

A08-1869

**State of Minnesota
In Court of Appeals**

Upper Minnetonka Yacht Club,

Respondent,

v.

City of Shorewood,

Appellant.

**BRIEF AND APPENDIX OF RESPONDENT
UPPER MINNETONKA YACHT CLUB**

George C. Hoff (I.D. No. #45846)
Justin L. Templin (I.D. No. 0305807)
HOFF, BARRY & KOZAR, P.A.
775 Prairie Center Drive, Suite 160
Eden Prairie, MN 55344
(952) 941-9220

*Attorneys for Appellant
City of Shorewood*

Kay Nord Hunt (I.D. No. 138289)
LOMMEN, ABDO, COLE,
KING & STAGEBERG, P.A.
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

*Attorneys for Respondent
Upper Minnetonka Yacht Club*

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).

TABLE OF CONTENTS

TABLE OF AUTHORITIES iv

STATEMENT OF THE ISSUES 1

STATEMENT OF THE CASE AND FACTS 2

 A. UMYC Is a Minnesota Non-Profit Corporation 3

 B. UMYC Marina Has Been Operated Since 1969 3

 C. There Are Two Other Shorewood Marinas 4

 D. The 1977/1978 CUP Differed Substantially and Intentionally Not
 Only From the Existing Special Use Permit Issued in 1969 But From
 the Terms UMYC Had Originally Requested for the CUP 5

 1. The 1969 special use permit issued to UMYC 5

 2. In 1977, the City granted UMYC a conditional use permit
 with no limitation on the type of boats 5

 3. The 1978 CUP was issued eliminating certain buoys based on
 an agreement between UMYC and the City 8

 4. The fact that the CUP was not limited to sailboats is clear
 from discussions regarding a 1992 request for variance for a
 clubhouse 8

 5. Other City dealings with UMYC show that the City was well
 aware that power boats and sailboats have been kept at the
 marina since 1977 10

 E. The Trial Court Decides That UMYC’s CUP as Granted Allows
 Power Boats and Dismisses the Criminal Case Brought Against
 UMYC 11

 F. The City Decides to Unilaterally Amend UMYC’s CUP 12

G.	UMYC Brings This Action in Response to the City’s Action and the Trial Court Grants Summary Judgment to UMYC	15
	ARGUMENT	16
I.	THE TRIAL COURT, IN ACCORD WITH MINNESOTA LAW, CORRECTLY GRANTED SUMMARY JUDGMENT TO UMYC, THEREBY DECLARING SHOREWOOD’S RESOLUTION NO. 07-067 INVALID AND UNENFORCEABLE	16
A.	Standard of Review.	16
B.	The City Cannot Unilaterally Add a Condition to the CUP 30 Years After Its Grant	17
C.	This Court Does Not Defer to the City’s Assertion That Its 2007 Resolution Was One of Clarification	19
D.	A CUP Whose Terms Are Clear and Unambiguous Cannot Be Subsequently Clarified	20
E.	A City 30 Years Later Cannot Clarify Its Earlier Enacted CUP	22
F.	The Cases Relied on by the City Do Not Support Reversal Here	24
1.	<u>In re Block</u> and <u>In re North Metro Harness, Inc.</u> do not support reversal	24
2.	Unpublished decisions of this Court cited by the City do not support reversal	25
a.	The analysis of the dissent in <u>Edling</u> is in accord with Minnesota law and cases across the country and supports the trial court’s ruling in this case	26
b.	This Court’s subsequent decision in <u>Minnewawa Sportsmen’s Club</u> is in accord with the dissent in <u>Edling</u>	28
G.	The Record Does Not Support That the City Made a Drafting Error in Its 1977/1978 CUP	32

II. IF THIS COURT SHOULD CONCLUDE THAT SUMMARY JUDGMENT WAS WRONGLY GRANTED TO UMYC, THIS COURT MUST ADDRESS WHETHER THE CITY’S DECISION TO AMEND A 30-YEAR-OLD CUP WAS ARBITRARY, CAPRICIOUS OR UNREASONABLE 33

A. There Was No Drafting Oversight 34

B. City Reached a Predetermined Result 35

III. IF THIS COURT SHOULD DISAGREE WITH THE TRIAL COURT’S RULING, COUNT III OF THE COMPLAINT CANNOT BE DISMISSED ... 37

CONCLUSION 37

CERTIFICATION OF BRIEF LENGTH 38

TABLE OF AUTHORITIES

Statutes:

Minn. Stat. § 394.301, subd. 4	29
Minn. Stat. § 462.3595, subd. 3	17, 26
Minn. Stat. § 462.3595, subd. 4	17

Cases:

BECA of Alexandria LLP v. County of Douglas by Bd. of Comm'rs., 607 N.W.2d 459 (Minn. Ct. App. 2000)	1, 34
Bettendorf v. St. Croix County Bd. of Adjustment, 591 N.W.2d 916 (Wis. Ct. App. 1999)	26, 28
Bingham v. Bd. of Supervisors of Winona County, 8 Minn. 441, 8 Gil. 390 (1863)	20
County of Washington v. Am. Fed. of State, County and Mun. Employees, Council No. 91, 262 N.W.2d 163 (Minn. 1978)	23
Dege v. City of Maplewood, 416 N.W.2d 854 (Minn. Ct. App. 1987)	1, 17, 27
Edling v. Isanti County, 2006 WL 1806397 (Minn. Ct. App. 2006)	25, 26, 28, 29
Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980)	1, 21, 34
Ginsberg v. Minn. Dept. of Jobs and Training, 481 N.W.2d 138 (Minn. Ct. App. 1992), <i>rev. denied</i>	36
Goldberg v. Kelly, 397 U.S. 254 (1970)	36
Holman v. All Nations Ins. Co., 288 N.W.2d 244 (Minn. 1980)	19

Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n, 518 N.W.2d 557 (Minn. 1994)	1, 19, 20, 23
In re Block, 727 N.W.2d 166 (Minn. Ct. App. 2007)	24, 25
In re De Laria Transp., Inc., 427 N.W.2d 745 (Minn. Ct. App. 1988)	17
In re Farrell & Desautels, Inc., 383 A.2d 619 (Vt. 1978)	27, 28
In re Kostenblatt, 640 A.2d 39 (Vt. 1994)	28
In re North Metro Harness, Inc., 711 N.W.2d 129 (Minn. Ct. App. 2006), <i>rev. denied</i>	24, 25
Minnewawa Sportsmen's Club v. County of Aitkin, 2008 WL 314495 (Minn. Ct. App. 2008)	25, 28, 30, 31
Nardini v. Nardini; 414 N.W.2d 184 (Minn. 1987)	19
Northpointe Plaza v. City of Rochester, 465 N.W.2d 686 (Minn. 1991)	17
Rural Am. Bank of Greenwald v. Herickhoff, 485 N.W.2d 702 (Minn. 1992)	19
S. Woodbury Taxpayers Ass'n v. Am. Institute of Physicians, Inc., 428 N.Y.S.2d 158 (N.Y. Sup. Ct. 1980)	28
STAR Centers, Inc. v. Faegre & Benson, L.L.P., 644 N.W.2d 72 (Minn. 2002)	16
State by Minneapolis Park Lovers v. City of Minneapolis, 468 N.W.2d 566 (Minn. Ct. App. 1991)	17
State v. Mann, 189 P.3d 843 (Wash. Ct. App. 2008)	21

Ubel v. State,
547 N.W.2d 366 (Minn. 1996), *reh'g denied* 1, 17, 19, 21, 23

Vlahos v. R&I Constr. of Bloomington, Inc.,
676 N.W.2d 672 (Minn. 2004) 26

Washington Mut. Bank, F.A. v. Elfelt,
756 N.W.2d 501 (Minn. Ct. App. 2008) 16

Watab Twp. Citizen Alliance v. Benton County Bd. of Comm'rs.,
728 N.W.2d 82 (Minn. Ct. App. 2007), *rev. denied* 34

Other Authorities:

2 Am. Law Zoning (5th ed. 2008) 28

3 Rathkopf's The Law of Zoning and Planning (4th ed. 2008) 18, 36

101A C.J.S. Zoning & Land Planning (2008) 27

Minn. Op. Atty. Gen. 59A-32, 1990 WL 596916 (Minn. A.G. 1990) 17, 18

STATEMENT OF THE ISSUES

- I. WHERE THE CONDITIONAL USE PERMIT ISSUED IS ADMITTEDLY UNAMBIGUOUS, MAY THE CITY AMEND THAT CONDITIONAL USE PERMIT 30 YEARS LATER ON THE PURPORTED BASIS THAT ITS ACTION IS ONE OF CLARIFICATION?

Dege v. City of Maplewood, 416 N.W.2d 854 (Minn. Ct. App. 1987).

Ubel v. State, 547 N.W.2d 366 (Minn. 1996), *reh'g denied*.

Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n, 518 N.W.2d 557 (Minn. 1994).

- II. IF THIS COURT SHOULD CONCLUDE THAT A CITY MAY ADD A CONDITION TO A 30-YEAR-OLD CONDITIONAL USE PERMIT, WAS THE CITY'S AMENDMENT HERE ARBITRARY, CAPRICIOUS OR UNREASONABLE?

Frank's Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604 (Minn. 1980).

BECA of Alexandria LLP v. County of Douglas by Bd. of Comm'rs., 607 N.W.2d 459 (Minn. Ct. App. 2000).

- III. IF THE COURT SHOULD CONCLUDE THAT THE CITY MAY UNILATERALLY AMEND THE CONDITIONAL USE PERMIT AT ISSUE AND THE CITY'S AMENDMENT WAS NOT ARBITRARY, CAPRICIOUS OR UNREASONABLE, MUST THE CASE BE REMANDED PURSUANT TO COUNT III OF THE COMPLAINT – EMINENT DOMAIN?

STATEMENT OF THE CASE AND FACTS

In 1977/1978, Appellant City of Shorewood (the City) granted a conditional use permit (CUP) allowing certain property owned by Respondent/Plaintiff Upper Minnetonka Yacht Club (UMYC) on Lake Minnetonka to be used as a yacht club, including slips for “storing and keeping not more than 30 boats.” (Appellant’s Appendix [A.] 43, 46.)¹ The CUP did not restrict the type of boats that could be stored and kept – not by size and not by means of propulsion. (*Id.*) As a result, UMYC has had slips for both sailboats and power boats. (A. 95, 98, 101, 104, 106, 109, 112; Respondent’s Appendix [R.A.] 21.)

Then, in 2006, the City brought a criminal complaint against UMYC in Hennepin County District Court alleging that UMYC’s storing and keeping of power boats, as opposed to just sailboats, constituted a violation of the 30-year-old CUP. (A. 356.) On April 25, 2007, the trial court dismissed the City’s criminal complaint, finding that based “on the plain language” of the CUP as well as the exhibits submitted, the storing and keeping of power boats was allowed by the CUP. (A. 418.)

The City decided to unilaterally amend the CUP to limit it to just sailboats. (A. 463.) And on October 22, 2007, the City, by resolution, added that additional condition to the April 24, 1978 CUP. (A. 613, 687.) In response, UMYC brought this action seeking a declaration that the City’s action in changing the CUP to restrict the

¹ The CUP was granted in 1977 and subsequently changed by agreement of UMYC and the City. That change is not relevant to this appeal. For purposes of this appeal, the CUP that governs will be referred to as the 1977/1978 CUP.

UMYC marina to sailboats was without factual or legal support and was improperly and unlawfully adopted and enacted by the City. (R.A. 1.)

The case proceeded on cross-motions for summary judgment with the trial court, the Honorable Janet N. Poston, granting summary judgment to UMYC holding the City cannot unilaterally add a condition to a CUP 30 years after its issuance. (A. 3.) The City has appealed and UMYC has filed a Notice of Review. (A. 1; R.A. 47.)

In setting out the facts, the City fails to present all of the undisputed material facts. In essence, the City cherry picks self-serving statements by which it attempts to argue that everyone all along intended to limit UMYC to sailboats. As will be explained, any purported intent in 1977/1978 is irrelevant to the legal issue raised. All that is relevant is what the CUP as issued in 1977/1978 unambiguously states. Moreover, what the entire record shows unequivocally is that there was no implied condition to limit UMYC to sailboats only. Accordingly, UMYC presents this detailed Statement of the Facts.

A. UMYC Is a Minnesota Non-Profit Corporation.

The City is a municipality bordering on Lake Minnetonka. (R.A. 1, 8.) UMYC (formerly known as the Upper Lake Minnetonka Yacht Club) is a Minnesota non-profit corporation that owns the marina at issue. It holds social events, rents boat slips at the marina and organizes sailboat races. (R.A. 1, 19.)

B. UMYC Marina Has Been Operated Since 1969.

The UMYC marina is located at 4580 Enchanted Point in Shorewood. UMYC has operated a marina on the site since 1969, first as a lessee and then as an owner.

Originally, the property was part of a larger parcel owned by another party and UMYC leased the land used for a marina. (R.A. 19.) Then, in 1972, UMYC purchased the approximately 1.2 acres currently used for the marina and the rest of the property was sold for lots for single family homes. Id.

The marina essentially consists of boat slips and a gravel parking area. There is no clubhouse, boat launch or fueling facilities. (R.A. 19.) Since 1977, boats powered by motors, boats powered by sails and boats powered by both have been stored and kept at the marina. (R.A. 16.)

C. There Are Two Other Shorewood Marinas.

In addition to the UMYC marina, the City has long permitted two other marinas on the shores of Lake Minnetonka – the Howards Point Marina and the Shorewood Yacht Club. The Howards Point Marina has leased slips to boats of all types for decades. (R.A. 19.) The Shorewood Yacht Club, until recently, had been limited to sailboats, based upon an explicit sailboat-only limitation in its own 30-year-old CUP. Just a few weeks after the City amended UMYC’s 30-year-old CUP to prohibit power boats, the City amended Shorewood Yacht Club’s 30-year-old CUP to allow 35 power boats.² (R.A. 35.)

² As will be explained, the sailboat-only limitation in the Shorewood Yacht Club’s CUP was extensively discussed at the very same Planning Commission and City Council meetings where the original UMYC CUP, which contained no such limitations, was discussed. (A. 21, 22, 32.)

D. The 1977/1978 CUP Differed Substantially and Intentionally Not Only From the Existing Special Use Permit Issued in 1969 But From the Terms UMYC Had Originally Requested for the CUP.

1. The 1969 special use permit issued to UMYC.

In 1969, under the then-applicable city zoning ordinances, the City granted a three-year special use permit to UMYC. (A. 16.) That permit contained a number of explicit limitations, including specifically limiting the number of boats that could be moored at the marina to “30 sailboats” and “no more than 2 power boats.” (A. 18.) That special use permit was renewed at various times over the years and by 1976 the total number of boats permitted had increased to 42. (A. 19.)

2. In 1977, the City granted UMYC a conditional use permit with no limitation on the type of boats.

In 1977, as a result of zoning ordinance changes, the City Planning Commission recommended that UMYC apply for a permanent CUP instead of a renewable special use permit. (A. 19-20.) UMYC did so, requesting a CUP for a “Yacht Club” and initially requesting dockage and/or mooring facilities for “34 sailboat slips or lift spaces, 8 buoys and 2 slips for Yacht Club Committee [motor] boats” plus “4 dinghies or prams.” (A. 30.) UMYC also indicated it planned to build a clubhouse on the property. (Id.)

Over the course of a number of Planning Commission and City Council meetings, the terms of the CUP were negotiated. (A. 20-21, 32-33, 38-39, 571, 597; R.A. 15-16.) As a result, the CUP which was issued by the City on July 25, 1977 differed substantially and intentionally, not only from the existing special use permit but from the terms UMYC had originally requested for the CUP. (R.A. 15-16.)

While the special use permit had set forth explicit limits on the number of sailboats and the number of power boats, the 1977 CUP eliminated all restrictions on the types of boats. (A. 16, 43.) In return, UMYC agreed to reduce the total number of boats allowed from 42 to 30 and deferred its request for permission to add a clubhouse. (A. 571, 597; R.A. 15-16.) As a result of these negotiations, the relevant final language of the CUP issued on July 25, 1977 states as follows:

That, upon and attached and in conjunction with the use of said property may be located lifts, slips, docks and buoys capable of storing and keeping not more than 30 boats during the docking season and such facility shall not extend beyond 200 feet of the shoreline.

(A. 43.)

Beginning sometime after 2005, the City has claimed that the omission of the sailboat limitation in 1977 was somehow unintentional, even though no one involved from the City in 1977/1978 has ever so testified. The City has presented no testimony from a member of the City Council or Planning Commission involved in these 1977 discussions and negotiations. And the City's argument is contrary to the sworn testimony of Mr. Richard Putnam, who was actually involved in the 1977 CUP negotiations on behalf of UMYC, which testimony the City ignores in its brief.³ (R.A. 15-16.)

³ The City references the statements made by James Thibault and Bill Zucco, whose properties are located near UMYC. (Appellant's Brief, p. 7.) Neither are or were City officials. Mr. Thibault states only that it was his "understanding" that in 1977 UMYC was authorized for 30 sailboats. (A. 562.) Mr. Thibault was one of the Shorewood residents who lives across the street from the property owned by UMYC and had actually advocated that the City amend the CUP in 2007 to limit it to sailboats. (A. 597-598, 706.) Mr. Thibault's argument is premised not on any personal knowledge of the negotiations surrounding the

The City's argument is also belied by the fact that both the City Planning Commission and the City Council, in considering the 1977 CUP, had before them the prior special use permit which did contain such an explicit sailboat limitation and the City chose not to include that limitation in the CUP. (A. 16, 43; R.A. 15-16.)

In addition, and at the very same meetings the City considered the CUP for UMYC, it also considered one for the Shorewood Yacht Club -- one which did explicitly contain limitations for sailboats. For example, at the May 26, 1977 City Planning Commission meeting, as the very next agenda item after the Planning Commission voted to recommend that the CUP be granted to UMYC only limited to "30 boats," the Planning Commission voted to recommend that the Shorewood Yacht Club also be granted a CUP, but this one to "be limited to sailboat harboring only, except for two power boats to be used for managerial or rescue situations." (A. 21, 22.) Similarly, at the City Council meeting on July 25, 1977, the Council considered the proposed Shorewood Yacht Club CUP containing the sailboat-only limitation and then, as its very next agenda item, approved the UMYC CUP with no such limitation. (A. 32.)

If the City had in fact intended to limit the UMYC CUP to sailboats, between the language of UMYC's special use permit and the language of the proposed Shorewood Yacht Club CUP, it had ample examples of how it could have done so. Instead, the City

1977 CUP but on his reading of council meeting minutes. (A. 703-706.) The City later refers to Mr. Thibault's rendition as "a detailed submission from a long-term resident of the neighborhood." (Appellant's Brief, p. 11.) Likewise, Mr. Bill Zucco states only his understanding that in 1969 UMYC's property was to be used as a sailing club. (A. 509.)

eliminated all such limitations and simply used the term "30 boats."⁴ (A. 43.) The City's brief just ignores these material facts. (See Appellant's Brief, pp. 6-7.)

3. The 1978 CUP was issued eliminating certain buoys based on an agreement between UMYC and the City.

At an April 24, 1978 City Council meeting, UMYC agreed to eliminate certain buoys shown on its dock plan and, as a result, a new CUP was issued. (A. 45, 46-47.)

However, the language of the type of boats that could be docked remained unchanged from the 1977 CUP:

That upon and attached and in conjunction with the use of said property may be located lifts, slips, docks and buoys capable of storing and keeping not more than 30 boats during the docking season and such facilities shall not extend beyond 200 feet of the shoreline.

(A. 46-47.)

4. The fact that the CUP was not limited to sailboats is clear from discussions regarding a 1992 request for variance for a clubhouse.

That the City has always known that UMYC's CUP was not limited to sailboats is demonstrated by its consideration in 1992 of adding such a restriction in conjunction with UMYC's request to build a clubhouse. Again, the City simply ignores that fact in its brief. (See Appellant's Brief, pp. 7-8.)

⁴ The City was also well aware at the time of the differences between sailboat and motor boat use of marinas as a result of its amendment to its zoning code which led to UMYC's application for a CUP. See various Shorewood Planning Commission meeting minutes, at A. 48-75, which reflect discussions of whether and how sailboat and motor boat use of marinas under the proposed code should be differentiated.

In 1992, UMYC requested a variance from the City in order to build a clubhouse at the marina. (R.A. 17.) In considering those requests, the City specifically discussed that as part of granting the variances, it could add a condition prohibiting power boats at UMYC's marina. (Id.)

In an August 26, 1992 memorandum to the Planning Commission, Mayor and City Council, the City's Planning Director Brad Nielsen stated: "For example, if variances were granted on the basis that a sailing club has less potential for impact than a marina with power boats, a protective covenant could be created restricting dockage to sailboats." (A. 78.)

Similarly, in a September 17, 1992 memorandum to the Planning Commission, Mayor and City Council, Mr. Nielsen listed various restrictions the City might wish to consider if it granted UMYC's variance request, including "[h]arboring of boats shall be limited to sailboats with the exception of one power boat used by the Club." (A. 79.) The minutes of the September 22, 1992 Planning Commission meeting also reflect that Mr. Nielsen again raised that a sailboat-only limitation could be added as part of granting the requested variance. (A. 83.)

Ultimately, the City Council rejected UMYC's request and, as a result, UMYC never got a clubhouse and the City never got a restriction limiting UMYC's CUP to sailboats. (R.A. 17-18.)

5. Other City dealings with UMYC show that the City was well aware that power boats and sailboats have been kept at the marina since 1977.

Consistent with the 1977/1978 CUP, since 1977 and until 2005, both power boats and sailboats have been stored and kept at the marina without complaint by the City. (A. 569, 573-574, 576-577, 597; A. 682; R.A. 16, 18, 20.) Public records reflect this pattern of both sailboat and motor boat dockage.⁵ For example, the records of the Lake Minnetonka Conservation District (LMCD), which also regulates marinas on Lake Minnetonka, reflect that in 1999 UMYC had 3 power boats and 13 sailboats (A. 95); in 2000, 3 power boats and 11 sailboats (A. 98); in 2001, 3 power boats and 8 sailboats (A. 101); in 2002, 3 power boats and 13 sailboats (A. 104); in 2003, 2 power boats and 8 sailboats (A. 106); in 2004, 2 power boats and 11 sailboats (A. 109); and in 2005, 3 power boats and 12 sailboats. (A. 112; R.A. 21.) Records predating 1999 have been lost or destroyed. (R.A. 21.) UMYC, however, has had power boats among its mix of boats for years. (R.A. 16, 18, 21.)

Despite the annual dockage of both sailboats and power boats in each year for which LMCD still has records until the present dispute arose, the City certified to the LMCD that the UMYC “met the zoning ordinance and any other city permit or license requirements.” (A. 117-121.) Recognizing this, in its certification for 2006, and after the current dispute arose, City Planning Director Nielsen first added to the 2006 annual

⁵ The City’s own documentation contradicts the City’s statements that UMYC had not rented power boat slips prior to 2005, as stated in the City’s brief. (*See* Appellant’s Brief, p. 2, footnote 1.)

certification without any notice to UMYC the following: "Provided they limit the water harboring of boats to sailboats only." (A. 122.) This self-serving addition for 2006 highlights that despite UMYC's harboring of motor boats for some 30 years, the City had never before added such a limitation and as recently as March 19, 2005 had certified that UMYC "met the zoning ordinance and any other city permit or license requirements." (A. 121.)

Similarly, from 1977 until mid-2005, City records reflect that the City dealt with UMYC on various issues on some 30 different occasions and not once was there any concern noted about UMYC's harboring of power boats or any sailboat-only limitation in its CUP. (A. 123-335.)⁶

E. The Trial Court Decides That UMYC's CUP as Granted Allows Power Boats and Dismisses the Criminal Case Brought Against UMYC.

After nearly 30 years of harboring motor boats, it was not until a May 2005 letter to UMYC that the City first raised an issue about power boats being docked at UMYC. (A. 345-355.) After an exchange of correspondence, the City filed a criminal complaint against UMYC alleging that its docking of power boats was an illegal intensification of a non-conforming use. (*Id.*; A. 356.) The City initially erroneously served its criminal complaint on the Minnetonka Yacht Club, a sailing club which maintains a marina in Deephaven with slips for 36 power boats. (R.A. 20, 48.)

⁶ UMYC believes that the City itself has periodically studied and surveyed the marinas within its borders, which would further document that the City has known and not objected to motor boats at the UMYC marina. However, the City has refused to produce such studies or surveys. (A. 337, 338-339.)

In advance of trial, both parties submitted trial briefs and each party submitted 18 separate exhibits. (A. 358, 399.) On the basis of that record, on April 25, 2007, and on the morning of trial, the trial court granted UMYC's motion and dismissed the criminal case, finding that based on the "plain language" of the CUP and "on the interpretive language from the [City] with regard to the response to the [1992] variance request as well as with regard to the response to the [LMCD] from last summer," the CUP did not limit the use to just sailboats. (A. 418.)

F. The City Decides to Unilaterally Amend UMYC's CUP.

Recognizing that the trial court's April 25, 2007 decision conclusively established that power boats were in fact permitted under the 30-year-old CUP, just two weeks later, the City decided to obtain through other means the result the court has denied it. In a May 9, 2007 memorandum, City Planning Director Nielsen asked the Mayor and City Council for authorization to proceed with a City-initiated amendment to UMYC's CUP which would prohibit power boats. (A. 420.) Planning Director Nielsen was the same planning director who in 1992 had recommended that if the City granted UMYC's request for a clubhouse, it could add a sailboat-only restriction. (A. 78, 79, 83.)

While the memorandum suggested the Planning Commission conduct a public hearing on the proposed amendment prohibiting power boats, the hearing was to be a sham because the record shows the result was preordained. The May 9, 2007 memorandum states that after the public hearing, the Planning Commission "would make its recommendation to the City Council," and the Council "would adopt findings of fact,

amending the conditional use permit.” (A. 420-21.) The memorandum then noted that once the CUP was amended, new enforcement proceedings could be initiated against UMYC. Id.

A week later, in a work session following a regularly scheduled May 14, 2007 City Council meeting, the City Council, without prior notice to or knowledge of UMYC, provided the authorization Nielsen sought and directed the Planning Commission to hold a public hearing on amending the CUP to add the word “sail” before the word “boat” thereby precluding power boats from the UMYC marina in the future. (R.A. 49; A. 434, 463.)

Members of the City Council questioned the legality of the City unilaterally amending the CUP. Council Member Wellens stated: “[T]hey won their case. They’re in conformance with the zoning, and now we’re looking at changing the rules on them after the fact.” (A. 441.) Council Member Callies noted that CUP “remains in effect as long as the conditions are satisfied” and that “[u]sually it’s the applicant who’s requesting an amendment.” (A. 442.) Council Member Callies also questioned whether the City had the authority to unilaterally change the conditions of a CUP and predicted that if UMYC sued over the amendment, “they will say you don’t have any authority to amend the [CUP].” (A. 454.) Nonetheless, the Council chose to proceed as it was told in response to Council Member Callies’ concerns that if UMYC did sue the City, the City’s defense would be paid for by the League of Minnesota Cities insurance trust. (A. 450, 458.)

In accord with the scheme set out in Nielsen's May 9, 2007 memorandum, the Planning Commission went through the motions of conducting a public hearing on August 7, 2007 (A. 470, 499.) and September 4, 2007 (A. 511, 559.)⁷ As had been planned in Nielsen's memorandum, the Commission recommended amending the CUP to limit the use of the UMYC marina to 30 sailboats. Id.

The City Council then considered that recommendation on September 24, 2007 and October 22, 2007. (A. 565, 593, 607, 613.) Although not solicited, UMYC submitted various written materials addressing the history of power boat and other boat use at the marina. (A. 614, 666, 668, 682, 685.) Nonetheless, the City Council adopted Resolution No. 07-067 amending the 1978 CUP by adding one four-letter term as follows:

That upon and in conjunction with the use of said property may be located lifts, slips, docks and buoys capable of storing and keeping not more than 30 sailboats during the docking season, and such facilities shall not extend beyond 200 feet of the shoreline.

(A. 689; emphasis added.)

⁷ Neither UMYC nor its counsel received notice of the hearing prior to late July 2007 and neither was requested to attend, sought out for information or consulted in any way. To the contrary, their input was ignored. (R.A. 49.)

Council Member Wellens voted against the resolution, having noted that “I still perceive this as the changing of a C.U.P. unilaterally, and revoking the usage of private property.” (A. 610, 613.)⁸

Just one month later, the City Council then amended the CUP of the Shorewood Yacht Club to now allow 35 power boats. Its CUP for 30 years had explicitly prohibited power boats. (R.A. 35.)

G. UMYC Brings This Action in Response to the City’s Action and the Trial Court Grants Summary Judgment to UMYC.

Because the City’s ordinances do not address the availability and necessity of administrative appeal, UMYC requested that the City and its Council waive any potential requirement of administrative appeal, which they agreed to do. (R.A. 4, 10.)

On November 30, 2007, UMYC filed its Complaint seeking to enjoin the City from enforcing the amendment to the CUP. (R.A. 1.) The Complaint sets forth claims for declaratory judgment, injunctive relief and a petition for writ of mandamus. Id.

On April 17, 2008, UMYC filed its Notice of Motion and Motion for Summary Judgment and for Leave to Amend, arguing that the City’s amendment to the 30-year-old

⁸ On appeal, the City makes assertions about UMYC based on isolated complaints, primarily the complaints of Scott Brown. (Appellant’s Brief, p. 11; A. 701.) Mr. Brown is a former member of UMYC who had fought internally against power boats at UMYC and subsequently made his battle external. (A. 537, 702.) What the City ignores is that when Mr. Brown complained of an incident involving a female boater, which incident is highlighted in its appellate brief, UMYC immediately responded, explaining that the behavior of which Mr. Brown complained was that of a guest of one of the slip renters. The slip renter was told by UMYC to remove his boat from the marina. (A. 701.) Implicit in the City’s assertions is that power boaters as a class behave more badly than sailors, for which there is no support in the record.

CUP is invalid and unenforceable and that it should be granted leave to amend its Complaint to add a claim under 42 U.S.C. § 1983. (R.A. 33.) The City then filed its Motion for Summary Judgment. (A. 3.)

By Order filed August 28, 2008, the trial court denied the City's motion for summary judgment and granted that of UMYC. (A. 3.) The trial court ruled that the City cannot unilaterally add a condition to a CUP 30 years after its issuance and therefore declared the City's Resolution No. 07-067 invalid and unenforceable. (A. 3, 10.) After so ruling, the trial court additionally states that if its decision is incorrect and that the City could add a condition to UMYC's 30-year-old CUP, the court finds that the amendment was not arbitrary, capricious or unreasonable. (A. 13-14.) The trial court also denied UMYC's motion to amend its Complaint to assert a claim under 42 U.S.C. § 1983. (A. 14.) The City has appealed and UMYC has filed a Notice of Review. (A. 1; R.A. 47.)

ARGUMENT

I. THE TRIAL COURT, IN ACCORD WITH MINNESOTA LAW, CORRECTLY GRANTED SUMMARY JUDGMENT TO UMYC, THEREBY DECLARING SHOREWOOD'S RESOLUTION NO. 07-067 INVALID AND UNENFORCEABLE.

A. Standard of Review.

On review of the grant of summary judgment, this Court determines whether any genuine issue of material fact exists and, if not, whether the district court erred in its application of the law. Washington Mut. Bank, F.A. v. Elfelt, 756 N.W.2d 501, 505 (Minn. Ct. App. 2008). This Court's review is de novo. STAR Centers, Inc. v. Faegre &

Benson, L.L.P., 644 N.W.2d 72, 77 (Minn. 2002). Here, the City does not assert the existence of any issues of material fact. Rather, it contends that the trial court misapplied Minnesota law to the facts of record. (Appellant's Brief, p. 32.)

While it is true the City's decision to grant or deny an applicant's request for a CUP is reviewed as to whether it is arbitrary, capricious or unreasonable, whether a City has the authority to unilaterally amend a CUP is a question of law which is reviewed de novo. See State by Minneapolis Park Lovers v. City of Minneapolis, 468 N.W.2d 566, 569 (Minn. Ct. App. 1991); In re De Laria Transp., Inc., 427 N.W.2d 745, 748 (Minn. Ct. App. 1988) (ultimate question of authority to act is one of law).

And while the City asserts that its actions in 2007 were one of clarification of the CUP issued some 30 years earlier, this Court does not defer to the City's characterization of its action as one of clarification. Rather, that also presents a question of law for this Court to review de novo. Ubel v. State, 547 N.W.2d 366, 370 (Minn. 1996), *reh'g denied*.

B. The City Cannot Unilaterally Add a Condition to the CUP 30 Years After Its Grant.

A CUP is not a personal license, but a constitutionally protected property interest that attaches to and runs with the land. Northpointe Plaza v. City of Rochester, 465 N.W.2d 686, 689 (Minn. 1991); Dege v. City of Maplewood, 416 N.W.2d 854, 856 (Minn. Ct. App. 1987). Pursuant to Minn. Stat. § 462.3595, subd. 4, a certified copy of any conditional use permit must be recorded. A CUP "remains in effect until its terms are violated." Dege, 416 N.W.2d at 856; Minn. Stat. § 462.3595, subd. 3. See also Minn.

Op. Atty. Gen. 59A-32, 1990 WL 596916 (Minn. A.G. 1990) (R.A. 51) (“It seems clear that an ordinance which would allow a municipality to terminate such a permit regardless of whether or not the conditions agreed upon were observed would be in direct conflict with [Minn. Stat. § 462.3595] and, as such, beyond the power of the municipality to enact or enforce.”).

As a result, a CUP continues perpetually as long as its stated conditions are met and may not be unilaterally amended by the governing body. Id.⁹ See also 3 Rathkopf’s The Law of Zoning and Planning § 61:49 (4th ed. 2008) (“Conditions generally cannot be imposed after [a conditional use] permit is granted.”); 3 Rathkopf’s The Law of Zoning and Planning § 61:50 (4th ed. 2008) (“Where a special permit has been granted, the body granting it has no authority to subsequently review the grant and reverse itself.”).

It stands undisputed that when the City brought the 2006 criminal proceedings against UMYC, and based on the plain language of the 1977/1978 CUP, the court found UMYC to be in full compliance with the CUP. (A. 418.) Since the City had no authority to unilaterally subsequently amend that CUP to add a new condition 30 years later, the grant of summary judgment must be affirmed.

The City attempts to evade the above principles of law by asserting that what it did in 2007 was not an amendment to the 30-year-old CUP, but rather asserts its 2007 action was one of “clarification.” The City would have the Court believe that its addition of the

⁹ On appeal, the City does not appear to take issue with those principles of law, other than a vague reference to these principles in a footnote on page 23 of its brief.

word “sail” before “boats” 30 years after the CUP was issued is not an amendment. The City’s argument has no merit.

C. This Court Does Not Defer to the City’s Assertion That Its 2007 Resolution Was One of Clarification.

As previously stated, the City does not directly assert that it had authority to unilaterally amend a 30-year-old CUP to add a new condition. And Minnesota law does not support such an assertion. Rather, the City takes the position that what it did in 2007 was not an act of amendment to add a new condition but an act of “clarification.” The City tries to support its clarification argument with Minnesota Supreme Court cases discussing clarification actions by the Minnesota Legislature. The Minnesota Supreme Court cases cited by the City do not support the City’s assertion here.

The City cites to 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). (Appellant’s Brief, p. 14.) None of the cases cited deal with a vested property right in a CUP and, in essence, merely discuss when statutory amendments may be applied retroactively. And while the cases cited do recognize the ability of the Legislature to clarify its previous statutory enactments, whether what has been done is clarification is a question of law for the court. Ubel, 547 N.W.2d at 370.

In reviewing the City’s claim of “clarification,” this Court does not defer to the City’s characterization of its action in 2007 as one of a clarification. Honeywell, Inc. v. Minn. Life & Health Ins. Guar. Ass’n., 518 N.W.2d 557, 562 (Minn. 1994). As the

Supreme Court stated, “if [the Court] were always to accept the . . . characterization of an amendment as a ‘clarification,’ [the Court] would be abandoning [its] power to interpret the law.” *Id.* See also Bingham v. Bd. of Supervisors of Winona County, 8 Minn. 441, 8 Gil. 390 (1863) (“The opinion of a subsequent legislature upon the meaning of a statute, is entitled to no more weight than that of the same men in a private capacity.”).

The question posed here by the City is whether the 2007 addition of the word “sail” before “boats” is one recognized by law as a “clarification” or whether its action in 2007 was a substantive modification of the 1977/1978 CUP. The record as applied to Minnesota law undisputedly establishes that the City’s action was not one of clarification but one of amendment. What occurred in 2007 was the City’s attempt to substantially and unilaterally change UMYC’s vested property rights. This, as the trial court correctly held, the City cannot do.

D. A CUP Whose Terms Are Clear and Unambiguous Cannot Be Subsequently Clarified.

It stands undisputed that the 1977 CUP of the City, which was modified in 1978 (but not as to the language relevant here) reads in relevant part:

That, upon and attached in conjunction with the use of said property may be located lifts, slips, docks and buoys capable of storing and keeping not more than 30 boats during the docking season and such facility shall not extend beyond 200 feet of the shoreline. (Emphasis added.)

(A. 46-47.)

As the trial court concluded in dismissing the criminal complaint against UMYC, the “plain language” of the CUP did not limit the UMYC marina’s use to just sailboats.

(A. 418.) On appeal, the City does not assert that the 1977/1978 CUP was in any respect ambiguous. In fact, on appeal, the City admits that the 1977/1978 CUP is not ambiguous, stating: “Here UMYC . . . complied with the terms of the CUP document as written.” (Appellant’s Brief, p. 20; emphasis in the original.)¹⁰ And by the use of the term “boats” in the CUP, the City unambiguously did not restrict the type of boats that could be stored and kept at the marina – neither by size nor by means of propulsion.

What the City ignores in presenting its “clarification” argument is that the Minnesota Supreme Court has specifically held that one cannot purport to later “clarify” a statute whose language as enacted is clear and unambiguous. Ubel, 547 N.W.2d at 370. *See also State v. Mann*, 189 P.3d 843, 848 (Wash. Ct. App. 2008) (“In general, legislative amendments change unambiguous statutes and legislative clarifications interpret ambiguous statutes.” (emphasis omitted)). So, likewise, here, since the City’s CUP as issued in 1977/1978 is admittedly unambiguous, the City’s subsequent action in 2007 cannot as a matter of law be one of “clarification.” The City’s assertion that “it lawfully clarified the permitted use under a CUP” fails as a matter of law and the trial court’s grant of summary judgment should be affirmed.

¹⁰ Even if the term “boats” was somehow ambiguous, which it is not, that term must be construed in favor of the property owner. Frank’s Nursery Sales, Inc. v. City of Roseville, 295 N.W.2d 604, 608 (Minn. 1980).

E. A City 30 Years Later Cannot Clarify Its Earlier Enacted CUP.

In addition, the City presents no case law where the courts have allowed a purported "clarification" 30 years after the original enactment. The minutes of the City Council meeting at which the City Council approved the 1977 CUP show that Mayor Frazier presided with Council Members Haugen, Huttner, Keeler and Naegele present. Also shown present were Attorney Kelly, Engineer Norton and Clerk Wiltsey. (A. 32.)

At an April 24, 1978 City Council meeting, UMYC agreed to eliminate certain buoys shown on the dock plan and, as a result, a new CUP was issued. However, the language of the type of boats that could be docked remained unchanged from the 1977 CUP:

That, upon and attached in conjunction with the use of said property may be located lifts, slips, docks and buoys capable of storing and keeping not more than 30 boats during the docking season and such facility shall not extend beyond 200 feet of the shoreline.

(A. 46-47.)

The City Council minutes show that present at that 1978 meeting were Mayor Frazier, Council Members Naegele, Haugen, Heiland, with Keeler arriving late. Others present were Attorney Kelly, Engineer Norton and Clerk Wiltsey. (A. 45.)

When the City Council took its purported action of clarification some 30 years later in 2007, the record shows that those now involved for the City were Mayor Lincee, Council Members Callies, Turgeon, Wellens and Woodruff; Attorney Keane; Acting Administrator/Director of Public Works Brown; Director Nielsen; and Engineer Landini.

(A. 593.) There is no legal basis to conclude that the 2007 City Council 30 years later was in any fashion interpreting (i.e., clarifying) the 1977/1978 CUP as opposed to substantially changing the CUP. Honeywell, Inc., 518 N.W.2d at 562.

As the Minnesota Supreme Court has also recognized, a subsequent legislature is not the interpreter of laws enacted by a prior legislature. Ubel, 547 N.W.2d at 370. The same is true for a city council. When an amendment which in effect construes and clarifies a prior ambiguous enactment is enacted soon after the original act, it may be logical to regard the amendment as a legislative interpretation of the original act. If, however, the amendment is passed many years after the original enactment, the assertion of clarification is not met and instead the change must be viewed as a substantive change with a new right created or an existing right withdrawn.

The City ignores that under well-established Minnesota law the very act of amendment carries with it the presumption that the enactor intended to change the original act by creating a new right or withdrawing an existing right. County of Washington v. Am. Fed. of State, County and Mun. Employees, Council No. 91, 262 N.W.2d 163, 168 (Minn. 1978). Therefore, any change of the scope or effect of an existing statute by addition, omission or substitution of provisions is treated as amendatory. That presumption of intent to change “is strengthened” when that “amendment was in response to the district court’s judgment.” Id. And to rebut the presumption that the new amendment amends the prior enactment, there must be, as previously stated, an ambiguity in the original enactment. Ubel, 547 N.W.2d at 370.

Here, the City only sought to amend the CUP after the trial court threw out its criminal complaint on the “plain language” of the CUP. The City certainly cannot and does not overcome the legal presumption that what it did in 2007 was seek to change UMYC’s vested property rights, which action it could not do.

The City in its brief to this Court ignores all of the above principles of law in making its “clarification” argument. Based on the above principles, the trial court’s grant of summary judgment to UMYC must be affirmed.

F. The Cases Relied on by the City Do Not Support Reversal Here.

1. In re Block and In re North Metro Harness, Inc. do not support reversal.

The City cites to and relies on this Court’s decision in In re Block, 727 N.W.2d 166 (Minn. Ct. App. 2007). That case involved a CUP to operate a dog breeding facility, which, as one of its conditions, required that the dogs be surgically debarked. It was less than one month after approving the CUP, and after receiving a large volume of material from the Minnesota Federated Humane Society and others, the county relaxed the condition that all dogs be debarked to the more humane condition that all dogs wear shock collars. Id. at 171-173.

On appeal, this Court did not decide whether even this prompt reconsideration in favor of the CUP holder was appropriate. Instead, it remanded the case to the county for further proceedings on the grounds that the original granting of the CUP was arbitrary because the county had failed to take into account Minnesota policy and statutes

concerning cruel and inhumane treatment toward animals and had failed to consider the ramification of its debarking requirements. Id. at 180.

Block is factually and legally distinguishable and provides no support for the premise that the City can unilaterally amend a 30-year-old CUP, as the City urges before this Court. As this Court has recognized, “the situation in Block was the decisionmaker’s reconsideration to relax a condition of a CUP soon after its imposition, not reconsideration to impose new conditions to a CUP long after issuing it.” Minnewawa Sportsmen’s Club v. County of Aitkin, 2008 WL 314495 at *5 (Minn. Ct. App. 2008) (A. 717).

Likewise, the City’s citation to In re North Metro Harness, Inc., 711 N.W.2d 129, 134 (Minn. Ct. App. 2006), *rev. denied*, is of no value because it has nothing whatsoever to do with CUPs and only addresses the ability of the Minnesota Racing Commission to reconsider the denial of a horse racing license just two days later based on new information.

2. Unpublished decisions of this Court cited by the City do not support reversal.

The City also asserts this Court’s unpublished decision in Edling v. Isanti County, 2006 WL 1806397 (Minn. Ct. App. 2006) (A. 719) is “particularly applicable” and asserts as to the Court’s subsequent unpublished decision in Minnewawa Sportsmen’s Club v. County of Aitkin, 2008 WL 314495 (Minn. Ct. App. 2008) (A. 713), “while [it] has some applicability to the issues in this matter, it is readily distinguishable and actually supports the City’s action in this matter.” (Appellant’s Brief, p. 21.) As this Court is well aware, and the Minnesota Supreme Court has stated, unpublished decisions of this Court are not

precedential and are to be used with great caution. Vlahos v. R&I Constr. of Bloomington, Inc., 676 N.W.2d 672, 676 n.3 (Minn. 2004). The City does not observe the Supreme Court's caution in its argument to this Court.

Edling does address a CUP, but the sole issue was whether the county had sufficient grounds for revoking a CUP because its terms had been violated. Id. at *1. (A. 720.) Here the City has not revoked UMYC's CUP.

The City cites Edling because in that unpublished opinion, this Court affirmed the revocation of the CUP, stating "the county's decision to revoke the CUP because it exceeded the scope of the CUP application was not arbitrary." (A. 722-723.) Judge Minge dissented, however, correctly recognizing that the legal proposition that the representations by the landowner somehow confine or become an implied condition of a CUP is not found in any Minnesota statute or in any reported decision. Judge Minge turned to the Wisconsin Court of Appeals decision in Bettendorf v. St. Croix County Bd. of Adjustment, 591 N.W.2d 916, 918-19 (Wis. Ct. App. 1999), which held that development plans filed by the applicant with the local unit of government did not limit the actual CUP as issued. (A. 724.)

a. The analysis of the dissent in Edling is in accord with Minnesota law and cases across the country and supports the trial court's ruling in this case.

Judge Minge's analysis in dissent is in accord with the case law across this country as well as the explicit terms of Minn. Stat. § 462.3595, subd. 3 that states a "conditional use permit shall remain in effect as long as the conditions agreed upon are observed."

In granting a CUP, a municipality can leave no doubt as to what was intended because the conditional use permit is not personal to the applicant but rather runs with the land. Dege, 416 N.W.2d at 856. One who subsequently obtains that land succeeds to any benefits that the original grantee of the permit enjoyed, as well as being subject to its conditions. That is why “the conditions imposed must be expressed with sufficient clarity on the use of the land and cannot incorporate by reference statements made at a hearing by the applicant for the conditional use permit nor can implied requirements be enforced.” 101A C.J.S. Zoning & Land Planning § 260 (2008).

Courts across the country have rejected an assertion that a governmental body can later seek to incorporate by reference into its issued CUP statements made by an applicant at a hearing. For example, in In re Farrell & Desautels, Inc., 383 A.2d 619, 621 (Vt. 1978), a developer was denied a permit to construct a planned unit development over two parcels of land on the basis that the developer had previously “committed” the first parcel of land “to a use other than the planned unit development.” Id. at 620. While the trial court found that the developer represented to the Zoning Board of Adjustments that it would not use the first parcel for any building use, this representation was not made a condition of the permit to build on the first parcel. Id.

In vacating the trial court order upholding the denial of a permit, the Vermont Supreme Court refused to “subscribe to the proposition that a formal written [Zoning Board of Adjustment] order which contained some express terms and conditions can also be said to carry with it silent and unexpressed terms and conditions.” Id. at 621.

Without the requirement of explicit conditions, the Vermont Supreme Court reasoned that aggrieved parties would have difficulty appealing permits for they would have had no notice of all conditions imposed, and similarly, subsequent purchasers would lack notice of all restrictions running with the property. *Id.* See also In re Kostenblatt, 640 A.2d 39, 43 (Vt. 1994) (conditions that are not explicitly stated in a conditional use permit may not be imposed on the permittee); Bettendorf, 591 N.W.2d at 919 (Wisconsin Court of Appeals refused to read into the permit conditions the board discussed but chose not to incorporate); 2 Am. Law Zoning § 14:30 (5th ed. 2008) (“Conditions must be clearly expressed and will be strictly construed.”). See also S. Woodbury Taxpayers Ass’n v. Am. Institute of Physicians, Inc., 428 N.Y.S.2d 158, 162 (N.Y. Sup. Ct. 1980).

The same is true in Minnesota. Conditions imposed in a conditional use permit must be explicit. So regardless of any discussions at the time the CUP was considered, the alleged representations of the applicant or alleged internal considerations which prompted the grant of the CUP, all that can be enforced is that which is stated in the CUP. No conditions can be implied and the CUP cannot be unilaterally amended by the City to add conditions not originally imposed. And this Court so recognized in its subsequent unpublished decision in Minnewawa Sportsmen’s Club. (A. 713.)

b. This Court’s subsequent decision in Minnewawa Sportsmen’s Club is in accord with the dissent in Edling.

Two years after Edling, this Court addressed an amendment to a CUP in Minnewawa Sportsmen’s Club. (A. 713.) The CUP issued to Minnewawa Sportsmen’s Club was to operate a trapshooting range, rifle range, archery range, gun safety facility,

restaurant and bait shop but with no conditions as to operational hours. (A. 713-714.) In 2006, Minnewawa applied to amend its CUP to include “nine new acres for [an] archery range and a new [service] road.” (A. 714.) Minnewawa contended the county then altered its amendment application “to attempt to open the original 1997 CUP to add conditions to limit shooting hours at the club.” (Id.) The commission approved the CUP with 17 conditions and Minnewawa challenged, asserting the CUP as issued improperly took away operational rights possessed by Minnewawa. (A. 715.)

The county relied on this Court’s unpublished decision in Edling. (A. 715.) This Court took issue with the county’s assertion of implied conditions in a CUP based on statements made during the 1997 CUP approval process. This Court now recognized that “unless the landowner’s purportedly binding representations are themselves recorded with the CUP, interested parties or future purchasers may have no notice of use restrictions on the property,” citing Minn. Stat. § 394.301, subd. 4. That statute requires that a certified copy of any conditional use permit be recorded with the county recorder or register of titles. Since there is no record that such conditions were so recorded, this is critical “since a CUP runs with the land and continues to encumber the property even after it is conveyed to subsequent owners.” (Id.)

This Court also acknowledged that such an assertion presents a “practical problem concerning the allegedly binding representation – imprecision.” Ultimately, this Court decided it need not decide the legal question of whether oral representations at the 1997 hearing can or do constitute conditions incorporated into the 1997 CUP because

construction of the 1997 CUP was not raised to or anywhere decided by the commission on this record and, therefore, the question was not properly before the Court. (Id. at A. 715-716.)

This Court ultimately concluded that the county had no procedural basis to impose new conditions restricting the hours of operation of the shooting range. (A. 716.) This Court rejected the county's argument that it has the inherent authority "to reconsider the 1997 CUP, citing In re Block, 727 N.W.2d 166." Again noting that a CUP is not a personal license but a property right that attaches to and runs with the land, if the commission "has inherent authority to 'clean up' imprudently issued CUPs, then the case law that establishes that a CUP may continue perpetually if its conditions are not violated would be meaningless." (A. 717.) This Court also acknowledged that "because the situation in Block was the decisionmaker's reconsideration to relax a condition of a CUP soon after its imposition, not reconsideration to impose new conditions to a CUP long after issuing it, Block does not bear on the question before [the Court]." (A. 717.)

The City, as it did before the trial court, attempts to distinguish Minnewawa by arguing that in that case the county "invented entirely new and different conditions for the existing CUP," while the City claims that here it is simply trying to add conditions that it argues were implied originally. (Appellant's Brief, p. 22.) That, however, was precisely the same argument Aitkin County made in Minnewawa. *See, e.g., Minnewawa* at *1 ("the county now takes the position that the original CUP included restrictions"). As previously stated, this Court held in Minnewawa that whether or not the conditions were somehow

implied in the original CUP was irrelevant to the issue before it and that it would not decide the issue. Instead, irrespective of the outcome of that issue, this Court simply held that the county “had no procedural basis” to unilaterally amend a CUP long after issuing it. Thus, even if the City were right, and it is not, that the original CUP somehow impliedly incorporates the restrictions now desired by the City, that is irrelevant to the issue of whether the City has the authority to unilaterally amend the CUP. The City does not have such authority, and thus, its purported amendment is invalid, irrespective of the alleged original intent.

The City further states that Minnewawa supports its position because the Court remanded to the county with instructions to amend the CUP that it issued, thereby implying that the county does have authority to amend a CUP. That ignores, however, that in Minnewawa the landowner applied to have additional land added to the 10-year-old CUP, and the county agreed subject to certain limitations on the use of that new land. In issuing the new CUP, the county took it upon itself to add conditions to the language governing the original property, conditions it claimed were implied all along. Having determined that as a matter of law the county lacked any authority to unilaterally amend the limitations of the 10-year-old CUP, this Court remanded with instructions that the county execute an amended CUP without the added restrictions to the original property. To argue that this somehow supports the authority of a government body to unilaterally amend a CUP is disingenuous.

As a matter of law, just as Aitkin County and Minnewawa “had no procedural basis” to unilaterally amend the CUP years after the fact, neither did the City here. Just as Aitkin County had no authority to unilaterally “clean up” a CUP long after issuing it, neither did the City here. Just as Aitkin County’s long after-the-fact unilateral amendment was invalid, so, too, is the City’s. The trial court had it right and UMYC was entitled to the order declaring City Resolution No. 07-067 invalid and unenforceable.

G. The Record Does Not Support That the City Made a Drafting Error in Its 1977/1978 CUP.

In essence, the rationale posed for the City’s 2007 action has been that it was only due to a drafting oversight that the 1977/1978 UMYC CUPs were not limited to sailboats. (A. 688.) Even if there were such error, the law does not allow the City’s 2007 amendment. But in addition, there is no evidence to support such an assertion of “error” and the overwhelming evidence is to the contrary.

In drafting the original CUP without any sailboat-only restriction, the City had before it not only the 1969 special use permit but the proposed CUP for the Shorewood Yacht Club, both of which contain explicit sailboat-only limitations. (A. 18, 21, 22, 32.) Thus, if the City had intended to restrict UMYC’s CUP to only sailboats, it had the language to do so in front of it.

In addition, the record reflects that the sailboat-only limitation was negotiated out of the UMYC CUP in exchange for reducing the total number of boats allowed from 42 to 30. (R.A. 15-16.) Mr. Putnam was one of the leaders of UMYC’s negotiations with the

City in 1977. Mr. Putnam explained that much of the negotiations leading to the 1977 CUP centered on the number and type of boats. As Mr. Putnam explains:

[The UMYC] wanted the ability to lease to boats of all types. The trade off was [UMYC] agreed to accept the City's desired limitation of 30 boats.

(R.A. 16.)

And until this dispute arose in 2005, there was never an objection to UMYC's dockage of power boats. To the contrary, the City repeatedly certified that UMYC was in compliance with all applicable zoning ordinances and, in 1992, specifically discussed that a sailboat-only limitation "could be created" in connection with granting UMYC's request for a clubhouse. (*See* Brief, *supra*, at pp. 8-11.)

On this record, the trial court correctly ruled as a matter of law that the City could not add a condition to a CUP 30 years after its issuance and granted summary judgment to UMYC.

II. IF THIS COURT SHOULD CONCLUDE THAT SUMMARY JUDGMENT WAS WRONGLY GRANTED TO UMYC, THIS COURT MUST ADDRESS WHETHER THE CITY'S DECISION TO AMEND A 30-YEAR-OLD CUP WAS ARBITRARY, CAPRICIOUS OR UNREASONABLE.

After granting summary judgment to UMYC, the trial court then stated that assuming "arguendo that the [trial court's] decision is incorrect and that [the City] could add a condition to [UMYC's] 30-year-old CUP, which it cannot, nevertheless, in the interests of judicial economy, the issue of whether [the City's] amendment to [UMYC's]

CUP was arbitrary, capricious or unreasonable is addressed.” (A. 13.)¹¹ The trial court ultimately concluded that it was not arbitrary, capricious or unreasonable. (*Id.*) UMYC has filed a Notice of Review challenging that ruling on appeal. (R.A. 47.)

A. There Was No Drafting Oversight.

The Minnesota Supreme Court has held that in determining whether a governmental body acted arbitrarily, capriciously or unreasonably, the Court must determine whether the evidence could support or justify its determination. Frank’s Nursery Sales, 295 N.W.2d at 608; Watab Twp. Citizen Alliance v. Benton County Bd. of Comm’rs., 728 N.W.2d 82, 89 (Minn. Ct. App. 2007), *rev. denied* (a city’s decision is arbitrary or capricious if it offers an explanation for its decision that runs counter to the evidence). Since this issue comes before the Court pursuant to summary judgment motions, this Court does not defer to the trial court’s decision. *Id.*

The stated rationale for the City’s amendment is that it was due to a “drafting oversight” the 1977/1978 UMYC CUPs were not limited to sailboats. (A. 688.) While it is true that this Court gives deference to a governmental body’s land use decisions, such a decision must be with evidentiary support. BECA of Alexandria, L.L.P. v. County of Douglas by Bd. of Comm’rs., 607 N.W.2d 459, 462-63 (Minn. Ct. App. 2000). There is no evidence to support this finding of “drafting oversight” and the overwhelming

¹¹ As the City admitted to the trial court, this issue is only presented if the court concludes that what the City did and had authority to do in 2007 was one of clarification of the terms of the 1977/1978 CUP. (City of Shorewood’s Surreply Memorandum of Law, p. 5, dated May 27, 2008.)

evidence, as discussed previously, opposes it. It is arbitrary, capricious or unreasonable to conclude that sailboat-only limitations had always been intended.

As previously stated, when drafting the original CUP without any sailboat-only restriction, the City had before it not only the 1969 special use permit but the proposed CUP for the Shorewood Yacht Club, both of which contain explicit sailboat-only limitations. If the City had intended to restrict UMYC's CUP to only sailboats, it had the language to do so right before it.

In addition, the record reflects that the sailboat-only limitation was negotiated out of the UMYC CUP in exchange for reducing the total number of boats allowed from 42 to 30. And until this dispute arose in 2005, there was never any objection to UMYC's dockage of power boats. To the contrary, the City repeatedly certified that UMYC was in compliance with all applicable zoning ordinances and, in 1992, specifically discussed that a sailboat-only limitation "could be created" in connection with granting UMYC's request for a clubhouse. Those underlying facts were simply ignored in the City's findings of fact. (A. 688.)

B. City Reached a Predetermined Result.

These undisputed facts, together with the City's de facto decision to adopt the amendment before it conducted public hearings or considering UMYC's evidence, demonstrates that the amendment was arbitrary, capricious or unreasonable. Although the City claims it afforded UMYC due process because it conducted public hearings at which

it allowed UMYC to make a presentation, it cannot be disputed that it had predetermined the outcome.

The amendment process began just two weeks after the trial court held in the criminal action that the CUP did not prohibit power boats. (A. 420.) The City Planning Director set forth the City's strategy in his May 9, 2007 memorandum. That memorandum states that after conducting a public hearing, the Planning Commission "would make its recommendation to the City Council," whereupon the Council "would adopt findings of fact, amending the conditional use permit," whereupon new enforcement proceedings could begin. (A. 420-421.) This does not constitute due process. See Goldberg v. Kelly, 397 U.S. 254, 271 (1970) (due process requires decision by an impartial official); Ginsberg v. Minn. Dept. of Jobs and Training, 481 N.W.2d 138, 141 (Minn. Ct. App. 1992), *rev. denied* (same); 3 Rathkopf's The Law of Zoning and Planning § 57:66 (4th ed. 2008) ("The basic rule, applicable to all, is that a hearing before the body must be fair in all respects and must not be a mere formal procedure intended to precede a predetermined result.") Here, all the City did was go through the motions in order to reach its predetermined result. The City's decision is arbitrary, capricious and unreasonable.

Therefore, even if the City did have the authority to unilaterally amend the 30-year-old UMYC CUP, which it did not, its decision to do so should be reversed and rendered unenforceable on the alternate ground as being arbitrary, capricious or unreasonable.

III. IF THIS COURT SHOULD DISAGREE WITH THE TRIAL COURT'S RULING, COUNT III OF THE COMPLAINT CANNOT BE DISMISSED.

UMYC agreed before for the district court that if the City's unilateral amendment to the 30-year-old CUP is declared invalid, then Count III of its Complaint seeking the commencement of eminent domain proceedings is moot. (R.A. 6-7; Plaintiff's Reply Memorandum in Support of Its Motion for Summary Judgment, et al., p. 10, dated May 21, 2008.) However, if this Court were to uphold the 2007 CUP amendment, then the question becomes whether the 2007 amendment constitutes a taking. Count III of UMYC's Complaint states a valid claim, and therefore, the case cannot be dismissed under those circumstances but must be remanded to the trial court for further proceedings.

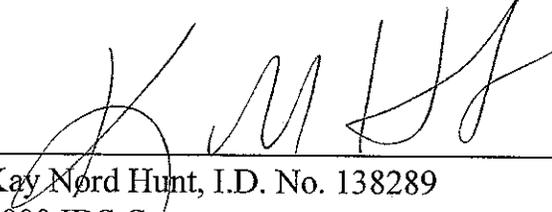
CONCLUSION

Respondent UMYC respectfully requests that the grant of summary judgment to UMYC be affirmed. The Appellant City of Shorewood's Resolution No. 07-067 is invalid and unenforceable. If this Court should uphold the CUP amendment, the case must be remanded to proceed on Count III of the Complaint.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: December 22, 2008

BY



Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Respondent Upper Minnetonka Yacht Club

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 1 and 3, for a brief produced with a proportional font. The length of this brief is 9,817 words. This brief was prepared using Word Perfect 12.

LOMMEN, ABDO, COLE, KING & STAGEBERG, P.A.

Dated: December 22, 2008

BY  _____

Kay Nord Hunt, I.D. No. 138289
2000 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 339-8131

Attorneys for Respondent Upper Minnetonka Yacht Club