

## Governmental Authority in Regulating Land Use

by Daniel J. Stahley

The lakes, rivers and land are an abundant and enjoyable natural resource to be shared and enjoyed by the people of Minnesota. This can create an interesting dilemma between the legal rights of governmental entities, who represent the interests of the public at large, and private landowners, who enjoy legal property rights to use their land as they wish.

One such dilemma was recently discussed in *Nelson v. City of Birchwood*, 2009 WL 3426792 (Minn. App. October 27, 2009). In *Nelson*, the Plaintiff, an easement holder on Birch Beach Park, in the City of Birchwood, claimed riparian rights flowed from his easement on a public park. Riparian rights are simply the rights that a landowner enjoys in the water and shoreline adjoining his or her property. Mr. Nelson asked the Court for a declaratory ruling that he could use the easement to construct a dock to allow for easy access to his property. The Court of Appeals held that holding a private easement, which affords access to a lake over land adjacent to the water, does not make the grantee of the easement a riparian owner entitled to exercise riparian rights. The Court went on to rule that even if a landowner has riparian rights to the water and shoreline adjoining his or her property, those rights are qualified, restricted and subordinate to the paramount rights of the public. See *Nelson v. City of Birchwood*, 2009 WL 3426792 \*6 (Minn. App. October 27, 2009). The Court went on to rule that a municipality may exercise its police powers to regulate navigable waters in the public interest, and that riparian rights must yield to the government's power to regulate. *Id.* The take away lesson from this ruling is that a landowner's riparian rights are generally subordinate to and subject to the police power of local governments.

Another battle that has been recently addressed by the Courts is the decision to grant or deny a conditional use permit (CUP) to convert an existing resort into a common interest community and to add 11 new cabins to the resort. See *Big Lake Ass'n v. St. Louis County Planning Com'n*, 761 N.W.2d. 487 (Minn. 2009).

A conditional use permit is a mechanism that allows governmental entities to permit activities and different uses for land when those uses and activities are not currently permitted due to zoning restrictions. They are generally used when a governmental entity would like to prevent a detrimental activity from occurring or would like to encourage a use or activity that is not possible due to zoning restrictions. In this case, the Plaintiffs were neighbors of the existing resort and they attended a public rezoning hearing and lodged numerous complaints about the project, including the increase in units, environmental concerns, and concerns over the property owners' long term intentions regarding the property. On appeal, the Plaintiffs asserted that the County erroneously permitted the zoning classification to remain commercial, when the new development appeared to be residential in nature. The classification in this instance was important because residential properties have stricter density requirements than commercial properties.

The Court reaffirmed that county zoning authorities have wide latitude in making decisions on CUPs and, except in rare cases where there is no rational basis for the decision, it is the duty of the judiciary to exercise restraint and to accord appropriate deference to civil authorities in routine zoning matters. *Id.* at 490. The County's decision to approve a CUP is reviewed independently to see whether there was a reasonable basis for the decision, or whether the County acted unreasonably, arbitrarily or capricious. *Id.*

In the case, the Court ruled that the Plaintiffs'

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*Comments or inquiries may be directed to Shannon Banaszewski.*

## The Changing Landscape for Unemployment Benefits: Misconduct and the Single Incident

by Marlene S. Garvis

There are recent changes in the law governing unemployment compensation benefits that, hopefully, will result in determinations that are more favorable for employers. In 2009, due in part to the requirements of the American Recovery and Reinvestment Act, the federal “stimulus legislation package,” the Minnesota Legislature enacted several changes to Minn. Stat. § 268.095, including the elimination of the automatic application of the *single incident exception* to protect an employee against a determination of misconduct.

Prior to the amendments, under Minn. Stat. § 268.095, subd. 6(a), misconduct did not include: inefficiency, inadvertence, simple unsatisfactory conduct, a **single incident that does not have a significant adverse impact on the employer**, conduct an average reasonable person would have engaged in under the circumstances, poor performance because of inability or incapacity, good faith errors in judgment if judgment was required, or absence because of illness or injury with proper notice to the employer . . . (emphasis added).

Applying the *single incident exception*, an employee was eligible to receive unemployment compensation benefits even though she violated her employer’s confidentiality policy because the single act of accessing her own medical information had no significant impact on her employer. See *Hendren v. Allina Medical Group*, 2007 WL 900450 (Minn. App. 2007). In *Wood Chip of Princeton, Inc. v. Clarin*, 2009 WL 2225842 (Minn. App. 2009), an employee was eligible to receive benefits because his altercation with his supervisor that involved the use of profanity was a single incident with no significant adverse employment impact.

By contrast, when there has been a significant impact on the employer, the *single incident exception* has been found to be inapplicable. See *Skarbus v. Davanni’s, Inc.*, 721 N.W.2d 340 (Minn. App. 2006) (employee ineligible because her act of failing to charge for her own meal on-the-job undermined

the employer’s trust in her); *Frank v. Heartland Automotive Services, Inc.*, 743 N.W.2d 626 (Minn. App. 2008) (employee ineligible because fraudulently billing a customer had a significant impact on the employer’s trust); *Ozangar v. Walgreen*, 2009 WL 2016404 (Minn. App. 2009) (employee ineligible because violating her employer’s policy by handling her own photo processing and underpaying for it led the employer to mistrust her); and *Kibler v. Wesco Distribution Inc.*, 2010 WL 88273 (Minn. App. 2010) (employee ineligible because falsifying time records undermined employer’s trust).

The statutory amendments, effective August 1, 2009, still define employment misconduct as: ...intentional, negligent, or indifferent conduct . . . that displays clearly a serious violation of the standards of behavior that the employer has the right to reasonably expect of the employee; or a substantial lack of concern for the employment... See Minn. Stat. § 268.095, subd. 6(a).

But, importantly, a single incident is no longer an automatic defense to a claim of employee misconduct. Rather, it is only a factor to consider in determining misconduct. “If the conduct for which the applicant was discharged involved only a single incident, **that is an important fact that must be considered** in deciding whether the conduct rises to the level of employment misconduct under paragraph (a).” Minn. Stat. § 268.095, subd. 6(d) (emphasis added).

Even when an employee is terminated, an employer’s worries regarding payments to that employee are not yet over because the terminated employee often applies for unemployment compensation benefits. Employers are hesitant, at times, to oppose the application. In addition, despite an employer’s best efforts at opposing it, an employee has often been successful in being found eligible for benefits by the Department of Employment and Economic Development (DEED) adjudicator. The employer’s choices then are either to accept that result or appeal the eligibility determination.

Prior to the changes in the statute, employers would often forego an appeal, as it involves significant time and money, with no assurance that the appeal determination

would be favorable to them. Of importance is the fact that the evidentiary appeal hearing is conducted simply as an evidence gathering inquiry with no regard to burden of proof, although the factual findings of the Unemployment Law Judge (ULJ) must be based on a preponderance of the evidence. See Minn. Stat. § 268.105, subd. 1(b). The ULJ “must ensure that all relevant facts are clearly and fully developed.” *Id.* See *Vargas v. Northwest Area Foundation*, 673 N.W.2d 200 (Minn. App. 2004) (holding that a ULJ is required to make independent findings of fact and such decisions as those facts require).

The removal of the *single incident exception* as an automatic defense has potentially important implications for the employer. If an employer believes that an employee’s termination was due to misconduct and, therefore, merits disqualification by the DEED, the change in the law may make it more likely that the employer will prevail, i.e., that the terminated employee will be found to be ineligible for benefits even if the conduct at issue was a single act that did not adversely affect the employer in any way. While optimistic about this, it is too early to predict any trend in how the DEED will apply the new misconduct language of Minn. Stat. § 268.095. In the interim, however, the guidance offered employers is to continue to have rules in place that establish clear expectations for employee work performance and specific policies and procedures for employee discipline and termination. •





**Congratulations to Gerald M. Linnihan** upon his retirement from Jardine, Logan & O'Brien, PLLP. Jerry began employment with the Firm in September of 1968. He became a Partner of the Firm in October of 1973 and retired after 40+ years of service. The Firm thanks Jerry for his partnership, friendship, and years of service. He will be missed! •

**Congratulations to Eugene J. Flick** for his recognition in the November/December 2009 Edition of Super Lawyers - Workers' Compensation Edition. •

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arguments were not properly raised before the county zoning authority, so to litigate new issues on review would encroach on the County's broad authority. In order to determine whether the issue was fairly raised for consideration by the zoning authority, the issue does not need to be framed in precise legal terms. There only must be sufficient specificity to provide fair notice of the nature of the challenge so that the zoning authority has an opportunity to consider and address the issue. The Court held that generalized complaints about density or the long term plans of the resort owners were not sufficient to put the zoning authority on notice that the Plaintiffs were challenging the commercial zoning classification of the resort.

This decision protects local zoning boards from after-the-fact attacks about the legality of their zoning designations. Therefore, zoning boards must only address and consider concerns that are specifically raised at the public hearing.

Another important CUP decision was recently issued in *Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d 184 (Minn. App. 2009). In this case, a CUP limited the number of boats that could be docked at a marina. The language of the CUP did not differentiate between sailboats and motorboats, even though the intent of the original parties to the CUP was that it applied only to sailboats. After a number of years, the City unilaterally amended the terms of the CUP such that only sailboats could be docked at the marina.

In its decision, the Court of Appeals ruled that a CUP is a protected property right that is perpetual in nature and runs with the land so the City could not unilaterally amend the terms of the CUP. See *Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d at 187 (Minn. App. 2009). This means that once a CUP is issued to a parcel of property, the conditional use will pass on to subsequent property owners until the end of time, except with the consent of both parties, or upon the violation of the express terms of the CUP. Therefore, local governments must carefully plan for the future and consider long term development goals when determining whether to grant or deny a CUP proposal.

However, the Court left a gaping alternative to unilaterally amending a CUP. The Court noted that if the City wanted to amend the terms of the CUP, it had the possibility of amending the current zoning ordinance to provide that marina use be limited only to sailboats. The Court explained that the statutory restriction on a local government's authority to invalidate a CUP is not intended to prevent zoning changes that may affect the status of a CUP. This means that a governmental entity can also consider making broad zoning changes in lieu of parcel specific changes to a protected property right.

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### CASE UPDATE

#### MN Supreme Court Upholds Preemption by Graves Amendment

On January 14, 2010, the Minnesota Supreme Court issued its decision in *Meyer v. Nwokedi*, 777 N.W.2d 218, (Minn. 2010), affirming the Court of Appeals decision, limiting a rental-vehicle owner's vicarious liability to the minimum limits required by Minnesota law.

In *Meyer*, the plaintiffs were passengers in a rental vehicle that was involved in a single vehicle accident. The plaintiffs sued the driver of the vehicle. They also sued the vehicle's owner, Enterprise Rent A Car Co., claiming vicarious liability. Enterprise deposited the minimum limits of \$60,000 (multiple claims) into the court, and the District Court granted Enterprise's summary judgment motion.

The Minnesota Supreme Court agreed with Enterprise that it could not be held vicariously liable above the minimum limits as the owner of the rental vehicle. The Supreme Court unanimously held that the Graves Amendment preempted Minnesota law that held rental-vehicle owners vicariously liable for damages in excess of the legally required minimums arising out of accidents caused by renters. •

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