

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 REPLY BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
REPLY ARGUMENT	1
I. STANDARD OF REVIEW	2
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.....	3
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	13
CONCLUSION.....	20

TABLE OF AUTHORITIES

	Page
CASES	
<u>Arvig Telephone Company v. Northwestern Bell Telephone Company</u> , 270 N.W.2d 111, 116 (Minn. 1978).....	3
<u>Handicraft Block Limited Partnership v. City of Minneapolis</u> , 611 N.W.2d 16 (Minn. 2000).....	3
<u>In re Application by Block & McDuffee</u> , 2007 WL 403897 (Minn. App. Feb. 6, 2007)	11
<u>Interstate Power Company v. Nobles County Board of Commissioners</u> , 617 N.W.2d 566 (Minn. 2000)	14, 17
<u>Neitzel v. County of Redwood</u> , 521 N.W.2d 73, 76 (Minn.App. 1994), rev.den. (Minn.Oct. 27, 1994)	2
<u>Newton v. County of Itasca</u> , 2006 WL 771719 (Minn.App. 2006).....	14, 15
<u>Property Research and Development Co. v. City of Eagan</u> , 289 N.W.2d 157 (Minn. 1980):.....	7
<u>Rose Cliff Landscape Nursery, Inc. v. City of Rosemount</u> , 467 N.W.2d 641 (Minn.App. 1991)	3, 7
<u>Sunrise Lake Association, Inc. v. Chisago County Board of Commissioners</u> , 633 N.W.2d 59 (Minn.App. 2001)	3, 4, 6, 12
<u>Yeh v. County of Cass</u> , 696 N.W.2d 115 (Minn.App. 2005).....	3, 4, 7, 12
STATUTES	
Minn.Stat. Ch. 394.....	2, 6, 7
Minn.Stat. Sec. 394.27	7
Minn.Stat. Sec. 394.301	3, 6, 7, 11, 12
Minn.Stat. Sec. 606.01 - .06	2

Minn. Stat. § 116D.04, subd. 2b (2004) 17

RULES

Minn.R. Ch. 4410 17

Minn.R. Ch. 4410.1700, subp. 1 17

Minn.R. Ch. 4410.3100, subp. 1 17

OTHER AUTHORITY

Becker County Zoning Ordinance Section 3, subd. 2..... 7, 8

Becker County Zoning Ordinance
Section 7A..... 1, 3, 4, 5, 6, 8, 9, 10, 12, 13, 16

Becker County Zoning Ordinance
Section 7C..... 1, 4, 5, 8

Becker County Zoning Ordinance Section 16..... 1, 6, 12

REPLY ARGUMENT

The Brief and Appendix filed by Relator in this appeal demonstrated that the Court of Appeals should vacate the November 28, 2006 CUP issued by Respondent Becker County to the Jacobs Respondents. Sections 7A and 16 of the Ordinance adopted in 2005 applied to the County's review and approval of the CUP application. During 2005, Respondent County went through an open public process under Minnesota law to amend the existing ordinance. Among other things, the 2005 amendments enacted density limitations on lakeshore development for reasons of public policy. The 2005 amendments repealed the former ordinance provisions, including Section 7 that was in effect in 2004. It is undisputed that the project at issue failed to meet the minimum standards of the Section 7A and 16 of the Ordinance in 2006. Density limitations would have allowed about 29 sites, instead of 46 sites. Relator maintains that Respondent County arbitrarily approved the CUP in the quasi-judicial decision of November 28, 2006.

In order to avoid reversal of the CUP, the County Respondents argue in the Respondents' Brief for the Court of Appeals to affirm the approval of the November 28, 2006 CUP. Respondents argue that Minnesota law allowed Respondent County to pick and choose in November 2006 as a legislative decision whether to apply Section 7 of the May 2004 repealed ordinance. Respondents argue that Section 7C, not Section 7A of the Ordinance applies anyway because Section 7C applies to transient commercial uses, such as RV camps, and not to residential uses. Respondents' Brief makes a number of factual assertions without citation to the administrative record. Respondents argue that the legal doctrines of vested rights and estoppel have no application here. There is no case law

directly supporting these theories. The Jacobs Respondents join in the arguments of the County Respondents, without separate argument.

Relator respectfully submits this Reply Brief to address new matter raised in the County Respondents' Brief, including the serious and radical flaws with Respondents' arguments. Relator maintains that the Respondents' Brief contains several erroneous factual assertions that the administrative record contradicts. The Court of Appeals should reverse the CUP issued to the Jacobs Respondents.

I. STANDARD OF REVIEW ON THIS APPEAL.

Respondents' Brief at pages 15-17 argues that Counties have broad powers to conduct zoning activity under Minn.Stat. Ch. 394, and that the "decision of whether to pass a zoning ordinance, amend a zoning ordinance, or which zoning ordinance applies to an application, is in reality a legislative decision. The standard of review for the legislative zoning decision is narrow." Respondents argue that this appeal concerns a "legislative decision", which is a "policy decision". At page 18, Respondents' Brief argues that the "broad grant of discretion given to municipalities extends to whether land use applications are processed under the ordinance in effect at the time of application, or the ordinance in effect at the time of approval." There is no case citation in support.

This appeal to the Court of Appeals is under Minn.Stat. Sec. 606.01-.06 from the quasi-judicial decision of Respondent County Board to issue a CUP. The decision to issue or deny a CUP is quasi-judicial for review by the Court of Appeals. Neitzel v. County of Redwood, 521 N.W.2d 73, 76 (Minn.App. 1994), rev.den. (Minn.Oct. 27, 1994). Minnesota Courts more closely scrutinize quasi-judicial decisions than legislative. See

Arvig Telephone Company v. Northwestern Bell Telephone Company, 270 N.W.2d 111, 116 (Minn. 1978). An action of a County Board is quasi-judicial where: 1) there is an investigation into a disputed claim and weighing of facts; 2) application of evidentiary facts to a standard; and 3) a binding decision on the claim. Handicraft Block Limited Partnership v. City of Minneapolis, 611 N.W.2d 16 (Minn. 2000).

Where the County approves a CUP as a quasi-judicial decision that fails to meet the minimum standards of an ordinance, the approval is contrary to Minnesota law. Minn.Stat. Sec. 394.301, subd. 1; Yeh v. County of Cass, 696 N.W.2d 115 (Minn.App. 2005); 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).

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.

Respondents' Brief argues that Section 7A of the Becker County Ordinance adopted in 2005 and in effect at all times during 2006 does not apply to the May 2004 CUP application of the Jacobs Respondents. Respondents make these arguments at, among other places, page 9 and pages 12-13 of the Respondents' Brief. Respondents argue that the May 2004 Ordinance allowed for approval of the CUP up to 74 sites.

The plain and ordinary language of Section 7A of the Ordinance and Minnesota statutes establish that this section applies to the CUP application that is the subject of this

appeal. Minnesota Courts apply the plain and ordinary language of statutes and zoning ordinances. Yeh v. County of Cass, 696 N.W.2d 115 (Minn.App. 2005).

The administrative record herein, including public notices, demonstrates that Respondent County handled the review and approval of the CUP as a quasi-judicial decision under the Ordinance. The Statement of the Case on file herein so indicates. RA3. Relator appeals the issuance of the CUP and does not challenge the rezoning decision.

A. **Because the Jacobs Respondents applied for a CUP for a Seasonal RV Campground, the proposed use is longer than 28 days, is residential and is subject to Section 7A of the Ordinance.**

Respondents' Brief argues at pages 9-10 and pages 12-13 that Respondent County could choose to apply Section 7 of the Ordinance from May 2004 (as amended in July 2005 into Section 7C) to the CUP application because RV/campsites are "transient" or "commercial" uses, and are not "residential" land uses. The Respondents' Brief argues that the CUP application was for a "recreational vehicle campground [that] is not a residential development." This argument is new and not in the record below.

As a matter of law the proposed project is residential within the meaning of Section 7A of the Ordinance. A County must approve or deny a CUP in reference to the applicable ordinance provisions. Minn.Stat. Sec. 394.301; Sunrise Lake Ass'n, Inc. v. Chisago County Bd. Of Comm'rs, 633 N.W.2d 59, 61 (Minn. App. 2001). The plain language of the Ordinance at several places distinguishes between short-term rental facilities, which are commercial, and long term (over 28 days) rental facilities, which are residential. RV camps can be either long-term seasonal facilities, on the one hand, or weekend and overnight transient facilities, on the other hand. The two types of uses are

distinct. Respondent adopted Section 7A to apply to developments whose rentals were for over 28 days and were therefore residential. Section 7A, Subd. 1B, states that this section applies to “sites or units that are sold, leased for periods of longer than 28 days, or any other method of transferring long term rights to lodging spaces, rooms, RV sites, or parcels shall be considered residential and must comply with this section of the Ordinance.” RA8. The definitions in Section 4 define residential developments as greater than 28 days. Section 4, Subd. 2-112, defines “Shoreland Multi Unit Residential Development” as those for “periods longer than 28 days.” Record No. 1.

On the other hand, Respondent County adopted Section 7C to apply to short term rentals of less than 28 days, which are deemed commercial. Section 7C, subd. 1B, distinguishes these from residential and provides that RV sites “providing more than 28 days of continued service shall be considered as permanent and must comply with the multi-unit residential development requirements . . .” Id. A seasonal RV camp does not need to check-in guests on a daily basis, takes in guests for the entire season and has a wholly different staffing level.

The CUP application of the Jacobs Respondents states that the reason for the request was “C.U.P. for Seasonal RV Campground consist. of 46 sites.” RA21. Seasonal rentals of RV and campsites consist of rentals of about 120 days, more or less, which is substantially longer than the 28 days transient rental. The Notice of Public hearing identifies the Project as a CUP for a Seasonal RV Camp. Record No. 5. During the entire process, Respondents considered the project as a residential project, acknowledged that Section 7A, if applicable, would limit the density of the project to about 29 sites. Record

No. 41. This includes the presentation made by counsel for the Jacobs Respondents at the planning commission (“PC”) on October 17, 2006. Id. The minutes of the final PC meeting document that “the campground will be seasonal.” Record No. 52.

The Court of Appeals should also reject this argument because Respondents never raised this argument in the proceedings below. All parties in the CUP proceedings understood that this was a seasonal RV camp. Record Nos. 41; 52.

B. Because the RV Campground of the Jacobs Respondents was not existing, operating, or licensed as of 2005, Section 7A of the Ordinance applies.

Respondents’ Brief argues that Respondent County could pick and choose which Ordinance to apply as a “legislative” decision and that it had a “County Policy” of applying the ordinance in effect at the time of an application was received. Respondents argue that the County could choose in November 2006 to disregard Sections 7A and 16 adopted in 2005 and could choose to apply Section 7 of the version of the Ordinance in effect in May 2004 to the CUP application from May 2004.

The plain language of the Ordinance and the applicable statutory provisions establishes that Respondent County cannot choose in 2006 to apply the repealed ordinance provisions from 2004, instead of applying the Ordinance adopted in 2005 and in effect at all times in 2006. The County Board of Commissioners must evaluate a CUP application with reference to the existing ordinance. Minn.Stat. Sec. 394.301; Sunrise Lake Ass’n, Inc. v. Chisago County Bd. Of Comm’rs, 633 N.W.2d 59, 61 (Minn. App. 2001). Minn.Stat. Ch. 394 establishes the authority of Minnesota Counties to conduct

land use planning and zoning. Minn.Stat. Sec. 394.301 establishes that a County Board of Commissioners may issue CUPs to projects that meet all Ordinance criteria.

On the other hand, Minn.Stat. Sec. 394.27 establishes that a County Board of Adjustment has exclusive authority to issue a variance from the provisions of the Ordinance. The County Board of Commissioners has no authority to issue any variance from the terms of an ordinance. Minn.Stat. Sec. 394.27, subd. 7, provides as follows:

“Subd. 7. **Variances; hardship.** The board of adjustment shall have the exclusive power to order the issuance of variances from the terms of any official control including restrictions placed on nonconformities.”

The Board of Adjustment is an appointed body. The Board of Commissioners is elected. They exist separately under Minn.Stat. Ch. 394.

Minnesota case law has consistently recognized this rule that 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).

Respondent County Board of Commissioners had no authority to choose in November 2006 to disregard the Ordinance provisions lawfully adopted in 2005 and in effect at all times in 2006. Section 3, subd. 2, states that the Ordinance applies to all activities in the unincorporated areas of the County. Section 3, Subd. 2, of Respondent County's Ordinance in effect at all times since March 2005 provides:

“After the effective date of this Ordinance the use of all property and every structure or portion of a structure erected, altered, added to or relocated in Becker County shall conform with this Ordinance. Any existing building or structure and any existing use of property that does not conform with this Ordinance may be continued, extended or changed only as provided by the provisions of this Ordinance relating to nonconforming uses.” Record No. 1.

The Ordinance applies to the proposed activities of the Jacobs Respondents, who had not obtained rights under the Ordinance in the mere application. Section 7A grandfathers in existing and operating seasonal campgrounds, but only those existing and operating as of March 23, 2005. Section 7A, Subd. 1B, of the Ordinance also states that this “provision does not apply to existing or operating resorts and campgrounds in existence as of March 23, 2005 . . .”. RA8. Section 7C, subd. 1D, provides that “Existing Licensed Resorts, RV Parks and Campgrounds that are licensed, with the Minnesota Department of Health as of April 26, 2005, *and continue to operate as a resort*, are only subject to the provisions of Subdivision 15 of this Section (emphasis in original).” Record No. 1; Record No. 2.

The proposed seasonal RV camp of the Jacobs Respondents was not existing or operating in 2005 and, indeed, has not yet become existing or operational. Only the Board of Adjustment has the power to issue variances to the terms of the Ordinance.

Respondents’ Brief argues at page 11 that the County had a “practice” of applying the ordinance in effect at the time of application and that “this was also consistent with the opinion given by the Assistant County Attorney, Gretchen Thilmony.”

Neither the plain language of the Ordinance nor the administrative record supports these arguments. The plain language of the Ordinance indicates that the Ordinance

applies to all land uses and makes no exception for mere applications. The Ordinance does have grandfather clause provisions, which apply to existing and licensed seasonal uses as of March 2005 and not to mere applications. While the language of the moratorium did except applications, the Ordinance did not. Any County policy would be contrary to Ordinance, which also requires any amended projects to comply therewith and to submit a new application. Section 7A, subd. 10.

Moreover, any County practice or policy could not have been the official policy of Respondent County based on the record. The County EAW Committee did not know of any such policy on April 19, 2005, as indicated in the minutes. Record No. 23. The County PC publicly debated which ordinance to apply on October 17, 2006, with at least one member (Lien) supporting the application of the “current ordinance” and another stating that he did “not know what the magic number [on density] is.” Record No. 41. There was no discussion of a County practice binding the PC. *Id.* The attorney for the Jacobs Respondents requested at the PC on October 17, 2006 a continuance and a formal County Attorney opinion on the issue, which opinion would have not been necessary if there was a formal County policy. Record No. 41. In the opinion, the County Attorney nowhere referred to any such County policy in the letter of November 3, 2006. Record No. 45. The opinion letter speaks for itself and addressed the general rule, vested rights and estoppel. *Id.* Nowhere does the County Attorney opinion letter refer to any practice or policy of the County. *Id.* The minutes of the PC meeting of November 21, 2006 include a discussion of the County attorney opinion, which “stands as written”. Record

No. 52. The Zoning Administrator, Johnson, “stated that Courts look at case law when making a decision. The PC does not.” Id.

Any use of the repealed Ordinance language from May 2004 was arbitrary. The Board of Adjustment, not the Board of Commissioners, has exclusive authority to vary from the Ordinance terms.

Respondents rely on the letter from County staff to the Jacobs Respondents stating that the moratorium did not apply to the May 2004 application. The moratorium is not at issue in this case. Section 7A of the Ordinance is applicable. Moreover, County staff comments in the record refer to amendments to a project requiring a new application subject to the moratorium. Record No. 51. The Jacobs Respondents substantially modified the project in 2006 in order to avoid the EIS order and increased the number of proposed sites to 54. County staff told the Jacobs that for an increase in sites he: “needs new app & falls under moratorium [sic].” Id. If there was any County policy to grandfather in applications for the moratorium, such policy did not apply to modified projects under the Ordinance. There was no policy relative to the Ordinance.

Further proof of the lack of any such policy as to modified projects is that the County Board approval of November 28, 2006 followed the EIS termination order based on substantial modifications to the project and allowed for 46 sites without any site plan. Respondents’ Brief nowhere mentions the lack of a site plan for the CUP approval.

Where the County fails to take a hard look at required criteria, the Court of Appeals will vacate the approval as unreasonable, arbitrary and an abuse of discretion.

Minn. Stat. Sec. 394.301, subd. 1; In re Application by Block & McDuffee, 2007 WL 403897 (Minn. App. Feb. 6, 2007).

There is no site plan anywhere in the record to establish what 46 sites were approved on November 28, 2006 as part of the modified project that was revised in the EIS process to move further from the lake. In September 2006, the Jacobs Respondents moved all sites back away from the lake to avoid the EIS and revised a site plan to include 54 sites. There is no revised site plan for 46 sites. It was purely arbitrary to approve 46 sites with no indication as to which sites were approved. If the EIS process was “successful” as asserted in Respondents’ Brief, the recommendations and improvements should have reflected in the CUP decision. Without any site plan to support the CUP, the decision was arbitrary.

At page 10, Respondents’ Brief argues that Relator only in September 2006 “began to assert” that the County could not process the application under the Ordinance in effect in May, 2004”. Respondents then condemn Relator for first asking Respondent County to apply the Ordinance late in the game when the County terminated the EIS order over the objections of many. Respondents suggest that the allegedly belated timing of the request somehow influences the outcome of this appeal, without citing authority.

Respondents are mistaken as to the administrative record, which establishes that Relator consistently asked for Respondent County to apply the Ordinance since April 12, 2005, as part of the process of the CUP review and immediately after Respondent County adopted the amendments in March 2005. Relator first made this request in a letter to Respondent County dated April 12, 2005. Record No. 22. The EAW Committee of

Respondent County discussed Relator's request in detail on April 19, 2005 in a meeting. Record No. 23. The minutes of Respondent County's EAW Committee meeting of April 19, 2005 document the discussion. Id. Relator continued to make the request in several letters and at the October 17, 2006 PC meeting (Record No. 41) and at the November 28, 2006 Board meeting (Record Nos. 53 and 55). In support, Relator on November 27, 2006 submitted District Court decisions (Ripley Dairy, LLP v. Ripley Township; Save Lantern Bay v. Cass County) applying new or amended ordinances to projects that had previously applied. Record No. 53. Counsel for the County here are the same as counsel in Save Lantern Bay v. Cass County and make the same arguments about picking and choosing.

Respondent County adopted the 2005 Ordinance amendments in response to widespread concerns for high density developments on lakeshore throughout the County. There is neither evidence nor argument that Respondent County improperly targeted the 2005 Ordinance amendments at the proposed project.

C. The proposed project of the Jacobs Respondents fails to meet the minimum standards of Sections 7A and 16 of the Ordinance.

Respondents' Brief nowhere disputes that the proposed modified project of the Jacobs Respondents violated Section 7A of the Ordinance.

Because the modified project violates the density limitations and other provisions of the Ordinance, it was arbitrary and capricious for the County to approve the CUP. Approval of a CUP for a project that fails to meet the minimum standards of an ordinance is arbitrary. Minn.Stat. Sec. 394.301; Yeh v. County of Cass, 696 N.W.2d 115 (Minn.App. 2005); Sunrise Lake Ass'n, Inc. v. Chisago County Bd. Of Comm'rs, 633

N.W.2d 59, 61 (Minn. App. 2001). The Jacobs Respondents conceded at the October 17, 2006 PC meeting that Section 7A of the Ordinance would only allow about 29 sites.

Record No. 41. The CUP for the modified project allows 46 sites, which violates Section 7A. Record No. 57. In addition, Relator will not here repeat the other violations in Relator's Brief, such as the lack of a site plan. Other concerns of Relator for the project are set forth in the record. Record Nos. 11; 22; 29; 33.

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 County Respondents argue in their Brief at page 19, that "neither the vested rights doctrine nor estoppel are determinative factors in this case." At page 20, the Brief argues that: "Vested rights analysis does not help." Respondents argue at pages 19 and 21 that the appeal involves review of a "discretionary legislative decision". Respondents do not argue that the Jacobs Respondents acquired vested rights do not argue that the County is estopped from applying Section 7A of the current Ordinance. The Jacobs Respondents did not file a separate brief to follow up on the estoppel argument set forth in the November 16, 2006 letter from counsel. Record No. 46.

The administrative record contains the opinion of the County Attorney:

"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 . . .

I am not fully advised of all the facts in this particular file. This opinion relates generally to the application of ordinances when amendments have occurred. If there

are other specific facts you feel I should know that would affect the application of the analysis in this letter to the Blue Valley Campground file specifically, please contact me.” Record No. 45.

For purposes of this appeal, Respondents have abandoned the vested rights and estoppel arguments made in the administrative proceedings below.

Instead, Respondents argue that Respondent County Board reasonably chose to apply the repealed May 2004 ordinance to the CUP application. Respondents argue that during the CUP process, a County Board has the authority to disregard duly adopted ordinances and to effectively repeal current ordinances within the CUP process without public notice of that intent. Respondents essentially rely on two cases: Interstate Power Company v. Nobles County Board of Commissioners, 617 N.W.2d 566 (Minn. 2000); Newton v. County of Itasca, 2006 WL 771719 (Minn.App. 2006).

In the limited circumstances of a remand from the Courts for additional findings and because of the unique risks on remand that the municipal body could attempt to legislate away by an amended ordinance gains by the landowner in the litigation process, the Court of Appeals may in a writ of certiorari proceedings consider whether it is reasonable to apply a zoning amendment enacted after an appeal and remand of the Board’s initial action for further findings. Interstate Power Company v. Nobles County Board of Commissioners, 617 N.W.2d 566 (Minn. 2000). In Interstate Power Company, the Minnesota Supreme Court addressed a situation where the County Board initially approved a CUP with several conditions. After appeal and remand of the CUP by the Court of Appeals for more findings, the County Board adopted an amendment to the ordinance, which amendment was specifically legislated at the Interstate Power project

and intended to preclude it. The Supreme Court refused to apply the amended ordinance in the limited circumstances of the remand of that case. A divided Supreme Court held:

“The specific procedural posture and circumstances of this case are such that application of the new setback amendment to this proposed project would result in a ‘manifest injustice’ that warrants deviation from the usual rule of applying the law as amended. Specifically, the limited nature of the remand from the court of appeals combined with the stated impetus for the amendment compels this conclusion.” 617 N.W.2d at 572.

The Supreme Court cited to a concern for manipulation of zoning ordinances during a limited remand for more findings, as follows:

“Other courts have recognized that equitable concerns should prevent courts from ‘approving the proposition that every time a party came close to successfully challenging a town and its zoning board in its zoning actions, his gains could be legislated away by the enactment of an amendment to the ordinance’”. 617 N.W.2d at 572.

Newton v. County of Itasca is an unpublished decision that involved a District Court challenge to the quasi-legislative decision to rezone a parcel of property, which went to the Minnesota Court of Appeals from summary judgment. There was a different standard of review for the rezoning than for a CUP. Newton v. County of Itasca did not involve a quasi-judicial decision to issue a CUP and involved another limited remand from two courts to the County Board for more findings to articulate the board’s reasons for its decision. During the limited remand, the ordinance changed. The Court noted the unique circumstances of a delay caused by the limited remand, which delay was partially attributable to errors by the permitting authority in not making adequate findings.

Here, this is the only appeal of the CUP via writ of certiorari. There was no remand from the District Court or the Court of Appeals for more findings during which

time ordinances changed. There is no District Court challenge to the validity of a rezoning decision. There is no risk and no argument that Respondent County legislated the 2005 amendments at the Jacobs Respondents. The 2005 amendments applied equally throughout the County. There is no manifest injustice here caused by a change of ordinances within the time of a limited remand for additional findings. There is no risk that Respondent County was attempting to legislate away gains made by the Jacobs Respondents under a prior zoning approval. There is no evidence that Respondent County did or could use the environmental review process to legislate away gains.

Respondent County had a reasonable basis for adopting Section 7A of the Ordinance resulting from general concerns for high-density development on lakeshore properties. Density has been a big issue around Minnesota lakes. Section 7A restricts the density based on issues of land use planning and protecting lakeshore. Section 7A does not take away the ability of the Jacobs Respondents to build a project up to 29 sites. Indeed, a less dense development might lead to a property with an increased value over and above a high density project. If there weren't valid reasons for the Ordinance, Respondent County shouldn't have adopted it. The Ordinance applies equally in the County to everyone and should be applied equally to everyone. The County can always amend the Ordinance to allow higher density project. Picking and choosing among ordinances could lead to favoritism and the risk of corruption.

Respondents argue that the delays in approving the CUP were unreasonable and that extra time resulted from the environmental review process. Respondents attempt to

equate the time with the environmental review process with the delays from limited remand in Interstate Power Company and argue that “manifest injustice” exists here.

The environmental review process relative to this project does not constitute manifest injustice to warrant deviation from the usual rule of applying the law as amended. Our Minnesota legislature intended that the environmental review process take place prior to permitting and prohibits final governmental approvals during that review. Minn. Stat. § 116D.04, subd. 2b (2004) and Minn.R. 4410.3100, subp. 1. An EAW is a brief document prepared by the developer in worksheet format, designed to rapidly assess the environmental effects associated with a proposed project. The EAW serves primarily to aid in the determination of whether an EIS is needed on the project and to serve as a basis for the scoping process for an EIS. The EAW is not intended to be a detailed analysis of potential environmental impacts of a proposed project. The environmental impact statement (“EIS”) is a much more detailed study of all factors contributing to a significant impact on the environment and is prepared by independent parties.

“Where there is potential for significant environmental effects resulting from any major governmental action, the action shall be preceded by a detailed [EIS] prepared by the [RGU].” Minn. Stat. § 116D.04, subd. 2a (2004); Minn. R. 4410.1700, subp. 1 (2003).

The Minnesota Rules on environmental review, Chapter 4410, include various timelines for the environmental review process triggered by applicant submissions. The legislature intended the normal process to take place prior to permitting.

Our Minnesota laws intend that, before the County could issue any CUP, the Jacobs Respondents needed to complete the environmental review process commenced

with the EAW petition in June 2004 and concluded in September 2006, with the process intended to identify possible improvements to the project.

The delays in project review resulted from the Jacobs Respondents and their engineers being unwilling participants in the process, delaying in making submittals and refusing to make adjustments in the project in order to limit environmental impacts. Respondent County ordered the EAW on the project in June 2004 after the Jacobs Respondents did not volunteer an EAW. The initial site plan had 60 sites, though the application was for 46. Record No. 4. An EAW would have been mandatory for over 50.

The Jacobs Respondents submitted the draft EAW in July 2004. Record No. 14. It was incomplete, as the County determined in August 2004. Record No. 15. The Jacobs Respondents delayed in submitting a revised EAW until January 2005. Record No. 17. The delay from June 2004 to January 2005 resulted solely from the incompleteness and delays by the Jacobs Respondents and their engineers. Continued concerns existed with the project, as evidenced by the comments on the EAW from the Minnesota DNR and many others. Record Nos. 21; 22. Based on valid concerns in the EAW process that included design problems, such as crowding sites too close to the lake, Respondent County ordered the EIS on the project in May 2005. Record No. 26. The Jacobs Respondents accepted that decision and did not appeal to District Court. The next year's delay appears to have resulted from the decision to revise the project, make it larger and attempt to lessen environmental impacts. The revised EAW was reviewed in June 2006. Record No. 30. The modified project still involved concerns that led the County EAW Review Committee to conclude that the reasons for the EIS continued. Record No. 35. In

any event, Respondent County rescinded the order for the EIS in September 2006 based on the changes made. Record No. 36.

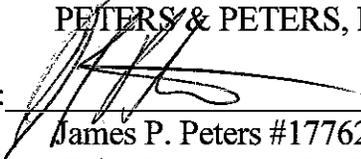
Respondents also argue that a finding of manifest injustice here will conserve the resources of the parties and Minnesota Counties. The Jacobs Respondents assert that they incurred expenses of \$18, 863.93 on review, legal and permitting. Record No. 47.

However, enforcing the general rule of ordinance application to all projects that have not received permits will protect the resources of the parties and the Courts. Lakeshore has been in high demand in Minnesota. Demand will likely increase. Minnesota DNR is proposing new alternative standards for shoreland following a five county pilot project. Counties around the state are in the process of, or considering, amendments to shoreland ordinances. New standards for environmental review of lakeshore developments are in process. Many changes are likely. There exists a significant risk of additional litigation if no clear standards exist and Counties are allowed in reviewing CUPs to pick and choose between repealed and amended ordinances. As to the expenses incurred by the Jacobs Respondents, they are proposing a significant project. Permitting and review has expenses associated therewith, as does commenting on projects and litigation.

III. CONCLUSION

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.

Dated: March 27, 2007

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