STATE OF MINNESOTA
IN COURT OF APPEALS
A08-0581

Veit USA, Inc., et al.,
Relators,

vs.

Sherburne County, Minnesota, et al.,
Respondents.

Filed March 10, 2009
Reversed and remanded
Stauber, Judge

Sherburne County Board of Commissioners

Jack Y. Perry, Jason R. Asmus, Briggs and Morgan, P.A., 2200 IDS Center, 80 South Eighth Street, Minneapolis, MN 55402-2157 (for relators)

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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

STAUBER, Judge

In this certiorari appeal from respondent-county's denial of relator's application for a conditional use permit (CUP) allowing expansion of an aggregate mine, relator argues that (1) the county's discretion was limited by criteria in the relevant CUP ordinance as well as other caselaw-based considerations and (2) the county board's

findings were arbitrary and capricious. Because the decision was arbitrary and capricious, the findings were legally insufficient, and the county could have addressed its concerns by implementing conditions to the CUP, we reverse and remand.

FACTS

This case and companion cases portray an unusually contentious and litigious relationship between the parties. In 1993, following years of administrative proceedings and litigation, relator obtained zoning and CUP approvals and began operating a construction and demolition (C&D) landfill on a 28.9-acre parcel in Sherburne County (VONCO I). Activities at the site included demolition, reclamation, and disposal.

Beginning in 1997, relator began the process of site relocation. Again, after years of administrative proceedings and litigation, in 2002, relator was able to relocate VONCO I to a 160-acre parcel (the Anderson Property) also in Sherburne County. However, as part of litigation settlement in 2002, relator and Sherburne County entered into a "Stipulation of Settlement" (stipulation) wherein relator agreed to exchange the Anderson property for a comparable parcel owned by Xcel Energy, a site favored by the county. Like VONCO I, the new site (VONCO II) was also used for aggregate (gravel) mining, and the reclamation plan included a C&D landfill. The stipulation required the county to "promptly process VONCO's rezoning, CUP and variance applications relating to the New Parcel." The county complied.

When relator opened VONCO II on the 160-acre "New Parcel" in Becker Township, it was rezoned from agriculture to heavy industrial and a CUP was issued pursuant to the 2002 stipulation. Under the stipulation, the county agreed that it would

not rezone VONCO II to a less intensive zoning classification that would not allow continued operation of relator's facility. The stipulation also recognized that relator's anticipated acquisition of adjacent expansion parcels may result in additional rezoning, variances and CUPs:

> The parties recognize that VONCO's anticipated acquisition of adjacent parcels may be substantially delayed and, as such, VONCO may have to submit more than one request for the Heavy Industrial rezoning of related property *to be included in the New Parcel, including any adjacent parcel(s) owned by VONCO*, and there may be more than one request for a CUP and a variance. In this event, County will promptly act on these additional applications . . . .

(Emphasis added.) The stipulation did not specify which adjacent parcels were included, but the parties were aware that the new expansion parcels would be adjacent to the VONCO II facility.

In 2004, the county board timely approved another CUP allowing relator to exchange 40 acres of the VONCO II property for an adjacent 40 acres in order to square out the site.

In 2006, as anticipated in the 2002 stipulation, relator entered into a purchase agreement to acquire a 200-acre property adjacent to VONCO II (VONCO II expansion). The VONCO II expansion property was zoned for agricultural use, so it could not be used for aggregate mining without a CUP, and also could not be used to operate a landfill without a rezone and a separate CUP. In August 2007, relator submitted an application to rezone the VONCO II expansion property to heavy industrial, and also applied for CUPs to operate an aggregate mine and a landfill. The purpose of the VONCO II expansion is

to continue relator's aggregate mining easterly onto the newly acquired site, to fill the excavated mine pit with clean demolition debris, to cap the site with topsoil, and to return the property for other uses.

While relator was reconfiguring the site and acquiring additional VONCO II property, the City of Becker adopted a comprehensive land use plan in 2004. The city's plan included the VONCO II expansion parcel within the bounds of a planned expansion of the city. That same year Sherburne County updated its comprehensive land use plan, showing this site as "Urban Reserve." Both of these land use plans established goals and policies for future land use in the city and county. One of the overarching goals of the county's land use plan was to work with the townships and cities regarding development based on the needs identified by each local unit of government in their respective comprehensive land use plans. In October 2007, Becker Township adopted a comprehensive land use plan, which designates the VONCO II expansion site for industrial use.

From September 2007 to February 2008, several public hearings were held to discuss relator's separate rezoning and CUP applications for aggregate mining and operating a C&D landfill. The county planning commission ultimately recommended denial of the aggregate mining CUP to the county board. On March 11, 2008, the Sherburne County Board of Commissioners denied the CUP for the following reasons:

> 1. On a per acre basis, mining doesn't provide high wage employment opportunities to residents.
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> 2. The City of Becker's comprehensive land use plan identifies the affected property as Industrial Reserve which is

expected to be the area our Industrial Park expands into the future. Gravel mining operations are not permitted within the City's Industrial Park zoning district.

3. If gravel mining occurs on proposed site the city's . . . transportation routes are restricted [on Sherburne Avenue].

4. The current access to the 200 acre site is by easement over Xcel Energy's property . . . [and causes] visibility & other safety issues. City staff has spoken with [relator] about this as they were looking to relocate the access further east. Staff expressed concern . . . as the access easement was granted for farm equipment when the affected property was being farmed [rather than for] high volumes of semi traffic carrying full loads of gravel & debris. Staff asked [relator] to consider running all of their future truck traffic through their current Vonco II access which they said would **not** work for them.

5. The property is located adjacent to the proposed Xcel Energy Great River Woodland Trail which the City has received State bonding money to construct. Gravel mining operations create traffic, visibility, noise and odor issues for the future users of this trail system.

6. There is an existing power line easement owned by Xcel Energy that runs through the property . . . [The County knows of no] agreement regarding relocation of that easement or approval from Xcel Energy to mine within that easement.

7. [Relator] has not applied for wetland approvals as required through the MN Wetland Conservation Act for replacing up to 1.04 acres at a minimum 2:1 ratio . . . . [t]he County has not received a wetland replacement plan application. If the County's Wetland Technical Evaluation Panel denies the wetland replacement request, this would have a substantial impact as to the determination of this request.

8. Staff commented on the drawings that were submitted by [relator] on Sept. 14, 2007 that there are at least five holding ponds that will require excavation into the 200 ft setback line that [relator] is proposing. The proposed area for wetland replacement is located within the 200 ft setback. The

> County did not feel this met the setback the [proposal] had originally stated.
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> 9. No Restoration Plan has been submitted that would be an allowable use in the Agricultural District. The only end use [relator] has submitted is for a construction and demolition landfill which is not permitted in the Agricultural District.
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> 10. The applicant has not shown the proposed locations of the warehouse/maintenance and office buildings, the proposed septic system location or the proposed aboveground storage tank in the expansion area as requested by County Staff.

D E C I S I O N

Conditional use permits are

> zoning devices designed to meet problems that arise when certain uses, although generally compatible with the basic use classification of a particular zone, should not be permitted to be located as a matter of right in a particular area of that zone because of hazards inherent in the use itself or because of special problems which its proposed location may present.

Amoco Oil Co. v. City of Minneapolis, 395 N.W.2d 115, 117 (Minn. App. 1986) (citing *Zylka v. City of Crystal*, 283 Minn. 192, 195, 167 N.W.2d 45, 48 (1969)). By utilizing conditional use permits, "certain uses that may be considered desirable to the community, but which would not be authorized generally in a particular zone because of considerations involving public health, safety, or general welfare, may be permitted upon a proposed site depending upon the facts and circumstances of the particular case." *Id*. (citing *Zylka*, 283 Minn. at 195, 167 N.W.2d at 48-49)

A county's decision to grant or deny a CUP is quasi-judicial in nature and reviewable by writ of certiorari. *Bartheld v. County of Koochiching,* 716 N.W.2d 406,

411 (Minn. App. 2006). A county's quasi-judicial decision to grant or deny a CUP is independently reviewed by an appellate court to determine whether the county acted unreasonably, arbitrarily, or capriciously. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). Reasonableness is measured by examining whether the standards in the ordinance have been satisfied. *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982)). "A county's denial of a conditional use permit is arbitrary where the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met." *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003).

A county's stated reasons for denying a CUP are reviewed and a reversal is warranted "if the reasons are legally insufficient or if the decision is without factual basis." *Bartheld*, 716 N.W.2d at 411. Here, we believe that the county's findings are legally insufficient.

At oral argument before this court, each of the ten findings were discussed, but the restoration plan, finding number nine, was clearly the central issue. The restoration plan that relator proposed was to fill the mining pit created by aggregate removal with demolition debris through the operation of a C&D landfill on the site. This is consistent with the existing and adjacent VONCO II operation. But in order to have a C&D landfill on the expansion site, relator had to acquire at least five different approvals: a rezone, a separate CUP, an environmental assessment, a National Pollutant Discharge Elimination System (NPDES) permit, and approval from the Minnesota Pollution Control Agency (MPCA). Since numerous approvals were needed before the C&D landfill could be

implemented, relator noted that requiring the restoration plan – which might not occur until 20 years from now – to be approved prior to the mining CUP being granted was circular in nature. Relator did not deny that it must comply with a restoration plan, but rather argued that the county could condition its approval of the mining CUP on the county later approving the restoration plan.

Relator's argument relies heavily on *Trisko v. City of Waite Park*, 566 N.W.2d 349 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997). In *Trisko*, the city board denied a CUP to operate a rock quarry on the grounds that: (1) granting the permit would impede the normal and orderly development of the surrounding property; (2) utilities and drainage were inadequate in that area; (3) fumes, dust, and noise from the site could not adequately be controlled so they created a nuisance to development in the area; (4) there was no demonstrated need for the proposed use; (5) the proposed use was inconsistent with existing and future development in the area; and (6) denial of the permit preserves the land use policies of the city. 566 N.W.2d at 351–52. While each of these reasons facially appeared to comply with the terms of the CUP ordinance, this court determined 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." *Id*. at 357. This court reversed because the city's denial was unreasonable, arbitrary, and capricious.

Here, the county board did suggest conditions – 37 in all – that could be applied to the CUP had it been approved. Many of these suggested conditions were addressed in the board's findings denying the CUP. Approval of the CUP with the 37 conditions would

have allowed the county's concerns to be fully addressed. Following *Trisko*, and because the county could have approved the CUP with conditions, we find the denial unreasonable, arbitrary, and capricious. *See Scott County Lumber Co. v. City of Shakopee*, 417 N.W.2d 721, 727 (Minn. App. 1988) (reversing the city council's decision for legally insufficient reasons where city planner recommended granting the permit with 20 conditions dealing with dust, noise, and traffic, and appellant agreed to take all action necessary to meet the conditions), *review denied* (Minn. Mar. 23, 1988). Here, the CUP denial arguably leaves relator with property it acquired in good faith upon the 2002 stipulation and now cannot use.

Additionally, there are certain criteria for reviewing allegations of denials based upon arbitrariness.

First, while the county can deny a CUP "for reasons relating to the public health, safety, and general welfare" or for incompatibility with a city's land use plan, *Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982), it must "at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion." *City of Barnum v. Carlton County*, 386 N.W.2d 770, 775 (Minn. App. 1986) (quoting *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981)). In *Barnum*, this court held that the county acted arbitrarily when the county did not provide minimal reasons for denying the CUP for a sewage treatment plant beyond stating "it appears that" such a facility would "substantially diminish and impair property values." 386 N.W.2d at 775. Here, Sherburne County outlined its reasons for denial in

writing, but the findings were presented in a vague and conclusory fashion and all could be addressed as CUP conditions.

At oral argument, the county noted that one factor for denying the CUP was the changes in the comprehensive land use plans since VONCO II's CUP approvals in 2002 and 2004. Since the 2002 stipulation, the city of Becker and Becker Township have established comprehensive plans, and the county has revised its plan. Two of the changes outlined in the new and updated land use plans addressed employment goals and industrial zoning. The city of Becker adopted a goal for employment and wages on a per acre basis, and also designated the VONCO II expansion as an "industrial reserve."

The board's first finding stated that "[o]n a per acre basis, mining doesn't provide high wage employment opportunities to residents." This finding is mere speculation. There is no evidence on the record regarding wage or employment opportunities in the county generally, nor those that would be specifically created by the proposed expansion. There is also no evidence in the record to substantiate county's allegations regarding a lack of "high wage" employment opportunities. *See Trisko*, 566 N.W.2d at 356 (holding that the city acted arbitrarily when it based its denial on neighborhood speculation that the quarry could cause respiratory problems).

The board's second finding identifies the VONCO II expansion as an Industrial Reserve in the City of Becker where the city plans on expanding its industrial park. Since the city's plan does not allow gravel mining operations in that district, the county argues that granting the CUP would be inconsistent with the city's new comprehensive plan. But the city's comprehensive plan states that industrial reserves are "[a]reas that

are in agricultural use currently and provide expansion opportunities for employment and power generation uses as utility and road infrastructure is available to serve their needs." Based on the surrounding areas that are also zoned for "industrial reserve," it appears that the city simply intends for this land to be used for industrial not residential purposes, so using this particular parcel for aggregate mining does not seem incongruent with an "industrial reserve." *See Amoco*, 395 N.W.2d at 117 (stating that the city council improperly relied on the comprehensive plan's classification for a 24-hour gas and grocery store when denying the CUP because such a facility was a proper use). Furthermore, the city's comprehensive plan is not binding on the county's decision regarding the aggregate mining CUP, so it is irrelevant that county base their denial on this alleged incompatible use of "industrial reserve" land.[1]

Similarly, transportation, traffic, noise, and odor issues noted in the county's third, fourth, and fifth findings, to the extent such concerns were not addressed in VONCO II's

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[1] We note at least two companion cases arising from the VONCO II expansion. *Veit U.S.A. Inc. and VONCO Corporation v. Sherburne County*, No. 71-CV-08-610 (Minn. Dist. Ct. Nov. 19, 2008); *Veit U.S.A. Inc. and VONCO Corporation v. Sherburne County*, No. 71-CV-07-1855 (Minn. Dist. Ct. Sept. 5, 2008) [Opinions not available on Westlaw.] (Copies of these decisions were provided at oral argument by agreement.) In No. 71-CV-07-1855, the district court found that

> [t]he Board of Commissioners failed to adopt 'Findings and Determinations' denying VONCO's rezoning application . . . as required by Minn. Stat. § 15.99, subd. 2(a)." In No. 71-CV-08-610, the district court concluded that "the Board of Commissioners acted arbitrarily and capriciously in basing its decision on the Urban Reserve designation in the Sherburne County Comprehensive Plan . . . .

The district court granted VONCO's motion and remanded the matter to the board of commissioners for additional consideration consistent with the court's conclusions.

existing CUP, can be addressed as conditions to this CUP, as can the Xcel Energy power line, wetlands, setbacks, holding ponds, and structure locations.

Second, in the course of the public hearings, the county board admitted that not only does relator have the right to mine gravel, but the county also has a need for it. The county's own environmental assessment worksheet noted that "[m]ining activities may be conducted under the current Sherburne County agricultural zoning designation if a conditional use permit is granted. The Minneapolis-St. Paul metropolitan area is in short supply of gravel and aggregate."[2]

Third, the county did not consider the underlying 2002 stipulation. The 2002 stipulation contemplated that: (1) additional adjacent land would be acquired; (2) the purpose of acquisition was to expand and continue VONCO's current mining and landfill operations; and (3) the county would apply the same standards to the expansion parcel as were applied to the existing VONCO II site. Here, the VONCO II expansion parcel adjoins the existing VONCO II parcel to the east. The county knew relator's expansion intent when entering into the 2002 stipulation. The agreement stated that the county "will

[2] In 1998 the Minnesota Legislature formed an Aggregate Resources Task Force. 1998 Minn. Laws ch. 401, § 50, at 1818–19. In a report to the legislature in February 2000, the task force noted that "[i]f aggregate resources are not properly identified and managed, both the environment and the public will suffer detrimental consequences." In a special session in 2001, the legislature amended Minn. Stat. § 473.859, subd. 2, to require that local comprehensive plans address aggregate resources. *See* 2001 Minn. Laws 1st Spec. Sess. ch. 8, art. 2, §§ 73–74, at 2014–15. The statute currently reads: "A land use plan shall also include the local government's goals, intentions, and priorities concerning aggregate and other natural resources . . . ." Minn. Stat. § 473.859, subd. 2(d) (2008).

promptly act on these additional applications." By denying the CUP for this adjacent expansion parcel, the county ignored the clear purpose of the stipulation.

Fourth, the decision of the board appears arbitrary when examining the land uses surrounding the proposed expansion. The surrounding area includes: VONCO II's aggregate mine and C&D landfill, the Sherco coal-fired power plant, several Sherco ash ponds, the NRG Energy, Inc. Refuse Derived Fuel incinerator ash landfills, the Monticello Nuclear Generating Plant, and the Knife River cement plant. All are multi-acre sites which appear to be compatible with relator's present and expanded use.

Relator presents several other arguments that the county's discretion was limited in this matter, but because we agree that county board acted arbitrarily and its findings were legally insufficient, we need not reach these arguments.

Because the Sherburne County Board of Commissioners acted arbitrarily and capriciously in denying relator's CUP, we reverse and remand.

Reversed and remanded.