COLORADO COURT OF APPEALS

DATE FILED: November 22, 2017
CASE NUMBER: 2017CA463

Court of Appeals No. 17CA0463
Weld County District Court No. 15CV30776
Honorable Todd L. Taylor, Judge

Motherlove Herbal Company, a Colorado Certified B Corporation; Indianhead West Homeowners Association, Inc., a Colorado nonprofit corporation; Rockin S. Ranch LLC, a Colorado limited liability company; John Cummings; David Kisker; Gary Oplinger; Wolfgang Dirks; and James Piraino,

Plaintiffs-Appellants,

v.

Board of County Commissioners of Weld County, Colorado; Chair Julie Cozad; Pro-Tem Steve Moreno; Sean Conway; Michael Freeman; Barbara Kirkmeyer; Martin Marietta Materials, Inc., a North Carolina corporation; and Gerrard Investments, LLC, a Colorado limited liability company,

Defendants-Appellees.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division VI
Opinion by JUDGE TERRY
Casebolt* and Carparelli*, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(e)
Announced November 22, 2017

Ireland Stapleton Pryor & Pascoe, PC, Mark E. Lacis, James R. Silvestro, Denver, Colorado, for Plaintiffs-Appellants

Bruce T. Barker, County Attorney, Greeley, Colorado, for Defendants-Appellees Board of County Commissioners of Weld County, Colorado; Chair Julie Cozad; Pro-Tem Steve Moreno; Sean Conway; Michael Freeman; and Barbara Kirkmeyer

Brownstein Hyatt Farber Schreck, LLP, Wayne F. Forman, Mark J. Mathews, Julia E. Rhine, Denver, Colorado, for Defendant-Appellee Martin Marietta Materials, Inc., a North Carolina corporation

Witwer, Oldenburg, Barry & Groom, LLP, Patrick M. Groom, Kent A. Naughton, Greeley, Colorado, for Defendant-Appellee Gerrard Investments, LLC, a Colorado limited liability company

*Sitting by assignment of the Chief Justice under provisions of Colo. Const. art. VI, § 5(3), and § 24-51-1105, C.R.S. 2017.

¶ 1 In this C.R.C.P. 106(a)(4) action, above-captioned plaintiffs seek judicial review of the decision of defendant Weld County Board of County Commissioners (the board) to approve a use by special review in favor of defendants Martin Marietta Materials, Inc., and Gerrard Investments, LLC (defendant corporations). We reverse and remand to the district court for entry of judgment in favor of plaintiffs.

I. Background

¶ 2 Defendant corporations applied for a use by special review to construct and operate an asphalt and concrete production, processing, and railroad transloading facility (the proposed use) on a 132-acre agriculturally zoned parcel (the proposed site). The facility would involve the construction of multiple new buildings, including an asphalt plant, a ready-mix concrete plant, a 14,000 square-foot office building, and additional supporting elements such as an electrical substation, multiple storage tanks, and a railroad loop that can accommodate up to 121 train cars for the transloading of materials.

¶ 3 Plaintiffs are a diverse group made up of homeowners in a neighboring residential development, an organic farm, and a proposed agriculturally themed event space.

¶ 4 Following a lengthy hearing, the board issued a resolution approving the use by special review. Plaintiffs then sought review in the district court under C.R.C.P. 106(a)(4), arguing that the board violated the Weld County Code (W.C.C.) and abused its discretion in approving the proposed use. After finding that the board's initial resolution did not include sufficient findings of fact or explanations as to how the use by special review would meet the relevant portions of the code, the district court remanded the case to the board to make further factual findings necessary for judicial review.

¶ 5 On remand, the board issued a second, more detailed resolution approving the proposed use, and the case was returned to the district court. That court affirmed the board's decision in a lengthy and detailed order.

II. Record Support for Approval

¶ 6 Plaintiffs contend that the administrative record lacks competent evidence supporting the board's decision to grant

defendant corporations a use by special review to carry out the proposed use in an agricultural zone. We agree and reverse the district court's judgment affirming the board's resolution.

A. Standard of Review

¶ 7 C.R.C.P. 106(a)(4) requires us to review a governmental body's decision to determine whether that body abused its discretion. A governmental body such as the board abuses its discretion if it misapplies or misconstrues the applicable law, or if "the decision under review is not reasonably supported by competent evidence in the record." *Freedom Colo. Info., Inc. v. El Paso Cty. Sheriff's Dep't*, 196 P.3d 892, 899-900 (Colo. 2008). "Lack of competent evidence occurs when the administrative decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority." *Id.* at 900.

¶ 8 We interpret a county code de novo, applying the ordinary rules of statutory construction. *Alpenhof, LLC v. City of Ouray*, 2013 COA 9, ¶ 10. However, we may defer to a governmental body's interpretation of a code, provided that it is reasonable and consistent with the drafters' overall intent. *Id.*; *see Whitelaw v. Denver City Council*, 2017 COA 47, ¶¶ 8, 57.

¶ 9 Because an appellate court sits in the same position as the district court when reviewing a governmental body's decision under C.R.C.P. 106(a)(4), our review of the district court's decision is de novo. *Whitelaw*, ¶ 8 (citing *Alward v. Golder*, 148 P.3d 424, 428 (Colo. App. 2006)). This means that we show no deference to the district court's conclusions and review the board's decision afresh. *See Nixon v. City & Cty. of Denver*, 2014 COA 172, ¶ 9.

B. Compatibility with Surrounding Uses

¶ 10 Plaintiffs first argue that there was no competent evidence in the record supporting the board's finding that the proposed use would be compatible with the existing surrounding land uses. We agree because the board's conclusion that the project would be compatible relied on an unsupported conclusion that the proposed use would mitigate noise to a residential level.

1. Relevant Portion of the Weld County Code

¶ 11 W.C.C. section 23-2-230.B provides that the board shall only approve the request for a use by special review if "the applicant has met the standards or conditions of this Subsection B." Section 23-2-230.B.3 states that the applicant shall demonstrate "[t]hat the

USES which would be permitted will be compatible with the existing surrounding land USES."

¶ 12 In the amended resolution, the board determined that the proposed use would be compatible with the existing surrounding uses because the conditions of approval and development standards issued by the board would "not only ensure, but enhance the compatibility with existing surrounding land uses by mitigating any issues," such as traffic, noise, dust, and visual impact.

2. Discussion

¶ 13 Plaintiffs argue that given the characteristics of the proposed use and surrounding land uses, there was no competent evidence in the record supporting compatibility. We conclude that the record lacks competent evidence to support the board's finding that the proposed use will comply with applicable noise standards as part of a mitigation strategy under the conditions of approval and development standards.

¶ 14 The Weld County Comprehensive Plan, which provides the "foundation for land use policy in the County," W.C.C. § 22-1-120, seeks to allow industrial uses within "agricultural areas when the impact to surrounding properties is minimal or mitigated." W.C.C.

§ 22-2-20.B.2. The W.C.C. also provides that "[w]here reasonable methods or techniques are available to mitigate any negative impacts which could be generated by the proposed USE upon the surrounding area, the Board of County Commissioners may condition the decision to approve the Special Review Permit upon implementation of such methods or techniques." W.C.C. § 23-2-230.C. A plain reading of the code indicates that conditions of approval or development standards placed on a use by special review may be considered in an evaluation of compatibility with the surrounding uses.

¶ 15 In finding in favor of compatibility, the board concluded that as part of the development standards, "noise has been mitigated to be at the residential standard of 55/50 dB(A)" even for the closest homes to the proposed site. This conclusion appears to correspond with the board's adoption of development standard twenty-four, which states: "This facility shall adhere to the maximum permissible noise levels allowed in the Residential Zone as delineated in Section 14-9-30 of the Weld County Code *as measured at the property line* of the adjacent residential lots." (Emphasis added.) The corresponding sections of the code limit

maximum residential noise to 55 dB(A) during the day and 50 dB(A) at night. W.C.C. §§ 14-9-30, -40.

¶ 16 The only evidence contained in the record on this issue indicates that the proposed use will not meet the residential noise standards "at the property line of the adjacent residential lots," as required by development standard twenty-four and as relied on by the board in making the compatibility decision. One data set included in defendant corporations' own noise analysis projects that the proposed use will exceed the 50 and 55 dB(A) residential noise limits at many of the residential property lines, even when mitigation efforts are in place. Defendants point to a separate data set, which projects compliance with the residential limits at the noise receiver locations. But their argument fails to acknowledge that development standard twenty-four — adopted by the board and relied on as evidence of mitigation in the compatibility analysis — requires that noise be measured at the residential property lines, and not at the receiver locations, which are located farther back at the actual residences.

¶ 17 Therefore, contrary to the board's finding that "noise has been mitigated to be at the residential standard of 55/50 dB(A)," the only

evidence in the record indicates that the proposed use will not meet the residential noise standard at the property lines, as required by development standard twenty-four. We therefore conclude that the board abused its discretion because its finding of compatibility relied on a conclusion of noise mitigation that is unsupported by the record.

¶ 18 Defendant corporations argue that the noise analysis contained in the record is based on an unrealistic, worst-case assumption that all sources of noise coming from the proposed use would be operating simultaneously, and that they need only comply with the noise requirements once the plant is actually operating. But W.C.C. section 23-2-230.B places the burden on the applicant to demonstrate that the proposed use "has met" the conditions of the subsection. Therefore, it was up to defendant corporations to demonstrate, as a condition of the board's approval, that the proposed use will be compatible with the existing surrounding uses by placing supporting information in the administrative record. There is currently insufficient support in the record for us to conclude that the proposed use, when running under normal operations, would comply with development standard twenty-four.

¶ 19 We therefore reverse the district court's judgment and remand to the district court for the entry of judgment in favor of plaintiffs.

III. Plaintiffs' Other Contentions

¶ 20 Because the board's decision must be overturned, we decline to address plaintiffs' other contentions that the board improperly considered non-adjacent land uses in its compatibility analysis, that there was not competent evidence demonstrating a diligent effort to conserve prime farmland, and that the board engaged in illegal "spot zoning." We also decline to address plaintiffs' contention that the board and defendant corporations' attorneys engaged in improper ex parte communications.

IV. Conclusion

¶ 21 The judgment is reversed and the case is remanded to the district court for the entry of judgment in favor of plaintiffs.

JUDGE CASEBOLT and JUDGE CARPARELLI concur.

Court of Appeals

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PAULINE BROCK
CLERK OF THE COURT

NOTICE CONCERNING ISSUANCE OF THE MANDATE

Pursuant to C.A.R. 41(b), the mandate of the Court of Appeals may issue forty-three days after entry of the judgment. In worker's compensation and unemployment insurance cases, the mandate of the Court of Appeals may issue thirty-one days after entry of the judgment. Pursuant to C.A.R. 3.4(m), the mandate of the Court of Appeals may issue twenty-nine days after the entry of the judgment in appeals from proceedings in dependency or neglect.

Filing of a Petition for Rehearing, within the time permitted by C.A.R. 40, will stay the mandate until the court has ruled on the petition. Filing a Petition for Writ of Certiorari with the Supreme Court, within the time permitted by C.A.R. 52(b), will also stay the mandate until the Supreme Court has ruled on the Petition.

BY THE COURT: Alan M. Loeb
Chief Judge

DATED: October 19, 2017

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