

NO. A08-1869

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State of Minnesota  
**In Court of Appeals**

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City of Shorewood,

*Appellant,*

v.

Upper Minnetonka Yacht Club,

*Respondent.*

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REPLY BRIEF OF APPELLANT CITY OF SHOREWOOD

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## INTRODUCTION

In its brief to this Court, UMYC offers the same skewed version of events it offered at the District Court to support the idea that it has always operated with no restrictions on the type of boats for which it rents slips at its facility and the City wrongfully changed its CUP after thirty years. The reality, as reflected by the undisputed record in this matter, is quite different. UMYC sought a “sailboats-only” facility from Day One. Its application materials state that intention without equivocation. Neighbors present at City meetings related to the issue specifically recall discussions which all related to the number of sailboats to be allowed there, not the type of boats. The City, during the review of a request to rezone the property in 1992, expressed concern about what would happen to the limitation to sailboats if the property were rezoned and changed hands. UMYC operated pursuant to that limitation until it decided, in January 2005, that it would take advantage of a mistake in written terms of its CUP and start to rent slips for power boats in order to alleviate financial woes, without prior notice to the City. Problems attendant to overly-intensive uses in residential zones—excessive noise, disruption, and, in at least one case, shockingly lewd behavior—quickly resulted. The City took prompt action to correct the problem when it had notice of UMYC’s actions and this case is the continuation of those efforts.

UMYC challenges the City’s action to require that the yacht club remain as a sailboats-only facility, consistent with the clear conditions of its application and its thirty years of operation pursuant to those conditions. This Court should uphold the City’s action and reverse the District Court decision on that issue. This Court should uphold the

District Court's conclusion that the City's action was rational and supported by the record and decline to adopt UMYC's fanciful suggestion that the outcome at the City was preordained. Further, the District Court concluded that the City's actions did not constitute a taking and decided to deny a motion to amend the complaint to add a federal claim. Those decisions were proper and should be upheld.

## ARGUMENT

### I. **The City lawfully clarified the terms of the CUP to match the specific use sought by the application.**

In its initial brief, the City noted the inherent authority of a legislative body to revisit prior acts where circumstances warrant. See City's Brief, pp. 14-15 (citing Rural Am. Bank of Greenwald v. Herickhoff, 485 N.W.2d 702, 707 (Minn. 1992); Nardini v. Nardini, 414 N.W.2d 184, 196 (Minn. 1987); and Holman v. All Nations Ins. Co., 288 N.W.2d 244, 251 (Minn. 1980)). This Court has explicitly extended that authority in cases involving CUPs. In Re Block, 727 N.W.2d 166 (Minn. Ct. App. 2007).

Rather than acknowledging this clear authority and arguing whether the City appropriately exercised it in this matter, UMYC engages in a lengthy semantic discussion about the proper way to identify the City's action. UMYC's Brief, pp. 17-24. But what the City's action is called in these briefs—be that a “clarification” or an “amendment” or some other term culled from a thesaurus—is unimportant. The meaningful discussion, and the issue on which this case must be decided (and to which UMYC eventually turns), is whether the City exceeded its authority when it acted to conform the CUP to the terms of the original application and nearly thirty years of consistent operation.

A. *This Court's decision in Block supports the City's action.*

In re Block recognizes the inherent authority of a City to reconsider the issuance of a CUP under appropriate circumstances. 727 N.W.2d 166. This Court in Block determined that revisiting the explicit terms of a CUP that had been lawfully issued was appropriate where the county in that case had received new information after the fact to call its decision into question. Id. at 180. The relators in Block challenged the county's ability to reconsider *sua sponte* the terms of a CUP, but this Court dismissed those concerns. Id. at 182. Instead of worrying about the procedural aspects of the CUP amendment process, this Court held that the "*fairest result* is to remand this matter to the county board to give the board a chance to reconsider the issuance of the CUP." Id. (emphasis added).

The instant case, too, involves an important question of fairness. UMYC argues that Block provides no support for the proposition that a city could change the terms of a CUP long after issuing it. UMYC's Brief, p. 25. But what Block concluded was that the county in that case, upon receiving information that circumstances were different than it had been led to believe, could reconsider the CUP it had issued—notwithstanding any procedural defects in the manner it did so. 727 N.W.2d at 182. The City's action in this matter is comparable. The fairest result here is to conform the terms of the CUP to the application, consistent representations, and the long-standing operation of the facility. Instead, UMYC seeks an unfettered ability to rent slips to power boat users (with the attendant noise and disruption that has already occurred and would only intensify if

allowed to continue unabated) without regard to the property's zoning classification or its residential location.

The applicants for the original permit in Block produced a veterinarian who testified that he had surgically “debarked” thousands of dogs. Id. at 179. The county issued the CUP with a condition to require debarking. Only later did the county learn that the practice was “overwhelmingly disfavored in the veterinary community” and that many considered it inhumane. Id. at 180. When it received that information, the county took prompt action.

Here, the CUP was issued based on promises of an idyllic sailing facility which would not disturb the residentially-zoned neighborhood in which it was to be located. The record reflects those consistent representations. See A.29; A.30, ¶ 13.D; A.697. UMYC maintained the facility in that quiet, non-disruptive condition—for a time. But UMYC determined in January 2005 that it would suffer financial hardship unless it could generate additional revenue by renting slips for power boats. See A.347-351; A.538-539. It did so, without notice to the City, and the problems often attendant to power boat marina operations, including noise and neighborhood disturbance, quickly followed. See A.701-702. Upon learning about the current circumstances of UMYC's operations, the City took immediate action.

UMYC would have this Court disregard the applicability of its previous decision in Block because more time passed between the original issuance of the CUP and the change in circumstances in this case than in that one. UMYC's Brief, p. 25. But that distinction misses the point. Block is applicable precedent because the county in that

case and the City in this one revisited a CUP as soon as information to correct a misimpression became available. The fact that the change in the CUP in Block was to lessen a restriction is immaterial, especially considering that the main group challenging the change in Block was opposed to the CUP as a whole. See 727 N.W.2d at 170 (noting that the relators challenged as arbitrary both the CUP itself and the County's efforts to modify it *sua sponte* after-the-fact). Both the action in Block and the action in this case are appropriate.

UMYC states that it "has had power boats among its mix of boats for years," but that the City simply changed its mind about the issue in 2005. UMYC's Brief, pp. 10-11. This argument, too, either misses the mark or is designed to mislead this Court.<sup>1</sup> UMYC has always, without objection from the City and consistent with its application for a CUP, kept power boats at the site *for use by management*. Problems arose, and the City began lodging its objections, in 2005 when the City learned that UMYC began *renting out* slips to the general public for the storage of power boats. The City did not simply change its position on the issue on a whim. For that matter, neither did UMYC. It reacted to a change it perceived in financial circumstances. The City reacted specifically and promptly upon learning that UMYC intended to rent slips for use by power boats. A.345-346. In short, slip rentals for power boats in the middle of a residential area, with the noise and disturbance to which such a practice would lead, is simply untenable.

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<sup>1</sup> The quoted material appears in the UMYC "Statement of the Case and Facts" section, but is referenced here as an "argument." UMYC's "fact" section is argumentative in a manner far beyond simple advocacy and the City has responded to those arguments in this brief as appropriate.

Contrary to UMYC's argument, the condition placed on the City's certification to the LMCD in early 2006 supports the City's version of events in this matter. UMYC's Brief, pp. 10-11. Certifications are submitted prior to the boating season in each year. It was only after the certification for the 2005 boating season—the first one in which UMYC rented out slips to power boat users—that the City became aware UMYC had abandoned its sailing-only mission in favor of rentals to power boat users. In early 2006—in the first certification following the City's learning that UMYC had started renting slips to power boat users—the condition first appeared. It did not appear before that because UMYC had not opened its slips for rental to power boat users until that time and UMYC's operation comported with the application as well as the permit issued to comport with that application.

This Court's decision in Block, seeking to reach the "fairest result" and recognizing a local government's right to revisit a CUP where circumstances warrant and fairness dictates, supports the City's action in this matter.

*B. Two recent unpublished decisions of this Court also support the City.*

After itself citing an unpublished decision of this Court as support for its argument, UYMC inexplicably chides the City for its use of unpublished opinions without observing caution as to their status. UMYC's Brief, pp. 25-26. UMYC evidently failed to notice the City's clear citation to Minn. Stat. § 480A.08, subd. 3 or the flat recognition that unpublished cases do not control the outcome in this or any subsequent case. See City's Initial Brief, p. 17. Moreover, it was UMYC's District Court counsel who first argued the applicability of an unpublished decision to this matter, calling it

“remarkably similar” to the instant case. See UMYC’s Memorandum in Support of Motion for Summary Judgment and for Leave to Amend, p. 13. The City certainly cannot be faulted for rebutting such an argument, particularly where it, at least, has observed Minn. R. Prof. Conduct 3.3 regarding cases’ status and opposing counsels’ arguments citing them. In any event, this Court is well-aware of the status of its unpublished decisions (and dissents from them) and can assign counsels’ arguments raising those cases whatever value this Court may choose. Those decisions support the City’s action in this matter.

1. This Court’s decision in Edling shows that revisiting a CUP’s express terms is lawful under appropriate circumstances.

Not only does UMYC mischaracterize the City’s use of Edling v. Isanti County, No. A05-1946, 2006 WL 1806397 (Minn. Ct. App. July 3, 2006),<sup>2</sup> it misstates the holding in that case as well. UMYC suggests that “the sole issue was whether the county had sufficient grounds for revoking a CUP *because its terms had been violated.*” See UMYC’s Brief, p. 26 (emphasis added). The District Court in this matter drew the same erroneous conclusion. See A.12. In fact, this Court explicitly 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 violate the explicit terms of the CUP document,

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<sup>2</sup> 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) was appended to the City’s initial brief at A.719-725.

but did exceed the scope of the representations Edling made six years earlier during the application process. At the time of the application, Edling indicated his intention to conduct a small-scale operation involving shallow ponds and removal of black dirt on less than half of a 114-acre tract. Id. Years later, after leasing out the property, it was a full-scale mining operation with deep excavation pits and fifty-foot gravel piles and the nuisance to the surrounding area that such a use entails. For that reason, this Court upheld the county's revocation of the CUP.<sup>3</sup>

In this case, too, the applicant for a CUP failed to live up to the representations it made in its application. UMYC told the City in its written application materials (see A.29-30), and numerous times since then (see, e.g., A.697), that it intended to run a sailboats-only facility. Relying on the application, the City determined that, like the small-scale operation in Edling, UMYC could peacefully co-exist with its neighbors in the residential zone in which it would be located and issued the CUP. Years later, UMYC abandoned its sailboats-only intentions and became a powerboat marina. That subsequent intensified use, like the gravel mine in Edling, came with consequences for

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<sup>3</sup> UMYC argues that the City cannot be allowed to revisit conditions on a CUP because such a holding would be unfair to subsequent purchasers. UMYC's Brief, pp. 27-28. No such concern applies. In contrast to the instant case, the applicant in Edling leased out the property to a different operator six years after the representations to which this Court eventually held the lessee. 2006 WL 1806397, \*3-\*4. In some cases, perhaps a transfer of the property to a bona fide purchaser for value in the interim period would prevent a second look at a CUP, but no such transfer or transfers occurred here. UMYC was the applicant for the original CUP and it is that same entity now seeking to avoid the restrictions with which it previously promised to abide. An abstract concern about future cases, the facts of which may in no way resemble the instant one, should not sway this Court's resolution of this case.

the residential neighborhood in which it was located: residents were subjected to excessive noise and, in at least one case, exceedingly lewd behavior. See A.701-702.

Edling is in some ways different from the instant case, but those differences only make its applicability in this matter more compelling. UMYC attempts to distinguish Edling on the grounds that the county in that matter revoked the CUP rather than simply restricting it to the terms of the application. UMYC's Brief, p. 26. The District Court apparently applied similar logic, which seems to suggest that no good deed goes unpunished. Rather than taking action that would have closed UMYC entirely, the City saw the value of retaining UMYC in the community according to the terms of its original application, i.e., as a sailboats-only facility. The City's relative lenience in this matter, by allowing UMYC to keep the CUP and live within the terms of its application as compared to the county revoking the CUP in Edling, should not be held against it. This Court's decision in Edling supports the City's course of action in this case.

Perhaps recognizing that Edling (should this Court choose to view that decision as persuasive in this matter) is damaging to its argument, UMYC relies heavily on Judge Minge's dissent in that case. See UMYC's Brief, pp. 26-28. Judge Minge's dissent stresses what he perceived as problems with the evidence regarding both the application and the revocation. Judge Minge noted the "sparse record" and stated that "at a minimum, I would hold that finding implied conditions on this [sic] basis of representations *should be limited to clear situations*. As the following discussion indicates, the situation in this proceeding is *far from clear*." 2006 WL 1806397, \*5 (Minge, J. dissenting) (emphasis added).

Judge Minge's dissent notes the "murky evidence" of Edling's representations at the time of the application. Edling did involve some question as to where the statements regarding limitations on the operation originated and about the actual conditions at the site. Id. at \*5-\*6. The majority opinion in Edling saw those questions as insufficient to allow Edling (or his lessee) to walk away from the previous representations. Id. at \*3. And again, any differences between this case and Edling render it more applicable, not less, as no such concern about "murky evidence" could be stated in this case. In Edling, the representations were oral. In this matter, the written CUP application materials unequivocally state the intention the UMYC to run a sailboats-only facility. See A.29-30. UMYC explicitly restated that intention (again, in writing) in 1992: "All yachts are sailboats only, except for one power boat, which is used for officiating races." A.697. UMYC's decision to change that intention, to begin renting slips for use by power boats when UMYC recognized coming financial hardship, is pegged to a specific meeting of the UMYC's Board in January 2005. See A.538-539. The evidence of UMYC's intentions in this case, and the specific time and motivation for the change, could hardly be clearer. Judge Minge's concern about the lack of substantial evidence in the record in Edling simply would not apply in this matter.

The Edling decision, allowing the county to revisit a CUP it had issued and hold the applicant (and his lessee, in that case) to the terms of the application, supports the City's action in this matter.

2. This Court's decision in Minnewawa supports the City's decision to revisit the written terms of an existing CUP.

At p. 32 of its Brief, UMYC draws an overly-simplistic comparison between this Court's decision in Minnewawa Sportsman's Club v. County of Aitkin, No. A07-0381, 2008 WL 314495 (Minn. Ct. App. Feb. 5, 2008),<sup>4</sup> and the instant case, concluding that Minnewawa favors upholding the District Court's ruling in this matter. It does not. Critical factors supporting the Minnewawa decision are not present in this case and noteworthy comparisons between the two cases support the City's decision to conform the CUP to the terms of the application and long-standing consistent practices.

As set forth in the City's initial Brief, the county planning commission in Minnewawa used its approval of a 2006 request for a CUP amendment (to add an archery range and a new road) to impose conditions on a separate use (a firearms range) from 1997. See 2008 WL 314495, \*1 and \*3. This Court struck down the new conditions pertaining to 1997 CUP because they exceeded the scope of the 2006 application. Id. at \*4. The property covered by the 1997 CUP *was not even at issue* in the 2006 application, which related to an adjoining parcel. Id. at \*6. This Court's decision in Minnewawa to stop that attempt undoubtedly was correct.

The instant case is very different. The county in Minnewawa invented entirely new and different conditions for the existing CUP after the fact which had never been applied for, agreed to, or understood by the applicant. In contrast, the City in this matter

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<sup>4</sup> 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) was appended to the City's initial brief at A.713-718.

applied a condition that was consistent with the application and UMYC's long-standing use of the property. Its written application materials from the late 1970s are unequivocal and it explicitly told the City in 1992 that its slips were only rented to sailboats. See A.29-30 and A.697. Moreover, UMYC specifically acknowledged in early 2005 in a letter to the City that its decision to start renting slips for powerboats was "recent" and driven by economic concerns. A.347-348. UMYC decided, in January 2005, that it wanted to raise revenue by renting slips to power boats and changed its membership documentation to reflect the change for the following boating season. A.538-539. UMYC changed the status quo; the City tried to maintain it.

The City in this case did not attempt to invent new conditions; rather it required UMYC to live within the conditions to which all parties had agreed from the start. The applicant in Minnewawa did not originally come to the county with an application for an archery range, talking about how it wanted to promote archery and teach archery to kids, obtaining a CUP for a "target range," and only later decide that it could not make a go with archery alone and needed to expand its use to allow firearms even though it was in a residential zone. But that is precisely what UMYC seeks here.

Moreover, this Court in Minnewawa remanded the CUP application to the county for imposition of conditions as indicated by the original application. 2008 WL 314495 at \*4 (emphasis added). This Court specifically stated that it would "consider the *signed application itself* as presenting the issue for consideration by the commission without regard to the conflicting and ambiguous statements made later." Id. at \*4 (emphasis added). In other words, this Court permitted the county, on remand, to conform the CUP

to the terms of the original application. The City in this matter asks this Court for nothing more. The District Court decision in this case should be reversed.

*C. The record of this matter supports the City's contention that a mistake—not some negotiated change—led to the CUP document's failure to conform to the application materials.*

As its “overwhelming evidence” that the CUP document *deliberately* did not contain a limitation to sailboats, UMYC offers the affidavit of one of UMYC's members, the City's treatment of a different yacht club in a different zoning classification, the results of a criminal court proceeding, and its own faulty interpretation of events related to its rezoning request in 1992. UMYC's Brief, pp. 32-33. None of these items, when offered to prove anything about the instant case, hold up to scrutiny.

1. The affidavit

UMYC cites an affidavit offered by a long-standing member of the UMYC who asserts that the City agreed to a “trade off” by which the UMYC would be able to moor any kind of boats it liked so long as it had no more than thirty and that the UMYC has historically operated without any such restriction. See R.A.15-16. But the record in this case shows those contentions to be false. As noted multiple times, the application materials for the CUP are unequivocal: UMYC wanted a sailboat marina and to promote sailing. A.29-30. The minutes of City meetings from that time demonstrate that the discussion was about the number of slips, not about the type of boats. A.32. Residents present at those meetings confirm the universal understanding that UMYC was to be a sailboats only facility. A.509; A.562; A.597-598. The commodore of the UMYC specifically told the City in 1992 that all the boats at UMYC (except a powerboat for

management uses) were *sailboats* and its promotional materials at that time indicated it was open to those interested in promoting sailing and to teach the sport to kids. A.697. UMYC acknowledged in 2005 that its decision to begin renting its sailboat slips for power boat usage was “recent” (January of 2005) and driven by financial concerns, not due to some long-standing right enjoyed and exercised since shortly after its inception. A.347-348, 538-539. No negotiations resulting in UMYC having an unfettered ability to rent slips for use by powerboats ever occurred.

## 2. Shorewood Yacht Club

UMYC argues that Shorewood Yacht Club (“SYC”), despite having a CUP application pending at the same time as UMYC, did have an explicit limitation to sailboats included and, thus, the City must have intentionally left that restriction out for UMYC. UMYC compares an apple to an orange. While both sites are marinas, UMYC is a thirty-slip yacht club located in a residential zone; SYC is a 117-slip commercial marina in the Lakeshore Recreational zone (in which marinas are a lawful use). Moreover, the idea that the City would deliberately allow the noise and commotion associated with power boats in the middle of a residential zone while banning them in a Lakeshore Recreational zone defies logic and underscores the importance of local zoning.

## 3. Previous criminal proceedings

UMYC suggests that a criminal court’s dismissal of misdemeanor charges against it related to its expanded use of the property under a CUP somehow defeats the City’s claim in this matter. UMYC’s Brief, p. 33. But as this Court knows (and the City pointed out in its initial brief), criminal charges require the government to prove guilt

beyond a reasonable doubt to obtain a conviction. Here, in 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). The fact that a criminal court could not find UMYC guilty on this record simply has no bearing on whether UMYC should prevail in a case where it must prove that the City acted outside the law.

#### 4. 1992 Rezoning request

In 1992, UMYC sought to change the zoning of its property from residential to Lakeshore Recreation to eliminate its non-conforming use status and allow it to obtain a variance and construct a clubhouse. See A.76. UMYC suggests that the discussions with the City at that time reveal that it was not then and is not now properly limited to sailboats only. See UMYC's Brief, pp 8-9, 33. UMYC misreads the evidence. What is clear from the memorandum from which the argument is drawn is that City staff was concerned about what would happen "if the property were to change hands" after any rezoning. A.78. The City was not concerned about the current status of the property and current limitations on its use. Adequate conditions, as clearly stated in UMYC's application, already applied to UMYC. City staff's concern was with what could happen with the property if it changed to *L-R Lakeshore Recreation zoning* and the property was sold. If it did, that change would moot the existing CUP (because a marina and related uses would be allowed in an L-R zone) and the property could become a commercial marina with powerboats. 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 in the future. It is apparent that City staff’s statement that a “protective covenant could be created” referred to that possible scenario; not to the property as it existed under its present ownership.

Under the logic and decisions of this Court in Block, Edling, and Minnewawa, addressing the inherent right of a local government body to revisit and clarify prior CUP decisions where appropriate, UMYC’s unequivocal application should govern in this matter. Further, none of the “overwhelming evidence” UMYC proffers to bolster its theory that the City deliberately omitted the “sailboats only” limitation from UMYC’s CUP actually supports its claims. The District Court decision should be reversed.

**II. The District Court properly found that the City’s clarification of the CUP was rational and supported by the record.**

UMYC suggests that if this Court should rule in favor of the City, stating that it had a right to expect that UMYC would abide by the restrictions to which it had agreed (in fact, had specifically applied for), that UMYC should still prevail because the City’s decision is arbitrary, capricious, and unreasonable. UMYC misconstrues both the evidence and the standard this Court must apply in this instance in order to reverse the District Court on this point.

First, appellate courts’ authority to intervene in municipal decision-making is “limited” and should be “sparingly invoked.” White Bear Lake Docking & Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174, 175 (Minn. 1982). 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. v. City of Little Canada, 539 N.W.2d 264, 266 (Minn. Ct. App. 1995). The City needs but one rational basis in the *entire record*, not just on the face of the resolution at issue, to sustain its decision. Mendota Golf v. City of Mendota Heights, 708 N.W.2d 162, 180 (Minn. 2006).

UMYC points to the City’s “stated rationale”—a drafting oversight—for its clarification of UMYC’s CUP and argues that it is unsupported. UMYC’s Brief, p. 34. As noted herein and in the City’s initial brief, there is considerable evidence supporting the conclusion that a mistake occurred on the face of the CUP. Moreover, per Mendota Golf, courts consider the *entire record* of decision to determine whether a rational basis supports the decision, not just the “stated rationale” in a resolution. 708 N.W.2d at 180 (holding that review of language in resolution alone is “too narrow a focus” and stating that courts look at the entire record to determine if a decision has a rational basis). The clarification of the CUP in this matter has substantial rational support in the record and it should be upheld.

No matter how this Court views the legal basis for the City’s action to clarify the CUP, 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 this material is borne out in the record.

Moreover, the UMYC is situated in the middle of a residential zone. A commercial marina—precisely what a facility unrestricted as to the types of boats for which its slips can be rented, is an inappropriate use in a residential zone. UMYC has never applied for a permit to allow such a use. The only reason UMYC could occupy the site and peacefully co-exist with its residential neighbors is because of its quiet character as a “sailboats-only” facility. This rational position has been the City’s consistent approach throughout the life of the UMYC. Until its self-described recent financial hardships, UMYC agreed. The City’s clarification of the CUP is rational, supported by the record, and should be upheld.

UMYC also argues that it “cannot be disputed” the City had “preordained the outcome” in this matter and that, as a result, its decision is arbitrary and violative of due process. See UMYC’s Brief, pp. 12-13 and 35-36. However, as should be obvious from the transcript of the meeting (the same proceedings UMYC now inexplicably calls a “sham”), the result at the City Council was anything but a certainty. See A.434-451. UMYC itself points out that more than one member of the City Council questioned the legality of the decision and argued against the City taking the action at issue in this case. See UMYC’s Brief, pp. 13. It is difficult to imagine how UMYC could even argue that the City had a “preordained” result coming out of the heated exchange among the decision-makers at the City. The District Court properly rejected that claim.

**III. The District Court properly considered and rejected UMYC's takings claim.**

UMYC submits that a remand of this matter is required if this Court finds in favor of the City. See Respondent's Brief, p. 37. UMYC suggests that "if this Court were to uphold the 2007 CUP amendment, then the question becomes whether the 2007 amendment constitutes a taking." Id. UMYC baldly states that it has a "valid claim" for a taking and that the case "cannot be dismissed." Id.

But UMYC fails to acknowledge that the District Court *already considered* the possibility of a takings theory on these facts (in the context of the proffered amendment to the complaint<sup>5</sup>) and rightly rejected it. See A.15. As the District Court noted, in order to state a regulatory takings theory on the basis of the 2007 CUP clarification, UYMC would need to identify a protected property interest and show that it has no reasonable, economically-viable use of the property remaining as a result of the regulation.

Wensmann Realty, Inc. v. City of Eagan, 734 N.W.2d 623, 635 (Minn. 2007). UMYC has made no effort to demonstrate that its property has no reasonable economically viable use under the clarified CUP and no such showing is possible on these facts.<sup>6</sup> The

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<sup>5</sup> Whether a takings claim is couched as "eminent domain" or as a claim pursuant to 42 U.S.C. § 1983, the adjudication of the merits of that claim proceed pursuant to the same standards. Minnesota courts use both federal and state precedent to analyze the viability of takings claims. Zeman v. City of Minneapolis, 552 N.W.2d 548, 551-52 (Minn. 1996).

<sup>6</sup> If UMYC were to prevail in this matter, no taking claim is viable. UMYC ignored the City's directive to maintain the operation as a sailboats-only facility consistent with the application and long-standing practices and rented slips for use by powerboats. As a result, regardless of the outcome in this matter, UMYC has suffered no loss.

property can, without question, be utilized as a sailboat marina or in other capacities consistent with its residential zoning classification.

If this Court finds that the City's actions in this matter were lawful, there has been no interference with a protected property interest and, in any event, no taking of that property under the clear standard stated in Wensmann, 734 N.W.2d at 635. No remand is required.

**IV. UMYC has waived any argument that its proposed amendment to add federal claims was improperly denied by the District Court.**

In its Notice of Review, UMYC purported to contest whether the District Court had erred by rejecting its attempt to amend its complaint to add a claim under 42 U.S.C. § 1983. See R.A. 47. In its brief to this Court, however, UMYC makes no argument regarding that issue. The issue does not appear in UMYC's Statement of the Issues and neither the argument nor any reference to the federal statute appears anywhere in the brief or its Table of Authorities. See Respondent's Brief, p. iv-vi and 1. Unless prejudicial error resulting from a District Court decision is "obvious on mere inspection," failure to argue a purported issue in briefs to this Court constitutes a waiver. See Balder v. Haley, 399 N.W.2d 77, 80 (Minn. 1987) (recognizing waiver for failure to brief issue unless miscarriage of justice is apparent) (internal citation omitted); Melina v. Chaplin, 327 N.W.2d 19, 20 (Minn. 1982) (holding that failure to brief an issue constitutes a waiver). See also Chay-Velasquez v. Ashcroft, 367 F.3d 751, 756 (8th Cir. 2004) (failure to raise issue in opening brief constitutes waiver).

Here, the District Court properly recognized that amendment of pleadings should be denied where it would serve no legal purpose, i.e., where it would fail on summary judgment. See A.14. The District Court also noted the difficulty of sustaining a 42 U.S.C. § 1983 claim in the zoning context. See A.15. Further, a 42 U.S.C. § 1983 claim is not ripe because UMYC has not exhausted state remedies prior to attempting to assert a federal claim. See Williamson County Reg'l Planning Comm'n v. Hamilton Bank, 473 U.S. 172, 186 (1985). Dismissal on ripeness grounds alone would be required. In any event, the District Court analyzed the possible claims under 42 U.S.C. § 1983 and concluded that no conceivable theory could support a claim on the undisputed facts presented. Id. No “obvious” error—in fact, no error at all—undercuts the District Court’s efficient analysis.

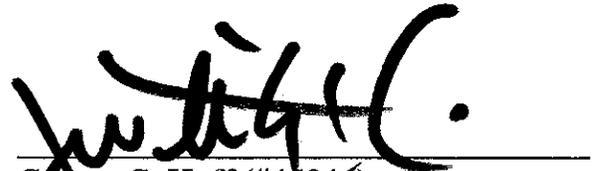
By failing to include any argument regarding its purported federal claims in its brief, UMYC has waived and effectively conceded that the District Court properly denied its attempt to amend its complaint to assert a claim under 42 U.S.C. § 1983. No further challenge to that denial should be permitted.

### **CONCLUSION**

UMYC argues that the City unlawfully forced it to live with the restrictions to which it had agreed, i.e., to be a sailboats-only facility, in its initial application for a CUP. UMYC also suggests that the District Court erred by concluding the City had a rational basis for its decision. But the City’s action is supported both by caselaw and the record and it should be sustained. Moreover, the District Court properly rejected UMYC’s

takings claim and its attempt to amend its complaint to add a federal claim. In any event, UYMC has now waived any argument that it should be allowed to amend its complaint.

Dated: January 5, 2009

A handwritten signature in black ink, appearing to read "George C. Hoff", written over a horizontal line.

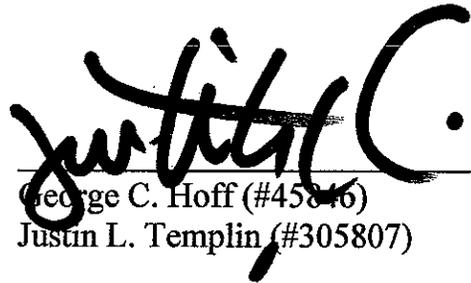
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**CERTIFICATE OF COMPLIANCE**  
PURSUANT TO MINN. R. CIV. APP. P. 132.01, SUBD. 3(a)

This brief complies with the type-volume limitation of Minn. R. Civ. App. P. 132.01, subd. 3(a) because this brief contains 6221 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: January 5, 2009



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