STATE OF MINNESOTA
IN COURT OF APPEALS
A10-378

In the Matter of the Wetland Conservation Act appeal
filed for Tim Robertson with Duluth Ready Mix, Inc.
of a Replacement Plan decision, located in part of Sections 7
and 8, T.51N, R.16W, Grand Lake Township, St. Louis County

Filed December 28, 2010
Affirmed
Wright, Judge

Minnesota Board of Water and Soil Resources

Jeffrey W. Coleman, J.R. Toren, Stephen F. Buterin, Coleman, Hull & Van Vliet, P.L.L.P., Minneapolis, Minnesota (for relator Duluth Ready Mix)

Lori Swanson, Attorney General, Thomas K. Overton, Assistant Attorney General, St. Paul, Minnesota (for respondent Minnesota Board of Water and Soil Resources)

Considered and decided by Wright, Presiding Judge; Ross, Judge; and Larkin, Judge.

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

WRIGHT, Judge

St. Louis County denied relator's wetland-replacement-plan application after concluding that it did not meet the sequencing requirements of Minn. R. 8420.0520 (2009) because the use of the property was not authorized under the local zoning ordinance. Relator appealed to the Minnesota Board of Water and Soil Resources (BWSR), which denied the appeal as "without sufficient merit." Relator now appeals from BWSR's ruling, arguing that BWSR's denial of the requested relief was erroneous. We affirm.

FACTS

Relator Duluth Ready Mix, Inc. (DRM), is a family-owned borrow pit[1] in Saginaw that has been in operation since the early 1940s. In July 2008, the Minnesota Department of Natural Resources (DNR) issued a Cease and Desist Order directing DRM to immediately cease any activity that drained, filled, or excavated the wetland located on a portion of DRM's property. The DNR ordered DRM to either restore the identified areas of impact or obtain approval of an after-the-fact wetland-replacement plan. DRM submitted a wetland-replacement plan to St. Louis County, the local government unit. St. Louis County's Wetland Technical Advisory Committee determined that DRM failed to meet the sequencing standards of the Wetland Conservation Act (the Act) because the wetland impacts were not associated with an authorized use of the property. The advisory committee denied the wetland-replacement plan on this ground.

[1] A borrow pit is a gravel pit used to excavate fill material for use at another site.

DRM appealed that decision to the director of the St. Louis County Planning and Development Department, arguing that the advisory committee erred by determining that DRM's borrow pit was not an authorized use of the property. The advisory committee interpreted the zoning ordinance to require a conditional-use permit or some other authorization. DRM countered that it had a "grandfathered" right to continue its nonconforming use of the property because its use predated the zoning ordinance. According to DRM, this "grandfathered" right constituted "other authorization" under the zoning ordinance. The director rejected DRM's argument and affirmed the advisory committee's decision. DRM appealed the director's decision to the St. Louis County Planning Commission, again arguing that the zoning ordinance did not require DRM to obtain a conditional-use permit because it had a "grandfathered" right. The planning commission conducted a public hearing and unanimously affirmed the advisory committee's decision.

DRM appealed to BWSR, arguing that St. Louis County erred by determining that DRM needed to acquire a conditional-use permit. BWSR denied DRM's appeal without a hearing, concluding that St. Louis County's decision was complete and in full accordance with the sequencing requirements of Minn. R. 8420.0520 and that DRM's appeal was "without sufficient merit." This appeal followed.

D E C I S I O N

DRM argues that, because its appeal had ample legal and factual support, BWSR erred by concluding that DRM's appeal petition was "without sufficient merit." DRM contends that BWSR was required to accept the appeal and conduct a hearing. Because

DRM's appeal contested St. Louis County's zoning determination, an issue beyond BWSR's authority to review, BWSR asserts that its denial of DRM's appeal was proper.

BWSR's decision is subject to certiorari review under Minn. Stat. § 14.69 (2008). Minn. Stat. § 103G.2242, subd. 9(d) (2008); *Board Order, Kells (BWSR) v. City of Rochester*, 597 N.W.2d 332, 336 (Minn. App. 1999). We, therefore, review the record to determine whether BWSR's decision is the product of an unlawful procedure, affected by an error of law, unsupported by substantial evidence, or arbitrary or capricious. Minn. Stat. § 14.69. An agency decision generally enjoys a presumption of correctness and will not be reversed unless the party challenging the decision establishes a statutory basis for doing so. *City of Moorhead v. Minn. Pub. Utils. Comm'n*, 343 N.W.2d 843, 849 (Minn. 1984) (stating burden of proof); *CUP Foods, Inc. v. City of Minneapolis*, 633 N.W.2d 557, 562 (Minn. App. 2001) (stating presumption), *review denied* (Minn. Nov. 13, 2001). Statutory interpretation presents a question of law, which we review de novo. *In re Application for PERA Police & Fire Plan Line of Duty Disability Benefits of Brittain*, 724 N.W.2d 512, 516 (Minn. 2006). But we afford deference to an agency's interpretation of its rules. *Minn. Ctr. for Envtl. Advocacy v. Comm'r of Minn. Pollution Control Agency*, 696 N.W.2d 95, 100-01 (Minn. App. 2005).

Administrative agencies, such as BWSR, are "creatures of statute" and have "only those powers given to them by the legislature." *In re Hubbard*, 778 N.W.2d 313, 318 (Minn. 2010). To determine the extent of those powers, we first look to the plain language of the authorizing statute. *ILHC of Eagan, LLC v. County of Dakota*, 693 N.W.2d 412, 419 (Minn. 2005) ("The touchstone for statutory interpretation is the plain

meaning of a statute's language."); *see also* Minn. Stat. § 645.08(1) (2008) (providing that words are construed according to their common usage). An agency's authority may be either expressly stated in the statute or implied from the expressed powers. *Hubbard*, 778 N.W.2d at 318. But if the statutory language leaves any uncertainty as to an agency's authority, we resolve that uncertainty "against the exercise of such authority." *In re Qwest's Wholesale Serv.*, 702 N.W.2d 246, 259 (Minn. 2005).

St. Louis County made two determinations regarding DRM's wetland replacement plan application: (1) that DRM failed to comply with the local zoning ordinance and must acquire a conditional-use permit to bring its property into compliance; and (2) that, because DRM failed to comply with the zoning ordinance, it failed to meet the sequencing requirements of the Act. In its appeal to BWSR, DRM asserted error only as to St. Louis County's determination regarding the zoning ordinance. Because only the second determination regarding the sequencing requirements of the Act falls within the scope of BWSR's statutory authority, BWSR argues, it denied the requested relief.

A local government unit cannot approve a wetland-replacement plan unless the applicant demonstrates that the activity impacting the wetland complies with the five sequencing principles prescribed by the rule. Minn. R. 8420.0520, subp. 1. Under the first sequencing requirement, the activity must avoid impacts that may destroy or diminish the wetland. *Id.* Among the necessary considerations for the local government unit when determining compliance with this requirement is "the extent to which proposed activities are consistent with . . . land use plans, zoning, and comprehensive plans." Minn. R. 8420.0515, subp. 10 (2009).

Review of a wetland-replacement-plan decision is within BWSR's statutory authority. Minn. Stat. §§ 103B.101, subd. 10, 103G.2242, subd. 9 (2008). But DRM did not assert in its appeal to BWSR that St. Louis County misapplied the Act or the sequencing requirements.[2] Rather, DRM asserted that St. Louis County's decision "was arbitrary and capricious and was the result of an error in fact and law with respect to *the need for borrow pit permits*." (Emphasis added.) When BWSR requested additional information in support of DRM's appeal, DRM did not assert any other basis for relief. BWSR correctly concluded that the rules prohibit a local government unit from "considering or approving a wetland replacement plan application unless the government unit finds that the applicant has demonstrated the activity impacting a wetland has complied with the sequencing principles." *See* Minn. R. 8420.0520, subp. 1. Because St. Louis County complied with the Act and the sequencing requirements, BWSR determined that DRM's appeal was "without sufficient merit."

DRM maintains that BWSR erred by denying DRM's appeal petition without granting a hearing or deciding the zoning issue on the merits. This argument is unavailing because BWSR lacks statutory authority to review St. Louis County's zoning

[2] DRM argues that the sequencing requirements, and particularly the "avoidance" requirement, should apply only to proposed or future activity, not after-the-fact wetland impacts, because an impact is necessarily unavoidable if it has already occurred. Because this argument is raised for the first time in DRM's reply brief, we decline to address it. *See* Minn. R. Civ. App. 128.02, subd. 4 (stating that [t]he reply brief must be confined to new matter raised in the brief of the respondent"); *McIntire v. State*, 458 N.W.2d 714, 717 n.2 (Minn. App. 1990) (stating that issues not addressed in appellant's principal brief are "waived and cannot be revived by addressing them in the reply brief"), *review denied* (Minn. Sept. 28, 1990); *see also Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988) (stating that an appellate court generally will not consider matters not argued to and considered by the district court).

determination. The Act does not expressly grant BWSR statutory authority to review zoning decisions that form the foundation of the local government unit's application of the wetland-replacement rules. Under its rules, BWSR "shall affirm the local government unit's decision if the local government unit's findings of fact are not clearly erroneous [and] if the local government unit correctly applied the law to the facts . . . ." Minn. R. 8420.0905, subp. 4(G) (2009). The issues that are expressly appealable to BWSR relate directly to wetlands and to the Act. Minn. Stat. § 103G.2242, subd. 9 (listing as appealable "a replacement plan, exemption, wetland banking, wetland boundary or type determination, no-loss decision, or restoration order"). Implied authority also cannot be derived from the Act's statutory language. The Act limits BWSR's appellate authority to wetland decisions while explicitly reserving for local government units, such as St. Louis County, the right to determine whether an applicant's wetland impacts are consistent with local zoning requirements. Minn. R. 8420.0515, subp. 10. Any putative exercise of implied authority would contravene the St. Louis County zoning ordinance, which provides that the board of adjustment shall have the *exclusive* authority to hear and decide appeals from the county's zoning determinations; and all board of adjustment decisions are appealable to the district court in the county where the land is located. St. Louis Cnty. Ord. No. 46, Art. X, §§ 6.02(A), 6.03(E); *see also* Minn. Stat. § 394.27 (2008) (providing statutory authority for boards of adjustment).

BWSR is authorized to hear appeals from wetland-replacement-plan decisions, but it has neither express nor implied authority to review a county zoning determination. *See* Minn. Stat. § 103G.2242, subd. 9. To obtain the relief sought, DRM's options were to

appeal the zoning determination to the St. Louis County Board of Adjustment or, if necessary, to seek a declaratory judgment in district court. Because DRM's appeal petition failed to assert a claim within BWSR's authority to review, BWSR did not err by denying DRM's appeal petition as "without sufficient merit."

Affirmed.