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**STATE OF MINNESOTA
IN COURT OF APPEALS
A16-1768**

A Resolution Setting Forth Findings of Fact and Conclusions of Law
and Order Denying S. M. Hentges & Sons, Inc. and
Jordan Gravel, LLC Application for an
Interim Use Permit for Aggregate Mining and
Processing Operation in Sand Creek Township.

**Filed November 13, 2017
Affirmed
Kirk, Judge**

Scott County Board of Commissioners
File No. PL2014-052

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Considered and decided by Bjorkman, Presiding Judge; Hooten, Judge; and Kirk,
Judge.

UNPUBLISHED OPINION

KIRK, Judge

Relators-developers challenge respondent-county's denial of their interim use permit (IUP) application, arguing that the denial was arbitrary and capricious because the county's findings were not supported by the record and could have been adequately addressed by imposing permit conditions. We affirm.

FACTS

Project Description and Procedure Leading Up to the IUP Denial.

In an IUP application, under Chapter 10 of the Scott County Zoning Ordinance (S.C.Z.O.), relators S. M. Hentges & Sons, Inc. and Jordan Gravel, LLC proposed to operate an aggregate mine (the Project) on an 87.5 acre parcel in Sand Creek Township (the Township), Scott County (the County). The Project site is zoned Urban Business Reserve (UBR) under the S.C.Z.O., a zone that allows mining as an interim use. Scott County, Minn., Zoning Code, Table 20-4 (2016). Valley View Drive, an unpaved township road, runs along the northwest side of the Project site, and U.S. Highway 169 is located to the southeast of the Project site. The Project anticipated 10,000 annual hauling-truck round trips, with up to 110 daily round trips.

Relators proposed to mine above and below the water table, forming a permanent 36-acre groundwater pond attached to the aquifer in the center of the Project site. The Scott County Association for Leadership and Efficiency Regional Training Facility (SCALE Facility) for police and fire departments is located directly north of the Project site, and includes a high-capacity pumping well on site to provide water for fire training exercises. The Scott County Juvenile Alternative Facility (JAF) is located immediately northeast of the Project site, and also has a public well. There is a 100-foot offset along Sand Creek to the southeast of the Project site. Sand Creek has historically flooded multiple times per

year and flooded three times in 2014. About two-thirds of the Project site is located in the floodplain, and about one-half of the Project site is designated as floodway.¹

Water-Related Issues.

During the study-phase before this permit application, it was noted that because the Project site has been exclusively used as farmland, soil contamination or other environmental hazards are unlikely, but that groundwater under the Project site may contain elevated nitrates or traces of pesticides. The Minnesota Geological Survey designated the proposed site as highly susceptible to groundwater contamination. Relators noted that it was possible that the private water supply wells in the area of the Project site would be affected by mining operations and the 36-acre pond, and said they would develop a final monitoring and mitigation plan, subject to the County's approval, in collaboration with the Minnesota Pollution Control Agency (MPCA) and the Minnesota Department of Health (MDH) during the IUP process. Relators were expected to be financially responsible for monitoring the groundwater quality during and after the mining operation. County staff recommended that relators assume financial responsibility for monitoring and implementation of necessary mitigation for 20 years after cessation of mining, or for one year after a 100-year flood event occurred with no detection of contamination in surrounding wells.

¹ The S.C.Z.O. defines "floodplain" as "[t]he beds proper and the areas adjoining a wetland, lake or watercourse which have been or hereafter may be covered by the regional flood." S.C.Z.O., ch. 1-7 (2016). The S.C.Z.O. defines "floodway" as "[t]he bed of a wetland or lake and the channel of a watercourse and those portions of the adjoining floodplain which are reasonably required to carry or store the regional flood discharge." *Id.*

The County completed an Environmental Assessment Worksheet (EAW) in October 2009. Barr Engineering (Barr), a company hired by the County to complete an Independent Groundwater Flow Modeling for the Project, issued a memorandum on March 31, 2011, that indicated that the SCALE Facility well and three private wells would be affected by floodwater entering the aquifer via the 36-acre pond. Barr could not predict how significant the impact would be because it could not predict the composition of floodwaters.

On April 5, 2011, the Scott County Board of Commissioners (the Board) determined that the Project had the potential for significant environmental impacts related to truck traffic and groundwater, and declared that an Environmental Impact Statement was needed. The November 25, 2013 Final Environmental Impact Statement (FEIS) suggested drilling replacement wells for the SCALE Facility, JAF, and a private well that was likely to be impacted by contaminated floodwaters entering the aquifer. The FEIS noted that the replacement wells would likely require water treatment to address water chemistry concerns for boiler operation and water aesthetics. It noted that point-of-use water softening may be sufficient to address objectionable minerals and taste and odor issues.

On January 21, 2014, the Board determined that the FEIS was inadequate because it lacked an acceptable groundwater monitoring and mitigation plan, and an aquifer degradation protection plan or mitigation plan. County staff then prepared a Groundwater Monitoring and Mitigation Plan and Cost Estimate including the requirement that relators provide financial security both during and after the mining operation. The County noted that relators were only willing to fund replacement wells to avoid the groundwater

pollution, and were unwilling to fund mitigation of floodwaters entering the aquifer. On July 15, 2014, the Board found the updated FEIS with the Groundwater Monitoring and Mitigation Plan to be adequate.

At the July 15, 2014 Board meeting, it was noted that relators were willing to monitor neighboring wells and to replace impacted wells, but would not agree to mitigate floodwater entering the aquifer. Relators believed that because the mining operation would not be the source of the pollution in Sand Creek's floodwaters, relators should not be responsible for the effects of that pollution on the aquifer via the 36-acre pond. The County believed relators should be responsible for protecting the aquifer from contamination and that the County should not have to bear the burden of the loss of the aquifer or future cleanup.

Relators' IUP application was submitted on December 2, 2014. The Township recommended denial. After a public hearing on the application, the Scott County Planning Commission (the Planning Commission) also recommended denial. The Planning Commission noted that as a condition of any IUP, relators would be required to continue monitoring for groundwater contamination after mining ceased, and to provide security to drill replacement wells and for water quality equipment for impacted wells. The Planning Commission noted that the MPCA does not require this sort of financial security in

conjunction with National Pollutant Discharge Elimination Systems (NPDES) permits, but that the County would.²

Relators obtained an NPDES permit from the MPCA in April 2016 before bringing their completed IUP application before the Board. Relators' IUP application was supplemented three times and was finalized on August 30, 2016. The resultant draft IUP contained conditions relating to groundwater and well monitoring and mitigation and financial security. When their IUP application was addressed at the September 6, 2016 Board meeting, relators noted that because their NPDES permit did not require monitoring and mitigation of water aesthetics, relators would not agree to monitor or mitigate those conditions, nor would they agree to provide financial security for well replacement or for mitigation of declining water aesthetics.

Water-Related Findings in Support of Denial.

In denying relators' IUP application, the Board found that relators failed to show that the Project would not create a burden on public facilities and utilities, specifically on wells serving the SCALE Facility and JAF. The Board also found that the Project posed a public health and safety risk because it had the potential to impact the aesthetic quality and water safety of a local private well and that relators refused to provide financial security for future mitigation. The Board concluded that the risk of contamination of the aquifer

² "Surface water and groundwater quality associated with the project will be regulated by the [MPCA], specifically by the [NPDES] permit. The NPDES permit is required for all mining operations and will specify the surface and groundwater monitoring locations, the parameters and frequency of monitoring, water quality limits that must be adhered to, and actions that need to [be] taken if the limits are exceeded. . . . [For the Project, s]hallow and deep [monitoring] wells will both be installed. An existing bedrock aquifer well will also be sampled and could be used as a basis if there ever is a concern of contamination."

and local wells was not acceptable in the face of relators' refusal to provide financial security or to agree to measures to mitigate water aesthetics.

The Board found that because the MPCA may choose to discontinue relators' NPDES permit and its related groundwater monitoring before the Board is satisfied regarding its water contamination concerns, and because the NPDES permit does not address water aesthetics, it was insufficient to establish that the mining operation would not burden public facilities. The Board noted that relators initially proposed to provide financial security, but then reversed their position. Because of this, the Board concluded that there were not adequate plans in place to address potential contamination of neighboring wells, or to address the possible decline in water aesthetics if replacement wells became necessary. The Board further noted that its Floodplain Ordinance prohibits human-made berming in the Floodway District, so the County could not impose a mitigation measure in the IUP to permanently block Sand Creek's flood waters from entering the aquifer through the 36-acre pond. The Board found that the NPDES permit did not provide the long-term oversight and financial security needed to avoid deterrence of the use or development of adjacent land. The Board concluded that the permanent 36-acre pond and the lack of planning and funding for future mitigation constituted an impermissible public health and safety risk.

Before denying the IUP application, the Board concluded that it could not impose sufficient conditions to ensure water quality, that relators did not meet the criteria for approval under ch. 2-7-1 of the S.C.Z.O., and that the Project is inconsistent with the County's 2030 Comprehensive Plan.

Traffic-Related Issues.

During the study-phase before this permit application, it was noted that mine-related truck traffic will result in a maximum daily volume of 110 round trips per day during periods of peak production, and an average of 5 round trips per hour with a maximum of 11 round trips per hour during peak production. Relators estimated that 80% of the traffic will be northbound and 20% will be eastbound or southbound from the Project site. On December 13, 2010, the City passed a City Council Resolution opposing truck traffic passing through the City. The Project intended to primarily utilize Highway 169 and Valley View Drive. Valley View Drive continues south from the Project site into the City where it intersects with County Highway 9. The portion of Valley View Drive to the south of the Project site includes approximately one mile of unpaved, aggregate surface that would not support hauling trucks. A pavement evaluation conducted on the paved portion of Valley View Drive indicated that the paved portion was sufficient to support the proposed truck traffic, but that the heavy truck traffic will contribute to deterioration of the pavement and reduce its life cycle.

The FEIS described six haul-route options to accommodate the Project site. Each option required infrastructure updates to township roads and/or Highway 169 and presented various safety concerns. The cost of road improvements for each option ranged from \$300,000 to over \$2 million. In order to obtain an IUP, the Planning Commission recommended that relators be required to enter into a developer's agreement with the Township to make necessary improvements to Valley View Drive. Relators would also be required to install any improvements to Highway 169 required by the Minnesota

Department of Transportation (MNDOT). The resultant draft IUP contained conditions relating to road upgrades and maintenance and financial security.

Traffic-Related Findings in Support of Denial.

In denying relators' IUP application, the Board found that relators failed to show that the proposed use would not create a burden on public facilities and utilities, specifically public roads. The Board found that it did not have the authority to require the necessary updates to township roads, city streets, or state highways to accommodate the Project, and that without an existing agreement with the Township and/or financial security to ensure repair of those roads, the Board could not ensure that public roads would not be burdened. Relators did not present the Board with any evidence, despite repeated requests, that the outstanding roadway issues would be resolved. The Board also noted relators' failure to cooperate with the Township when it attempted to resolve the outstanding haul-route issues. Instead, relators merely announced to the Board that they would update the township roads as indicated in their pavement evaluation.

Rather than presenting the Board with a developer's agreement with its IUP application, relators stated that they would "negotiate" the terms of an agreement with the Township regarding road updates and "contribute" to road improvements. The Board found that the lack of a developer's agreement, and relators' refusal to agree to pay for necessary roadway improvements, caused the Project proposal to be premature under the County's Comprehensive Plan.

The Board also noted that relators' proposed use of Highway 169 presented safety concerns that MNDOT could not require relators to address because the Project site does

not directly enter onto Highway 169. The Board found that it lacked jurisdiction over the highway so it could not impose an IUP condition requiring improvements to Highway 169. The Board concluded that because relators did not provide the necessary information regarding arrangements for updating Highway 169, the Board could not conclude that public roadways would not be burdened by the Project. The Board also concluded that relators failed to satisfy the criteria under ch. 2-7-1 of the S.C.Z.O. and denied relators' IUP application.

D E C I S I O N

I. The Board's denial of relators' IUP application was not arbitrary and capricious.

The decision of a county to grant or deny an IUP is quasi-judicial in nature and reviewable by writ of certiorari. *Interstate Power Co. v. Nobles Cty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). Certiorari review is limited to an inspection of the record developed by the governmental actor in reaching its decision and "is necessarily confined to . . . whether the decision was 'arbitrary, oppressive, unreasonable . . . or without any evidence to support it.'" *Stephens v. Bd. of Regents of Univ. of Minn.*, 614 N.W.2d 764, 769 (Minn. App. 2000) (quotation omitted), *review denied* (Minn. Sept. 26, 2000).

IUPs are not granted as a matter of right. *Zylka v. City of Crystal*, 283 Minn. 192, 197, 167 N.W.2d 45, 50 (1969). A county has broad discretion in deciding whether to grant an IUP. *See BECA of Alexandria, L.L.P. v. County of Douglas ex rel. Bd. of Comm'rs*, 607 N.W.2d 459, 463 (Minn. App. 2000) (discussing a conditional-use permit). Whether a decision about a land-use permit is reasonable "is measured by the standards set out in the local ordinance" *White Bear Docking & Storage, Inc. v. City of White Bear Lake*,

324 N.W.2d 174, 176 (Minn. 1982). Denial of an IUP “is arbitrary where the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met.” *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003). A county board’s decision is not arbitrary if any one of the reasons provided satisfies the rational basis test. *See Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997). If an IUP was denied without the governing body suggesting or imposing conditions that would facilitate compliance, the denial may be arbitrary. *Id.* at 357.

On appeal, the permit applicant bears the burden of showing that the governing body’s denial is either legally insufficient or lacks a factual basis in the record. *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982). “A legally sufficient reason is one reasonably related to the promotion of the public health, safety, morals and general welfare” *BECA*, 607 N.W.2d at 463 (quotation omitted).

Minn. Stat. § 394.303, subd. 1 (2016), defines an “interim use” as “a temporary use of property until a particular date, until the occurrence of a particular event, or until zoning regulations no longer permit it.” Minn. Stat. § 394.303, subd. 2 (2016), provides that:

The governing body may grant permission for an interim use of property if: (1) the use conforms to the zoning regulations; (2) the date or event that will terminate the use can be identified with certainty; (3) permission of the use will not impose additional costs on the public if it is necessary for the public to take the property in the future; and (4) the user agrees to any conditions that the governing body deems appropriate for permission of the use.

Pursuant to the S.C.Z.O., “[i]n granting an interim use permit, the County Board shall consider the effect of the proposed use upon the health, safety, and general welfare of

occupants of surrounding lands.” Ch. 2-7-1 (2016). The Planning Commission and Board are also required to make certain findings under ch. 2-7-1, which include that:

1. The use will not create a burden on public facilities and utilities which serve or are proposed to serve the area.
2. The use will be sufficiently compatible with . . . adjacent agricultural or residential land uses so that there will be no deterrence to the use or development of adjacent land and uses.
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5. Adequate water supply, individual sewage treatment system facilities, erosion control and stormwater management are provided in accordance with applicable standards. . . .

The Board may also impose “additional conditions which the County Board considers necessary to protect the interests of the surrounding area or the County as a whole[,] . . . includ[ing] but not limited to . . . [a] financial guarantee consistent with Section 2-12 of this Ordinance to assure compliance.” S.C.Z.O., ch. 2-7-2 (2016). Section 2-12 of the S.C.Z.O. provides that “the County shall be provided with a financial guarantee in the form of a letter of credit or cash escrow approved prior to the . . . initiation of work on the proposed . . . development. Said security shall guarantee conformance and compliance with the conditions of the application approval and County ordinance provisions.” Ch. 2-12 (2016). The section further provides that “The County shall hold the security until completion of the proposed . . . development and a certificate of compliance with the application conditions and County ordinance provisions has been issued by the Planning Department.” *Id.*

A. The Board's water-related bases for denial are legally sufficient and supported by the record.

Relators rely largely on the existence and conditions of the NPDES permit to argue that the Board's conclusions regarding well and aquifer contamination were unsupported by the record. Relators note that the MPCA has the authority to issue NPDES permits to place limits on the type and quantity of pollutants released into waterways. See *The Clean Water Act*, 33 U.S.C. § 1342(b) (2016); Minn. Stat. § 115.03, subd. 5 (2016); Minn. R. 7001.1000-1100 (2015). Relators assert that the Board is not entitled to second guess the conditions of its NPDES permit when it comes to the regulation of groundwater quality. See *In re Hutchinson*, 440 N.W.2d 171, 176 (Minn. App. 1989) ("Agency decisions are presumed to be correct by reviewing courts, and will be reversed only when they reflect an error of law or when the findings are arbitrary and capricious or unsupported by substantive evidence."), *review denied* (Minn. Aug. 9, 1989). Relators further assert that the MPCA will oversee the mine for as long as it determines is necessary, which may extend beyond active mining, and would require relators to be responsible for the cost of any required mitigation.

Relators assert that the County cannot impose requirements and conditions regarding wells and water quality above and beyond what is required by the NPDES permit because the MPCA, the Minnesota Department of Natural Resources, and the Minnesota Department of Health are responsible for well and groundwater issues, and further requirements are unreasonable. Relators also argue that water aesthetics do not pose a risk to the health, safety, or general welfare of the public. Relators conclude that because the

Board based its decision on issues not addressed by the NPDES permit, the denial was arbitrary and capricious.

The Board agrees that relators' NPDES permit addresses groundwater contamination, but notes that the permit does not necessarily extend far enough into the future to address the County's concerns and does not address water aesthetics. The Board argues that the standards set by the MPCA and NPDES permit do not, as a matter of law, preclude the Board from denying a land-use permit where relators failed to satisfy the Board's concerns regarding health, safety, and welfare as they have here.³ *See August v. Chisago Cty. Bd. of Comm'rs*, 868 N.W.2d 741, 747 (Minn. App. 2015) (concluding that even if a use complies with the noise pollution limits determined by the MPCA, a governing body may still conclude that the level of pollution would negatively impact neighboring properties), *review denied* (Minn. Dec. 15, 2015). The Board notes that it requested financial security to ensure that future groundwater issues could be mitigated without the County becoming liable for those costs, and that relators not only declined to provide financial security to the County, but also declined to discuss future mitigation of groundwater contamination. The Board asserts that its denial was not arbitrary and capricious because relators failed to provide assurances regarding long-term mitigation of aquifer and well contamination, and failed to show that the IUP would not burden public facilities (the wells), or negatively affect adequate water supplies.

³ The argument that "water aesthetics," or secondary water standards, is a "health and safety concern" is not supported on this record, but water aesthetics do implicate the welfare of County residents in terms of water palatability as well as possible staining of skin, teeth, and clothing.

Here, the Board considered extensive information from experts on behalf of relators, from County staff evaluating the Project, and from County residents, and concluded that, despite some indication that the aquifer would be protected, there was too much uncertainty. The Board also concluded that approval of the IUP would risk exposing the County to financial liability because relators were not agreeable to posting financial security. The Board made the necessary findings under S.C.Z.O. ch. 2-7-1, and its justifications for denial are provided for under Minn. Stat. § 394.303, subd. 2(3). Because the Board had a rational basis, supported by the record, to conclude that relators failed to meet the requirements of S.C.Z.O. ch. 2-7-1, its denial of relators' IUP application was not arbitrary and capricious.

B. The Board's traffic-related bases for denial are legally sufficient and supported by the record.

Relators assert that the Board's concerns regarding traffic were not supported by independent analysis or by facts in the record and were not an appropriate basis for denial. *See, e.g., Yang*, 660 N.W.2d at 834 (finding that neighbors' unsubstantiated concerns regarding traffic were not sufficient to support denial of a conditional-use permit). Relators argue that the Board's conclusion that the Project "could" burden Valley View Drive and Highway 169 is improperly speculative, and that the S.C.Z.O. requires a finding that the use "will" burden public facilities. S.C.Z.O., ch. 2-7-1(1). Relators argue that the conditions in the draft IUP adequately addressed traffic issues by requiring relators to enter into a developer's agreement with the Township and to resolve outstanding issues with MNDOT. Relators also claim that because it was pursuing agreements to update the roads in question, the Board's conclusion that public roads would be burdened by the Project is

not supported by the record. Relators inaccurately claim that it agreed to fund the necessary road improvements, and conclude that the Board's denial of its IUP application was arbitrary and capricious.

The record shows that there were a number of haul routes proposed by relators and that each of the proposed routes presented concerns. Both the County and the Township requested that relators enter into a developer's agreement regarding the Township roads prior to approval of the IUP, but relators failed to do so. The record shows that relators also failed to present a funding plan for road upgrades that would be necessary to create a safe haul route for their trucks. The Scott County 2030 Comprehensive Plan provides that "[t]he County shall consider any development or subdivision premature if . . . [t]he development or subdivision lacks necessary adequate local paved roads (or plans for future paved roads)." Chapter 6-Transportation, Goal #VI-2(g) (2016). Failure to submit a proposal that is consistent with the County's Comprehensive Plan is a valid reason to deny a land-use permit. *See Hubbard Broad., Inc.*, 323 N.W.2d at 763. The Board had the responsibility to act to protect the health, safety, and welfare of County residents, and relators failed to present a safe haul-route plan in compliance with Scott County's Comprehensive Plan. The Board had a rational basis, supported by the record, to deny relators' IUP application, and its denial was not arbitrary and capricious.

Affirmed.