

*This opinion is nonprecedential except as provided by
Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0885**

In the Matter of the Application of East River Electric Cooperative
for a Conditional Use Permit.

**Filed April 11, 2022
Affirmed
Segal, Chief Judge**

Lyon County Board of Commissioners

Barry R. Gronke, Jr., Stoneberg, Giles & Stroup, P.A., Marshall, Minnesota (for appellant
Scott Josephson)

Jason J. Kuboushek, Andrew A. Wolf, Iverson Reuvers, Bloomington, Minnesota (for
respondent Lyon County Board of Commissioners)

East River Electric Cooperative, Madison, South Dakota (respondent)

Considered and decided by Worke, Presiding Judge; Segal, Chief Judge; and Ross,
Judge.

NONPRECEDENTIAL OPINION

SEGAL, Chief Judge

Relator challenges respondent county board's grant of a conditional-use permit (CUP) to respondent electrical cooperative to relocate a 69-kilovolt transmission line along the right-of-way of a county road. Relator argues that (1) respondent board failed to state, orally or in writing, adequate reasons for its decision; (2) one commissioner improperly failed to abstain from voting based on a familial relationship with an affected resident who opposed the CUP; and (3) a second commissioner improperly failed to abstain from voting

when, according to relator, the commissioner feared retaliation by respondent electrical cooperative. We affirm.

FACTS

Respondent East River Electric Cooperative (the electrical cooperative) filed an application for a CUP in May 2021 to replace an existing 69-kilovolt transmission line in Lyon County (the county) with a new line to be located in the county right-of-way along a county road.¹ A public hearing was held on the CUP application at a June 2021 meeting of the Planning Commission (the planning commission) and Board of Adjustment.²

A representative from the electrical cooperative spoke at the hearing and explained that the CUP was being sought as one part of a larger project to rebuild and relocate the “1968 vintage” transmission line. He explained that the cooperative’s “system replacement initiative [was] to move [transmission] lines currently located on cross country sections to the roadway where possible for better response times during outages and accessibility for routine patrols and maintenance.” The representative noted that the section of the transmission line at issue in the CUP application was “flagged by our operations division as being particularly difficult to access due to the terrain.” He explained that the proposed

¹ The county’s right-of-way generally extends 50 feet from the centerline of the county highway. The electrical cooperative proposed to build the transmission line 48 feet from the centerline, or, in other words, two feet away from the end of the right-of-way/the property line for private property. Because the transmission line would be constructed in the right-of-way, the electrical cooperative would not need to obtain overhang easements from property owners along the route.

² The board of adjustment and planning commission are separate entities, but held a joint meeting.

relocation site in the county right-of-way alongside a relatively straight, well-maintained county road would provide easy accessibility to the cooperative's maintenance crews who often had to go out during the most inclement weather to determine the source of a power outage and repair it. He emphasized that it was "crucial for the safety of [the] line crews and the reliability of [the] power delivery to [one of the members of the electrical cooperative] to locate the new lines in more accessible areas." Finally, the representative noted that the "route for this rebuild was selected after review by our operations and engineering staff to be the most direct and accessible path between the connection point and the . . . substation."

Relator Scott Josephson spoke at the hearing and urged the planning commission to consider an alternative route he had proposed for the transmission line. He explained that his family "owns 50 percent of the property that [the proposed transmission line] will come across in Lyon County"³ and that he and other residents had concerns regarding the proposed route. Josephson acknowledged that the alternative route was "possibly a little less convenient" than the electrical cooperative's preferred route, but argued that it should be considered because the electrical cooperative's preferred route would "affect[] the aesthetics" along the route and residents were "concerned . . . about the health of having a power line there."

³ As previously noted, the electrical cooperative proposed to construct the transmission line in the road right-of-way. The transmission line would therefore not cross Josephson's property, but rather run parallel to his property approximately two feet off his property line in the right-of-way.

The representative from the electrical cooperative explained that the alternative route “was reviewed by engineering and operations staff in the field, and it was determined that it was not a better option for the line due to the meandering alignment of the road, the amount of trees and terrain, and the road’s condition compared to the primary route.” The representative further noted that the alternative route suggested by Josephson would “go in front of a number of other landowners.” The representative indicated that the electrical cooperative had also considered a request from Josephson to modify the proposed route to move the power line to the opposite side of the road to avoid passing in front of a house located on Josephson’s property. The representative explained that “jumping the road” would require much larger structures than the one being proposed, which would “have a much larger visual impact and footprint than the standard structures and be roughly ten times more expensive.” The representative stated that road jumping would also require relocation of a cooperative member’s three-phase overhead distribution line, “adding cost to the project and impacting our member’s facilities and operations.”

After receiving comments from Josephson and other residents, the public hearing was closed and the planning commission voted to recommend to respondent Lyon County Board of Commissioners (the board) that the board approve the application for the CUP with conditions.

The board then held its public hearing on the CUP application. A representative from the electrical cooperative again spoke at the meeting and described the electrical cooperative’s process in selecting its proposed route and why it rejected the alternative route proposed by Josephson. The representative explained to the board that the proposed

route ran “along a much better, more maintained road,” which allowed for “better access to the line to operate and maintain that and restore it if there is damage during a storm” and offered a “very direct route.” The representative also indicated that for the electrical cooperative to construct the transmission line along the alternative route it would need to remove a number of trees, and that the alternative route ran along a “windy path” that would “add[] cost and decrease[] the reliability for the lines to serve that distribution substation for a number of cooperatives.”

Josephson also spoke at the meeting and again argued in favor of the alternative route. He argued that the decision concerning the location of the transmission line would “permanently . . . affect[] property values, livelihoods, the aesthetics of [the] homes, and . . . health.” He acknowledged the electrical cooperative’s noted concerns with the alternative route, but argued that the trees along the route “can be removed and [the] roads can be upgraded and maintained more appropriately” and that the alternative route was a “feasible alternative and need[ed] serious consideration.” In addition, the county board acknowledged that it had received correspondence from an affected citizen, the daughter of Josephson who lived in a house along the proposed route, expressing concerns over the impact the transmission lines could have on the health and safety of the residents and property values along the route.

On a vote of three in favor, with two opposed, the board approved a grant of the CUP, with conditions, to construct the transmission line along the proposed route. Josephson appeals by writ of certiorari.

DECISION

We review the grant of a CUP under a deferential standard because “counties have wide latitude in making decisions about special use permits.” *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). We independently review a county’s grant of a CUP to determine if it is unreasonable, arbitrary, or capricious. *Id.* A county acts unreasonably if the reasons for its decision are legally insufficient or lack a factual basis in the record. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015).

I. The board articulated sufficient reasons for granting the CUP.

In this appeal, Josephson does not argue that the application for the CUP and proposed route failed to satisfy the CUP criteria. He argues only that the case should be remanded to the board because the board failed to adequately articulate its reasons for granting the CUP. He argues that the board was “required to, at the very least, reduce the reason for its decision to a writing,” that the board did not do so, and that “the audio transcript . . . fails to provide any findings of fact regarding the Board’s decision.”

Josephson relies on *White Bear Rod & Gun Club v. City of Hugo* to support his argument. 388 N.W.2d 739 (Minn. 1986). In that case, the city council denied an application to amend a special-use permit. *Id.* at 741. On appeal, the supreme court explained that “the city council was not required to prepare formal findings of fact” but “was, at a minimum, required to have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion.” *Id.* at 742 (quotation omitted). The supreme court remanded the case back to the city council because the council failed to

provide “any findings of fact or other explanation of its decision adequate for any judicial review.” *Id.*

Here, however, the board provided an adequate record of the reasons for its decision to grant the CUP to allow for appellate review. First, both the board and the planning commission meetings were recorded and transcripts of both meetings were included as part of the record transmitted to this court. *See id.* (noting that the reasons for the decision on a special-use permit must be “recorded or reduced to writing” (emphasis added) (quotation omitted)). The record also included the minutes of the planning commission meeting that summarize the commission’s findings and decision.

Second, both the planning commission and board discussed, at their respective meetings, the relevant criteria, the most significant of which is whether the proposed “use or development conforms to the comprehensive land use plan of the County and is compatible with the existing neighborhood.”⁴ Lyon County, Minn., Zoning Ordinance

⁴ In addition to the criterion set out above, the county’s zoning ordinance, Lyon County, Minn., Zoning Ordinance art. 22, § 22.2.D.1 (2015), provides that

the County Board may consider the following: (a) Whether the establishment of the conditional use will not impede the normal and orderly development and improvement of surrounding properties. (b) Whether adequate utilities, access roads, drainage and other necessary facilities have been or are being provided. (c) Whether adequate measures have been or will be taken to provide sufficient off-street parking and loading spaces to serve the proposed use. (d) Whether adequate measures have been or will be taken to prevent or control offensive odor, fumes, dust, noise, and vibration, so that none of these will constitute a nuisance, and to control lights signs and other lights in such a manner that no disturbance to neighboring properties will result. (e) Whether there is a

art. 22, § 22.2.D.1 (2015). The discussion at the meetings included the fact that the county's zoning ordinance provides a preference for siting utility lines, such as the transmission line, along existing county right-of-ways. Both the planning commission and board also heard detailed explanations from a representative of the cooperative about the reasons why the cooperative's proposed route was chosen and why the alternative route advocated by Josephson was not a satisfactory option for the transmission line.

Third, the motion at the board meeting to approve the CUP stated that it was based on the recommendation of the planning commission. Indeed, one of the board commissioners stated, when voting to grant the application for the CUP, that the planning commission "did an excellent job" and thought the board "should comply with what they recommended." And the planning commission made explicit findings of fact, identifying the relevant criteria along with reasons why the criteria were satisfied by the proposal. As noted above, these findings were also summarized in the minutes of the planning commission meeting.

The planning commission's findings include the fact that the transmission line provides a major essential service that would upgrade the existing line, that the electrical cooperative would be working with the highway department during the construction and the construction locations would have proper retention structures, and that construction would take place primarily during normal business hours and would not block the road. Thus, there is ample evidence in the record to allow for appellate review of the board's

demonstrated need for such use. (f) Whether the use will adversely affect the public health, safety or general welfare.

decision and we are not faced with the situation in *White Bear* where there was no such record.

Thus, with due deference to the “wide latitude” accorded governing bodies in making decisions whether to grant a CUP, *Schwardt*, 656 N.W.2d at 386, we conclude that the record is adequate to allow for appellate review.

II. There is no evidence of improper influence on the part of the commissioners.

Josephson next argues that two of the board commissioners should have abstained from the vote on the CUP. He contends that one of the commissioners should have abstained from the vote “due to his familial relation with affected residents.” He bases this argument on the assertion that the commissioner’s cousin is married to an affected citizen who submitted an email to the board in opposition to the proposed route for the transmission line. He argues that the commissioner should have abstained from voting because the commissioner “took great effort to defeat the arguments presented by Dr. Josephson and [the affected citizen]” and it is “unclear if [the commissioner’s] efforts [were] based on his perceived obligations to his constituents or due to some family dispute.”

Josephson also argues that another commissioner should have abstained from the vote on the CUP because the commissioner told him “that he voted to approve the conditional use permit out of fear of retaliation from the Cooperative.” Josephson does not identify what specific form of retaliation the commissioner allegedly feared, but theorizes that “the Cooperative likely has tremendous influence on the time it takes to restore power to areas affected by severe weather or natural disaster” and therefore “[i]t is possible that

[the commissioner] feared that if the Board denied the conditional use permit, the Cooperative could prolong the time it took to restore power to Lyon County if it were the victim of severe weather or natural disaster.” He argues that the commissioner therefore should have abstained because he voted “under duress.”

A decision is arbitrary and capricious if it reflects the decision-maker’s will rather than its judgment such as when the decision-maker considered factors not intended to be considered. *In re Valley Branch Watershed Dist.*, 781 N.W.2d 417, 423 (Minn. App. 2010); *see also Chanhassen Chiropractic Ctr., P.A. v. City of Chanhassen*, 663 N.W.2d 559, 562 (Minn. App. 2003) (recognizing that “constitutional due process protections include the right to an impartial decisionmaker” (quotation omitted)), *rev. denied* (Minn. Aug. 5, 2003). Thus, a governing body’s decision may be arbitrary and capricious if the vote on a CUP application was based on impermissible reasons.

The board maintains that Josephson’s claims of improper influence should not be considered because they are based on information that is outside the record and are being raised for the first time on appeal. Appellate courts generally will not consider issues not raised before a county zoning authority. *Big Lake Ass’n v. St. Louis Cnty. Plan. Comm’n*, 761 N.W.2d 487, 490-91 (Minn. 2009). “But an appellate court, in its discretion, may review any matter in the interest of justice.” *Indep. Sch. Dist. No. 709 v. Bonney*, 705 N.W.2d 209, 219 (Minn. App. 2005). We also observe that there may be situations in which a party does not learn of an impermissible motive for voting until after the decision is made and may need the opportunity to provide additional argument and evidence in the

interests of justice to ensure fairness. However, we are persuaded that under the circumstances here the proceedings were fair and impartial.

Our review of the record reveals no evidence of bias or improper influence on the part of either commissioner identified by Josephson. Notably, the first commissioner's relative submitted a letter to the board prior to the meeting on the application for the CUP, and although she opposed the CUP, she did not mention any sort of familial dispute that may have had a bearing on the commissioner's vote. She therefore had the opportunity to raise the issue of her familial relationship with a commissioner and did not do so.

We also note that Josephson himself raised the concern at the planning commission's meeting that the electrical cooperative could "become[] punitive and neglect[] . . . any upgrades to the county" if the CUP were denied. A member of the planning commission responded that he had "never heard that" and asked Josephson to provide his source for that information, but Josephson refused to provide the source and generally stated that "it is someone in the court." Thus, Josephson was asked to provide information to support his assertion that the electrical cooperative may retaliate but refused to do so. It is therefore of his own accord that the record does not contain information that may support his assertion that such a fear existed and impacted one of the commissioners' votes.

We therefore reject Josephson's claims that the vote was tainted by improper influence and affirm the decision to grant the application for the CUP.

Affirmed.