STATE OF MINNESOTA
IN COURT OF APPEALS
A08-1220

In the Matter of the Wetland Conservation Act
appeal filed for The Beard Group of a
Wetland Type/Boundary Decision, located in part of
Sections 36 and 25, T. 119N, R. 23W, Hennepin County.

Filed May 12, 2009
Reversed and remanded
Bjorkman, Judge

Minnesota Board of Water and Soil Resources

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Considered and decided by Bjorkman, Presiding Judge; Klaphake, Judge; and Randall, Judge.*

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

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

BJORKMAN, Judge

This certiorari appeal arises out of the Elm Creek Watershed Management Commission's rejection of relator's wetland delineation in connection with a proposed commercial and residential development in Hennepin County. The Board of Water and Soil Resources (BWSR) summarily denied relator's appeal of that decision. Because the BWSR did not follow the rule governing appeals, we reverse and remand.

FACTS

Relator The Beard Group is the developer of a proposed 640-acre project identified as Stones Throw, which includes several acres that are subject to Minnesota's Wetland Conservation Act, Minn. Stat. §§ 103G.222-.2372 (2008). The area of the proposed development at issue in this appeal, referred to as the "north sod fields," is former wetland that has been converted for sod farming through the use of "ditches, berms, equalizer pipes and pumps."

In January 2007, relator submitted a wetland delineation[1] report to the Elm Creek Watershed Management Commission, the local government unit (LGU) for wetlands in the area of the proposed development. Relator requested approval of the wetland boundaries for Stones Throw as identified in the report. The LGU approved most of the proposed delineation, with the exception of the north sod fields. Because the north sod fields have an "extremely disturbed nature," the LGU required relator to develop and

[1] A wetland delineation is a determination of the boundaries of a wetland. Minn. R. 8420.0110, subp. 52(D) (2007).

implement a monitoring plan "to determine if wetland hydrology conditions exist in the sod fields" before it could approve the delineation.

The LGU convened a Technical Evaluation Panel (TEP) pursuant to Minn. Stat. § 103G.2242, subd. 2a(b) (authorizing LGU to seek advice of the TEP in making a wetland boundary or type determination), to approve relator's monitoring plan and evaluate the results. The TEP approved relator's monitoring plan in March 2007.

In January 2008, relator produced an updated hydrology study, and the TEP met later that month to consider the additional information. On April 4, 2008, the TEP issued findings that "if the hydrology manipulation resulting from ditching, piping and pumping of the sod fields did not occur, normal circumstances would exist," and "[u]nder normal circumstances, the sod fields on Stones Throw would be considered wetlands." The TEP recommended that the north sod fields, based on normal circumstances, be delineated as protected wetlands.

The LGU adopted the TEP's findings at its regular meeting on April 9. Because relator had not received notice that its proposed delineation was on the agenda for that meeting, relator asked the LGU to reconsider the issue at its next meeting. Relator also requested a final wetland delineation consistent with the January 2008 hydrology study, in which the north sod fields were not delineated as wetlands. At its May 14 meeting, the LGU reconsidered its adoption of the TEP's findings but ultimately reaffirmed its decision. At that same meeting, the LGU denied relator's delineation of the north sod fields.

Relator appealed the LGU's decision to the BWSR. The BWSR denied relator's appeal without conducting a hearing. This certiorari appeal follows.

D E C I S I O N

The BWSR's decision is a contested case for purposes of judicial review and is governed by Minn. Stat. §§ 14.63-.69 (2008). *See* Minn. Stat. § 103G.2242, subd. 9(d); *Board Order, Kells (BWSR) v. City of Rochester*, 597 N.W.2d 332, 336 (Minn. App. 1999).

> In a judicial review [of a contested case], the court may affirm the decision of the agency or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the petitioners may have been prejudiced because the administrative finding, inferences, conclusion, or decisions are:
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> (a) in violation of constitutional provisions; or
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> (b) in excess of the statutory authority or jurisdiction of the agency; or
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> (c) made upon unlawful procedure; or
>
> (d) affected by other error of law; or
>
> (e) unsupported by substantial evidence in view of the entire record as submitted; or
>
> (f) arbitrary and capricious.

Minn. Stat. § 14.69. We review an agency's factual findings in the light most favorable to the agency's decision and do not reverse them if they are reasonably sustained by the evidence. *White v. Metro. Med. Ctr.*, 332 N.W.2d 25, 26 (Minn. 1983). But we are not bound by the agency's legal determinations. *St. Otto's Home v. Minn. Dep't of Human Servs.*, 437 N.W.2d 35, 39-40 (Minn. 1989).

Relator argues that the BWSR's decision should be reversed because the BWSR did not comply with the appeal procedures required by the applicable rules.[2] The BWSR's appeal function is governed by Minn. R. 8420.0250, subp. 3 (2007), which requires the BWSR to first determine whether to grant the petition and consider the appeal on its merits. The rule directs the BWSR to grant the petition and consider the appeal within 30 days after receiving the petition "unless the appeal is deemed meritless, trivial, or brought solely for the purposes of delay." Minn. R. 8420.0250, subp. 3. If the BWSR grants the appeal petition, the rule provides that

> the [LGU] shall forward to the board the record on which it based its decision. The board will make its decision on the appeal after [a] hearing. . . . When the [LGU] has made formal findings contemporaneously with its decision and there is an accurate verbatim transcript of the proceedings and the proceedings were fairly conducted, the board will base its review on the record. Otherwise it may take additional evidence, or remand the matter.

Id.

Here, the BWSR departed from the procedures prescribed by the rule, opting to decide the merits of relator's appeal without affording a hearing and based on evidence outside of the record. It is undisputed that the BWSR's decision addresses the underlying facts and relator's arguments and denies the appeal on its merits. But the decision does

[2] Relator also argues the LGU's adoption of the TEP's findings at the April 9, 2008 meeting violated its due-process rights because the LGU provided no notice of the meeting to relator and the issue was not listed on the public meeting agenda. "The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner." *Mathews v. Eldridge*, 424 U.S. 319, 333, 96 S. Ct. 893, 902 (1976) (quotation omitted). Relator was given an opportunity to be heard in a meaningful time and manner when the LGU reconsidered its adoption of the TEP's findings, at relator's request, at the May meeting.

not include a determination that relator's petition was "meritless, trivial, or brought solely for the purposes of delay." Absent such a finding, the rule required the BWSR to accept the appeal, conduct a hearing, and arrange for the introduction of additional evidence, if necessary.

Respondents contend that the BWSR's decision complied with the rule because it "addressed each of the three stated grounds for appeal, stated the reason that each ground was without merit and denied the appeal." We disagree. The BWSR must initially determine, in every case, whether to grant the petition. Unless the BWSR decides the appeal is "meritless, trivial, or brought solely for the purposes of delay," the BWSR must hear the appeal. Minn. R. 8420.0250, subp. 3. With respect to relator's petition, the BWSR failed to make the requisite initial determination. And we decline respondents' invitation to construe the BWSR's decision on the merits as an implicit determination that relator's appeal was meritless. *See Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421, 98 S. Ct. 694, 700 (1978) ("[T]he term 'meritless' is to be understood as meaning groundless or without foundation, rather than simply that [a party] has ultimately lost [its] case."). Absent an express finding that relator's petition should be summarily dismissed on one of the three grounds set out in the rule, the BWSR was obligated to accept the appeal and conduct a hearing. The BWSR's failure to follow this clear mandate constitutes unlawful procedure.

Moreover, the BWSR based its decision on evidence outside the record without conducting a hearing and formally accepting additional evidence. The BWSR's finding that "correspondence from the U.S. Army Corps of Engineers [(the Corps)] St. Paul

District, dated June 18, 2008[,] reaffirms the [LGU's] decision that artificial pumping is not part of the normal circumstances for this site," is based on an e-mail that a BWSR water-management specialist solicited after the LGU made its decision. The communications between the BWSR and the Corps occurred approximately one month after relator submitted its appeal to the BWSR. Relator had no opportunity to review or comment on the e-mail. Minn. R. 8420.0250, subp. 3, authorizes the BWSR to take additional evidence when it grants an appeal petition and affords the parties the opportunity to be heard. Under the circumstances of this case, the BWSR's consideration of evidence outside of the record constitutes unlawful procedure.

Because we conclude that the BWSR's decision was based on unlawful procedure, we decline to address relator's other arguments.

Reversed and remanded.