BEFORE THE DANE COUNTY BOARD OF ADJUSTMENT

ANDREW GRIMMER, MARC BRODY
ROSS REINHOLD, JOSH KRAMER

Appellants, Appeal of CUP No. 2441

v.

TYROL PROPERTIES, LLC

Respondents.

BRIEF OF APPELLANTS RELATING TO DETERMINATION RELATING TO EFFECT OF CUP NO. 1632

INTRODUCTION

Andrew Grimmer, Marc Brody, Ross Reinhold and Josh Kramer have appealed the Dane County Zoning and Land Use Resources Committee's approval of CUP #2441 issued for property owned by Tyrol Properties, LLC. The central concern Appellants have with CUP #2441 is that the installation of new lighting on an additional 30 acres of Tyrol's property will result in a dramatic increase in light pollution. Appellant's contend that other reasonable lighting options exist that will achieve a meaningful reduction of light pollution, the implementation of which should be required by the CUP.

Tyrol has responded to Appellant's appeal by seeking to revert to CUP #1632, the CUP in existence prior to the issuance of CUP #2441. By agreement of the parties, the Board is first asked to determine whether Tyrol is permitted to move forward with its plans to install new lighting on under CUP #1632 such that it can abandon CUP #2441 and, thus eliminate the basis for Appellants' call for stricter lighting standards.

The primary issue underlying the status and scope of CUP #1632 relates to the legal description on the permit. The legal description on the permit, which establishes the geographic scope of the CUP excludes, the northwestern 30 acres of Tyrol's property.[1] On March 20, 2019, Roger Lane, Dane County Zoning Administrator issued an opinion on this

[1] The precise acreage of this parcel is unknown. 30 acres, for purposes of this brief is an approximation, but the area to which this reference refers is the entirety of Tyrol's lands in the SW ¼ of the SE ¼ of Section 28.

issue and requested the Board make certain Findings of Fact and Conclusions to support Tyrol's request to abandon CUP #2441 and to proceed under CUP #1632. Appellants question Mr. Lane's conclusions, but argue that even if it is determined that CUP #1632 encompasses the entirety of Tyrol's property, Tyrol is nonetheless precluded from proceeding under CUP #1632 for the following reasons:

(1) Because neither Tyrol, nor its successors established the use under the CUP, the CUP as to the northwestern 30 acres is expired pursuant to Section 10.25(2)(n).

(2) The rezoning that occurred in conjunction with CUP #1632 property never became effective because deed restrictions required as a condition precedent to rezoning were never recorded. Restrictions were required to be in favor of both Dane County and the Town of Vermont, but the restrictions recorded only run in favor of the Town of Vermont.

(3) The recorded deed restrictions require Tyrol to address lighting concerns raised by neighbors, thus, Tyrol cannot disregard neighbor concerns by reverting to CUP #1632.

ARGUMENT

No matter how the issue is framed, Tyrol seeks to significantly expand its operations and substantially increase the amount of lighting and related light pollution resulting therefrom. The right upon which Tyrol relies to undertake such expansion is a CUP issued almost 20 years ago, issued to predecessors in interest by an entirely different ZLR committee, (then the Zoning and Natural Resources, "ZNR" committee) reviewed by different staff, under different neighborhood circumstances, attitudes and concerns regarding light pollution and different available lighting technology.

Clearly Tyrol, the Town of Vermont and Dane County all believed at one point that CUP #1632 did not apply to Tyrol's expansion plans. Otherwise, CUP #2441 would never have existed. Through that process, Tyrol consented to some restrictions, albeit inadequate, on the temperature of its lighting. Now, rather than address legitimate concerns its plans may have on increased light pollution, it threatens to abandon what it previously agreed to and proceed on an outdated CUP to install lighting of greater detriment to the public interest than what is necessary for its purposes. Such approach should not be sanctioned.

I. CUP #1632 DOES NOT COVER TYROL'S EXPANSION PLANS.

No question exists that the legal description on CUP #1632 does not encompass the entirety of Tyrol's property. It excludes the northwestern 30 acres in the SW ¼ of the SE ¼ of Section 28. Appellants do not contest Mr. Lane's proposed "Findings of Fact" set forth on page 2 of his March 20, 2019 opinion except for finding #7 which at this time Appellants can neither admit nor deny. While the descriptions appear to be the same with regard to the zoning ordinance amendment 7263, a copy of CUP #1505 was not provided.

In any event, we argue that such findings are insufficient to conclude that CUP #1632 applies to the northwestern 30 acres. Mr. Lane's findings fail to answer all questions and given the passage of time a complete picture of what was intended for approval is not presented. Other evidence exists to support the conclusion that the legal description on CUP #1632 is correct.

A. The Board should not go outside the four corners of the CUP to find error in the document.

Ordinarily, when the terms of a document such as an ordinance or contract are unambiguous, the law requires that the terms of the document to be applied as written. See e.g. ***Goldstein v. Lindner,*** 2002 WI App 122, ¶12, 254 Wis.2d 673, 648 N.W.2d 892. One may not ordinarily refer to evidence outside of the document itself to construe its meaning or to introduce ambiguity as to its terms; a principle commonly referred to as the "parole evidence rule." ***Id.*** In this case, no internal ambiguity about the legal description in CUP #1632 exists. Nothing on the face of the document suggests that any error exists. Under the parole evidence rule, therefore, it is error to go outside of its terms, as Mr. Lane has done, in order to find ambiguity and rely upon such evidence to change the terms. ***Goldstein***, at ¶12.

An exception to the parole evidence rule exists in the law on contracts and deeds where a party alleges that a "mutual mistake" was made regarding the terms of the contract. See e.g. ***Newmister v. Carmichael***, 29 Wis.2d 573, 577, 139 N.W.2d 572 (1966). It is not clear, however, that the principle of mutual mistake applies in this case. For one, the same "parties" to this document are not involved. Documentary evidence is available as set forth in Mr. Lane's memo, but no individuals who were actually involved in the approval process are present to be able to fill in any blanks left unfilled by the existing documentary evidence. Moreover, other evidence exists to suggest CUP #1632 may be accurate and important gaps exist in the evidence presented undermining the certainty of Mr. Lane's conclusions.

B. Evidence exists to support a contrary conclusion.

Other evidence exists suggesting that, CUP #1632 does not apply to the northwestern 30 acres. The first and most obvious fact is that the northwestern 30 acres was never

developed as permitted by CUP #1632. In almost 20 years, nobody came forward to correct the legal description CUP #1632.

Further, while minutes of the December 12, 2000 ZLR minutes do not appear to describe any change in the application, (Exhibit E, Lane Determination) another "Composite Report" that Appellants obtained from zoning department files shows only certain parcels being affected by the amendment of deed restrictions relating to lighting. (See Exhibit 1 attached hereto). Those lands do not include the northwestern 30 acres. This document further records the ZNR approval that occurred on December 12, 2000.

The "Composite Report" submitted as Exhibit D in Mr. Lane's report is undated. At the top of the first page, however, it refers to "Item #16" suggesting that the report was prepared for a specific meeting at which the item in question was "Item #16." The excerpt of the minutes of the December 12, 2000 ZNR Committee meeting minutes, however, do not refer to the Tyrol CUP as "Item #16." Instead, Tyrol's CUP is item "j." The Composite Report attached hereto as Exhibit 1, in upper left-hand corner of the report seems to suggest that the Tyrol CUP was Item 16 to the agenda on the night of the May 23, 2000 public hearing, over six months prior to the December 12, 2000 approval of the CUP.

The staff report upon which Mr. Lane relies, therefore, appears to reference the status of plans at some time earlier in the year 2000, not necessarily the proposal before the ZNR committee on December 12, 2000. The application, rezoning, town public hearings and related events occurred between March and around the end of May 2000. (See Exhibits A and C, Lane Determination). The deed restrictions relating to the rezoning were recorded in September of 2000. Yet the CUP shows it was not approved until December of 2000.

As yet, no records appear to have been uncovered to explain this delay. A Composite Report, however, exists that appears consistent with the legal description that appears on CUP #1632. Thus, CUP #1632 is not the only document that appears inconsistent with the original plans proposed in March through May of 2000. If plans for the extent of the CUP had been changed before December 12, 2000, (a proposition supported by the Composite Report reflecting what had been approved on December 12, 2000) it is unreasonable to expect the minutes of the ZNR meeting of December 12, 2000 to make any reference to a change in plans.

C. The evidence is insufficient to support reformation of CUP #1632.

In order to reform a document based on mutual mistake, the proof of the mistake must be demonstrated by evidence that is clear and convincing. ***Newmister***, 29 Wis. 2d at 577. We know from the record that Tyrol's predecessor applied to have the CUP cover the entire property and the documentary evidence provides no explanation for why the CUP ultimately

excluded the northwestern 30 acres. We know, however, that for almost 20 years that land has not been developed in accordance with the CUP, that the CUP was not finally approved until long after the rezoning was approved and deed restrictions recorded. We also have a "Composite Report" reflecting that what was approved on December 12, 2000 may be consistent with the legal description on CUP #1632.

Under these circumstances, the evidence of mistake in this instance is far from clear and convincing. CUP #1632 must be interpreted as written.

II. CUP #1632 IS EXPIRED AS TO THE PROPERTY IN SECTION 28 UNDER SECTION 10.25(2)(n).

Tyrol may not proceed under CUP #1632 to install lighting on property in Section 28 because the CUP expired in December 2001. According to the property history prepared by zoning staff, prior to the year 2000, Tyrol's property in Section 33 had been approved for outdoor lighting since 1998. CUP #1632 (according to initial plans) was to expand the lighting for recreational purposes to Tyrol's property in Section 28 and permit the 14 acre parcel in Section 28 to be used for something other than parking. Tyrol did not expand its recreational operations or lighting to these new areas. CUP #1632 has, therefore expired.

According to the express terms of CUP #1632 and consistent with Section 10.25(2)(n), "any use for which a conditional use has been issued, upon its cessation or abandonment for a period of one year, will be deemed to have been terminated and any future use shall be in conformity with the ordinance." (See Exhibit G, Lane Determination). The manifest purpose of this provision is to ensure that a property owner's rights to engage in uses under a CUP do not vest without the property owner actually putting the property to the proposed use. Times change. Surrounding circumstances change. Something that is approved in the year 2000 may simply no longer be appropriate in 2019. If the use is not yet in existence where rights to the use have vested to the owner, inappropriate uses should not be permitted to commence.

In this case, the immediately surrounding neighborhood has not changed dramatically, however, at least one new neighboring residence exists (Andrew Grimmer's residence) than existed in 2000. In this case, the biggest change that has occurred is to lighting technology.

In 2000, LED lighting was not commonly used. CUP #1632 and the deed restrictions recorded in relation to the accompanying rezoning does not address issues that arise with different lighting technologies. According to information from the Flagstaff Dark Skies Coalition, the spectral emissions of various lighting technology (e.g. High Pressure Sodium and Low Pressure Sodium versus LED lighting) can vary dramatically:

LPS vs LED (3000k) LEDs are 5.4 times worse (relative sky glow impact)

LPS vs LED (4100k) LEDs are 6.4 times worse (relative sky glow impact)

HPS vs LED (3000k) LEDs are 2.1 times worse (relative sky glow impact)

HPS vs LED (4100k) LEDs are 2.4 times worse (relative sky glow impact)

http://www.flagstaffdarkskies.org/critical-dark-sky-issues/lamp-spectrum-light-pollution/

Had Tyrol developed and put its property to the use contemplated by CUP #1632, there may be little to nothing that the County could do to prevent the switch to LED lighting. Nonetheless, where no vested right exists to proceed, the County should take every opportunity to evaluate the use in accordance with present conditions and available technology. Tyrol should not be permitted to proceed under CUP #1632 contrary to the terms of the permit or Section 10.25(2)(h).

III. THE UNDERLYING REZONING RELATING TO APPROVAL OF THE AMENDMENT TO DEED RESTRICTIONS WAS NOT SATISFIED.

The County approved the amendment to the deed restrictions recorded as Document No. 3050476 as part of its approval of Dane County Ordinance Amendment No. 7858. According to Amendment No. 7858, the amendment will be effective "if within 90 days of its adoption by Dane County the owner or owners of the land shall record the following restrictions on said land." (Exhibit 2, attached hereto, p. 2) Amendment No. 7858 then goes on to state: "Said restrictions shall run in favor of Dane County and the pertinent Town Board as well as the owners of land within 300 feet of the site. Failure to record the restrictions will cause the rezone to be null and void."

Some question exists as to when the rezone was approved to start the 90 day clock, but no question exists but that the deed restrictions recorded on September 20, 2000 do not run in favor of either Dane County, or the owners of land within 300 feet of the site. Also, no question exists but that we are well beyond the 90 days from approval of Amendment No. 7858. The deed restrictions do not satisfy the conditions required to render the County Board's approval effective. Having failed to timely record the required restrictions, Amendment No. 7858 never became effective and is "null and void."

IV. THE DEED RESTRICTIONS STILL REQUIRE TYROL TO ADDRESS NEIGHBOR CONCERNS REGARDING LIGHTING.

CUP #2441 like the deed restrictions relating to CUP #1632 and deed restrictions relating to prior approvals all require Tyrol, in the event neighbors are concerned about any specific fixtures, "to review and make modifications if possible or reasonable from both an operational and economic (cost) perspective." The Appellants, in their appeal, identify a problems that arise with respect to LED fixtures with temperatures greater than 3,000K.

Regardless of whether such issues are heard through an appeal of CUP #2441 or whether such issues are heard under the terms of existing deed restrictions, it is obviously much preferable to address such issues before the lights are installed, rather than after.

The neighbors have attempted to exercise this right of review and modification before. Tyrol has received a request (in writing) to modify the installation of two recently installed light fixtures which appeared particularly bright to a neighbor. Tyrol replied indicating that the fixtures had shielding and they would not take action. They also refused permission for the neighbor to visit the site, so the neighbor could evaluate screening option. Neither the prior deed restrictions, nor CUP #2441 can reasonably be construed to permit Tyrol's determination on such concerns to be the final, unreviewable word on the issue. If that were so, the condition would be meaningless. When interpreting language in documents such as ordinances or contracts, the language should be interpreted in accordance with its manifest purpose and to avoid absurd results. See ***Kolupar v. Wilde Pontiac-Cadillac, Inc.***, , 2007 WI 98, ¶27, 303 Wis. 2d 258, 277, 735 N.W. 2d 93, 102; ***Star Direct, Inc. v. Dal Pra***, 2009 WI 76, ¶62, 319 Wis. 2d 274, 304, 767 N.W.2d 898, 913.

CONCLUSION

For the above and forgoing reasons, the Board should determine that CUP #1632 is no longer valid as to the 30 and 14 acre parcels Tyrol owns located in Section 28. The natural consequence of such determination is that Tyrol will be required to obtain a CUP to expand its operations as proposed in its application and this matter will move forward to a hearing on Appellant's appeal of CUP #2441.

Dated this 27th day of March, 2019.

MURPHY DESMOND S.C.
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4825-1697-4479, v. 1

COMPOSITE REPORT

Dane County Zoning & Natural Resources Committee

Dane County Application for Change in Zoning or CUP **HEARING DATE:** 05/23/00 **ITEM#:** 16.

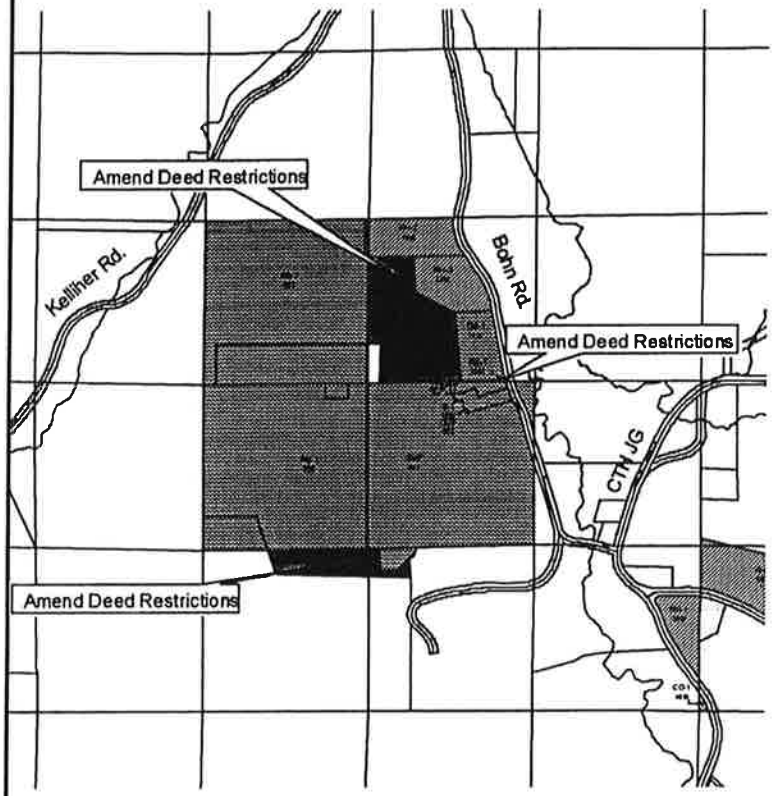
ZONING PETITION #: 7858 CUP #: 1632
APPLICANT: TYROL BASIN INC.

TOWN / SECTION: Town of Vermont 28
LOCATION: at 3487 Bohn Road

AREA: 19.4 A acres DELAYED EFFECTIVE DATE: Yes

CHANGE: From the RE-1 Recreational to the RE-1 Recreational

PROPOSED USE: amend lighting restrictions



TOWN ACTION RECOMMENDATION:
☒ Approved MAY 8 2000
☐ DENY

SUBJECT TO:
☒ Conditions ☐ Amended

IF CUP:
☐ Conditions ☐ None

ZNR COMMITTEE ACTION – REZONING
☐ Postponed
☒ Approve ☒ Cond/Amend Town ☐ Cond/Amend. Comm.
☒ As Condition lighting in RE-1/B-1
☐ Amended ☐ Changed Zone Dist.
☐ Changed Boundary Description
☐ DENY Vote
Action Date 5/23/00 ___-___

ZNR CUP APPROVAL
☒ Approved ☐ As Specified by Town
☐ Con by ZNR ☐ DENY
Date Dec. 12 2000

COUNTY BOARD ACTION REZONING
☐ Referred Date 06-01-00
☒ Approved ☐ Amended on Floor
as Amended
☐ DENY
COUNTY BOARD AGENDA ITEM #

Blumberg No. 5116

1

DANE COUNTY ORDINANCE AMENDMENT NO. 7858

Amending Section 10.03 relating to Zoning Districts in the Town of Vermont.

The Dane County Board of Supervisors does ordain as follows: That the Zoning District Maps of the Town of Vermont be amended to include in the RE-1 Recreational District/s the following described land:

PETITION NUMBER/C.U.P. NUMBER: 7858/1632
TO RE-1:
Part of the SE 1/4 of the SE 1/4 of Section 28, Town of Vermont, described as follows: Commencing at the Southeast corner of the said Section 28; thence West 591.42 feet to the point of beginning; thence N03°55' West 583.07 feet; thence N62°03'52" West 328.65 feet; thence N02°50' West 290.40 feet; thence N89°46'23" West 384.91 feet; thence S00°10'04" East 697.27 feet; thence East 100.00 feet; thence S00°10'04" East 330.0 feet; thence East 626.43 feet to the point of beginning.

Also, commencing at the Southeast corner of the said Section 28; thence due West along the Section line 203.50 feet to the centerline of Bohn Road and the point of beginning; thence N10°14' West along the centerline of Bohn Road 49.87 feet; thence S79°46' West 33.00 feet; thence S26°20'West 26.85 feet; thence S81° 28' West 129.10 feet to the Section line, thence due East 180.92 feet along the Section line to the point of beginning.

Also, a part of the SE 1/4 of the NE 1/4 of Section 33, Town of Vermont described as follows: Commencing at the Northwest corner of the S 1/2 NE 1/4, thence East 1421.0 feet along the North line of the said S 1/2 NE 1/4 to the point of beginning; thence continue East 300.00 feet along said North line; thence S23° West 60 feet, thence S54° West 155 feet, thence West 150 feet; thence North 150 feet to the point of beginning.

Also, a part of the S 1/2 NE 1/4 of Section 33, Town of Vermont, described as follows: Commencing at the Northwest corner of the S 1/2 of the NE 1/4; thence East 529.6 feet along the North line of the said S 1/2 NE 1/4 to the point of beginning; thence continue East 891.4 feet to a parcel, previously deeded, thence South 150 feet, thence East 150 feet; thence N54° East 100 feet, more or less, to the Westerly line of the East three-fourths of the SE 1/4 of the NE 1/4 of the said Section 33; thence South 104 feet, more or less, to a point which is 195 feet South of the North line of the said S 1/2, NE 1/4; thence West 1058 feet along a line which is 195 feet South of the said North line; thence N18° West 205 feet to the point of beginning.

TO B-1:
Part of the NE 1/4 of the NE 1/4 of Section 33, Town of Vermont described as follows: Commencing at the Northeast corner of the said Section 33; thence N87°51'36" West 220.72 feet; thence S83°51'24" West 378.02 feet; thence S14°48' East 41.78 feet to the point of beginning; thence S75°12'60.0 feet; thence S14°48'East 60.0 feet; thence S75°12' East 60.0 feet; thence N14°48' East 60.0 feet; thence S88°14'47" West 655.29 feet; thence N02°08'West 208.06 feet; thence East along the section line 626.43 feet to the Southwest corner of CSM #8857; thence S04°28'East 72.83 feet to the point of beginning.

The Dane County Board of Supervisors does ordain that this amendment, based upon their findings, to be consistent with the provisions of Wisconsin State Statute 91.77 (1)(a),(b),(c).

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AND

Part of the NE 1/4 NE 1/4, Section 33, Town of Vermont described as follows: Commencing at the Northeast corner of the said Section 33; thence N87°51'36" West 220.72 feet; thence S83°51'24" West 378.02 feet; thence S14°48' East 41.78 feet to the point of beginning; thence N75°12' East 128 feet; thence S14°48' East 68 feet; thence N75°12' East 245 feet; thence S14°48' East 107 feet; thence S75°12' West 373 feet; thence N14°48' West 115 feet; thence S75°12' West 60 feet; thence N14°48' West 60 feet; thence N75°12' East 60 feet to the point of beginning.

DEED RESTRICTION REQUIRED

This amendment will be effective, if within 90 days of its adoption by Dane County the owner or owners of the land shall record the following restrictions on said land:

1). Amend the wording of the Deed and Covenants and Restrictions to include "Outdoor lighting for organized activities in the RE-1 and B-1 areas shall be limited to parking lots, building lights, downhill slopes, snow slides, and cross country ski trails."

Said restrictions shall run in favor of Dane County and the pertinent Town Board as well as the owners of land within 300 feet of the site. **Failure to record the restrictions will cause the rezone to be null and void.**

A copy of the recorded document shall be submitted to Dane County Zoning.

***Terminate deed restriction #30504767 "the 14.54 rezone area(RE-1) shall be utilized for a parking lot area only."**

Effective: 9/20/00

The Dane County Board of Supervisors does ordain that this amendment, based upon their findings, to be consistent with the provisions of Wisconsin State Statute 91.77 (1)(a),(b),(c).