

CASE NO. A12-0681

**STATE OF MINNESOTA
IN COURT OF APPEALS**

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

Respondents,

vs.

City of Elk River,

Appellant.

**BRIEF OF *AMICUS CURIAE*
LEAGUE OF MINNESOTA CITIES**

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STATEMENT OF THE LEGAL ISSUE

Minnesota law provides that “a conditional use permit shall remain in effect as long as the conditions agreed upon are observed.” Can a city revoke a conditional use permit for violations of its conditions if the use of property that was conditionally authorized by the permit subsequently becomes a nonconforming use because of a zoning amendment?

The district court held that a city does not have authority to revoke a CUP governing a nonconforming use.

STATEMENT OF THE IDENTITY AND INTEREST OF *AMICUS CURIAE*

The League of Minnesota Cities (League) has a voluntary membership of 830 out of 853 Minnesota cities.¹ The League represents the common interests of Minnesota cities before judicial courts and other governmental bodies and provides a variety of services to its members including information, education, training, policy-development, risk-management, and advocacy services. The League's mission is to promote excellence in local government through effective advocacy, expert analysis, and trusted guidance for all Minnesota cities.

STATEMENT OF THE CASE AND FACTS

The League concurs with the City's statement of the case and facts.

LEGAL ARGUMENT

The City's brief demonstrates why the district court's decision should be reversed. The League concurs with the City's legal arguments and will not repeat them here. Instead, this brief focuses on this appeal's statewide significance and on why it would be bad public policy to hold that a conditional use permit (CUP) cannot be revoked even though its conditions are violated if the use of property that was conditionally authorized by the CUP subsequently becomes a nonconforming use because of a zoning amendment.

¹ The League certifies under Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the League made a monetary contribution to its preparation or submission.

I. This case will have a significant, statewide impact.

The League has a public interest in this case as a representative of cities throughout Minnesota. The League sought permission to participate as *amicus curiae* because this case will have a significant, statewide impact on cities' land-use authority and on the public health, safety, and welfare of the Minnesota citizens that are protected by the conditions attached to CUPs. The district court created new law when it erroneously held that a city cannot revoke a CUP for a property use that subsequently becomes a nonconforming use because of a zoning amendment even though it is undisputed that the CUP's conditions were violated.² All Minnesota cities have a public interest in correcting this error and in confirming that a city has authority to revoke a CUP that is attached to a nonconforming use if the CUP's conditions are violated. Without this authority, Minnesota cities will not be able to effectively enforce CUPs for nonconforming uses because permit holders will be able to violate the conditions of their CUPs without fear of revocation. This will harm Minnesota citizens throughout the state because cities have adopted these conditions to protect the public health, safety, and welfare.

Indeed, cities designate certain property uses as conditional uses because although they are generally favorable uses of property, they also pose potential hazards that need

² The City granted Respondents a CUP in 1984 to operate their property as a campground. Appellant's App. at A. 11-13. The City subsequently amended its zoning ordinance in 1988, and campgrounds are no longer permitted as conditional uses. Appellant's App. at A. 14, 17. As a result, the campground became a nonconforming use. Minn. Stat. § 462.357, subd. 1(e) (a).

to be mitigated to protect the public. *Zylka v. City of Crystal*, 167 N.W.2d 45, 48-49 (Minn. 1969) (conditional uses are generally compatible with the basic use classification of a particular zone but are not be permitted to be located as a matter of right in every area within the zone because of hazards inherent in the use itself or because of special problems that a proposed location may present); *Zoning Guide for Cities*, League of Minnesota Cities, Jan. 2012, at 19 (<http://www.lmc.org/page/1/LandUseMaterials.jsp>) (conditional uses are generally favorable uses but pose potential hazards that need to be mitigated). For example, local governments commonly designate gravel quarries, electrical substations, recycling facilities, animal feedlots, campgrounds, golf courses, outdoor recreational facilities, and cemeteries as conditional uses. 8-44 *Zoning and Land Use Controls* § 44.01, Matthew Bender & Company, Inc., 2012. In addition, cities will often designate different conditional uses for different zoning districts. In the city of Minnetonka's general business district, for example, some conditional uses include fast food restaurants, theaters, licensed day care facilities, hospitals, medical clinics, marinas, and accessory sidewalk cafes and outdoor eating areas. Minnetonka Code of Ordinances, Ch. 3, § 300.19.

A conditional use is a use of land that is allowed if certain standards or "agreed upon conditions" are met. Minn. Stat. § 462.3595. Minnesota cities commonly adopt both general and specific standards for conditional uses in order to protect the public health, safety, and welfare. *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. Ct. App. 2004) (upholding a city's use of a general standard for CUPs that required applicants to demonstrate that their proposed conditional use would not have a

negative impact on the “general public health, safety and welfare”). General standards apply to all conditional uses in a particular city. *Conditional Use Permits, Frequently Asked Questions*, League of Minnesota Cities Insurance Trust, 2008.

(<http://www.lmc.org/page/1/LandUseMaterials.jsp>). For example, a city may require that all conditional uses conform to the comprehensive land-use plan, be compatible with adjoining properties, and be served by adequate roads and public utilities. Specific standards, in contrast, only apply to a particular type of conditional use. For example, a city may adopt specific standards for the conditional use of businesses with drive-thru service that impose requirements for off-street parking, loading areas, landscaping, and hours of business operation. If cities cannot effectively enforce the general and specific conditions in the CUPs attached to nonconforming uses, the public will be harmed.

Consider, for example, a city that imposes conditions regarding gating, fencing, and the use of buffer zones for a private shooting range that operates under a CUP. If the city cannot effectively enforce these conditions, it could create a significant safety risk for individuals using the range and for the neighboring public. Or consider, a city that imposes a condition limiting the hours of operation for a gravel pit operating under a CUP to mitigate noise pollution. If the city cannot effectively enforce this condition, neighboring properties could be harmed by noise from the gravel pit’s operation late at night and early in the morning. In short, the conditions that are attached to CUPs are an important exercise of municipal police power intended to protect the public health, safety, and welfare, and there will be serious, negative effects on the public if cities lose their authority to effectively enforce these conditions.

And finally, this case raises one additional significant issue of statewide impact for Minnesota cities. In their complaint, Respondents sought tort damages for the City's alleged interference with their tenants' rental contracts by imposing "impermissible, arbitrary and capricious permit conditions" on the renewal of the interim use permit. Am. Compl. ¶ 94. The district court did not specifically address this issue, but it is important to all Minnesota cities for this Court to confirm that city councils are entitled to immunity from tort claims for their discretionary decisions regarding what conditions should attach to land-use permits to protect the public. As the City has already established, statutory discretionary immunity protects cities' discretionary permitting decisions regardless of whether a city council abuses its discretion when determining what conditions should apply to a particular land-use permit. Minn. Stat. § 466.03, subd. 6; Appellant's Br. at 16-17.

II. It would be bad public policy to hold that a CUP for a nonconforming use can never be revoked even though the CUP's conditions are violated.

It would be bad public policy to hold that a CUP for a nonconforming use can never be revoked even though the CUP's conditions are violated. First, such a holding would invalidate lawfully adopted police-power regulations intended to protect the public health, safety, and welfare. Minn. Stat. § 462.351 (the exercise of municipal planning and zoning authority promotes "the public health, safety, and general welfare"). It would be bad public policy to invalidate these powers, and it would also be inconsistent with the broad deference that courts have traditionally provided to the exercise of police power.

See, e.g., Dale Properties, LLC v. State, 638 N.W.2d 763, 769 (Minn. 2002) (Paul

Anderson, J., concurring) (holding there was no unconstitutional taking as a matter of law because the state properly exercised its police power to protect public safety); *State v. Crabtree Co.*, 15 N.W.2d 98, 100 (Minn. 1944) (municipal police powers are broadly interpreted); 6A *Municipal Police Power and Ordinances*, *McQuillin Mun. Corp.* § 24.44 (3rd ed. 1997) (general welfare clauses delegate broad municipal police powers). This Court should reject Respondents' novel argument that a city's authority to enforce its own lawfully adopted police-power regulations should evaporate simply because the city exercises its discretion to amend its own local zoning ordinance. Such an interpretation is bad public policy and is inconsistent with the plain language of the two statutes at issue.

The conditional-use-permit statute provides that: "A conditional use permit shall remain in effect as long as the conditions agreed upon are observed, but nothing in this section shall prevent the municipality from enacting or amending official controls to change the status of conditional uses." Minn. Stat. § 462.3595. Thus, the statute's plain language logically implies that a CUP does not remain in effect—that is, a city can revoke a CUP—if its conditions are not observed. *NBZ Enters., Inc. v. City of Shakopee*, 489 N.W.2d 531 (Minn. Ct. App. 1992) (recognizing that pursuant to the conditions attached to a CUP, a city could revoke a conditional use permit if the city finds that the applicants have substantially, or repeatedly violated the permit's terms); *Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d 184, 189 (Minn. Ct. App. 2009) (recognizing that a city may take remedial action upon the violation of a CUP because "a conditional use permit continues until its provisions are violated"). Further,

the conditional-use-permit statute does not make an exception for nonconforming uses and does not provide that a city loses its authority to revoke a CUP if it changes the status of a conditional use. In addition, the nonconforming-use statute expressly provides that only a “lawful” use of property has a right to be continued.

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

Minn. Stat. § 462.357, subd. 1(e) (a) (emphasis added). In short, it is compliance with a CUP’s conditions that entitles a conditional use to nonconforming-use status in the first place after a zoning amendment prohibits a previously allowed conditional use, and it is a nonconforming use’s continuing compliance with a CUP’s conditions that makes it “lawful,” and therefore, authorized to continue. *Lam v. City of St. Paul*, 714 N.W.2d 740, 744 (Minn. Ct. App. 2006) (to continue a nonconforming use, a property owner must comply with all restrictions on the use existing at the time it became nonconforming).

Second, it would be bad public policy to hold that a CUP for a nonconforming use can never be revoked because such a holding favors private interests over the public interest. Minn. Stat. § 645.17 (courts presume that the Legislature intends to favor the public interest as against any private interest). The nonconforming-use statute was adopted to provide limited protection to private-property interests in continuing a use of property that was originally lawful but that is subsequently prohibited in a particular zoning district. Minn. Stat. § 462.357, subd. 1(e) (a); *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010) (the nonconforming-use statute gives

property owners' a limited right to continue a nonconforming use but prohibits expansion of a nonconforming use without a city's approval). In contrast, cities attach conditions to CUPs to protect the public interest by mitigating the negative effects that certain property uses can have on the public health, safety, and welfare. If the district court's holding is not reversed, it will result in the unprecedented situation where a property use has more rights as a nonconforming use than it did as a conditional use. Indeed, as the City has pointed out, if a CUP for a nonconforming use can never be revoked, then there really are no enforceable conditions on its use; and therefore, it has effectively been allowed to expand. Appellant's Br. at 12. This result is contrary to the public interest, and it directly conflicts with the statutory language prohibiting a nonconforming use's expansion. Minn. Stat. § 462.357, subd. 1(e) (a).

And finally, it would be bad public policy to hold that a CUP for a nonconforming use can never be revoked because such a holding will inhibit cities from engaging in the type of comprehensive land-use planning and zoning that the Municipal Planning Act was designed to foster. For example, city councils will be hesitant to exercise their discretionary zoning authority to change the status of a conditional use to a nonconforming use even if it is the best result for their community as a whole because such a change will eliminate a city's authority over any conditional uses that would be granted nonconforming-use status. Or in the alternative, if a city does change the status of a conditional use to a nonconforming use, it would be forced to jump through hoops and spend valuable public time and resources in order to reassert its right to enforce its lawfully adopted police-power regulations over nonconforming uses that are

noncompliant. For example, in this case, Respondents concede that their nonconforming use is subject to the conditions in the CUP. Appellant's App. at A. 5, 7. So hypothetically, the City could choose to amend its zoning ordinance to make campgrounds a conditional use again and then could revoke Respondents' CUP for the undisputed violations of its conditions. After the CUP is revoked, the city could hypothetically amend its zoning ordinance yet again to prohibit the use of campgrounds. But this hypothetical process of zoning amendments is not the type of comprehensive land-use planning and zoning that is desirable. In addition, the fact that the City could in an indirect manner eventually reassert its enforcement authority over nonconforming uses that are noncompliant confirms that it is discretionary zoning decisions and valid police-power regulations that are at issue here; and therefore, this also confirms that the district court erred when it held that the city did not have authority to revoke the CUP. In sum, the district court's holding is inconsistent with the plain language of the two statutes at issue and it is bad public policy because it invalidates lawfully adopted police-power regulations, favors the private interest over the public interest, and inhibits cities from engaging in comprehensive land-use planning and zoning.

CONCLUSION

This case will have a significant, statewide effect on cities' land-use authority and on the public health, safety, and welfare of the Minnesota citizens that are protected by the conditions attached to CUPs. The district court erred when it held that a City cannot revoke a CUP for undisputed violations of its conditions if the property use that was conditionally authorized by the CUP subsequently becomes a nonconforming use because

of a zoning amendment. Such a holding conflicts with the plain language of Minn. Stat. § 462.3595 and Minn. Stat. § 462.357 and is bad public policy because it invalidates lawfully adopted police-power regulations, favors private interests over the public interest, and inhibits cities from engaging in comprehensive land-use planning and zoning. All Minnesota cities have a public interest in confirming that cities can revoke a CUP that is attached to a nonconforming use of property if the CUP's conditions are violated. Minnesota cities also have an interest in confirming that city councils are entitled to statutory discretionary immunity from tort claims for the discretionary decisions they make when determining what conditions should attach to land-use permits to protect the public health, safety, and welfare.

For all of these reasons, the League respectfully requests that this Court reverse the district court's decision and grant summary judgment in the City's favor.

LEAGUE OF MINNESOTA CITIES

Date: May 23, 2012


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