

NO. A07-112

State of Minnesota
In Court of Appeals

Eagle Lake of Becker County Lake Association,

Relator,

vs.

Becker County Board of Commissioners,
the County of Becker, Minnesota, Bruce Jacobs
and Barbara Jacobs

Respondents.

RELATOR'S BRIEF AND APPENDIX

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STATEMENT OF ISSUES

- I. STANDARD OF REVIEW ON THIS APPEAL.
- II. WHETHER RESPONDENT COUNTY ARBITRARILY APPROVED RESPONDENT JACOBS' CONDITIONAL USE PERMIT APPLICATION BECAUSE THE PROJECT FAILED TO MEET THE MINIMUM PERFORMANCE STANDARDS OF THE COUNTY ZONING ORDINANCE?

Respondent County approved the conditional use permit on the application of the Jacobs Respondents despite the project not meeting the density and other Ordinance requirements for approval as a RV campground under the Zoning ordinance.

Minn.Stat. Sec. 394.301.

Becker County Zoning Ordinance, Sections 7A & 16.

In the Matter of an Application by Harvey Block and Gary McDuffee for a Conditional Use Permit, Case Nos. A06-387 & A06-518 (Minn.App. February 6, 2007).

Sunrise Lake Association, Inc. v. Chisago County Board of Commissioners, 633 N.W.2d 59 (Minn.App. 2001).

- III. THE JACOBS RESPONDENTS SUBSTANTIALLY MODIFIED THEIR PROJECT AFTER RESPONDENT COUNTY AMENDED THE ZONING ORDINANCE. WHETHER THE JACOBS RESPONDENTS ACQUIRED NO VESTED RIGHTS IN THE PREVIOUS ZONING ORDINANCE AND ESTOPPEL DOES NOT PRECLUDE APPLICATION OF THE AMENDED ZONING ORDINANCE TO THE SUBSTANTIALLY MODIFIED PROJECT?

Respondent County approved the modified project despite non-conformity with the provisions of Sections 7A and 16 of the Zoning Ordinance with comments indicating that Respondent County could apply whatever standards they wanted.

Yeh v. County of Cass, 696 N.W.2d 115 (Minn.App. 2005).

Rose Cliff Landscape Nursery, Inc. v. City of Rosemount, 467 N.W.2d 641 (Minn.App. 1991).

STATEMENT OF THE CASE

This case presents the question of whether, under Minnesota law, Respondent County's decision of November 28, 2006 to approve a conditional use permit ("CUP") to the Jacobs Respondents was arbitrary, capricious and an abuse of discretion as contrary to the Zoning Ordinance for Respondent Becker County. The Jacobs Respondents submitted to Respondent County an application in May 2004 for the establishment of a 46 site RV campground on Eagle Lake in Becker County known as Blue's Valley Campground. ("Project"). Based on a Citizen petition from neighboring residents, Respondent County ordered an environmental assessment worksheet ("EAW") on the Project in June 2004. The Jacobs Respondents prepared the EAW. Based on the soils information, density of the Project next to Eagle Lake and surface water concerns, among other things, Respondent County ordered an environmental impact statement ("EIS") on the Project in May 2005. The EIS order put on hold the permitting process while Respondent County assessed the potential for significant environmental effects to Eagle Lake.

The Jacobs Respondents did not want to complete an EIS on the Project. In order to obtain a termination of the order for the EIS, the Jacobs Respondents met with Respondent County staff and substantially modified the Project in the spring and summer of 2006. Many residents, including those in the Eagle Lake Group ("ELG") raised concerns about the modified Project, including about a 20% increase in the density of sites from 46 to 54, and requested that the EIS continue. In September 2006, Respondent County terminated the EIS order with specific findings that the Project had been

substantially modified to mitigate environmental concerns and allowed the modified Project to proceed to permitting.

By fall of 2006, Respondent County's ordinance provisions had changed from those ordinance provisions existing in May 2004. Between September 2004 and September 2005, Respondent County went through the public planning process for amending the Zoning Ordinance, including Section 7A regarding density of RV campgrounds in shoreland, among other things. The planning process included public hearings for input and comment. As of September 2005, Respondent County had amended the Zoning Ordinance and incorporated a number of changes, including new density limits on RV campgrounds in shoreland.

In October and November 2006, Respondent County held public input meetings on the modified Project of the Jacobs Respondents, including statements in support and in opposition for a number of reasons. Respondent County also received opinion letters from attorneys regarding the application of the current Zoning Ordinance or the repealed ordinance to the modified Project. On November 28, 2006, Respondent County applied the repealed ordinance, set aside a number of concerns regarding the modified Project and approved a CUP on the modified Project. This appeal followed.

For the reasons set forth herein, Relator respectfully requests that this Court of Appeals reverse the November 28, 2006 decision of Respondent County to approve Respondent's application for approval of the CUP.

STATEMENT OF FACTS

The factual background on this appeal is relatively simple and straightforward and is set forth in the administrative record that was available to Respondent County at the time of its final decision on CUP on November 28, 2006. The following is a brief summary of the pertinent facts for purposes of this appeal.

A. The Parties. 1. Relator. Relator is a lake association duly organized and existing for the benefit of advancing and promoting the interests of property owners on Eagle Lake of Becker County, Minnesota, including protection of the environment on Eagle Lake.

2. Respondent County. Respondent Becker County is a political subdivision of the State of Minnesota, created and existing pursuant to Minn.Stat. Ch. 373. Respondent County Board is an appointed agent of the County, which exercises the powers of the County of Becker pursuant to Minn.Stat. Sec. 373.02 and Ch. 394. Respondent County has adopted and amended land use ordinances applicable to, among other areas, the shoreland of Becker County. Respondent County administers and enforces these ordinances. For certain projects proposed in Becker County, Respondent County is also responsible for administration of the environmental review process under the Minnesota Environmental Policy Act ("MEPA"), Minn.Stat. Ch. 116D. Respondent County has an EAW Review Committee that includes technical experts to assist with the environmental review process.

3. Jacobs Respondents. Respondents Bruce and Barb Jacobs are residents and owners of substantial acreages of property in Becker County, including over a mile of shoreline on Eagle Lake. On May 21, 2004, the Jacobs Respondents submitted a written application for a CUP for the conversion of a small portion of their holdings of farmland

on Eagle Lake into a RV campground consisting of 46 sites on Eagle Lake known as Blue's Valley Campground ("Project"). RA 21. The Jacobs Respondents submitted a list of tentative rules for the Project with the application. RA 22.

B. APPLICABLE COUNTY ORDINANCE PROVISIONS. At all relevant times for purposes of this appeal, Respondent County had in place land use zoning ordinance provisions for shoreland, which regulated RV campgrounds, among other things. As of May 2004 at the time of the application, Becker County had in place a zoning ordinance requiring building and other permits for RV campgrounds to protect the public health, safety and general welfare, and other proper purposes, including to encourage the most appropriate uses of land and for environmental protection of lakes. RA 8. The Ordinance applies to all unincorporated areas of Respondent County. It is undisputed that the Ordinance in place in May 2004 allowed as a conditional use the density for 46 sites, and perhaps up to about 70 sites, on the property owned by the Jacobs Respondents on Eagle Lake.

In September 2004, Respondent County adopted a moratorium on various types of development projects countywide. In 2005, Respondent County duly amended the ordinance, including amending Section 7A, which is applicable to shoreland multi use residential developments ("MURD"), such as RV campgrounds and which sets density limits for such projects. RA 8. The amended Ordinance includes Section 16 relative to CUPs. RA 17. Subd. 1C of Section 7A provides that Respondent County reviews all MURDs as conditional uses. RA8. Subd. 2A.2 and Subd. 3A of Section 7A requires detailed site plans for each project evaluating the density of the projects and depicting the location of the individual sites and proposed septic systems. RA 9. Subd. 3D of Section 7A

requires: "A master plan/drawing describing the project and the site plan for the dedicated area of each site." RA10. Subd. 4 of Section 7A establishes density limitations on projects in shoreland based on a formula involving the tiers of the lakeshore and the zoning classification of the lake. RA10. Subd. 10 of Section 7A establishes the requirement that modified projects must resubmit for re-approval any changes in the arrangements of sites. RA15. Where an applicant rearranges sites or changes open space, among other things, the applicant must resubmit the application. Id. Subd. 10 of Section 7A provides as follows:

"Subdivision 10. Design Changes

A. During the development of the approved MURD, the Department may approve minor changes in the location, placement and height of buildings, if such changes are required by engineering or other circumstances not foreseen at the time the Preliminary Plan was approved.

B. Changes in uses, rearrangement of lots, block and building tracts, or any changes in the provisions of the common open space require re-submission and re-approval of the Preliminary Plan by the Planning Commission." RA15.

C. **JACOBS RESPONDENTS' MAY 2004 APPLICATION.** In May 2004, the Jacobs Respondents submitted their application to Respondent County for the development of the Project as including 46 sites. RA21-22. Although the Project sought a CUP for 46 sites, the specified site plan for the lots, open space and septic system shows a total of 60 lots. The project would convert pastureland on Eagle Lake into the MURD, thereby requiring a CUP from Respondent County Board.

D. **EAW PROCESS ON PROJECT.** Because there was an indication in the survey drawings for the site plan on the Project that the physical capacity of the Project could have been for over 50 sites (60 sites), counsel for the ELG requested by letter on June 4, 2004

that Respondent County require a mandatory EAW on the Project. RA23. As noted in the letter, Minn.R. 4410.4300, subp. 20, requires a mandatory EAW on campground projects of 50 sites or more. Counsel requested that Respondent County complete the EAW prior to review of the CUP application as required by law. RA23. In response to the letter, Respondent County stated that the Project involved less than 50 sites. RA26. Respondent County refused to require a mandatory EAW on the Project because the County Attorney determined that the Project was for less than 50 sites and included this determination in the County Attorney's letter of June 10, 2004. RA26.

Also in June 2004, over 25 citizens petitioned for an EAW on the Project. The Minnesota EQB determined that the EAW petition was valid and assigned review of the petition to Respondent County, which had in place an EAW Review Committee of technical experts to assist the Board. On June 22, 2004, Respondent County held a regular board meeting. The minutes of that June 22, 2004 Board meeting are RA32. The minutes document that Respondent County determined that Minnesota law required an EAW on the Project based on the Citizen petition. RA32. The EAW petition documents concerns relative to soils, density and surface water quality in Eagle Lake, among other things.

E. RESPONDENT JACOBS FIRST EAW. As ordered by Respondent County, the Jacobs Respondents prepared an EAW on the 46 site RV Campground project. The pertinent 6 pages of the EAW are filed in the Appendix. RA34-39. The August 3, 2004 site plan associated with the EAW indicated 50 lots as part of the Project. The EAW indicates that the Project will "consist of a maximum of 50 RV unit sites", noting that the CUP application was for 46 sites. RA34. County staff considered the CUP application as for 46

sites in the EAW process. The Project submitted a detailed site plan and survey for the sites, including location of sites, density analysis, setbacks from the OHWL, and the location of proposed septic system drain fields.

F. RESPONDENT COUNTY AMENDS ORDINANCE. In about September 2004 and as a result of public concern over a number of controversial land use developments in the County, Respondent County adopted a moratorium, or interim ordinance, on certain types of shoreland developments anywhere in Becker County for a limited period of time. Following a process of public input, committee review and board action, in 2004 and 2005, Respondent County adopted amended Section 7A of the Zoning Ordinance. Among other requirements, Section 7A included more stringent density limitations on RV campground projects. It is undisputed for purposes of this appeal that Section 7A of the Zoning Ordinance adopted in March 2005 substantially limited the number of sites at the Project and would allow the Jacobs Respondents a total of about 29 sites at the Project.

The Jacobs Respondents, being well aware of the moratorium and amendments to the zoning ordinance, contacted Respondent County to inquire as to the potential application of the moratorium and amended ordinances to the Project. In response, Respondent County notified the Jacobs Respondents in writing on January 31, 2005 that, notwithstanding the moratorium, Respondent County would evaluate the proposed Project as submitted for 46 sites per the application under the Ordinance in effect as of the May 2004 application. RA40. However, County staff notified that Jacobs Respondents that they needed to resubmit a new application and that Respondent County would evaluate the Project under the moratorium and amended ordinance if the Jacobs Respondents modified the Project and

changed the number of sites at the Project. RA41. Staff documented this communication in a set of staff notes to the Jacobs file. RA41. These staff comments are consistent with Subd. 10 of Section 7A of the Ordinance, which requires an applicant to resubmit upon a change in the number and layout of proposed sites and open space. RA15.

G. RESPONDENT COUNTY ORDERS EIS ON PROJECT. On April 19, 2005, Respondent County's EAW Review Committee met, reviewed the Project and recommended that Respondent County require an EIS on the Project for several reasons. RA42. The minutes of that EAW Review Committee meeting document some of the environmental concerns of, and noted some of the regulatory approvals and necessary from, the US Army Corps of Engineers, MPCA, MN DOT, and the Minnesota DNR regarding the Project. RA42-43. The ELG submitted concerns and provided information to the EAW Review Committee regarding the potentially significant environmental impacts of the Project. The concerns included, among others, inadequate soils types for the septic system, too much density, surface water contamination, excessive proposed excavation and improper location of the Project relative to wetlands. The EAW Review Committee concluded that the "land is not suitable in its natural state for the proposed project." The EAW Review Committee recommended an EIS on the Project. RA42-43.

Respondent County Board ordered an EIS on the Project, following the recommendations of the EAW Review Committee. On April 26, 2005, the Board of Respondent County met for a regular meeting and reviewed a proposed resolution (PZ 04-05-2E) to require an EIS on the Project. RA50. The minutes of the April 26, 2005 meeting of the Board document that the Board tabled the passage of the resolution over to the May

10, 2005 regular meeting of the Board. RA50. The Board had a Resolution for this purposes. RA52. The minutes of the May 10, 2005 regular meeting document that the Respondent County Board officially passed the resolution for the EIS on May 10, 2005 following the recommendation of the EAW Review Committee. RA57.

H. MODIFIED PROJECT AND TERMINATION OF EIS ORDER. Because of the costs and expenses associated with an EIS, the Jacobs Respondents set out after May 10, 2005 to substantially modify and resubmit the Project for, among other reasons, to prepare a second EAW and seek from the County Board the termination of the order for the EIS. RA59-64. As part of this process, the Jacobs Respondents prepared a second EAW on the modified Project and resubmitted detailed new site plans for 54 sites, new open space and new locations for septic systems. Id. The second EAW on the modified Project included a new site plan for the 54 sites in new locations, including moving most of the sites back away from the lake for environmental concerns into the "Tier II" of the shoreland. The new site plans also created new open space in Tier I, created a buffer zone in Tier I and moved back the septic system into a new location. In summary, the modified Project in 2006 increased in density by about 20% and took a number of measures to mitigate the environmental impacts of the Project on Eagle Lake in order to negate the need for an EIS. The modified Project moved RV sites back away from Eagle Lake into the Tier II area, protected wetlands along the shoreline, and included a conservation easement. Id. The second EAW indicates that the Project would consist of "54 RV unit sites, 24 boat slips" and various associated structures. RA59. Paragraph 27 of the second EAW referenced a detailed site map depicting the new format of the Project, including relocation of the

proposed sites into Tier II, open spaces and septic system. RA64. The Jacobs Respondents resubmitted the modified Project and EAW to Respondent County with a request to terminate the EIS order.

The Project went through the amended EAW. Respondent County then considered the modified Project as resubmitted, the EAW and considered the need for an EIS. Respondent County received and reviewed the second EAW on the Project, including the detailed site plans for new site locations, additional open space and new septic locations. It appears that County staff considered the Project as "modified", and gave written notice on June 15, 2006 of intent to terminate the EIS order under Minn.R. 4410.2100, subp. 11, for these reasons documented in the County notice:

"The project has been modified (detailed in the EAW) to reduce the amount of land alteration, campsites have been setback to the second tier of development (267 feet), and green open space has been set aside. Also the previously reviewed mitigation measures (shoreline restoration, stormwater protection measures and screening) will remain as part of the project proposal." RA58.

On July 17, 2006, the EQB Monitor published Respondent County's notice of intent to terminate the EIS order on the Project. RA65-66. The notice states that Respondent County: "has terminated the preparation of an Environmental Impact Statement (EIS) for the Blue's Valley Campground, based upon substantial modification of the project." RA66. As of July 17, 2006, Respondent County Board had not taken action to terminate the EIS. This was apparently staff direction. The process for terminating an EIS involves notice, opportunity to comment, opportunity to object to the termination and a meeting or hearing on the decision. Minn.R. 4410.2100, subp. 11. While the notice indicates that Respondent County had already terminated the EIS order (RA58), in fact Respondent County Board had not

taken any formal action on terminating the EIS as of July 2006 and would not consider that decision until September 26, 2006.

Comments on the modified Project were received for the later hearing in September 2006, including the comments of the ELG. The ELG noted that the reasons for ordering the EIS, based on the criteria established by the EQB and the Minnesota Rules, Chapter 4410, remained and had not been removed from the modified Project. In fact, the Jacobs Respondents increased the density of the modified Project from 46 to 54 sites, instead of downsizing. In about August 2006, Respondent County's EAW Review Committee met and reviewed the modified Project and the second EAW. The Committee recommended to Respondent County Board to continue the EIS on the Project and had thereby authorized a draft resolution in the County files and records to continue the EIS and against termination.

On September 26, 2006, Respondent County Board held a regular meeting at which meeting the County Board decided to terminate the EIS order on the modified Project as resubmitted. The minutes of that meeting of September 26, 2006 document the decision. RA69-75. Respondent County determined that "the project has changed substantially from the original proposal." RA74. Respondent County Board also adopted Resolution PZ 09-06-2C memorializing the reasons for terminating the EIS order on the modified project. RA76. In making this decision, Respondent County Board acted against the recommendations of its EAW Review Committee. Among other things, the Resolution provides: "In May 2006 the Developer revised the project and completed a revised EAW and stormwater pollution prevention plan." RA76. The Resolution notes that Respondent County had received a comment letter from counsel for the ELG requesting that Respondent

County apply to the modified Project the current Zoning Ordinance from March 2005, instead of the repealed ordinance. RA77. Respondent County also documented that they had received a comment letter from the ELG requesting that the EIS order remain in place for various reasons related to the potential environmental impacts of the modified Project. Id. The Resolution provides in part:

“the project has changed substantially from the original project proposal and therefore the reasons for ordering the initial EIS no longer apply. Substantial changes noted include: The RV sites relocated 267 feet from the lake and 20 feet from the wetland; soil structure and topography improve to a well drained, sandy loam with slopes between 2 to 6t percent; the relocation reduced the amount of the land alteration to 15,175 cubic yards for grading and shaping of the project area an construction of the stormwater features; the project will restore the shoreline banks and wetland environment (retiring from an active cattle pasturing) which will sustain and improve the fish and wildlife habitat.” RA77.

It appears that Respondent County ignored in the Resolution that the Jacobs Respondents had actually increased the density of the modified Project by almost 20% and that the amount of land alteration changed by about 3,000 cubic yards, both points raised in the ELG letter to Respondent County. No party appealed the September 26, 2006 decision of Respondent County to terminate the EIS order on the modified project so that the decision was final for all purposes.

I. OCTOBER 2006 PLANNING COMMISSION MEETING. On October 17, 2006, Respondent County’s planning commission (“PC”) met to address the CUP application on the modified Project as resubmitted. The minutes of that meeting document the proceedings before the PC. RA84. The Jacobs Respondents, individually and by their attorney Beeson, presented the CUP application for the modified Project and requested approval. RA84-85. Several individuals spoke in favor of the modified Project. Id.

Numerous individuals also spoke to the PC against approving the CUP on the modified Project, including counsel for the ELG, Joy Penney, Mike Murphy, Terry Sullivan, Ron Jenson, Eric Gunderson, Jim Landbloom and Deb Simonsen. RA85-86. The persons requesting denial of the CUP application raised issues, as documented in more detail in the minutes, regarding improper soils for the proposed septic system, regarding excessive density of the project, regarding increased vehicle traffic, increased water activity, and impairment of surface water quality on Eagle Lake. Id. The persons requesting denial also requested that Respondent County apply the amended Ordinance to the modified Project as resubmitted because of the need to limit density of this controversial project. Id. Counsel for the ELG submitted a detailed list of reasons to deny the CUP application under the Ordinance. RA79-81. Counsel for the ELG also submitted a list of proposed conditions for any CUP for the modified Project. RA82-83.

The PC heard the information and “questioned if the County Attorney has been contacted as to which Ordinance applies to this application”. RA86. The PC had a motion made and seconded to deny the application for the CUP on the modified Project. RA87. On the vote, the motion failed. Id. Based upon a suggestion of a County Commissioner present at the PC meeting and counsel, the Jacobs Respondents requested that Respondent County table the CUP application (and agreed to waive the application of the 60 day rule of Minn.Stat. Sec. 15.99). RA88. The PC decided to table the application to the PC meeting in November 2006. RA88. The Jacobs Respondents waived the 60-day rule of Sec. 15.99.

J. NOVEMBER 2006 PLANNING COMMISSION MEETING. On November 21, 2006, Respondent County’s PC met at a regular meeting to discuss the modified Project.

The minutes of that meeting document the proceedings. RA107. Per a request of the PC from October 2006, Respondent County received a November 3, 2006 opinion letter from the County Attorney regarding Minnesota law on the application of amended ordinances to projects, which concluded that the general rule is that a mere application does not create any vested rights. RA98-100. The letter provides: "As a general rule, Minnesota Courts have upheld the application of an amended ordinance to pending zoning applications." RA 98. The County Attorney noted vested rights and estoppel exceptions. Id. The County Attorney then wrote: "I am not aware of further facts that may support substantial actions taken by the applicant in this case to support an entitlement argument sufficient to create a vested right. In addition, there certainly seems to be no evidence that estoppel applies." RA99. The County Attorney did condition the opinion on not being "fully advised of all the facts in this particular file." RA100.

The Jacobs Respondents presented information regarding the modified Project, including the rearrangement of sites back to Tier II, addition of open space, buffer from wetlands and increase in the number of sites. Attorney Beeson for the Jacobs Respondents discussed the moratorium and amended ordinance, indicating in his legal opinion that Respondent County could pick and choose which ordinance version to apply to the modified Project. RA108. Attorney Beeson also argued that the modified Project had obtained vested rights and/or that the equitable doctrine of estoppel precluded the County from applying the existing Ordinance. RA107-108. Respondent County had received a November 16, 2006 letter from attorney Beeson for the Jacobs Respondents on the Ordinance issue. RA101-104. Numerous people spoke in favor of the modified Project.

Also at the PC meeting on November 21, 2006, numerous people spoke in opposition to the modified Project. The minutes document some of the concerns with the modified Project, including the poor quality of soils for septic system, negative impacts to surface water quality of Eagle Lake, increased traffic and water activity on the small lake, the need for other approvals and impacts on wetlands. RA109. Respondent County heard that the PC should have had, but did not have, a detailed site plan for 46 sites so that there was a rational basis for the approval of the CUP for 46 sites. Respondent County also received a letter dated November 21, 2006 from counsel for the ELG repeating the request to deny the CUP application and giving specific reasons. RA105-106; RA .

The PC received a motion to limit the modified Project to 50 sites, which motion failed. RA110-111. The PC received a motion to approve the CUP for the modified Project for 46 sites, 18 boat slips, and a conservation easement. RA111. The motion was seconded and carried. Id. The PC did not have any site plan at all anywhere in the record for a modified 46 unit campground with the site locations, open space and septic locations.

K. RESPONDENT COUNTY BOARD APPROVAL. On November 28, 2006, Respondent County Board approved the modified Project for 46 sites. RA127. Respondent Board did hear objections from Mike Murphy to the approval based on the lack of any approved site plan for the site locations, open space and septic system locations following the EIS termination order and substantial modifications. Id. The minutes of the meeting document the Board action. RA127. Respondent Board took public input on the decision and received two additional letters from counsel for ELG requesting that Respondent County deny the CUP on the modified Project. RA118-119; RA121-122 . Respondent

County went ahead and approved the CUP for the modified Project with 46 RV sites, 18 boat slips, and a conservation buffer, among other things. There was no site plan before Respondent Board on the approval of the CUP.

L. **THE INSTANT APPEAL.** Relator filed a Petition for Writ of Certiorari for review of Respondent County Board's November 28, 2006 approval of the CUP application, with the Court of Appeals issuing a Writ on January 17, 2007. RA1.

ARGUMENT

I. **STANDARD OF REVIEW ON THIS APPEAL.**

The Minnesota Court of Appeals reviews by certiorari quasi-judicial decisions of a county board to issue or deny a CUP. Where a project fails to meet the minimum performance standards of an ordinance at the time the project comes before the Board, the Court of Appeals will vacate the approval as unreasonable, arbitrary and an abuse of discretion. In the Matter of an Application by Harvey Block and Gary McDuffee for a Conditional Use Permit, Case Nos. A06-387 & A06-518 (Minn.App. February 6, 2007); Sunrise Lake Ass'n, Inc. v. Chisago County Bd. Of Comm'rs, 633 N.W.2d 59, 61 (Minn. App. 2001); Rose Cliff Landscape Nursery, Inc. v. City of Rosemount, 467 N.W.2d 641 (Minn.App. 1991). Our Courts give reasonable deference to County decisions on conditional use permits with more deference to a decision approving a conditional use permit than to one denying. Schwardt v. County of Watonwan, 656 N.W.2d 383, 386 (Minn. 2003). Our Court of Appeals held:

An agency's decision is arbitrary or capricious if the agency relied on factors the legislature never intended it to consider, if it entirely failed to consider an important aspect of the problem, if it offered an explanation for the decision that

runs counter to the evidence, or if the decision is so implausible that it could not be ascribed to a difference in view or the result of agency expertise.

Pope County Mothers v. Minn. Pollution Control Agency, 594 N.W.2d 233, 236 (Minn. App. 1999).

II. **RESPONDENT COUNTY ARBITRARILY APPROVED RESPONDENT JACOBS' CONDITIONAL USE PERMIT APPLICATION BECAUSE THE PROJECT FAILED TO MEET THE MINIMUM PERFORMANCE STANDARDS OF THE COUNTY ZONING ORDINANCE.**

Because the modified Project of the Jacobs Respondents failed in several important respects to meet the minimum standards of Sections 7A and 16 of the County Ordinance, the Court of Appeals should reverse as arbitrary, capricious and an abuse of discretion on November 28, 2006, by Respondent County Board to approve the CUP.

An applicant for a conditional use permit must show compliance with the applicable standards of the land use ordinance. Minn.Stat. Sec. 394.301, subd. 1, provides that a County may approve a conditional use “upon a showing by an applicant that standards and criteria in the ordinance will be satisfied.” Where a proposed project fails to meet the performance standards of a land use ordinance, the appellate court will reverse because a county board acts arbitrarily and abuses its discretion in approving a conditional use permit in such circumstances. Sunrise Lake Association, Inc. v. Chisago County Board of Commissioners, 633 N.W.2d 59 (Minn.App. 2001). In Sunrise Lake Association, the applicable ordinances precluded the placement and use of manufactured homes as a “manufactured home park” in the particular district. Respondent Chisago County approved a CUP for the placement of manufactured homes and their use as a seasonal recreational park. The Court of Appeals reversed, holding that the plain and

ordinary language of the ordinance precluded the proposed use in that district. Granting a CUP to a project that did not meet the ordinance requirements was arbitrary and an abuse of discretion by Chisago County. The improperly issued CUP was vacated.

Appellate courts will reverse as unreasonable a decision to approve permits that fail to meet the plain and ordinary interpretation of applicable ordinance standards as applied to the perceptible use. Yeh v. County of Cass, 696 N.W.2d 115 (Minn.App. 2005). In Yeh, the project developer described the proposed project to Cass County as an expansion of a resort as a commercial operation and sought approval for the expansion as such. Evidence in the record conclusively established that the actual use was as a residential development, which was a different land use for purposes of the ordinance than the indicated resort expansion, which the developer represented to Cass County. The Court of Appeals applied the plain and ordinary language of the applicable Cass County ordinances. The construction and interpretation of ordinances is a question of law for de novo review by the appellate courts. Canadian Connection v. New Prairie Township, 581 N.W.2d 391 (Minn.App. 1998); Duncanson v. Board of Supervisors of Danville Tp., 551 N.W.2d 248 (Minn.App. 1996). Applying the plain and ordinary language of the ordinance to the facts of record regarding the operation and marketing of the proposed project, the Court of Appeals in Yeh v. Cass County concluded that the proposed project was, as a matter of law, a residential development within the meaning of the ordinance and not a resort expansion. As such, the Court of Appeals affirmed the District Court, which vacated the approvals by Respondent Cass County. The Court of Appeals also held

that the actions of the County officials in deferring their decision on the application to a “court of law” was an unreasonable abdication of their duty to review the application.

The Court of Appeals also will reverse the grant of a conditional use permit where a county board fails to make a reasonable inquiry into the issue of the proposed project’s compliance with the applicable land use ordinance on significant issues. In the Matter of an Application by Harvey Block and Gary McDuffee for a Conditional Use Permit, Case Nos. A06-387 & A06-518 (Minn.App. February 6, 2007). In this recent decision, the Minnesota Court of Appeals reversed the approval of a conditional use permit to a commercial dog breeding facility proposed for part of Morrison County. Relators challenged the grant of the permit on a number of grounds, including that Respondent Morrison County had no reasonable basis on which to condition approval of the project to limit noise impacts on a surgical procedure to “debark” the dogs at the facility that had access to outdoors. The Court of Appeals held: “The decision of the county board to include a limited debarking condition, based on the scarcity of information provided before January 10, 2006, was arbitrary and capricious.” In making the decision, the Court of Appeals referenced that appellate courts review approvals of CUPs, in part, based on whether the agency took a hard look at the significant issues and cited to Pope County Mothers v. Minn. Pollution Control Agency, 594 N.W.2d 233, 236 (Minn. App. 1999). The Court of Appeals noted that it would reverse where the record fails to show that the county took a hard look at one of the required criteria. Citizens Advocating Responsible Dev. v. Kandiyohi County Bd. of Comm’rs, 713 N.W.2d 817, 838 (Minn. 2006).

Here, the modified Project of the Jacobs Respondents failed to meet several of the applicable requirements of Sections 7A and 16 of the Becker County Ordinance. Like Minn.Stat. Sec. 394.301, subd. 1, the plain language of Section 16 of the Ordinance establishes that the County may issue a CUP only to a project that meets ordinance standards. Section 16, subd. 1, provides that conditional use permits may only be allowed for uses allowed by this Ordinance. RA17. Respondent County adopted the official position of the County of requiring all CUPs to meet the Ordinance standards.

The Project of the Jacobs Respondents does not meet the Ordinance standards as a matter of law. Section 7A, subd. 4, of the Ordinance sets density limits on campgrounds in shoreland. RA10. It is undisputed that the Ordinance would only allow for about 29 campground sites for the Project under the density formula of Section 7A, subd. 4, because of the shoreland location on Eagle Lake. Respondent County Board disregarded this provision of the Ordinance by approving the modified Project for 46 sites. Respondent County acted arbitrarily and abused its discretion in granting a CUP for 46 sites for the Project in violation of Section 7A, subd. 4. The Ordinance does not allow for approval of 46 sites for the Project and only allows for 29.

This issue of noncompliance with the Ordinance was fully considered by Respondent County PC and Board, as various individuals and counsel for the ELG repeatedly presented that issue to Respondent County. The issue was presented in several letters. RA67; RA105; RA118; RA121. The issue was presented verbally at public hearings. The County Attorney for Respondent County issued an opinion letter that indicated the general rule that the Count must apply current ordinances. RA98. The

attorney for the Jacobs Respondents indicated to the County PC, as indicated in the minutes, in October and November 2006 that Respondent County could pick and chose between the current Ordinance and the repealed ordinance. There is no legal authority for this position. That is contrary to the plain language of the Ordinance. The old ordinance was repealed and was legally ended. Section 7A, subd. 10, required the Jacobs Respondents to resubmit a modified Project. Respondent County simply approved the Project with full knowledge of the lack of compliance with Ordinance standards. This was an abuse of discretion to approve this CUP.

Moreover, the November 28, 2006 approval of the CUP was in violation of Section 7A, subds. 2A, 3A and 3D, which required a detailed site plan and master plan, commonly prepared by a licensed surveyor. There was no detailed site plan for the modified Project as limited to 46 sites. Respondent County abused its discretion in approving the modified Project for 46 sites where there was no detailed site. Section 7A, subds. 2A, 3A and 3D of the Ordinance all require a detailed site plan showing location and size of lots, the location and size of open space and two alternative locations for septic system, among other things. This was all missing from the approval of November 28, 2006 for 46 sites. The Project first was submitted to Respondent County in May 2004 for approval of 46 sites and related features. Counsel for the ELG told that County in a letter of June 4, 2004 that the site plan for the Project indicated space for 60 sites. RA23. The County Attorney responded on June 10, 2004 that the Project was less than 50 sites and therefore was not subject to a mandatory EAW. RA26. In addition to the application, this determination by the County Attorney conclusively establishes the Project as less

than 50 sites. After receiving a valid Citizen Petition for an EAW, Respondent County ordered an EAW on the Project because the Project may have the potential for significant environmental effects. Following the EAW process on the Project, Respondent County ordered an EIS. This was a significant decision by Respondent County and was based on the substantial modifications to the Project.

Section 7A, subd. 10, of the Ordinance required the Jacobs Respondents to resubmit for any significant changes in the proposed Project. In order to avoid the EIS and the expenses associated with an EIS, Respondents sought to substantially modify the Project in order to qualify for a termination of the EIS order under Minn.R. 4410.2100, subp. 11. Instead of downsizing, the Jacobs Respondents increased the number of sites in the modified Project from 46 to 54 sites. They submitted a detailed revised site plan drawn by a licensed surveyor for the 54 sites, and associated open space, septic locations and conservation easement. Based on the substantial modifications to the Project, Respondent County terminated the EIS order. Respondent County included this in the minutes and in the Resolution. RA69-78. This meant under the Ordinance and as staff directed that the Jacobs Respondents had to resubmit. When the modified Project came before the County in November 2006, there was only a detailed site plan for 54 sites. The Jacobs Respondents had moved the sites back into Tier II, added open space in Tier I, and had moved septic locations. While there was no new application, the Jacobs Respondents submitted a new EAW and new site plan information.

Respondent County had no rational basis for approving the modified Project at 46 sites because there were no detailed site plans as required by Section 7A of the Ordinance

of a project with 46 sites. Respondent County went ahead and approved 46 sites, but which ones of the 54? It was not clear which 46 sites were approved. There were no specifics given on the approval. There was no detailed site plan in front of Respondent County. In summary, it appears that Respondent County simply didn't care as to what were their ordinance standards or where the sites went. Respondent County's approval has no details as to location of sites, size of sites, location of open space and septic systems. The approval gives no basis for which 8 lots were not approved. There is no rational basis on which to enforce this approval so that the purposes of the EIS termination are effectuated. You could infer that Respondent County was attempting a political compromise (without regard for the ordinance) by granting approval for 46 sites, given that 46 was the number of sites from the initial application and was not the 54 sites sought for the modified Project. This is an abuse of discretion.

Respondent County's approval was also arbitrary for purposes of Section 16, subd. 4F, of the Ordinance, which requires suitable soils for the development. Under Section 16, conditional use permits in shoreland can only be allowed where soil conditions are suitable. Individual Mike Murphy presented to the PC and the Board that these soils were extremely unique in Becker County and unsuitable for septic systems. While the Jacobs Respondents presented information from a septic designer, the supposed septic designer did not even know that a mound system would have greater depth to groundwater than an in ground system. The EAW process, order for EIS and various comments of citizens and the Minnesota DNR from April 17, 2006 and August 2006 make clear that better measures are needed than the proposed simple sediment pond and the generic planning.

This is a sensitive site on a sensitive lake. The site does not have suitable soils for the septic system. There is not enough room for adequate storm water facilities. There is rapid drainage of surface waters and septic towards Eagle Lake. The EAW Review Committee minutes indicate that the "land has not been proven suitable for this type of development". The Becker County review committee minutes from April 19, 2005 reference that the area is environmentally vulnerable because of wetlands and spawning areas. RA42-43. The Becker County Soil Survey Manual lists these soils as severe for building and construction. The soils are not suitable.

The modified Project does not meet other standards, as well, which was presented to Respondent County in the fall of 2006. RA79-81. Counsel for the ELG submitted letters to Respondent County establishing that the modified Project had not shown compliance with Minnesota Department of Health standards for RV campgrounds, including:

- a. 4630.0300 – on site caretaker required
- b. 4630.0400 – minimum size per site of at least 2,000 sq.ft.
- c. 4630.0600 – adequate water supply for domestic use
- d. 4630.1100 – garbage disposal at least 2x week
- e. 4630.1300 – night time lighting of all drives, paths and walkways (RA79-81).

III. THE JACOBS RESPONDENTS SUBSTANTIALLY MODIFIED THEIR PROJECT AFTER RESPONDENT COUNTY AMENDED THE ZONING ORDINANCE. THE JACOBS RESPONDENTS ACQUIRED NO VESTED RIGHTS IN THE PREVIOUS ZONING ORDINANCE. ESTOPPEL DOES NOT PRECLUDE APPLICATION OF THE AMENDED ZONING ORDINANCE TO THE SUBSTANTIALLY MODIFIED PROJECT.

The Jacobs Respondents argued, inter alia, to the Respondent County Board that they had obtained vested rights to have Respondent County approve the application under the

repealed Ordinance provisions. The Jacobs Respondents also argued that Respondent County could “choose as to which Ordinance they choose to follow in this situation” and that the equitable doctrine of estoppel precludes application of Section 7A of the Ordinance as against the modified Project. It appears from the record that Respondent County approved the modified Project under the repealed Ordinance.

The Court of Appeals should reverse the grant of the CUP to the modified Project of the Jacobs Respondents because Minnesota law provided the Jacobs Respondents with neither any vested rights in their initial application nor the right to estop the enforcement of applicable ordinance standards against the modified Project.

A property owner has no vested rights in an application for zoning approval. A property owner loses any rights to a land use allowed under a repealed ordinance, which a later amendment to the ordinance precludes prior to final review of the application. Yeh v. County of Cass, 696 N.W.2d 115 (Minn.App. 2005); Rose Cliff Landscape Nursery, Inc. v. City of Rosemount, 467 N.W.2d 641 (Minn.App. 1991); Property Research and Development Co. v. City of Eagan, 289 N.W.2d 157 (Minn. 1980). The vested rights doctrine exists to protect development rights to a particular project where the developer has a permit in hand and has progressed sufficiently with his construction to acquire a vested right to complete that project.

In Yeh v. County of Cass, the Court of Appeals affirmed that the developer had not acquired vested rights to pursue construction of a residential development where the developer inaccurately described the project to the County as a resort expansion and obtained approval for a resort expansion, not a residential development. Where the

project actually constructed or proposed differs materially from the project described in the application, the doctrine of vested rights has no relevance.

In Rose Cliff Landscape, the Minnesota Court of Appeals held that a landowner has no right in mandamus to the approval of a permit and site plan, which met the requirements of the applicable ordinances at the time of application, but did not meet the requirements of the ordinances in effect at the time of approval of the plat. Rose Cliff Landscape Nursery, Inc. v. City of Rosemount, 467 N.W.2d 641 (Minn.App. 1991). In Rose Cliff, the city had amended its zoning ordinances between the time of issuance of the building permit and the time of the site plan application. The Court of Appeals held that the amended ordinance established the controlling standards and stated that there is no vested right in zoning under a mere application. The Court of Appeals stated: “appellant lost whatever right it may have had to approval of its building permit application and site plan when the zoning ordinance was amended by the Rosemount City Council.” The Court affirmed the denial of a writ of mandamus to compel the City to issue the permit, without discussing other remedies or issues.

In the Property Research case, the Minnesota Supreme Court affirmed the denial of a writ of mandamus seeking to compel the City to issue plat approval. The Supreme Court stated that there exists no vested right in zoning from a mere application and held that an amendment to the platting ordinance precluded the property owner from constructing the improvements on the plat in violation of the amended ordinance. The City had amended its zoning ordinance to prohibit the use sought by the preliminary plat.

Here, the Jacobs Respondents submitted their application for the Project with 46 sites in May 2004. The County Attorney determined based on the application that the Project was for less than 50 sites and thereby refused to require a mandatory EAW under Minn.R. 4410.4300, subp. 20. Based on the Citizen petition and on June 22, 2004, Respondent County ordered the EAW on the Project because it may have the potential for significant environmental effects. In September 2004, Respondent County adopted a countywide moratorium on all types of various developments in shoreland zones throughout the County. It is believed that the moratorium applied to several projects that were in process. In 2005, Respondent County adopted the current versions of Sections 7A and 16 of the Ordinance, which limited the density of all campground projects in shoreland in the County. In May 2005, Respondent County ordered an EIS on the Project.

In order to avoid the EIS, the Jacobs Respondents set out to substantially modify the Project. While County staff had told the Jacobs Respondents in a letter that the County would apply the old ordinance to the application, County staff specifically told the Jacobs Respondents that any change in the number of sites on the proposal would trigger application of the amended Ordinance, which was documented in file notes of the County. RA41. This staff statement is consistent with subd. 10 of Section 7A of the Ordinance. With full knowledge that any change in the number of sites would require resubmission so that the current Ordinance provisions would apply, the Jacobs Respondents went ahead and substantially modified the Project, including by increasing the number of sites from 46 to 54. They were hoping to avoid the EIS. In terminating the EIS order, Respondent County made several specific findings of fact and conclusions that

the Project was substantially modified. RA76-78. Respondent County terminated the EIS despite the increase in the number of sites because the modified Project moved the sites back away from the lake and into the Tier II area, which they said would have less direct impacts on Eagle Lake. They also included open space and a conservation easement.

In summary, the changes to the modified Project included an increase in the number of sites from 46 to 54, a change in the location of many of the sites into Tier II, a change in the location of open space, the addition of a conservation easement on wetland and the change in location for proposed septic systems. The Jacobs Respondents submitted a new EAW on the modified Project. They never began any construction and had no approvals. The Jacobs Respondents have no vested rights in a mere application where they substantially modified the Project after Respondent County adopted the amendments to the Ordinance.

All of the expenses incurred by the Jacobs Respondents in the EAW process are normal expenses of the permitting and environmental review process that do not create any vested rights under Minnesota law. The Jacobs Respondents did not start any construction on the modified Project. The Ordinance does allow the modified Project up to 29 sites. The Jacobs Respondents have no vested rights in the mere application where the Project was substantially modified to avoid environmental review and the EIS order.

The equitable doctrine of estoppel also does not preclude application of the amended Ordinance to the modified Project of the Jacobs Respondents. Where governmental officials give out incorrect readings of the law, and a party expends some resources on that error, Minnesota Courts have not estopped later enforcement of terms

and conditions of the written zoning ordinances because property owners are deemed by the law to know and understand the ordinances and regulations that apply to their property. Dege v. City of Maplewood, 416 N.W.2d 854 (Minn.App. 1987) (truck garage ordered removed despite City initial approval and construction); Jasaka Co., v. City of St. Paul, 309 N.W.2d 40 (Minn. 1981) (radio tower ordered taken down despite City initial approval and substantial construction); Hawkinson v. Itasca County, 231 N.W.2d 279 (Minn. 1975); State v. Iten, 106 N.W.2d 366 (Minn. 1960). Private property owners can enforce violations of the applicable zoning ordinances. Mohler v. City of St. Louis Park, 643 N.W.2d 623, 630 (Minn.App.2002)

Here, the equitable doctrine of estoppel has no application to preclude the application of the zoning ordinance in place in November 2006 to the modified Project. While the Jacobs Respondents will point to the January 2005 letter from the County regarding application of the ordinance in place in May 2004, this letter did not create an estoppel and carte blanche as to any approval as to any modification to the Project, no matter what the changes, such as an increase in density. Moreover, the January 2005 letter is not valid in the first instance because it conflicts with both Section 7A, subd. 10, and Section 16, subd. 1 of the Ordinance. In any event, County staff told the Jacobs Respondents that any modification to the Project would force the Project to comply with the Ordinance in effect at the time of the modification. These staff comments are consistent with Subd. 10 of Section 7A of the Ordinance. There are no grounds for an estoppel that would prevent enforcement of the Ordinance.

The expenses incurred by the Jacobs Respondents in the EAW process are the normal costs related to environmental review and permitting. These do not give grounds for any equitable estoppel.

The application of the ordinance in place in 2006 to the modified project resulted from the Jacobs Respondents substantially modifying their Project with full knowledge of the amendments to the ordinance. A party cannot benefit from equitable relief where that party comes to the Court with unclean hands through inducement of the error. See, Gully v. Gully, 599 N.W.2d 814 (Minn. 1999). In the Gully case, the Minnesota Supreme Court refused to grant equitable relief because the party claiming the relief: “does not come before this court with clean hands, and, thus, he cannot seek the benefit of the equitable doctrine.” Staff at Respondent County clearly told the Jacobs Respondents that any modification to the Project number of sites would fall under the amended Ordinance. Section 7A, subd. 10, says the same thing. With actual or constructive notice of these requirements, the Jacobs Respondents went ahead and modified the Project to increase the number of sites from 46 to 54. The Jacobs Respondents cannot set up an estoppel against the ordinance based on their own decision.

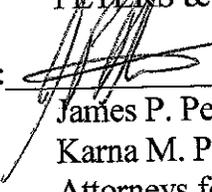
VI. CONCLUSION

This controversial Project in Becker County fails to meet minimum performance standards of the Ordinance in place at the time of permitting review and approval. Respondent County adopted these standards to apply in all parts of the County in 2005 following a public process of notice and public hearing. The failures of the modified Project to meet the Ordinance standards include the density of the number of sites at the

Project, the lack of any site plan and other significant inconsistencies. The approval by Respondent Board was arbitrary and an abuse of discretion. While the Jacobs Respondents argue that the County can pick and choose which ordinance to apply, argue for vested rights and argue for an estoppel, the factual record shows that the County staff clearly told the Jacobs Respondents (as was stated in the Ordinance) that any increase in the number of sites would definitely trigger application of the amended ordinance to a modified project. The Jacobs Respondents went ahead anyway and increased the density from 46 to 54 sites. There are no grounds for vested rights or an estoppel on this record.

For the foregoing reasons, Relator respectfully requests that the Court of Appeals issue an order reversing Respondent County's approval of a CUP for the modified Project and vacating the November 28, 2006 decision.

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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) (with amendments effective July 1, 2007).