

In re Appeal of:

Gene M. Thompson/Thompson Family LTD (Washburn County Board of Adjustment review of a conditional use permit approved by the Washburn County Zoning Committee, requested by the Spooner Lake Protection and Rehabilitation District)

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## FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The Washburn Board of Adjustment (“Board”) hereby issues its Findings of Fact and Conclusions of Law to support its decision on July 30, 2021, and which decision was filed in the office of the Board on August 27, 2021.

### I. BACKGROUND AND FACTS

This matter came before the Board on appeal by the Spooner Lake Protection and Rehabilitation District (the “District” or “Appellant”). Appellant sought review of a decision made by the Washburn County Zoning Committee (the “Zoning Committee”) on February 23, 2021 to issue a conditional use permit (the “CUP”) to Gene M. Thompson/Thompson Family LTD (the “Applicant”) for a seasonal campground (“Proposed Use”) on property located in the Town of Spooner and as more fully described in the Application for Conditional Use Permit dated January 6, 2021 (“CUP Application”). The parcels of real property described in the CUP Application (collectively, the “Property”) abut Spooner Lake and Evergreen Lake. The Zoning Committee held a public hearing on February 23, 2021 and also rendered its decision to approve the CUP Application and the issuance of the CUP on February 23, 2021.

The Appellants filed this appeal on March 19, 2021 seeking reversal of the Zoning Committee’s approval of the CUP and issuance of the CUP. The Appellant cited the following reasons for appeal: (1) the CUP Application was incomplete; (2) the Zoning Committee improperly accepted supplemental application information after the first notice of the February 23, 2021 public hearing; (3) the CUP Application did not demonstrate that all requirements and conditions established are or would be satisfied by substantial evidence, and the Zoning Committee’s decision was not supported by substantial evidence; (4) the Zoning Committee failed to meet the standards set forth in Sec. 38-522 County Ordinances because it did not make sufficient findings of fact in approving the CUP; and (5) the Zoning Committee erred in approving the CUP because the CUP violates the purpose of the Land Development Code and the County’s RR-2 zoning designation.

## II. HEARING

The Board held an initial hearing on May 4, 2021 (“May 4<sup>th</sup> Hearing”) at which a lengthy discussion occurred regarding the information to be contained in the record before the Board and whether the Board would accept new evidence. After submission of the record and multiple telephone conferences between legal counsel for the parties, the Board issued a Scheduling Order dated July 12, 2021 (“Scheduling Order”) to set forth a briefing schedule and procedures for the hearing.

After proper notification, a public hearing was held on July 30, 2021 and also convened for purposes of deliberations on July 30, 2021 (collectively, the “July 30<sup>th</sup> Hearing”), at which the Board heard presentations from the Appellant (by counsel), the Zoning Committee (by counsel) and the Applicant (both by counsel and in-person). The July 30<sup>th</sup> Hearing was transcribed by a court reporter; however the transcript will not be completed prior to the issuance of these Findings of Fact and Conclusions of Law due to reasons beyond the control of the Board or the County.

The following documents were submitted by counsel for Appellant, counsel for the County Zoning Committee and counsel for the Applicants:

1. Appellant’s Brief
2. Zoning Committee’s Brief
3. Applicant’s Brief
4. Appellant’s Response Brief
5. Zoning Committee’s Response Brief
6. Applicant’s Response Brief
7. Applicant’s Motion to Dismiss and Brief in Support of Motion to Dismiss
8. Appellant’s Response Brief to Applicant’s Motion to Dismiss

Many members of the public spoke at the July 30<sup>th</sup> Hearing to voice opinions on the CUP Application and correspondence from members of the public was read aloud at the July 30<sup>th</sup> Hearing. The Board was able to ask questions of the parties at the July 30<sup>th</sup> Hearing, and did indeed do so. The July 30<sup>th</sup> Hearing and the Board’s deliberations lasted over seven (7) hours.

Prior to the presentation of evidence and arguments at the July 30<sup>th</sup> Hearing, the Board considered the following questions:

1. Applicant’s Motion to Dismiss, which was delivered to the Board via legal counsel on July 23, 2021. Regarding the Motion to Dismiss, the Board determined as follows:

- a. The Motion to Dismiss and Brief in Support of the Motion to Dismiss violated Section IX of the Scheduling Order because the Applicant's Brief in Support of the Motion to Dismiss was "additional briefing" and "set forth arguments and evidence."
  - b. The Board did not have jurisdiction to grant the Motion to Dismiss because such a remedy is not available under the Board's powers set forth in the County Ordinances or Wis. Stat. § 59.694.
2. Appellant's request of July 22, 2021 that "people can cede their two minutes of speaking time to others at the hearing." The Board determined that individuals speaking at the public hearing may not cede their allotted time to other speakers based on the discussion and decision at the May 4<sup>th</sup> Hearing.
  3. Appellant's Motion to Supplement Reasons for Appeal and Record of July 7, 2021. The Board denied Appellant's Motion based on the Board's decision at the May 4<sup>th</sup> Hearing that it would not accept new information or evidence.

The Board proceeded with the public hearing, at which individuals were given an opportunity to speak for no longer than two (2) minutes, and the Board allotted sixty (60) minutes total for public comment. All members of the public wishing to speak had an opportunity to do so.

After the public hearing, the Board proceeded to the parties' presentation of evidence and argument. Pursuant to the Scheduling Order, each party was allocated one (1) hour to present evidence that was included in the record and argument, which may have included the presentation of witnesses. Counsel for the other parties were not given the opportunity to ask questions of other party witnesses or otherwise cross-examine witnesses. Board members had the right to ask questions of witnesses following a party's presentation of evidence and arguments. After the initial presentation by the parties and questions by the Board, each party was given 30 minutes of rebuttal time.

The presentation of evidence was conducted in the following order:

1. Appellant's Presentation of Evidence and Argument by Attorney Westerberg:
  - a. Witness called:
    - i. Jamie Dunn, testifying in part as to the adequacy of soil conditions to sustain the Proposed Use. Also, testifying in part that the CUP Application was incomplete due to the failure to include the proposed water supply, the type septic systems proposed, the location of drain fields.

- ii. Ted Smith, testifying in part that the CUP Application was incomplete due to an inadequate wetland delineation and failure to properly determine the ordinary highwater mark of Spooner Lake as it exists in relation to the Proposed Use (“OHWM”).
    - iii. Kathy Bartilson, testifying in part that the CUP Application was incomplete because it did not include a proper determination of the OHWM, and such a determination is required to properly establish other requirements in the CUP Application, such as compliance with setback restrictions.
  - b. The Board posed questions to Attorney Westerberg and Appellant’s witnesses during each presentation.
- 2. Applicant’s Presentation of Evidence and Argument by Attorney Helquist:
  - a. Witness called: Mark Krause, testifying in part as to the completeness of the CUP Application and the sufficiency of establishing the OHWM.
  - b. The Board posed questions to Attorney Helquist and Mr. Krause during each presentation.
- 3. Zoning Committee’s Presentation of Evidence and Argument by Attorney Frost:
  - a. Witness called: Dale Beers, County Zoning Administrator, testifying in part as to the completeness of the CUP Application and appropriate establishment of the OHWM.
  - b. The Board posed questions to Attorney Frost and Mr. Beers during each presentation.
- 4. Additional questions by Board members and Board counsel.
- 5. Rebuttal/closing arguments for Appellant by Attorney Westerberg.
- 6. Rebuttal/closing arguments for Applicant by Attorney Helquist.
- 7. Rebuttal/closing arguments for Zoning Committee by Attorney Frost.

After closing of the presentation of the evidence, the Board commenced its deliberations.

The Board must render its decision pursuant to Wis. Stat. § 59.694 and *Osterhues v. Board of Adjustment for Washburn County*, 2005 WI 92, 282 Wis. 2d 228. More specifically, the Board may “reverse or affirm, wholly or partly, or may modify the order, requirement, decision or determination appealed from, and may make the order, requirement, decision or determination as

out to be made,” and to that end the Board has all powers of the Zoning Committee. The legal questions before the Zoning Committee, and hence before the Board as it stepped into the shoes of the Zoning Committee, are: (1) whether the CUP Application complied with the County Ordinances; and (2) whether such decision is consistent with the terms of Wis. Stat. § 59.69(5e). In setting forth its arguments, the Applicant’s legal counsel, the Appellant’s legal counsel and the County’s legal counsel utilized the standards of certiorari review in answering the legal questions. Those certiorari standards are: (1) whether the Zoning Committee kept within its jurisdiction when it approved the CUP Application and issuance of the CUP; (2) whether the Zoning Committee proceeded on a correct theory of law; (3) whether the Zoning Committee’s decision to approve the CUP Application and issue the CUP was arbitrary, oppressive, or unreasonable, and represented its will and not its judgment; and (4) whether the Zoning Committee might reasonably make the decision to approve the CUP Application and issue the CUP based on the evidence.

After evaluation and discussion of the evidence, the Board determined that the CUP Application did not comply with the requirements set forth in the County Ordinances and that the Zoning Committee’s decision was not consistent with Wis. Stat. § 59.69(5e). As such, pursuant to Wis. Stat. § 59.694(8), the Board did not affirm the Zoning Committee’s decision.

### **FINDINGS OF FACT**

Having heard the testimony and considered the evidence presented, the Board determined the facts of this case to be:

1. The Proposed Use was a conditional use under the RR-2 zoning district and therefore required a conditional use permit pursuant to Sec. 38-372, County Ordinances.
2. Applicant was required to submit a complete application pursuant to Secs. 38-520 and 38-521 and 38-522, County Ordinances.
3. The CUP Application was incomplete because it did not include:
  - a. Pursuant to Sec. 38-521, County Ordinances, and the standard form conditional use application, which was used by Applicant as the CUP Application, a complete and accurate Plot Plan showing:
    - i. The OHWM.
    - ii. Location of wetlands.
    - iii. Location of proposed septic tanks.
  - b. Pursuant to Sec. 38-522 (5) and (8), County Ordinances, the information necessary for the Zoning Committee to consider the compatibility with the immediate and surrounding environment and its relationship to the public interest.

- c. Pursuant to Sec. 38-370, County Ordinances, evidence that the soil conditions were suitable for the Proposed Use.
  - d. Pursuant to Sec. 38-563(2), County Ordinances, a detailed description of all the accessory structures and facilities.
  - e. Pursuant to Sec. 38-563(10), sufficient information to establish compliance with Wis. Admin. Code Ch. NR 115, Wis. Admin. Code Ch. NR 116 and the applicable setback requirements of the County Ordinances.
  - f. Pursuant to Sec. 38-563(12), County Ordinances, information to adequately establish that the camping units located at camping sites for three or more consecutive weeks will be served with suitable sanitary facilities in accordance with the County Private Sewage Systems Ordinance (chapter 56 of Washburn County Code) and Wis. Admin. Code Ch. SPS 383.
  - g. Pursuant to Sec. 38-563(13), County Ordinances, information to adequately establish that the Proposed Use met the minimum area, minimum shoreline and density requirements because such measurements must be taken at the OHWM.
4. In addition to the CUP Application not including all information required by the County Ordinances, the CUP Application also did not include the following information, which was essential for the Zoning Committee to render a reasonable decision that was consistent with Wis. Stat. § 59.69(5e):
- a. The OHWM of Spooner Lake.
  - b. A properly measured and considered ordinary highwater mark of Evergreen Lake.
  - c. Wetland delineation.
  - d. Depth to groundwater.
  - e. Soil type information besides surface soils.

**CONCLUSIONS OF LAW**

Based on the above Findings of Fact, the Board concluded the following:

- 1. The CUP Application did not comply with the County Ordinances because the CUP Application did not include, and the Applicant did not provide to the Zoning Committee, the following:

- a. A complete and accurate Plot Plan showing:<sup>1</sup>
    - i. The OHWM.
    - ii. Location of wetlands.
    - iii. Location of proposed septic tanks.
  - b. The information necessary for the Zoning Committee to consider the compatibility with the immediate and surrounding environment and its relationship to the public interest.<sup>2</sup>
  - c. Evidence that the soil conditions were suitable for the Proposed Use.<sup>3</sup>
  - d. A detailed description of all the accessory structures and facilities.<sup>4</sup>
  - e. Sufficient information to establish compliance with Wis. Admin. Code Ch. NR 115, Wis. Admin. Code Ch. NR 116 and the applicable setback requirements of the County Ordinances.<sup>5</sup>
  - f. Information to adequately establish that the camping units located at camping sites for three or more consecutive weeks will be served with suitable sanitary facilities in accordance with the County Private Sewage Systems Ordinance (chapter 56 of Washburn County Code) and Wis. Admin. Code Ch. SPS 383.<sup>6</sup>
  - g. Information to adequately establish that the Proposed Use met the minimum area, minimum shoreline and density requirements because such measurements must be taken at the OHWM.<sup>7</sup>
2. The Zoning Committee's decision did not comply with the County Ordinances because it failed to make adequate findings of fact when rendering its decision.<sup>8</sup> The Board's conclusions set forth herein are based on the record of materials, and not the findings of the Zoning Committee.
  3. The Zoning Committee's decision was not consistent with the terms of Wis. Stat. § 59.69(5e) because the CUP Application was not complete and the decision to

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<sup>1</sup> Sec. 38-521, County Ordinances, and the standard conditional use permit application form, which was used by the Applicant as the CUP Application.

<sup>2</sup> Sec. 38-522 (5) and (8), County Ordinances.

<sup>3</sup> Sec. 38-370, County Ordinances.

<sup>4</sup> Sec. 38-563(2), County Ordinances.

<sup>5</sup> Sec. 38-563(10), County Ordinances.

<sup>6</sup> Sec. 38-563(12), County Ordinances.

<sup>7</sup> Sec. 38-563(13), County Ordinances.

<sup>8</sup> Sec. 38-522, County Ordinances.

approve the CUP Application and issue the CUP was not supported by substantial evidence.

4. The Zoning Committee did not proceed on a correct theory of law when it granted the CUP because:
  - a. The CUP Application was incomplete and did not contain all of the information required pursuant to the County Ordinances<sup>9</sup>;
  - b. There was not substantial evidence to support the granting of the CUP in light of the incomplete CUP Application<sup>10</sup>; and
  - c. Substantial evidence was presented to the Zoning Committee to support denial of the CUP.<sup>11</sup>
  
5. The Zoning Committee's decision to issue the CUP was arbitrary and unreasonable because:
  - a. The Zoning Committee approved the CUP Application and the issuance of the CUP despite not having all the information and material required by the County Ordinances<sup>12</sup>;
  - b. The Zoning Committee approved the CUP Application and issuance of the CUP despite the Applicant's failure to properly establish the OHWM. Proper establishment of the OHWM was a both a requirement of the County Ordinances and the actual CUP Application,<sup>13</sup> but the establishment of the OHWM was also the prerequisite to determine whether other County Ordinance requirements were met;<sup>14</sup>
  - c. The Zoning Committee failed to consider or discuss the Proposed Use's compatibility with the immediate and surrounding environment and the Proposed Use's relationship with the public interest;<sup>15</sup>
  - d. The Zoning Committee approved issuance of the CUP even though there was no evidence of the soil conditions suitable to sustain the Proposed Use;<sup>16</sup> and
  - e. The Zoning Committee failed to make adequate findings of fact.<sup>17</sup>

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<sup>9</sup> See Secs. 38-521, 38-512, 38-522, 38-370, 38-563(2), (10), (12) and (13), County Ordinances.

<sup>10</sup> See Wis. Stat. § 59.69(5e)(b)2.

<sup>11</sup> *Id.*

<sup>12</sup> See Secs. 38-520 and 38-522, County Ordinances.

<sup>13</sup> See Sec. 38-521, County Ordinances, and the County's standard form conditional use application.

<sup>14</sup> See Sec. 38-563(13), County Ordinances.

<sup>15</sup> See Sec. 38-522(5) and (8), County Ordinances.

<sup>16</sup> See Sec. 38-370, County Ordinances.

<sup>17</sup> See Sec. 38-522, County Ordinances, and Wis. Stat. § 59.69(5e).



6. The Zoning Committee could not have reasonably made the decision to grant the CUP because:
  - a. It is impossible to know how the Zoning Committee could have reasonably made its decision because it did not make any findings of fact as required by Sec. 38-522, County Ordinances, and Wis. Stat. § 59.69(5e).
  - b. The Zoning Committee it did not have all the information and material required by the County Ordinances<sup>18</sup>;
  - c. The Applicant's failure to properly establish the OHWM, which is required generally under the County Ordinances<sup>19</sup> and the OHWM is used as the measure to ensure compliance with other County Ordinance requirements<sup>20</sup>;
  - d. It failed to consider or discuss the Proposed Use's compatibility with the immediate and surrounding environment and the Proposed Use's relationship with the public interest;<sup>21</sup>
  - e. The CUP Application and record did not include any evidence that the soil conditions were suitable to sustain the Proposed Use;<sup>22</sup>
  - f. The CUP Application and information presented to the Zoning Committee did not include substantial evidence to support issuance of the CUP<sup>23</sup>; and
  - g. Substantial evidence was presented to the Zoning Committee to support denial of the CUP.<sup>24</sup>

Based on the foregoing Findings of Fact and Conclusions of Law, the Board declined to affirm the Zoning Committee's decision to approve the CUP Application and issue the CUP.

### III. APPEAL/REVIEW OF BOARD'S DECISION:

*The Washburn County Board of Adjustment's decision may be appealed by filing an action in certiorari in the circuit court for Washburn County within 30 days after the date of filing of the decision. The decision was filed on August 27, 2021. These Findings of Fact and Conclusions of Law are hereby issued to further illustrate the reasoning for the Washburn County Board of Adjustment's decision rendered on July 30, 2021 and filed on August 27, 2021. The Washburn County Board of Adjustment assumes no liability for and makes no warranty as to reliance on the decision or the issuance of these Findings of Fact and Conclusions of Law.*

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<sup>18</sup> See Secs. 38-520 and 38-522, County Ordinances.

<sup>19</sup> See Sec. 38-521, County Ordinances, and the County's standard form conditional use application.

<sup>20</sup> See Sec. 38-563(13), County Ordinances.

<sup>21</sup> See Sec. 38-522(5) and (8), County Ordinances.

<sup>22</sup> See Sec. 38-370, County Ordinances.

<sup>23</sup> See Wis. Stat. § 59.69(5e)(b)2.

<sup>24</sup> *Id.*

Dated this 30<sup>th</sup> of August, 2021.

WASHBURN COUNTY BOARD OF ADJUSTMENT

/s/ Ruth King  
By: Ruth King, Chairperson