

NO. A08-1869

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State of Minnesota
In Court of Appeals

City of Shorewood,

Appellant,

v.

Upper Minnetonka Yacht Club,

Respondent.

BRIEF OF APPELLANT CITY OF SHOREWOOD

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STATEMENT OF THE ISSUES

1. **Can a City lawfully clarify the terms of a CUP to match the specific use sought by the Applicant in its application?**

The District Court held that the City could not do so.

Most Apposite Authorities:

Rural Am. Bank of Greenwald v. Herickhoff, 485 N.W.2d 702 (Minn. 1992)

In Re Block, 727 N.W.2d 166 (Minn. Ct. App. 2007)

In Re License Application of North Metro Harness, Inc., 711 N.W.2d 129 (Minn. Ct. App. 2006)

Minnewawa Sportsman's Club v. County of Aitkin, No. A07-0381, 2008 WL 314495 (Minn. Ct. App. Feb. 5, 2008)

Edling v. Isanti County, No. A05-1946, 2006 WL 1806397 (Minn. Ct. App. July 3, 2006)

2. **Did the City have a rational basis for its decision to clarify the CUP?**

The District Court determined that the City's clarification of the CUP was not arbitrary, capricious, or unreasonable.

Most Apposite Authorities:

Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203 (Minn. 1993)

SuperAmerica Group, Inc. v. City of Little Canada, 539 N.W.2d 264 (Minn. Ct. App. 1995)

3. **Did the District Court properly deny a motion to amend the complaint to add a claim under 42 U.S.C. § 1983?**

The District Court found that an amendment to the complaint would serve no legal purpose because no such claim could be supported.

Most Apposite Authorities:

Bib Audio-Video Prods., v. Herold Marketing Assoc., Inc., 517 N.W.2d 68 (Minn. Ct. App. 1994)

CPJ Enter., Inc. v. Gernander et al., 521 N.W.2d 622 (Minn. Ct. App. 1994)

STATEMENT OF THE CASE

This case arises out of the City of Shorewood's ("City") clarification of the terms of a Conditional Use Permit ("CUP") which was intended to authorize a sailboat marina in a residential zone in the City. Though Upper Minnetonka Yacht Club ("UMYC") had applied for a sailboats-only facility, the CUP as issued inadvertently did not include an explicit limitation to that effect. Nonetheless, both parties acknowledged that the facility was exclusively for sailboats¹ until early in the 2005 boating season, at which time the City learned via resident complaints that UMYC had rented several of its slips to power boat users and that UMYC had decided that it no longer believed itself bound by the terms of its application. The City sought compliance throughout the 2005 boating season and again in 2006. Early in the 2006 boating season, the City learned that not only had UMYC ignored the City's previous requests for compliance with the terms of the application, but UMYC had rented power boat slips at the facility.

After failing to obtain UMYC's cooperation in preserving the original intended conditions for the CUP and, as a direct consequence, the character of the residentially-zoned neighborhood in which the facility was located, the City brought a criminal complaint against UMYC for a violation of City Code, i.e. unlawful intensification of a conditional use. The District Court dismissed the case, finding that due to the ambiguity

¹ UMYC maintained as many as two power boats at the site for use by management without objection by the City. It had not commercially rented power boat slips prior to 2005.

in the operative language of the CUP, it could not be shown beyond a reasonable doubt that UMYC had violated the terms of the CUP.

Resident concerns escalated along with UMYC's intensified operations during the 2007 boating season. The City, upon notice and an opportunity to be heard, took up the matter of clarifying the language of the CUP to reflect the original application and long-standing use of the residentially-zoned site. After several public hearings at which City officials heard from supporters and opponents of the City's effort to conform UMYC's operations to its application—sailboats only, consistent with its location in a residential neighborhood—the City determined that it should clarify the terms of the CUP.

By Summons and Complaint dated November 30, 2007, UMYC sued the City seeking declaratory judgment, injunctive relief, and a writ of mandamus to prevent the City from enforcing the clarified CUP. UMYC sought discovery in the form of interrogatories and depositions of the City's planning director and the City itself under Minn. R. Civ. P. 30.02(f). The City answered the interrogatories and objected to the depositions, noting that the matter should be decided on the record. Both parties then moved for summary judgment. In its initial memorandum in support of its motion for summary judgment, UMYC moved for leave to amend its complaint to add a claim under 42 U.S.C. § 1983.

By an Order filed August 28, 2008, the Hennepin County District Court (Judge Janet N. Posten presiding) found in favor of UMYC as to the clarification of the CUP. The District Court found that the City did, however, have a rational basis for its effort to do so. Moreover, the District Court denied UMYC's motion for leave to amend its

complaint, finding that UMYC could present no evidence adequate to support any variety of claim under 42 U.S.C. § 1983.

By Notice of Appeal dated October 27, 2008, the City sought this Court's review of the District Court's order related to the clarification of the CUP. On November 12, 2008, UMYC, after a substitution of counsel, sought this Court's review of the District Court's (a) conclusion that the City's decision was not arbitrary, capricious or unreasonable; and (b) denial of the motion for leave to amend.

THE RECORD

A true and correct copy of the Record on which the City's decision in this matter was based, as presented to and reviewed by the District Court, is contained in the appendix to this brief, at A.16-712. These materials were submitted to the District Court in the Affidavit of J. H. Strothman, April 16, 2008 as Exhibits 1-10 and 12-40² and the Affidavit of Justin L. Templin, May 2, 2008, as Exhibits A-D. The following statement of facts is taken from the Record before the City.

STATEMENT OF THE FACTS

1. Respondent UMYC's marina is located at 4580 Enchanted Point in Shorewood.

The property is legally described as Lots 1 and 2, Block 4, Enchanted Park. A.4.

² Strothman Aff. Ex. 11 and 41 pertain to an *Interim* CUP issued to the Shorewood Yacht Club which has no relevance to the present case. Shorewood Yacht Club is a large, commercial facility with 117 slips which operates as a lawful use in an L-R Lakeshore Recreational zoning district. Its permit is limited in duration. In contrast, UMYC is a small yacht club with thirty slips in a residential area operating as a non-conforming use under a CUP. Items pertaining to the Shorewood Yacht Club's operations have no relevance to and are not properly part of the record of decision in this matter.

2. UMYC operates as a non-conforming use (under a Conditional Use Permit (“CUP”)) in the R-1 C/S single-family residential / shoreland zoning district. A.687.
3. UMYC has operated at the site since 1969, first as lessee (until 1972) and then as owner. A.4.
4. The site consists of 1.2 acres comprised of boat slips and a gravel parking area. Id.
5. UMYC (then known as Upper Lake Minnetonka Yacht Club) applied for and received a Special Use Permit³ in 1969 that was subsequently renewed. That Special Use Permit authorized slips specifically for no more than thirty “sailboats” and two “power boats” for official use at the site and no launching of other boats at the site was permitted. A.18.
6. By 1976, the Special Use Permit then in effect permitted forty-two total boats, forty sailboats and two others, at the site. A.19.
7. The Shorewood Planning Commission took up the matter at its May 26, 1977 meeting. The minutes of that meeting reflect that the Planning Commission felt that the “yacht club” should be handled under a CUP “including the terms of the special use permit.” A.20. As noted, those terms explicitly limited the UMYC to mooring sailboats.

³ According to law applicable at the time, the Special Use Permit was for a limited term of three years.

8. Discussion at that meeting involved the *number* of slips to be allowed: forty-two v. thirty. A.21. The minutes reflect no discussion regarding removing the restriction to sailboats only.
9. UMYC's 1977 application materials indicate that the proposed use is "*sailing*" and that the yacht club provides "a service to families interested in *sailing* on the Upper Lake." A.29. UMYC indicates that a "sailing yacht club" would not have an adverse impact on the neighborhood. Id. UMYC specifically sought "sailboat slips." A.30, ¶ 13.D. UMYC offered no evidence or testimony at the City's hearings on clarification to contradict that its application for slip rental was for sailboats only.
10. According to the minutes, discussions at the July 25, 1977 City Council meeting again involved the number of slips to be authorized by a CUP; not the type of boats which would utilize those slips. A.32. UMYC's application sought forty-two slips; a neighborhood spokesman sought twenty-one. Id.
11. In Resolution No. 55.2-77 on July 25, 1977, the City Council approved a CUP which authorized a "yacht club" with up to thirty boat slips. A.42-44.
12. The CUP was renewed in 1978 under Resolution No. 30-78. A.46-47. The City Council found that use of the property "as and for a yacht club" did not adversely affect the neighborhood. Id. Again, the "yacht club" CUP authorized up to thirty boat slips.
13. At no time in the discussion reflected in the minutes did anyone raise the possibility that these "boats" would be anything other than sailboats. In fact,

according to a resident in attendance at the City meetings related to this issue in 1977 who submitted materials and testified before both the Planning Commission and the City Council on this issue, it was clearly understood by all parties at the time that UMYC sought a *sailing only* operation (with the exception of powerboats for management use during sailing races and the like). A.562; A.597-598. Moreover, the same resident recalled no more than two powerboats (used by UMYC's management) at the site since purchasing his property in 1973 until approximately 2004, at which time the resident began voicing concerns to the City. A.598. A second resident, also noting that he had been present at the City meetings relating to the UMYC property since 1969, indicated that there was "never any doubt that the UMYC was intended to be a 'sailing club.'" A.509.

14. In 1992, UMYC applied for a rezoning of the property from residential to L-R, Lakeshore Recreational. A.76-78. UMYC sought the change in order to eliminate its non-conforming use status so that a clubhouse could be built on the site. Id. UMYC Commodore Skip Jewitt represented to the City at that time that UMYC operated exclusively as a sailing club: "All yachts are sailboats only, except for one power boat, which is used for officiating races." A.697. Commodore Jewitt's letter also pointed out the critical differences between its operations and those of commercial marinas. Id.
15. Promotional materials for UMYC in 1992 specifically state that UMYC is open to "all interested in promoting sailing" and that its sailing school's goal is to "promote love of sailing" and to teach sailing to children. Id. UMYC did not

suggest during the hearings or application for rezoning process that it intended to rent slips to power boats.

16. At the time of the rezoning application, City staff also recognized that UMYC was exclusively a “sailing club” and took it at its word that it intended to remain so. Staff noted concerns about what would happen if the property changed hands *if a rezoning* to L-R had occurred, i.e., that a subsequent owner of L-R property might want to operate a commercial marina, which could include power boats. A.78. In order to address that concern, staff suggested a protective covenant or other restrictions *to accompany any rezoning of the property* to eliminate that possibility from occurring in the future. Id.
17. On a divided vote, the Planning Commission recommended the rezoning to L-R (and associated restrictions to prevent a change in the use to include power boats). A.93. But the City Council ultimately denied the application and UMYC’s yacht club continued as a non-conforming use on the property, operating pursuant to its CUP which was issued consistent with the 1977 application, i.e., rental for sailboats only.
18. On March 29, 2005, after inquiry from the Lake Minnetonka Conservation District (“LMCD”) regarding UMYC’s status under City requirements, City staff informed the LMCD that, so far as City personnel knew at the time, UMYC was in compliance with City requirements and that its license for a multiple dock under LMCD regulations could be renewed. A.121. Prior to that time, City staff had no notice of UMYC’s unilateral decision to begin to rent slips to power boats.

19. By letter dated May 2, 2005, the City notified UMYC that it had been brought to the City staff's attention that UMYC was contemplating renting slips to users for docking power boats. A.345-346. The City's Planning Director notified UMYC that such activity would constitute an intensification of its use and therefore result in a violation of its CUP. Id.
20. In response to that letter, UMYC, by letter dated May 16, 2005, gave the City its first indication that UMYC did not consider itself bound by the strictures of its application or the conditions under which its special use permit and CUP had been granted. A.347-348. UMYC noted that its decision to begin renting sailboat slips for power boat usage was "recent" and driven by economic concerns. Id. When again notified by the City that UMYC was violating the zoning code by renting slips for use by power boats, UMYC stated that it considered itself in compliance and that it refused to appeal the City staff's determination as directed. A.349-351.
21. By letter dated September 14, 2005, City staff again notified UMYC that it was in violation of the zoning code and directed it to remove powerboats from the facility by September 30, 2005. A.352. That letter was ignored and the boating season ended, temporarily mooting the issue.
22. When LMCD made its annual inquiry regarding UMYC's status for purposes of renewing a multiple dock license for its operations in December, 2005, City staff indicated that UMYC was in compliance and, so long as UMYC limited harboring to sailboats, it could continue operations as a non-conforming use at the site. A.122.

23. By letter dated May 24, 2006, City staff reiterated its concerns about UMYC's operations, noting that powerboats were again docked at rented slips at the facility. A.353. UMYC was given until June 5, 2006 to rectify the issue or face legal action. On June 5, 2006, City staff notified the City Attorney that not only had UMYC ignored the previous correspondence, but that it had rented even more slips for powerboats at the site. Id.
24. After failing to obtain UMYC's cooperation in abiding by the intentions it had originally and repeatedly expressed regarding its operations and which were the basis for its CUP, the City commenced criminal prosecution against UMYC under City Code, § 1201.03, subd. 1.b for an unlawful intensification of its nonconforming use. A.356-357.
25. Upon commencement of trial on April 24, 2007, the District Court found that, because of ambiguity on the face of UMYC's CUP, i.e. the operative language in paragraph 2.a of the CUP refers to "boats," not "sailboats," the City could not sustain its burden of proving a criminal violation beyond a reasonable doubt and dismissed the matter. A.411-418.
26. City Staff recognized the Court's decision left the City in a difficult position. A.420-421. From the perspective of criminal liability, UMYC was unfettered as to the type of boats that could be stored at its facility. City staff viewed that outcome as untenable given UMYC's location in the middle of a residential area. Id.

27. As might have been expected, neighborhood concerns about UMYC's intensified operations and complaints about particular incidents continued. In July 2007, a resident, a former commodore at UMYC, stated that the "problem," i.e. slip rentals to powerboaters, is "massive and most likely to continue." A.701. The UMYC has become a "floating night club open for business any day and any time of day." Id. One particular incident was relayed to members of the UMYC Board as well as to the City. A.702. The incident involved a female power boater at the site removing her clothing and urinating on the property in broad daylight and in full view of neighbors gardening on their property. Id. The neighbors asked the woman to respect the rights of the residents in the area and received a crude and obscene response for their trouble. Id.
28. The City also received a detailed submission from a long-term resident of the neighborhood prior to consideration which set forth the history of the site and the initial CUP application in 1977, which indicated that the intention for the property had always been a "sailing only" facility. A.703-712.
29. Resident statements also make clear the recent nature of the UMYC's change in philosophy and the specific motivation for that change: money. A former member and former commodore of the club stated that in January 2005, the UMYC Board began a "brain discussion" of how to raise revenue for the club and that the conclusion of that discussion was to start renting to power boats. A.538-539. His precise recollection was aided by the fact that he himself had taken the minutes of that particular meeting for the UMYC. A.539.

30. UMYC supporters confirm the recent nature of the UMYC renting slips for use by powerboats and the financial motivation for doing so. Describing the matter as being about the “survival” of the UMYC in relation to its tax burden, the Vice Commodore of the UMYC noted for the Planning Commission on September 4, 2007 that economics (increases in its tax burden) required the UMYC to fill its slips, with powerboats, beginning approximately in 2006. A.525-527.
31. On August 7, 2007, the City’s Planning Commission, following notice and an opportunity for UMYC to present evidence, took up the matter of clarifying the language of UMYC’s CUP to reflect the long-standing intent for the operation. During a public hearing on that date, staff summarized its concerns, counsel for UMYC addressed the Planning Commission, and several residents voiced their opinions on the issue. A.470-510.
32. The Planning Commission continued the public hearing on the matter on September 4, 2007. Counsel for UMYC again addressed the issues at some length and residents voiced their opinions. A.511-564. At the conclusion of that hearing, the Planning Commission voted five-zero with one abstention in favor of the clarification to reflect the terms of the UMYC’s 1969 special use permit and the UMYC’s application for a CUP in 1977.
33. The City Council took up the matter at its meeting on September 24, 2007. Again, City staff summarized the issue, counsel for UMYC spoke at some length regarding the issues, and residents voiced their opinions. A.565-606. At the conclusion of that hearing, the City Council directed City staff to prepare a draft

resolution with findings of fact to clarify Resolution No. 30-78 (granting the CUP) and patterned after the 1969 approval, limiting the facility to mooring thirty sailboats and two powerboats for use by the UMYC. A.599.

34. At no point during hearings before the Planning Commission and the City Council, despite being given ample opportunity to speak, did counsel for UMYC deny that the 1977 CUP was issued based on an application for sailboats only, that rental of slips for power boats occurred only recently in response to monetary concerns, or that UMYC failed to give the City notice of any proposed change in operation.
35. During its October 22, 2007 meeting, the City Council adopted Resolution 07-067 clarifying the terms of the CUP to reflect the original and long-standing intention of the UMYC to moor only sailboats at the site. A.607-613; A.687-696.

STANDARD OF REVIEW

The decision whether to allow amendment to pleadings is committed to the discretion of the District Court and will not be reversed absent an abuse of discretion. State v. Baxter, 686 N.W.2d 846, 850 (Minn. Ct. App. 2004). Whether such an abuse of discretion occurred may turn on the correctness of an underlying legal ruling. Doe v. F.P., 667 N.W.2d 493, 500-01 (Minn. Ct. App. 2003).

On an appeal from summary judgment, this Court asks two questions: (1) whether there are any genuine issues of material fact and (2) whether the District Court erred in its application of the law. State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990).

It is well-established and long-standing Minnesota law that municipal “land use decisions are entitled to great deference and will be disturbed on appeal only in instances where the city’s decision has *no rational basis*.” Carl Bolander & Sons Co. v. City of Minneapolis, 502 N.W.2d 203, 207 (Minn. 1993) (emphasis added); see also SuperAmerica Group, Inc. v. City of Little Canada, 539 N.W.2d 264, 266 (Minn. Ct. App. 1995). An appellate court’s “authority to interfere in the management of municipal affairs is, and should be, limited and sparingly invoked.” White Bear Lake Docking & Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 175 (Minn. 1982).

A municipal government’s land use decisions are uniquely suited to summary judgment because review is based on the record before the government entity and seeks to determine whether the decision was unreasonable, arbitrary, or capricious. Swanson v. City of Bloomington, 421 N.W.2d 307, 313 (Minn. 1988).

ARGUMENT

A. **The City lawfully clarified the permitted use under a CUP to match the terms sought by the application.**

Consistent Minnesota case law recognizes the ability of a legislative body, like a city council or planning commission, to correct and clarify the intent of its prior acts. See Rural Am. Bank of Greenwald v. Herickhoff, 485 N.W.2d 702, 707 (Minn. 1992) (noting legislative authority to clarify prior decisions and to have those clarifications apply retroactively); Nardini v. Nardini, 414 N.W.2d 184, 196 (Minn. 1987) (recognizing inherent ability to clarify previous decisions and applying clarification retroactively); Holman v. All Nations Ins. Co., 288 N.W.2d 244, 251 (Minn. 1980) (explaining impact

of a retroactive legislative “clarification” to insurance coverage requirements). These cases demonstrate conclusively that a legislative authority’s clarification of previous decisions is proper where circumstances warrant it.

This Court has specifically recognized that the inherent authority to clarify decisions extends to cases involving CUPs. In Re Block, 727 N.W.2d 166 (Minn. Ct. App. 2007). In Re Block involved the *sua sponte* reconsideration of a CUP for a dog-breeding facility after it was issued. Id. at 181. The county board had initially imposed a condition on the CUP it issued that dogs in the facility with access to outside spaces be surgically “debarked” in an effort to mitigate environmental impacts, i.e. noise, in the surrounding area. Id. at 179. Upon later learning that the procedure is “overwhelmingly disfavored in the veterinary community” and “inhumane,” the County sent a letter to the holder of the CUP altering its terms. Id. at 181. Neighbors challenging the *sua sponte* change to the CUP were rebuffed. Id. at 182. This Court noted that the county board realized after the fact that it erred by including a condition requiring “debarking” and rather than reverse and remand on the “narrow point of procedurally amending a CUP,” this Court recognized the “inherent authority of an agency [the county board] to reconsider a decision.” Id. This Court held that the “fairest result” is to allow the county board on remand “to reconsider the issuance of the CUP.” Id.

Here, too, the city council recognized an error in a prior action, specifically the omission of a term requiring that storage at the facility be limited to sailing boats in accordance with the facility’s mission as stated in its application. Upon receiving information that UMYC was operating in a manner contrary to its application, and,

contrary to its consistent characterization of itself and operation as a sailing facility, renting slips for use by power boats, the City moved quickly to rectify the situation. See A.345-355. When UMYC refused to comply with the applied-for restrictions on its CUP, the City took action. See A.607-613; A.687-696. In Re Block involved the protection of dogs from what the county board in that case learned after-the-fact was “inhumane” treatment. This Court, recognizing the deferential standard of review to be applied in such cases, allowed the county board to revisit the CUP’s terms. 727 N.W.2d at 177, 182. In this case, the City is not imposing a new or additional condition in exercising its authority to preserve the quiet character of a residential neighborhood against the noise and disruption that typically accompany commercial power boat marina operations; it is simply affirming what UMYC applied for and which is consistent with UMYC’s operation for almost thirty years.⁴ The City’s inherent authority to revisit its decisions includes the authority to clarify a CUP in a manner consistent with the application filed and consistent operation for many years. See also In Re License Application of North Metro Harness, Inc., 711 N.W.2d 129, 134 (Minn. Ct. App. 2006) (dispensing with numerous objections to an agency’s renewed look at a prior decision on a license application). This Court should recognize the City’s ability to revisit its prior decision and reverse the District Court as to this issue.

⁴ In essence what UMYC did by its unilateral action was to create an unfettered commercial marina which requires, at the least, a zoning amendment to L-R which was previously rejected by the City. UMYC never challenged the City’s decision to deny its rezoning request.

As this Court is well-aware, its unpublished opinions are non-precedential under Minn. Stat. § 480A.08, subd. 3 and do not control the outcome in this matter or any other subsequent matter. However, if this Court determines that such decisions may be informative or persuasive, Edling v. Isanti County,⁵ another case involving a *sua sponte* second look at a CUP, is particularly applicable.

In early 1999, Edling applied for a CUP from the Isanti County Planning Commission for “mining & excavating” on property consisting of approximately 114 acres. Id. at *1. Department of Natural Resources (“DNR”) staff submitted a letter to the county noting that an Environmental Assessment Worksheet (“EAW”) may be required for the project and asked the county to table the application pending further determination of need. Id. The minutes of a subsequent planning commission meeting indicate that Edling stated his intention to undertake a small operation on the site—digging ponds fewer than ten feet deep and mining only black dirt, using fewer than forty acres. Id. Edling’s statement satisfied the DNR’s concerns and the county issued a CUP for mining operations with a condition banning the filling of wetlands to Edling. Id.

More than six years later, in May of 2005, Edling entered a five-year lease agreement granting exclusive rights for mining on the property to a gravel mining operation. Id. Responding to a complaint, county staff visited the site and concluded that a much larger scale mining operation than had been represented when the CUP was

⁵ A true and correct copy of this Court’s unpublished decision in Edling v. Isanti County, No. A05-1946, 2006 WL 1806397 (Minn. Ct. App. July 3, 2006) is appended to this brief at A.719-725.

issued was underway. Id. When questioned, Edling indicated that he had a CUP for mining operations and that he was following its conditions. Id. The county informed Edling that even though the CUP document was issued with a “paucity of conditions,” he was bound by the representations he had made six years earlier during the application process. Id. at *2.

In the succeeding months, complaints flooded county offices. Id. During a second site visit, county staff observed a large scale mining operation with three pits exceeding thirty-five feet in depth and piles of sand and gravel more than fifty feet high. Id. The County scheduled a hearing, at which Edling appeared with counsel, and revoked the CUP. Id.

This Court upheld the revocation, citing the deferential standard of review of local government affairs, and noting that the revocation was appropriate because the mining operation “exceeded the scope of the CUP application.” Id. at *3. This Court made that decision even though Edling’s CUP had been issued without conditions banning or limiting mining activities that Edling’s lessee actually undertook. Id.

This case is remarkably similar. In fact, it is in some ways a more egregious attempt to unfairly take advantage of a situation than that at issue in Edling. Here, the written application specifically indicates the intention (indeed, the *mission*) of the site was to encourage and support *sailing* on Lake Minnetonka. It was to be a “sailboats only” facility. A.29. UMYC specifically sought “sailboat slips.” A.30, ¶13.D. The UMYC operated under an original permit for a “sailboats only” facility and continued to represent in writing that it was a “sailboats only” facility as late as 1992 and never

indicated otherwise.⁶ The City had no notice of any slip rental at the site for power boats until residents made complaints in 2005 and there is no evidence that any such rentals occurred prior to that time. Edling made similar promises about the limited nature of his operation, but orally rather than in writing and only at the time of the initial application. In each case, the city investigated the situation in response to neighbors' complaints. In each case, the city determined that the holder of a CUP was operating in a manner that was different, and more intensive, than it had represented at the time of its application (and, for UMYC, repeatedly since that time). Edling's lessee was operating a full scale gravel mining operation when a small-scale black dirt excavation business had been promised. UMYC is operating a marina open to power boats even though it applied for a quiet, neighborhood-appropriate, sailboats-only facility. In each case, the property owner had exceeded the scope of its originally-intended use in a manner damaging to the community. And in each case, the city took action to eliminate the problem.

The District Court considered Edling but dismissed its applicability based on at least two erroneous conclusions. First, the District Court suggested that the sole issue in Edling was whether the scope of the CUP had been violated. See A.12. In fact, this Court clearly recognized in Edling that the terms of the CUP itself *did not prohibit the activity* at the site but that they *would have* (by requiring an EAW) if Edling had accurately disclosed the nature of the use for which he would lease out the property six years later. Edling, 2006 WL 1806397 at *3. In other words, Edling's lessee did not

⁶ The District Court noted but did not address the importance of the fact that UMYC had applied for and operated as a sailing facility from its inception. See A.11.

violate the explicit terms of the CUP document, but did exceed the scope of the representations Edling made six years earlier during the application process. Here, UMYC similarly complied with the terms of the CUP document *as written*, but exceeded the scope of its application and changed its operation long after the fact. The District Court also noted that the City lost a criminal case in which it had attempted to prosecute UMYC on that basis, demonstrating that no violation occurred. See A.12. But as this Court knows, criminal charges require the government to prove guilt beyond a reasonable doubt to obtain a conviction. In this, a civil context, UMYC must show that the City's action was arbitrary. Neither *res judicata* nor any other bar to civil action impacts the City's decision in this matter. In Re Kahldahl, 418 N.W.2d 532, 535 (Minn. Ct. App. 1988). In fact, as the Court in the criminal case pointed out, there is no such thing as a dismissal with prejudice in the criminal context. See A.418. The fact that a criminal court could not find UMYC guilty simply has no bearing on whether UMYC should prevail in a case where it must prove that the City acted outside the law.

Second, the District Court found a critical distinction between Edling and the instant case based on the fact that the county in Edling revoked the CUP outright rather than simply restricting its terms to make it consistent with the application. See A.12. The District Court's logic seems to suggest that the City's decision could have been upheld had it revoked the CUP instead of seeking to clarify its terms. Evidently, no good deed goes unpunished. The City in this matter saw the value of retaining UMYC in the community according to the terms of its original application, i.e. as a sailboats-only facility. Rather than moving directly to close UMYC entirely by revoking the CUP, it

afforded UMYC a full opportunity to present its position with respect to the scope of the 1977 CUP. UMYC presented no evidence to show that the 1977 permit was issued for anything other than rental to sailboats. The holding in Edling, that the express terms of a CUP can be clarified to match the original application when the applicant's use exceeds the scope of that application, should not be rendered any less applicable in this matter by the fact that the county in that case determined that revocation, rather than a restriction on mining activities to match the applicant's original assurances, was appropriate. This Court's decision in Edling supports the City's course of action in this case.

While dismissing the applicability of Edling, the District Court found a second unpublished opinion of this Court, Minnewawa Sportsman's Club v. County of Aitkin,⁷ to be "directly on point." See A.10. While Minnewawa has some applicability to the issues in this matter, it is readily distinguishable and actually *supports* the City's action in this matter.

Minnewawa resulted from the applicant's June 2006 request to add an archery range and a new road to its firearms-range operation in Aitkin County. 2008 WL 314495, *1. The club at that time operated under a 1997 CUP which contained no expressly stated conditions. Id. There was some confusion—this Court described it as "vacillation" by both parties—as to whether implied conditions had been imposed on the original operation. Id. at *3. Upon approval of the 2006 application, the county's

⁷ A true and correct copy of this Court's unpublished decision in Minnewawa Sportsman's Club v. County of Aitkin, No. A07-0381, 2008 WL 314495 (Minn. Ct. App. Feb. 5, 2008) is appended to this brief at A.713-718.

planning commission added seventeen new conditions that related mostly to the existing firearms use of the property (under the previously-issued 1997 CUP) rather than the new archery range or road uses contained in the new application. Id. This Court struck down the conditions which did not pertain to the current application, stating that the imposition of conditions on the 1997 CUP exceeded the scope of the application, which related only to the new CUP application. Id. at *4.

What Minnewawa held is that Aitkin County could not impose conditions on the 1997 CUP because the only application at issue in the case pertained to a new CUP related to adjoining property. Id. at *6. The city invented entirely new and different conditions for the existing CUP after the fact which had never been agreed to or understood by the applicant. This Court's decision in Minnewawa to stop that attempt undoubtedly was correct.

But the present case involves a much different situation. Here, there is no attempt by the City to invent new conditions for an existing CUP. Rather, the City, upon discovery that UMYC was no longer planning to abide by conditions to which it had agreed (in fact, conditions UMYC itself had sought), moved to clarify the CUP to conform its language to the explicit terms of the original application and nearly thirty years of consistent, limited-to-sailing operations.

In terms of the Minnewawa case, it is as though the club came to the City with an application seeking an archery range and spoke of how it wanted to promote the sport of archery and teach archery to children. The city issued a CUP, in response to that explicit application, to allow a "target range" in a residential zone specifically for that purpose.

Then, many years later, when too few archers were members and the club was in financial straits, it abandoned its mission and opened its “target range” to firearms enthusiasts—fundamentally changing the scope of the use and its impact on its neighborhood. Of course, nothing like that happened in Minnewawa. It had been open to both archery and firearms uses since its inception. Rather, the city in that case imposed new conditions which the club had never before understood to limit its operations and lawful use. Id. at *5.

Moreover, this Court in Minnewawa remanded to the county for imposition of conditions, and issuance of an *amended* CUP, related to the uses and property involved in the 2006 application. Id. This Court allowed that effort even though it explicitly declined to find that any such “operational conditions” had previously existed. Id. at *4. The Minnewawa court remanded the matter to the county for issuance of an amended CUP consistent with conditions *as indicated by the original application*. In fact, this Court specifically stated that it would “consider the *signed application itself* as presenting the issue for consideration” of a revised CUP. Id. at *4 (emphasis added).⁸

⁸ The District Court stressed that a CUP is not a personal license but rather a property interest that runs with the land and that it “remains in effect until its terms are violated.” See A.10. However, it is unclear why, if the District Court was compelled by that proposition to find in favor of UMYC in this matter, similar logic did not require a different outcome in In Re Block, 727 N.W.2d 166 (reconsidering, *sua sponte*, a CUP upon receipt of additional relevant information bearing on its terms), or in Edling, 2006 WL 1806397 (revoking a CUP even though the written terms of the same had not been violated), or in Minnewawa, 2008 WL 314495 (remanding for reconsideration of a CUP and addition of terms consistent with the original application, even though the explicit terms of the CUP had not been violated). In each of those cases, this Court’s decision resulted in changes to an existing CUP, the written terms of which had not been violated

The City in this matter asks this Court for nothing more than consideration of UMYC's application. This Court in Minnewawa expressly did not decide whether oral representations by the applicant can or do constitute conditions on a CUP. Id. But, in this matter, oral representations are not at issue. Written ones are. And they are in no way unclear. Unlike in Minnewawa, there can be no question based on the record that UMYC applied for a permit for and intended to operate as a *sailing* club. Its application materials reflect that intention without equivocation. See A.29-30. (referencing the "sailing" and "sailing yacht club" and specifically requesting a permit for "sailboat slips"). Further, residents present at those meetings in the late 1970s specifically recall and testified during City Council and Planning Commission hearings on this matter that, other than two management power boats, "sailboats" were the only watercraft ever considered for unfettered use at the site until the recent debate about UMYC's operation. See A.509; A.562; A.597-598. See also A.703-712. Promotional materials issued by UMYC in 1992 indicated that the organization was open to "anyone interested in promoting sailing" and that the UMYC wanted to "promote love of sailing" among children through its various programs. See A.697-700. A 1992 letter to the City from UMYC's commodore indicated that it operated exclusively as a sailing club: "All yachts are sailboats only, except for one power boat, which is used for officiating races." Id.

City staff in 1992 also recognized that UMYC was and always had been a sailing club, at that time considering how to maintain that status in the event of a rezoning (to L-

by the holder. Under the District Court's apparent restricted view of the courts' ability to act in such cases, all of those results must have been incorrect.

R Lakeshore Recreational, which would permit a commercial marina with powerboats).

A.78. Contrary to UMYC's characterization of City staff's comments, they were not made with a mind toward trying to add conditions to the existing CUP for operations by UMYC under its present zoning. Those conditions, as clearly stated in UMYC's application, already applied to UMYC. City staff's concern was with what could happen with the property *under L-R Lakeshore Recreation zoning* were that change to occur. If it did, it would moot the existing CUP (because a marina and related uses would be allowed in an L-R zone) and allow a commercial marina with powerboats on the site. A.76.

Because the UMYC site is in the middle of a residential neighborhood, the City understandably viewed that possibility as untenable in the event of a zoning change and looked for ways—including a deed restriction to operate as a sailboats-only facility, zoning classification notwithstanding—to make sure it would not and could not occur.

Nothing in the record of this matter indicates any equivocation on this point by any party: everyone agreed UMYC was exclusively a sailing club and should remain that way. The only change has come as the result of UMYC's decision to change its fundamental operation. Under the logic and decisions of this Court in Minnewawa and Edling, as well as that of previous cases, such as In Re Block, addressing the inherent right of a local government body to revisit and clarify prior decisions, UMYC's unequivocal application should govern in this matter. The District Court should be reversed.

B. The District Court properly found that the City's clarification of the CUP is rational and supported by the record.

UMYC contended at the District Court and has indicated in its Notice of Review that, even if the City's clarification of the CUP to conform it to the original application were lawful, that action is arbitrary, capricious, or unreasonable. The District Court properly determined that UMYC's contention is unsupportable. See A.13-14. UMYC has asserted its intention to appeal the District Court's ruling on that issue in this proceeding.

First, as noted herein, appellate courts' authority to intervene in municipal decision-making is "limited" and should be "sparingly invoked." White Bear Lake Docking, 324 N.W.2d at 175. Courts give great deference to municipal land use decisions and will overturn such decisions only when there is *no rational basis* for them. SuperAmerica Group, Inc., 539 N.W.2d at 266. The City needs a single rational basis in order for its action to be sustained. It has many. The clarification of the CUP in this matter has substantial rational support, all of which is evidenced in the record, and it should be upheld.

Regardless of the courts' view of the propriety of the City taking action to clarify the drafting oversight in the CUP that led to this litigation in the first instance, the City had ample record support for its decision. Resolution 07-067, the City's final action with regard to the CUP, notes that (a) the initial application was for a private yacht club for mooring no more than thirty *sailboats*; (b) the property is a non-conforming use, the uses of which cannot by law be intensified, in a residential zone; (c) UMYC represented in

1992 that all yachts at its facility were *sailing* boats, with one exception used by the UMYC's management; (d) UMYC has never applied for a permit that would allow motorized watercraft; and (e) the City did not become aware until 2005, through neighbors' complaints, that UMYC was renting slips for use by power boats and took action immediately. A.687-696.

All of the foregoing reasons are important, but most notable among them is the initial application by UMYC. From Day One, UMYC sought permission to operate a *sailing* club on the site. UMYC's application in 1969 distinguished between sailboats and powerboats and limited the rental of the slips to sailboats. See A.18. While the number of slips gradually grew in the initial years, the limitation to sailboats remained. A.19. In 1976, the City's planning commission noted that the application for a CUP should be handled according to the terms of the special use permit, which included the "sailboats only" limitation. A.20-22. The 1977 UMYC application materials contain references to the site being used exclusively for sailing and for "sailing slips." A.29-30, ¶13.D. While the number of slips to be permitted at the site was a source of contention, the type of boats to be moored was not. A.562 and A.597-598. UMYC ran a "sailing club"—not a power boat marina.⁹ A.509. Facing what it characterized as declining

⁹ UMYC, at various points in its submissions to the District Court and testimony before the City, indicates that there have always been "powerboats" at the yacht club site. Such statements are, at best, misleading. The City does not contest that UMYC management has always had a right to maintain a limited number of boats at the site for its own use. Neither does the City contest that some "yachts" are not "sailboats" or that some "sailboats" have motors. The relevant issue in this matter is not whether any particular "sailboat" is also a "yacht" or whether any particular "sailboat" has a motor. The issue is that in order to qualify as a "sailboat"—and thus qualify to use a "sailboat slip"—the boat

interest in sailing and under economic pressures in January 2005, the UMYC realized that it needed additional revenue and sought to raise it through rentals to power boat users, abandoning its “sailing only” mission. See A.538-539. The City’s rational response to that changed organizational direction was to require that the UMYC maintain the use for which it had applied—a “sailing only” yacht club. The City determined that a “sailing only” use is the use for which UMYC applied and all that the residential neighborhood in which UMYC is sited can sustain. That neighborhood complaints about unruly and vulgar behavior arose shortly after UMYC began renting slips for use by powerboats confirms the wisdom of that rational conclusion. See A.701-702.

A commercial marina, which essentially is what the UMYC becomes if it is allowed to rent its slips for use by power boats, is an inappropriate use in a residential zone. UMYC has never applied for a permit that would allow such a use. The only reason UMYC could occupy the site and peacefully co-exist with its residential neighbors is because of its character as a “sailboats only” facility. A facility wide open to powerboats is untenable in a residential zone. This rational position has been the City’s consistent approach throughout the life of the UMYC. Until its recent economic troubles, it was UMYC’s approach, too. The City’s clarification of the CUP requiring UMYC to live within the parameters of the operation for which it applied and has operated for a significant period of time is rational, supported by the record, and should be upheld.

in question must, in fact, have a sail. Traditional “powerboats” (a distinction that UMYC itself drew in its application materials) do not.

C. The District Court properly denied a motion for leave to amend the complaint when it determined that the new claim was unsupportable as a matter of law.

UMYC submits that the City's clarification of its CUP deprived UMYC of a protected property interest such that it raises a constitutional claim for relief and sought, in the middle of the summary judgment stage of the District Court proceedings, to amend its complaint to add that claim. As the District Court in this matter recognized, UMYC's proffered claims under 42 U.S.C. § 1983 (and the attendant attorneys fees claim under 42 U.S.C. § 1988) fail as a matter of law. Thus, the District Court declined to permit the requested amendment and that decision should be upheld.

A requested amendment to pleadings should be rejected, notwithstanding liberal pleading standards written into Minn. R. Civ. P. 15.01, if the amendment would serve no legal purpose. Gunnufson v. Onan Corp., 450 N.W.2d 179, 181 (Minn. Ct. App. 1990); Bib Audio-Video Prods., v. Herold Mktg. Assoc., Inc., 517 N.W.2d 68, 73 (Minn. Ct. App. 1994). A motion to amend should be denied "if it will accomplish nothing, such as when the amendment does not state a cognizable legal claim." Envall v. Indep. Sch. Dist. No. 704, 399 N.W.2d 593, 597 (Minn. Ct. App. 1987). See also Bebo v. Delander, 632 N.W.2d 732, 740-41 (Minn. Ct. App. 2001) and CPJ Enter., Inc. v. Gernander et al., 521 N.W.2d 622, 625 (Minn. Ct. App. 1994) (noting that an amendment to pleadings should be denied where the new claim could not survive summary judgment).

1. *UMYC's claim may be moot and definitely is not ripe.*

As this Court has recognized, a constitutional claim for damages first requires a Plaintiff to show that it has been deprived of a right, privilege, or immunity secured by

the constitution under color of law. See, e.g., Mohler v. City of St. Louis Park, 643 N.W.2d 623, 635 (Minn. Ct. App. 2002). If this Court rules that the City lawfully required UMYC to adhere to the limitations contained in its application for a CUP, any constitutional claim for damages in this matter is moot. Under those circumstances, UMYC could demonstrate no protected property interest with which the city interfered.¹⁰

Regardless of the Court's ruling on whether this case involves a deprivation of a protected property interest by the City, UMYC's proffered claim is not ripe. UMYC has made no effort to utilize and exhaust state remedies prior to its attempt to assert a federal constitutional claim, as is required. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985) (requiring final decision and exhaustion of state remedies before pursuing a federal constitutional taking claim). On that basis alone, the District Court properly rejected the amendment proposing a 42 U.S.C. § 1983 claim.

2. *UMYC's constitutional claims would fail on their merits.*

Even assuming UMYC's claim is not moot and that it could somehow avoid the ripeness issue in this case, the standard for asserting a viable federal constitutional claim in the zoning context is especially stringent in the Eighth Circuit. An Eighth Circuit plaintiff "must swim upstream against a current increasingly hostile to substantive due process claims arising from zoning decisions." Randy's Sanitation, Inc. v. Wright County, 65 F. Supp.2d 1017, 1029 (D.Minn. 1999).

¹⁰ Conversely, if the Court rules in UMYC's favor, it would be a confirmation of the new status quo because UMYC has been renting slips for power boats over City objection. It will have lost nothing.

UMYC's explanation of its intended additional claims suggests two possible claims: takings and substantive due process. Neither could survive summary judgment.

a. Takings

In order to state a claim for a taking, UMYC would have to demonstrate that it has *no reasonable, economically viable use* remaining for the property as a result of the regulation. Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 635 (Minn. 2007). Of course, no such showing has been or could be made. The property can without question be used as a sailboat marina or in other capacities consistent with its zoning. No "takings" claim (if, indeed, UMYC could even show that a property interest were at stake) could survive summary judgment and the District Court properly denied the request to amend.

b. Substantive Due Process

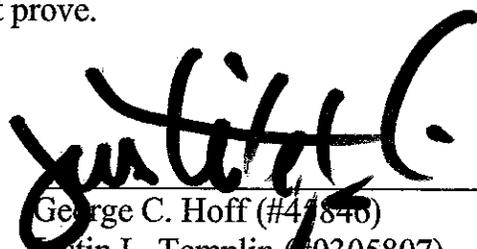
A substantive due process claim on these facts is similarly infirm. To state a viable substantive due process claim, UMYC must demonstrate that the City's actions were "truly irrational"—something akin to deciding an issue by flipping a coin or applying a zoning ordinance only to those individuals whose names begin with a letter in the first half of the alphabet. See Chesterfield Development Corp. v. Chesterfield, 963 F.2d 1102, 1104 (8th Cir. 1992); see also Lemke v. Cass County, 846 F.2d 469, 470-471 (8th Cir. 1987 (en banc) (per curiam)). A violation of law, even if one had occurred here, would not be sufficient to support a substantive due process claim. Bituminous Materials, Inc. v. Rice County, 126 F.3d 1068, 1070 (8th Cir. 1997). UMYC can offer no evidence that the City's decision was motivated by racial animus, personal financial

gain for a council member, or any other basis even approaching the high threshold for such a claim. As the District Court properly recognized, any substantive due process claim (or any other constitutional claim¹¹) on these facts would fail.

CONCLUSION

In accordance with consistent Minnesota caselaw, the City in this matter acted to clarify a CUP to match its terms to the application that sought it and the nearly thirty years of consistent operations under it. In addition to being a lawful action in terms of the CUP at issue, that effort was rational and supported by the record. The District Court's decision undoing the City's effort should be reversed, but its conclusion that the City acted rationally and with support in the record should be upheld. Further, this Court should uphold the District Court's denial of UMYC's attempt to amend its complaint to add constitutional claims that it simply cannot prove.

Dated this 25th day of November, 2008.



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¹¹ No other constitutional claim is supportable, either. During proceedings at the District Court, UMYC vaguely hinted at an Equal Protection claim, but offers nothing in the way of proof that some other entity, similarly situated in time and manner, was treated differently. See Bituminous Materials, Inc., 126 F.3d at 1071-1072.

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

This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, Subd. 3(a) because this brief contains 8,985 words, excluding the parts of the brief exempted by Minn. R. Civ. App. P. 132.01, Subd. 3. This brief has been prepared in a proportionally spaced typeface using Microsoft Word 97 in Times New Roman with a 13 point font.

Dated: 25 NOV 08



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