STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0637

In Re the Matter of the Application of:
Kathy Lawrence for a Conditional Use Permit.

Filed February 24, 2009
Affirmed
Shumaker, Judge
Dissenting, Kalitowski, Judge

Lake County District Court
File No. 38-CV-07-459

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Considered and decided by Stauber, Presiding Judge; Kalitowski, Judge; and Shumaker, Judge.

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

SHUMAKER, Judge

Appellant Lake County Planning Commission denied respondent Kathy Lawrence's application for a conditional use permit to allow her to kennel 12 sled dogs, finding that the dogs would "create potential noise problems" and that a kennel was not a proper use of land in the area. The district court reversed and the commission appealed. We affirm.

FACTS

Respondent Kathy Lawrence lives on 15.91 acres in a platted subdivision in Lake County known as Sugarloaf Highlands Plat, land that is zoned Forest Recreational (FR). She is a full-time resident in the 19-lot subdivision, and according to the record the only adjacent lots are privately owned but undeveloped. The lots in the subdivision are large, ranging in size from 10 acres to 30 acres. Although the FR zone permits homeowners to keep up to three dogs on the property, if four or more dogs are kept that use is classified as a "kennel," for which a conditional use permit (CUP) is required.

Wanting to keep 12 Alaskan Husky sled dogs on her land, Lawrence applied to the Lake Country Planning Commission for a CUP in April 2007. Lawrence stated in her application that the dogs would be kept "out of view from the road and unnoticed by our neighbors." She further indicated that the dogs "are not your average dog they are well trained and rarely bark. However, they do bark when we feed them and when we hook them up for a run. A few times throughout the day they do a group howl which sounds like a group of wolves." And she pointed out that "[a] land owner about a half mile away has a kennel permit for eighty dogs."

On May 21, 2007, the commission held a public hearing on Lawrence's application. Before the hearing, some landowners sent letters to the commission regarding the application. Of the six letters, three favored a grant of the CUP, and three opposed. The letters in opposition expressed concerns about the noise the dogs would make, about health and safety, and about how a kennel would alter the character of the subdivision.

The commission also took testimony from Lawrence, and from various subdivision landowners, some of whom opposed the kennel. The principal reason for the opposition was the belief that the dogs would make noise. One opponent indicated that he had been associated with a couple of kennels and "[t]hey make a lot of noise." Another said he had experience with sled dogs and "they howl at least twice a day when you feed them and if someone comes in the yard, they howl." Yet another noted that he had resided "a few hundred feet from a kennel" and "believe me I was awakened more times than I care to say between midnight and 5 a.m." Two property owners stated that they would not have bought their lots had they known there might be a kennel in the subdivision, and one suggested that the presence of a kennel could have a negative impact on property values.

After the hearing, the commission denied Lawrence's application, making five findings:

> 1. The Planning Commission felt the request did not meet Article 25, Section 25.03 F. and G. because the kennel would create potential noise problems and the proposed use will be detrimental to the rightful use and enjoyment of other property in the immediate [vicinity].
> 2. The area around the kennel is a platted subdivision of 19 total lots which is not appropriate location for this type of use.
> 3. The landowners within this plat have a reasonable expectation that there will be homes and no noisy dog kennels.
> 4. Testimony from adjoining landowners stated that the proposed use will be noisy and alter the character of the area.

5. Planning Commissioner Linscheld stated personal experience living in close proximity to a kennel and having been awakened in the middle of the night; other normal uses that create noise normally do not wake you up in the middle of the night.

Lawrence appealed to the district court and moved to reverse the commission's denial. Ruling that the commission's denial of the CUP was "not supported by a rational basis," the court granted Lawrence's motion. The commission appealed.

D E C I S I O N

The commission argues that its denial of Lawrence's application for a CUP was not arbitrary or capricious and that it met the rational-basis test because (1) Lawrence's application failed to satisfy the requisite criteria under the county's ordinance; (2) the noise from the dog kennel would have a detrimental effect on the surrounding area; and (3) the kennel was an inappropriate use in a platted subdivision. Lawrence contends that the district court properly reversed the commission's denial because there was no actual evidence that these dogs would make noise that would be problematic, and that mere potential for noise is insufficient to provide a rational basis for the denial of a CUP.

We review the record de novo, "independent of the findings and conclusions of the district court." *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983). Because CUP denials are held to a less deferential standard than approvals, an applicant challenging the denial of a permit faces a lighter burden on appeal than one challenging a permit approval. *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) (citing *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 389 n.4 (Minn. 2003)). The permit applicant has the burden of persuading a reviewing court that the

reasons for the permit denial are either legally insufficient or have no factual basis in the record. *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982).

A reviewing court will uphold the denial of a CUP unless an independent review of the record shows that the decision was unreasonable, arbitrary, or capricious. *Schwardt*, 656 N.W.2d at 386. A denial is arbitrary when the evidence presented to the municipal governing body establishes "that the requested use is compatible with the basic use authorized within the particular zone and does not endanger the public health or safety or the general welfare of the area affected or the community as a whole." *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969). Accordingly, the reasonableness of the denial of a CUP is determined with reference to the applicable ordinance. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981). And denial of a land-use permit is not arbitrary when at least one of the supporting reasons provides a rational basis for the denial. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997).

Under Minn. Stat. § 394.301, subd. 1 (2008), a county may designate certain "land development activities" as conditional uses, for which special permits are required. Minn. Stat. § 394.22, subd. 7 (2008), states:

> "Conditional use" means a land use or development as defined by ordinance that would not be appropriate generally but may be allowed with appropriate restrictions as provided by official controls 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.

Lawrence does not contend that her proposed use is permitted without a CUP.

A county may grant a CUP upon the order of the planning commission. Minn. Stat. § 394.301, subd. 2. Because a CUP is not granted as a matter of right, the planning commission may weigh several factors, including noise that might affect public health, safety, or general welfare of the community. *Zylka*, 283 Minn. at 195, 167 N.W.2d at 49.

Lawrence's land is zoned FR. Lake County's zoning ordinance lists all permitted uses of the land, noting that a conditional use permit is required for uses other than those listed. Lake County, Minn., Land Use Ordinance #12, §§ 9.02, 9.03 (May 26, 2006). Dog kennels consisting of "any structure . . . on which four (4) or more dogs over three (3) months of age are kept or raised" are not a permitted use and require conditional use permits. *Id.* at § 3.47. Lake County's conditional use section states:

> With the exception of the North Shore Management Zone which allows less flexibility, any use not specifically permitted or prohibited within a district may be allowed as a conditional use when it can be regulated and controlled in its proposed location so as to preserve the stated general purpose of the district beyond the location of the use and not unreasonably interfere with the development of the permitted uses listed in the district. Any such conditional use may be permitted only after a complete application for a Conditional Use Permit has been received by the Planning Commission and approved pursuant to the procedures and criteria of this Article.

Id. at § 25.00.[1] Lawrence's proposed use is neither specifically permitted nor prohibited.

[1] The zoning ordinance applied by the commission and the district court in this case became effective in May 2006. As a result of a resolution in December 2008 that is unrelated to the sections applicable to this case, some articles of the zoning ordinance were renumbered. For ease of reference, we have retained the numbering used in the parties' exhibits and the district court's decision.

Lake County's zoning ordinance, in specifying the criteria for conditional use permits, states:

> General Standards and Criteria: A Conditional Use Permit shall be approved by a majority vote of the Planning Commission upon written findings of fact that the following conditions have been complied with:
>
> . . . .
>
> F) The proposed use will not create potential health and safety, environmental, lighting, *noise*, signing, or visual *problems*.
>
> G) The proposed use or development will not be detrimental to the rightful use and enjoyment of other property in the immediate vicinity, nor substantially diminish or impair values within the vicinity.

Id. at .03 (emphasis added).

Four of the commission's five reasons for denial are based solely on the potential for noise problems. The fifth merely states that the use is not appropriate for this location, but this, too, is based on noise. During oral argument before this court, counsel for the commission explained that the location is inappropriate because it might cause noise, affecting Lawrence's neighbors. Lawrence argues, and the district court found, that there was no rational basis on which the commission denied her CUP application because there was no evidence that the admitted noise the dogs would make would constitute potential noise problems.

Under the criteria for granting a CUP in Lake County, the proposed use must "not create potential health and safety, environmental, lighting, *noise*, signing or visual *problems*." *Id.* at § 25.03(F) (emphasis added).

The key word in that provision is "problems." The word is not defined, but it would be unreasonable to suppose that the intent of the ordinance is that the commission could deny a CUP upon a finding merely that "noise" would occur from a particular use. Noise is ubiquitous in this world, whether it comes from airplanes flying low, snowmobiles in recreational areas, lawnmowers and other yard-maintenance equipment, motor vehicles using the roads, or animals acting as animals do. But a noise "problem" connotes something beyond the sounds that occur, perhaps necessarily, as attributes of the reasonable uses of property and the reasonable activities in which people engage. To comport with common sense, the noise "problem" addressed by the ordinance connotes excessive noise, or prolonged noise, or noise that occurs at times when people should not be expected to endure it, or unnatural noise, or noise designed to annoy, noise that truly can be said to be an unwarranted and unjustified assault on the sense of hearing. There must be a type or degree or extent of noise that would be concretely detrimental to the neighbors' rightful use and enjoyment of their properties.

The commission read Lawrence's application and heard her testimony. She alleged that these sled dogs "rarely bark," but she conceded that they do so at times and they howl as well. Landowners in opposition to the CUP also said that the dogs bark and howl. One opponent testified that he lived a few hundred feet from a kennel and had been awakened by dogs between midnight and 5 a.m. He did not specify the type of dog kenneled there, nor did anyone suggest that Lawrence's dogs would be kenneled within a few hundred feet of anyone's residence. At the close of the hearing, the commission was

left with evidence of two facts: (1) Lawrence's 12 dogs would likely make some noise, and (2) some neighbors did not want a kennel in the subdivision.

A commission is "not required to ignore neighborhood concerns in making its decision, nor does it bear the responsibility of showing that the concerns are unfounded." *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 261 (Minn. App. 2004). But neighborhood opposition alone is not enough to support the denial of a CUP. *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712, 718 (Minn. 1978). Although the planning commission here was permitted to credit the neighborhood opposition under *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988), it was not permitted to convert that opposition into a basis for finding that the conceded noise would have the potential for "noise problems." *Yang*, 660 N.W.2d at 833. *Yang* held that a city "may consider neighborhood opposition only if based on concrete information" and reversed the denial of a CUP because "the findings [did] not establish a causal link" between the facts asserted and finding that it claimed to support. *Id.* at 833-34.

Lake County's zoning ordinance section 3.47 permits the keeping of three dogs. On this record, the commission could conclude that three sled dogs would also make noise by barking and howling. That noise would be permissible. Inferentially, 12 dogs would be noisier than 3, but the record lacks evidence that the noise of 12 dogs would constitute the kind of "problem" the CUP ordinance is designed to address. There was no evidence of the volume of the noise that could be expected, or its frequency, or its timing, or its duration, or its range, or that it would likely be any more disturbing than noises emitted from machines and vehicles operated in the area. We do not suggest that the

commission must engage in a circular approach whereby it has to first allow the use and then measure its propriety. Rather, we conclude that the commission must comply with its ordinance and must be able to point not just to noise but to a potential "noise problem." The commission has not done so and thus lacks a rational basis grounded in fact for denying Lawrence's application.

Although the dissent indicates that the commission based its decision on *evidence* as to the frequency and amount of noise that would occur, the record shows only neighbors' complaints and speculation about dog noise in general. Barking from an unspecified breed of dog in an unspecified kennel without a disclosure of the proximity of that kennel to the complainant's residence is not, in our view, *evidence* that could provide a rational basis for denial of the CUP. Rather, it is conjecture that thinly veils the true basis for the denial, namely, neighbors' opposition.

We also note that "[e]vidence that a municipality denied a conditional use permit without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary." *Trisko,* 566 N.W.2d at 357. Lawrence made her application for a CUP that would allow her to keep 12 sled dogs on her property. Although the commission heard about noise-mitigation possibilities during the public testimony, it did not explore any of them or impose any noise-mitigation requirements as conditions of granting the CUP. This fact, coupled with the absence of facts to provide a rational basis for its denial, compels us to conclude that the commission's denial was arbitrary, being based entirely on the opponents' speculation as to the effect the kennel might have.

Finally, neither Lake County nor lot owners in the subdivision lack remedies if Lawrence's dogs create a "noise problem," for municipal noise ordinances and nuisance laws exist for precisely such problems.

Affirmed.

KALITOWSKI, Judge (dissenting)

I respectfully dissent. I would affirm the decision of the Lake County Planning Commission (the commission) denying respondent Kathy Lawrence's request for a conditional use permit (CUP). Our standard of review mandates deference to the commission's decision, where, as here, there is evidence in the record to support its denial of the CUP.

The commission shall grant a CUP if "[t]he proposed use will not create potential health and safety, environmental, lighting, *noise*, signing or visual problems." Lake County, Minn., Zoning Ordinance, Art. 25.0, § 25.03(F) (emphasis added). Thus, it was appropriate for the commission to determine whether respondent's proposed kennel with 12 dogs would create a noise problem.

The commission held a public hearing and properly based its decision on evidence that the kennel would be a problem for nearby residents because of the frequency and amount of noise that would result. Specifically, the commission heard testimony that kenneled dogs often make noise between midnight and 5 a.m. And respondent admitted that the dogs would likely engage in a "group howl" a few times a day. In addition, the record indicates that respondent failed to propose any measures to mitigate the noise.

The Lake County Zoning Ordinance also states that the proposed use must not be "detrimental to the rightful use and enjoyment of other property in the immediate vicinity . . . ." Lake County, Minn., Zoning Ordinance, Art. 25.0, § 25.03(G). Respondent's land is one of 19 lots in a platted subdivision and is bordered by neighboring residences. Nearby landowners attended the hearing and some objected to the kennel because of

concerns about noise. And the owners of neighboring property testified to the same concerns, noting that in purchasing this land in a platted subdivision they did not contemplate living near a kennel. The commission's findings reflect these concerns as indicated by the comment of one of the commissioners that when a person purchases land in a platted subdivision "the expectation of un-intrusive regular noise is not an unreasonable expectation."

Because there was evidence in the record that a kennel with 12 dogs creates a noise problem that would interfere with neighboring landowners' use and enjoyment of their land, the commission's decision to deny the CUP was not arbitrary and capricious, and was supported by a rational basis.