

NO. A12-0681

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 REPLY BRIEF

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INTRODUCTION

In challenging the City's authority to revoke the 1984 CUP, Respondents take the position that they are entitled to the benefits of nonconforming use status free from the obligations of complying with the conditional use regulations under which the Campground became a lawful nonconforming use. Respondents ignore the fundamental principle that in order to continue operating the Campground, the use had to remain lawful. The governing regulations included not only the conditions of the 1984 CUP, but the City's authority to enforce the conditions including through revocation. Because the City properly revoked the 1984 CUP based on Respondents' undisputed permit violations, its decision should be affirmed and Respondents related claims dismissed.

ARGUMENT

I. THE CITY PROPERLY REVOKED THE 1984 CUP

In attempting to limit the City's authority to revoke the 1984 CUP, Respondents misapply nonconforming use law. Minn. Stat. § 462.357, subd. 1e states, 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). The statute unambiguously provides that a nonconforming use may only be **continued** if it remains **lawful**. *Id.* The lawfulness of the nonconforming use is defined by the regulations in effect at the time of the adverse zoning change. *Hooper v. City of St. Paul*, 353 N.W.2d 138, 140 (Minn. 1984) (only uses complying with the regulations in effect at the time of the zoning change may continue to exist as a lawful

nonconforming use); County of Morrison v. Wheeler, 722 N.W.2d 329, 334 (Minn. Ct. App. 2006) (same); State v. Reinke, 702 N.W.2d 308, 313 (Minn. Ct. App. 2005) (same). Accordingly, a nonconforming use may only be continued if the property owner remains in compliance with the regulations governing the use at the time of the zoning change.

Here, section 462.357, subd. 1e does not limit the City's authority to revoke the 1984 CUP because the Campground was no longer a **lawful** nonconforming use after Respondents violated the permit conditions. The parties agree that the Campground became nonconforming in 1988 when the City amended the zoning code. Prior to the zoning change, the regulations governing Respondents' use of the Property included 1) the zoning classification of a recreational campground as a conditional use and 2) the terms and conditions of the 1984 CUP authorizing the Campground use. After the zoning change, the parties agree that the regulations adopted by the City under Minn. Stat. § 462.3595 defined the extent to which Respondents could continue the Campground as a lawful nonconforming use under section 462.357, subd. 1e.¹ These regulations included the City's revocation authority under Minn. Stat. § 462.3595.

There is no dispute that Respondents violated the conditions of the 1984 CUP. The City determined that Respondents allowed permanent residents in the Campground in violation of the terms of the 1984 CUP and Minn. Stat. ch. 327, which governs recreational campgrounds. The City raised the reasonableness of its decision on summary judgment and Respondents failed to provide any argument or evidence

challenging the City's findings as required by Minn. R. Civ. P. 56.05. See Memorandum and Reply Memorandum in Support of Plaintiffs' Motions for Partial Summary Judgment and a Temporary Restraining Order. Respondents attempt to do so now on appeal fails. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988).

Even so, Respondents' reference to the City's proceedings without a showing that the City's findings are unreasonable is insufficient to overturn the City's decision. See White Bear Docking and Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 176 (Minn. 1982) (a municipality's land use decision is afforded great deference by the court and disturbed on appeal only when the decision lacks a rational basis). Moreover, Respondents' argument that the City lacks standing to enforce state law with respect to recreational campgrounds is contrary to Minn. Stat. § 327.16, subd. 5. That section provides that a recreational campground licensee must comply with all local ordinances not in conflict with the statute. Id. The City's incorporation of the standards in Minn. Stat. ch. 327 as conditions in the 1984 CUP cannot, as a matter of law, be considered in conflict with the statute. Thus, the City properly revoked the 1984 CUP based on Respondents' undisputed permit violations and the City's decision should be affirmed.

In challenging the City's decision revoking the 1984 CUP, Respondents take the novel position that the City's revocation authority simply vanishes when the status of the

¹ Respondents concede their lawful use of the Campground has always been defined by the terms and conditions of the 1984 CUP. Memorandum in Support of Plaintiffs' Motions for Partial Summary Judgment and a Temporary Restraining Order p. 12.

property changes from a conditional to a nonconforming use.² Respondents' position fails on several grounds. First, Respondents' reliance on nonconforming use case law is misplaced. In Hooper v. City of St. Paul, 353 N.W.2d 138, 141 (Minn. 1984), the issue was whether the nonconforming use was a lawful use at the time of the adverse zoning change. The issue in County of Freeborn v. Claussen, 203 N.W.323, 325 (Minn. 1972) was whether the property owners' construction of a building to enclose a lawful nonconforming use was a prohibited expansion of the use. The court in Lam v. City of St. Paul, 714 N.W.2d 740, 744 (Minn. Ct. App. 2006) recognized that a use lawfully existing pursuant to a CUP prior to a zoning change may continue as a lawful nonconforming use. Contrary to Respondents' argument, the court in Lam did not hold or indicate that the conditions of or the City's authority to enforce the CUP vanished once the use became nonconforming. See id. None of the cases relied on by Respondents address or impose any limits on the City's authority to revoke a CUP when the conditions have been violated rendering the nonconforming use unlawful. Thus, Respondents' position is unsupported and contrary to the terms of Minn. Stat. § 462.357, subd. 1e.

Second, there is no conflict between Minn. Stat. §§ 462.357, subd. 1e and 462.3595, subd. 3. On the one hand, Respondents agree that section 462.357, subd. 1e does not limit the City's revocation authority under section 462.3595, subd. 3; but on the other hand, Respondents appear to claim that revocation of a CUP governing a nonconforming use expands section 462.357, subd. 1e beyond its terms. Respondents'

² Respondents do not dispute the City's authority to revoke a CUP when the conditions of the permit are violated. Resp.'s Br. p. 5.

argument fails because they ignore the plain terms of section 462.357, subd. 1e requiring a nonconforming use to remain lawful. Once Respondents violated the terms of the 1984 CUP, their use of the Campground became unlawful and they were no longer afforded any protection under Minn. Stat. § 462.357, subd. 1e.

Third, nothing in Minn. Stat. § 462.3595 converts the status of a conditional use to a nonconforming use free of the conditions that allowed the use as a result of a zoning change. When a statute is unambiguous, courts apply the statute in accordance with its plain terms and do not engage in further construction. Reiter v. Kiffmeyer, 721 N.W.2d 908, 909 (Minn. 2006). Further, courts will not read into a statute language that was omitted by the legislature. Id. at 911. The second phrase of section 462.3595, subd. 3 stating that “nothing in this section shall prevent the municipality from enacting or amending official controls to change the status of conditional uses” in fact recognizes a city’s authority to amend its zoning code so that a conditional use is no longer allowed in a particular zone. The statute does not, as Respondents’ imply, eliminate the conditional use regulations once the use is no longer a conditionally permitted use.

Finally, Respondents’ position leads to absurd results. If the City cannot revoke the CUP, Respondents are in a better position and have more rights than they did when the Campground was a permitted conditional use. Respondents’ superior position comes at the expense of their neighbors and the public since the City’s revocation authority is necessary to ensure the conditions imposed on the use to protect the public health, welfare and safety are observed. Respondents concede their use of the Property cannot exceed the conditions imposed in 1984 and the City retains the right to enforce the CUP

conditions, but argue that enforcement is limited to unspecified “injunctive” relief.

Resp.’s Br. pp. 8-9. Revocation is a recognized enforcement tool on a continuum of tools available to a city when the conditions of a CUP are violated. Minn. Stat. § 462.3595, subd. 3. Moreover, there is no discernible difference between the remedies Respondents suggest. Under the court’s broad equitable authority, Respondents could be ordered to terminate the Campground for continued violations.

In sum, Respondents had the benefit of nonconforming use status while the use remained lawful under the regulations existing at the time of the zoning change. Once Respondents violated those regulations – the 1984 CUP conditions – the City properly revoked the permit. Because the Campground is no longer permitted, and Respondents concede the Building is an accessory use, the Building use also cannot continue as a matter of law. Respondents’ claims challenging the 2000 and 2010 IUPs are therefore moot and should be dismissed.

II. THE CITY PROPERLY REQUIRED RESPONDENTS TO OBTAIN A PERMIT TO REBUILD THE BUILDING

If the court determines that the Campground is a lawful use, Respondents’ claims regarding the IUPs should still be dismissed. Respondents’ challenge to the IUPs is barred by the doctrines of waiver and laches. Even so, Plaintiffs did not have the right to rebuild the Building in 2000 without restriction. Finally, Respondents’ could not have obtained nonconforming use rights to continue the Building use because the IUP by its terms expired in 2010.

A. Respondents' challenge to the IUPs is barred by waiver and laches.

Respondents do not dispute their failure to timely challenge the 2000 IUP.

Instead, Respondents blame the City for their delay because the City did not enforce the terms of the 1984 CUP. It is well-settled that a "municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on prior city action." Mohler v. City of St. Louis Park, 643 N.W.2d 623, 638 (Minn. Ct. App. 2002). Respondents have known since the City issued the CUP in 1984 that permanent residents and vehicles were prohibited in the Campground regardless of whether the City took any enforcement action. Finally, Respondents cannot argue any prejudice caused by the ten year duration of the 2000 IUP because they were present at the City's proceedings and agreed to the ten year limitation because they planned to sell the Property during that timeframe. A.14-19.

B. Only the value of the Building was relevant to the City's decision requiring an IUP in 2000.

Respondents incorrectly claim the City was required to consider the value of the entire nonconforming Campground use, including the value of the underlying real estate, in requiring Respondents to obtain an IUP to rebuild the Building. In 2000 there was no statutory limitation or direction on how the City was to measure percentage of destruction to determine whether a non-conforming building could be rebuilt, leaving it to be governed by City ordinance.³ City Code § 900.34 (2000) unambiguously provided:

³ In 2000, the only State law limitation on the City's authority over nonconforming uses was a provision limiting the City's ability to eliminate such uses through amortization. Minn. Stat. § 462.357, subd. 1c (2000).

[a] nonconforming **building** or **structure**, except single-family dwellings in an R-4 District, which has been damaged by fire, explosion, flood, act of God or other calamity to the extent of more than fifty percent (50%) of its assessed market value shall [not] be restored except in conformity with the regulations of this Ordinance. A nonconforming **building** or **structure** which is damaged to a lesser degree may be restored and its previous use continued or resumed provided that restoration is completed within one (1) year following its damage and no enlargement occurs.

The plain terms of section 900.34 refer only to the nonconforming “building” or “structure,” not the nonconforming “use.” See Frank’s Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608 (Minn. 1980) (courts construe an ordinance in accordance with the plain and ordinary meaning of its terms). Thus, the City properly measured the loss against solely the market value of the Building, not the entire Campground. There is no dispute that the Building was completely destroyed, and Respondents were therefore not entitled to rebuild under section 900.34 (2000).

Respondents’ reliance on Buss v. Johnson, 624 N.W.2d 781 (Minn. Ct. App. 2001) and Hertog v. Milwaukee Mut. Ins. Co., 415 N.W.2d 370 (Minn. Ct. App. 1998) is misplaced. First, as discussed in the City’s initial brief, Buss is not controlling because the court in Buss applied Minn. Stat. § 394.36, subd. 1, which applies to counties, not cities, including the City of Elk River. Respondents make no effort to explain how Buss can or does apply to this case. Here, the City’s zoning authority is contained in Minn. Stat. §§ 462.351, et. seq. Nordmarken v. City of Richfield, 641 N.W.2d 343, 349 (Minn. Ct. App. 2002). In 2000, Minn. Stat. § 462.357 did not contain any language limiting the City’s authority to regulate when and under what circumstances nonconformities could

be rebuilt.⁴ Because there was no statutory conflict in 2000, the plain and unambiguous terms of City Code § 900.34 applied to the City’s decision requiring the IUP.⁵

Second, the court’s decision in Hertog does not apply. In that case, the City’s ordinance prohibited reconstruction of a “*non-conforming use*” destroyed to the extent of over 75% of the fair market value of the structure as determined by the City. The court held that under the plain terms of the ordinance, the City was required to consider the value of the entire nonconforming use, not just a single building. Here, unlike the ordinance in Hertog, City Code § 900.34 (2000) did not apply to the nonconforming “use,” but only the “building” or “structure.” Thus, the City properly considered only the value of the nonconforming Building in determining whether to allow Respondents’ to rebuild. Since the Building was completely destroyed, Respondents could not have rebuilt without the 2000 IUP.

C. Respondents did not obtain nonconforming use rights in the Building.

As stated above, a lawful nonconforming use may only be continued under Minn. Stat. § 462.357, subd. 1e for so long as it remains in compliance with the regulations existing at the time of the zoning change. Here, the 2000 IUP by its terms was temporary

⁴ In 2001, long after the Building burned down and the City granted the 2000 IUP, the legislature amended Minn. Stat. § 462.357 to define the circumstances under which a nonconformity may be rebuilt after its damage or destruction.

⁵ Respondents cite Buss for the proposition that there could be an “absurd” result from the City’s requirement of an IUP. Aside from the inapplicability of that case, there is no absurd result as the court was concerned with in Buss because the City did not claim that the entire nonconforming Campground ended as a result of the complete destruction of the Building. Rather, consistent with City Code, the City applied the percentage of destruction to the Building alone. The Campground use remained until properly terminated by the 1984 CUP revocation.

and expired automatically after ten years. The time duration was based on Respondents' representation that the Campground use would only continue for about another ten years or less depending on the availability of municipal utilities. A.14-18. Extending the IUP beyond its expiration in 2010 would have the illogical result of affording Respondents more rights as a nonconforming use than they had before the zoning change.

III. THE CITY IS IMMUNE FROM TORT DAMAGES

For the first time on appeal, Respondents challenge the City's claim of immunity from tort damages. It is well-settled that a reviewing court is limited to the facts and legal arguments contained in the District Court's record. Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988). Arguments not raised by a party in proceedings before the District Court are waived on appeal. Id. Here, the City moved for summary judgment dismissing Respondents' tortious interference with contract claim on the basis of the City's discretionary immunity under Minn. Stat. § 466.03, subd. 5. Respondents did not even acknowledge the City's immunity claim, let alone offer any argument or evidence in opposition to the City's motion. By not opposing this issue on summary judgment before the District Court, Respondents waived their right to have their arguments heard by this Court and the City should be granted immunity. Id.

Even if this Court considers Respondents' arguments, the City is entitled to immunity. In defining the "conduct at issue" as the City's decisions requiring an IUP and to initiate revocation proceedings of the 1984 CUP, Respondents ignore the narrow scope of their tort claim. Resp.'s Br. p. 14. The only alleged intentional interference by the City is the following:

94. Defendant's intentional actions in delaying the renewal of Plaintiffs' 2000 IUP by attempting to impose impermissible, arbitrary and capricious permit conditions caused many of Wapiti's longer term campers to not renew their rental contracts with Wapiti.

95. Defendant's intentional actions, more fully described above, were without justification as the conditions Defendant was attempting to impose were attempts to illegally regulate the Campground, a legal, nonconforming use.

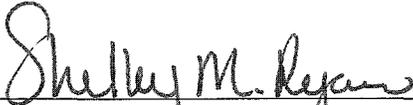
Am. Compl. ¶ 94-95. Thus, the sole issue with respect to the City's immunity is whether its decision imposing conditions on the 2010 IUP was discretionary. See Thiele, 425 N.W.2d at 583 (appellate review is limited to the facts and arguments in the district court record); Minn. Stat. § 466.03, subd. 5 (municipalities are immune from tort damages for their discretionary decisions, regardless of whether or not that discretion is abused). Respondents concede that "[t]he City is correct that deciding what conditions to impose on the IUP generally involves public policy balancing" and is therefore entitled to discretionary immunity. Resp.'s Br. p. 14. The City is entitled to immunity and Respondents' tortious interference with business claim should be dismissed.⁶

⁶ To the extent this Court considers Respondents' arguments, the City is entitled to immunity. First, Respondents' claim that requiring an IUP is non-discretionary is simply an attack on the City's decision to adopt the ordinance which requires an IUP. A city's legislative decision in adopting an ordinance determining appropriate enforcement measures is inherently discretionary. See Honn v. City of Coon Rapids, 313 N.W.2d 409, 417 (Minn. 1981) (a city acts in its legislative capacity when in enacting a zoning ordinance involving a "wide range of value judgments"). Second, the decision whether to initiate revocation proceedings for the 1984 CUP was discretionary. City Code provides that upon a violation of the CUP conditions, the City may revoke the permit or utilize any other remedy for a zoning violation. In making its determination, the City weighed factors including the health, welfare and safety of the community and patrons of the Campground, along with the costs and administrative burden required to revoke the CUP in deciding to proceed in the first instance.

CONCLUSION

Based on the foregoing, the Court should reverse the District Court's decision and grant the City summary judgment finding 1) the City properly revoked the 1984 CUP; 2) Respondents did not have the right to rebuild the Building without a permit; 3) the City is entitled to immunity and Respondents' tort claim is dismissed; and 4) dismissing Respondents remaining equitable and taking claims as moot.

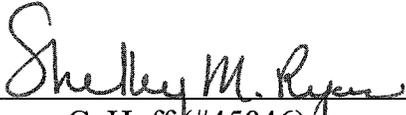
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CERTIFICATE OF COMPLIANCE
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This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, Subd. 3(a) because this brief contains 3,300 words, excluding the parts of the brief 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: 6/28


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