STATE OF MINNESOTA
IN COURT OF APPEALS
A10-1111

Charles Kotten,
Relator,

vs.

Brown County Board of Commissioners,
Respondent.

Filed February 8, 2011
Affirmed, motion granted in part
Minge, Judge

Brown County Board of Commissioners
File No. C-00242

Thomas L. Borgen, Nierengarten & Hippert, Ltd., New Ulm, Minnesota (for relator)

Scott T. Anderson, Ratwick, Roszak & Maloney, P.A., Minneapolis, Minnesota (for respondent)

Considered and decided by Lansing, Presiding Judge; Minge, Judge; and Crippen, 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

MINGE, Judge

In this certiorari appeal, relator Charles Kotten challenges respondent Brown County Board of Commissioners' (county board) denial of a conditional use permit (CUP) to operate a gravel pit.

As a procedural matter, Kotten moves this court to strike certain documents that the county board included in the record and to amend the county board's statements of proceedings and strike portions of the county board's brief based on those documents. We grant this motion with respect to all documents identified except uncontested photographs of area roads, the synopsis of the county board's meeting, and the letter from the chair of the county board to Kotten setting forth the board's decision. We also grant this motion with respect to those parts of the county's brief and statement of proceedings relying on stricken documents. We further grant the motion to strike references in the county's statement of proceedings regarding the personal knowledge of county board members regarding township roads, safety conditions, and dust problems in the area of the proposed gravel pit. We deny Kotten's motion to amend his statement of proceedings to add facts.

With regard to the merits, Kotten argues that the county board's decision denying his CUP application was improper because (1) he complied with all requirements in the amended Brown County Zoning Ordinance; (2) the decision is not supported by the record; (3) the board failed to identify conditions upon which it would grant a CUP; (4) the board failed to make sufficient findings of fact; and (5) the board's denial treated

Kotten differently from similar CUP applicants. Based on the record and briefing after excluding the stricken documents and materials, we conclude that the county board's decision denying the CUP is supported by substantial evidence, and is not otherwise in violation of the law, and we affirm.

FACTS

The following facts are based on material that relator Charles Kotten does not dispute are properly part of the record or which we have accepted over his objection. In March 2010, Kotten applied to respondent Brown County Board of Commissioners for a CUP to operate an existing gravel mine (pit) that he had recently acquired. The gravel pit is located on land zoned Agricultural/Shoreland, and is near LADD Demolition and Aggregates (LADD), a gravel pit and demolition-debris landfill operated by another business. The Brown County Planning and Zoning Commission (planning commission) held three public hearings on Kotten's CUP application. At each of the hearings, individuals from the area attended to express opposition to granting a CUP to Kotten. Specifically, the individuals voiced concerns about large trucks generating dust in the surrounding areas; increased truck traffic creating hazardous conditions on the township roads; and the weight and wear and tear of the trucks on township roads. Kotten asserted that operation of his gravel pit would result in only four to eight additional trucks on township roads each day, that he would take measures to suppress the dust and insure responsible driving, and that given the existing truck traffic, his additional trucks would not have a material, additional adverse effect on dust, safety, or the roads.

At the first public hearing, the planning commission indicated that it wished to see more detailed maps and a plan to control dust, and tabled the application to allow Kotten to produce the requested documents. Following the hearing, Kotten hired an engineering firm to create maps, a soil and sediment control plan, and a dust and noise control plan. The planning commission considered Kotten's CUP application in light of the additional information at the second public hearing. Following a lengthy discussion regarding neighbors' concerns, the planning commission again tabled the matter to allow relator and the county staff to develop additional conditions to address some of the community concerns. Prior to the third and final planning commission hearing, Kotten agreed to make reasonable efforts to negotiate in good faith with LADD to reach an agreement "on the amount of traffic on nearby roads." At the last hearing on May 17, 2010, the planning commission voted unanimously to recommend approval of the CUP to respondent Brown County Board of Commissioners.

The county board held a meeting on May 25, 2010. Approximately fourteen community members attended the meeting with respect to Kotten's CUP application, and four individuals expressed concern that the additional truck traffic generated by Kotten's gravel pit would result in more dust in the nearby residential areas and traffic hazards/congestion on township roads. In addition, the Brown County Sheriff testified that he believed that granting Kotten's CUP presented a safety issue with regard to the narrow and winding township roads. Two officials of the township in which the gravel pit and affected roads are located opposed the CUP on the basis that additional gravel

trucks would cause increased damage and stress to the township roads. At the end of the meeting, the county board voted to deny Kotten's CUP.

In June 2010, the county board sent a letter to Kotten providing the following reasons as bases for the denial of his CUP: "1. Traffic safety and congestion[;] 2. Excessive burden on existing township roads[;] 3. Additional truck traffic would not be sufficiently compatible with residences in the area[;] 4. Existing land uses, particularly residences nearby, would be adversely affected by the dust and noise caused by additional truck traffic." Kotten then petitioned this court for writ of certiorari, challenging the county board's denial of his CUP.

On November 9, 2010, ten days before the parties' oral argument in this appeal, Kotten filed a motion to amend the county board's statement of proceedings, to strike 18 documents that the board included in the record, and to strike those portions of the county board's brief and statements of the proceeding based on the offending documents. The county board filed a response on November 19, 2010, subsequent to oral argument. Kotten did not file a reply.

D E C I S I O N

I.

A. Motion - Timing

We first address Kotten's motion to amend the county board's statement of the proceedings and to strike. As an initial matter, the county board argues that Kotten's motion to amend the record and strike should be denied as untimely.

The decision of a county board to approve or deny a CUP is a quasi-judicial decision that this court reviews by writ of certiorari. *Big Lake Ass'n v. Saint Louis Cnty. Planning Comm'n*, 761 N.W.2d 487, 490 (Minn. 2009); *see Interstate Power Co. v. Nobles Cnty. Bd. of Comm'rs*, 617 N.W.2d 566, 574 n.5 (Minn. 2000) (providing that unlike decisions of cities, towns, and boards of adjustment, decisions of county boards are reviewable by writ of certiorari "because the legislature has not provided for judicial review of zoning decisions of county boards in the district court"). In decisions reviewable by certiorari, a relator must file a brief within 30 days after the decision-making body serves an itemized list of the contents of the record. Minn. R. Civ. App. P. 115.04, subd. 4. The advisory committee comment to the rule explains that a purpose of this provision is to defer briefing until the contents of the record are known to the parties. Minn. R. Civ. App. P. 115.04 2009 advisory comm. cmt. But notably, the rule does not specify any time limit on a party's motion challenging the contents of the record prepared by the decision-making body.

In *In re Livingood*, a certiorari appeal from a county board's decision denying a CUP, the county board filed a motion to supplement the record following oral argument in this court. 594 N.W.2d 889, 892 (Minn. 1999). The court of appeals denied the county board's motion on the basis that it was untimely and unjustified. *Id.* The supreme court, having determined the issue on other grounds, did not address the county's argument that the court of appeals wrongfully denied its motion, but noted, "At a minimum, it would have been more appropriate to motion the court of appeals to supplement the record at some point prior to oral argument." *Id.* at 896.

Here, the county board filed and served its itemized list of the contents of the record on July 26, 2010. Kotten filed his brief on August 30, and the county board filed its brief on October 4. Kotten then filed his motion to amend the record and strike 18 documents on November 8, about a month after the county board filed its brief. The deadline for the county board's response to Kotten's motion was one day *after* oral argument for the appeal, and Kotten had yet additional, post-oral-argument time for a reply. This delay presents a risk of confusion and abusive practice. If, as here, the motion is made after the opposing party has filed its brief, the adverse impact of the delay is apt to be substantial. However, here no claim of prejudice or abuse is alleged or is identifiable. Because Minn. R. Civ. App. P. 110.05 does not set forth a time limit for motions to modify the record, because the *Livingood* court indicated that such a motion should be made, "[a]t a minimum," prior to oral argument before this court, and because we are ultimately upholding the board's action without relying on the stricken material, we decline to deny Kotten's pre-oral-argument motion as untimely.[1]

B. Motion to Supplement and Delete the Statement of Proceedings

1. *Supplement*

Kotten moves to amend the record by including "several key facts" left out of his statement of the proceedings by mistake or simple omission. Minn. R. Civ. App. P. 110.05 provides that the appellate court may correct the record if anything "material" to either party is omitted by error or accident, or is misstated. *See also* Minn. R. Civ. App.

[1] For purposes of future practice, parties in certiorari appeals are urged to file motions to supplement the record or to strike promptly after the record documents are identified by the responsible party or the allegedly offending brief is filed.

P. 115.04, subd. 1 (stating that rules 110 and 111 apply "to the extent possible," for certiorari appeals).

Here, Kotten moves to amend the record to note additional facts and to reflect that he disputed certain facts at the planning commission and county board meetings. However, none of the additional facts he has requested to include are material. First, he moved to note that he disputed that there was a daycare in the area and that there was a blind intersection at 280th Avenue and 200th Street. But the existence of a dispute does not preclude the county board from considering and relying on these claimed circumstances. Kotten also moves to amend the record to indicate that the owner of LADD attended the May 17th planning-commission meeting and expressed a willingness to work with Kotten. But the county board did not find that Kotten failed to work with LADD, and the fact that LADD was willing to work with Kotten does not render the county board's reasons for denying Kotten's CUP legally insufficient or factually unsupported. Therefore, LADD's willingness to work with Kotten does not show that the county board's denial of Kotten's application was improper. *See Yang v. Cnty of Carver*, 660 N.W.2d 828, 832 (Minn. App. 2003) (providing that an applicant challenging a zoning authority's denial of a permit must show that the reasons for the denial are either legally insufficient or lacking a factual basis in the record).

In addition, Kotten moves to amend the record to show that the county zoning administrator initially told him that his proposed use could be grandfathered in. But because Kotten failed to challenge the need to apply for a CUP to the county board, this argument is waived on appeal, and the proposed additional information is not material to

the issues before us. *See In re Stadsvold*, 754 N.W.2d 323, 327 (Minn. 2008) (concluding that an issue was not properly before an appellate court when it had not been presented to or considered by the county board (citing *Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)). Lastly, Kotten moves to amend the record to show that the sheriff, who testified at the county board meeting regarding the winding and narrow nature of the township roads, was present to discuss an unrelated matter and was "pulled into the discussion" of Kotten's CUP by one of the community members. We note that the impromptu nature of the sheriff's testimony does not preclude the county board from considering or relying on it, and that there is no assertion that the sheriff was not competent to testify regarding the nature of the township roads.

In sum, a review of Kotten's motion to supplement in light of the pertinent issues on appeal indicates that the additional facts he wishes to include are not "material" to the outcome of the case.

2. *Disregard*

Kotten moves to disregard certain parts of the county board's statement of proceedings.[2] Specifically, Kotten moves this court to disregard all statements referencing the county board members' familiarity with township roads, safety concerns, and dust, on the basis that the members failed to state their opinions and observations orally or in writing at any time in the proceedings. The county board argues that it is entitled to rely on the county board's common knowledge of road conditions and safety

[2] A statement of the proceedings is a description of what occurred at a hearing or trial in situations where a transcript is not available. Minn. R. Civ. App. P. 110.03.

concerns, but does not dispute that the county board members failed to identify this personal knowledge at the May 25 hearing.

"The papers filed in the trial court, the exhibits, and the transcript of the proceedings, if any, shall constitute the record on appeal in all cases." Minn. R. Civ. App. P. 110.01; *see also* Minn. R. Civ. App. P. 115.04, subd. 1 (providing that in the context of certiorari appeals, references to "the trial court" shall be read as references to the decision-making body). Court rules require that in a certiorari appeal we review decisions being appealed based on the record below. Minn. R. Civ. App. P. 110.01; 115.04, subd. 1; *see also Amdahl v. Cnty. of Fillmore*, 258 N.W.2d 869, 874 (Minn. 1977) (providing that our review is based solely on the record before the decision-making body). In general, when a county board makes a quasi-judicial decision denying a permit, the reviewing court should confine itself to the facts and circumstances developed before that body. *Livingood*, 594 N.W.2d at 893 n.3; *see also Thiele*, 425 N.W.2d at 582-83 ("An appellate court may not base its decision on matters outside the record on appeal, and may not consider matters not produced and received in evidence below."). Procedural due process similarly requires that persons adversely affected by agency action know the evidence against them and have an opportunity to rebut the evidence. *Mathews v. Eldridge*, 424 U.S. 319, 348-49, 96 S. Ct. 893, 909 (1976). Because the board members did not identify their personal knowledge of road conditions and safety concerns as a part of the factual record at the hearing, it was improper for the board to

include this information as evidence in its statement of proceedings. Therefore, in this review, we disregard as evidence claims of board-member familiarity.[3]

Motion to Strike

Kotten moves to strike 18 documents from the record, arguing that he has never seen these documents and that they were not presented to the county board.[4] The challenged documents include, among other things, notes of telephone complaints by neighbors regarding dust from gravel trucks, notes from the planning commission meetings, synopses of the planning commission meetings, and photographs of township roads. Kotten further moves to strike portions of the county board's brief that he contends are not supported by documents that are properly part of the record.

In general, as discussed above, our review is limited to the record before the county board. *See Amdahl*, 258 N.W.2d at 874. But, the Minnesota Supreme Court has stated that documents reflecting the historical designation, regulation, and character of the property are properly part of the record on appeal, even if those documents were not presented to the decision-making body. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 181 n.13 (Minn. 2006) (determining that the district court erred by

[3] We note that the county board does not argue that it took judicial notice of these facts. *See* Minn. R. Evid. 201 (providing that a court may take judicial notice of a fact that is not subject to reasonable dispute). Even if the county board relied on the principle of judicial notice, it is not applicable because Kotten was denied "an opportunity to be heard as to the propriety of taking judicial notice and the tenor of the matter noticed." *See* Minn. R. Evid. 201(e).

[4] The specific documents are identified as numbers 4, 7, 8, 9, 10, 12, 13, 15, 18, 19, 21, 23, 24, 26, 28, 29, 30, and 34. In his memorandum, Kotten identifies document 2 rather than document 4. However, this appears to be a typographical error and we consider this as an objection to document 4.

excluding the city's 1979 comprehensive plan and subdivision ordinance, among other public records, because they were not specifically presented during the municipal proceedings).

We accept as well-founded Kotten's arguments for striking 15 documents; namely, the planning commission notes, various meeting synopses, and notes of complaints.[5] There is no evidence that these documents were presented to, considered by, or constitute an official's effort to set forth the actions of the county board in reaching its decision. However, we deny Kotten's motion to strike with regard to the photographs of township roads, the county administrator's synopsis of the county board meeting, and the county board's letter to relator stating the bases for denying his CUP. Notably, Kotten does not dispute the accuracy of the photographs. *See Livingood*, 594 N.W.2d at 895-96 (providing that uncontroverted documentary evidence of a conclusive nature which supports the result obtained in the lower court is an exception to the rule against consideration of new matters on appeal). And an official's synopsis of a county board meeting and its subsequent written decision are part of the record on appeal because they reflect proceedings before the county board and its action. Therefore, in reviewing Kotten's appeal, we will rely only on the following documents: those documents included in the record that Kotten does not challenge, the synopsis of the county board meeting, the photographs of township roads, and the county board's letter to Kotten conveying its

[5] The stricken items are documents 4, 7, 8, 9, 12, 13, 15, 18, 19, 21, 23, 24, 26, 28, and 29.

decision. With regard to the county board's brief and statement of proceedings, we disregard portions that are based on the stricken documents.

II.

The substantive issue raised by Kotten is whether the county board's decision denying relator's CUP application was legally improper. County zoning authorities have "wide latitude" in making decisions on CUPs, and "it is the duty of the judiciary to exercise restraint and accord appropriate deference to civil authorities in routine zoning matters." *Big Lake Ass'n*, 761 N.W.2d at 491 (quotation omitted). Thus, we will uphold a county board's decision approving or denying a CUP unless the decision is arbitrary, capricious, or unreasonable. *Bartheld v. Cnty. of Koochiching*, 716 N.W.2d 406, 411 (Minn. App. 2006); *see also SuperAmerica Grp., Inc. v. City of Little Canada*, 539 N.W.2d 264, 266 (Minn. App. 1995) (providing that this court will disturb the denial of a CUP only when it has "no rational basis"), *review denied* (Minn. Jan. 5, 1996).

A county may approve a CUP upon an applicant's showing that "standards and criteria stated in the ordinance will be satisfied." Minn. Stat. § 394.301, subd. 1 (2010). A county's denial of a CUP is arbitrary when the evidence presented to the zoning authority establishes that the requested use is compatible with the basic use authorized in 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, 48 (1969); *see SuperAmerica Grp.*, 539 N.W.2d at 267 ("[A] city council may deny a conditional use permit only for reasons relating to the

public health, safety, and general welfare or for incompatibility with a city's land use plan.").

Kotten's gravel pit is located in a district zoned as an Agricultural/Shoreland Protection District. The Amended Brown County Zoning Ordinance (ordinance) provides that the purpose of the Agricultural/Shoreland Protection District is to "serve, promote, maintain and enhance the use of land for commercial agricultural purposes, to prevent scattered and leap-frog non-farm growth, to protect and preserve natural resource areas and to stabilize increases in public expenditures for such public service as roads and road maintenance, police and fire protection, and schools." Brown County, Minn., Zoning Ordinance (BCZO) § 603.1 (2009). The ordinance classifies gravel mining and extraction in this district as a conditional use requiring an "in-depth review procedure" for obtaining a CUP. BCZO §§ 402, 603.4 (2009).

1. Compliance with Ordinance

Kotten argues that the county board's decision to deny his CUP was legally improper for five reasons: First, he asserts that he complied with all of the requirements of the ordinance. Specifically, Kotten argues that he provided the maps, soil erosion and sediment control plan, plan for dust and noise control, and a description of all phases of the proposed operation, as required by the ordinance. In support, Kotten cites the rule in *Yang* that a county's denial of a CUP is arbitrary when the applicant establishes that all of the standards specified by the zoning ordinance as conditions of granting the permit have been met. *See* 660 N.W.2d at 832.

The Brown County ordinance requires that the county board consider the planning commission's recommendations and the "effect of the proposed use upon the health, safety, and general welfare of occupants of surrounding lands," and make findings "where applicable" with regard to eight factors. BCZO § 505.1 (2009). Here, the record indicates that the county board considered the planning commission's recommendations and the safety and welfare of individuals residing in the area. Specifically, the county board found that Kotten's proposed use would (1) affect traffic safety and congestion; (2) excessively burden township roads; (3) be incompatible with residences in the area; and (4) adversely affect existing land uses, particularly residences, by dust and noise. These findings addressed three of the eight factors set forth in the ordinance. *See* BCZO § 505.1 (providing that the county board shall make findings where applicable on, among other factors, whether the proposed use will be compatible with adjacent residential land, whether the proposed use will cause a traffic hazard or congestion, and whether the proposed use will create an excessive burden on existing streets). Thus, the county board's decision is consistent with the standards in the ordinance and represents a conclusion that the ordinance standards are not met.

2. Evidentiary Basis for Findings

The next question is whether there is substantial evidence on the record as a whole supporting the findings. When a zoning authority states its reasons for denying a permit, an applicant challenging the decision must show that the reasons for the denial are either legally insufficient or lack a factual basis in the record. *Yang*, 660 N.W.2d at 832. Only one of the given reasons needs to be legally sufficient or supported by facts in the record

to satisfy the rational-basis test. *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. App. 1997), *review denied* (Minn. Sept. 25, 1997). Kotten challenges the factual basis of the county board's findings, arguing that the county board relied on generalized and unsupported community opposition rather than "independent analysis or reliable facts."

A zoning authority may consider neighborhood opposition if it is based on "concrete information." *Yang*, 660 N.W.2d at 833; *see also Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (providing that generalized or unsupported neighborhood opposition, by itself, is not a legally sufficient reason for a CUP denial). In *Yang*, the county denied the applicant's CUP largely on the basis that the proposed slaughterhouse would generate excessive traffic on township gravel roads. 660 N.W.2d at 832. The county argued that the finding was supported in part by the township board's evaluation of traffic on the particular gravel road and public comment that a slaughterhouse would generate excessive traffic. *Id.* at 832-33. But this court reversed, concluding that the record lacked a factual basis to support the board's finding. *Id.* at 832. Specifically, the *Yang* court reasoned that the township's evaluation of traffic was "based wholly on public comment" that focused on traffic generated by the applicant's weekend parties, but that failed to address how "the cars they witnessed might affect circulation or the general welfare." *Id.* at 833-34; *see also C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981) (providing that the board's CUP denial lacked a factual basis where several homeowners expressed "vague reservations" regarding traffic, property values, and density). Significantly, the

Yang court distinguished the public commentary from that in *SuperAmerica*, where this court upheld the denial of a CUP based on traffic concerns where "witnesses spoke of existing, daily traffic problems and gave specific examples of current congestion." *Yang*, 660 N.W.2d at 834 (quoting *SuperAmerica Grp.*, 539 N.W.2d at 268 (quotation marks omitted)).

Here, Kotten is correct that the county board based its decision in large part on public commentary. But unlike in *Yang*, where neighbors vaguely complained about the applicant's weekend traffic, here the public comments addressed "existing, daily traffic problems," with the complainants providing specific examples of safety, dust concerns, and stress on the township roads. *See id.* A letter submitted to the planning commission by two neighbors states that the existing gravel-truck traffic makes it "almost impossible to go for a walk or a bike ride without fear of being hit by a truck" and that the "dust storm" created by the trucks makes it difficult to see oncoming traffic. The letter further indicates that the trucks make the roads "rough and bumpy." The planning commission meeting notes, limited to those that Kotten does not challenge, show that individuals expressed concerns about dust control, that there were "way too many trucks" on the township roads, and that the roads were in poor condition. One individual stated that 22 people, including a number of children, lived in the area, and that there was also a day-care facility there.[6]

[6] As previously noted, Kotten moves to amend the record to reflect that he disputed this fact. However, the existence of a dispute does not mean the county board could not rely on the evidence and is not grounds for reversal.

Notes from the May 25, 2010 county board meeting, unchallenged by Kotten, indicate that 14 citizens attended the hearing, and 4 of them expressed concerns "related to dust control, safety, and traffic hazards/congestion on township roads that would be utilized by gravel trucks from the proposed mining operation in addition to existing truck traffic." A member of the Leavenworth Township Board voiced concern about traffic safety and the additional burden on township roads. Portions of the county board's statement of proceedings, unchallenged by Kotten, indicate that nearby residents claimed that there were seven gravel pits in a four-mile radius, and "testified to a number of close calls with resident vehicles meeting trucks on the curves or the hills, with dust diminishing the ability to see the trucks before encountering them." And finally, the Brown County Sheriff stated that he believed additional trucks would present a "safety issue," and "raised issues relating to the configuration of the road being winding and narrow."[7] The record also includes a petition signed by over 30 individuals, stating, "We cannot tolerate anymore gravel trucks being put on our roads because of the safety factor, there is already an existing gravel and demolition pit." The public commentary regarding

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Kotten argues that he was not operating the gravel pit at the time of the meetings, and thus "he had nothing to do" with the neighbors' complaints of dust and reckless driving. But Kotten did not have to contribute to the current road conditions in order for the county board to deny his CUP on the basis that his proposed use would worsen these conditions. *See, e.g.*, *SuperAmerica Grp.*, 539 N.W.2d at 268 (upholding county's denial of CUP to operate a gas station when community members expressed concern about current congestion and existing traffic problems in area of proposed gas station).

[7] As previously noted, Kotten challenges the record of the sheriff's comments, asserting that the sheriff was pulled into the county board meeting to answer an inquiry about issues in Kotten's application when he was present to address another matter. That the sheriff's comments may be impromptu or perceived differently does not preclude the county board from relying on them.

the winding and narrow nature of the roads is supported by the photographs of the roads and the aerial photograph of the area, both of which are properly part of the record on appeal.

We recognize that Kotten represents that his gravel pit will only add a few trucks per day, that this is minimal given existing truck traffic, that he will employ dust suppression procedures, and that he will insist that his trucks be safely driven. Although helpful, the county board is not required to accept additional industrial activity or such self-enforcement commitments as avoiding or as resolution of problems. The county board has discretion to evaluate the impact of the incremental activity and the adequacy of promised steps to settle matters. We conclude that at least three of the county board's bases for the denial of Kotten's CUP—safety, dust control, and incompatibility with residential use—are supported by a factual basis in the record. *See Trisko*, 566 N.W.2d at 352 (providing that only one of the given reasons needs to be supported by facts in the record).

3. Additional Conditions

Kotten argues that the county board's decision was arbitrary because the county board failed to suggest or impose additional conditions that would bring the proposed use into compliance. In support of this position, Kotten urges that we consider the ruling in *Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee*, 303 Minn. 79, 226 N.W.2d 306 (1975). There, the Minnesota Supreme Court determined that the city council acted arbitrarily in denying the applicant's CUP when, among other things, "there was no attempt made, either by the opponents or the council, to suggest or to impose

conditions which would insure proper landscaping, setbacks, or ingress and egress." *Svee*, 303 Minn. at 85-86, 226 N.W.2d at 309. But in *Svee*, the applicant's opponents failed to present the council with any evidence that the proposed use would result in traffic problems, and the applicant presented evidence that it would not. *See id.* at 85, 226 N.W.2d at 309. Here, Kotten's opponents did provide evidence in the form of competent, specific testimony regarding traffic concerns, dust, and incompatibility with residential use.

We acknowledge that here, unlike in *Svee*, the planning commission and Kotten did add a condition to his CUP application regarding working with LADD prior to the May 17, 2010 meeting. Notably, the planning commission voted to recommend approval of Kotten's CUP to the county board at this meeting. But Kotten fails to provide any authority for the contention that the county board's failure to impose yet additional conditions render its subsequent denial arbitrary. In sum, the county board had the discretion to deny Kotten's CUP permit without suggesting additional conditions that would bring Kotten's use into compliance.

4. Sufficiency of Findings

Kotten argues that the county board's decision was arbitrary because the county board failed to make sufficient findings of fact. A zoning authority, while not required to prepare formal findings of fact, must, at a minimum, set forth the reasons for its decision "in more than just a conclusory fashion." *White Bear Rod & Gun Club v. City of Hugo*, 388 N.W.2d 739, 742 (Minn. 1986) (determining that the city's findings were insufficient where it "cryptically listed nine 'reasons'" that were "nothing more than a list of the

council's sources of information," revealing nothing about how the council used such information); *see also Earthburners, Inc. v. Cnty. of Carlton*, 513 N.W.2d 460, 463 (Minn. 1994) (remanding council's CUP denial based on inadequate record and ordering council to articulate the "specific basis for the denial, i.e., an explanation of the applicant's failure to satisfy the ordinance criteria").

Here, in its decision letter to Kotten, the county board set forth four reasons for its denial of relator's CUP: (1) traffic safety and congestion; (2) excessive burden on township roads; (3) incompatibility with area residences; and (4) the effect of dust and noise on nearby residences. As discussed above, these reasons address three of the eight factors set forth in the ordinance. *See* BCZO § 505.1. We conclude that under the relevant caselaw, these reasons, while minimal, are sufficient to explain why the county board decided to deny Kotten's request for a CUP and to allow this court to review the county board's decision.

5. Equal Protection

Kotten argues that the county board acted arbitrarily by denying his CUP when it had already granted one for the LADD mine. "The Equal Protection Clause requires that the government treat all similarly situated people alike." *Barstad v. Murray Cnty.*, 420 F.3d 880, 884 (8th Cir. 2005). Accordingly, in the context of zoning, a zoning authority may not prefer one applicant over another for reasons that are not related to the "health, welfare, or safety of the community or any other particular and permissible standards or conditions imposed by the relevant zoning ordinances." *Nw. College v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979) (quotation omitted).

Here, Kotten does not indicate that his CUP application and LADD's CUP application were submitted in the same timeframe. *See id.* at 869 (providing that two parties are similarly situated when they simultaneously file applications); *Stotts v. Wright Cnty.*, 478 N.W.2d 802, 806 (Minn. App. 1991) (providing that applicant could not "meet the similarly situated requirement for an equal protection claim because his variance request and his neighbor's variance request are separated in time"), *review denied* (Minn. Feb. 11, 1992). In fact, Kotten does not allege any facts regarding LADD's CUP at all. Moreover, Kotten fails to allege facts showing intentional discrimination. *See Barstad*, 420 F.3d at 884 (providing that a class-of-one claimant must show that "she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment" (quotation omitted)). Therefore, Kotten's equal-protection claim fails.

In conclusion, the county board's denial of Kotten's CUP was not arbitrary because its stated bases for rejection indicate a finding that the use posed a danger to the "public health or safety or the general welfare of the area affected." *See Zylka*, 283 Minn. at 196, 167 N.W.2d at 49 (setting forth standard of review for a county board's decision approving or denying a CUP).

Affirmed, motion granted in part.

Dated: