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November 30, 2012

City of Scandia
Attn: Ms. Kristina Handt
City Administrator
Scandia City Office
14727 209th Street North
Scandia, MN 55073

Re: Take Action-Conserve Our Scandia Comment on the Tiller Mine Conditional Use Permit ("CUP") Application

Dear Scandia City Council and City Planning Commission:

On behalf of our client, Take Action-Conserve Our Scandia ("TA-COS"), we submit this comment to the City of Scandia ("City") in opposition to Tiller Corporation's application for a conditional use permit ("CUP") to develop a gravel and sand mine at the Zavoral property. TA-COS is a group of residents from Scandia and the surrounding area concerned about the significant negative impacts that development of the gravel mine proposed by Tiller Corporation ("Tiller") will have on the Scandia community and environment. TA-COS has commissioned an expert report to evaluate the mine's effect on traffic safety and has reviewed the impacts already of record in the Environmental Impact Statement for the Zavoral Mine and Reclamation Project ("EIS"), and the City of Scandia Comprehensive Plan ("Comprehensive Plan"). Based on the EIS and these reports, the City has the right and the responsibility to deny Tiller's application for a CUP due to the harmful impacts the proposed mine would have on the Scandia community and natural environment.

The City should deny Tiller Corporation's application for a CUP for four reasons set forth in the City Code and supported by the expert reports, the EIS, the comments to the EIS, and the Comprehensive Plan. First, the City should deny the CUP to preserve and comply with Scandia's Comprehensive Plan which designates mining as a land use incompatible with the residential and agricultural uses allowed on the Zavoral property and in the surrounding area. Second, the City should deny the CUP to protect public safety because the mine would cause a significant increase in the risk of fatal or severe traffic collisions at the TH95/TH97 intersection. Third, the City should deny the CUP to protect the enjoyment of the St. Croix River and respect the National Park Service's determination that the mine's industrial noise audible on the river is an unacceptable impairment to a nationally protected river. Fourth, the City should deny the CUP to prevent property values from being substantially diminished and impaired due to the mine. According to the Scandia City Code and Minnesota law, each of these impacts alone is sufficient reason for the City to deny Tiller's CUP application. Therefore, the City has the authority and the necessary evidence to deny Tiller's CUP application for a sand and gravel mine on the Zavoral property.

This Comment begins by reviewing the standard for evaluating a CUP under the City Code and the City's legal authority to approve or deny a CUP application. The Comment then discusses the City Code's criteria in conjunction with the expert reports and facts in the record to demonstrate that denial of Tiller's CUP application is the appropriate action for the City to take:

Legal Standard

Tiller's proposed mine cannot meet the legal standard to be entitled to a CUP. To be entitled to a CUP, Tiller must show "all standards specified in the zoning ordinance as conditions of granting the permit have been met." *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. Ct. App. 2003). Correspondingly, the City has the authority to deny a CUP for "reasons relating to public health, safety, and general welfare or for incompatibility with a city's land use plan." *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. Ct. App. 1995).

Tiller is not entitled to a CUP for its proposed mine because it cannot meet the standards for a CUP in the Scandia City Code. The City Code sets forth seven criteria that an applicant must meet to receive a CUP. These criteria are:

- (1) The conditional use will be in compliance with and shall not have a negative effect upon the Comprehensive Plan, including public facilities and capital improvement plans.
- (2) The establishment, maintenance or operation of the conditional use will promote and enhance the general public welfare and will not be detrimental to or endanger the public health, safety, morals or comfort.
- (3) The conditional use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially diminish and impair property values or scenic views.
- (4) The establishment of the conditional use will not impede the normal and orderly development and improvement of surrounding property for uses permitted in the district.
- (5) Adequate public facilities and services are available or can be reasonably provided to accommodate the use which is proposed.
- (6) The conditional use shall conform to the applicable regulations of the district in which it is located and all other applicable standards of this Chapter.
- (7) The conditional use complies with the general and specific performance standards as specified by this Section and this Chapter.

City Code § 8.4.

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A determination by the City that the Tiller Mine is inconsistent with any one of these criteria due to facts in the record is a legally sufficient reason to deny the CUP application. *Yang v. County of Carver*, 660 N.W.2d 828, 832 (Minn. Ct. App. 2003). As demonstrated by the record and discussed below, the City should deny the CUP because Tiller's proposed mine cannot meet the standards for public health, safety, general welfare, and compatibility with the City's land use plan set forth in the City Code. The City's decision to deny the CUP for these reasons will be given great deference by the courts if challenged. *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 266 (Minn. Ct. App. 1995) ("Land use decisions are entitled to great deference and will be disturbed on appeal only in instances where the city's decision has no rational basis.").

The case of *Barton Contracting Co., Inc. v. City of Afton* is an excellent example of a city's authority to deny a CUP for a gravel mine. *Barton Contracting Co., Inc. v. City of Afton*, 268 N.W.2d 712 (Minn. 1978) (attached as **Exhibit 1**). In *Barton*, the Minnesota Supreme Court specifically addressed the question of when a city may deny a permit for a gravel mine, and the Court upheld the City of Afton's right to deny Barton Contracting Co.'s request for a permit to expand its gravel mine in an area surrounded by agricultural and residential uses. In that case, the City of Afton denied Barton's permit application after hearing evidence from numerous residents opposed to the expansion of the mine and making the following findings:

1. That [the mine] is contrary to the comprehensive plan.
2. That further excavation appears to increase the danger of irreparable environmental damage.
3. That the citizens in the area of Afton are opposed to the use of this land to further mining.
4. That the applicant has not proven that the proposed use would not effect health, safety, morals and welfare of the occupants of the surrounding land.
5. That the end use would not be compatible with the comprehensive plan.

Id. These findings were based on testimony and evidence provided by citizens opposed to the mine. *Id.* With the exception of the citizen opposition in Finding No. 3, the Minnesota Supreme Court found that each of these findings was a "legally sufficient reason for denying Barton's application." *Id.*

The factual support on which the City of Afton relied to make these findings is similar to the facts in the record weighing against the Tiller mine. Afton's comprehensive plan did "not specifically mention gravel mining," but was "permeated with evidence of a strong desire to preserve the rural character and unique scenic beauty of Afton and the St. Croix Valley." *Id.* at 717. The City of Afton had heard evidence of two types of possible environmental damage: "interference with the underground water table due to loss of gravel layers" and "potential erosion of the south slopes leading down to Lake

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Edith.” *Id.* On the matter of public welfare, the Minnesota Supreme Court found that the “testimony by an experienced real estate broker that in his opinion [the] expanded gravel mining would have an adverse effect on the value of surrounding property” was sufficient factual basis for the City of Afton to determine the mine would injure the public welfare and the permit should be denied. *Id.*

As recently as 2011, Brown County denied a CUP for a gravel mine and had its decision upheld by the Minnesota Court of Appeals. Consistent with the result in *Afton*, the court found that the County’s concerns over the incremental effect of the mine on safety, dust, and compatibility with residential use based on the testimony of local citizens were legally sufficient reasons to deny the CUP. See *Kotten v. County Board of Commissioners*, No. A10-1111 (Minn. Ct. App. Feb. 8, 2011) (attached as **Exhibit 2**). In that case, the court noted that:

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.

Id. (citations omitted).

Similar to the cases in Afton and Brown County, the City of Scandia is now presented with substantial evidence relevant to the City’s criteria for a CUP that weighs against the mine. Each criterion alone is a legally sufficient basis for the City to deny the permit under the City Code. See *Cemetery v. City of Roseville*, 689 N.W.2d 254, 260 (Minn. Ct. App. 2004) (holding that if even one of the reasons for denying a CUP is legally sufficient or supported by the facts in the record the denial of a CUP will be upheld); City Code § 8.4. In this case, there is not just one, but several, legally sufficient reasons to deny the CUP application that are supported by well-documented evidence in the record. There is evidence relevant to the criteria concerning the negative impact of the mine to the comprehensive plan, the mine’s threat to public safety due to traffic impacts, the mine’s impairment of enjoyment of property, including the St. Croix River, the mine’s negative impact to property values, and the mine’s interference with the orderly development of Scandia, all which weigh against the CUP for the mine. See EIS at ES-1-44.

I. The Mine Will Negatively Impact the Comprehensive Plan

The City should deny Tiller's application for a CUP because the proposed Tiller mine will have an adverse effect on the Comprehensive Plan and the orderly development of Scandia. The Comprehensive Plan prohibits new mining projects in Scandia, including the Zavoral property, as a use inconsistent with Scandia's development goals and needs to preserve important natural resources. Comprehensive Plan at 20-26. Though the City has elected to allow Tiller's application to proceed despite the express prohibition on mining enacted in the Comprehensive Plan and zoning code, the City has consistently maintained its right to consider the merits of the application. The consideration of these merits, by law, includes the obligation to consider the merits of the mine's impact on the Comprehensive Plan currently in effect, which weighs strongly against approving the mine. City Code § 8.4. In addition, the City must protect "the normal and orderly development and improvement of surrounding property," which, as indicated by the Comprehensive plan, would be frustrated by the Tiller mine. City Code § 8.4

The City, after years of review and preparation, completed and approved its Comprehensive Plan in 2009. The Comprehensive Plan eliminated mining as an allowed use on property zoned agricultural, including the Zavoral property, and only allowed mining at the two active mine sites, which do not include the Zavoral property. Comprehensive Plan at 21, 48, 50. This limitation on mining was an express goal of the City in adopting the Comprehensive Plan as illustrated in Land Use Goal No. 13, which states "Mining is limited to existing locations." Comprehensive Plan at 136.

The City adopted this policy of prohibiting new gravel mines after determining that mining was inconsistent with Scandia's future development goals and Scandia's need to preserve its natural resources, such as groundwater and natural areas. See Comprehensive Plan at 20. In making this decision, the City was aware that there were gravel resources located on the Zavoral property, but determined the competing need to protect groundwater sensitive to pollution and preserve Scandia's high value natural areas outweighed the need to mine those gravel resources. *Id.* at 20-22. In fact, the Comprehensive Plan identified the Zavoral property as containing and being adjacent to areas the City identified as the highest quality of ecological resources deserving protection. *Id.* at 25-26. As noted by the EIS, Tiller's proposed mine has the potential to adversely impact these resources, including the potential to cause groundwater contamination. EIS at 4-35.

If the City were to approve the mine, it would defeat the core goals of Scandia's Comprehensive Plan, undermine Scandia's plan for the future over the next 20 years, and undo years of rigorous city planning. Allowing the mine to proceed would encourage development in direct conflict with the existing and intended character of the area. Comprehensive Plan at 48-50. As noted by the EIS, "Current land uses in the area near the Site include agricultural production, single-family residences, and parks and open space." EIS at ES-12. Furthermore, as noted by the EIS, this inconsistent land use would discourage and delay the residential development the City set forth to promote in its Comprehensive Plan. *Id.* Approving the mine would also defeat the Comprehensive Plan's attempt to promote development that does not threaten the City's significant ecological resources. *Id.* The Tiller mine, if approved, would

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devalue Scandia's Comprehensive Plan, interfere with the normal and orderly development of the surrounding area, and set a dangerous precedent for future projects inconsistent with the Comprehensive Plan. Therefore, the City should deny Tiller's CUP application. City Code § 8.4

II. The Mine is a Threat to Public Safety

The City should deny Tiller's CUP application because the proposed mine will endanger public safety. City Code § 8.4. As described in the report TRAFFIC ANALYSIS OF THE PROPOSED TILLER CONDITIONAL USE PERMIT prepared by RLK Incorporated ("Traffic Analysis Report") attached as **Exhibit 3**, the Tiller mine will cause a drastic and unacceptable increase in the risk of severe or fatal collisions occurring at the intersection of TH95 and TH97. Vernon Swing, the report's author, is a professional traffic engineer with 26 years of traffic engineering and transportation planning experience.

After analyzing the impact on traffic patterns, RLK determined that the mine proposed by Tiller would result in a 350% increase in the potential for severe or fatal collisions at the TH95/TH97 intersection. Traffic Analysis Report. The risk of collisions at this intersection skyrockets because the mine causes the number of opportunities for vehicles to collide with one another when entering the intersection to increase from 9 opportunities to 32 opportunities. Even if Tiller had proposed a site access that was offset from the TH95/TH97 intersection, the number of opportunities for a collision would still increase from 9 opportunities to 18 opportunities, representing a 100% increase in the potential for severe or fatal collisions. *Id.* This increased risk is especially concerning because the EIS determined the mine will cause the TH95/TH97 intersection's level of service to decrease during peak traffic hours, thereby increasing exposure to the higher risk of collisions. EIS at 4-66-67.

The potential for severe traffic accidents at this intersection is a proven risk even without the mine. There has already been one fatal traffic accident at the TH95/TH97 intersection. EIS at ES-30. Furthermore, gravel hauling has previously been responsible for at least one serious traffic accident involving injuries at this intersection in the last year. *Id.* On April 24, 2012, the junction was the location of a gravel truck rolling over, which sent the driver to the hospital and spilled the truck's contents. Phillip Brock, *One Injured in Semi Rollover*, COUNTRY MESSENGER, May 2, 2012. Given the 350% increase in the risk of severe or fatal collisions it will cause, the Tiller mine would significantly endanger the Scandia community and therefore the City should deny Tiller's application for a CUP. City Code § 8.4.

III. The Mine Will Injure the Use and Enjoyment of the St. Croix River

The City should deny the proposed Tiller mine because it will injure the enjoyment of the nationally-protected St. Croix Scenic Riverway in violation of the requirement that the conditional use not injure the "use and enjoyment of other property in the immediate vicinity." City Code § 8.4. The National Park Service, which is responsible for protecting the St. Croix Scenic Riverway as part of the National Park System, has determined the proposed Tiller mine "would degrade the aesthetic and recreational values of the Riverway because [the mine] would create a source of industrial noise that would be audible from the boundary, including the river

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surface.” Letter from National Park Service Superintendent Christopher E. Stein to Scandia City Administrator Anne Hurlburt, September 10, 2012. As a result of this finding, the National Park Service has asked the City to deny Tiller’s application for a CUP. *Id.* The EIS confirmed industrial noise would be audible on the river. EIS at ES-11, 14. The National Park Service, under authority from Congress, has determined the industrial noise audible on the river as a result of the mine will be injurious to its use and enjoyment. The City should respect the National Park Service’s extensive expertise on these matters and deny Tiller’s CUP application.

When the U.S. Congress enacted the Wild and Scenic Rivers Act (“WSRA”) protecting the St. Croix, it stated:

It is hereby declared to be the policy of the United States that certain selected rivers of the Nation which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values, shall be preserved in free-flowing condition, and that *they and their immediate environments shall be protected for the benefit and enjoyment of present and future generations.*

16 U.S.C. § 1271 (emphasis added). It was, therefore, the intent of Congress that the enjoyment of the St. Croix River be protected from degradation and its natural state preserved. *Id.*

To ensure the protection of the St. Croix, Congress empowered the National Park Service to maintain and protect it. See 16 U.S.C. § 1271. Knowing, however, that the National Park Service would not always be able to protect the St. Croix by itself, Congress included an explicit directive in the WSRA encouraging state and local governments to cooperate with the National Park Service in the protection of the St. Croix Scenic Riverway. See 16 U.S.C. § 1271(e) (“The States and their political subdivisions shall be encouraged to cooperate in the planning and administration of components of the system.”). Therefore, the Congress of the United States intended that local governments, like the City of Scandia, take an active role in protecting the St. Croix in cooperation with the National Park Service.

If the City refuses to heed the warning of the National Park Service and does not use the authority granted by the City Code to deny the CUP, the City will be sabotaging the express goals of the United States Congress set forth in the WSRA. The City has an obligation to prevent this injury to the St. Croix Riverway, which is considered independently from any state noise standards.¹ The City Code creates a separate requirement to prevent conditional uses from injuring “use and enjoyment of other property in the immediate vicinity.” City Code § 8.4. This duty includes the obligation to protect the St. Croix River in cooperation with the National Park Service in furtherance of the national policy of preserving the St. Croix Scenic Riverway.

¹ The state noise standard acknowledges that separate noise standards may be required when necessary to protect public welfare, stating “However, these standards do not, by themselves, identify the limiting levels of impulsive noise needed for the preservation of public health and welfare.” Minn. R. 7030.0040, subd. 1.

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Because of the national significance of the St. Croix River and the harm that Tiller's mine will do to its enjoyment, the City should find that the proposed mine will be injurious to the enjoyment of the St. Croix and deny the CUP application as directed by the City Code. City Code § 8.4.

IV. The Mine Will Substantially Diminish Property Values and Enjoyment of Property

The City should deny Tiller's application for a CUP because the mine will "substantially diminish and impair property values." City Code § 8.4. As described in the EIS, the Tiller mine will cause a negative impact on the value of homes within the area of the mine. The EIS predicts the mine will cause homes within ¼ mile of the mine to lose 2-5% of their value. EIS at 4-11-13. This prediction, however, is based on the "Extraordinary Assumption" that the Project would meet or exceed all MPCA requirements." EIS at 4-11. Comments to the EIS indicate that this loss could be much higher. In its comment to the EIS, TA-COS submitted a report from a professional mortgage broker who determined the mine's actual impact may cause property values to decline by as much as 25% within ¼ mile and properties up to three miles away may be affected. See Letter from Kieran Dwyer to the Scandia City Administrator dated May 17, 2012. In addition, 17 Scandia residents submitted written comments to the EIS stating their concern that the mine would negatively impact their home values, confirming the mine creates a negative perception of the value of nearby properties. See EIS at EIS, Appendix A.

The EIS identifies numerous impacts which will adversely impact home values. These impacts include dust, noise, truck traffic, and impairment of scenic views, among others. EIS at ES-10-30. For example, the EIS determined that uncontrolled mining would result in dust emissions from the mine, including silica dust, at a level prohibited by National Ambient Air Quality Standards under the Clean Air Act. EIS at ES-10-11, 15. Even if Tiller implements a Fugitive Dust Control Plan using chemicals to reduce dust, some dust will still occur and the EIS does not guarantee that the mine will not exceed the National Ambient Air Quality Standards. *Id.* This potential for non-compliance with air quality requirements indicates the EIS may have grossly underestimated the impact to property values by erroneously assuming the mine would be in compliance. See EIS at 4-11. In addition, while there are some mitigations to reduce noise and impairment of scenic views, these impacts cannot be completely mitigated. Other impacts, such as traffic from gravel hauling, cannot be mitigated for homeowners in the area. ES-10-30

These impacts translate into a decline in property values which is a significant financial loss to the community of Scandia. As the EIS notes, the total value of the properties located within the ¼ mile radius of the proposed Tiller mine is estimated to be \$12,886,000 based on recent sales data. EIS at 4-13. The 5% loss in property values predicted by the EIS within this area results in a total financial loss to the community of approximately \$650,000. EIS at ES-15. If the magnitude of the loss reaches 25% as comments to the EIS suggest, the loss to the community because of the mine balloons to \$3.2 million in total lost property value within just the ¼ mile radius.

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This financial loss is borne directly by the individual homeowners in Scandia and is an economic hardship whether the loss is 5% or 25%. For example, a home worth \$200,000 that suffers a 5% loss because of the mine would be worth \$190,000 after the mine is constructed and the individual homeowners must bear this \$10,000 loss in the event he or she needed to sell the home. As a result, the 5% loss predicted by EIS the constitutes a "substantial diminishment and impairment of property values." If the loss is 25%, the financial loss to the homeowner becomes a crippling \$50,000. In our depressed economy, even a \$10,000 loss is a substantial burden on homeowners. Therefore, given the impact to home values described in the Environmental Impact Statement, the merits of Tiller's proposed mine weigh against approving the CUP according to the City Code. City Code § 8.4.

Conclusion

As demonstrated by the wealth of information in the record, including expert reports, the EIS, the comments to the EIS, and the Comprehensive Plan, Tiller Corporation's Application for a CUP should be denied because the proposed mine does not meet the criteria in the Scandia City Code for issuing a CUP. City Code § 8.4. As a matter of city planning, the mine would negatively impact Scandia's Comprehensive Plan because it conflicts with Scandia's goals for future development. The mine would also threaten public safety due to a significant increase in the risk of fatal or severe accidents at the TH97/TH95 intersection, which already has a record of accidents involving injuries and fatalities. The mine would harm the enjoyment of the St. Croix River by creating industrial noise audible on the river. Finally, the mine would substantially diminish and impair property values around the mine causing Scandia residents to suffer financial losses in an already difficult economy. Under the Scandia City Code, any one of these impacts alone is sufficient reason to deny Tiller's CUP application. Therefore, the City has the right and the responsibility to deny Tiller's CUP application for a sand and gravel mine on the Zavoral property in order to protect public safety and welfare in Scandia. City Code § 8.4.

Sincerely,



Kieran P. Dwyer

KPD/aj
Enclosures

EXHIBIT 1

268 N.W.2d 712
(Cite as: 268 N.W.2d 712)

C

Supreme Court of Minnesota.
BARTON CONTRACTING CO., INC., Respondent,
v.
CITY OF AFTON, Appellant.

No. 47580.
April 14, 1978.

Landowner, whose application for special use permit authorizing mining of gravel from parcel of land zoned for residential use was denied by city council, filed petition for writ of mandamus. The District Court, Washington County, William T. Johnson (Retired), J., granted writ directing city to issue special use permit, and city appealed. The Supreme Court, Peterson, J., held that: (1) landowner was not denied procedural due process because he was not allowed at public hearings before planning commission and city council to cross-examine those who made adverse statements; (2) landowner was not denied procedural due process on theory that he did not receive letters of private individuals opposed to its project in sufficient time prior to hearing to prepare a response; (3) landowner was not denied procedural due process on theory that three city council members relied upon information outside the record, in that information in question clearly was made part of record, and (4) four of the five reasons stated by city council for denying landowner's application for special use permit were legally sufficient to support city's denial of permit.

Reversed.

Irving C. Iverson, Acting Justice, dissented and filed opinion in which Kelly, J., joined.

West Headnotes

[1] **Zoning and Planning 414** ↪ 1351

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1350 Right to Permission, and Discretion
414k1351 k. In general. Most Cited Cases
(Formerly 414k375.1, 414k375)

Zoning and Planning 414 ↪ 1472

414 Zoning and Planning
414IX Variances and Exceptions
414IX(A) In General
414k1472 k. Right to variance or exception, and discretion. Most Cited Cases
(Formerly 414k488)

“Special-use permit” differs from variance; special use provision permits property, within broad discretion of governing body, to be used in manner expressly authorized by ordinance, while variance provision permits particular property to be used in manner forbidden by ordinance by varying terms of ordinance.

[2] **Constitutional Law 92** ↪ 3875

92 Constitutional Law
92XXVII Due Process
92XXVII(B) Protections Provided and Deprivations Prohibited in General
92k3875 k. Factors considered; flexibility and balancing. Most Cited Cases
(Formerly 92k251)

Requirements of due process must be measured according to nature of government function involved and whether or not private interests are directly affected by government action.

[3] **Constitutional Law 92** ↪ 4096

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications
92XXVII(G)3 Property in General

268 N.W.2d 712
(Cite as: 268 N.W.2d 712)

92k4091 Zoning and Land Use

92k4096 k. Proceedings and review. Most Cited Cases
(Formerly 92k278(1))

In zoning proceedings, basic determination with respect to due process requirements is whether proceedings are legislative or judicial in nature.

[4] Constitutional Law 92 ↪4096

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4096 k. Proceedings and review. Most Cited Cases
(Formerly 92k278.2(1))

When municipal governing body adopts or amends zoning ordinance, its action will usually affect open class of individuals, interests, or situations, so that governing body is then acting in legislative capacity, and any rights of procedural due process in such proceedings are minimal.

[5] Constitutional Law 92 ↪4096

92 Constitutional Law
92XXVII Due Process
92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4096 k. Proceedings and review. Most Cited Cases
(Formerly 92k278(1))

Zoning and Planning 414 ↪1411

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(B) Proceedings on Permits, Certificates, or Approvals
414k1411 k. Nature of proceedings; legislative, judicial, or administrative action. Most Cited

Cases

(Formerly 414k436.1, 414k436)

Zoning and Planning 414 ↪1420

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(B) Proceedings on Permits, Certificates, or Approvals
414k1418 Notice and Hearing
414k1420 k. Notice. Most Cited Cases
(Formerly 414k434)

Zoning and Planning 414 ↪1421

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(B) Proceedings on Permits, Certificates, or Approvals
414k1418 Notice and Hearing
414k1421 k. Hearings in general. Most Cited Cases
(Formerly 414k436.1, 414k436)

When zoning authority considers application for special use permit it acts in quasi-judicial capacity and must accord applicant basic due process; rights to be accorded include reasonable notice of proceedings and reasonable opportunity to be heard, but do not include right to cross-examine those who give testimony opposed to its application.

[6] Zoning and Planning 414 ↪1411

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(B) Proceedings on Permits, Certificates, or Approvals
414k1411 k. Nature of proceedings; legislative, judicial, or administrative action. Most Cited Cases
(Formerly 414k431)

Quasi-judicial proceedings at which municipal governing body considers application for special use permit pursuant to zoning ordinance do not invoke full panoply of procedures required in regular

268 N.W.2d 712

(Cite as: 268 N.W.2d 712)

judicial proceedings, civil or criminal, many of which would be plainly inappropriate.

[7] **Constitutional Law** 92 ↪4096

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4096 k. Proceedings and re-

view. Most Cited Cases

(Formerly 92k278(1))

Cross-examination is not essential of procedural due process in hearings by municipal governing body to consider application for special use permit pursuant to zoning ordinance.

[8] **Constitutional Law** 92 ↪4096

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4096 k. Proceedings and re-

view. Most Cited Cases

(Formerly 92k278(1))

Landowner, which filed application with city for special use permit authorizing mining of gravel from parcel of land zoned for residential use, and which was at public hearing before planning commission and city council accorded opportunity to present information and argument to rebut opposing statements, was not denied procedural due process because it was not allowed at public hearings before planning commission and city council to cross-examine those who made adverse statements.

[9] **Constitutional Law** 92 ↪4096

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applica-

tions

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4096 k. Proceedings and re-

view. Most Cited Cases

(Formerly 92k278(1))

Landowner, which filed application with city for special use permit authorizing mining of gravel from parcel of land zoned for residential use, was not denied procedural due process of law on theory that it did not receive written material, consisting largely of letters expressing opinions of private individuals opposed to its gravel-mining project, in sufficient time prior to hearing before city council in order to prepare a response, as such material did not require lengthy analysis in preparation of response, and there was no indication in transcripts of hearings that landowner requested delay, nor indication by landowner of how or why its interests were prejudiced.

[10] **Constitutional Law** 92 ↪4096

92 Constitutional Law

92XXVII Due Process

92XXVII(G) Particular Issues and Applications

92XXVII(G)3 Property in General

92k4091 Zoning and Land Use

92k4096 k. Proceedings and re-

view. Most Cited Cases

(Formerly 92k278(1))

Landowner, which filed application with city for special use permit authorizing mining of gravel from parcel of land zoned for residential use, was not denied procedural due process of law on theory that three members of city council, which denied landowner's application, relied on information outside the record, in that information in question concerning general nature of geological formations underlying plateau on which parcel of land was located clearly was made part of record.

[11] **Zoning and Planning** 414 ↪1351

414 Zoning and Planning

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(Cite as: 268 N.W.2d 712)

414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1350 Right to Permission, and Discretion

414k1351 k. In general. Most Cited Cases

(Formerly 414k375.1, 414k375)

Application for a special use permit may not be denied arbitrarily; however, administering body, be it city council itself or planning commission to which power to act is delegated, has broad discretionary power to deny application for special use permits.

[12] **Mandamus 250** ↪ 187.9(4)

250 Mandamus

250III Jurisdiction, Proceedings, and Relief

250k187 Appeal and Error

250k187.9 Review

250k187.9(4) k. Presumptions. Most Cited Cases

Landowner, which filed application with city for special use permit authorizing mining of gravel from parcel of land zoned for residential use, and which was granted writ of mandamus by district court directing city to issue special use permit, bore burden of persuasion, upon appeal by city to Supreme Court, that reasons given by city council for its denial of landowner's application were either without factual support in record or legally insufficient.

[13] **Zoning and Planning 414** ↪ 1354

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1354 k. Grounds for grant or denial in general. Most Cited Cases

(Formerly 414k378.1, 414k378)

In deciding whether to grant special use permit, municipality may weigh whether proposed use is consistent with its land use plan.

[14] **Zoning and Planning 414** ↪ 1429

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(B) Proceedings on Permits, Certificates, or Approvals

414k1424 Determination

414k1429 k. Findings, reasons, conclusions, minutes or records. Most Cited Cases (Formerly 414k439)

Determination by city council, in proceedings upon application by landowner for special use permit authorizing mining of gravel from parcel of land zoned for residential use, that graveling on parcel in question would be inconsistent with city comprehensive land use plan was not without evidentiary support and was within bounds of city council's informed discretion in interpreting plan, and thus was legally sufficient reason for denial of special use permit.

[15] **Zoning and Planning 414** ↪ 1429

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(B) Proceedings on Permits, Certificates, or Approvals

414k1424 Determination

414k1429 k. Findings, reasons, conclusions, minutes or records. Most Cited Cases (Formerly 414k439)

Evidence in proceedings upon application filed by landowner for special use permit authorizing mining of gravel from parcel of land zoned for residential use supported determination by city council that further excavation of gravel from parcel in question would appear to increase danger of irreparable environmental damage, and thus that determination was legally sufficient reason for denial of special use permit.

[16] **Zoning and Planning 414** ↪ 1354

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1354 k. Grounds for grant or denial in general. Most Cited Cases

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(Cite as: 268 N.W.2d 712)

(Formerly 414k378.1, 414k378)

Simple fact that community members oppose landowner using his land for a particular purpose is not legally sufficient reason for denying special use permit.

[17] **Zoning and Planning 414** ↪ 1384

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(A) In General

414k1384 k. Mining and minerals; sand and gravel. Most Cited Cases

(Formerly 414k378.1, 414k378)

Community opposition to landowner's application for special use permit authorizing mining of gravel from parcel of land zoned for residential use was not legally sufficient reason, in and of itself, for denying special use permit.

[18] **Zoning and Planning 414** ↪ 1429

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(B) Proceedings on Permits, Certificates, or Approvals

414k1424 Determination

414k1429 k. Findings, reasons, conclusions, minutes or records. Most Cited Cases

(Formerly 414k439)

Evidence in proceedings upon application filed by landowner for special use permit authorizing mining of gravel from parcel of land zoned for residential use supported determination by city council that expanded gravel mining on parcel in question would have adverse effect on value of surrounding property, and affect welfare of surrounding landowners, and such determination was legally sufficient reason for denying landowner's application.

[19] **Zoning and Planning 414** ↪ 1429

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(B) Proceedings on Permits, Certific-

ates, or Approvals

414k1424 Determination

414k1429 k. Findings, reasons, conclusions, minutes or records. Most Cited Cases

(Formerly 414k439)

Evidence in proceedings upon application filed by landowner for special use permit authorizing mining of gravel from parcel of land zoned for residential use supported conclusion by city council that gravel mining on parcel in question would be incompatible with residential end use contemplated for parcel, and incompatibility between landowner's proposed use and residential end use specified in zoning ordinance was legally sufficient reason for denying special use permits.

[20] **Zoning and Planning 414** ↪ 1429

414 Zoning and Planning

414VIII Permits, Certificates, and Approvals

414VIII(B) Proceedings on Permits, Certificates, or Approvals

414k1424 Determination

414k1429 k. Findings, reasons, conclusions, minutes or records. Most Cited Cases

(Formerly 414k439)

Five reasons stated by city council for denying application for special use permits authorizing mining of gravel from parcel of land zoned for residential use were sufficiently supported in record, and four of those reasons, that mining was contrary to city's comprehensive plan, that further excavation would apparently increase danger of irreparable environmental damage, that landowner had not proven that proposed use would not affect welfare of surrounding landowners, and that end use of parcel would not be compatible with comprehensive plan, were legally sufficient to support city's denial of permit.

**714 Syllabus by the Court*

1. When a zoning authority considers an application for a special-use permit it acts in a quasi-judicial capacity and must accord the applicant basic due process. The rights include reasonable notice of the proceedings and a reasonable opportun-

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ity to be heard but do not include the right to cross-examine those who give testimony opposed to its application.

2. The five reasons stated by the city council for denying an application for a special-use permit to mine gravel in an area zoned residential were sufficiently supported in the record. Four of those reasons were legally sufficient to support the municipality's denial of the permit.

Lawson, Ranum, Raleigh & Marshall and Raymond O. Marshall, Stillwater, Doherty, Rumble & Martin and David G. Martin, St. Paul, for appellant.

Petersen Lyons Tews & Squires and Gerald S. Duffy, St. Paul, for respondent.

Stanley G. Peskar, St. Paul, for League of Minn. Cities, amicus curiae, seeking reversal.

Popham, Haik, Schnobrich, Kaufman & Doty and Raymond A. Haik, Minneapolis, for The Aggregate & Readymix Assoc. of Minn., seeking affirmance.

Heard before PETERSON, YETKA, WAHL, and IVERSON, JJ., and considered and decided by the court en banc.

PETERSON, Justice.

The city of Afton appeals from the order granting a peremptory writ of mandamus and from the order denying the motion for amended findings of fact, conclusions of law, and order for judgment or, in the alternative, a new trial. The writ directs the city to issue a special-use permit to Barton Contracting Co., Inc. (hereafter Barton), authorizing Barton to expand its open pit gravel operations in northern Afton. We reverse and dissolve the writ.

The Barton property involved in this case consists of two adjoining 80-acre parcels of *715 land located on a plateau on the northern edge of Afton. The northernmost parcel is referred to as the Hess parcel. Lying immediately south and somewhat to the east of the Hess parcel is the so-called Bishop parcel. Barton has mined gravel on the Hess parcel

since 1961 and has been its record owner since 1963. To the north, northeast, and east of the Hess parcel there are various operational and planned graveling operations owned by others.

[1] Barton became the record owner of the Bishop parcel in 1967, and up until 1977, when mining began pursuant to the district court's writ, the Bishop parcel was farm and grassland. The southern portion of the Bishop parcel remains in its natural state and slopes down to Lake Edith. To the west of the Bishop parcel (and south of the western portion of the Hess parcel) is the Metcalf Nature Center which is operated by the Science Museum of Minnesota. To the east of the Bishop parcel is private residential property. The Bishop parcel was first zoned "residential" by the Afton Town Board (as it was then known) in 1959. The city of Afton adopted a comprehensive-use plan in May 1975, and pursuant to that plan the Bishop parcel is now zoned "R-1" for residential use with 5-acre minimum lots. Under the Afton ordinance gravel mining is a permitted use where a special-use permit is obtained.[FN1]

FN1. A special-use permit differs from a variance. A special-use provision permits property, within the broad discretion of the governing body, to be used in a manner expressly authorized by the ordinance. A variance provision permits particular property to be used in a manner forbidden by the ordinance by varying the terms of the ordinance. *Zylka v. City of Crystal*, 283 Minn. 192, 195, 167 N.W.2d 45, 49 (1969)

The focus of the dispute between Afton and Barton is the northern portion of the Bishop parcel. In early 1976 Barton applied to the city for a special-use permit to expand its operations from the Hess parcel [FN2] onto the northern portion of the Bishop parcel. Up until now it has been essentially a farmland buffer between (a) the graveling operations on the Hess parcel and elsewhere to the north, and (b) the recreational, residential, and nature

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areas to the south and southwest.

FN2. Since 1971 Barton's graveling operations on the Hess parcel have been conducted pursuant to a special-use permit issued annually by Afton. These operations on the Hess parcel are not in dispute here.

Between March and September 1976 numerous meetings were held between representatives of Barton and Afton. On September 14, 1976, the Afton Planning Commission held a public meeting on the Barton application. Representatives of Barton and numerous opponents to its application spoke, and the commission recommended to the city council that Barton's application be denied. One week later the city council held a public hearing on the Barton proposal. Again Barton representatives and opponents spoke and the city council voted to deny Barton the special-use permit.

Shortly after the city council's action Barton commenced this action seeking a writ of mandamus. In ordering the writ, the district court concluded that Afton had denied Barton procedural due process and that, because there was insufficient evidence to support its action, Afton's denial of the permit was arbitrary, capricious, and unreasonable.

[2][3][4][5][6] 1. We turn first to the issues of procedural due process. Prefatory to specific consideration of the three respects in which the district court concluded that Barton was denied procedural due process, we observe generally that the requirements of due process must be measured according to the nature of the government function involved and whether or not private interests are directly affected by the government action. In zoning proceedings the basic determination is whether the proceedings are legislative or judicial in nature. When a municipal governing body adopts or amends a zoning ordinance its action will usually affect an open class of individuals, interests, or situations, so that the governing body is then acting in a legislative capacity, *716Sun Oil Co. v. Village of New Hope, 300 Minn. 326, 220 N.W.2d 256 (1974). Any

rights of procedural due process in such proceedings are minimal. When the governing body considers an application for a special-use permit pursuant to such ordinance, its action no longer bears on an open class of persons but directly on the particular interests of the applicant, in which case it acts in what is usually called a quasi-judicial capacity. Sun Oil Co. v. Village of New Hope, supra. The basic rights of procedural due process required in that case are reasonable notice of hearing and a reasonable opportunity to be heard. These quasi-judicial proceedings do not invoke the full panoply of procedures required in regular judicial proceedings, civil or criminal, many of which would be plainly inappropriate in these quasi-judicial settings.

[7][8] The first respect in which the district court concluded that Barton was denied due process was that Barton was not allowed to cross-examine those who made adverse statements at the public hearing before the planning commission or the city council. We hold that cross-examination is not an essential of procedural due process in such hearings. Colagiovanni v. Zoning Bd. of Review of Providence, 90 R.I. 329, 158 A.2d 158 (1960); Zimmarino v. Zoning Bd. of Review of Providence, 95 R.I. 383, 187 A.2d 259 (1963). The statements made at such a public hearing, unlike a regular judicial proceeding, are not given under oath and are not limited by the traditional rules of evidence. They are usually broad expressions of opinion in favor or against the application. Barton was accorded, and exercised, the opportunity to present information and argument to rebut opposing statements. [FN3]

FN3. We note, in addition, that the asserted right of cross-examination was waived. The transcripts of the two hearings reflect statements by counsel for Barton but there is no indication that any request was made to cross-examine those who made statements adverse to Barton. See, Gibson v. Talbot County Board of Zoning Appeals, 250 Md. 292, 242 A.2d 137 (1968).

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[9] The second respect in which the trial court concluded that Barton was denied procedural due process concerns advance copies of written materials presented at the city council hearing. The trial court concluded that Barton did not receive the written material in sufficient time prior to the hearing to prepare a response. The material consisted largely of letters expressing the opinions of private individuals who were opposed to Barton's project. This was not material which required lengthy analysis in preparation of a response. And, there is no indication in the transcript of either hearing that Barton requested a delay. Even if a request to delay the second hearing was in fact made, we are convinced that its denial did not deny Barton procedural due process. The city council had wide discretion in setting the date of the second hearing, and Barton has not particularized in any way how or why its interests were prejudiced by the city council's action. We hold, therefore, that there was no denial of due process.

[10] The third respect in which the trial court concluded that Barton was denied procedural due process is based upon an unsupported finding that three of the city council members relied on information outside the record. The information in question concerned the general nature of geological formations underlying the plateau on which the Barton property was located. Information on these formations and their bearing on possible environmental damage had been presented to the city council 2 years earlier in connection with a proposal for a sanitary landfill on the Hess parcel. But the information clearly was made a part of the record in the present case. A number of those testifying at the hearing, particularly Dr. Dale Chelberg, testified concerning this same underlying geology and risk of environmental damage, so that this information was a part of the record on which the city council could base its decision.

In sum we find that Barton was not denied procedural due process in any of the three respects found by the district court. Our review of the record

convinces us that Barton was accorded the basic procedural due process rights which were appropriate *717 given the quasi-judicial character of the proceedings.

[11] 2. We turn now to the merits of Afston's denial of Barton's application for a special-use permit for the Bishop parcel. The basic principle, as stated in our leading case, *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969), is that the application may not be denied "arbitrarily" but that "the administering body, be it the council itself or a planning commission to which power to act is delegated, has broad discretionary power to deny an application for a special use permit * * * ." Subsequent cases such as *Inland Construction Co. v. City of Bloomington*, 292 Minn. 374, 195 N.W.2d 558 (1972), and *Metro 500, Inc. v. City of Brooklyn Park*, 297 Minn. 294, 211 N.W.2d 358 (1973), in determining the boundary between permissibly broad discretionary action and an impermissibly arbitrary denial, have looked to whether the zoning authority stated reasons for its decision. In *Corwine v. Crow Wing County*, 309 Minn. 345, 352, 244 N.W.2d 482, 486 (1976), we explained how a statement of reasons affected the scope of judicial review to determine whether the denial was arbitrary:

"* * * Since the court is reviewing the decision of another body, it should, of course, confine itself at all times to the facts and circumstances developed before that body. If the decision-making body does not state reasons contemporaneously with its action, its decision will be prima facie arbitrary, and it will bear the burden of persuading the reviewing court that the facts and circumstances before it gave rise to legally sufficient reasons for denial or revocation. If the decision-making body does state reasons, review will be limited to the legal sufficiency and factual basis for those reasons. When reasons are given, the party seeking review must bear the burden of persuading the reviewing court that those reasons are legally insufficient." (Italics supplied.) [FN4]

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FN4. "When a special use permit is approved," we said in *Corwine v. Crow Wing County*, 309 Minn. 345, 352, 244 N.W.2d 482, 486, "the decision making body is always implicitly giving the same reason all requirements for the issuance of the permit have been met."

[12] The recorded reasons for denying Barton's application for a special-use permit, as the trial court found, were:

"1. That it is contrary to the comprehensive plan.

"2. That further excavation appears to increase the danger of irreparable environmental damage.

"3. That the citizens in the area of Afton are opposed to the use of this land to further mining.

"4. That the applicant has not proven that the proposed use would not effect health, safety, morals and welfare of the occupants of the surrounding land.

"5. That the end use would not be compatible with the comprehensive plan."

We turn to a consideration of each of these reasons in light of the standard articulated in *Corwine* that Barton, as the party seeking review, bears the burden of persuasion that these reasons are either without factual support in the record or are legally insufficient.

1. That the use is contrary to the comprehensive plan.

The Afton comprehensive land-use plan is included in the record and was discussed at several points during the hearings. The plan does not specifically mention gravel mining, so there was room for both Barton and its opponents to argue whether or not graveling on the Bishop parcel would be consistent with the plan. The plan is, however, permeated with evidence of a strong desire to preserve the rural character and unique scenic beauty of Af-

ton and the St. Croix Valley. These aims, as expressed in the plan, were discussed at the hearings.

[13][14] A municipality may weigh whether the proposed use is consistent with its land-use plan in deciding whether to grant a special-use permit. On the facts of this case, the city council's determination that graveling on the Bishop parcel would be inconsistent with the plan was not without*718 evidentiary support and was within the bounds of the council's informed discretion in interpreting the plan. Afton's determination that the Barton proposal was inconsistent with its adopted comprehensive plan was a legally sufficient reason for denial of a special-use permit.

2. That further excavation appears to increase the danger of irreparable environmental damage.

[15] Two types of possible environmental damage were discussed at the hearings on the Barton proposal. These were, first, interference with the underground water table due to loss of gravel layers and, second, potential erosion of the south slopes leading down to Lake Edith. There was a sharp conflict in the testimony concerning the likelihood of either form of environmental damage. Dr. Dale Chelberg, a biologist associated with the Metcalf Nature Center (which adjoins the Bishop parcel), discussed at length the basis for his belief that the risk of both forms of environmental damage was substantial. On Barton's behalf a civil engineer and a planning consultant discussed at length the reasons for their view that the risk of environmental damage was slight or nonexistent. The city council obviously chose to credit the testimony of Dr. Chelberg and other opponents of Barton's proposal more than the testimony of those favoring Barton's proposal.

The standard for assessing conflicting evidence was persuasively expressed in *Boisvert v. Zoning Bd. of Rev. of the Town of South Kingston*, 94 R.I. 107, 178 A.2d 449 (1962), a case which, like the present case, involved judicial review of the denial of a permit to mine gravel on land zoned as residential. The reasons given by the zoning authority in

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Boisvert for denying the permit are generally similar in content and specificity to the reasons given by the Afton City Council in the present case. In reviewing the conflict in the testimony before the zoning authority the Boisvert court observed that its function was not to weigh the evidence, but to review the record to determine whether there was legal evidence to support the zoning authority's decision. The court upheld denial of the permit as we now do here.

We hold, upon careful review of the record, that there was sufficient evidence to support the council's determination as to the threat of environmental damage. That determination was a legally sufficient reason for denial of a special-use permit.

3. That the citizens in the area of Afton are opposed to the use of this land to further mining.

[16][17] The record of the hearings leaves no doubt as to the ample factual basis for this determination. However, under our cases the simple fact that community members oppose a landowner using his land for a particular purpose is not a legally sufficient reason for denying a special-use permit.

Minnetonka Congregat. of Jehovah's Witnesses v. Svec, 303 Minn. 79, 226 N.W.2d 306 (1975); *Twin City Red Barn, Inc. v. City of St. Paul*, 291 Minn. 548, 192 N.W.2d 189 (1971). We hold that community opposition to Barton's application was not a legally sufficient reason, in and of itself, for denying Barton a special-use permit.

4. That the applicant has not proven that the proposed use would not affect the health, safety, morals, and welfare of the occupants of the surrounding land.

[18] At the city council's hearing there was testimony by an experienced real estate broker that in his opinion expanded gravel mining would have an adverse effect on the value of surrounding property. There was thus a factual basis for at least that part of the council's determination which concerned the welfare of the surrounding landowners. The determination that their welfare would be detrimentally affected was a legally sufficient reason for

denying Barton's application.

5. That the end use would not be compatible with the comprehensive plan.

[19] Under the relevant zoning ordinance residential use was the end use contemplated*719 for the Bishop parcel. There was testimony at the hearing that geological and soil conditions would not allow residential use following gravel mining. Barton also proposed light industrial or agricultural use after mining, but there was testimony that these end uses would not be desirable following gravel mining.

The Afton City Council was rightly concerned with the use of the land following the completion of mining, and on the record in this case there was an adequate factual basis for the council's conclusion that gravel mining would be incompatible with a residential end use of the land. This incompatibility between Barton's proposed use and the residential end use specified in the zoning ordinance was a legally sufficient reason for denying Barton a special-use permit.

[20] In sum, for four of the five reasons given by the Afton City Council for denying the permit Barton has not met its burden of showing that they were without factual support in the record or were legally insufficient. We hold that the denial of the permit on the basis of reasons 1, 2, 4, and 5 was proper.

Our holding in this case is supported by the decisions of other courts in analogous cases. In *Dolomite Products Co. Inc. v. Kipers*, 19 N.Y.2d 739, 279 N.Y.S.2d 192, 225 N.E.2d 894 (1967), a particularly relevant example, the landowner brought a declaratory judgment action against members of the town board to determine the status of his land. Prior to the enactment of a zoning ordinance the landowner had purchased parcels A, B, and C, but had begun quarrying only on parcel A. The Court of Appeals of New York held that the zoning ordinance was applicable to, and barred quarrying of parcels B and C. In the present case it will be recalled

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that the Bishop parcel has been zoned as residential since 1959. Barton did not become the record owner of the Bishop parcel until September 1967. Thus Barton is in an even weaker equitable position than the landowner in Dolomite to argue for the expansion of its mining operations from the Hess parcel onto the Bishop parcel. The expansion of open pit mining operations onto adjacent acquired parcels was similarly rejected in *Struyk v. Samuel Braen's Sons*, 17 N.J.Super. 1, 85 A.2d 279 (Super.Ct.App.Div.1951), and *Fredal v. Forster*, 9 Mich.App. 215, 156 N.W.2d 606 (1967).

Reversed.

OTIS, J., took no part in the consideration or decision of this case.

IRVING C. IVERSON, Justice [FN*] (dissenting).

FN* Acting as Justice of the Supreme Court by appointment pursuant to Minn.Const. art. 6, s 2, and Minn.St. 2.724, subd. 2.

I respectfully dissent from the majority decision.

The decision of the majority of the court does not conform to the requirements necessary for denial by a municipality of a request for a "special use" permit set forth clearly in *Zylka v. City of Crystal*, 283 Minn. 192, 167 N.W.2d 45 (1969).

The denial of Barton's request for a "special use" permit, to be a proper exercise of the city of Afton's authority, must conform to the following language expressed in *Zylka* :

"* * * It could also have justifiably denied the application if it had determined that the proposed use would endanger the public health and safety and the general welfare of the area affected, and if the factual basis and reasons for that determination at the time the action was taken were expressed in findings, reflected in the council minutes, or otherwise established in judicial proceedings challenging

its determination." (283 Minn. 197, 167 N.W.2d 49)

The "reasons" given by the Afton city council in denying the application of Barton were conclusions of law, not "findings" of fact as mandated by *Zylka v. City of Crystal*, supra.

It must be kept in mind that the application for a special-use permit to mine gravel *720 submitted by Barton provided for a temporary use of the subject property, not a permanent use. Adequate provisions had been made, guaranteed by a bond furnished by applicant Barton, to restore the premises to a suitable condition so as not to adversely affect the area environmentally. The contemplated special-use, mining of subsurface gravel, was in conformity with existing zoning requirements of the city of Afton, and the so-called comprehensive plan did not address itself to gravel mining operations. It appears clear, however, that the highest and best temporary use of the subject property, as well as much of the surrounding area including the contiguous property owned by the State of Minnesota which contains substantial deposit of gravel, is at present gravel mining.

Factual support for the city of Afton's first reason for refusal of the permit was not legally sufficient, having in mind that the special use was temporary and with the requirements for restoration of the premises and the safeguards provided including the bond requirement.

The second reason for the city's denial of the permit was not factually supported so as to satisfy the test of legal sufficiency. The testimony of Dr. Dale Chelberg, a biologist associated with the Metcalf Nature Center (which adjoins the Bishop parcel, the subject property), was relied upon by the city in adopting this reason. Dr. Chelberg, lacking the necessary qualifications as an expert on geological matters, could not provide sufficient factual reasons to support a legally sufficient basis for a realistic or reliable opinion on the question of environmental damage. His testimony and opinions

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would not be permitted in a trial before a court or a jury.

I agree with the majority opinion that the city's third reason was not a legally sufficient reason.

The majority, as well as the city of Afton, mistakenly placed the burden of proof on the applicant in the city's fourth reason stated at the time of its denial of the permit. A special-use permit contemplates a use which is permitted by the existing zoning. It was incumbent therefore that to deny the applicant Barton's application the city must show at the time it denies the permit that the granting of the permit will adversely affect or endanger the public health and safety and the general welfare of the area affected, as stated in *Zylka v. City of Crystal*, supra.

The only evidence on this subject was the testimony of a real estate broker who testified that the permit would adversely affect real estate values. Again having in mind the temporary use contemplated, this evidence alone, absent any evidence that the health, safety, morals, and general welfare would be adversely affected, is legally insufficient to sustain the city's reason on this ground.

The city's fifth reason for its denial of Barton's application is perhaps the most convincing reason for the denial. However, because the city maintains continuing authority over zoning, land use laws, and building permits and may insist that certain requirements and safeguards be fulfilled by the applicant in restoring the subject property to suitable grades and structurally suitable soil for the erection of buildings, whether they be ultimately residential or light industrial use as changing conditions may dictate, I find this reason to be legally insufficient to support the denial of the special-use permit.

I find that the city of Afton acted arbitrarily and capriciously in denying the application of Barton for a special-use permit when it acted in a quasi-judicial capacity.

I would sustain the trial court or, in the alternative, remand with directions that the city council conduct further hearings in full conformity with the prior decisions of this court.

KELLY, Justice (dissenting).

I join in the dissent of Mr. Justice Iverson.

Minn., 1978.

Barton Contracting Co., Inc. v. City of Afton
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END OF DOCUMENT

EXHIBIT 2

Not Reported in N.W.2d, 2011 WL 382811 (Minn.App.)
(Cite as: 2011 WL 382811 (Minn.App.))

Only the Westlaw citation is currently available.

NOTICE: THIS OPINION IS DESIGNATED AS
UNPUBLISHED AND MAY NOT BE CITED EX-
CEPT AS PROVIDED BY MINN. ST. SEC.
480A.08(3).

Court of Appeals of Minnesota.
Charles KOTTEN, Relator,

v.

BROWN COUNTY BOARD OF COMMISSION-
ERS, Respondent.

No. A10-1111.
Feb. 8, 2011.

West KeySummaryZoning and Planning 414 
1384

414 Zoning and Planning
414VIII Permits, Certificates, and Approvals
414VIII(A) In General
414k1384 k. Mining and Minerals; Sand
and Gravel. Most Cited Cases

Substantial evidence supported the county board's decision to deny property owner a conditional use permit (CUP) to operate a gravel pit. Commentary by community members at public hearings were specifically concerned about "existing, daily traffic problems," safety, dust and stress on the township roads. A letter submitted to the planning commission by two neighbors stated that the existing gravel-truck traffic made 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 made it difficult to see oncoming traffic. The county sheriff also believed that more trucks would create a safety issue.

Brown County Board of Commissioners, File No. C-00242.
Thomas L. Borgen, Nierengarten & Hippert, Ltd.,
New Ulm, MN, for relator.

Scott T. Anderson, Ratwick, Roszak & Maloney,
P.A., Minneapolis, MN, for respondent.

Considered and decided by LANSING, Presiding
Judge; MINGE, Judge; and CRIPPEN, Judge.^{FN*}

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

UNPUBLISHED OPINION

MINGE, Judge.

*1 In this certiorari appeal, relator Charles Kot-
ten challenges respondent Brown County Board of
Commissioners' (county board) denial of a condi-
tional 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 photo-
graphs 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 de-
cision. We also grant this motion with respect to
those parts of the county's brief and statement of
proceedings relying on stricken documents. We fur-
ther grant the motion to strike references in the
county's statement of proceedings regarding the
personal knowledge of county board members re-
garding 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 ap-
plication was improper because (1) he complied
with all requirements in the amended Brown

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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.

*2 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

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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.

DECISION

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.

*3 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.^{FN1}

FN1. For purposes of future practice, parties in certiorari appeals are urged to file motions to supplement the record or to

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strike promptly after the record documents are identified by the responsible party or the allegedly offending brief is filed.

B. Motion to Supplement and Delete the Statement of Proceedings

1. Supplement

*4 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. 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 leg-

ally 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

*5 Kotten moves to disregard certain parts of the county board's statement of proceedings.^{FN2} 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 concerns, but does not dispute that the county board members failed to identify this

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personal knowledge at the May 25 hearing.

FN2. 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

“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, 47 L.Ed.2d 18 (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.^{FN3}

FN3. 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).

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.^{FN4} 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.

FN4. 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.

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 excluding the city's 1979 comprehensive plan and subdivision ordinance, among other public records, because they were not specifically presen-

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ted during the municipal proceedings).

*6 We accept as well-founded Kotten's arguments for striking 15 documents; namely, the planning commission notes, various meeting synopses, and notes of complaints.^{FN5} 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 decision. With regard to the county board's brief and statement of proceedings, we disregard portions that are based on the stricken documents.

FN5. The stricken items are documents 4, 7, 8, 9, 12, 13, 15, 18, 19, 21, 23, 24, 26, 28, and 29.

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 mat-

ters.” *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.”).

*7 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).

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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 substan-

tial 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."

*8 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 dens-

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ity). 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.^{FN6}

FN6. 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.

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).

*9 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.”^{FN7} 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 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.

FN7. As previously noted, Kotten challenges the record of the sheriff's com-

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ments, 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.

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.

*10 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 Kotten's CUP: (1) traffic safety and congestion; (2) ex-

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cessive 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 case-law, 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.

*11 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.

Minn.App.,2011.

Kotten v. Brown County Bd. of Com'rs
Not Reported in N.W.2d, 2011 WL 382811
(Minn.App.)

END OF DOCUMENT

EXHIBIT 3



Engineering • Landscape Architecture • Planning • Surveying • Traffic

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November 17, 2012

Ms. Christine Maefsky—Chair
Planning Commission
City of Scandia
14727 209th Street
Scandia, MN 55073

**Re: Traffic Analysis of the Proposed Tiller Conditional Use Permit
RLK Incorporated Project No. 2011-163-M**

Dear Ms. Maefsky:

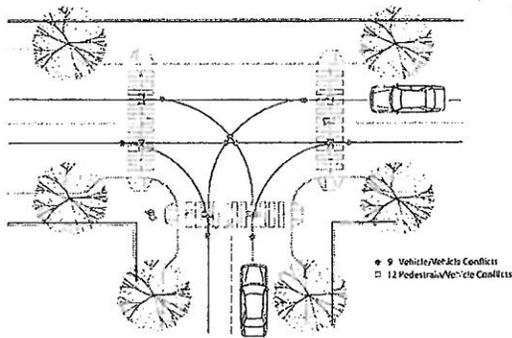
RLK Incorporated has been hired by the Take Action - Conserve Our Scandia to review Tiller Corporation's Conditional Use Permit application for the Zavoral Mining project. RLK focused specifically on traffic safety at the access for the mining site. The construction of a site access at the TH95/TH97 intersection creates a significant threat to traffic safety by increasing the potential for severe or fatal accidents by over 350%. Even if Tiller constructs a site access offset from the TH95/TH97 intersection in accordance with MnDOT guidance, the risk of severe or fatal accidents will still increase by 100%.

As documented in the Federal and State Access Management Manuals (see figures below), the current T-intersection has 9 potential conflict points. Each conflict point represents the opportunity for a collision. Adding a site access aligned with the intersection as Tiller proposes would create a total of 32 conflict points according to the Federal and State Access Manuals, presenting a 350% increase in the potential for collisions. Given the speed at which traffic is moving and the large nature of the gravel trucks that will be using the intersection, collisions have a proven potential to be severe or fatal at this intersection.

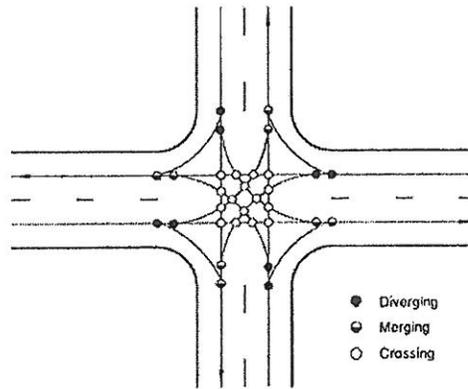
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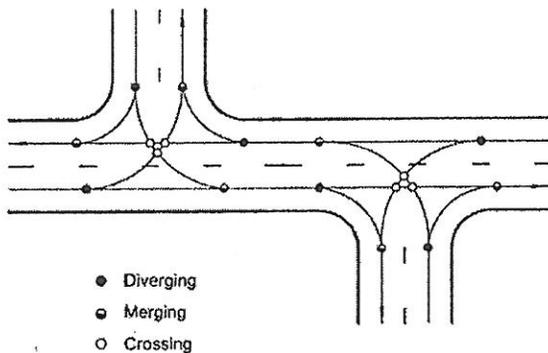


9-Conflict Points

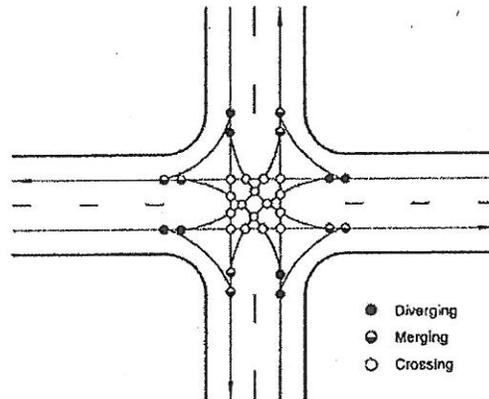


32-Conflict Points

Even if the Tiller mine access were constructed according to MnDOT guidance, there would still be a 100% increase in the risk for severe or fatal collisions. MnDOT's Access Management Manual (2008). MnDOT recommends offset driveways, as opposed to overlapping driveways because "offset driveways allow opposing left-turn movements to occur at the same time." (In other words, the left turning vehicles do not interfere with each other.) If Tiller were to construct an off-set access, creating two T-intersections—TH95 with TH97 and TH95 with the site access—the total conflict points would increase to 18, representing a 100% increase in the risk for severe or fatal collisions.



18-Conflict Points

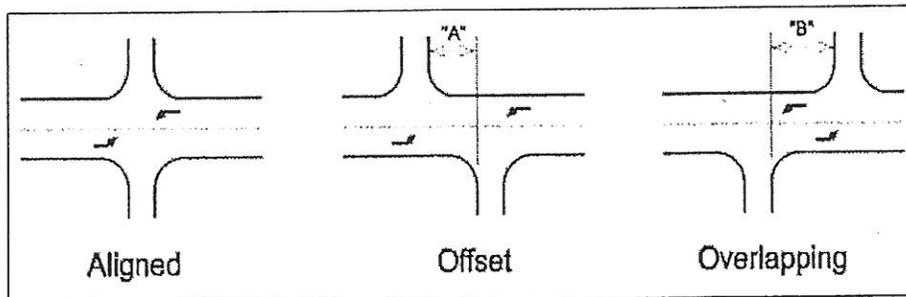


32-Conflict Points

MnDOT's Access Management Manual (2008) provides guidance on constructing driveway connections to the public roadway network. MnDOT classifies driveways by type. Type 1 is a residential or field entrance. Type 2 is a low-volume commercial access. Type 3 is a high-volume commercial driveway. For the proposed land use as a mining development, the trip generation forecast submitted in the FEIS of at most 744 trips per day would match the definition of the driveway for the site as Type 2 – Low-Volume Commercial.

According to the MnDOT Access Management Manual, "Offset driveways should be separated by at least the Spacing between Adjacent Driveways (100 feet for Types 1 and 2 Driveways), as shown as distance "A" in Figure 3.31." (MnDOT Access Management Manual, 2008, p. 35). Figure 3.27 of the Access Management Manual provides direction on spacing between adjacent driveways. For roadways with 55 mph speed limits, the spacing required between adjacent driveways of Type 1 and 2 is 100 feet. Review of the mining site boundary shows there is ample room to provide the 100 foot minimum offset required by MnDOT for this access type.

Figure 3.31: Overlapping Driveways



Source: Mn/DOT Access Management Manual, 2008, p. 35

From a safety standpoint, the best option for the City of Scandia is to not allow the construction of the site access for the Tiller mine, thereby preventing any increase in the potential for severe or fatal collisions. If the City does approve the Tiller mine, then the offset T-intersections with at least a spacing of at least 100 feet is the appropriate design for Type 2 driveways and should be required by the City for access to this site.

Thank you for the opportunity to review and comment on this information.

Sincerely,
RLK Incorporated

Vernon E. Swing, P.E.
Principal Traffic Engineer

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