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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-0778**

Agate Lake Association, et al.
Relators,

vs.

County of Cass Board of Commissioners, et al.,
Respondents,

Birch Bay RV Resort, Inc.,
Respondent.,

Dale Spohn,
Respondent,

and

Jodi Spohn,
Respondent.

**Filed May 15, 2017
Affirmed
Halbrooks, Judge**

Cass County Planning Commission
File No. CU16-134-29-1

Mark A. Severson, Kurt W. Porter, Severson Porter Law, Crosslake, Minnesota (for
relators)

Paul D. Reuvers, Brian P. Taylor, Iverson Reuvers Condon, Bloomington, Minnesota (for
Cass County respondents)

Birch Bay RV Resort, Inc., Royalton, Minnesota (respondent)

Dale Spohn and Jodi Spohn, Royalton, Minnesota (pro se respondents)

Considered and decided by Cleary, Chief Judge; Halbrooks, Judge; and Jesson, Judge.

UNPUBLISHED OPINION

HALBROOKS, Judge

Relators Agate Lake Association and Gull Chain of Lakes Association challenge respondent Cass County Planning Commission's (the planning commission) grant of a conditional-use permit (CUP) to respondent Birch Bay RV Resort, Inc. (Birch Bay), arguing that the planning commission abused its discretion because the evidence does not support its decision. We affirm.

FACTS

Birch Bay purchased Birch Bay Golf Course and Resort, which is located on the shoreline of Agate Lake. Agate Lake is approximately 150 acres in size with an average depth of seven to eight feet. The resort consisted of ten private lakefront cabins, an inn with seven lake-view rooms, and a golf course. Birch Bay plans to redevelop the golf course in order to create, in three phases, 170 recreational vehicle (RV) sites equipped with water, electrical, and sanitary sewer hookups to be used seasonally from May 1 to October 1.

The county prepared an environmental assessment worksheet (EAW) that provided a detailed overview of the proposed project and its potential environmental impacts. Following public comment and further assessment, the planning commission determined that an environmental impact statement (EIS) was not required. On February 18, 2016,

Birch Bay applied for a CUP for the first phase of the project. The planning commission sought comment and held a public hearing on the CUP application at which members of the public voiced their concerns. The planning commission subsequently approved the CUP application, making 17 findings and imposing 23 conditions, many of which were responsive to comments received throughout the EAW and CUP processes. This certiorari appeal follows in which relators seek a remand to the planning commission for additional studies and preparation of an EIS.

D E C I S I O N

A county's decision to grant or deny a CUP is a quasi-judicial act. *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). "We will reverse a governing body's decision regarding a conditional use permit application if the governing body acted unreasonably, arbitrarily, or capriciously." *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015). "Our standard of review is a deferential one, as counties have wide latitude in making decisions about special use permits." *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). And because zoning laws restrict the use of private property, "[a] challenge to the approval of a CUP must meet a higher burden of proof than a landowner's challenge to a denial of a CUP." *Sunrise Lake Ass'n, Inc. v. Chisago Cty. Bd. of Comm'rs*, 633 N.W.2d 59, 61 (Minn. App. 2001); *see also Bd. of Supervisors of Benton Twp. v. Carver Cty. Bd. of Comm'rs*, 302 Minn. 493, 499, 225 N.W.2d 815, 819 (1975).

"[C]ounties may approve conditional uses if the applicant satisfies the standards set out in the county ordinance." *Schwardt*, 656 N.W.2d at 387; *accord* Minn. Stat. § 394.301,

subd. 1 (2016). To show that the planning commission acted unreasonably, relators must “establish that the proposal did not meet one of the standards set out in the [o]rdinance and that the grant of the CUP was an abuse of discretion.” *Id.* In this case, the relevant ordinance provides:

The Planning Commission shall consider the following evaluation criteria when reviewing conditional use applications:

- A. Evaluation of water bodies, rivers, and wetlands, and also the topographic, vegetation, and soils conditions on the site shall be made to ensure:
 - 1. The prevention of soil erosion or other possible pollution of Public Waters, both during and after construction.
 - 2. The visibility of structures and other facilities as viewed from Public Waters is limited.
 - 3. There is a complying [subsurface sewage treatment system (SSTS)] present, or there is an approved SSTS site evaluation and design for the intended use of the property.
 - 4. To limit or mitigate impact to designated critical habitat.
- B. Consistency with the policies and provisions of the Comprehensive Plan and the intent, purposes and requirements of the various ordinances.
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- E. Degree to which the proposed use impacts natural, scenic, or historic features of major importance.
- F. Other factors specific to the application that impact upon public health, safety, and welfare.

Cass County, Minn., Land Use Ordinance (CCLUO) § 705.2 (2014).

Relators contend that the planning commission's decision to grant the CUP was unreasonable, arbitrary, and capricious because it failed to consider the project's effects on Gull Lake¹ as required under subdivisions A, B,² E, and F of section 705.2 of the CCLUO, and as expressed by the public during both the comment period and the public hearing regarding the CUP.³

Relators also contend that the planning commission's decision to grant the CUP was unreasonable, arbitrary, and capricious because it violated the CCLUO and CCCP by failing to address the project's effect on the water quality and safety of Agate Lake, which the Minnesota Department of Natural Resources (DNR) identified as concerns with the project. CCLUO § 705.2(B). The record does not support this contention.

At the outset, and in order to clarify the scope of this matter on review, we note that although relators' arguments encompass what they perceive to be the possible environmental impact of the entire 170-site project, Birch Bay has been granted a CUP for phase one only. That is what is before us on appeal. As required by the planning commission, the other two proposed phases of the project will require separate CUPs. The planning commission prudently specified that "[i]nformation gathered and outcomes

¹ Gull Lake is a lake approximately 9,947 acres in size located about one mile from Agate Lake.

² The Cass County Comprehensive Plan (CCCP) identifies the following desired future conditions: "[d]evelopment of lakeshore property with minimal natural resource impacts" and "[l]ake access that does not degrade water quality."

³ Relators concede that the planning commission stated reasons "in more than just a conclusory fashion," so they are sufficient for judicial review. See *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 742 (Minn. 1986) (quotation omitted).

observed in the course of the initial phase or phases can be utilized to evaluate [the] subsequent applications” that will only be accepted “after a two season interval between each phase.”

The record before us reveals that the planning commission conducted a very thorough decisional process. Pursuant to Minn. R. 4410.1000-.1700 (2015) and Minn. R. 4410.4300, subps. 1, 20a (2015), the county, as the responsible governmental unit, prepared an EAW for the proposed project. In addition to examining the potential environmental effects associated with a project, an EAW is also used to determine whether an EIS is needed. Minn. R. 4410.1000, subp. 1. “An EIS shall be ordered for projects that have the potential for significant environmental effects.” Minn. R. 4410.1700, subp. 1.

The EAW was made available for comment by publication in local periodicals, placement on the county’s website, and distribution to interested parties and agencies. In response, the county received 52 comments from citizens and six comment letters from government agencies. Following the comment period, Birch Bay prepared detailed responses to the comments. The planning commission then visited the project site and held a special hearing.

Based on its review at that time, the planning commission decided to postpone a decision on the need for an EIS. The planning commission directed the Environmental Services Department (ESD) to obtain additional information from Birch Bay on 13 matters of concern. A supplemental informational packet was then distributed to all written commenters. The planning commission received 19 responsive comments.

Based on its review of the entire record, including the supplemental information packet and the comments, the planning commission determined that an EIS was not required. As stated by the planning commission:

4. Areas where the potential for significant environmental effects may exist have been identified along with potential mitigation measures that will be incorporated into the proposed project design and permits.

5. Based upon M.R. 4410.1700 there are no potential significant environmental effects that can be reasonably expected to occur that cannot be addressed through the CUP process conducted prior to each phase and that the preparation of an EIS will only serve to further delay the final outcome of the proposed project and cannot be expected to reveal additional relevant and actionable information.

6. Therefore, based upon findings and items 1-5 an EIS is not required.

Relators focus on the concerns voiced by members of the public regarding the project's effects on Gull Lake. But "[a] city may consider neighborhood opposition only if based on concrete information." *Yang v. County of Carver*, 660 N.W.2d 828, 833 (Minn. App. 2003). Here, as respondents note, there was no concrete information underlying the concerns.

The DNR responded with comments to the EAW, in which Birch Bay stated that its patrons would be encouraged to trailer their boats to Gull Lake or other larger recreational lakes in the area. The DNR did not raise any concerns regarding Gull Lake but did respond with suggestions to mitigate the potential impact associated with increased boat use on Agate Lake.

The potential ecological impacts that the DNR listed included an increase in turbidity, an increase in internal nutrient loading, and a lower overall water quality and

species diversity. The DNR was also concerned that an increase in the number of boats on the water might create a problem because many water-based activities directly conflict with each other. To address these concerns, the DNR suggested that the planning commission limit watercraft access to Agate Lake; restrict mooring; centralize swimming areas, docks, watercraft mooring, and launch ramps; and require preservation of the native buffer on Agate Lake.

The planning commission included 17 findings and 23 conditions in Birch Bay's CUP approval that address these concerns, including: restricting motorized watercraft access, allowing no more than 12 motorized watercraft on Agate Lake at a time, limiting permanent mooring, restricting the acceptable swimming area and mooring systems, mandating invasive aquatic species inspections of all boats, requiring a vegetative maintenance plan, requiring maintenance of the tree and vegetative buffers, and requiring analysis of water quality in both Agate Lake and nearby wells. These conditions are consistent with the DNR's suggestions and address its ecological and safety concerns.

Because the planning commission considered the evaluation criteria set out in its ordinances, based on our deferential standard of review, we conclude that the planning commission properly exercised its discretion by issuing the CUP to Birch Bay for phase one of its project.

Affirmed.