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State of Minnesota
In Court of Appeals

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

v.

City of Elk River,
Defendant/ Appellant.

APPELLANT'S BRIEF, ADDENDUM AND APPENDIX

HOFF, BARRY & KOZAR, P.A.
George C. Hoff (#45846)
Shelley M. Ryan (#348193)
160 Flagship Corporate Center
775 Prairie Center Drive
Eden Prairie, MN 55344
(952) 941-9220

Attorneys for Appellant City of Elk River

LEAGUE OF MINNESOTA CITIES
Susan L. Naughton (#259743)
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

Attorney for Amicus Curiae

WAYZATA LAW GROUP, LLC
Gregory E. Woodford (#0387894)
James G. Robin (#92290)
1907 East Wayzata Boulevard
Suite 170
Wayzata, MN 55391

and

BATTINA LAW, PLLC
Bryan R. Battina (#338102)
1907 East Wayzata Boulevard
Suite 170
Wayzata, MN 55391
(952) 314-1344

*Attorneys for Respondents
Lorraine White, Trustee, et al.*

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

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STATEMENT OF THE ISSUES

- I. Does the City have the authority to revoke a conditional use permit (“CUP”) governing a nonconforming use when it is undisputed that the conditions of the permit have been violated?

The District Court held that the City does not have the authority to revoke the CUP governing Respondents’ nonconforming recreational campground use.

Most Apposite Authorities:

Minn. Stat. § 462.3595, subd. 3
Elk River City Code § 30-657

Lam v. City of St. Paul, 714 N.W.2d 740, 744 (Minn. Ct. App. 2006)

- II. Did Respondents have the right to rebuild a nonconforming building after its total destruction in 1999 when the only governing regulation prohibited replacement of buildings or structures damaged to the extent of 50% or more of their value?

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

Most Apposite Authorities:

Elk River City Code § 900.34 (2000)

Ryan v. Minneapolis Police Relief Ass’n, 88 N.W.2d 17 (Minn. 1958)
N. States Power Co. v. City of Mendota Heights, 646 N.W.2d 919 (Minn. Ct. App. 2002)

- III. Is the City entitled to immunity from a tortious interference claim based on its discretionary decisions with respect to Respondents’ permits?

The District Court denied the City’s claim of immunity.

Most Apposite Authorities:

Minn. Stat. § 466.03, subd. 5
Minn. Stat. § 462.3597

Elwood v. County of Rice, 423 N.W.2d 671 (Minn. 1988)
Culbertson v. Chapman, 496 N.W.2d 821 (Minn. Ct. App. 1993)

STATEMENT OF THE CASE

Respondents brought this action challenging the City's enforcement and revocation of the conditional and interim use permits governing their operation of a recreational campground and accessory building. Respondents sought declaratory and injunctive relief alleging that the City's decisions either violated their nonconforming use rights or were arbitrary and capricious. Respondents also sought Writs of Mandamus ordering the City to: (1) approve an IUP under Minn. Stat. § 15.99; and (2) rescind its revocation of the CUP it issued in 1984. Respondents also claimed the City is equitably estopped from imposing conditions on the IUP it issued in 2010. Further, Respondents brought claims for a taking under Minn. Stat. § 117.184 and intentional interference with business. The City brought counterclaims seeking declaratory and injunctive relief enforcing the terms of the 1984 conditional use permit and state law governing recreational campgrounds.¹

On December 2, 2011, the parties brought cross motions for summary judgment. On March 16, 2012, the Honorable Thomas D. Hayes, Sherburne County District Court, issued the Amended Order and Order for Immediate Entry of Judgment Pursuant to Minn. R. Civ. P. 54.02. Judge Hayes: (1) found that at the time the Building was completely destroyed by fire in 1999, it had a value of less than 50% of the value of the Campground as a whole, including the real estate, and as a result, Respondents were entitled to rebuild without further permit from the City; and (2) granted Respondents' motion in part holding that the Campground is a lawful nonconforming use and because

of that, the City cannot revoke the 1984 CUP. With respect to the City's motion, Judge Hayes determined that the District Court lacked jurisdiction to review the City's revocation of Respondents' liquor licenses. That decision was not appealed. Judge Hayes denied the remainder of the City's motion, including the City's claim of immunity from the tort claim under Minn. Stat. 466.03, subd. 5. Finally, Judge Hayes found that his decision that the Campground is a lawful nonconforming use moots Respondents' remaining claims for equitable relief and governmental taking. The court entered partial judgment pursuant to Minn. R. Civ. P. 54.02 on March 16, 2012 and this appeal followed.

STATEMENT OF THE FACTS

Respondents own approximately fifty-two (52) acres of property in the City ("Property"). Am. Compl. ¶ 1. Respondents operate a recreational campground on the Property ("Campground"). The Campground includes a building used as an office, bar, laundry, and community space for persons staying at the Campground ("Building"). *Id.*

In 1984, the City issued Respondents a conditional use permit ("CUP") to operate the Campground. A. 11-13. The City Council granted the CUP subject to several conditions, including the following:

8) That the provisions of the Minnesota Department of Health rules and regulations pertaining to recreational camping areas and referred to as MDH 187, and the provisions of Minnesota Statute 327.10 through 327.28 pertaining to recreational camping areas and recreational camping vehicles shall apply and be conditions within the City's conditional use permit.

9) That the wheels must remain on vehicles parked in the campground and that there be no permanent units for rental purposes.

¹ The City's counterclaims are not at issue in this appeal.

("1984 CUP"). A. 24.

In 1988, the City amended its zoning ordinance, which in part, made recreational campgrounds no longer a permitted or conditional use in the R-1b zoning district. A. 14, 17. As a result, Respondents' use of the Property for the Campground and Building became a legal nonconforming use subject to the terms and conditions of the 1984 CUP. Respondents concede that the operation of the Campground is defined by and cannot expand beyond the conditions in the 1984 CUP. A. 5, 7.

In November 1999, a fire completely destroyed the Building. A. 14. In early 2000, Respondents requested a CUP to rebuild the Building. A. 14-15.² City Code § 900.34.9 (2000) (emphasis added) in effect at the time of Respondents' application provided, in relevant:

[a] **nonconforming building or structure** ... which has been damaged by fire ... to the extent of 50 percent or more of **its assessed market value** shall not be restored except in conformity with the regulations in this article. A **nonconforming building or structure** which is damaged to a lesser degree may be restored...."

State law governing nonconforming uses in 2000 only regulated amortization of the use, not the circumstances under which the use could be rebuilt after its destruction. Minn. Stat. § 462.357, subd. 1c (2000). Staff determined that the Building could not be rebuilt under section 900.34.9 due to its total destruction and processed Respondents' application under the City' interim use ordinance. A. 17-19. On April 17, 2000, the City approved an interim use permit ("IUP") to allow reconstruction of the Building, valid for

² There is no evidence in the record that Respondents objected to applying for a permit to rebuild the Building. A. 14-15.

ten years and subject to compliance with the requirements of the Chief Building Official, based in part on Respondents' representation that the Campground would be sold and developed within ten years. A. 16. Respondents appeared at the March 28th and April 17th public hearings and had no objection to the ten year requirement or conditions of the IUP. A. 14-16.

In June 2010, after expiration of the 2000 IUP, Respondents applied for a new IUP to continue their use of the Building. A. 22. Because the Building is accessory to (subordinate and serving) the principle recreational campground use, City Staff's review of Respondents' application included consideration of the Campground and Respondents' compliance with the 1984 CUP conditions. A. 20. The City's inspection of the Campground on July 16, 2010 revealed several vehicles that had been altered with improvements not designed to be temporary, including rigid piping connecting the vehicles to the sanitary system, decks, sheds, and additions. A. 25. Testimony at the public hearings on Respondents' application indicated that many people consider the Campground their year-round home. A. 24. On August 2, 2010, the City Council approved an IUP valid for ten years, provided that the permit would terminate January 1, 2011 if Respondents failed to comply with several conditions, including the following:

A. A verifiable plan has been approved by the City Council that will ensure permanent residents will not live at the recreational camping facility.

F. All structures and vehicles other than recreational camping vehicles as defined by Minnesota Statutes Section 327.14, subd. 7 have been removed.

G. The Applicant is in full compliance with the nine conditions of the 1984 CUP.

A. 28-32.

In December 2010, City staff determined that Respondents were not in compliance with several conditions in the 1984 CUP and 2010 IUP. The City extended the 2010 IUP to provide an opportunity for Respondents and the City to agree to conditions for a new IUP, but the parties were unable to come to an agreement. A. 33-42. Consequently, on April 18, 2011, the City Council adopted Resolution Number 11-17 finding that because Respondents had not complied with the conditions of the 2010 IUP, the IUP expired by its terms. A. 43-48. The City Council directed staff to initiate revocation of the 1984 CUP. Id.

On June 20 and 27, 2011 and July 18, 2011, the City Council held a public hearing on the revocation of the 1984 CUP. A. 49-56. Respondents, through legal counsel, appeared at and participated in the public hearing. In making its decision, the City Council considered, among other things, testimony from Respondents' counsel and persons using the Campground, reports from the City Police Department and environmental and building inspection staff, photos of vehicles in the Campground, and all of the application and related materials the City Council had previously considered with respect to the 1984 CUP and the IUPs. Id. On July 18, 2011, the City Council adopted Resolution No. 11-43 conditionally revoking the 1984 CUP based on Respondents' failure to comply with the conditions in the permit. A. 57-63. The Council found, among other things, that Respondents failed to comply with Minnesota Statutes,

chapter 327.10 through 327.28; vehicles in the Campground were unlicensed or modified with permanent skirting and additions; and people were using the Campground as their permanent residence. The City Council revocation was conditioned on Respondents' compliance with several conditions including Minn. Stat. ch. 327. Id. There is no dispute that Respondents failed to comply with these conditions and the City's revocation of the 1984 CUP became effective on December 31, 2011. Id.

STANDARD OF REVIEW

Summary judgment is proper when there are no genuine issues of material fact and a determination of the applicable law will resolve the matter. Gaspord v. Wash. County Planning Comm'n, 252 N.W.2d 590, 591 (Minn. 1977). When a moving party makes and supports a summary judgment motion, the nonmoving party has the burden to "present specific facts showing that there is a genuine issue for trial." DHL, Inc. v. Russ, 566 N.W.2d 60, 69 (Minn. 1997) (quoting Minn. R. Civ. P. 56.05). "Summary judgment may not be avoided simply because there is some metaphysical doubt as to a factual issue." Bob Useldinger & Sons v. Hangsleben, 505 N.W.2d 323, 328 (Minn. 1993).

"When the district court grants summary judgment based on the application of a statute to undisputed facts, the result is a legal conclusion that we review de novo." Weston v. McWilliams & Assoc., Inc., 716 N.W.2d 634, 638 (Minn. 2006).

ARGUMENT

I. THE CITY HAS THE AUTHORITY TO REVOKE THE 1984 CUP BASED ON RESPONDENTS' FAILURE TO COMPLY WITH ITS CONDITIONS

The City properly revoked the 1984 CUP based on Respondents' undisputed violation of the permit conditions. Municipal land use decisions are afforded great deference by the courts and are disturbed on appeal only when the decision lacks a rational basis. White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn. 1982); SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc. v. City of Little Canada, 539 N.W.2d 264, 266 (Minn. Ct. App. 1995). The standard of review for all zoning decisions is whether the municipality acted reasonably or with a rational basis. Honn v. City of Coon Rapids, 313 N.W.2d 409, 416-17 (Minn. 1981). The court's scope of review is limited to determining whether the decision was based on legally sufficient and factually supported reasons.³ Roselawn Cemetery v. City of Roseville, 689 N.W.2d 254, 259 (Minn. Ct. App. 2004). A reason is legally sufficient when it is reasonably related to the promotion of the public health, safety, morals and general welfare of the community. Id. at 260. The City's decision should be affirmed so long as at least one of its stated reasons is reasonable. Id. Further, "courts defer to a municipality's decision when the factual basis for the [decision] has even the slightest validity." Id.

In this case, Respondents do not challenge the City's authority to revoke a CUP based on noncompliance with the conditions of the permit. Minn. Stat. § 462.3595, subd.

3 states, in relevant part, that a CUP “shall remain in effect **as long as the conditions agreed upon are observed . . .**” (Emphasis added). Further, Elk River City Code (“City Code”) § 30-657 provides that a CUP may be revoked based on the failure to comply with its conditions. Further, this Court has held that a CUP may be revoked when the permit conditions are violated. Town of Denmark v. Suburban Towing, Inc., 2010 WL 1190756, at *4 (Minn. Ct. App. Mar. 30, 2010). A. 64-68. See also Upper Minnetonka Yacht Club v. City of Shorewood, 770 N.W.2d 184, 189 (Minn. Ct. App. 2009) (recognizing that a city may take action upon the violation of a CUP because the permit only “remain[s] in effect for so long as the conditions agreed upon are observed”). The City adopted legal standards into the 1984 CUP and there is no dispute that Respondents failed to comply with those standards. The record of the City’s decision is replete with evidence that the Campground was being used by permanent residents, including photos of vehicles with permanent skirting and additions and testimony by persons who consider the Campground to be their residence, all of which are in violation of the conditions of the 1984 CUP and Minn. Stat. ch. 327. The City’s decision revoking the 1984 CUP is therefore reasonable and must be upheld.

The novel defense raised by Respondents is that when a use becomes non-conforming, the City’s ability to take enforcement action to terminate what has become an unlawful use somehow evaporates. In denying the City summary judgment and holding that it cannot eliminate Respondents’ nonconforming use rights, the District

³ The record of the City’s decision is attached to the Affidavit of Shelley M. Ryan dated November 11, 2011 as Exhibits A-E.

Court appears to have found that the City's authority to revoke the 1984 CUP is limited by Minn. Stat. § 462.357, subd. 1e(a). The construction of a statute is a question of law. Cummings v. Koehnen, 568 N.W.2d 418, 420 (Minn. 1997). When a statute is clear and unambiguous, it is enforced according to its plain meaning. Krummenacher v. City of Minnetonka, 783 N.W.2d 721, 726 (Minn. 2010). Further, "[e]very law shall be construed, if possible, to give effect to all its provisions." Id. (quoting Minn. Stat. § 645.16).

The City's authority to revoke the 1984 CUP is not limited by Minn. Stat. § 462.357, subd. 1e(a). That section provides, in relevant part:

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

(Emphasis added). Pursuant to its plain and unambiguous terms, section 462.357, subd. 1e(a) only limits a city's authority to remove **lawful** nonconforming uses. In other words, if a nonconforming use becomes unlawful, there is no statutory right to continue that use. In this case, the use became unlawful and Minn. Stat. § 462.357, subd. 1e(a) does not prohibit appropriate action to terminate that which is illegal under the pre-existing regulations governing that use.

Respondents concede that their nonconforming rights were defined by the 1984 CUP and they violated the permit conditions by allowing permanent residents and other violations to exist at the Campground. In order to continue a legal nonconforming use, a property owner must comply with all restrictions on the use existing at the time it became

nonconforming. Lam v. City of St. Paul, 714 N.W.2d 740, 744 (Minn. Ct. App. 2006).

In the CUP context, these restrictions include not only the conditions in the CUP, as Respondents concede, but the City's enforcement authority under Minn. Stat. § 462.3595 and City Code § 30-657. Thus, the City had the authority to revoke the 1984 CUP notwithstanding its nonconforming status because the Campground was not a lawful use. See id. (holding that a lawful nonconforming use governed by a CUP may continue because it had not been revoked or amended and had not expired). See also Daily v. City of Long Lake, 1999 WL 118633, at *3 (Minn. Ct. App. Mar. 9, 1999) (acknowledging that the City's decision revoking a CUP governing a nonconforming use may be upheld if supported by a rational basis). A. 69-73.

Finally, the District Court's application of Minn. Stat. § 462.357, subd. 1e(a) violates sound public policy concerning conditional and nonconforming uses. Existing lawful nonconforming uses are only allowed to continue under certain circumstances and may not be expanded. Minn. Stat. § 462.357, subd 1e(a); Krummenacher, 783 N.W.2d at 726. Moreover, a CUP is only permitted when the applicant demonstrates that the standards and criteria set forth by ordinance will be satisfied and the use will not be detrimental to the public health, safety, morals and general welfare of the community. Roselawn Cemetery v. City of Roseville, 689 N.W.2d 254, 260 (Minn. Ct. App. 2004). Conditional uses, while authorized by ordinance, require consent by the zoning authority because of the hazards and location problems associated with the use. Zylka v. City of Crystal, 167 N.W.2d 45, 48-49 (Minn. 1969); SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc., 539 N.W.2d at 267. If Respondents were allowed to continue the

Campground as a nonconforming use without regard to the conditions in the 1984 CUP, Respondents would be expanding the use beyond what was authorized by the Ordinance and eliminating the conditions necessary to protect the public health, safety and welfare. This also begs the question, if the regulations that govern the use are found to be unenforceable and new regulations cannot be imposed because it was a “lawful” non-conforming use, what local regulations govern the ongoing campground use?

In sum, the City had the authority to revoke the 1984 CUP and acted reasonably in doing so. Respondents’ claims challenging the City’s revocation should therefore be dismissed. Moreover, it is undisputed that the Building is an accessory use to the Campground. Because the principal Campground use is no longer permitted, Respondents cannot continue the Building use as a matter of law. Respondents’ claims challenging the 2000 and 2010 IUPs are therefore moot and do not need further consideration by this Court.

II. RESPONDENTS DID NOT HAVE THE RIGHT TO REBUILD THE BUILDING WITHOUT AN IUP IN 2000

For the first time in this lawsuit, Respondents claim they were entitled to rebuild the Building without further permit from the City following its total destruction in 1999 because it was nonconforming and the value of the totally destroyed Building was less than 50% of the value of the entire nonconforming use, including the value of the real estate. The District Court erred in holding that Respondents had the right to rebuild in 2000 without a permit because Respondents’ claims are barred by waiver and laches.

Moreover, to the extent Respondents' claims are considered, City Code unambiguously prohibited them from rebuilding without the IUP.

First, Respondents waived their right to challenge the 2000 IUP. "Waiver is the voluntary relinquishment of a known right." N. States Power Co. v. City of Mendota Heights, 646 N.W.2d 919, 925 (Minn. Ct. App. 2002). When the facts are undisputed, waiver is a question of law for the court. Id. Here, by accepting the 2000 IUP to reconstruct the Building and waiting over eleven (11) years to first assert their claim, Respondents waived any rights they may have had to challenge the permit. It is undisputed that all of the facts were available to Respondents in 2000 and they chose, for whatever reason, not to pursue the rights they now claim exist.⁴

Second, Respondents' claim is barred by the doctrine of laches. The doctrine of laches bars a party from asserting a claim when they have delayed acting on their rights for too long and it would be inequitable to require the defendant to defend against the claim. Gully v. Gully, 599 N.W.2d 814, 825 (Minn. 1999). The doctrine applies when "the delay is so long and the circumstances of such a character as to establish a relinquishment or abandonment of rights." Ryan v. Minneapolis Police Relief Ass'n, 88 N.W.2d 17, 21 (Minn. 1958). Whether laches applies is a question of law when the facts are undisputed. Elder v. La Crescent Township, 2002 WL 1465954, at *6 (Minn. Ct. App. July 9, 2002). A. 74-79. Here, an eleven (11) year delay can hardly be termed

⁴ Respondents produced a portion of an "appraisal" of the Property from 2000. Affidavit of Gregory E. Woodford at Ex. J, dated October 21, 2011. It appraises the Property for residential purposes. Clearly, Respondents sought and were in possession of information relevant to the assertion of a "percentage of destruction" claim, but chose not to assert it.

anything but unreasonable. See id. (holding that a twenty-five (25) year delay in challenging a zoning decision is barred by laches as a matter of law). Prejudice to the City is equally obvious. Had Respondents asserted their claim at the time it arose, the City may not have issued the IUP and would have been able to evaluate the merit of Respondents' circumstances with respect to market value in the light of information available in 2000. See Ridge Creek I v. City of Shakopee, 2010 WL 154632, at *6 (Minn. Ct. App. Jan. 19, 2010) (finding that the City acted reasonably in relying on the developer's silence during the City's consideration of its development applications). A. 80-89. In short, Respondents should not be rewarded for accepting a permit to allow them an agreed upon ten (10) years of continued use, and later raise a right to permanent continuation of a nonconforming building.⁵

Finally, even if considered, Respondents' challenge to the 2000 IUP cannot succeed. In 2000, the determination of when to allow the reconstruction of nonconforming uses was left entirely to cities under the then existing provision of Minn. Stat. § 462.357.⁶ In 2000, the City Code § 900.34 governing continuance of nonconforming uses provided, in relevant part:

[a] **nonconforming building or structure** ... which has been damaged by fire ... to the extent of 50 percent or more of **its assessed market value** shall not be restored except in conformity with the regulations in this

⁵ In Wheeler v. Wayzata, 533 N.W.2d 405 (Minn. 1995), the doctrine of laches was applied to a stale (30 year old) land use claim, finding the delay unreasonable and that prejudice inured because the Court found as a general matter that surrounding property owners (not parties or named) who may have relied on the 30 year old designation would be prejudiced by the sudden change.

⁶ Prior to 2001, Minn. Stat. § 462.357 only limited the City's ability to eliminate nonconforming uses by "amortization." Minn. Stat. § 462.357, subd. 1c (2000).

article. A **nonconforming building or structure** which is damaged to a lesser degree may be restored....”

(Emphasis added). Under City Code § 900.34, the loss is measured against the value of the building or structure damaged, not the entire nonconforming use, and certainly not the underlying real estate. It is undisputed that the Building was a total loss and thus not eligible to be rebuilt without restrictions under the terms of City Code § 900.34.

In holding that Respondents were entitled to rebuild the Building without a permit because the value of destruction was less than 50% of the value of the entire Campground, the District Court wrongly applied Buss v. Johnson, 624 N.W.2d 781 (Minn. Ct. App. 2001). In Buss, a fire destroyed one of three barns on a nonconforming farm. Id. at 783. The court construed Minn. Stat. § 394.36, subd. 1 as overriding Blue Earth County’s ordinance and found that the measurement of value had to be based upon all of the buildings that comprised the nonconforming use. Id. at 786.

The court’s decision in Buss is not controlling. Minn. Stat. § 394.36 governs counties and has no application to cities. *Municipal* land use regulation is governed by Minn. Stat. § 462.351, *et seq.* In 2000, there was no language in Minn. Stat. ch. 462 similar to that found in Minn. Stat. § 394.36 which limited or controlled a city’s ability to regulate nonconforming uses, including when and under what conditions they may be rebuilt. Statutory language controlling how the percentage of destruction is measured first appeared in Laws of Minnesota, 2001, Ch. 174, adopted in May 2001, long after the destruction of the Building and the issuance of the IUP: Thus, unlike Buss, there was no

controlling statute and the City had the ability to determine how to evaluate whether to allow reconstruction of nonconforming structures.

In sum, Respondents' challenge to the 2000 IUP is barred by waiver and laches. Moreover, Respondents were not entitled to rebuild the Building without the IUP under the plain terms of City Code § 900.34 in effect in 2000 at the time of the City's decision. Thus, if the Court reaches this issue, the District Court's decision should be reversed.

III. RESPONDENTS' TORTIOUS INTERFERENCE CLAIM SHOULD BE DISMISSED BECAUSE THE CITY HAS IMMUNITY

Cities in Minnesota are immune from tort damages for their discretionary decisions, regardless of whether or not that discretion is abused. Minn. Stat. § 466.03, subd. 5. The determination of immunity is a legal question for the court that is to be determined at the earliest possible stage of the litigation. Culberson v. Chapman, 496 N.W.2d 821, 825 (Minn. Ct. App. 1993); Elwood v. County of Rice, 423 N.W.2d 671, 675 (Minn. 1988). Here, Respondents seek tort damages for the City's alleged interference with their tenants' rental contracts. Specifically, the City's attempt to impose "impermissible, arbitrary and capricious permit conditions" on the renewal of the IUP "caused many long term campers to not renew their rental contracts." Am. Compl. ¶ 94. In other words, the conduct that caused the alleged damage was the City Council's decision, in its legislative capacity, to impose conditions on the IUP that it believed were appropriate and necessary to the safety and welfare of the City and its residents.

Minn. Stat. § 462.3597 expressly grants discretion to city councils as follows, in relevant part:

The governing body *may grant permission* for an interim use of property if:

(4) the user agrees to *any conditions the governing body deems appropriate* for permission of the use.

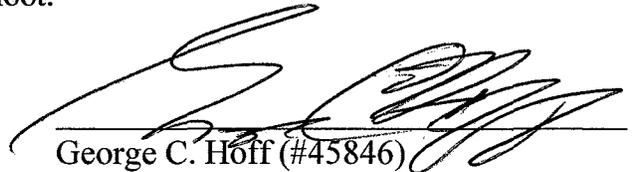
(Emphasis added). In making the judgment as to what conditions were appropriate to allow the use, the City Council necessarily weighed its policies, permit conditions and requirements of state law to determine the necessary conditions that would allow the proposed use to function as a lawful campground and ensure the safety of city residents and campers. The balancing of such safety and policy considerations is at the heart of discretionary decision-making and is therefore accorded immunity. See Unzen v. City of Duluth, 683 N.W.2d 875, 882 (Minn. Ct. App. 2004) (distinguishing between policy decisions for which immunity is accorded and day to day operational decisions); Vrieze v. New Century Homes, 542 N.W.2d 62, 66-67 (Minn. Ct. App. 1996) (holding that decisions concerning the issuance of permits akin to building permits is discretionary);

Respondents disagree with the conditions imposed, but do not, and cannot, argue that the City was not exercising its policy making discretion in requiring the conditions for renewal. Whether those conditions are an abuse of discretion makes no difference to the grant of immunity, as statutory immunity is afforded regardless of whether that discretion has been abused. Minn. Stat. § 466.03, subd. 6.

CONCLUSION

For the foregoing reasons, this Court should reverse the District Court's decision and grant the City summary judgment (1) upholding the City's revocation of the 1984 CUP; (2) finding that Respondents did not have the right to rebuild the Building without an IUP; (3) dismissing Respondents' tortious interference with business claim based on the City's immunity from damages; and (4) dismissing Respondents' remaining claims for equitable relief and governmental taking as moot.

Dated: 5/15, 2012

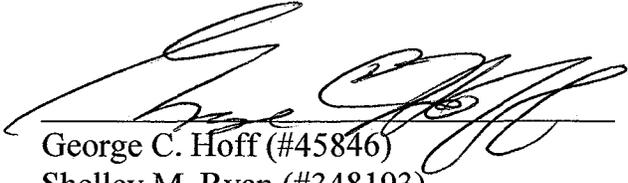


George C. Hoff (#45846)
Shelley M. Ryan (#348193)
Hoff, Barry & Kozar, P.A.
775 Prairie Center Drive, Suite 160
Eden Prairie, MN 55344
(952) 941-9220
**Attorneys for Appellant
City of Elk River**

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 4,735 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 2003 in Times New Roman with a 13 point font.

Dated: 5/15, 2012


George C. Hoff (#45846)
Shelley M. Ryan (#348193)
Attorneys for Appellant
City of Elk River