STATE OF MINNESOTA
IN COURT OF APPEALS
A09-30

In the Matter of an Application by
Colleen Stuckmayer and Robert Hennen
for a Conditional Use Permit.

Filed December 22, 2009
Reversed; motions denied
Halbrooks, Judge

Morrison County Board of Commissioners

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Considered and decided by Klaphake, Presiding Judge; Halbrooks, Judge; and Bjorkman, Judge.

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

HALBROOKS, Judge

Relators challenge the denial of their conditional-use-permit application, arguing that the basis for denial is legally insufficient and unsupported by the record. Because we conclude that the county board's denial is not supported by the record, we reverse. The motions brought by relators and respondent are denied.

FACTS

Relator Colleen Stuckmayer owns a farm in respondent Morrison County that is operated as a feedlot known as Heiferstreak by relator Robert Hennen. Heiferstreak is in an area that is zoned agricultural, and feedlots constitute conditional uses. Heiferstreak currently holds a Tier-1 conditional use permit (CUP), allowing up to 300 animal units on the feedlot. Relators are seeking a Tier-2 CUP for Heiferstreak, which would increase the feedlot's capacity to 650 animal units. Hennen operates two other feedlots in Morrison County, neither of which are owned by Stuckmayer. To date, relators have submitted three applications seeking a Tier-2 CUP for Heiferstreak.

The process of obtaining a CUP is defined in the Morrison County Land Use and Control Ordinances. First, the Morrison County Planning Commission (the commission) holds an initial hearing and makes a recommendation to the Morrison County Board of Commissioners (the board). Morrison County, Minn., Land Use and Control Ordinance § 507.4(d), (f) (2008). The board ultimately votes to approve or deny the CUP application. Morrison County, Minn., Land Use and Control Ordinance § 507.5(c) (2008). The county's land use and control ordinance lists seven findings the commission must make before a CUP may be granted, including a finding that "[e]xisting occupants of nearby structures will not be adversely affected because of curtailment of customer trade brought about by intrusion of noise, odor, glare or general unsightliness." Morrison County, Minn., Land Use and Control Ordinance § 507.2 (2008).

Relators first applied for a Tier-2 CUP in 2006. The commission held a hearing and found that, based on an environmental review of Heiferstreak, the site was a pollution

threat to a nearby creek. The commission also found that the CUP did not meet three of the seven required findings. Based on these conclusions, the commission recommended denying relator's CUP application. Thus, the board denied relators' application based on the commission's recommendation.

In response to this first denial, relators completed significant earthwork to regrade the feedlot and eliminate the pollution threat to a nearby creek. As indicated by an October 31, 2007 letter from the Morrison Soil and Water Conservation District (SWCD), "Mr. Hennen . . . satisfactorily completed various earthwork activities to eliminate feedlot run off from entering Little Mink Creek and the wetland which borders the Creek." In early 2008, a joint county and Minnesota Pollution Control Agency (MPCA) feedlot inspection was conducted at relators' feedlot. This inspection indicated that Heiferstreak was in compliance with feedlot rules, and in response to the inspection, a Morrison County feedlot specialist sent a letter to Hennen stating that "a conditional use permit was deemed the appropriate choice in moving forward with future plans."

Accordingly, relators applied for a Tier-2 CUP for a second time in March 2008. SWCD conducted an environmental review in response to this application. SWCD assessed Heiferstreak using MinnFarm, a modeling program designed to evaluate the pollution potential of farms. MinnFarm generates a feedlot evaluation (fleval) score for specific areas of a site. A fleval score of zero indicates that water-quality discharge standards are being met. The March 2008 environmental review contained a MinnFarm printout indicating a fleval score of 11 for the "concrete pad." The environmental-review report states that "Mr. Hennen has completed the earthwork to bring the open feedlots in

compliance with run off issues," but that "[t]he manure stockpile on the concrete slab does pose a potential pollution problem." The SWCD technician who prepared the report recommended "containing the storage area or diverting possible run-off away from the county ditch" as a solution to this pollution threat.

Ultimately, the commission recommended denying the CUP because "[t]he requested use will create an unreasonably adverse affect [sic] because of noise, odor, glare or general unsightliness for near-by property owners," and that

> [d]ue to Mr. Hennen's pattern of mismanagement of his farm properties in the County, any expansion of the site in question would likely have a harmful effect upon the health, safety, and general welfare of the occupants of surrounding lands and bodies of water, even with the conditions that have been proposed.

The commission proposed various conditions along with its recommendation. One of the proposed conditions was that Heiferstreak obtain a zero fleval score. After the commission's recommendation to deny the CUP, relators submitted a June 2008 MinnFarm printout to the board indicating a fleval score of zero for the "stacking slab." Relators ultimately withdrew their second CUP application prior to the board's final determination.

In August 2008, relators submitted their third application for a CUP. The commission noted the work that had been done at Heiferstreak. Specifically, the commission recognized that

> [c]urbing around an open lot was . . . installed to divert runoff toward a westward field away from the creek. The applicants have also discontinued the use of a large stockpiling slab near the road ditch. A small portion of the slab is used, but is

> walled up. The applicants are also proposing to plant trees between the operation and the road ditch, to improve aesthetics. . . . The applicants were able to achieve a compliance status from MinnFarm according to a trial run by the SWCD.

The record also includes an addendum to the March 2008 review dated September 16, 2008 that states:

> A MnFarm pollution potential model was run on the existing operation. The operation did not meet the compliance criteria. The two lots to the south do flow toward the county road ditch. A diversion to direct any run-off to the west—into the cropland and away from the road ditch will be constructed. This will bring the site into compliance.

The parties do not agree as to whether the MinnFarm pollution model referenced in this addendum was run on the operation as proposed in relators' third CUP application or whether it was run on a prior submission. There is no MinnFarm printout attached to or referenced in the September addendum. The MinnFarm printout from the March 2008 environmental review shows a noncompliant score for the "concrete pad," but the MinnFarm printout from June 2008 (the most recent one in the record) shows a fleval score of zero for the "stacking slab."[1] On the other hand, the environmental-review addendum implies that the pollution threat is from "two lots to the south," which is inconsistent with the rest of the record. We are unable to determine from the record whether the term "existing operation" used in the environmental-review addendum refers to the operation as of September 16, 2008 (the date of the addendum) or March 14, 2008

[1] The terms "concrete pad" and the "stacking slab" seem to be used interchangeably throughout the record.

(the date the environmental review was conducted). But our analysis does not depend on resolution of this factual dispute.

The environmental-review addendum was not discussed by the commission at the initial hearing following relators' third CUP application. The commission noted at this hearing that "[t]here will be an improvement with the attainment of a compliant status on the MinnFarm rating, which was obtained by abandoning the large stockpile site near the road ditch." The commission also heard at this hearing that "[a] diversion or berm should be constructed to divert run-off to the west toward a field." A site map attached to the environmental review addendum shows the abandoned slab and the proposed diversion.

Four people spoke in opposition to the application at the commission's initial hearing on relators' third CUP application. A Buh Township[2] supervisor discussed an incident where mud that he attributed to Heiferstreak was left on the road. A neighbor to the west was concerned about possible contamination of her wells. Another neighbor complained about the unsightliness and odor of Heiferstreak. A third neighbor was upset because his land was classified as a wetland whereas Stuckmayer's was not. At the conclusion of the hearing, the commission voted to recommend granting the CUP. The commission found that relators had met all seven criteria for granting a CUP and approved six conditions:

> a. Notify County Engineer when hauling manure on County roads during road restrictions.
> b. Maintain a compliance status on the Heiferstreak site.
> c. Construct and maintain a diversion to divert runoff away from the road ditch to an area where adequate

[2] Heiferstreak is located in Buh Township.

treatment is available before reaching waters of the state.

d. Plant and maintain a shelter belt between the Hawthorn Road ditch and feedlot.

e. Refrain from using the abandoned area of the stockpile, and only use the area that is blocked off.

f. At the discretion of the County Feedlot Officer, unannounced inspections may take place throughout the years to ensure that cattle numbers are below the 1000 head threshold.

The board met to address relators' third CUP application on November 12, 2008. The county's feedlot specialist presented the application and the commission's recommendation to the board. Commissioner Don Meyer voiced his opposition to the application. He claimed that a required berm was not in place, that the feedlot did not fit the area, that Hennen's history was bad, and that there was no support for the application. Commissioner Meyer moved to deny the application, which was seconded for more discussion. Commissioner Meyer continued to discuss complaints he had received and argued that there continued to be a runoff issue to the east threatening the water supply. A commissioner attempted to clarify that the feedlot has a compliance status and that Meyer's opposition should not be personal. Commissioner Gene Young stated that "Mr. Hennen has improved his operation whether we like it or not." Commissioner Meyer went on to disagree with the contention that the runoff issue has been corrected, stating, "[T]here clearly is run-off. I looked at it yesterday. . . . You can have the soil and water technician say what he wants to, he can write anything on paper." After additional discussion, the initial motion to deny the CUP failed.

The board continued its discussion and asked Hennen to delay increasing the number of animals until June 2009 to see if Heiferstreak remained in compliance. Commissioner Jeff Schilling proposed the delay because he wanted to see the berm go through a freeze/thaw cycle. But Hennen's attorney clarified for the board that the berm was completed and had already endured a freeze/thaw cycle. Hennen rejected the proposed delay but offered to refrain from making structural changes to Heiferstreak until June 2009 if he could increase the number of animals immediately.

The board rejected Hennen's alternative proposal and Commissioner Schilling made another motion to deny the CUP because he did not feel he had "sufficient time to see if it[] [was] going to work." Following a second to Commissioner Schilling's motion, the option of tabling relators' application was raised, and the possibility that findings of fact might need to be in front of the board prior to the vote—rather than prepared after the vote—was also raised. Without addressing these issues, the motion to deny passed. The board clarified after the vote that it was going to order county staff to develop findings of fact to support the denial and would approve or deny the findings of fact at the board's next meeting.

On November 13, 2008, the day after the board voted to deny relators' application, the county feedlot specialist sent a letter to the commissioners asking for the basis of the commissioners' denial. There is one e-mailed response to this request in the record. Commissioner Wenzel stated that the "Buh townboard is totally against this. They know the neighbors around this operation better than anyone. Also they know the lay of the land in this area and where the water will drain." He also stated that he did not agree

with number 16(g) of the commission's findings of fact, which states that "[t]he requested use will not create an unreasonably adverse affect [sic] because of noise, odor, glare or general unsightliness for near-by property owners."

On November 25, 2008, the board approved 22 findings of fact and reached seven conclusions before denying relators' application "because it will create an unreasonably adverse affect [sic] because of noise, odor, glare, and/or general unsightliness for nearby property owners." This certiorari appeal follows.

D E C I S I O N

I.

Quasi-judicial zoning decisions, such as the denial of an application for a CUP, are reviewable by writ of certiorari. *Interstate Power Co. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). An appellate court reviews a county's decision "independently to see whether there was a reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously." *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). CUP denials are held to a less deferential standard of review than CUP approvals. *Id.* at 389 n.4. But when a CUP is denied, the applicant has the burden of persuading a reviewing court that "the reasons for the denial either are legally insufficient or had no factual basis in the record." *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) (citing *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982)).

In its decision, the board stated that its reason for denying the CUP was that the feedlot would "create an unreasonably adverse affect [sic] because of noise, odor, glare,

and/or general unsightliness for nearby property owners." Because Morrison County Land Use and Control Ordinance section 507.2 requires a finding that nearby property owners would not be adversely affected due to noise, odor, glare, or general unsightliness, the board's stated reason is legally sufficient to support a denial. But we must also determine that there is a factual basis in the record to support the board's conclusion. *See C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981) ("We are thus required to assess the legal sufficiency of the reasons given by the [board] and to determine whether, if legally sufficient, they had a factual basis."). Our careful review of the record leads us to conclude that the board's decision lacks a factual basis in the record.

The factual findings and conclusions contained in the board's written decision offer very little support for its stated reason for denying relators' CUP application. Even in the absence of relevant factual findings, a reviewing court may uphold a CUP denial if substantial evidence is found in the record. *Graham v. Itasca County Planning Comm'n*, 601 N.W.2d 461, 467 (Minn. App. 1999). Because there is nothing in the record pertaining to any noise or glare created by Heiferstreak, the stated basis for the board's denial is limited to a consideration of whether Heiferstreak would cause unreasonably adverse effects due to odor or general unsightliness. The sum total of evidence in the record regarding the general unsightliness or odor of Heiferstreak includes: (1) a concern over mud left on the road on a prior occasion, (2) a concern over manure stockpiled at the site (resulting in both odor and unsightliness), (3) an unsubstantiated complaint about

dead animals at the site, (4) a complaint in 2008 regarding empty silage bags blowing onto a neighbor's property, and (5) a complaint in 2006 regarding odor.

We are not convinced that four concerns over unsightliness, raised over a three-year period, provide a factual basis to conclude that a Tier-2 CUP for Heiferstreak would create an unreasonably adverse effect for nearby property owners due to general unsightliness. The board did not specify what the adverse effect for nearby property owners might be. The land use and control ordinance states that the CUP must not adversely affect nearby property owners "because of curtailment of customer trade." Morrison County, Minn., Land Use and Control Ordinance § 507.2(g). The record does not reflect that any of the complaints were raised by business owners. The board also ignored the proposed condition of planting a row of trees that was specifically designed to improve the aesthetics of Heiferstreak, further supporting relators' argument that the board's decision was arbitrary. *See Trisko v. City of Waite Park*, 566 N.W.2d 349, 357 (Minn. App. 1997) ("Evidence that a municipality denied a [CUP] without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary."), *review denied* (Minn. Sept. 25, 1997).

We are similarly not persuaded that the record contains a factual basis sufficient to support the board's conclusion that an increase in the number of animal units at Heiferstreak would cause an unreasonably adverse effect on nearby property owners due to odor. Again, the board failed to identify the adverse effect due to odor that would result from granting relators' CUP. There are two complaints in the record regarding odor, one from 2006 and one regarding the manure stockpile that was raised at the

commission's hearing. Two complaints spanning a three-year time period are an insufficient factual basis to support the board's conclusion that an increase in the animal units on relators' feedlot would create an unreasonably adverse effect due to odor for nearby property owners. We cannot conclude that the evidence in the record constitutes a sufficient factual basis warranting a conclusion that nearby properties would suffer unreasonably adverse effects due to odor or unsightliness because of relators' requested increase in the size of their feedlot. *See Yang*, 660 N.W.2d at 833-34 (finding that neighbors' concerns regarding traffic were insufficient to support a conclusion that proposed use would cause "excessive" traffic).

Additionally, the board made no attempt to identify a link between the increase in the number of animal units and the alleged unreasonably adverse effect on nearby property owners. Nearby property owners live in an agriculturally zoned area where feedlots are relatively common. All of the complaints and concerns in the record that could possibly support the board's stated reason for denying the CUP are based on the current use of Heiferstreak. There is nothing in the record to indicate how, if at all, any odor or unsightliness due to a Tier-1 feedlot would increase by expanding to a Tier-2 feedlot, and the board makes no attempt to define this causal link. *See Yang*, 660 N.W.2d at 834 (finding a decision arbitrary in part because a causal link was not articulated by the decision-making body). This lack of a causal link supports our conclusion that the board's stated reason for denying relators' CUP lacks a factual basis in the record and is therefore arbitrary.

Respondent argues that, aside from the board's stated reason for denying the CUP, the "conclusions" reached by the board provide alternative rational bases for the board's denial. *See Trisko*, 566 N.W.2d at 352 ("[A] . . . denial of a land use request is not arbitrary when at least one of the reasons given for the denial satisfies the rational basis test."). But when a decision-making body gives a reason for its denial, our review is limited to the stated reason. *See id.* (stating that when a decision-making body "states its reasons for denying the permit, we limit our review to the legal sufficiency and the factual bases for those reasons"). We therefore disagree that we need to look to the board's conclusions to determine if the board could have reasonably denied relators' CUP for a different reason. But even if we were to examine each conclusion in the board's written decision, none provides a rational basis to deny relators' CUP.

The board reached the following seven conclusions:

> a. Buh Township does not support this application.
> b. A Buh supervisor is against the approval of this application because there was mud left on the road from the site which was not addressed, therefore he could not support approval.
> c. Excessive odor from this site is a common complaint by neighbors.
> d. There were concerns that the berms which were constructed to protect Little Mink Creek will not be maintained or will be compromised by the freeze/thaw cycle.
> e. The recent enforcement action and monetary penalty made public by the Minnesota Pollution Control Agency on the Silverstreak site, also operated by Mr. Hennen, should be taken into account because it demonstrates that Mr. Hennen is unable to keep his sites in compliance with MN Rule 7020, and the Morrison County Land Use Control Ordinance.

f. There were concerns based on Mr. Hennen's statement at the Sept. 22, 2008 Planning Commission Public Hearing that because of other commitments he cannot be there (on this site) all the time.

g. A MinnFarm pollution potential model was run on the existing operation. The operation did not meet the compliance criteria because the two southern lots flow toward the road ditch. There is not adequate treatment between the open lots and road ditch to treat the runoff before reaching waters of the state.

A general expression of concern over public health and welfare is not a legally sufficient basis for denial. *See Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (stating that denial of a CUP must be based on "something more concrete than neighborhood opposition and expressions of concern for public safety and welfare"). Conclusions (a), (b), and (c) involve the general neighborhood opposition due to odor or general unsightliness. Our review of the record leads us to conclude that the board overstated the opposition to relators' CUP application and that the limited evidence in the record of neighborhood opposition does not independently provide a legally sufficient basis to deny relators' application.

Respondent claims that this conclusion runs contrary to our decision in *SuperAmerica Group, Inc. v. City of Little Canada*. 539 N.W.2d 264, 268 (Minn. App. 1995) (stating that it was proper for the decision-making body to consider concerns raised by "[n]umerous business owners and residents" in denying a CUP), *review denied* (Minn. Jan. 5, 1996). But in *SuperAmerica*, "[n]umerous business owners and residents" testified in opposition to a CUP and expert testimony was equivocal regarding the effects of the proposed use. *Id.* Here, there were only two people who spoke at the

commission's hearing on these subjects and three complaints in the record. More importantly, our holding in *SuperAmerica* is limited to the fact that a decision-making body may appropriately *consider* neighborhood opposition. *See id.* *SuperAmerica* does not stand for the proposition that neighborhood opposition alone necessarily provides a legally sufficient basis to deny a CUP. And we conclude that the limited neighborhood opposition in this record does not provide a legally sufficient basis to deny relators' CUP application.

Conclusion (d) is not based on a finding of fact, but the transcript from the board meeting shows a great deal of discussion surrounding the berm. Respondent argues that concern about the berm was rational because the "record before the Board [did] not contain any reports with respect to the effects of a freeze/thaw cycle on the environmental protection berm." Unfounded concerns with no basis in the record cannot be used to support the denial of a CUP. *See C.R. Invs., Inc.*, 304 N.W.2d at 325 (stating that factual support cannot be found in the "vague reservations expressed by . . . commission members"). A thorough review of the record shows that this concern was indeed unfounded. The berm in question was completed by October 5, 2007, and had survived a complete freeze/thaw cycle by the time of relators' third CUP application. There is nothing in the record to suggest that the berm was affected at all by the freeze/thaw cycle. The record shows that a second environmental review was conducted in March 2008, and a MinnFarm analysis was conducted in June 2008. Neither reported a concern over the berm.

Conclusion (e) is based on a finding of fact, which states that one of Hennen's other sites "was found to be out of compliance by the Minnesota Pollution Control Agency. The violations included beginning construction of a runoff storage area, and making modifications to a manure storage area without receiving required approval from the MPCA. A civil penalty totaling $11,700 was paid by the applicant to the MPCA." There is no factual basis in the record for this finding. The only support in the record is a statement by Commissioner Meyer at the board meeting that "when it was in the paper the other week [Hennen] paid his fines to the PCA, it wasn't his fault, it was the engineer's fault. In the Belle Prairie site, it was engineer's fault. When does he take responsibility for something? Could you answer that for me?" Respondent cites to an MPCA website, but this website is not part of the record. There is nothing in the record regarding any past noncompliance by Hennen that resulted in a fine. Accordingly, even if it were proper for the board to consider a compliance issue at a completely unrelated site,[3] there is no factual basis in the record to support this finding or conclusion.

Conclusion (f) is also not based on a finding of fact, but seems to refer to a statement made by Commissioner Meyer at the board meeting that Hennen was "never around." In its brief, respondent links Commissioner Meyer's statement to Hennen's

[3] Respondent cites an unpublished opinion for the contention that the board may deny a CUP application based on noncompliance with a separate CUP. *Larson v. County of Douglas*, No. CX-93-2502, 1994 WL 396357 (Minn. App. Aug. 2, 1994). But in *Larson*, the applicants were out of compliance with "existing conditional use permits (CUPs) for the operation of their business." *Id.*, at *1. In this case, Hennen's alleged past compliance issues involved completely separate farming operations. Therefore, respondent has offered no support for its contention that the board should have considered compliance issues at unrelated properties.

alleged "pattern of noncompliance." Respondent claims that "the Board determined that Relators' physical presence on the site might have an impact on the noncompliance." First, we note that the vague concern of one commissioner is an insufficient legal basis to support the denial of a CUP. *See C.R. Invs., Inc.*, 304 N.W.2d at 325. Second, the board did not demonstrate any link between Hennen's physical presence and his issues of alleged noncompliance. Again, the lack of any causal connection between a factual conclusion and the denial suggests that the board's decision to deny the CUP was arbitrary. *See Yang*, 660 N.W.2d at 834.

Conclusion (g) restates the SWCD's ambiguous environmental review addendum. Even assuming that the addendum refers to the operation as proposed by relators' third CUP application, this conclusion still does not provide a legally sufficient basis for the board to deny relators' application. Ignoring conditions that would bring the site into compliance further suggests that the denial was arbitrary. *See Trisko*, 566 N.W.2d at 357. The addendum clearly states that the proposed diversion would bring the site into compliance, and the condition proposed by the commission to "[c]onstruct and maintain a diversion to divert runoff away from the road ditch to an area where adequate treatment is available before reaching waters of the state" directly addresses this point.

In sum, we conclude that relators have met their burden of persuading this court that the board had no rational basis for denying their CUP application. There is no factual basis for the board's conclusion that granting the CUP would create an unreasonably adverse effect on nearby property owners due to odor or unsightliness, and the record contains no facts that independently provide a legally sufficient basis for

denying relators' CUP application. Because the planning commission carefully crafted conditions to address possible concerns regarding relators' operation of Heiferstreak under a Tier-2 CUP, we order that the board grant relators' CUP with the six conditions approved by the commission.

II.

Both parties submitted motions in this matter. Relators moved to supplement the record with an e-mail that they allege shows a personal bias of a commissioner, and respondent moved to strike portions of relators' briefs referencing the e-mail. Because we conclude that the board acted arbitrarily when it denied relators' CUP application and because we reach that conclusion without relying on the extra-record e-mail, we deny both relators' motion to supplement the record and respondent's motion to strike as moot. *See Drewitz v. Motorwerks, Inc.*, 728 N.W.2d 231, 233 n.2 (Minn. 2007) (denying a motion to strike as moot when the reviewing court did not rely on the material).

Reversed; motions denied.