COLORADO COURT OF APPEALS

DATE FILED: October 16, 2014
CASE NUMBER: 2013CA1806

Court of Appeals No. 13CA1806
Delta County District Court No. 12CV314
Honorable J. Steven Patrick, Judge

Travis Jardon, Corinne Holder, Susan Raymond, Mark Cool, and Andrea Robinsong,

Plaintiffs-Appellees,

v.

Edwin Hostetler, Eileen Hostetler, Greg Hostetler, Carmen Hostetler, and Delta County Board of County Commissioners,

Defendants-Appellants.

JUDGMENT REVERSED AND CASE
REMANDED WITH DIRECTIONS

Division I
Opinion by JUDGE TAUBMAN
Terry and Richman, JJ., concur

NOT PUBLISHED PURSUANT TO C.A.R. 35(f)
Announced October 16, 2014

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Defendants, the Delta County Board of County Commissioners (the Board) and Edwin, Eileen, Greg, Carmen Hostetler (collectively the Hostetlers) appeal the district court's C.R.C.P. 106(a)(4) review of the Board's quasi-judicial decision to approve with conditions the Hostetlers' specific development applications to establish two egg-laying farms. We reverse and remand.

I. Background

In 2011, the Hostetlers requested permission to build and operate two single-barn egg-laying farms called Western Slope Layers (WSL) and Rocky Mountain Layers (RML) in rural Delta County. The applications sought approval for 2 400-foot by 50-foot barns, each housing 15,000 hens with access to a 335-foot by 90-foot outdoor area.

Delta County does not have a traditional zoning code; rather, it regulates certain types of new developments through the Delta County Regulations for Specific Developments (the Regulations), the current version of which became effective in August 2009. Agricultural activities are exempt from the Regulations, except feedlots and "new confined animal operations." The Regulations

require applicants to file a Specific Development Application and undergo extensive reviews before the county's Advisory Planning Committee, the County Planning Commission, and finally, the Board. Ultimately, the Board decides whether to approve, approve with conditions, or deny the proposed development. If approved, the applicants and the Board enter into a Specific Development Agreement setting forth any conditions.

In addition, in 1996, Delta County adopted a revised "Master Plan," described as "a blueprint for the County's future." The revised Master Plan stated that it "will serve as an advisory document to guide both public and private entities in making sound decisions, based on a shared community vision for the future growth and development of Delta County."

The Regulations stated that in connection with a specific development application, the applicant shall use the performance standards contained in the Regulations and the Delta County Master Plan in designing, reviewing and constructing new specific developments. With respect to the Regulations performance standard titled "compatibility with adjacent land uses," the

Regulations state that "comments from surrounding property owners, other interested persons and existing land use shall be among the factors considered to determine compatibility." They further provided that the specific development "must be consistent with the Delta County Master Plan."

A. First Approval with Conditions and C.R.C.P. 106(a)(4) Appeal

At a public hearing on August 15, 2011, after receiving numerous written comments, oral presentations, and other evidence from proponents and opponents of the egg barns, the Board approved the Hostetlers' two applications subject to fifteen separate conditions. The conditions included requirements that the Hostetlers submit plans for water quality control, manure and litter control, dust and odor control, and other health-related provisions. Subsequently, Edwin and Eileen Hostetler built and began operating the WSL egg barn.

Immediately following the Board's ruling, neighboring landowners, plaintiffs Travis Jardon, Corrine Holder, Susan Raymond, Mark Cool, and Andrea Robinsong (collectively, the neighbors), filed a C.R.C.P. 106(a)(4) action challenging the

approval. On July 5, 2012, the district court ruled in favor of the neighbors in two respects.

First, the court held that the Master Plan was regulatory, not advisory, and required all applicants to prove four elements: (1) compatibility of the proposed use with the neighborhood; (2) the impact of the proposed use on surrounding property values; (3) the sufficiency of the conditions and undertakings to address the concerns identified in the record; and (4) the capability of the county to monitor compliance with the conditions and undertakings.

Second, the district court held that the record lacked competent evidence concerning these four issues and remanded the case to the Board to address them.

B. Reapproval and Second C.R.C.P. 106(a)(4) Appeal

On September 4, 2012, the Board held a second public hearing where the parties presented extensive comments and other evidence on the four remand issues, including compatibility with the neighborhood. During the hearing, witnesses presented conflicting evidence on the issue of the egg barns' compatibility with

the neighborhood. With respect to compatibility, the Board proceedings reflect that the Board reviewed the conflicting documents concerning compatibility. It noted that "documents against the chicken facility explained the incompatibility to surrounding neighbors while other documents detailed that there was no conflict," and concluded that "there is conflicting evidence supplied by both neighbors and experts specific to compatibility." The Board, nonetheless, reapproved the application with the same fifteen conditions and made findings addressing all four items identified by the district court.

The neighbors again sued in district court, complaining in part that they had had no opportunity to respond to four items of air quality evidence submitted to the Board after the second public hearing. The district court denied the neighbors' motion to strike the contested evidence, but remanded for the Board to consider their challenge.

C. Third Hearing

On remand, the Board conducted a third public hearing, receiving comments and additional lay and expert evidence

regarding air quality. The Board received and acknowledged written submissions and oral testimony that argued the air quality analysis was technically flawed. On May 28, 2013, the Board issued its final decision. While it reiterated that the experts' opinions were contradictory, it again approved the Hostetlers' two development agreements. This time, however, in response to the comments, the Board added two additional conditions to the agreement, requiring the Hostetlers to (1) to obtain the services of a professional air pollution engineer to evaluate the air pollution emissions and (2) to provide a plan to the Delta County Health Department for reducing the air emissions from the two egg-laying facilities.

D. The District Court's Ruling at Issue

On September 5, 2013, the district court again overturned the Board's decision. The court ruled that there was competent evidence in the record to support the Board's findings as to three of the four remand issues. It cited both sides' expert reports and held that there was competent evidence to support the findings that the egg barns did not impact property values, that the conditions

imposed were adequate, and that there was appropriate monitoring of the egg operations.

However, the district court found that the egg barns were incompatible with the neighborhood because the neighbors had presented unrebutted evidence that the WSL barn, then operating, was causing respiratory problems in the community. It further found that the new conditions regarding air quality were insufficient because they did not require medical input and set no specific limit on air quality.

The district court ordered the Board to issue a cease and desist order to the Hostetlers. The Board did so, and the Hostetlers sold their chickens and ceased operation.

II. C.R.C.P. 106(a)(4) Standard of Review

C.R.C.P. 106(a)(4) provides that a district court may review the decision of a governmental body exercising a judicial or quasi-judicial function to determine whether it exceeded its jurisdiction or abused its discretion based on the evidence in the record before the defendant body.

On appeal of a C.R.C.P. 106(a)(4) ruling, the appellate court reviews the decision of the governmental body itself rather than the district court's determination regarding that decision. *Bd. of Cnty. Comm'rs v. O'Dell*, 920 P.2d 48, 48 (Colo. 1996); *Save Park Cnty. v. Bd. of Cnty. Comm'rs*, 969 P.2d 711, 714 (Colo. App. 1998), *aff'd* 990 P.2d 35 (Colo. 1999). We apply the same standard of review as the trial court: whether the Board abused its discretion or exceeded its jurisdiction. *Fire House Car Wash, Inc. v. Bd. of Adjustment*, 30 P.3d 762, 766 (Colo. App. 2001).

A reviewing court must uphold the decision of the governmental body unless there is no competent evidence in the record to support it. *O'Dell*, 920 P.2d at 50. "No competent evidence" means that the governmental body's decision is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority. *Id.*; *Save Park Cnty.*, 969 P.2d at 714; *Burns v. Bd. of Assessment Appeals*, 820 P.2d 1175, 1176 (Colo. App. 1991) ("For purposes of judicial review of administrative decisions, competent evidence is the same as substantial evidence."). However, it is up to the Board to weigh competing

testimony, resolve any conflicts, and make appropriate findings. *See Goldy v. Henry*, 166 Colo. 401, 408, 443 P.2d 994, 997 (1968) ("When a conflict in the evidence exists, it is not within the power of a reviewing court to substitute its judgment for that of the fact-finding authority as to the weight of the evidence and the credibility of witnesses.").

The reviewing court must also determine whether an agency misconstrued or misapplied the law. *Berger v. City of Boulder*, 195 P.3d 1138, 1139 (Colo. App. 2008). However, if there is a reasonable basis for its interpretation of the law, an agency decision may not be set aside on that basis. *Bd. of Cnty. Comm'rs v. Conder*, 927 P.2d 1339, 1343 (Colo. 1996).

III. The Master Plan

The Hostetlers contend that the district court erred in holding that the Master Plan creates individual regulatory requirements that they and other applicants must affirmatively prove. We agree.

A. Applicable Law

As a general rule, "a master plan is merely advisory and does not affect legally protected interests of property owners." *Theobald*

v. Bd. of Cnty. Comm'rs, 644 P.2d 942, 950-51 (Colo. 1982). However, a master plan can become regulatory if it is required by state statute or if the master plan's provisions are formally included "in a duly-adopted land use regulation by a board of county commissioners." *Conder*, 927 P.2d at 1346. In such a case, the master plan's provisions must be "sufficiently specific 'to ensure that any action taken by a county in response to a land use proposal will be rational and consistent and that judicial review of that action will be available and effective.'" *Id.* at 1348 (quoting *Beaver Meadows v. Bd. of Cnty. Comm'rs*, 709 P.2d 928, 936 (Colo. 1985)).

B. Analysis

Here, the Regulations require applicants to prove compatibility with the Master Plan, and state that "the applicant and the Board of County Commissioners shall use the performance standards contained herein and the Delta County Master Plan in designing, reviewing, evaluating, and constructing new and expanding specific developments. . ." and that all specific development requests "must be consistent with the Delta County Master Plan." But, the

Regulations do not require compliance with any specific provisions of the Master Plan. In its initial hearing, the Board considered the Hostetler application's compatibility under the Master Plan, treating the plan as advisory, not regulatory. We cannot say that the Board's interpretation of the Master Plan as advisory, and not regulatory, was unreasonable.

The Master Plan contains five goals, twenty policies, and fifty-one implementation strategies. The Master Plan itself explains that its goals "establish the direction to be followed in the future" and that its policies "provide a framework for achieving the goals." The goals themselves are broadly worded and aspirational.

The Master Plan's goals sometimes conflict. For example, one goal is to "preserve the rural character and natural environment" of the county. Another goal is to "promote and maintain a stable and diversified economic base." Accordingly, the Board had a reasonable basis to conclude that the Master Plan's language lacks the "sufficient exactitude" required by *Conder*.

Under Rule 106(a)(4), we must affirm the Board's reasonable interpretation of the Regulations. *See Wilkinson v. Bd. of Cnty.*

Comm'rs, 872 P.2d 1269, 1277 (Colo. App. 1993) ("If there is a reasonable basis for the Board's interpretation of the law, the decision may not be set aside on that ground upon review.").

Therefore, we conclude the district court erred to the extent it held that the Master Plan creates individual regulatory requirements that applicants must affirmatively prove.

IV. The Board's Decision

The Board and the Hostetlers contend that the district court erred in holding that no competent evidence in the record supports the Board's conclusion that the Hostetlers' proposed use is compatible with the neighborhood. Once again, we agree.

The Master Plan describes Delta County as "an agricultural County where the importance of the agricultural economy is real and not merely a symbol of a western life style." It further explains that "agriculture, more than any other factor, defines the rural character of the County." Before the Hostetlers built the WSL barn, they tended irrigated fields and raised livestock. The surrounding lands feature many types of agricultural operations, including

orchards, vineyards, hay fields, pastures, and cattle and horse ranches.

The county's rural setting and agricultural nature are well attested to in the record, which includes comments from more than 500 county residents describing the region as a traditionally rural, agricultural area. These comments came from neighbors, realtors, other farmers and ranchers, and state and local farm bureaus. Many of these residents urged the Board to approve the Hostetlers' application, affirming that the proposed use was compatible with the county's agricultural character.

To be sure, the record also contains conflicting comments from many adjoining landowners who presented evidence opposing the egg barns' compatibility with the surrounding area. The record also contains reports from experts that offer conflicting opinions as to the compatibility of the Hostetler's application with the surrounding neighborhood. However, it was up to the Board to weigh such competing testimony, resolve any conflicts, and make appropriate findings. *See Goldy*, 166 Colo. at 408, 443 P.2d at 997.

The Board and the Hostetlers also correctly assert that the record contains substantial evidence that the egg barns will not adversely affect respiratory health in the surrounding area.

One study by an agricultural engineer explained that the ambient air quality generated by such a facility is "not high enough to present health issues." Another study by a poultry specialist opined that the Hostetlers' operations would not physically damage the surrounding properties and that the conditions of the development agreement are sufficient to address any adverse health effects.

The record also contains expert testimony that exhaust from poultry houses like the WSL barn extends a mere fifty feet before being dispersed into the atmosphere and that there have been no known airborne transmissions of salmonella from poultry to humans. Additional expert testimony stated that the possibility of groundwater contamination from the WSL barn was extremely low, and regulators found the barn to be clean and well-maintained.

Finally, the record contains the results of an independent air quality study finding that there was insufficient evidence to

conclude that the barn's emissions were "contextually abnormal," or that they were sufficient to induce health problems in normal healthy individuals.

We thus conclude that although there was conflicting evidence as to whether the Hostetlers' use was compatible with the Master Plan, the record was not "so devoid of evidentiary support" as to render the Board's decision an abuse of discretion. *O'Dell*, 920 P.2d at 50. The record reflects that the Board considered the evidence on both sides, and reached a reasoned judgment in approving the application with conditions. Therefore, the district court erred in holding that there was no competent evidence in the record to support the Board's conclusion that the Hostetlers' proposed use was compatible with the neighborhood.

V. The Neighbors' Constitutional Claims

The neighbors contend that the Board's decision violated their procedural due process rights protected by the United States and Colorado Constitutions. We disagree.

A. Applicable Law

The neighbors rely on *Hillside Cmty. Church, S.B.C. v. Olsen*, 58 P.3d 1021 (Colo. 2002), to argue that the Board's decision violated their due process rights under the United States and Colorado Constitutions. The *Hillside* court held that a party asserting a procedural due process violation must establish: (1) a property right; (2) government action amounting to a deprivation; and (3) lack of due process.

Whether a property interest exists in the outcome of a particular administrative decision "depends not on the probability of a favorable result, but on the degree of discretion vested in the decision-maker." *Id.* at 1027. In other words, a property right exists in the outcome of an administrative hearing only if the administrative decision maker has no discretion. *Id.* at 1027-28 ("[I]n order to prove a property interest in the denial of the special use permit, Respondents must show that, had it held the hearing, [the planning commission] was obligated to deny the special use permit.").

B. Analysis

Here, the neighbors have failed to show that they have a protected right to any procedures in the Regulations and Master Plan. The neighbors have no constitutionally protected right to the denial of the Hostetlers' application because the Regulations gives the Board substantial discretion in approving Special Development Applications. *See JJR 1, LLC v. Mt. Crested Butte*, 160 P.3d 365, 370-71 (Colo. App. 2007) ("If the ordinance or code grants a broad range of discretion, then neither the applicant nor affected third parties have a property interest in a particular outcome.").

Therefore, the Board did not violate the neighbors' procedural due process rights.

VI. Bias

The neighbors next contend that the Board was biased and therefore its decision must be overturned in accordance with *Churchill v. Univ. of Colo.*, 2012 CO 54. We disagree.

A. Applicable Law

In *Churchill*, the supreme court held that an administrative decision can be set aside as arbitrary and capricious if the administrative body "held some institutional bias or personal

grudge against the affected party." *Id.* at ¶ 66. "Absent a personal, financial, or official stake in the outcome evidencing a conflict of interest on the part of the decisionmaker, an adjudicatory hearing is presumed to be impartial." *Vernard v. Dep't of Corr.*, 72 P.3d 446, 449 (Colo. App. 2003). The party arguing for bias has the burden to rebut this presumption. *Id.*

B. Analysis

We agree with the district court that the neighbors have failed to demonstrate bias on the part of the Board. To the contrary, the record reflects that the Board spent ample time considering the neighbors' concerns. The Board held three hearings, reviewed a substantial amount of evidence, and imposed numerous conditions on the Hostetlers' development. Further, the Board inspected the WSL barn on numerous occasions, demanding corrective action when it identified compliance issues. The neighbors have failed to show that the Board was biased. Therefore, we reject the neighbors' contention that the Board was biased.

VII. Conclusion

The district court's judgment is reversed, the Board's decision is affirmed, and the case is remanded to the trial court to vacate the cease and desist judgment against the Hostetlers and to reinstate the Board's decision in their favor.

JUDGE TERRY and JUDGE RICHMAN concur.

Court of Appeals

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CHRIS RYAN
CLERK OF THE COURT

PAULINE BROCK
CHIEF DEPUTY CLERK

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(I), 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 10, 2013

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