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**STATE OF MINNESOTA
IN COURT OF APPEALS
A07-0381**

Minnewawa Sportsman's Club,
Relator,

vs.

County of Aitkin, et al.,
Respondents.

**Filed February 5, 2008
Affirmed in part, reversed in part, and remanded
Ross, Judge**

Aitkin County Planning Commission
File No. CUP #34906C

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Considered and decided by Dietzen, Presiding Judge; Lansing, Judge; and Ross,
Judge.

UNPUBLISHED OPINION

ROSS, Judge

This appeal arises from Minnewawa Sportsman's Club's request for a conditional
use permit to expand its operation by adding an archery range and a new road to its
firearms-range operation in Aitkin County. The club operates under a 1997 conditional

use permit, which the county's planning commission issued with no expressly stated conditions. The county granted the club's application for an amendment to the conditional use permit, but it added 17 conditions that related mostly to the firearms use rather than exclusively to the archery range and road uses. Because we agree with Minnewawa that its limited conditional-use-permit application does not open the door for the county to add conditions to the club's existing permit for use as a firearms range, we reverse in part. But because the permit imposed several reasonable conditions related to the addition of an archery range and a new road, we affirm in part.

FACTS

Minnewawa Sportsman's Club applied for a conditional use permit (CUP) in 1997 to operate a trap-shooting range, rifle range, archery range, gun-safety facility, restaurant, and bait shop on roughly 20 acres of land in Aitkin County zoned as open. When the Aitkin County Planning Commission met to discuss Minnewawa's application on October 20, 1997, the participants discussed potential problems with noise and traffic, but the minutes reflect no attempt to impose operational conditions on the club. Minnewawa representative Lyle Ward told the commission that "the majority" of shooting would occur from approximately 5:00 p.m. to 8 or 8:30 p.m. "one day per week, and maybe Saturday." When one attendee asked whether the permit would include any conditions, "the Chair[person] stated he did not see a need for any conditions." The balance of the informal discussion included only a commissioner asking "about toilet facilities" and Ward's answer that "they had portables," which immediately preceded unanimous approval of Minnewawa's application with no further mention of conditions. The

commission granted the CUP without any express conditions, leaving blank the section of the executed CUP form that is reserved for the listing of conditions.

The record suggests that neither the county nor Minnewawa has acted with any certainty about whether the CUP issued in 1997 included implied conditions. For example, although the county now takes the position that the original CUP included restrictions on operational hours, a county inspector responded to neighbors' complaints about late-night noise in 2003 by observing that "[t]he Planning Commission attached no conditions to the CUP approval. . . . [T]here was no time limit on operations per Planning Commission." The inspector noted similarly in 2004 that "[b]ecause this is an approved CUP . . . without conditions, there is very little control over issues that the state does not regulate." And although Minnewawa now takes the position that the 1997 CUP imposed no conditions as to operational hours, the minutes of the planning commission's January 2007 meeting reflect that Minnewawa representative Gary Vorlicky indicated that the club "would like to obtain more days" on which members would be allowed to shoot.

Minnewawa applied to amend the CUP in June 2006. The CUP-amendment record adds little clarity to the confusion over whether the original CUP was perceived as restricting operational hours. On its face, Minnewawa's CUP application requests only to amend the existing CUP to include nine new acres for use "for [an] archery range and a new [service] road." The planning commission met on July 17, 2006, to review this request. At that meeting, Ronald Clasen, a Minnewawa representative, argued that the 1997 CUP already allows for daily shooting. Arguably inconsistent with this position, Minnewawa also submitted a supplemental document stating, "We would like to shoot

trap Tuesday, Thursday and 6 Saturdays a year. . . . Please keep this in mind when you amend our permit.” One commissioner opined that the permit had been granted based on Lyle Ward’s statement at the 1997 commission meeting that the club would allow shooting only one weeknight and on Saturdays. But the commission made no finding that relates to the commissioner’s stated opinion. It tabled Minnewawa’s application so that it might consider potential conditions of the CUP, and it indicated that it would reconsider the application at an August 2006 meeting. Minnewawa withdrew its amendment request, however, before the commission took any action on the application at the August meeting.

On December 27, 2006, Minnewawa again submitted a request to amend the 1997 CUP, again specifically seeking to include the additional acreage for an archery range and a new road. But for reasons not indicated in the record, after Vorlicky signed his application on Minnewawa’s behalf, someone other than Vorlicky at some point altered Minnewawa’s application documents to add language that purported to request “amending shooting times” to “rifle—3 days, trap—3 days and . . . Saturdays.” Minnewawa insists that these alterations were made by the county without Minnewawa’s authorization. Although the record does not establish the truth of this assertion, the county does not contest it. The county asserts that it altered the documents to make the application accurate and complete. But on appeal, Minnewawa objects, contending that the county altered the application to attempt to open the original 1997 CUP to add conditions to limit shooting hours at the club. On January 2, 2006, the planning commission issued a notice of review, indicating that the commission would meet on

January 22, 2007, to discuss the amendment request, which it summarized as a request to expand the acreage of the club *and* to expand the hours of operation.

Minnewawa representatives Ron Clasen and Gary Vorlicky argued to the commission that Minnewawa's 1997 representative had stated only that the "majority" of the operation would be one day a week, but that the permit did not limit the club's hours of operation. In keeping with the confusion, Minnewawa's Clasen had already written a letter in January 2007 in support of the club's requested amendment, urging the commission to "give Minnewawa the hours of operation they are asking for." Despite his assertion that Minnewawa was not restricted in its hours of operation, Vorlicky agreed to keep shooting hours limited to Tuesdays and Saturdays, if the club would be allowed to increase shooting hours once it made sound-abatement improvements. The commissioners discussed the amendment request subject to 17 potential conditions, including operational conditions related to the shooting range. Vorlicky protested that the county was trying to change the 1997 permit in a way that would limit the operational rights that Minnewawa already possessed by "taking away what they have already."

The commission approved the CUP with the 17 conditions. Many of the conditions specifically related to Minnewawa's firearms operation, such as the following: the club must follow NRA rules and guidelines; the rifle range must have a culvert or other physical barrier before Minnewawa could extend its hours of firearms operation; the rifle range must have a sound barrier; the days of operation for the trap range would be limited to two weeknights and six Saturdays a year; the rifle and pistol range could operate only on Tuesdays and Saturdays; the operation of these ranges would be limited

to specific start and stop times on specific days; and the firearms range must be closed during deer-hunting season. Vorlicky objected, refusing to sign the Notice of Decision. Minnewawa contests the county's decision in this certiorari appeal.

D E C I S I O N

Minnewawa challenges the county's CUP decision. The county has discretion to approve or deny a conditional use permit application. *Zylka v. City of Crystal*, 283 Minn. 192, 195, 167 N.W.2d 45, 48–49 (1969). We will uphold a county's decision to approve or deny a CUP application unless we determine that the county's decision was arbitrary, capricious, or unreasonable. *Schwardt v. County of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003).

The parties fire several shots at the wrong target, focusing on the scope of the CUP issued in 1997. Despite its vacillation before this appeal, Minnewawa insists now that the 1997 CUP imposed no operational restrictions. And despite its own vacillation on this point throughout the life of the CUP when responding to noise complaints, the county now insists that the 1997 CUP included an implied condition limiting operational hours based on the statements made by Minnewawa's representative during the 1997 CUP approval process.

The county relies on an unpublished opinion of this court for the proposition that a landowner's representations made during a CUP-application process are binding and become part of the CUP even when the executed CUP does not include the conditions expressly. *See Edling v. Isanti County*, No. A05-1946 2006, WL 1806397 (Minn. App. July 3, 2006) (upholding county's decision to revoke a CUP because Edling exceeded the

limited scope of the CUP as construed to include his representations made during the application process). The county's reliance on that unpublished opinion has apparent problems. First, 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. *See* Minn. Stat. § 394.301, subd. 4 (2006) (requiring that a certified copy of any conditional use permit be recorded with the county recorder or registrar of titles). There is no indication in the record that Ward's statements during the 1997 hearing were recorded as part of the CUP. This is critical since a CUP runs with the land and continues to encumber the property even after it is conveyed to subsequent owners. *See Northpointe Plaza v. City of Rochester*, 465 N.W.2d 686, 689 (Minn. 1991) (noting that the property interest in a CUP runs with the land). Second, this case also presents a practical problem concerning the allegedly binding representation—imprecision. The minutes of the 1997 process indicate that Minnewawa's representative Ward stated only that “the *majority* [o]f the shooting” would occur during expressly stated times and days. Third, the chairperson specifically said that he “did not see a need for any conditions” on the CUP. Consistent with that discussion, the county's chairman signed the CUP indicating the imposition of no conditions.

But we do not decide the legal question of whether Ward's 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 the question is not properly before this court. *See Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416–17 (Minn. 1981) (holding that when reviewing a

rezoning decision, new or additional evidence received at trial will be included in the record only if that evidence relates to the issues raised and considered by the municipal body); *In re Block*, 727 N.W.2d 166, 175 (Minn. App. 2007) (declining to address an issue related to the grant of a CUP raised for the first time on appeal). We therefore do not determine whether the 1997 CUP includes any operational conditions. We resolve only whether the county's decision to grant the CUP in 2007 with its 17 conditions was arbitrary or unreasonable based on Minnewawa's application for a CUP amendment.

We believe the 2007 CUP improperly exceeded the scope of Minnewawa's limited application for use of nine new acres specifically for an archery range and a service road. Minnewawa's signed and submitted amendment application requested consideration of those uses only and for that acreage only. The county added language to the CUP amendment application after the applicant signed it, substantially altering the request to include the hours of operation of the firearms ranges and regarding property beyond the nine added acres identified in the application. Minnewawa's contention that the commission was attempting to use the 2007 process to impose conditions that it thought may have been imprudently absent from the existing CUP has support in the record. According to the minutes of the January 22, 2007, commission meeting to consider Minnewawa's application, "The chair[person] stated they want to clean this CUP up."

At oral argument, the parties disagreed as to whether Minnewawa submitted a supplement to their December 2006 application requesting to shoot trap three days a week. Minnewawa did agree that the undated supplement was submitted in June 2006, but it disputed that it was submitted again in December 2006 with its second request, and

the commission made no findings concerning whether that supplement was submitted for consideration with the December application. We therefore do not consider the supplement here.

It is true that, despite the limited scope of Minnewawa's application, the commission's notice about the requested amendment referred more broadly to the club's hours of operation. And it is true that Minnewawa's representatives made statements in writing and at the hearing to indicate they wanted to expand the allowed hours of operation for the firearms ranges. But the notice does not itself amend the application and the postapplication statements by the club's representatives also do not amend the club's specific application. The representatives also made contrary statements indicating that they understood the original CUP as imposing no operational limits, objecting to any new limits on the firearms ranges, and rejecting the CUP as an improper alteration of their existing rights. We will consider the signed application itself as presenting the issue for consideration by the commission without regard to the conflicting and ambiguous statements made later.

The county had no procedural basis to impose new conditions restricting the hours of operation of the shooting ranges. We note that there are ways that the county might have imposed restrictions on the operations at Minnewawa's firearms ranges, none of which occurred here. For example, if Minnewawa applied for a CUP regarding firearms use on the property covered by the 1997 CUP, the commission could have acted on that application. If the county had established both the existence of a condition and that Minnewawa had violated the condition restricting operation of the firearms ranges, it

could have taken remedial action. See Minn. Stat. § 394.301, subd. 3 (2006) (“A conditional use permit shall remain in effect for so long as the conditions agreed upon are observed.”); *State ex rel. Neighbors Organized in Support of the Env’t v. Dotty*, 396 N.W.2d 55, 59 (Minn. App. 1986) (noting that “a conditional use permit continues until its provisions are violated”). The planning commission might have sought to amend its current zoning ordinance, which provides that a shooting range is allowed by CUP. See Minn. Stat. § 394.301, subd. 3 (indicating that the statutory restriction on a local government’s authority to invalidate a CUP is not intended to prevent zoning changes that may affect a CUP’s status); Aitkin County, Minn., Zoning Ordinance, app. C (Jan. 10, 1995). But because the matter of operational hours and uses on the property beyond the nine new acres was not before the commission in January 2007, we conclude the county acted arbitrarily when it imposed new conditions on firearms use on Minnewawa’s original property.

The county argues that it has the inherent authority to reconsider the 1997 CUP, citing *In Re Block*, 727 N.W.2d 166. A CUP is not a personal license, but a property right that attaches to and runs with the land. *Dege v. City of Maplewood*, 416 N.W.2d 854, 855-56 (Minn. App. 1987). If the commission has inherent authority to “clean up” imprudently issued CUPs, then the caselaw that establishes that a CUP may continue perpetually if its conditions are not violated would be meaningless. And this court has refused to remand a case for findings when doing so would allow the county to “merely rationalize” its previous decision to deny a CUP application. *City of Barnum v. County of*

Carlton, 386 N.W.2d 770, 776 (Minn. App. 1986), *aff'd on reh'g*, 394 N.W.2d 246 (Minn. App. 1986), *review denied* (Minn. Dec. 17, 1986).

We add that the county's reliance on *Block* is misplaced for two reasons. First, *Block* is factually dissimilar. *Block* involved a CUP to operate a dog-breeding facility, a rather startling condition of which was that the dogs would be surgically "debarked." *Block*, 727 N.W.2d at 171. After the CUP was issued, the county received considerable opposition to the arguably inhumane condition included in the CUP. *Id.* at 172-73. Upon informal reconsideration, the county administrator and county attorney altered the condition that all dogs be debarked to the more humane condition that all dogs wear shock collars to discourage barking. *Id.* at 173. This court recognized the "inherent authority of an agency to reconsider a decision." *Id.* at 182. And even then, rather than to affirm or reverse on the narrow contention that the county had improperly amended the CUP, we remanded for further proceedings and more evidence to allow the board to *formally* reconsider its debarking decision. *Id.* at 182. 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 us. Second, *Block* is legally distinguished. *Block* relies on *In re N. Metro Harness* for the underlying proposition that inherent authority supports reconsideration. But *In re N. Metro Harness* limits that inherent authority to the time before the appeal period runs on the initial decision. 711 N.W.2d 129, 136-37 (Minn. App. 2006), *review denied* (Minn. June 20, 2006). *Block* provides no support for the premise that the Aitkin County Planning Commission could simply

“reconsider” Minnewawa’s 1997 CUP to add new conditions in 2007 without a proven violation or a specific amendment request that opens the permit to greater restrictions.

We are mindful that the Shooting Range Protection Act, codified at Chapter 87A of Minnesota statutes, may impose limitations in similar settings. *See* Minn. Stat. § 87A.03, subd. 1(5) (2005) (prohibiting qualifying shooting ranges from being restricted from conducting shooting activities daily between 7:00 a.m. and 10:00 p.m., and allowing local government with zoning jurisdiction to extend the hours of operation by conditional use permit); Minn. Stat. § 87A.07, subd. 1 (2005) (prohibiting closure of a firearms range unless the range or activity is found to be an immediate safety hazard); Minn. Stat. § 87A.08, subd. 1 (2005) (providing that the chapter shall not be construed to supersede more restrictive regulation of a range’s days and hours of operation imposed by ordinances and permits in effect on May 28, 2005). But the parties do not cite or otherwise incorporate the Act into their arguments, and we offer no opinion regarding its applicability.

Minnewawa argues that this court should remand to the planning commission to consider its specific request to add nine acres to the 1997 permit for an archery range and a new road. A remand for that purpose is unnecessary. In granting the CUP, the commission already addressed Minnewawa’s amendment request to add nine acres, imposing conditions for the requested archery use. Because the county’s decision to grant the CUP relating to the archery range on the nine acres with specific conditions regarding that use is reasonable, we affirm the county’s decision to grant the CUP with the stated conditions regarding the archery range.

We therefore affirm the 2007 CUP with its conditions to the extent that it relates to the nine acres, the archery range, and the service road. To the extent the 2007 CUP and conditions relate to the firearms ranges, we reverse. We remand with instructions to the planning commission and county to execute an amended CUP limited to imposing conditions related to the uses and property indicated in Minnewawa's December 2006 CUP application, before its alteration. We offer no opinion concerning whether or to what extent the original CUP incorporates Ward's 1997 comments or otherwise restricts firearms operations.

Affirmed in part, reversed in part, and remanded.