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**STATE OF MINNESOTA
IN COURT OF APPEALS
A19-1208**

In the Matter of the Application of Chris Bolton for a Conditional Use Permit.

**Filed May 4, 2020
Affirmed
Hooten, Judge**

Hubbard County Board of Commissioners
File No. 4-CU-19

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Considered and decided by Reilly, Presiding Judge; Connolly, Judge; and Hooten,
Judge.

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

HOOTEN, Judge

Relator challenges respondent county board's decision to deny his application for a conditional use permit (CUP), arguing that the findings underlying the CUP's denial are erroneous. Further, relator argues that the board's conclusion (1) violates his riparian rights and (2) contradicts the opinion of a DNR report. We affirm.

FACTS

Relator Chris Bolton challenges respondent Hubbard County Board of Commissioners' decision to deny his application for a CUP to build and operate a 14-site

recreational vehicle (RV) park on his property, arguing that the board's findings underlying the decision are erroneous. Specifically, Bolton argues that the board's conclusion that his proposed use of the property is incompatible with adjacent land uses is: (1) unsupported by the record, (2) contradicts the plain language of the relevant ordinance, and (3) contradicts other findings made by the commission. Further, Bolton argues that the board's conclusion that his property is not suitable and capable of safely accommodating the types, uses, and number of watercrafts that it will generate (1) violates his riparian rights and (2) contradicts the findings of a report by the Minnesota Department of Natural Resources (DNR).

Bolton owns a five-acre parcel of land on Long Lake in Hubbard County. The property is largely vegetated and consists of a single house and a few outbuildings that can be reached by a driveway. The property is bordered by seasonal and year-long residential lots to the north and east of the property. To the south of the property is Long Lake and a peninsula that contains residential lots of varying size and degree of development. To the west of the property is approximately 48 acres of undeveloped land.

On April 12, 2019, Bolton submitted a CUP application to build and operate a 14-site RV park on his property.¹ The property is subject to the Hubbard County Shoreland Management Ordinance (HCSMO). The HCSMO outlines the standards that the Hubbard County Planning Commission and the Board of Commissioners must apply when evaluating a CUP application. The standards require 12 specific findings on which the applicant has demonstrated the proposed development will not have a negative impact.

¹ This is the second application that Bolton has submitted for an RV park CUP on his land; he was denied a CUP in 2018 for a similar purpose.

These findings include the types and uses of watercraft that will frequent the lake and the compatibility of the proposed use with adjacent land uses.

The HCSMO also establishes specific requirements for RV parks, which are allowed as a conditional use of the property. RV parks are subject to the general standards and requirements of all CUP applications, as well as additional requirements specific to RV parks. These additional requirements include mandatory tiered setbacks from the lake's high-water mark, vegetative screening, and a minimum campsite size of 3,000 square feet. The proposed RV park would include 14 RV campsites of 2,400 square feet each located at least 267 feet landward of the lake's high-water mark. Additionally, the application proposed the creation of an access road connecting two existing roads—Emerald Island Circle and Enchanted Drive—to provide access to the RV campsites.² To accommodate guests, the application proposed the inclusion of an additional structure to serve as a bath house, laundry area, storage area, and recreation room. As the property does not contain a beach, Bolton proposed the installation of a swimming platform. Finally, the application proposed extending the existing 88-foot long dock so as to allow additional watercrafts associated with the RV park.

The Hubbard County Planning Commission held a public hearing on the CUP application in May 2019. A staff report prepared for the meeting identified five separate

² Public comment from Bolton's 2018 application for the RV park raised concerns about the ease and safety of travel along Enchanted Drive due to its narrowness, traffic by pedestrians and bicycles, and the fact that it terminates at a dead end. Bolton sought to mitigate this concern in his 2019 application by explaining his intention that guests would enter and exit the RV park via Emerald Island Circle, on which his property is the first driveway.

environmental violations specifically on the property committed by Bolton between 2013 and 2018.³ These violations include paving within the high-water mark zone without a variance, and twice clearing ground cover vegetation, and two convictions for “dredging, filling, and changing the cross-section of public waters (Long Lake) without a permit.” The report also listed numerous concerns for the planning commission to address, including the plan’s required ground sloping, which would result in the clearing of the remaining vegetative cover and impact “the aesthetic and noise screening [the vegetation] provides to the adjacent neighboring landowners.” The staff report noted that the proposal would likely leave the land susceptible to severe weather and storm-water related erosion issues. Furthermore, the proposed dock expansion raised concerns over increased erosion of the already-delicate lake bottom and aquaculture. The effect of an RV park on the lake was of particular concern to the planning commission and the community in light of Bolton’s five past violations of environmental regulations.

The DNR also provided an environmental report regarding the CUP application. The DNR acknowledged that Bolton planned to extend the dock in order to provide more mooring locations for boats in deeper water, and recommended that the CUP require enforcement of a strict no-mooring policy and a no-wake zone throughout the bay so as to limit lake-bottom erosion and aquaculture damage. Additionally, the DNR recommended that the CUP “permanently preserve the shore impact zone” by prohibiting all use of the

³ The report also notes a sixth infraction of Henrietta Township’s road authority.

shoreline, including boat launching, and that the property “must be found to be fully compliant with” a prior revegetation restoration order.

During the public meeting, the planning commission discussed the CUP application with Bolton and his attorney. The planning commission also offered time for public comment, during which members of the local community voiced their opposition. Additionally, numerous written comments were submitted. Most comments raised concerns over the application; they addressed the negative impact of land development and increased traffic on the residential character of the neighborhood, the quality of the water, and the health of the local environment.

After public comment, the planning commission created a list of 22 suggested conditions that Bolton would have to satisfy in order to obtain its recommendation for CUP approval. However, even with the proposed conditions, the planning commission determined that it needed more information from Bolton before it could make a recommendation. The planning commission requested Bolton provide an estimate of the total cost of the project, a performance bond proposal, a revegetation plan prepared by a licensed landscape architect for after the construction, a storm-water management plan prepared by a licensed engineer for during and after the construction, and a grading site plan prepared by a licensed engineer.

Bolton provided the requested documentation for a second public hearing. However, during the public hearing, neighbors still expressed concern over the development, including the effect that the RV park and increased boat traffic would have on the shoreland and the lake. The planning commission voted 3–2 to recommend approval

of the CUP, subject to the 22 conditions. The conditions attached to the recommendation included rules regarding quiet hours, hours and days of operation, supervision by an on-site manager, and enforcement of environmental concerns such as a no-wake zone.

The planning commission's findings of fact on the CUP standards also accompanied its recommendation for approval. Among these findings included the planning commission's determination that the requested use was compatible with adjacent land uses as it "comple[d] with the dwelling unit density allowed for the property's size along with all other applicable ordinance regulations," and that Long Lake was able to safely accommodate the proposed use.

The Hubbard County Board of Commissioner held a special meeting to consider the planning commission's recommendation regarding the CUP application. The board received a copy of the planning commission's record, including its recommendation, findings of fact, the staff report, the DNR report, and public oral and written comments.

At the special meeting, the board considered the conditions suggested by the planning commission and noted various problems with the conditions including a lack of enforceability. Specifically, the board discussed the unenforceability of the quiet hour condition, and the condition requiring Bolton's four-hour response time to any RV park issues. Even Bolton acknowledged that he would be unable to completely comply with certain conditions such as prohibiting RV park guests from exiting and entering the RV park from Enchanted Drive rather than from Enchanted Island Circle as he had proposed.

Finally, the board expressed concern over the effect of the RV park on the ecosystem of the lake. The board relied on testimony from a DNR hydrologist, who testified at the

meeting, and who stated that an increase in lake traffic would likely further erode the lake's bottom. Although the hydrologist acknowledged that the lake's bottom would continue to deepen based on the existing residential use, the board still sought to limit the number of mooring slips allowed. Furthermore, the hydrologist informed the board that the proposed swimming platform would likely be hazardous for boats navigating at night, visible to neighbors, and cause a disturbance when people use it.

The board voted 3–2 to deny the CUP despite the planning commission's recommendation for approval. The board found that the proposal was not compatible with adjacent land uses because it was “a proposed commercial use in an area that is basically residential, not commercial,” and that the affected public waters were unable to safely accommodate the types, uses, and numbers of watercraft that the RV park would generate. Specifically, the board stated that lake access was problematic because:

There is no beach area, nor are there any areas for the water activities other than a dock and mooring for boats. . . . The amount of watercraft using the area will pose a hazard given the narrow quarters. It is unlikely that any effective No Wake zone can be maintained and only after-the-fact enforcement is likely to occur. Due to the limitation of access recommendations from the DNR along the sensitive shoreline there are no places for canoes, kayaks, wakeboards, etc. to be moored or given access to the water other than from the dock. It is unlikely those using kayaks, canoes, wakeboards, etc. will launch and exit the lake via the dock. All this activity can lead to unnecessary and unwanted damage to the aquatic environment. There is also no swimming area in the bay and putting a raft to use on the main portion of the lake may have a potential hazard as those accessing the raft would have to . . . anchor their boat, canoe, kayak, wakeboard, etc. on the main body of water close to the raft.

Bolton appeals.

DECISION

Counties are authorized to carry out planning and zoning activities “[f]or the purpose of promoting the health, safety, morals, and general welfare of the community” through ordinances. Minn. Stat. § 394.21, subd. 1 (2018); Minn. Stat. § 394.24, subd. 1 (2018). CUPs are zoning tools that identify particular land uses otherwise inappropriate under a county’s ordinance, “but may be allowed with appropriate restrictions . . . upon a finding that (1) certain conditions as detailed in the zoning ordinance exist, and (2) the use or development conforms to the comprehensive land use plan of the county and (3) is compatible with the existing neighborhood.” Minn. Stat. § 394.22, subd. 7 (2018).

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). The standard of review for such decisions is deferential, as counties “have wide latitude in making decisions about special use permits.” *Schwardt v. City of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). Therefore, this court “will reverse a governing body’s decision regarding a [CUP] application if the governing body acted unreasonably, arbitrarily, or capriciously.” *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015).

A denial of a CUP is arbitrary if “all of the standards specified by the ordinance as a condition to granting the permit have been met.” *Zylka v. City of Crystal*, 167 N.W.2d 45, 49 (Minn. 1969). In determining whether the county acted arbitrarily and capriciously, this court follows a two-step process: first, we determine whether the reasons given by the county were legally sufficient; and second, if the reasons were legally sufficient, we must

determine whether “the reasons had a factual basis in the record.” *RDNT, LLC*, 861 N.W.2d at 75–76.

I. The board’s denial of the CUP application was not arbitrary and capricious.

a. The board’s findings were legally sufficient.

The CUP application was denied pursuant to the HCSMO. This ordinance designates RV parks on Long Lake as a conditional use. HCSMO, art. II, § 202; art. IV, § 401, Table 1. To obtain a CUP, a landowner must apply to the Environmental Services Director, receive a recommendation of approval from the planning commission, and receive approval from the board of commissioners. HCSMO, art. XI, § 1105. The applicant “bears the burden of proving that the proposed use will not have a negative effect” upon:

- 1) the maintenance of the public health, safety and welfare;
- 2) the prevention and control of water pollution, including sedimentation and nutrient loading;
- 3) existing topography and drainage features and vegetative cover on the site;
- 4) the location of the site with respect to floodplains and floodways of rivers or tributaries;
- 5) the erosion potential of the site based upon the degree and direction of slope, soil type and existing vegetative cover;
- 6) the location of the site with respect to existing and proposed access roads;
- 7) its compatibility with adjacent land uses;
- 8) the need for the proposed use for a shoreland location;
- 9) the amount of liquid waste to be generated and the adequacy of the proposed sewage disposal system;
- 10) the visibility of structures and other facilities as viewed from public waters;
- 11) [A]dequacy of the site for water supply and on-site sewage treatment systems; and

- 12) [A]ssessment of the types, uses, and numbers of watercraft that the project will generate in relation to the suitability of public waters to safely accommodate these watercraft.

§ 1105(1).

All enumerated requirements in HCSMO § 1105(1) pertain to the environmental maintenance of public waters and shorelands, the maintenance of water supplies and sewage facilities, and the effect of the use on the surrounding community. Accordingly, all are relevant to the health, safety, and the general welfare of the affected community and are legally sufficient. *See RDNT, LLC*, 861 N.W.2d at 76 (noting that denial of a CUP is appropriate when doing otherwise would endanger the health, safety, or welfare of a community).

b. The board's finding that the proposal is incompatible with adjacent land use is factually sufficient.

- i. The board's interpretation of the HCSMO is supported by its plain language.

Bolton argues that the board's non-compatibility finding is erroneous because it is unsupported by the plain language of the HCSMO's stated purpose. He argues that the plain language of the HCSMO's primary purpose, to "ensure safe, proper and orderly development of shoreland areas to preserve the shoreland," does not contemplate dividing property based on commercial, residential, and industrial uses, but rather documents individualized uses to be non-permitted, permitted, or conditional. Accordingly, he challenges the board's interpretation of "compatibility with adjacent land uses." HCSMO, art. XI, § 1105.

Zoning ordinances should be construed based on: (1) “the plain and ordinary meaning of their terms,” (2) “in favor of the property owner,” and (3) “in light of the ordinance’s underlying policy goals.” *Clear Channel Outdoor Advertising, Inc. v. City of St. Paul*, 675 N.W.2d 343, 346 (Minn. App. 2004), *review denied* (Minn. May 18, 2004). “The interpretation of an ordinance is a question of law for the court, which we review *de novo*.” *Eagle Lake of Becker Cty. Lake Ass’n v. Becker Cty. Bd. of Comm’rs*, 738 N.W.2d 788, 792 (Minn. App. 2007).

The HCSMO instructs that words or phrases not expressly defined “shall be interpreted so as to give them the same meaning as they have in common usage and so as to give the Ordinance its most reasonable application.” HCSMO, art. I, § 111. Accordingly, the plain and ordinary meaning of the “compatibility with adjacent land use” provision is that the board must evaluate whether the proposed use can exist in harmony with adjoining land uses. *See The American Heritage Dictionary* 21 (5th ed. 2011) (defining adjacent as “[c]lose to” or “[n]ext to”); *id.* at 375 (defining compatible as “capable of existing or performing in harmonious, agreeable, or congenial combination with another or others.”).

The policy underlying the HCSMO is to “regulate . . . the use and development of the shorelands . . . in order to preserve and enhance the quality of surface waters, conserve the economic and natural environmental values of shorelands, and to provide for the wise use of waters and related land resources.” HCSMO, art. I, § 102. The HCSMO goes on to describe several purposes of the ordinance, which include efforts to implement all regulations in accordance with the “Hubbard County Land Use Plan” (the land use plan).

HCSMO, art. I, § 103. One of the objectives of the land use plan is to “[m]aintain the rural character of the County, which includes preservation of open space, the prevention of land use conflicts between residential and non-residential uses, and the retention of vegetative buffers.” The land use plan indicates that this objective can be achieved in part by encouraging and supporting “the concentration of commercial activity in designated centers throughout the County.”

The language of the HCSMO, in combination with its stated purpose, allows the board to consider, among other criteria, the residential or commercial nature of adjacent land even if such descriptive terms are not included within the provision directing the board to consider the “compatibility with adjacent land uses.” Accordingly, we hold that the board’s use of residential and commercial designations to determine land use compatibility is supported by the plain language of the HCSMO and thus is not clearly erroneous.

- ii. The record is sufficient to support the board’s determination of incompatible adjacent land use.

Bolton argues that the basis for the board’s denial of his CUP application is arbitrary because he met his burden of showing that the RV park was compatible with adjacent land uses by proposing the placement of the RV campsites in a manner that would obscure visibility of the RV park from the lake and the construction of a boundary fence to obscure visibility of the RV park from neighboring residential properties. He claims that with these accommodations to his property, the RV park would be compatible with the undeveloped land and sparse residential areas located adjacent to the RV park.

The board determined that, despite these accommodations, Bolton's proposed use was incompatible with adjacent land uses because it is a proposed commercial use of the land in an area that is "basically residential." While the board's finding does not explicitly state why the proposed commercial use is incompatible with adjacent residential uses, the reasoning is clear from the public record. *See RDNT, LLC*, 861 N.W.2d at 76 (noting that the court's function is "not to weigh the evidence, but to review the record to determine whether there was legal evidence to support the zoning authority's decision.") (Quotation omitted). The public comments reflect that many of the neighbors' concerns about the incompatibility of Bolton's proposal with the residential nature of the neighborhood were in part related to the public health, safety, or general welfare of the neighborhood. The staff report also raised compatibility concerns, such as the noise pollution that results from de-vegetation and the safety concerns with increased traffic on narrow public roads.

The public comments and the DNR report detail the negative impacts that the addition of a commercial use could have on the primarily residential community in which Bolton's property exists. These impacts include public safety concerns, such as the risks that increased traffic poses to pedestrians, as well as general welfare concerns, such as the impact that increased traffic will have on the roads and the impact that an increased population density would have on the rural quality of the existing neighborhood. These concerns are not unfounded as the board recognized the proposed conditions placed on the property by the commission which incurred various enforcement and compliance challenges and Bolton himself acknowledged that he would not be able to "guarantee that

there will never be a Park guest that uses” the pedestrian-heavy and narrow Enchanted Drive.

Based on our review of the record, we hold that there is sufficient factual evidence to support the board’s finding that the proposed use was incompatible with adjacent land use, and therefore the board did not act arbitrarily or capriciously when it denied Bolton’s CUP petition on this ground.

c. The board’s finding that Long Lake is not suited and able to safely accommodate the proposed use is factually sufficient.

i. The record supports the board’s finding that the lake is not suited and able to accommodate the proposed use.

Bolton argues that the board did not have a factually sufficient basis in the record to find that Long Lake is unable to safely accommodate the types, uses, and numbers of watercraft that his RV park would generate. Specifically, he argues that the board erroneously disregarded the DNR’s report that acknowledged that continued use of the lake would negatively impact the lake regardless of whether the CUP was approved. Again, a court’s function is “not to weigh the evidence, but to review the record to determine whether there was legal evidence to support the zoning authority’s decision.” *RDNT, LLC*, 861 N.W.2d at 76 (quotation omitted).

Bolton is correct that the DNR hydrologist’s testimony at the July hearing acknowledged that the channel under Bolton’s dock will deepen as a result of his existing use of the dock without any increased commercial use. However, the hydrologist also opined that the rate at which the channel deepens will likely be affected by the increase in use that would occur if the CUP were approved.

In addition to the increased risk of deepening the channel as a result of higher use by the RV park visitors, the board also found that the proposed RV park was unsuitable because there are no “areas for the water activities other than a dock and mooring for boats.” Due to the lack of a beach, there are no places for “canoes, kayaks, wakeboards, etc. to be moored or given access to the water other than from the dock,” and it “is unlikely those using kayaks, canoes, wakeboards, etc. will launch and exit the lake via the dock.” The board determined that this increase in activity “can lead to unnecessary and unwanted damage to the aquatic environment.” These concerns relate to both the health of the channel and the shore impact zone, which had already been damaged due to prior violations committed by Bolton.

The board’s findings also indicated a concern for the narrow quarters through which the watercraft would need to maneuver. Specifically, the record states that there is a small island about 30 to 40 feet from the current dock and that the area between the island and the opposite shore is approximately 60 feet wide. Furthermore, 300 to 400 feet of the small bay on which Bolton’s property is located must be traversed to reach open water from the dock. These findings with respect to the size of the bay and its suitability for Bolton’s use support the board’s determination that the narrow quarters would pose a hazard for watercrafts to maneuver.

Additionally, the board noted that the proposed swimming raft posed a hazard because “those accessing the raft [would] have to anchor their boat, canoe, kayak, wake board . . . on the main body of water close to the raft.” The DNR report commented that

this swimming raft could cause additional navigational and safety hazards as those driving a boat may not see the raft.

In light of these considerations, as well as Bolton's history of five environmental regulation violations, we determine that the board relied on adequate evidence when it found that Long Lake could not support the amount of activity that the proposed use would create. These reasons are grounded in concerns for the safety of those on the lake and the environmental quality of the lake and thus are inherently related to public safety and welfare. Therefore, we hold that the board's decision to deny Bolton's CUP application was neither arbitrary nor capricious.

- ii. The asserted impact on riparian rights does not make the denial of the CUP application arbitrary and capricious.

Finally, Bolton argues that the board's decision to deny his CUP application based on a determination that the lake is unable to safely accommodate the types, uses, and numbers of watercraft associated with his proposed RV park was unreasonable as it interferes with his riparian rights.

Riparian rights are the rights to reasonably use the surface of waters abutting a parcel of real property. *Johnson v. Seifert*, 100 N.W.2d 689, 696–97 (Minn. 1960). A riparian right-holder does not own the water; rather, a person who owns a lakeshore or lake bed has the riparian right to use and enjoy the water. *Pratt v. State Dep't of Nat. Res.*, 309 N.W.2d 767, 772 (Minn. 1981). Riparian rights include the right to build and maintain docks and landings that extend into the water from the property owner's land. *State by Head v.*

Slotness, 185 N.W.2d 530, 532–33 (Minn. 1971); *see also Farnes v. Lane*, 161 N.W.2d 297, 299 (Minn. 1968).

We addressed the interaction between riparian rights and CUPs before in *BECA of Alexandria, L.L.P. v. Cty. of Douglas ex. rel. Bd. of Comm'rs*, 607 N.W.2d 459, 463–64 (Minn. App. 2000). In *BECA*, we determined that a restriction placed by a county board on a CUP prohibiting the building of a dock, raft, or mooring due to the impact of such a structure on the aquatic ecosystem, without any reasonable rationale to support the concern, amounted to an arbitrary and capricious action. *Id.*

However, Bolton is not being prohibited from building a dock on his property where the municipality's ordinance and the county's land use plan all contemplate the right of an individual to build a dock. Indeed, Bolton is entitled to exercise his riparian rights in the manner that he always has. Furthermore, unlike in *BECA*, the board's decision to deny Bolton's CUP application was based on reasonable concerns related to the size of the space necessary for the watercraft to maneuver, which would pose a hazard given the number of watercraft; a lack of a space to launch any watercraft; safety concerns related to boaters and swimmers on the swimming raft; and the DNR report that stated that the rate at which the channel erodes may be affected by the increase in use that would occur if the CUP were approved.

Therefore, as we conclude that any asserted impact on Bolton's riparian rights does not make the denial of the CUP application arbitrary and capricious, and because the record

reflects a sufficient factual basis for the board's determination, its decision to deny Bolton's CUP application on these grounds was neither arbitrary nor capricious.

Affirmed.