

BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

Determination of a ministerial error for the boundaries of CUP #1632

BRIEF OF TYROL PROPERTIES, LLC AND TYROL HOLDINGS, LLC

INTRODUCTION

The Dane County Board of Adjustment (“BOA”) has been convened to consider an appeal filed by four individual neighbors of the Tyrol Basin recreation area (the “Neighbors”) alleging that the Dane County Zoning and Land Resources Committee (“ZLR”) issued Conditional Use Permit #2441 (“CUP 2441 (2018)”) in error. Instead of proceeding with a full review of CUP 2441 (2018), however, Tyrol Properties, LLC and Tyrol Holdings, LLC (“Tyrol”) and the Neighbors have agreed that the BOA shall first consider and act upon the following limited issue: Did the metes and bounds legal description written on a previously applicable conditional use permit (“CUP 1632 (2000)”) erroneously describe the geographical boundary of the CUP approved by the Town of Vermont and the ZLR. If so, Tyrol requests that the ministerial error be corrected and CUP 1632 (2000) apply today to all of the Tyrol Basin RE-1 zoned property. If the BOA makes such a determination, the remaining issues on appeal would be rendered moot, as Tyrol would withdraw CUP 2441 (2018).

CUP HISTORY

In the year 2000, after nearly two years of negotiation with neighbors and the Town of Vermont, Tyrol Basin Corporation applied for a conditional use permit requesting night lighting on “all contiguous RE-1-zoned Tyrol Basin Corp. property, subject to uniform Town and County conditional use limitations.” The 2000 application specifically included plans for a lighted tubing hill on the northwest quarter of the Tyrol Basin property. The Town of Vermont and ZLR granted Tyrol Basin Corp’s application and issued CUP 1632 (2000). Although Dane County’s Staff report specifically mentioned that CUP 1632 (2000) would apply to “all RE-1 zoned property owned by Tyrol Basin Corp.,” the written CUP contained a metes and bounds legal description that omitted the northwest quarter of Tyrol’s RE-1 zoned property.

Tyrol purchased the Tyrol Basin recreation area (the “Property”) from Tyrol Basin Corporation in the year 2018. Like the previous owner, Tyrol plans to install a new lighted tubing hill in the northwest quarter of its Property. Tyrol applied for a conditional use permit to extend night lighting to that northwest quarter of Tyrol’s RE-1 zoned property, and thereafter learned that that CUP 1632 (2000) arguably already applied to the northwest quarter but contained an inaccurate boundary description. The Town of Vermont and Tyrol had several discussions with the Dane County Zoning Administrator (“Administrator”) and determined that Tyrol could either

proceed with CUP 2441 (2018) or ask the ZLR to order the Administrator to correct the ministerial error in CUP 1632 (2000). The Administrator expressed a preference that Tyrol continue with CUP 2441(2018) instead of correcting the ministerial error. Tyrol agreed with the final conditions proposed for CUP 2441 (2018) and believed that those conditions, which posed greater restrictions on Tyrol's use of the Property than CUP 1632 (2000) had, would demonstrate Tyrol's willingness to compromise with the neighbors, who had expressed concerns with Tyrol's planned use. Tyrol, therefore, initially agreed to pursue CUP 2441 (2018) instead of pursuing correction of CUP 1632 (2000). The Town of Vermont and ZLR granted CUP 2441 (2018), allowing the conditional use of night lighting on the recreational slopes of all of Tyrol's RE-1 zoned Property.

Thereafter, the Neighbors appealed. Tyrol and the Neighbors have now agreed that the BOA shall first consider and act upon the limited issue of the geographical boundaries CUP 1632 (2000). Tyrol, the Town of Vermont, the Administrator, Corporation Counsel for the ZLR, and the ZLR itself have all expressed that the omission of the northwest quarter of Tyrol's RE-1 zoned land from the CUP 1632 (2000) document was an error.

If the metes and bounds description for CUP 1632 (2000) had not mistakenly omitted part of the entire property that was undisputedly subject to the permit, or if the ministerial error on CUP 1632 (2000) had been corrected in 2018 following requests by both Tyrol and the Town of Vermont, Tyrol would have abandoned its application before CUP 2441 (2018) was ever issued and would have relied solely upon CUP 1632 (2000). Therefore, in the event that the BOA determines that CUP 1632 (2000) remains in place with corrected geographical borders, Tyrol would voluntarily withdraw CUP 2441 (2018), making the Neighbors' current appeal moot.

Tyrol respectfully requests that the BOA take the following actions:

- (1) Determine that the boundary description written on CUP # 1632 was a ministerial error, as it does not accurately reflect the Town of Vermont's and ZLR's approval of Tyrol Basin Corp's application "to have *all contiguous RE-1 zoned Tyrol Basin Corp. property* subject to uniform Town and County conditional use limitations for outdoor lighting";
- (2) Order the Administrator to correct the boundary description error on CUP 1632 (2000) to include all of Tyrol's RE-1 zoned property;^{1,2}
- (3) Order that CUP 1632 (2000) remains in effect for all of Tyrol's RE-1 zoned property; and

¹ Tyrol acknowledges that the zoning classification of "RE-1" has changed to or may change to "RE." Tyrol intends for any use of "RE-1" herein to also include "RE," as applicable.

² Although written in different words, Tyrol's first three requests for the BOA are essentially the same as the Administrator's requests. Tyrol's position varies only slightly from #2 and #3 of the Administrator's request. The Administrator requests (in Conclusion #2 and #3 of its Brief) that the BOA conclude that "Conditional Use Permit #1632 covers the *entire 125.3 acres* of land owned by Tyrol Basin," and that the BOA should instruct the Administrator "to change the boundary description found on Conditional Use Permit #1632 to identify the *entire 125.3 acres* owned by Tyrol Basin." A portion of Tyrol's land is zoned B-1, and the evidence supports that that CUP 1632 (2000) was intended to apply only to the RE-1 zoned land, as the B-1 land is governed by CUP 1540.

- (4) Thereafter order that CUP 2441 (2018) is vacated and the Neighbors' appeal of CUP 2441 (2018) is dismissed as moot.

As discussed below, the BOA need not consider any new testimony or evidence presented by Tyrol or the Neighbors to make a full decision of the present appeal. Wisconsin statute and Supreme Court precedent authorize the BOA to execute the above-requested actions following only a review of the record provided to the ZLR during its consideration of CUP 2441 (2018).

DISCUSSION

I. IN ITS APPELLATE REVIEW, THE BOA HAS THE AUTHORITY TO TAKE ANY ACTION THE ZLR (2018) COULD HAVE TAKEN, AND IT NEED NOT CONSIDER EVIDENCE OUTSIDE OF THE 2018 PUBLIC RECORD PRESENTED TO ZLR

Wis. Stat. §59.694(7)(a) and DCO §10.255(2)(j) give the BOA explicit authority to hear appeals from individuals aggrieved by a decision of the ZLR. Upon appeal, the BOA may “modify...the determination appealed from, and may make the order, requirement, decision or determination as ought to be made.” Wis. Stat. §59.694(8). Indeed, the BOA has “all the powers of the officer from whom the appeal is taken.” *Id.* Stated plainly, the BOA has the power in this appellate review to make any decision and to take any action the ZLR could have when the ZLR considered Tyrol's application for CUP 2441 (2018).

In the case of *Osterhues v. Bd. of Adjustment for Washburn Cty.*, 2005 WI 92, 282 Wis. 2d 228, 698 N.W.2d 701, the Wisconsin Supreme Court considered the appellate review powers of the BOA and clarified that:

In reviewing the [ZLR's] decision, the Board may decide to review the record of evidence presented to the [ZLR] and may render an independent decision on that basis. It may also decide to take new testimony and evidence to supplement the record.³

Id. at ¶ 33 (*emphasis added*). This Supreme Court precedent indicates that the BOA is not required to consider evidence outside of the public record considered by the ZLR, but may do so if it deems additional evidence necessary to present a complete record in the event of future appeal.

The parties to this appeal have agreed that the issue currently before the BOA is *limited only to CUP 1632 (2000)*. Therefore, the BOA is not tasked with contrasting the brightness of phosphor-converted amber lights and narrow-band amber lights on the night sky with the brightness of 4000 Kelvin LEDs on the night sky, as the Neighbors urge in their appeal letter. The BOA is similarly not considering Tyrol's argument that it is far more important for thousands of skiers to clearly see snow jumps and lift poles to avoid serious nighttime accidents than it is for six concerned neighbors to clearly see the night sky so they can appreciate the stars. Those are issues that could, perhaps, reasonably require additional evidence to present a complete record on

³ In the event of certiorari review, the decision of the BOA “is entitled to a presumption of correctness and validity.” *AllEnergy Corp. v. Trempealeau Cty. Env't & Land Use Comm.*, 2017 WI 52, ¶88, 375 Wis. 2d 329, 371, 895 N.W.2d 368, 389.

appeal. However, they are issues related to the CUP 2441 (2018), which is not before the BOA today.

For its April 17th hearing, the BOA is tasked only with determining whether a ministerial error occurred in designating the boundaries of CUP 1632 (2000). To make that determination, the BOA (and any future court on appeal) may reasonably rely wholly upon the CUP 2441 (2018) public record, which contains Tyrol Basin Corporation's 2000 application, the 2000 application supporting documents, the minutes and documents evidencing approval of CUP 1632 (2000) by the Town of Vermont and Dane County, and the 2000 and 2018 Staff Reports mentioning the boundaries intended for CUP 1632 (2000).

The CUP 2441 (2018) public record was presented to the ZLR when it considered CUP 2441 (2018). Therefore, pursuant to the Wisconsin Supreme Court's *Osterhues* precedent, the BOA may review the CUP 2441 (2018) public record "**and may render an independent decision on that basis.**" *Osterhues*, 2005 WI 92 at ¶ 33. The BOA is not required to seek outside evidence from Tyrol or the Neighbors. Further, because the BOA's current review is limited only to the geographic boundaries of CUP 1632 (2000), the BOA may limit its review of the CUP 2441 (2018) public record only to discussion of the geographic boundaries of CUP 1632 (2000).

II. THE PUBLIC RECORD OF CUP 2441 (2018) CONTAINS AN ABUNDANCE OF EVIDENCE TO SUPPORT A BOA DETERMINATION THAT THE TOWN OF VERMONT AND ZLR INTENDED CUP 1632 (2000) TO APPLY TO "ALL RE-1 ZONED PROPERTY OWNED BY TYROL BASIN CORP."

The public record documents associated with CUP 2441 (2018) provide all the historical and factual evidence necessary for the BOA to determine that CUP 1632 (2000) should have applied to "all contiguous RE-1 zoned Tyrol Basin Corp. property." The Administrator agrees. In a nutshell, the Administrator explains in his Brief that 1) Tyrol Basin Corp's application for CUP 1632 (2000) was intended to apply to all of Tyrol's RE-1 zoned land, 2) the Town of Vermont and Dane County approved the application, and 3) there is no mention in the minutes of the 2000 ZLR Committee meeting indicating any intention to alter or revise the boundaries of the CUP. Accordingly, the Administrator requests an instruction to correct the boundary description on CUP 1632 (2000) and a BOA determination that CUP 1632 (2000) remains in effect as corrected.

Tyrol incorporates the Brief of Dane County Zoning Administrator as if fully restated herein, and therefore will not further repeat evidence provided by the Administrator. It is important to note that, aside from a public record map indicating parcel numbers, the Administrator's brief relies solely upon the application and supporting documents comprising the public record of CUP 1632 (2000), which documents are also included in the public record associated with CUP 2441 (2018). With the possible exception of the parcel number map, these documents were all presented to ZLR prior to its approval of CUP 2441 (2018).

In addition to the evidence presented by the Administrator in its Brief, the public record for CUP 2441 (2018) also contains an updated Staff Report which was submitted to the ZLR prior to

the final public hearing for CUP 2441 (2018), held October 23, 2018. The following excerpts are highlighted in yellow on the Staff Report, attached as Exhibit A:

- a. “In 2000, detailed approvals were granted for the expansion of the [Tyrol] business. ... In researching the approvals in 2000, the site plan submitted showed the installation of a tubing hill in the proposed location. The information submitted in 2000 referenced the entire RE-1 area being lighted at night, but the Conditional Use Permit issued in 2000 did not list the entire property.”
- b. “It appears that the property is being developed in accordance with the plans that were approved in 2000. The proposed [2018] conditional use permit will clarify the areas of the property to be illuminated.”
- c. **“County Staff had Corporation Counsel review the previous approval that happened in 2000. He noted that the information for CUP #1632 shows that Tyrol Basin received approvals to illuminate the entire property and noted that the entire property was listed in the recorded deed restriction. However, there was a ministerial error in the creating of the conditional use permit document. Corporation Counsel had suggested that a simple solution to the matter would be for the ZLR Committee to direct staff to correct the legal description for CUP #1632 to reflect the correct description without having any other additional approvals.”**

The ZLR relied upon the public record and Staff Report quoted above to approve CUP 2441 (2018). The ZLR also acknowledged the error in the boundary of CUP 1632 (2000). Indeed, the minutes of the November 13, 2018 ZLR meeting indicate that *“The approval of CUP #2441 ... is to correct a ministerial error of the legal description associated with CUP #1632 that was approved in 2000. This conditional use permit will allow the entire property (attached description) to be lighted at night...”*

Considering all of the documentary evidence in the public record proving the ministerial error in CUP 1632 (2000), there is no need for the BOA to solicit additional evidentiary testimony from Tyrol or the Neighbors on the same subject.

III. BOA CAN ORDER THE CORRECTION OF CUP 1632 (2000) BECAUSE ZLR COULD HAVE ORDERED THE CORRECTION OF CUP 1632 (2000) WHILE CONSIDERING CUP 2441 (2018).

Wis. Stat. §59.694(8) gives the BOA express permission to take whatever action it deems necessary to resolve the current appeal, so long as the ZLR could have taken that same action at the time it reviewed Tyrol’s application for CUP 2441 (2018). Both Tyrol and the Administrator have requested that the BOA enter an order instructing the Administrator to correct the ministerial

error in CUP 1632 (2000) and to determine that CUP 1632 continues to apply to the entirety of Tyrol's RE-1 zoned Property.

The BOA is entitled to enter orders correcting CUP 1632 (2000) today because at the time ZLR considered CUP 2441 (2018), it also had the option "to correct the legal description for CUP #1632 to reflect the correct description without having any other additional approvals."⁴ The ZLR had the opportunity, at the time that it considered CUP 2441 (2018), to either approve CUP 2441 or to order the Administrator to correct the geographical boundary of CUP 1632 (2000). The ZLR did not need to hear any public testimony about the year 2000 negotiations or the brightness of the lights intended for the tubing hill. The ZLR had to merely look at the public record for CUP 1632 (2000) to determine from the application that the boundary had been improperly mapped, and thereafter order correction of that error.

Tyrol therefore argues that the BOA may reasonably make the findings and enter the orders requested by Tyrol and the Administrator without consideration of or reference to any additional evidence submitted by the Neighbors or Tyrol.

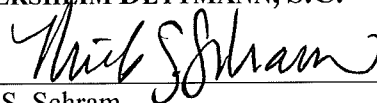
CONCLUSION

Tyrol respectfully requests that the BOA review the public record of CUP 2441 (2018), direct the Administrator to correct the ministerial error in the property description set forth for CUP 1632 (2000) to reflect the approved permit currently applies to all of Tyrol's property zoned RE-1 and based on this correction, determine that CUP 2441 (2018) may be withdrawn as moot.

Tyrol also respectfully requests that the BOA give three days' advance notice of its intention to request (or not request) additional evidence in the form of non-hearsay witness testimony on the April 17, 2019 hearing date. Tyrol would prefer not to inconvenience the Town of Vermont Board Members, the Administrator and other potential live witnesses if the BOA determines that it may rely solely on the documentary record.

Dated this 27th day of March, 2019.

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⁴ This is a quote from the 2018 Staff Report, attached as Exhibit A. This quote reflects the Administrator's interpretation of advice from Corporation Counsel about the possible ways the ministerial error could be corrected.