STATE OF MINNESOTA
IN COURT OF APPEALS
A22-0797

Thomas Behrends,
Appellant,

vs.

Jackson County, Minnesota Board of Adjustment and Appeals, et al.,
Respondents,

Dana K. Schmid, et al.,
Respondents,

EW Wind Holdings, LLC et al.,
Respondent.

Filed December 27, 2022
Affirmed
Jesson, Judge
Dissenting, Johnson, Judge

Jackson County District Court
File No. 32-CV-21-108

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Considered and decided by Johnson, Presiding Judge; Jesson, Judge; and Klaphake, Judge.*

NONPRECEDENTIAL OPINION

JESSON, Judge

After respondent Jackson County Board of Adjustment approved four variance requests for windmills adjacent to his property, appellant Thomas Behrends sought review of that decision in district court. Behrends alleged that because the board's decision did not explicitly consider factors in the local zoning ordinance, the board's decision was not legally sufficient. The district court affirmed the board's decision, holding that despite lacking specific reference to the ordinance and its requirements, the board's findings were legally sufficient. The district court also found that the board's decision was adequately supported by facts in the record. Because the board made detailed written factual findings and the proceedings before the board were fair and complete, we affirm.

FACTS

Behrends appeals the district court's grant of summary judgment dismissing his declaratory judgment action against respondents, the Jackson County Board of Adjustment, Jackson County, EW Wind Holdings, LLC, and four landowners whose properties host

* Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

wind turbines as a part of the wind farm. Behrends also challenges the district court's decision to exclude certain documents from the record.

The wind farm at issue began operation in 2008. Suzlon S88 wind turbines powered the wind farm, but in fall 2020, Suzlon, an India-based company, closed its United States operations. Another company developed a retrofit product for the Suzlon turbines, which consists of longer blades and a component that sits on the top of the existing towers. Adding the retrofit would increase the height of the wind turbines. EW Wind, the owner of the wind farm, wanted to install the retrofit and applied for new variances and a conditional use permit because of the increase in tower height.[1]

In July 2021, the Jackson County Board of Adjustment met to consider EW Wind's variance requests. Two employees from EW Wind presented to the board, explaining their reasons for requesting the variances and the benefits of the retrofit. They stated that the project would cause less noise pollution, increase energy efficiency, and result in less shadow flicker for nearby property owners.[2] One employee testified that the wind farm could continue reasonable use for another 4 to 8 years as is and could operate for another 10 to 20 years with regular maintenance and repairs to the current turbines.

Behrends was present at the meeting, represented by counsel, and spoke against granting the variance requests. He argued that the variance requests were motivated solely

[1] The wind farm is located on four pieces of land. EW Wind requested four variances related to road right-of-way setback requirements for three turbines, as one turbine needed a variance for two roads. Behrends' land is adjacent to the wind turbines, but does not host any. Most of the initial wind turbines complied with the setback requirements when they were built, but one turbine required and received a setback variance in 2006.

[2] Shadow flicker is alternating changes in light intensity caused by moving rotor blades.

by economic concerns and granting the variances would exacerbate existing noise pollution, increase shadow flicker, and lower property values. Behrends' attorney also spoke, aided by a PowerPoint presentation. He outlined the statutory framework for granting a variance request, but did not mention the county ordinance's requirements.[3] The board heard from other members of the public as well, and it did not limit the time for comments.[4]

The board of adjustment granted EW Wind's variance requests and made five findings of fact: (1) the property owners were proposing to use the property in a reasonable manner, (2) the need for variances was due to circumstances unique to the properties and not created by the property owners, (3) the variances would maintain the essential character of the locality, (4) the need for the variances involved more than economic considerations, and (5) the variances were requesting the minimum variance necessary. The board issued its findings of fact on a form outlining standard criteria used by the board of adjustment for granting variances in Jackson County, which included both the applicable county ordinance and the state statute.

In August 2021, Behrends commenced an action in district court against EW Wind Holdings, the Jackson County Board of Adjustment, and the four landowners over the granting of the variances, requesting a declaratory judgment that the zoning variances are

[3] Behrends attempted to submit additional materials to the board of adjustment, but the documents were rejected because he did not follow the proper procedure for submission.

[4] The Jackson County Planning & Zoning Commission met on the same day as the board of adjustment and granted EW Wind's conditional-use-permit application. Behrends did not appeal the Jackson County Planning & Zoning Commission's decision on EW Wind's conditional-use-permit application.

"unlawful, unenforceable, void, and of no effect." In January 2022, all parties moved for summary judgment. EW Wind also moved to exclude documents outside the scope of the administrative record because Behrends sought to introduce documents from the conditional-use-permit application and corresponding proceedings, which were not at issue. The district court granted respondents' summary judgment motions and motion to exclude documents outside the scope of the administrative record. It addressed Behrends' arguments about the board's failure to consider the ordinance requirement and found that they did not have merit because the board's analysis encompassed the ordinance's requirements.

Behrends appeals.

DECISION

Behrends appeals the district court's decision to grant summary judgment against his challenge to the board of adjustment's grant of the variance requests and to exclude documents outside the scope of the administrative record. We address each of Behrends' arguments in turn.

I. The Jackson County Board of Adjustment acted reasonably in issuing the four variances to EW Wind.

A board of adjustment acts in a quasi-judicial capacity when it considers granting a variance. *Graham v. Itasca Cnty. Plan. Comm'n*, 601 N.W.2d 461, 467 (Minn. App. 1999). Appellate courts exercise a limited and deferential review of quasi-judicial decisions, rooted in separation-of-powers principles. *Big Lake Ass'n v. Saint Louis Cnty. Plan.*

Comm'n, 761 N.W.2d 487, 491 (Minn. 2009) (explaining that it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in zoning matters).

As a result, the question this court asks when reviewing a summary-judgment decision of this nature is whether the zoning authority's action was reasonable or whether it was unreasonable, arbitrary, or capricious. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 314 (Minn. 1988) (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981)). When a governmental entity acts in a quasi-judicial capacity by receiving and weighing evidence and making factual findings, those actions are reasonable if supported by substantial evidence. *Graham*, 601 N.W.2d at 467. The party appealing a zoning authority's decision has the burden to demonstrate unreasonableness, and this court independently reviews the authority's decision without deference to the district court. *Moore v. Comm'r of Morrison Cnty. Bd. of Adjustment*, 969 N.W.2d 86, 91 (Minn. App. 2021).

Here, to determine whether the board of adjustment acted reasonably, we consider whether the board's stated reasons were legally valid and whether the decision had a factual basis in the record. *See RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015).[5] If there is evidence in the record supporting the decision, a reviewing court may not substitute its judgment for that of the board of adjustment, even if it would

[5] The board of adjustment argues that municipal decisions to grant land use permits are reviewed for an abuse of discretion and are entitled to great deference. While it is true that decisions to grant variances are given a more deferential standard of review than decisions to deny variances, that does not change the operative standard of review stated above. *Corwine v. Crow Wing County*, 244 N.W.2d 482, 486 (Minn. 1976).

have reached a different conclusion. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983). Because the party seeking review of the decision bears the burden of showing that the board of adjustment acted unreasonably, *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 387 (Minn. 2003), we address each of Behrends' arguments challenging the board's decision. In doing so we first turn to Behrends' argument that the board's decision was not legally valid, and then address whether the decision had a factual basis in the record.

A. The board's decision was legally valid because its findings of fact were robust and based on the correct legal standards.

A board of adjustment has the exclusive power to grant variance requests. Minn. Stat. § 394.27, subd. 7 (2020). The Jackson County Zoning Ordinance states that variances may only be granted in accordance with Minnesota Statutes section 394. Jackson County, Minn., Zoning Ordinance § 506(1) (Nov. 12, 2012). Under that statute, a board of adjustment may grant a variance request when the applicant establishes that there are "practical difficulties" in complying with existing requirements. Minn. Stat. § 394.27, subd. 7. Practical difficulties include situations in which: (1) the property owner proposes to use the property in a reasonable manner not permitted by an official control; (2) the plight of the landowner is due to circumstances unique to the property not created by the landowner; and (3) the variance, if granted, will not alter the essential character of the locality. *Id.* (4) Economic considerations alone do not constitute practical difficulties; and (5) a condition must be directly related to and must bear a rough proportionality to the

impact created by the variance. *Id.* If the board finds that a variance applicant has met this legal standard, then it must issue findings of fact explaining its reasoning.

While a zoning body need not prepare formal findings of fact, it is, at a minimum, required to "have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion." *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 462 (Minn. 1994) (quoting *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 742 (Minn. 1986)). Behrends makes two arguments to support his claim that the board's decision is legally invalid. First, he contends that the board of adjustment failed to incorporate the local zoning ordinance in its analysis. Second, he claims that its analysis of the statutory factors was incorrect. We address each in turn.

Behrends' Ordinance Arguments

Behrends argues that the board of adjustment's decision was legally invalid because it did not reference the Jackson County Zoning Ordinance when it granted the variance requests based solely on the five requirements in Minnesota Statutes section 394.27, subdivision 7. But the form outlining the criteria for granting variances, which the board of adjustment followed, included the entire text of Jackson County Zoning Ordinance section 506 and 506.1. The form lists five questions for the board to fill out, answering yes or no for each, with lines to indicate why the board decided the way it did. These five questions correspond to Minnesota Statutes section 394.27, subdivision 7, though the statute is not mentioned anywhere in the form. The supreme court has held that use of a checklist by a zoning body is not arbitrary if the zoning body receives and considers all proffered evidence, gives both sides an opportunity to be heard, and the evidence is not so

significant and one-sided as to render the approval arbitrary. *Schwardt*, 656 N.W.2d at 389. The board had this form in front of it when it granted the variance requests, so the ordinance was not ignored.

In addition, the board of adjustment received all testimony and properly submitted materials, gave Behrends and his attorney an opportunity to be heard, and the evidence before the board was not unbalanced. Because the reasons for the board of adjustment's decisions are recorded in more than a conclusory fashion, we will not second-guess them. *White Bear Rod & Gun Club*, 388 N.W.2d at 742.

And while the board of adjustment did not specifically mention the ordinance in its written findings, the ordinance and the zoning statute overlap, so the analysis of one is effectually an analysis of the other. The Jackson County Zoning Ordinance states: "Variances may only be granted *in accordance with Minnesota Statutes, Chapter 394*, as applicable." Jackson County, Minn., Zoning Ordinance § 506(1) (emphasis added). While 'in accordance' does not mean that the statutory requirements usurp the ordinance requirements, the phrase directs this court—particularly in light of our deferential review rooted in separation-of-powers principles—to read the statute and ordinance together, where possible.[6]

[6] Minnesota Statutes section 394.27, subdivision 7, was updated by the legislature in 2011. H.F. 52, 2011 Reg. Sess., ch. 19, § 1. The legislature removed language about 'particular hardship' and further defined what circumstances constitute 'practical difficulties' after two court cases interpreted these standards. *Compare In re Kenney*, 358 N.W.2d 120, 123 (Minn. App. 1984), *aff'd*, 374 N.W.2d 271 (Minn. 1985), *with In re Stadsvold*, 754 N.W.2d 323, 331 (Minn. 2008). We observe that the Jackson County Zoning Ordinance was written in 1993, updated in 2012, and updated again in 2022, yet it did not realign its language to

It is possible to read the ordinance requirements in accordance with the statutory ones here. While there are numerous ordinance requirements, Behrends only argues that one ordinance requirement applies in addition to the zoning statute: the extraordinary-circumstances requirement.[7] Jackson County, Minn., Zoning Ordinance § 506.1(1) (Nov. 12, 2012). The zoning ordinance requires that the applicant demonstrate that there are extraordinary circumstances that apply to the property "which do not apply generally to other properties in the same zone or vicinity, and result from lot size or shape, topography or other circumstances over which the owners of property since enactment of this Ordinance have had no control." *Id.*

But the second requirement under Minnesota Statutes section 394.27, subdivision 7, requires the board of adjustment to consider something very similar to this exceptional-circumstances requirement: whether the plight of the landowner is due to *circumstances unique to the property* not created by the landowner. An analysis of unique circumstances looks to the same factors an analysis of extraordinary circumstances would: whether there is something exceptional about the property, that the landowner did not cause, that makes it particularly qualified to receive a variance. Here, the manufacturer

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precisely match the corresponding statute after the statute was updated. Rather, the ordinance continues to direct that variances may only be granted in accordance with the zoning statute. Jackson County, Minn., Zoning Ordinance § 506(1). This suggests that the Jackson County government did not see its ordinance as conflicting with the statute, even after the statute's revisions.

[7] Behrends also argues that the board of adjustment disregarded non-economic considerations and reasonable use requirements that both the statute and the ordinance contain, but, as his brief acknowledges, these requirements are consistent with section 394.27, subdivision 7, and as a result, they are not additional requirements.

of the wind turbines closed its United States operations, making it difficult to service the existing wind farm, and as a result, the wind farm requested variances to continue operating. Accordingly, the board's stated reasons are legally valid because it is possible to read the exceptional-circumstances requirement under the county zoning ordinance and the statutory unique-circumstances requirement in accordance with each other.

Still, Behrends posits that the board of adjustment's decision is legally invalid because it does not meet the *Earthburners* standard, which states that when resolving variance requests, the zoning body must articulate the reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance. 513 N.W.2d at 463. But *Earthburners* is distinguishable from the case at hand. The *Earthburners* court reversed and remanded a zoning body's decision because it was unable to review the zoning body's decision given the failure to explain its decision. *Id.* And on remand, the supreme court directed the zoning body to state adequate reasons for its decision, stating:

> The effect of our decision is to reopen these proceedings with proper notice, to facilitate full discussion by all interested parties by providing the applicant ample opportunity to disseminate information concerning its [zoning request] so that board members and other interested parties are afforded adequate preparation time, and ultimately to allow the board to articulate the reasons for whatever action it takes and, in the event it approves the application, to define the scope and terms of the [zoning variation].

Id.

The reasons supporting the remand in *Earthburners* are absent here. This court has five factual findings and a complete record from the board of adjustment meeting to review the board's decision to grant the variance applications. All interested parties participated

fully in the board proceedings and the board articulated its reasons for approving the variance request. The Minnesota Supreme Court has distinguished *Earthburners* on similar grounds. *Schwardt*, 656 N.W.2d at 388 (concluding that because the zoning body in question had accepted all proffered testimony, unlike in *Earthburners*, the record was clear and the zoning body's decision was not unreasonable). Accordingly, *Earthburners* is distinct from the matter at hand.

Nor does *Stadsvold*, which relies upon *Earthburners*, dictate the result in this case. 754 N.W.2d at 332. In *Stadsvold*, the supreme court observed that the applicable ordinance required the board to consider three factors—and that there was "no indication in the record that the board considered any of these factors." *Id.* Not so here, where the board had the ordinance in front of it—an ordinance which can be read in symmetry with the statute. Because *Earthburners* is distinguishable from Behrends' claim, given the robust record and the interplay between the statute and the ordinance here, there is no basis to reverse and remand.[8]

Behrends' Statutory Arguments

Behrends next claims that the board of adjustment's decision is legally invalid because it misconstrued the first, second, and fifth statutory requirements: reasonable use, unique circumstances, and non-economic considerations. Minn. Stat. § 394.27, subd. 7. On the first factor, the board of adjustment found that the variances proposed reasonable

[8] We further observe that, in *Earthburners*, the court's directions were given to a particular zoning body to guide its actions on remand, not stated as a rule for other zoning bodies to follow for years to come. *Earthburners*, 513 N.W.2d at 463.

uses because the requested changes maintained existing towers. Behrends contends that because the variances are an effort to expand the existing use of the wind turbines, they cannot be a reasonable use. Because Behrends cites no legal authority which states that expanding an existing use is not a reasonable use, his argument does not succeed. *See Melina v. Chaplin*, 327 N.W.2d 19, 20 (Minn. 1982) (explaining that an inadequately briefed issue is not properly before an appellate court).

Behrends also argues that the board of adjustment erred in its analysis of the second statutory factor when it found unique circumstances justified the need for the variance because the existing wind turbines did not make the property unique. Minn. Stat § 394.27, subd. 7. A board of adjustment may grant a variance when the applicant establishes that there are practical difficulties in complying with the ordinance, and practical difficulties require "the plight of the landowner [to be] due to circumstances unique to the property not created by the landowner." Minn. Stat. § 394.27, subd. 7. The board of adjustment found that "[b]ecause the existing towers were built to the standards at the time and that, in order to repower the turbines, the tower needs to be taller with new blade technology," the variance was due to circumstances unique to the property and not created by the property owner. The windmills are part of the property because they are improvements to the property. *See Lietz v. N. States Power Co.*, 718 N.W.2d 865, 869 (Minn. 2006) (stating that an improvement is a permanent addition to or betterment of real property that enhances its capital value and involves the expenditure of labor or money and is designed to make the property more useful or valuable). And the landowners have no control over Suzlon's

decision to cease operations in the United States. Thus, the board of adjustment's decision is legally valid on this basis as well.

Turning to the fifth factor, the board of adjustment found that the variances met this factor—reasons beyond economic considerations—because "the new turbines will be more efficient, they are installing quieter blades, and because the manufacturer of the wind turbines is out of business." We are not persuaded by the argument that because the wind turbines could continue operating for the next few years without the variances, the upgrades are purely economic in nature.[9] Economic considerations can be present if they are not the *only* consideration for granting the variance. Minn. Stat. § 394.27, subd. 7 ("Economic considerations *alone* do not constitute practical difficulties." (Emphasis added.)). Here, no matter what economic factors are present, the findings show the board considered non-economic factors as well, such as reduced noise pollution and increased energy efficiency. Thus, its decision regarding the fifth factor is legally valid. Accordingly, the board of adjustment's decision is legally valid because it properly construed these three statutory requirements.

B. The board of adjustment's decision is adequately supported by facts in the record.

Additionally, Behrends contends that the board of adjustment's decision lacks a factual basis in the record because it was premised on inadmissible hearsay and conclusory statements as opposed to substantive evidence in the record. He alleges that "legal

[9] A representative from EW Wind testified before the board of adjustment that the wind farm could continue reasonable use for another 4 to 8 years as is and could operate for another 10 to 20 years with regular maintenance and repairs to the current turbines.

evidence" must support the board of adjustment's decision. *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 718 (Minn. 1978). But county-board proceedings are not governed by the rules of evidence. *Handicraft Block Ltd. P'ship v. City of Minneapolis*, 611 N.W.2d 16, 21 (Minn. 2000). And the board heard testimony from employees of the company that owns the EW Wind project that Suzlon does not service its United States wind turbines and the retrofit would reduce noise.

Behrends also claims that the board of adjustment assumed that the variances were the only option for repowering the turbines, and that assumption was not supported by evidence in the record. But even if the board made that assumption, it is not a required factor for granting the variance. Therefore, that assumption does not need to be supported by the record. Accordingly, the board of adjustment's factual findings are supported by substantive evidence in the record.

In sum, Behrends' arguments fail to demonstrate that the board's grant of the variances was legally invalid or unsupported by facts in the record. The district court did not err in granting respondents' motions for summary judgment.

II. The district court did not err in restricting the administrative record.

Behrends next argues that the district court erred in restricting the administrative record on the appeal when it excluded evidence from the conditional-use-permit proceedings. When proceedings before a board are fair and complete, appellate review is based on the record of the board's proceedings, not the district court's findings or conclusions. *Kismet Invs., Inc. v. County of Benton*, 617 N.W.2d 85, 90 (Minn. App. 2000), *rev. denied* (Minn. Nov. 15, 2000). The district court should receive additional evidence

only on substantive issues raised and considered by the municipal body if it determines that the additional evidence is material and that there were good reasons for failure to present it at the municipal proceedings. *Swanson*, 421 N.W.2d at 313. But this court need not reach this issue because Behrends cites no legal authority to support his argument. *State, Dep't of Labor & Indus. v. Wintz Parcel Drivers, Inc.*, 558 N.W.2d 480, 480 (Minn. 1997) (stating that appellate courts decline to reach issues that are inadequately briefed).

In sum, because Behrends cannot show that the board of adjustment's grant of the four variance applications was legally invalid or unsupported by the record, we affirm the district court's grant of summary judgment. Additionally, because Behrends cites no legal authority to support his argument that additional documents should be added to the record, we affirm the district court's decision to exclude those documents from the record.

Affirmed.

JOHNSON, Judge (dissenting)

The supreme court has clearly stated that, when considering a request for a zoning variance, a zoning authority "must 'articulate the reasons for its ultimate decision, *with specific reference to relevant provisions of its zoning ordinance*.'" *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008) (emphasis added) (quoting *Earthburners, Inc. v. County of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994)). Appellant's first argument is that, when the Jackson County Board of Adjustment stated its reasons for granting EW Wind's variance application, the board did not consider the requirements of the county's own zoning ordinance. Appellant is correct. Therefore, I respectfully dissent from the opinion of the court.

When EW Wind's zoning application was submitted and approved, Jackson County's ordinance concerning zoning variances provided as follows:

> **506. VARIANCES**
>
> 1) Variances may only be granted in accordance with Minnesota Statutes, Chapter 394, as applicable.
>
> 2) A variance may not circumvent the general purposes and intent of this ordinance.
>
> 3) No variance may be granted that would allow any use that is prohibited in the zoning district in which the subject property is located.
>
> 4) Conditions may be imposed in the granting of a variance to ensure compliance and to protect adjacent properties and the public interest.
>
> 5) In considering a variance request, the board of adjustment must also consider whether the property owner has reasonable use of the land without the variance, whether the

property is used seasonally or year-round, whether the variance is being requested solely on the basis of economic considerations, and the characteristics of development on adjacent properties.

6) The issued variance is valid for 60 months from recording date. If the variance has not been used by that time it shall expire.

7) Conditions may be imposed with a variance if they are directly related to the issue and bear a rough proportionality to the impact created by the variance.

8) If a structure for which a variance was granted is destroyed by any cause to an extent exceeding fifty percent (50%) of its fair market value as indicated by the records of the County Assessor at the time of damage, any new structure or structure moved on to the site shall conform to the requirements of this Ordinance unless a new variance is granted.

506.1 Criteria for Granting Variances

Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the Zoning Ordinance. A variance may be granted only in the event that the following circumstances exist:

1) Exceptional or extraordinary circumstances apply to the property which do not apply generally to other properties in the same zone or vicinity, and result from lot size or shape, topography or other circumstances over which the owners of property since enactment of this Ordinance have had no control.

2) The literal interpretation of the provisions of this Ordinance would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Ordinance.

3) That the special conditions or circumstances do not result from the actions of the applicant.

> 4) That the practical difficulty in this application is not solely an economic consideration.
>
> 5) That granting the variance requested will not confer on the applicant any special privilege that is denied by this Ordinance to owners of other lands, structures or buildings in the same district.
>
> 6) The variance requested is the minimum variance which would alleviate the practical difficulty.
>
> 7) The variance would not be materially detrimental to the purpose of this Ordinance, or to property in the same zone.
>
> 8) In the Flood Plain District no variance may be granted which permits a lower degree of protection than the Regulatory Flood Protection Elevation.

Jackson County, Minn., Zoning Ordinance §§ 506, 506.1 (2012).

The board of adjustment's reasons for its decision in this matter are found on the last page of its written decision, which states that the variance application "is approved based on the following findings of fact:"

> 1. Is the property owner proposing to use the property in a reasonable manner not permitted by the Zoning Ordinance? Yes. Finding: Because the proposed change is maintaining an existing tower. Therefore, the use of the property will be used in a reasonable manner not permitted by the Zoning Ordinance.
>
> 2. Is the need for a variance due to circumstances unique to the property and not created by the property owner? Yes. Finding: Because the existing towers were built to the standards at the time and that, in order to repower the turbines, the tower needs to be taller with new blade technology. Therefore, it does make this request unique to the property and not created by the property owner.

> 3. Will the variance maintain the essential character of the locality? Yes. Finding: Because the site already exists as a wind farm. Therefore, the request will maintain the essential character of the locality.
>
> 4. Does the need for a variance involve more than economic considerations? Yes. Finding: Because the new turbines will be more efficient, they are installing quieter blades, and because the manufacturer of the wind turbines is out of business. Therefore, the need for a variance does involve more than economic consideration.
>
> 5. Is the variance requesting the minimum variance which would alleviate the practical difficulty? Yes. Finding: Because the applicant is only asking for the minimum variance to satisfy the requirement. Therefore, the requested variance is the minimum variance which would alleviate the practical difficulty.

It is practically undisputed that the county board of adjustment's written decision does not specifically refer to the eight paragraphs of section 506 or the eight paragraphs of section 506.1. The county does not argue that the board did so. The county argues only that the board applied the *statutory* criteria. The county does not argue that the board made any reference to the requirements of the county's zoning ordinance that are independent of the applicable statute. Accordingly, the majority opinion concedes that the board "did not specifically mention the ordinance in its written findings." *Supra* at 9.

In *Earthburners*, the supreme court stated that, on remand in that case, the county

> must articulate the reasons for its ultimate decision, *with specific reference to relevant provisions of its zoning ordinance*. If the permit is granted, the order must demonstrate the board's conclusion that the applicant has satisfied each of the . . . conditions for approval. . . . Along with a clearly articulated rationale for its decision, *specific reference to the local ordinance is essential to facilitate effective judicial review*.

513 N.W.2d at 463 (emphasis added). In *Stadsvold*, the supreme court reiterated the requirement of *Earthburners*, stating as a general matter that a zoning authority "must 'articulate the reasons for its ultimate decision, *with specific reference to relevant provisions of its zoning ordinance*.'" 754 N.W.2d at 332 (emphasis added) (quoting *Earthburners*, 513 N.W.2d at 463). The supreme court explained the reasons for this requirement:

> When the zoning authority fails to comply with this requirement, it is difficult if not impossible for a reviewing court to determine whether the zoning authority's decision was proper, was predicated on insufficient evidence, or was the result of the zoning authority's failure to apply the relevant provisions of the zoning ordinance. A decision predicated on insufficient evidence or arising from a failure to apply relevant provisions of the ordinance would be arbitrary and capricious. In the absence of the Board in this case having articulated its reasons in the manner required by *Earthburners*, we cannot determine the basis for the Board's decision.

Id. (citation omitted).

These concerns are present in this case. It is "difficult if not impossible for [this] court to determine whether the zoning authority's decision was proper . . . or was the result of the zoning authority's failure to apply the relevant provisions of the zoning ordinance." *See id.* The majority opinion states that the board of adjustment's five findings of fact relate to statutory requirements. *Supra* at 8-9. If true, that begs the question whether the board applied any of the other provisions of the sixteen paragraphs in sections 506 and 506.1 of the ordinance. Appellant is entitled to know, without the need for speculation, and it is the board's obligation to make specific reference to the zoning ordinance before

this court engages in appellate review. Because the board did not "articulate[] its reasons in the manner required by *Earthburners*," this court "cannot determine the basis for the Board's decision." *See id.*

EW Wind attempts to avoid the problem described by *Stadsvold* by suggesting that the board of adjustment used a "checklist" of the type described in *Schwardt v. County of Watonwan*, 656 N.W.2d 383 (Minn. 2003). In that case, the Watonwan County board "indicate[d] on a checklist that the [CUP application] met the standards in the Ordinance." *Id.* at 389. In support of this argument, EW Wind relies on a document that is in the record but is not part of the board's five-page written decision. That document simply recites the text of sections 506 and 506.1 of the county's zoning ordinance. The document is not a checklist; there are no boxes to be checked, no check marks, and no markings of any type to indicate that the document was read or used during the board's decision-making process. The document does nothing to connect "the reasons for [the] ultimate decision" with the "relevant provisions of [the county's] zoning ordinance." *Stadsvold*, 754 N.W.2d at 332 (quotation omitted). Thus, the record does not support the county's comparison to *Schwardt*.

In sum, I would reverse and remand to the county board of adjustment with the same remand instructions as in *Stadsvold*: to "'articulate its reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance' and 'confine its inquiry to those issues raised in [the] earlier proceedings.'" 754 N.W.2d at 333 (quoting *Earthburners*, 513 N.W.2d at 463).