

NO. A12-0681

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**State of Minnesota**  
**In Court of Appeals**

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Lorraine White, Trustee for the Lorraine M. White Trust,  
and Wapiti Park Campgrounds, Inc.,

*Plaintiffs/Respondents,*

v.

City of Elk River,

*Defendant/Appellant.*

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**RESPONDENTS' BRIEF AND APPENDIX**

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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## STATEMENT OF THE ISSUES

- I. Can the City terminate the legal nonconforming Campground by revoking the 1984 CUP?

The District Court held that the City cannot eliminate Respondents' legal nonconforming use of the Property by revoking the 1984 CUP.

Most Apposite Authorities:

Minn. Stat. §462.357 subd. 1e

*Hooper v. City of St. Paul*, 353 N.W.2d 138 (Minn. 1984)

*Lam v. City of St. Paul*, 714 N.W.2d 740 (Minn. App. 2006)

- II. Did Respondents have the right to rebuild an accessory structure to a legal nonconforming use, when the value of the structure was less than 50% of the value of the entire legal nonconforming use?

The District Court held that Respondents had the right to rebuild the accessory structure without further use permit from the City.

Most Apposite Authorities:

*Buss v. Johnson*, 624 N.W.2d 781 (Minn. App. 2001)

*Hertog v. Milwaukee Mut. Ins. Co.*, 415 N.W.2d 370 (Minn. App. 1987)

- III. Is the City immune from Respondents' tortious interference claim when the City's conduct did not involve balancing public policy considerations?

The District Court denied the City's immunity claim.

Most Apposite Authorities:

Minn. Stat. §466.02

Minn. Stat. §466.03 subd. 6

*Conlin v. City of St. Paul*, 605 N.W.2d 396 (Minn. 2000)

*Holmquist v. State*, 425 N.W.2d 230 (Minn. 1988)

## STATEMENT OF THE FACTS

Respondents own approximately fifty two (52) acres of property in the City of Elk River (the "Property"). Respondents have continuously operated a campground on the Property since least 1976 (the "Campground"). Respondents' operation of the Campground has always included a building that was used as an office, laundry, and gathering place for the people renting space at the Campground (the "Building").

In December 1983, the City amended its zoning ordinance to make campgrounds a conditional use in the zoning district in which the Campground was located. R.A. 1-2. In 1984, the City issued a conditional use permit (the "1984 CUP") permitting Respondents to operate the Campground subject to nine (9) conditions. A. 24. In imposing the nine conditions, the City expressed concerns that some individuals were using the Campground as their permanent residence. A. 12, 24.

In 1988, the City amended its zoning ordinances such that campgrounds were neither a conditional nor a permitted use in the district in which the Campground was located. A. 14. The City concedes that, as a result of the zoning change, the Campground became a legal nonconforming use. A. 17. The City also concedes that the Building was an accessory structure to the Campground at the time the Campground became a legal nonconforming use. A. 11, *see also* Appellant's Br. p. 12.

In November 1999, the Building was destroyed by a fire. A. 14. Respondents desired to rebuild the Building in early 2000 and proposed a structure measuring 30' x 55', which was smaller than the original building (60'x120'). A. 17, 18. The City required that Respondents apply for and obtain an interim use permit before they could

rebuild the Building, claiming that the Building was a nonconforming structure that had been destroyed to an extent of greater than 50% of its assessed market value. A. 14, 18. Elk River City Code §900.43 adopted shortly before Respondents sought to rebuild the Building provided, in relevant part:

**900.43 – Interim Uses**

2. Authorized by City Council.

The City may authorize interim uses of property by issuance of an interim use permit. Interim uses that are not consistent with the land use designation on the adopted Land Use Plan may be authorized. Interim uses that fail to comply with all of the zoning standards established for the district within which it is located may also be authorized.”

R.A. 27-28. On April 17, 2000, pursuant to section 900.43, the City issued Respondents an interim use permit subject to two conditions (1) that the permit be valid for ten years or until the Property is sold; and (2) that the Building comply with all building codes (the “2000 IUP”). A. 17.

On March 15, 2010, prior to the purported expiration of the 2000 IUP, the City amended Elk River City Code §30-658 such that the interim use permits could no longer be issued to uses that did not conform to the uses allowed in the zoning district:

**Sec. 30-658. Interim uses.<sup>1</sup>**

(c) *Required Findings.* Before the city council may authorize an interim use, it must make the following findings:

....

(3) The use is similar to uses allowed in the zoning district in which the property is located.

....

(9) The proposed interim use is consistent with the City of Elk River Comprehensive Plan and conforms to the city’s zoning regulations.

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<sup>1</sup> At some point after the year 2000, but before the year 2010, the City of Elk River renumbered its City Code and section 900.43 became section 30-658.

The 2000 IUP issued by the City for the Building purportedly expired on April 17, 2010, ten years after it was issued and one month after the City amended Elk River City Code §30-658. A. 17; R.A. 30-31.

In June 2010, Respondents applied for the renewal of their liquor licenses, but were denied, because the City alleged that the use of the Building was illegal due to the expiration of the 2000 IUP. R.A. 8. Under direction from the City, Respondents applied for a renewal of the interim use permit for the Building (the “2010 IUP”). (Affidavit of Gregory E. Woodford in support of Summary Judgment, Ex. O, Permit Application.) By letter dated July 8, 2010, the City informed Respondents that the 2010 IUP would likely be approved, subject to four (4) conditions. R.A. 11. On July 13, 2010, Respondents were informed that the 2010 IUP would be subject to six (6) conditions. R.A. 12. On July 27, 2010, the City stated that approval of the 2010 IUP would now be subject to compliance with eight (8) conditions. R.A. 14. On August 2, 2010, the City purportedly approved the 2010 IUP, but it was now subject to seventeen (17) conditions, only a few of which related to the actual operation of the Building and most of which sought to regulate the operation of the Campground. R.A. 21-23. Perhaps most importantly, one of the conditions read as follows: “A verifiable plan has been approved by City Council that will ensure permanent residents will not live at the recreational camping facility . . . .” *Id.* On April 18, 2011, twelve months after Respondent’s applications and ten months after the City was required by Minn. Stat. §15.99 to approve or deny the 2010 IUP, the city council voted to deny the 2010 IUP and begin proceedings to revoke the 1984 CUP. A. 44.

On July 18, 2011, the City adopted Resolution 11-43 conditionally revoking the 1984 CUP.<sup>2</sup> A. 57-63.

### STANDARD OF REVIEW

When the material facts are not in dispute, the lower court's application of the law is reviewed de novo. *In re Collier*, 726 N.W.2d 799, 803 (Minn. 2007). The interpretation of a statute is a question of law that is reviewed de novo. *Swenson v. Nickaboine*, 793 N.W.2d 738, 741 (Minn. 2011). A statute should be interpreted to give effect to all of its provisions. *Am. Family Ins. Grp. v. Schroedl*, 616 N.W.2d 273, 277 (Minn. 2000). The interpretation of an ordinance is also a question of law for the court, which is reviewed de novo. *Eagle Lake of Becker Cnty. Lake Ass'n v. Becker Cnty. Bd. of Comm'rs*, 738 N.W.2d 788, 792 (Minn. App. 2007).

### ARGUMENT

#### **I. RESPONDENTS' USE IS A LEGAL, NONCONFORMING USE WHICH CANNOT BE TERMINATED BY REVOKING THE 1984 CUP.**

The District Court held that “[the City] may not eliminate [Respondents’] legal, nonconforming use of the property by revoking the 1984 use permit.” Add. 2. The District Court’s Order does not limit the City’s authority to revoke a conditional use permit. The City misstates the issue and argues that it must have the authority to revoke the CUP, if the conditions of the CUP are violated. Respondents do not dispute a city’s authority to revoke a conditional use permit if conditions are being violated. But such

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<sup>2</sup> The City states that the alleged violations of the 1984 CUP were undisputed. However, the record of this matter shows that Respondents did, in fact, dispute the alleged violations. A. 33-36; A. 50-51. Further, as argued at the District Court, Respondents allege that the City lacks standing to enforce the state laws regarding recreational campground licensing.

authority is immaterial to this case. The issue, as clearly spelled out by the District Court's Order, is whether the City has the power to eliminate Respondents' legal nonconforming use by merely revoking the 1984 CUP. The answer to that question is clearly no.

Minnesota Statutes and case law are very clear on the methods by which a legal, non-conforming use can be terminated; revocation of a conditional use permit is *not* one of those methods. Minn. Stat. §462.357 subd. 1e codifies the law relating to a landowner's right to continue a legal nonconforming use.

Except as otherwise provided by law, any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion, unless:

(1) the nonconformity or occupancy is discontinued for a period of more than one year; or

(2) any nonconforming use is destroyed by fire or other peril to the extent of greater than 50 percent of its estimated market value, as indicated in the records of the county assessor at the time of damage, and no building permit has been applied for within 180 days of when the property is damaged. In this case, a municipality may impose reasonable conditions upon a zoning or building permit in order to mitigate any newly created impact on adjacent property or water body. . . .

Minn. Stat. §462.357 subd. 1e(a)(1)-(2) (2008).

This statute codifies the long standing common law rule in Minnesota that protects legal, nonconforming uses and provides that their existence must either be permitted or removed through the use of eminent domain. *Hooper v. City of St. Paul*, 353 N.W.2d 138, 140-141 (Minn. 1984); *County of Freeborn v. Claussen*, 203 N.W.2d 323 (Minn. 1972). The Minnesota Supreme Court has stated that "it is a fundamental principal of the

law of real property that uses lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued.” *Hooper*, 353 N.W.2d at 140. A use permitted by a CUP at the time of a change in the official controls continues as a legal, nonconforming use thereafter. *Lam v. City of St. Paul*, 714 N.W.2d 740, 745 (Minn. App. 2006) (holding that “because the CUP was never revoked or otherwise extinguished, the use of the subject property for auto repair as an accessory to auto sales existed as a lawful use prior to the 2003 rezoning and thus became a nonconforming use upon that rezoning and continuing thereafter.”)<sup>3</sup>

The plain and unambiguous language of Minn. Stat. §462.357 subd. 1e and the case law interpreting the statute support the District Court’s holding. According to the statute and case law, the Campground must be allowed to continue until one of the following occurs: (1) the use as a Campground is discontinued for a year; (2) the Campground is destroyed by fire to an extent of greater than 50% of its assessed value; or (3) the City seizes the Property through eminent domain. None of these occurred in this case, nor is revocation of a CUP a means to eliminate a legal nonconforming use.

The City argues that Minn. Stat. §462.357 subd. 1e does not limit its authority to revoke the 1984 CUP under Minn. Stat. §462.3595.<sup>4</sup> The City is correct here as well.

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<sup>3</sup> The *Lam* case does not stand for the proposition for which it is cited by the City. Appellant’s Br. 10-11. It stands for the proposition that for a conditional use to become a legal nonconforming use, the conditional use permit must still be in effect at the time of the zoning change from a conditional use to a nonconforming use. After the zoning change, *Lam* indicates that the use continues as a legal nonconforming use, not a conditional use.

<sup>4</sup> The Amicus argument regarding §462.3595 appears to ignore the second clause of that section, which seems to indicate that a CUP does not remain in effect if the city amends

§462.357 does not address a City's authority to revoke a CUP; however, Minn. Stat. §462.357 subd. 1e does limit the ways in which a legal nonconforming use, such as the Campground, can be eliminated. Revocation of a CUP is not one of the ways in which §462.357 subd.1e says that a legal nonconforming use can be eliminated. The District Court was correct. Any other decision would require reading into Minn. Stat. §462.357 subd. 1e(a) a provision that the legislature did not include and presumably did not intend to include.

The City's apparent argument is that without the right to revoke the CUP, the Campground's operation will be allowed to expand beyond the terms of the 1984 CUP and the City would be left helpless to protect the public health, safety and welfare is entirely unavailing.<sup>5</sup> The City is not powerless. Minn. Stat.. 462.357 subd. 1e states that the City has the right to prevent any expansion of the legal nonconforming Campground. This should be accomplished by first, by defining the extent of Respondents' legal nonconforming use,<sup>6</sup> second, by a judicial determination as to whether Respondents are, in fact, exceeding that legal nonconforming use, and third, the issuance of an injunction if

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its official control to change the status of the conditional use. That is what happened in this case; the City amended its zoning ordinances, which resulted in the Campground's status changing from a conditional use to a legal nonconforming use.

<sup>5</sup> The amicus brief filed by the League of Minnesota Cities essentially makes this same argument, that without the authority to revoke a CUP for a nonconforming use, a city would be powerless to prevent the nonconforming use from expanding. This argument is similarly unavailing. Every city has the right to prevent the expansion of a legal nonconforming use, Minn. Stat. §462.357 subd. 1e is very clear on that. The city is just not allowed to immediately terminate the entire legal nonconforming use because of the alleged expansion.

<sup>6</sup> The extent of Respondents' legal nonconforming use and whether the conditions of the 1984 CUP apply is a question that was not raised at the District Court by the City.

Respondents are found to be exceeding the extent of their legal nonconforming use. The City could also use eminent domain to affect an immediate cessation of the use. But, the City does not have the authority to affect a cessation of the legal nonconforming use through revocation of a CUP. Whether the 1984 CUP is revoked or not still leaves Respondents with the right to continue their legal nonconforming use. If the city wishes the immediate termination of Respondents' legal nonconforming use, it must proceed through eminent domain. *See SLS Partnership, Apple Valley v. City of Apple Valley*, 511 N.W.2d 738, 742-743 (Minn. 1994).

Minn. Stat. §462.357 subd. 1e and eminent domain provide the only legally sanctioned ways for the termination of a legal nonconforming use.

**II. RESPONDENTS HAD THE RIGHT TO REBUILD THE BUILDING WITHOUT THE NEED FOR AN IUP BECAUSE THE BUILDING WAS AN ACCESSORY STRUCTURE TO THE NONCONFORMING USE**

**A. The value of the entire legal nonconforming campground must be considered when determining Respondents' right to rebuild the Building.**

On summary judgment, Respondents argued that the Building, which was destroyed by a fire in 1999 was an accessory structure to the legal nonconforming campground, and since the value of the Building was less than 50% of the value of the entire legal nonconforming use, Respondents had a right to rebuild the Building without a conditional or interim use permit from the City. At the suggestion on the District Court, Respondent's and the City stipulated that the value of Building was less than 50% of the value of the entire legal nonconforming Campground. After the stipulation, the District Court held that "[d]ue to the extent of destruction in relation to the value of the

Campground as a whole, [Respondents] were entitled to rebuild the Building after its destruction by fire in 199 without a permit from [the City] in 2000.”

The interpretation of an ordinance is a question of law for the court, which is reviewed de novo. *Eagle Lake of Becker Cnty. Lake Ass'n v. Becker Cnty. Brd. of Comm'rs*, 738 N.W.2d 788, 792 (Minn. App. 2007). Zoning ordinances should be construed strictly against the City and in favor of the property owner. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *County of Benton v. Kismet Investors, Inc.*, 653 N.W.2d 193, 196 (Minn. App. 2002) (holding that zoning regulations should be construed strictly against the government).

The Building was an accessory use to the legal nonconforming Campground which had a value less than 50% of the value of the entire legal nonconforming use, a fact to which the City stipulated. When deciding whether a legal nonconforming use can be repaired or rebuilt, the value of the entire legal nonconforming use must be considered when determining the percentage of destruction. *Buss v. Johnson*, 624 N.W.2d 781 (Minn. App. 2001); *see also Hertog v. Milwaukee Mut. Ins. Co.*, 415 N.W.2d 370 (Minn. App. 1987) (holding that a city ordinance must be interpreted to consider the value of all structures making up the legal nonconforming use must be considered when determining percent of destruction and not just the destroyed building alone.) When the Building was destroyed, the Elk River City Code provided that if “[a] nonconforming building or structure” was destroyed “to the extent of greater than 50 percent or more” of its assessed value, then that structure may not be rebuilt unless it conforms with the zoning regulations then in effect. Elk River City Code §900.34 (2000). The Minnesota Court of

Appeals held in *Buss*, that similar language, if read literally, would lead to an absurd or unreasonable result. *Id.* at 786 (interpreting Minn. Stat. §394.36 which contained similar standards regarding reconstruction of nonconforming structures). Instead, the value of the entire nonconforming use of which the structure is a part needed to be considered, not the value of the structure alone. *Id.* at 787.

Since the value of the Building was less than 50% of the value of the entire legal nonconforming campground, Respondents had the right to rebuild the Building without a use permit from the City. The District Court's holding should be affirmed.

B. Respondents' claims should not be barred by waiver or laches.

The doctrines of waiver and estoppel are equitable doctrines that are within the discretion of the trial court to grant or deny. *See Jackel v. Brower*, 668 N.W.2d 685, 690 (Minn. App. 2003). "He who seeks equity must do equity." *Peterson v. Holiday Recreational Indus., Inc.*, 726 N.W.2d 499, 505 (Minn. App. 2007). Waiver is the voluntary relinquishment of a known right. *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 952 (Minn. App. 2002). Laches is an equitable doctrine applied to prevent one who has not been diligent in asserting a known right from recovering at the expense of one who has been prejudiced by the delay. *Winters v. Kiffmeyer*, 650 N.W.2d 167, 169 (Minn. 2002).

In this case it would be inequitable to apply either doctrine of waiver or laches against Respondent, when it is the City's own delay in acting that caused Respondent's delay. Respondents have been operating the Campground in the same manner since 1976. When the City issued the 2000 IUP with no mention of any concerns regarding the

Campground, Respondents understood that there were no issues with the way the Campground was operating. Now, in 2010, after no changes in how the Campground is operated, the City is attempting to address the same concerns it had in 1984. To allow the City to delay over twenty-six (26) years and then be allowed to hide behind the doctrines of waiver or laches appears inequitable. The City should not reap the benefit of its own inequitable conduct, by having waiver and laches defeat Respondents claim to legal nonconforming use status for the Building.

The prejudice on which the City bases its laches argument is that it would have been easier to evaluate the market value of the Building in 2000. The City stipulated to the fact that the value of the Building was less than 50% of the value of the entire legal nonconforming campground. For it to base prejudice on a fact to which it stipulated appears disingenuous.

C. The Building regained legal nonconforming use status prior to the expiration of the 2000 IUP.

If this Court should find that Respondents waived their right to assert legal nonconforming use status for the Building as a result of their acceptance of the 2000 IUP, the Building regained such status prior to the expiration of the 2000 IUP. One month prior to the expiration of the 2000 IUP, the City amended its IUP ordinance to remove language that allowed the City to grant an IUP to a use that does not conform to the zoning regulations of the area in which the use would occur. Instead, the new ordinance required the City to find that “[t]he use is similar to uses allowed in the zoning district in which the property is located.” Elk River City Code §30-658 (2010). Such a finding is

impossible with respect to the Building and Campground. As a result of the amendment, and since the Building was being legally used pursuant to the 2000 IUP at the time of the amendment, the Building regained legal, nonconforming use status.

**III. THE CITY IS NOT IMMUNE FROM RESPONDENTS' TORTIOUS INTERFERENCE CLAIM BECAUSE THE ACTIONS OF THE CITY DID NOT INVOLVE BALANCING PUBLIC POLICY CONSIDERATIONS.**

The District Court was correct in denying the City immunity from Respondents' tortious interference claims. The general rule is that every municipality is liable for its torts. Minn. Stat. 466.02 (2008). The City, however, is entitled to immunity from "[a]ny claims based upon the performance or the failure to exercise or perform a discretionary function or duty whether or not the discretion is abused." Minn. Stat. 466.03 subd. 6 (2008). Discretionary immunity is an exception to the general rule, so it must be construed narrowly against the municipality. *Conlin v. City of St. Paul*, 605 N.W.2d 396, 400 (Minn. 2000). The discretionary immunity exception is meant to protect the municipality from tort liability resulting from planning level decision making where the municipality is evaluating and balancing "factors such as the financial, political, economic, and social effects of a given plan or policy." *Id.* (quoting *Holmquist v. State*, 425 N.W.2d 230, 232 (Minn.1988)). Operational level decisions, involving daily operations or the implementation of policy decision making is not protected. *Id.*; see also *Angell v. Hennepin Cnty Reg'l Rail Auth.*, 578 N.W.2d 343, 348 (Minn. 1998). The division between operational and discretionary acts is not perfectly clear, but the main consideration is whether the conduct of the City involved the balancing of public policy considerations to formulate policy. *Conlin*, 605 N.W.2d at 400.

The first step in the analysis is to determine the exact conduct at issue. At issue in this appeal is the City's requirement that Respondents apply for an IUP for the continued use of the Building and the City's decision to commence the revocation process with respect to the 1984 CUP.<sup>7</sup> Neither of these decisions involved balancing public policy considerations. The City is correct that deciding what conditions to impose on the IUP generally involves public policy balancing; however, the decision to require Respondents to apply for an IUP does not. Deciding what conditions to impose on the CUP in 1984 certainly involved public policy balancing, but the decision to commence revocation proceedings certainly did not. These decisions of the City were more like operational level decisions than discretionary decisions, as public policy considerations were not needed.

Since considering public policy was not required for either of the actions taken by the City, statutory or discretionary immunity should not bar Respondents' tortious interference with contract claim. The District Court's holding should be affirmed.

### CONCLUSION

Based on the foregoing, this Court should affirm the holdings of the District Court, that (1) the Campground, including the Building, is a legal, nonconforming use; (2) the City may not immediately terminate the use of the Property as a Campground by revoking the 1984 CUP; (3) since the Building had a value of less than 50% of the value

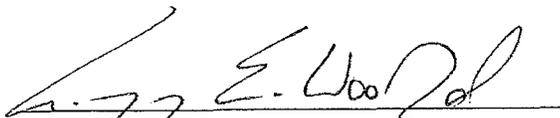
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<sup>7</sup> Contrary to the City's assertion, the arbitrariness or capriciousness of the conditions on the 2010 IUP is not at issue at this stage. While Respondents do disagree with the conditions imposed, that issue was rendered moot by the District Court's finding that the Campground is a legal, nonconforming use and that Respondents had an absolute right to rebuilding the Building without the IUP.

of the entire Campground, Respondents were entitled to rebuild the Building without a permit from the City; and (4) the City is not entitled to immunity from Respondents' tortious interference claim.

Dated: 6/12, 2012

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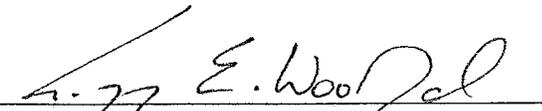
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CERTIFICATE OF COMPLIANCE  
WITH MINN. R. CIV. APP. P. 132.01, Subd. 3(a)

This brief complies with the formatting limitations of Minn. R. Civ. App. P. 132.01 subd. 3(a) because the brief contains 4,231 words, excluding the parts of the brief specified in Minn. R. Civ. App. P 132.01 subd. 3. This brief was prepared using Microsoft Word 2007 in the Times New Roman font with a 13 point size.

Dated: 6/12, 2012

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