpretation of the ordinance, it erred as a matter of law.

In addition, the Roaches also asserted that the use of the permit adversely affected their property in violation of the provision of the ordinance that states that a land alteration "shall not be allowed unless the use . . . does not adversely affect adjacent or nearby properties." *See* Becker County, Minn., Zoning Ordinance § 18, subd. 5(3) (2002). At the hearing, the Roaches presented unrefuted expert testimony that the additional runoff on their property could result in increased mold in their house, warping of their floors, and damage to their foundation and concrete slab. The zoning administrator declined to comment on the claim that the alteration in effect resulted in a dam on the Alinders' property, and the BOA did not address section 18, subdivision 5(3) in its decision. The BOA made no findings concerning whether the use of the permit adversely affected the Roaches' property or explaining the basis for its decision. On remand it must do so.

C. Conclusion

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, its decision is arbitrary and capricious. Consequently, we remand this matter 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. *See Stadsvold*, ___ N.W.2d at ___, 2008 WL 2445493, at *8 (remanding a variance denial to a zoning authority for findings with respect to the standards applicable in variance cases).

II.

We also address the challenges by the Roaches to the hearing. Under the Becker County zoning ordinance, the BOA "may reverse or affirm wholly or partly, or may modify the order, requirement, decision, or determination appealed from and to that end shall have all the powers of the officer from whom the appeal was taken and may direct the issuance of a permit." Becker County, Minn., Zoning Ordinance, § 20, subd. 4(F) (2002). The Roaches argue that the BOA overly restricted its scope of review, incorrectly limiting the question examined to whether the board should reverse the zoning administrator's grant. But at the outset of the hearing, the board chair read the correct standard set out in subdivision 4(F), and near the end of the hearing another board member also invoked this standard of review. There was no showing that the board, by referring to a summary standard during the hearing, applied an improper standard of review.

The county argues that the BOA properly considered the issue of whether the administrator's decision to issue the permit was reasonable and not arbitrary and capricious based on the information presented to her at the time she made her decision to issue the permit. It is beyond dispute that the BOA is to take evidence at the hearing, resulting in a record that could include transcripts, statements by experts, and written

reports by officials, and make contemporaneous written findings on which the zoning decision is based. *See Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988) (holding that district court review should be based on record before the body making the zoning decision unless that proceeding was not fair or the record was not clear and complete, in which case additional evidence may be presented in district court). Further, this court is to review the decision of the BOA based on the evidence before the BOA. *See Yeh*, 696 N.W.2d at 124-25. There is nothing to support the county's argument that this court is reviewing the decision of the administrator based only on the evidence that had been submitted to that administrator. On remand, the BOA must consider evidence presented by the Roaches, including any expert testimony.

III.

For the first time on appeal, the Roaches argue that the BOA should be overturned because it failed to consider every part of the ordinance. They argue that the retaining wall built pursuant to the permit is a "structure" that required a permit, that the Alinders' lot is substandard and required a variance before building the new home, and that the Alinders otherwise failed to appropriately apply for the permit. They also question the ability of the zoning administrator to grant an ex post facto permit. None of these issues was raised before the BOA. Failure to raise an issue before the BOA precludes consideration of the issue for the first time on appeal. *Stadsvold*, ___ N.W.2d at ___, 2008 WL 2445493, at *3. Consequently, we decline to consider these issues.

Reversed and remanded.