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Court of Appeals of Minnesota.

In re An Order Finding Certain Facts and Ordering the Denial of a Conditional Use Permit
United States Solar Corporation, et al., Relators,
v.
Carver County Board of Commissioners, Respondent.

A18-0432

Filed March 25, 2019

Reversed and remanded

Carver County Board of Commissioners

File No. PZ20170035

Attorneys and Law Firms

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Considered and decided by Hooten, Presiding Judge; Reyes, Judge; and Cochran, Judge.

UNPUBLISHED OPINION

Cochran, Judge

*1 **COCHRAN**, Judge

Relators challenge the decision by the Carver County Board of Commissioners to deny their application for a conditional-use permit, arguing that the decision is arbitrary, capricious, and unreasonable. Because the reasons cited for denial are not supported by evidence in the record, the county's decision is unreasonable, arbitrary, and capricious. We reverse and remand.

FACTS

In July 2017, relators United States Solar Corporation and USS Hancock Solar LLC (collectively U.S. Solar) submitted an application for a conditional-use permit (CUP) to construct and operate a one-megawatt **solar energy** system (solar garden) on eight to nine acres of land in Hancock Township, Carver County.

The application came before the Carver County Planning Commission during a public meeting in August 2017. At that hearing, the planning commission heard comments from U.S. Solar as well as members of the public who might be affected by the proposed solar garden. Several members of the public voiced their opposition to the project for a variety of reasons, including an assertion that it would negatively impact land values and concerns that the project could cause stray voltage. Stray voltage occurs when an electrical current passes through an object not intended as a conductor and can affect cows by passing through their hooves. At the end of the hearing, one of the commissioners moved to deny U.S. Solar's application for the CUP based on concerns about stray voltage affecting a dairy farm located 700 feet from the site. The planning commission voted unanimously to recommend denying the CUP.

Following the planning commission's vote, U.S. Solar made some modifications to its proposal, including moving the site so that it would be more than 1,000 feet from the nearest dairy farm. U.S. Solar also moved the point of interconnection with the utility company, Xcel Energy, to be over 1,500 feet from the nearest dairy farm.

On February 13, 2018, the revised application came before the Carver County Board of Commissioners (the county)

for a public hearing. During that hearing, U.S. Solar indicated that it was willing to put up at least $10,000 for an electrical reliability fund "to make modifications to be used to have stray voltage testing at any interval" on the neighboring dairy farm. U.S. Solar again indicated its position that the solar garden is not likely to cause stray voltage and that the solar garden will be built with multiple redundancies to automatically disconnect from the electrical grid in the event of a malfunction. Prior to the hearing, U.S. Solar submitted written materials to the county, including the Minnesota Stray Voltage Guide and a letter from an expert stating that "any concerns associating solar PV plants with increased risk of stray voltage are baseless." The expert's letter indicated that many other projects, such as a storage warehouse, a pole barn, a manufacturing facility, a residential development, or even another dairy operation would be more likely to create stray voltage than a solar garden. The county also heard more testimony from members of the public, who again expressed concern about stray voltage. The county voted unanimously to draft an order denying the CUP application.

***2** On February 27, 2018, the county again took up the issue. U.S. Solar indicated that it had secured the services of a stray voltage expert whom it would pay to test any farm within one-half mile of the solar garden for stray voltage before and after construction of the solar garden. U.S. Solar stated that it would pay the expert to give advice to the farmers on any potential sources of stray voltage on their farms and that it "will commit to pay for mitigation work, if the before-and-after testing reveals any increase in stray voltage." At the end of the meeting, the county voted 4-1 to deny U.S. Solar's application for a CUP. The county then issued its order finding certain facts and ordering the denial of the CUP application. By writ of certiorari, U.S. Solar appeals the county's decision.

DECISION

I. Standard of Review.

Counties are authorized to carry out planning and zoning activities for the purpose of promoting the health, safety, morals, and general welfare of the community. Minn. Stat. § 394.21, subd. 1 (2018). As a zoning tool, a conditional use may be approved "upon a showing by an applicant that standards and criteria stated in the ordinance will be satisfied." Minn. Stat. § 394.301, subd. 1 (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 is deferential, "as counties have wide latitude in making decisions about special use permits." *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). 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 decision is arbitrary and capricious if it represents the decision-maker's will rather than its judgment, or if it is "based on whim or is devoid of articulated reasons." *Appeal of Krenik*, 903 N.W.2d 224, 231 (Minn. 2017) (quotation omitted). A CUP denial is arbitrary when an applicant shows that all the zoning-ordinance standards required for a permit are met. *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003). "The permit applicant has the burden of persuading this court that the reasons for the denial either are legally insufficient or had no factual basis in the record." *Id.*

II. The county's decision to deny U.S. Solar's request for a CUP due to concerns about stray voltage is arbitrary, capricious, and unreasonable.

In determining whether the county acted arbitrarily, capriciously, or unreasonably, an appellate court follows a two-step process. *RDNT*, 861 N.W.2d at 75. We first determine whether the reasons given by the county are legally sufficient. *Id.* at 75-76. Second, if the reasons are legally sufficient, we must determine whether "the reasons had a factual basis in the record." *Id.* at 76.

A. Legal Reasons for Decision

In denying U.S. Solar's CUP application, the county determined that Carver County, Minn., Code of Ordinances (CCO) § 152.251(B), (I) (2016), were not satisfied due to the potential for stray voltage and a decrease in property values. These subparts require:

> (B) The conditional or interim use will not be injurious to the use and enjoyment of other property in the immediate vicinity for purposes already permitted.
>
> ....
>
> (I) The use or development is compatible with the land uses in the neighborhood.

CCO § 152.251(B), (I).

The Minnesota Supreme Court has "long held that a city may deny a [CUP] application if the proposed use endangers the public health or safety or the general welfare of the area affected or the community as a whole." *RDNT*, 861 N.W.2d at 76 (quotation omitted). Here, the legal basis for the county's decision resides in the ten subparts set out in the ordinance. Because subparts (B) and (I) are reasonably related to the health, safety, and general welfare of the community, the county had a legally sufficient basis for its decision.

B. Factual Basis for Decision

***3** U.S. Solar argues that the county's decision to deny their application for a CUP due to the potential for stray voltage is unreasonable, arbitrary, and capricious because it lacked factual support in the record. We agree.

"Stray voltage is a phenomenon in which an electrical current—voltage that returns to the ground after powering an appliance—passes through an object not intended as a conductor." *Siewert v. N. States Power Co.*, 793 N.W.2d 272, 276 (Minn. 2011). This court has recognized that stray voltage can be problematic to animals, including dairy cows, because:

> [a] cow's hooves provide an excellent contact to the earth while standing on wet concrete or mud, while at the same time the cow is contacting the grounded-neutral system consisting of items such as metal stanchions, stalls, feeders, milkers, and waterers. The current simply uses the cow as a pathway in its eventual return to the substation.

Poppler v. Wright Hennepin Coop. Elec. Ass'n, 834 N.W.2d 527, 534 (Minn. App. 2013) (quotation omitted), *aff'd*, 845 N.W.2d 168 (Minn. 2014).

The county's order denying the CUP found that "[c]oncerns remain regarding the potential for stray voltage." The county then concluded that "[b]ased on public testimony, and comments received at the Board of Commissioners' meeting on February 13, 2018, the request will be injurious to the use and enjoyment of other property in the immediate vicinity" and that "with regard to the potential for stray voltage, the proposed use would not be compatible with the adjacent dairy operation, and it may decrease surrounding property values."

U.S. Solar argues that the record contains no factual support for the county's determination that the solar garden will be injurious to the use and enjoyment of other properties or that it is incompatible with neighboring properties. U.S. Solar notes that it presented an uncontroverted expert opinion indicating that the solar garden is not likely to cause stray voltage and contends that the conditions it proposed for the CUP mitigate any possible concern about stray voltage. The county disagrees, arguing that its decision is supported by: (1) statements from board members, (2) statements from the neighbors, and (3) the board members' recent experience with other solar projects. The county also argues that it properly rejected the opinion letter from U.S. Solar's expert and that U.S. Solar failed to propose sufficient conditions to mitigate concerns about stray voltage. We consider each of these items in turn.

1. Commissioners' Statements about Stray Voltage

The county first argues that statements by Chairman Gayle Degler and Commissioner James Ische regarding their experience with stray voltage support the denial of the CUP. But, those personal experiences did not involve a solar garden. Chairman Degler stated that he knew a farmer who had stray voltage issues as a result of

"the utility up the roadways." He also noted that the farmer was not against solar power and that the farmer later installed solar panels himself. Although Chairman Degler mentioned the problems caused by stray voltage in general, he ultimately voted to grant U.S. Solar's application for the CUP for this solar garden.

Similarly, Commissioner Ische referred generally to the dangers of stray voltage, but he did not speak about any instances of solar gardens causing stray voltage or any concrete information that solar gardens could cause stray voltage. A generalized concern about stray voltage from non-solar sources, without more, is insufficient to find that this particular solar garden poses any real possibility of causing stray voltage on dairy farms in the area. *See Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (explaining that denial of a CUP "must be based on something more concrete than neighborhood opposition and expressions of concern for public safety and welfare"). The commissioners' anecdotal comments about stray voltage do not support the county's decision to deny the CUP for this solar garden.

2. Neighbors' Testimony

***4** The county also points to the comments of the nearby dairy farmers who were concerned about stray voltage. But, like the commissioners, the neighbors spoke only about their concerns about stray voltage in general. They did not speak to any knowledge that a solar garden could cause stray voltage. The neighbors' comments regarding their general concerns about stray voltage do not support the county's decision to deny the CUP for this solar garden.

3. The *Minnesota Solar* Case

The county argues that its denial of the CUP is also supported by a previous case, *Minnesota Solar, LLC v. Carver Cty. Bd. of Comm'rs*, in which this court affirmed the county's denial of a solar garden CUP. No. A17-0504, 2017 WL 6418179, at *1 (Minn. App. Dec. 18, 2017). As an unpublished decision, that case is not precedential and has no binding effect. *Gen. Cas. Co. of Wis. v. Wozniak Travel, Inc.*, 762 N.W.2d 572, 575 n.2 (Minn. 2009) (stating that an "unpublished Minnesota court of appeals decision does not constitute precedent"). Furthermore, the *Minnesota Solar* case is factually different from this one. In that case, the electrical interconnection infrastructure for the proposed solar garden would have been "adjacent" to a dairy farm. 2017 WL 6418179, at *3. Here, the solar garden is over 1,000 feet from the nearest dairy farm and the point of interconnection with the utility is over 1,500 feet from the nearest dairy farm. *Minnesota Solar* also involved a four-megawatt solar garden, rather than the one-megawatt solar garden in this case. *Id.* at *1. Although this court affirmed the denial of the CUP in *Minnesota Solar*, the opinion noted that it was "a very close case." *Id.* at *4.

The county also argues that expert testimony from the Minnesota Solar case supports its decision in this case. The county notes that when it considered the application for a CUP in the *Minnesota Solar* case, Minnesota Solar's expert stated that "with these solar gardens, there is always going to be a minimal amount of stray voltage." *Id.* at *3 (quotation omitted).[1] The county argues that it was entitled to rely on that previous statement to support its denial of the CUP in this case. In support of its argument, the county notes that the Minnesota Supreme Court has accepted government officials' reliance on collective knowledge and past experience in different contexts. *See, e.g., Schroeder v. St. Louis County*, 708 N.W.2d 497, 508 (Minn. 2006) (concluding that county was entitled to vicarious official immunity where its decision to permit drivers to grade roads against traffic was "based on the collective knowledge and experience of the county road superintendents"); *Anderson v. Anoka Hennepin Indep. Sch. Dist. 11*, 678 N.W.2d 651, 660 (Minn. 2004) (affirming school's reliance on "collective expertise and professional judgment to make discretionary operational decisions"); *see also Commc'ns Props., Inc. v. County of Steele*, 506 N.W.2d 670, 672 (Minn. App. 1993) (noting that city officials from small communities may rely on their general knowledge, but declining to extend that principle to a county's zoning decision).

Even if this principle applies to a county's denial of a CUP, the record must reflect that the commissioners

actually relied on this past experience in making their decision to deny the CUP. *Cf. Commc'ns Props., Inc.*, 506 N.W.2d at 672 ("Relaxing the requirement for findings based on expert opinions or other evidence should be narrowly construed as an exception to the general rule ...."). Here, there is no evidence that the county actually relied on expert testimony from the *Minnesota Solar* CUP proceeding as a basis to deny U.S. Solar's request for a CUP. Although Commissioner Ische discussed prior applications for CUPs to build solar gardens during the planning commission hearing as well as the February 13 county hearing, he never referenced any previous expert testimony that indicated a solar garden would cause stray voltage. The commissioners questioned U.S. Solar at length about a number of topics, but none of the commissioners ever raised a question about this previous expert testimony. Furthermore, the county's order explicitly states that its decision is based on "public testimony, and comments received at the Board of Commissioners' meeting on February 13, 2018." The record fails to support the county's argument that it relied on previous expert testimony.

4. U.S. Solar's Expert

*5 The county argues that it properly discounted U.S. Solar's expert's opinion that concerns about solar gardens increasing the likelihood of stray voltage are baseless. The expert's opinion noted that stray voltage can occur in any electrical system if there are design flaws or damage to the system. But the expert indicated that a solar garden is unlikely to suffer from these conditions because solar gardens are designed and constructed by licensed professionals and reviewed by electrical inspectors and licensed third-party engineers. Furthermore, the designs are such that if damage occurs, such as a high voltage cable being cut, the system automatically stops the flow of current to isolate the solar garden. The expert concluded that as a result of the extra layers of protection, a solar garden is less likely to cause stray voltage than many other common projects, such as a storage warehouse, a residential development, or even another dairy operation.

Minnesota caselaw establishes that "[a] city council is free to disregard an expert's opinion when it is presented with conflicting non-experts' opinions, including those of area residents, so long as the reasons are concrete and based on observations, not merely on fear or speculation." *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 260 (Minn. App. 2004).

Here, as discussed above, there is no "concrete" information in the record that contradicts the expert's opinion that concerns associating solar gardens "with increased risk of stray voltage are baseless." The county argues that it was entitled to reject the expert opinion based on comments from the commissioners that stray voltage can come from off-site utilities and that stray voltage can occur from human error. But neither of those facts is disputed. The expert opinion states that human error can cause stray voltage in any electrical system, but it goes on to state that a solar garden is less likely to suffer from human error than many other projects because there are many more checks and balances put into place for a solar garden than for other projects.

In deciding to deny the CUP, the county based its decision on public testimony, disregarding scientific evidence that solar gardens do not increase the risk for stray voltage. That public testimony was comprised only of vague concerns and speculation about the potential for stray voltage rather than reasoning based on concrete facts or experience and was insufficient to discount the expert opinion. Because the county improperly discounted expert evidence in favor of generalized public concern, its decision to deny the CUP due to concerns about "the potential for stray voltage" lacked a factual basis in the record.

5. Conditions to Mitigate Concerns about Stray Voltage

Finally, the county argues that U.S. Solar failed to propose conditions sufficient to alleviate its concerns about stray voltage. "If a conditional use permit applicant demonstrates to the governing body that imposing a reasonable condition would eliminate any conflict with the ordinance's standards and criteria, it follows that the governing body's subsequent denial would be arbitrary." *Loncorich v. Buss*, 868 N.W.2d 755, 761 (Minn. App. 2015) (quotation omitted). It is the applicants' burden

to propose conditions that would mitigate any concerns. *RDNT*, 861 N.W.2d at 78.

In this case, U.S. Solar agreed to pay to test nearby farms for stray voltage before, during, and after construction of the solar garden and to pay to mitigate any stray voltage coming from the solar garden. U.S. Solar also indicated that it is willing to create an "electrical reliability fund," to alleviate neighbors' concerns about stray voltage.

During oral arguments, the county conceded that it could not point to any concrete evidence of solar gardens causing stray voltage, but it argued that because solar gardens are a relatively new technology, its concerns are justified even without concrete evidence. To the extent the county's concerns were reasonable, despite the lack of concrete evidence, U.S. Solar's agreement to test for stray voltage, to pay to mitigate any stray voltage created by the solar garden, and to create an "electrical reliability fund" eliminated any conflict with the zoning ordinance's standards.

***6** U.S. Solar has met its burden to demonstrate that the county's reasons for denying its application for a CUP had no factual basis in the record. *See Yang*, 660 N.W.2d at 832. Furthermore, U.S. Solar met its burden to propose conditions that would mitigate any potential concerns arising out of its solar garden. *See RDNT*, 861 N.W.2d at 78. Accordingly, the county's denial of the CUP due to concerns about stray voltage is arbitrary and capricious.

III. The county's decision to deny U.S. Solar's request for a CUP due to concerns about property values is arbitrary, capricious, and unreasonable.

U.S. Solar also argues that the county's rationale for denying the CUP based on concerns that the proposal would diminish neighboring property values is not a legally valid reason to deny a CUP and is not factually supported.

A. Legal Reason for Decision

The county cites to *Perschbacher v. Freeborn Cty. Bd. of Comm'rs*, 883 N.W.2d 637 (Minn. App. 2016), to support its argument that a decrease in property values is a valid basis to deny a CUP. But the zoning ordinance at issue in that case stated that a CUP could be granted if it would "not substantially diminish and impair property values within the immediate vicinity." Freeborn County, Minn., Zoning Ordinance, art. VIII, § 42–614, subd. 1; *see Perschbacher*, 883 N.W.2d at 639. No such language exists in the Carver County Zoning Ordinance. U.S. Solar argues that, because the zoning ordinance does not specifically mention property values, the county may not deny a CUP on the basis that it reduces property values. We need not resolve this dispute because, even assuming that decreased property values are a sufficient legal basis to deny a CUP under the Carver County Zoning Ordinance, the record does not support that the solar garden will decrease surrounding property values.

B. Factual Basis for Decision

This court has previously reversed the denial of a CUP based on a decrease in property values where the county did not make an express finding that the project would decrease property values. *See City of Barnum v. County of Carlton*, 386 N.W.2d 770, 775 (Minn. App. 1986). This court explained:

> The board's statement that "it appears that" the treatment facility "would substantially diminish and impair property values" is an insufficient explanation for its decision. The board gives no factual basis for its findings. It merely recites the language of the zoning ordinance. It does not even state that the board expressly determined that property values would be impaired; it merely states that "*it appears that*" they would be. This failure by the county board to make sufficient findings in support of its decision makes this court's task highly impractical. There is no way to determine from the record before this court what the county board's thinking was when it denied the conditional use permit.

Id. The court declined to remand the issue for further findings from the county, stating that, "Remanding this case for findings would be unfair to appellants because of the risk that any findings made by the county board at this late date would merely rationalize their previous decision." *Id.* at 776.

Here, the county's order similarly finds that the solar garden "*may* decrease surrounding property values." (Emphasis added.) This finding is insufficient to support the county's decision to deny the CUP, and the record does not contain evidence to support a finding that the solar garden will decrease property values.

*7 During the hearings on U.S. Solar's application, only one neighbor suggested that the solar garden "will have a negative impact on [their] property values." The neighbor did not explain the basis for this assertion. Beyond this single comment about the impact of this particular proposed solar garden on property values, the record also contains comments about other solar garden projects that were under consideration in Carver County. For example, at the February 13 hearing, an individual submitted letters from two realtors. The first realtor, who recently sold a property near a solar garden, wrote that the solar garden was a drawback for some buyers. The second realtor wrote that disclosing the existence of a solar garden caused "many buyers" to no longer consider a property that he was selling and opined that being next to a solar garden decreased property values. But, notably, neither realtor wrote that the properties they were selling sold for less than they otherwise would have because of the solar gardens, or pointed to any actual examples of a decrease in property values.

In contrast, U.S. Solar submitted two resources to support its position that the solar garden would not impact property values. The first is a citation to a study finding that solar gardens across nine states[2] did not negatively affect surrounding property values. The second is an article from the Chisago County Press indicating that, according to the Chisago County Board, a 1,000-acre solar garden, roughly 100 times the size of the solar garden at issue in this case, did not affect neighboring property values. Although the county was not required to credit these resources, the county had no concrete evidence to the contrary. The comments about potential decreases in property values do not rise above the level of general concern and speculation and are insufficient to support denial of the CUP.

Because the record does not support the county's factual basis for denial of the CUP, we reverse the county's decision and remand with directions that the county issue the CUP subject to reasonable conditions.

Reversed and remanded.

All Citations

Not Reported in N.W. Rptr., 2019 WL 1320571

Footnotes

1 We note that U.S. Solar asserted during oral arguments that the statement was taken out of context, but the transcript of that hearing is not a part of the record in this case.

2 We note that during the February 13 hearing, the study is referred to as the "North Carolina Study," and a member of the public states that the study focuses primarily on North Carolina.

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