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**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A18-0571**

In the Matter of the Application of
Park Rapids Clay Dusters, Inc.,
for a Conditional Use Permit.

**Filed March 18, 2019**
**Affirmed**
**Smith, Tracy M., Judge**

Wadena County Board of Commissioners
File No. ZP18-8500

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Considered and decided by Halbrooks, Presiding Judge; Larkin, Judge; and Smith, Tracy M., Judge.

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

**SMITH, TRACY M.**, Judge

Respondent Wadena County Board of Commissioners, over the opposition of relators Randy and Tami Wenthold and their business, Went North LLC (collectively, the Wentholds), approved a conditional-use permit that allowed respondent Park Rapids Clay Dusters Inc. (PRCD) to construct and operate a shooting range on its property. In this

certiorari appeal, the Wentholds argue that a shooting range is not allowed as a conditional use in the relevant zone under the Wadena County, Minn., Zoning Ordinance (2017) (WCZO). They also argue that, even if a shooting range can be a conditional use in that zone, the county acted arbitrarily and capriciously by allowing the use despite their arguments that it will cause offensive noise and will result in shot leaving the property and falling onto adjoining state forest land. We affirm.

## FACTS

PRCD was gifted 40 acres of unproductive farm land in Wadena County. The property is bounded on the west, south, and east by the Huntersville State Forest and on the north by agricultural property that is owned by the donor of the property. The Wentholds own nonadjacent property approximately two miles northwest of the property. They operate a bed-and-breakfast and corral business that provides accommodations for horse trail riders who use trails in the state forest.

On February 14, 2018, PRCD applied for a conditional-use permit, seeking to build a shooting range for high school clay target leagues, firearm training and safety courses, and public use. The proposed range would include a clubhouse, four storage containers, five trap houses, and two portable toilets. PRCD included with its application, among other documents, a noise assessment performed using software to model the propagation of sound around the property.

In Wadena County, applications for conditional-use permits go through a two-stage review process. First, the application is reviewed by the Wadena County Planning Commission. WCZO § 21.B. The planning commission is required to hold at least one

public hearing regarding the application. *Id.* Based on the application and the statements at the hearing or hearings, the planning commission makes findings and a recommendation about whether to grant the conditional-use permit. *Id.* The planning commission must make findings on seven prerequisites to any recommendation that the county allow the conditional use,[1] WCZO § 21.D, and submit a report to the county board containing its findings and recommendations, WCZO § 21.C. After the county board holds "whatever public hearings it deems advisable," it makes the final decision about whether to grant the conditional-use permit. *Id.*

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[1] These are:

> 1. That 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 within the immediate vicinity;
> 2. That the establishment of the Conditional Use will not impede the normal and orderly development and improvement of surrounding vacant property for uses predominant in the area;
> 3. That adequate utilities, access roads, drainage and other necessary facilities have been or are being provided;
> 4. That adequate measures have been or will be taken to provide sufficient off-street parking and loading space to serve the proposed use;
> 5. That adequate measures have been or will be taken to prevent or control offensive odor, fumes, dust, noise and vibration, so that none of these will constitute a nuisance, and to control lighted signs and other lights in such a manner that no disturbance to neighboring properties will result.
> 6. That the use is consistent with our Land Use Controls Ordinance;
> 7. That the use is not in conflict with the Wadena County Comprehensive Plan.

WCZO § 21.D.

On March 15, 2018, the planning commission held a public hearing on PRCD's application. At that meeting, testimony from community members generally expressed either that allowing the shooting range would be good because high school students needed a safe place to shoot or that the location was wrong because noise and shotfall outside the property would interfere with land values and with recreation on the adjacent state forest land.

At the end of the hearing, the planning commission voted on findings of fact. It did not find that three of the seven prerequisites were satisfied. Specifically, it concluded that the use was not compatible with the surrounding area or would depreciate nearby properties, that the use would impede development of surrounding property, and that there were not adequate measures to control noise. Thereafter, proponents of the use asked for the opportunity to respond to opponents and sought a way to remedy the application's shortcomings. The planning commission tabled the application for research on the issues of noise and safety and decided to conduct a site visit.

On March 21, members of the planning commission visited the property. They also traveled to several nearby locations and listened while guns were fired on the property in order to hear for themselves how audible the gunshots were. After the site visit, the planning commission held a second public meeting. Discussion focused primarily on whether the noise would be intrusive and the hours in which shooting would occur. Following the public-comment period, the planning commission revoted on the findings, reversing two findings to conclude that the use would be consistent with the area and would not impede development of nearby vacant land. The other findings remained the same.

Thus, six of the mandatory prerequisites were found to be satisfied, but one—that there were adequate measures in place to prevent offensive noise—was not. Nevertheless, the planning commission voted to approve the conditional use with six conditions: (1) limited hours of operation, (2) limited types of firearm, (3) no shooting would be permitted during two particular horse-riding events, (4) no one under the age of 18 would be permitted to shoot a handgun, (5) a range safety officer was to be on site any time the range would be open, and (6) any incidents had to be reported to the sheriff's office.

In preparation for the county board's hearing on the permit application, staff for the county recommended amending the finding of inadequate noise-control measures to find that there were adequate measures. Staff also recommended that a seventh condition be imposed—specifically, that "a tree line buffer, consisting of 3-4 or more rows of coniferous trees, be established around the inside perimeter of the property" to help absorb noise.

On April 3, at a meeting of the Wadena County Board of Commissioners, the Wentholds and their attorney argued against approval of the conditional use. The Wentholds contended that the proposed use had grown more intensive over time, that the simulated noise study was inaccurate, and that noise levels would exceed the thresholds of Chapter 87A of the Minnesota Statutes. Their attorney argued that shooting ranges were not allowed as a conditional use within the relevant zone, that the simulated noise model did not comply with Minnesota law, and that the shotfall zone would extend beyond the property, causing interference with adjoining properties.

The proponents of the use also spoke, stating that there was no problem with the shot because they would be throwing clay pigeons at narrower angles, resulting in narrower

shotfall zones, and, alternatively, because the Minnesota Department of Natural Resources (DNR) did not object to some shot falling on state land. Finally, a county staff member spoke, summarizing the staff recommendations for amending the findings, adding a condition, and approving the use.

The county board voted unanimously to accept the staff recommendations and the planning commission's recommendation. The board amended the finding relating to noise, imposed the seventh condition requiring a tree-line buffer, and approved the conditional use.

The Wentholds appeal by writ of certiorari.

**D E C I S I O N**

The standard of review of a grant of a conditional-use permit is deferential because counties have "wide latitude in making decisions about special use permits." *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003). We independently review a county's grant of a conditional-use permit "to determine if it is unreasonable, arbitrary, or capricious." *Loncorich v. Buss*, 868 N.W.2d 755, 759 (Minn. App. 2015). A county acts unreasonably if the reasons for its decision are legally insufficient or lack a factual basis in the record. *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015).

**I. A shooting range is a conditional use in the A-2 district.**

The Wentholds argue that the county's decision was arbitrary and capricious because the proposed use of the property as a shooting range was not permitted under the ordinance.

The WCZO divides Wadena County into a number of districts, in which certain uses are permitted, certain uses are conditional, and other uses are prohibited. The property is located in the A-2 district, the mixed agriculture-forestry district, which is established in section 7 of the ordinance. Section 7.B identifies 13 permitted uses in the A-2 district; a shooting range is not among them. Section 7.C identifies 14 conditional uses that may be approved, subject to the ordinance's general requirements for conditional-use permits; again, a shooting range is not among them. However, section 7.C's list of conditional uses also includes a fifteenth item—a catchall provision: "If a use is not listed or does not have a designated type of use, the use may be allowed in the district as a conditional use." WCZO § 7.C.15. The county relied on this catchall provision in granting the conditional-use permit.

The parties dispute the meaning of subsection 15. According to the Wentholds, "not listed" means that a use must not be listed anywhere else in the ordinance for the subsection to apply. They argue that because shooting ranges are listed as a conditional use in the recreational district, *see* WCZO § 13A.C.1-.3, shooting ranges are "listed" and therefore fall outside the scope of section 7.C.15. In contrast, the county argues that "not listed" simply means not listed in section 7 of the ordinance, governing the A-2 district. Under the county's interpretation, the catchall provision allows any use that is not otherwise permitted in the A-2 district to be a conditional use, provided it meets the ordinance's general conditional-use requirements.

The interpretation of an ordinance is a question of law that we review de novo. *Prior Lake Aggregates, Inc. v. City of Savage*, 349 N.W.2d 575, 578 (Minn. App. 1984). The

purpose of our interpretation is to ascertain the intent of the legislative body. *State v. Vasko,* 889 N.W.2d 551, 556 (Minn. 2017) (interpreting city ordinance). When interpreting an ordinance, we "give words and phrases their plain and ordinary meaning." *Id.*; *see also Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn. 1980) (interpreting zoning ordinance). If the ordinance is unambiguous, we apply its plain meaning. *See Vasko*, 889 N.W.2d at 556. If, however, the ordinance is susceptible of two or more reasonable interpretations, it is ambiguous, and we turn to canons of statutory construction to determine its meaning. *Id.*

The question for us is the plain meaning of the phrase "not listed." Because the ordinance does not say what it means to be "listed," we may look to dictionary definitions to determine the plain meaning of the term. *See State v. Carson*, 902 N.W.2d 441, 445 (Minn. 2017) (determining meaning of "to be listed" in Minnesota's impaired-driving statute). To be "listed" is to be on a "list," and, according to dictionaries, a "list" is "a series or number of connected names, words, or other items written or printed one after another." *Id.* (summarizing definitions of "list" from three dictionaries). This definition, however, does not help us answer the question here. The question here is *where* within the ordinance an item must appear in order to be listed (or not) for purposes of subsection 7.C.15. Nothing inherent in the word "listed" requires that it be read narrowly to apply only to the permitted and conditional uses in section 7 or that it be read broadly to apply to all permitted and conditional uses in the entire ordinance. Either interpretation is reasonable, so the ordinance is ambiguous.

We therefore turn to canons of construction. A zoning ordinance must be interpreted in the manner that, while consistent with the ordinance's terms, is least restrictive upon the property owner's rights to use its property as it wishes. *See Frank's Nursery Sales*, 295 N.W.2d at 608-09. Here, interpreting "not listed" to mean not listed in section 7 is less restrictive of property owners' right to use their land as they wish.[2] When interpreted in this way, a property owner has a broader universe of potential conditional uses available to it in the A-2 district.

In addition, a zoning ordinance must be considered in light of its underlying policy. *Id.* at 609. As explained in the preface to the WCZO, the ordinance is "permissive rather than restrictive." While it permits uses that would naturally fit within an area and prohibits incompatible uses, the ordinance also provides "added flexibility" through conditional-use permits, making it "possible to allow certain uses to situate within a district" provided that conditions are met. Interpreting the catchall provision of subsection 15 to apply to any use not listed in section 7 provides more flexibility for potential uses in the A-2 mixed agriculture-forestry district.

The Wentholds contend, however, that application of the catchall provision to the proposed shooting range is "problematic" because it gives the county "unbridled

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[2] Though *Frank's Nursery Sales* describes the principle as requiring construction of the ordinance "strictly against the city," that is a result of the particular facts of that case. 295 N.W.2d at 608. There, the city denied the property owner a building permit; the property owner and the zoning body were the opposing parties. *Id.* at 607. Here, the county granted the conditional-use permit, and that grant is being challenged by a third party. Thus, construction of the ordinance in favor of the landowner, here PRCD, comports with *Frank's Nursery Sales*.

discretion," resulting in arbitrary decision-making. To the extent the Wentholds challenge the validity of the provision, we lack jurisdiction to consider their argument on a writ of certiorari.[3] However, one aspect of the argument is relevant to this appeal. The absence of clear, objective standards for the grant or denial of a conditional-use permit makes the county's decision more "vulnerable to a finding of arbitrariness." *RDNT*, 861 N.W.2d at 76 (quotation omitted). However, the standards referred to in *RDNT* and *Hay v. Township of Grow*, 206 N.W.2d 19 (Minn. 1973)—the case on which *RDNT* relies—were the standards for granting a conditional-use permit, not the standards for determining what uses were conditional uses. *See RDNT*, 861 N.W.2d at 76 (applying closer scrutiny to a city's factual findings because the denial of the conditional-use permit was based on a general finding that the use would be "injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare"); *Hay*, 206 N.W.2d at 22-23 (applying more scrutiny where the standard for a special-use permit was that the use would not "be detrimental to the public welfare or injurious to property or improvements in the neighborhood"). Because

[3] The subject-matter jurisdiction conferred by a writ of certiorari extends only to review of local governments' quasi-judicial acts and not to local governments' legislative acts. *Dead Lake Ass'n v. Otter Tail County*, 695 N.W.2d 129, 134-35 (Minn. 2005). Zoning ordinances are such legislative acts. *Id.* at 135. Thus, this court lacks subject-matter jurisdiction to consider a challenge to the validity of WCZO § 7.C.15 on the theory it unlawfully grants unbridled discretion to the county.

The Wentholds' additional argument that section 7.C.15 is invalid because it exceeds the county's delegated authority—specifically, that Minn. Stat. § 394.301 (2018) authorizes counties to "designate certain types of developments" as conditional uses and the uses designated by the catchall are insufficiently "certain"—is similarly beyond our jurisdiction. *See id.* at 134-35. Accordingly, we do not address this challenge to the validity of the ordinance.

the standards contained in WCZO § 21.D apply to all conditional uses, and because the Wentholds do not argue that those standards are insufficiently particular, there is no need to apply extra scrutiny to the county's findings.

We conclude that the county did not act arbitrarily or capriciously by applying WCZO § 7.C.15 to permit a shooting range as a conditional use within the A-2 district.

## II. The county did not act arbitrarily or capriciously by finding that adequate measures were in place to control shot.

When reviewing a zoning decision, this court's role is to determine whether there is evidence in the record to support the zoning authority's decision but not to re-weigh the evidence. *RDNT*, 861 N.W.2d at 76. The Wentholds argue that the county acted arbitrarily and capriciously by approving the conditional use even though PRCD's plan for the range did not comply with the NRA's *Range Source Book*. The *Range Source Book* is identified by Minnesota's Shooting Range Protection Act, Minn. Stat. §§ 87A.01-.10 (2018), as the basis of "best practices for shooting range performance standards" for purposes of that act. Minn. Stat. § 87A.02.[4]

The Wentholds suggest that the county must deny a conditional-use permit for any shooting range that does not comply with the Shooting Range Protection Act's best practices. But a zoning authority does not necessarily act arbitrarily by granting a

[4] The Shooting Range Protection Act, passed in 2005, Minn. Laws 2005 ch. 105, §§ 1-8, at 589-93, provides some legal protections for ranges that comply with best practices. Among other provisions, the act limits local government regulation of compliant shooting ranges, grants immunity from nuisance suits to operators of compliant shooting ranges, and limits the situations in which courts may grant permanent injunctions against shooting ranges. Minn. Stat. §§ 87A.03, .06, .07.

conditional-use permit for a use that may violate a rule that the zoning authority is not responsible for enforcing. *See Schwardt*, 656 N.W.2d at 388-89 (holding that a county board did not act arbitrarily by issuing a conditional-use permit for a feedlot without including as a condition a setback that was required for issuance of a feedlot permit). Here, the county is not responsible for enforcing the standards set out in the Shooting Range Protection Act. Thus, even if the shooting range is not compliant with the *Range Source Book*, that fact alone does not require the county to deny the conditional-use permit.

The Wentholds argue that the *Range Source Book* and the plans that PRCD submitted showing the layout of the property prove that shot is likely to land on adjoining parcels. This fact, they argue, proves that the county acted arbitrarily and capriciously by finding, first, that the use would not harm already permitted uses of surrounding property, and, second, that the use would not interfere with normal development and improvement of surrounding property. The Wentholds are correct that the PRCD's plans do not meet the standards of the *Range Source Book*. Using the *Range Source Book*'s shotfall zone, 400 feet on the adjoining property to the east will be in that zone. The Wentholds contend that the county's failure to address this issue renders its decision arbitrary and capricious. *See In re Block*, 727 N.W.2d 166, 178 (Minn. App. 2007) (quotation omitted) (holding that a governing body's decision is arbitrary and capricious where it "failed to consider an important aspect of the problem").

But the county addressed shotfall. Representatives of PRCD committed to taking necessary precautions to keep shot on the property. Also, the evidence in the record does not show that shot will in fact leave the property; it only shows that the shotfall zones as

determined by the *Range Source Book* extend beyond the property. But the county notes that the zones shown in the *Range Source Book* do not illustrate shotfall zones based on the rules that PRCD will use for shooting. It contends that PRCD's rules, which require that clays be thrown at a narrower angle, will result in smaller shotfall zones. The county could have credited the testimony of PRCD's representatives about their style of shooting and their willingness to prevent shot from leaving the property.

Moreover, even if shot would fall on adjoining land, the Wentholds have failed to prove that it was arbitrary or capricious for the county to conclude that the shotfall is not inconsistent with the adjoining land's current use or future development. The county concluded that the uses of the adjoining state forest—the only adjoining property onto which the *Range Source Book*'s shotfall zones extend—will not be impacted by occasional shotfall. The county relied primarily on an email from an employee of the DNR, the agency that manages the state forest, agreeing to accommodate shotfall if it occurs.

The Wentholds argue that reliance on the statement from the DNR was unreasonable for two reasons. The first is that it would be unreasonable for the DNR to permit "live ammunition" to be shot onto public land. The second is that the position attributed to the DNR by the county would expose the DNR to federal environmental liability. As to the first argument, the DNR already permits "target, trap, and recreational shooting" on state forest lands unless otherwise prohibited. Minn. R. 6100.0800, subp. 5 (2017). It is therefore not unreasonable for the county to rely on a statement that the DNR would permit recreational shotfall onto state forest land from other land. The second argument also fails. As an initial matter, the Wentholds' argument about federal environmental liability is based

on a case involving a suit against the operator of a gun club whose members fired shot into its own land and into Long Island Sound; it did not involve a third party onto whose land shot was discharged. *Conn. Coastal Fishermen Assoc. v. Remington Arms Co.*, 989 F.2d 1305, 1316 (2d Cir. 1993). However, even if the DNR's policies expose it to environmental liability, that fact does not make the shotfall inconsistent with the current use of that property. Thus, the finding that the conditional use will not negatively impact current uses has support in the record and is not so overwhelmingly contradicted "as to render the approval arbitrary." *Schwardt*, 656 N.W.2d at 389.

In sum, the county is not required to apply the provisions of Minn. Stat. §§ 87A.01-.10 in deciding whether to grant the conditional-use permit in this case and reasonable evidence supports the county's decision that any off-property shotfall would not be incompatible with the adjoining state forest. The county did not act arbitrarily or capriciously by finding that the shooting range will not be injurious to the use or enjoyment of other property in the immediate vicinity for the purposes already permitted.

## III. The county did not act arbitrarily or capriciously in finding that adequate measures were or would be in place to control offensive noise.

The Wentholds' final argument is that the county acted arbitrarily and capriciously because its findings with respect to noise were not compliant with state law. Their argument turns on whether Minn. Stat. § 87A.05 dictates the county's own standards for what levels of noise are offensive. They proceed on two fronts. First, they argue that the noise study's methodology is not compliant with Minn. Stat. § 87A.05, which imposes specific requirements for measuring noise for the purpose of that statute. Those requirements were

unquestionably not followed by the noise study. Second, they argue that the noise study shows that noise levels at surrounding properties will be louder than what is permitted under the statute.

In support of their argument that section 87A.05 sets a limit on noise from a shooting range that the county must follow in evaluating a conditional-use permit, the Wentholds point to the fact that the noise model submitted by PRCD described section 87A.05 as setting the relevant noise limits. But an acoustic modeler's assumption about the law does not control this court. The Wentholds next point to *Winczewski v. Becker Cty. Bd. of Comm'rs*, A16-2083, 2017 WL 3863845, at *4 (Minn. App. Sept. 5, 2017), to argue that a conditional-use permit may not be granted if the noise standards of section 87A.05 are not met. First, *Winczewski* is an unpublished case and therefore not precedential. *See* Minn. Stat. § 480.08 (2018). Additionally, while *Winczewski* observes that, in that case, no measurements were taken in conformity with the standards of section 87A.05, it does not hold that noise that exceeds the statute's standards requires a county to deny a conditional-use permit for a shooting range. *Id. Winczewski* does not persuade us that counties are prohibited from granting a conditional-use permit to a shooting range that will produce noise that is not compliant with Minn. Stat. § 87A.05. Thus, the fact that the shooting range may produce such noise levels does not, by itself, require that the conditional use be denied. *See Schwardt*, 656 N.W.2d at 388-89.

Another way that the noise standards of Minn. Stat. § 87A.05 could apply to the conditional-use permit is through the county's zoning ordinance. A conditional-use permit requires a finding that there are or will be adequate measures to control offensive noise so

that the noise will not constitute a nuisance. WCZO § 21.D.5. But Chapter 87A does not define noise in excess of the stated levels to constitute a nuisance. And while compliance with the provisions of Chapter 87A immunizes a shooting range operator from liability for nuisance, Minn. Stat. § 87A.06, that provision does not define noncompliance to be a nuisance per se. Thus, even if the study is methodologically inconsistent with Chapter 87A, and even if it shows that the shooting range will produce noise exceeding the standards in section 87A.05, those facts do not necessarily mean that the county acted arbitrarily or capriciously by approving the conditional use.

Again, the standard of review is whether there was a reasonable factual basis in the record to support the county's decision. *RDNT*, 861 N.W.2d at 76. Although, as we have explained, section 87A.05 does not dictate the standards that a county must follow, the noise study did predict noise levels in some locations that would be within the standards in section 87A.05, and the county could reasonably have determined that predicted levels that would exceed those standards in other locations would not be offensive or a nuisance. In addition, the site visit provided evidence about the potential noise from the range, and the county also imposed a condition that four rows of trees be planted around the property, which would absorb noise. The county had a reasonable factual basis for concluding that there were or would be adequate measures in place to control noise from the proposed conditional use and did not act arbitrarily and capriciously by approving it.

**Affirmed.**