NO. A12-0681

STATE OF MINNESOTA

IN SUPREME COURT

Lorraine White, Trustee for the
Lorraine M. White Trust, et al.,

Appellants,

vs.

City of Elk River,

Respondent.

BRIEF OF *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND MINNESOTA VACATION RENTAL ASSOCIATION IN SUPPORT OF APPELLANTS

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1. Did the City of Elk River have authority to terminate Petitioners' grandfathered use of their property, despite the fact that Petitioners had continuously maintained a campground on their property since before the City adopted pertinent zoning restrictions?

2. Did Petitioners' grandfathered rights to continue operating a commercial campground on their property entail the right to rebuild an accessory structure that was essential to that non-conforming use?

INTEREST OF AMICI CURIAE[1]

National Federation of Independent Small Business Legal Center ("NFIB Legal Center") is a nonprofit, 501(c)(3) public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. Accordingly, NFIB Legal Center files in this matter because the case presents a matter of public importance, which may potentially affect the rights of any property owner—including many small business owners—in Minnesota.

The National Federation of Independent Small Business ("NFIB") is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission

[1] NFIB Legal Center and Minnesota Vacation Rental Association certify that this brief was not authored in whole or in part by counsel for either party to this appeal, and that no other person or entity contributed monetarily toward its preparation or submission.

is to promote and protect the right of its members to own, operate and grow their businesses. NFIB represents 350,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses. We file here because the case raises fundamental questions about the background principles of property law in Minnesota. Specifically, we are concerned that the Court of Appeals misapplied fundamental concepts of property law and that the rule pronounced in its decision—if endorsed here—will enable municipalities to coerce landowners into waiving grandfathered rights.

The Minnesota Vacation Rental Association ("MNVRA") is a Minnesota non-profit organization whose purpose is to protect the property rights of Minnesota property owners to rent their homes, condominiums, and townhomes as short-term vacation home rentals. The MNVRA believes that all property owners have the constitutional right to rent their property, to make a living without arbitrary government regulation, to freely contract with others, and to the quiet enjoyment of their property. As an advocate for approximately 180 members, representing Minnesota vacation property owners and managers, the interests of MNVRA's members are directly implicated here, since the

outcome of this case will affect their member's rights to rent, use, and enjoy their property.

STATEMENT OF CASE

Amici NFIB Legal Center and MNVRA adopt Petitioners' statement of the facts and procedural history in this case.

SUMMARY OF ARGUMENT

The Court of Appeals erred in holding that Respondent, the City of Elk River (the "City"), had authority to revoke Petitioners' grandfathered rights. The parties acknowledge that Petitioners, Lorraine M. White Trust, et al. (the "Whites" or the "family"), used the subject property as a campground prior to the adoption of the 1980 and 1983 zoning codes. As such, the family had vested rights to continue using their property as a campground since the 1970s.

Though the Whites accepted a conditional use permit in 1984, they did not waive their right to continue operating the campground in doing so. Their grandfathered rights were never contingent upon the permit. The City thus never had the authority to terminate the family's vested rights by revoking the permit—it was bound to respect their continued right of operation.

Furthermore, the vested rights doctrine allows business owners to maintain existing buildings on their property, and to rebuild, when necessary for the continued operation of a non-conforming use. As such, the City never had the power to prevent the Whites from rebuilding a structure that was essential to their business operations, or from

using it after it was rebuilt. Petitioners have the right to continue running their campground and its accessory facilities.

ARGUMENT

I. THE CITY LACKED THE POWER TO TERMINATE THE FAMILY'S GRANDFATHERED RIGHTS

a. The Family Had Vested Rights to Continue Running Their Campground Following Enactment of the Zoning Code

The parties acknowledge that the family has used the subject property as a commercial campground since the 1970s.[2] No one disputes that this was a lawful use at the time.[3] After all, there were no zoning restrictions limiting the family's use of the property as a campground until 1980.[4] And before the 1980 zoning code ("1980 Zoning Code"), the family was free to make any reasonable use of their property, subject only to the common law nuisance doctrine.[5]

Once the zoning code was enacted, the City then restricted *new* developments; but, the City could not take away the family's vested rights to continue operating their

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[2] *White v. City of Elk River*, 822 N.W.2d 320, 321 (Minn. App. 2012).
[3] *Id.*
[4] *White v. City of Elk River*, 822 N.W.2d at 321.
[5] *See Olsen v. City of Hopkins,* 276 Minn. 163, 149 N.W.2d 394 (Minn. 1967) (recognizing that, at common law, a property owner maintains the right to make any reasonable use of the land and that—for this reason—zoning ordinances should be construed narrowly to preserve the landowner's common law rights); *see also Moore v. City of East Cleveland, Ohio*, 431 U.S. 494, 513 (1977) (Stevens, J., concurring) ("Long before the original States adopted the Constitution, the common law protected an owner's right to decide how best to use his own property."); William Blackstone, 1 Bl.Comm., The Rights of Persons Ehrlich Ed. P. 41 (property owners have an "absolute right" to "the free use, enjoyment, and disposal of all [] acquisitions, *without any control or diminution* save only by the laws of the land.") (emphasis added).

campground.[6] Thus, if the family had sought to expand their operations, or if they had sought to develop a new campground within the same zone, the 1980 Zoning Code—and its amendments in 1983—would have legitimately required the family to petition for a Conditional Use Permit ("CUP").[7] But the City could not terminate their grandfathered rights by enacting the zoning code or conditioning the continuation of their long-standing business operations on the requirement that they submit to a revocable CUP.[8]

b. The Family Maintained Their Pre-existing Vested Rights in Accepting the 1984 Conditional Use Permit

The Court of Appeals erred when it assumed that the family's grandfathered rights depended upon the continued validity of the 1984 CUP.[9] This fundamental error stems from the fact that the Court of Appeals failed to recognize that the Whites' had already attained vested rights in 1980.[10] Yet, if this Court recognizes—as we argue—that the Whites had vested rights as of 1980, then there is no question that they were entitled to continue operating their campground unless and until they voluntarily abandoned that

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[6] The City would have to initiate eminent domain proceedings to take away that right. *Hooper v. City of St. Paul*, 353 N.W. 2d 138, 140 (Minn. 1984) ("It is a fundamental principle of the law of real property that uses lawfully existing at the time of an adverse zoning change may continue to exist until they are removed or otherwise discontinued."); *Freeborn County v. Claussen*, 295 Minn. 96, 99, 203 N.W.2d 323, 325 (Minn. 1972) (citing *Hawkins v. Talbot*, 249 Minn. 549, 80 N.W.2d 863 (Minn. 1957)) ("[E]xisting nonconforming uses must either be permitted to remain or be eliminated by use of eminent domain…").

[7] *See Freeborn County,* 295 Minn. at 99, 203 N.W.2d at 325.

[8] *See Connor v. Township of Chanhassen*, 249 Minn. 205, 216, 81 N.W.2d 789, 797-98 (Minn. 1957) (recognizing that landowners have a constitutionally protected vested right to continue operating their business on their property, notwithstanding the adoption of municipal zoning restrictions that may purport to deny them this right).

[9] *See City of Elk River*, 822 N.W.2d at 324.

[10] *Id.* at 323 (assuming the campground only became a non-conforming use in 1988).

use.[11] To hold otherwise would require a finding that they waived their vested rights by accepting the 1984 CUP.

i. The City Lacked the Power to Compel the Family to Waive Grandfathered Rights

Since the Whites had vested rights to continue their non-conforming use when the 1980 Zoning Code was enacted, they were under no legal duty to obtain any permit or special permission from the City to continue their operations.[12] Moreover, the City had no power to force the family into waiving their grandfathered rights.[13] After all, government cannot subvert constitutional protections by requiring individuals to submit to procedures demanding waiver—otherwise government could systematically circumvent our rights.

The City had no power to require the family to obtain a CUP, or any other permit or license, if that would require them to waive their vested rights.[14] Any such requirement would constitute an unconstitutional condition.[15] If municipalities could defeat vested

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[11] *Hawkins,* 248 Minn. 549 (Minn. 1957) (recognizing the longstanding doctrine of vested rights restricts municipal police powers).

[12] *See Hooper*, 353 N.W.2d at 141 (affirming a landowners right to continue using a duplex following enactment of a zoning change that disallowed the use, notwithstanding allegations that the duplex was not in conformance with building code requirements).

[13] *Connor,* 249 Minn. at 216-17, 81 N.W.2d at 797-98 (affirming that the vested rights doctrine ensures the landowner's right to continue business operations, notwithstanding municipal zoning restrictions that "would deny the plaintiffs the right to continue…").

[14] *See Palazzolo v. Rhode Island*, 533 U.S. 606, 626-627 (2001) (holding that constitutionally protected rights run with the land, even after land use restrictions are adopted).

[15] *See e.g.*, *Perry v. Sindermann*, 408 U.S. 593, 597 (1972) ("[I]f the government could deny a benefit to a person because of his constitutionally protected speech or associations, his exercise of those freedoms would be penalized or inhibited. This would allow the government to 'produce a result which [it] could not command directly.'"

rights simply by requiring property owners to obtain a revocable CUP, there would be no vested-rights doctrine.

Indeed, the authorities could greatly accelerate the goal of eliminating non-conforming uses if they were allowed to render vested rights mere privileges subject to revocation. This would be an attractive option for city planners bent on abolishing long-standing uses. But, it would imperil the rights of ordinary property owners and turn the concept of vested rights on its head.[16]

ii. Acceptance of a Conditional Use Permit Purporting to Authorize Vested Grandfathered Rights Should Not Be Construed as a Waiver

It is highly improbable that the Whites sought out a CUP in 1984 without prodding from City officials. Most small business owners in the Whites' position want only to continue running their business without interference from local government which is their right to do so under the vested rights doctrine.[17] But if government officials tell a business owner to obtain a permit in order to continue operating a business, most will

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(internal citation omitted)); *Pickering v. Board of Educ.*, 391 U.S. 563, 568–70 (1968) (government may not condition the exercise of economic liberties on a requirement to "relinquish" constitutionally protected rights); *Frost & Frost Trucking Co. v. Railroad Comm'n of Cal.*, 271 U.S. 583, 593-94 (1926) (state may not require waiver of constitutional rights as a condition of allowing commercial operations).

[16] *See Connor*, 249 Minn. at 216, 81 N.W.2d at 797 (endorsing the rule that "[a]n ordinance which prohibits the continuation of existing lawful businesses within a zoned area is unconstitutional as taking property without due process of law and being an unreasonable exercise of the police power"); *see also* Laura Inglis, *Substantive Due Process: Continuation of Vested Rights?*, 52 Am. J. Legal Hist. 459 (2012) (tracing the development of the vested rights doctrine and summarizing it as holding government action invalid where it interferes with an already established property right).

[17] *Hawkins*, 248 Minn. at 551, 80 N.W.2d at 865 (recognizing that the "right of a governmental body to enact zoning restrictions must be subject to the vested property interests of lawful businesses and uses already established…").

comply to keep the peace. This understandable decision to acquiesce to official instructions should not waive already vested rights for three reasons.[18]

1) Vested Rights Are Only Waived With Voluntary Abandonment

Minnesota law recognizes waiver of a vested right only where the use has been voluntarily abandoned.[19] And, in this case, the non-conforming use unquestionably continued without interruption long after the Whites accepted the 1984 CUP.[20] Therefore acceptance of the 1984 CUP is not a waiver of the underlying right to continue running the campground.[21]

2) Acceptance of a CUP Cannot Constitute Waiver of Rights

Generally, CUPs are required only for *new* developments.[22] This makes sense because conditions imposed on a development permit are meant to mitigate adverse impacts that a proposed project might have on the public.[23] But Minnesota law makes

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[18] Even if the Whites voluntarily sought out a CUP out of concern that the 1983 Zoning Code threatened the continued legality of their campground operations, this should not be viewed as a waiver of their pre-existing vested rights for the reasons set forth here.
[19] *See Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919, 925-926 (Minn. App. 2002) ("Waiver is the voluntary relinquishment of a known right…").
[20] *City of Elk River*, 822 N.W.2d at 321-323.
[21] *See Hooper*, 353 N.W.2d at 140; *see also County of Isanti v. Peterson*, 469 N.W.2d 467, 470 (Minn. App.1991), *overruled on other grounds by Tyroll v. Private Label Chems., Inc.*, 505 N.W.2d 54 (Minn.1993) (stating that vested rights may be abandoned only with "(1) intent to abandon; and (2) an overt act or failure to act indicating the owner no longer claims a right to the nonconforming use.").
[22] *See* Minn. Stat. § 462.3595, subd. 1 (2006) (authorizing municipalities to "designate certain type of *developments*… as conditional uses under zoning regulations.") (emphasis added).
[23] *See Nollan v. California Coastal Com'n*, 483 U.S. 825, 837 (1987) (conditions imposed on a permit must bear a "nexus" to some impact the proposed project will have on the public).

clear that pre-existing non-conforming uses need no formal authorization.[24] Since a landowner is under no legal duty to obtain authorization for a pre-existing use the owner receives no benefit in accepting a CUP. This is significant because CUPs are often analogized to contracts, wherein there are corresponding benefits.[25]

Typically an owner accedes to the conditions of a permit to attain the benefit of authorization where the government has some discretion to withhold approval of a newly proposed use.[26] In such a case the right of development is conditioned on the requirements of a CUP, which may oblige the landowner to accede to certain conditions.[27] Yet even in that case there are constitutional limitations on what conditions may be imposed on a land use permit.[28]

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[24] This is so because the landowner has a vested right to continue a non-conforming use. *See Hooper*, 353 N.W.2d at 140; *Hawkins*, 248 Minn. at 551-52, 80 N.W.2d at 865; *Connor*, 249 Minn. at 215-16, 81 N.W.2d at 797-98. If the City takes issue with a long-standing non-conforming use it may have grounds to pursue an injunction under a nuisance theory, but it cannot terminate the use by fiat. *Hooper*, 353 N.W.2d at 141 (municipality could not address its concerns by prohibiting the use).

[25] *See State v. Larson Transfer & Storage, Inc.*, 310 Minn. 295, 304, 246 N.W.2d 176, 182 (Minn. 1976).

[26] *See Anderson v. City of Minneapolis,* 287 Minn. 287, 288-89, 178 N.W.2d 215, 217 (Minn. 1970); *see also Hooper*, 353 N.W.2d at 140 (recognizing local authorities maintain discretion to prohibit new developments).

[27] *See Larson Transfer & Storage, Inc.*, 310 Minn. at 304, 246 N.W.2d at 182 (recognizing the owner may lose the benefits procured with the permit if attached conditions are unsatisfied).

[28] *Kottschade v. City of Rochester*, 537 N.W.2d 301, 307-308 (Minn. App. 1995) (recognizing that "the city must show an 'essential nexus' exists between the 'legitimate state interest' and [a] condition exacted.") (citing *Dolan v. City of Tigard*, 512 U.S. 374, 379-380 (1994)).

But, in the case of a landowner who is told to acquire a CUP to continue lawfully operating a long-standing business, the government has no discretion to deny approval.[29] To the extent a zoning code may seek to require a landowner to obtain a CUP for a non-conforming use, the local authorities would have a ministerial duty to process and approve the permit without imposing conditions requiring waiver of rights.[30] Since any attempt to impose such requirements would have been invalid *ab initio*, the Whites could not have waived their rights in accepting the 1984 CUP.[31]

3) It Would Be Inequitable to Construe Acceptance of a CUP as Waiver of Vested Rights

Third, it would inequitable to construe acceptance of a CUP as a waiver of rights in a case where the government has prompted a landowner to apply for a CUP. Here, the Court of Appeals assumed that the Whites extinguished their pre-existing vested rights by accepting the 1984 CUP, apparently on the view that those rights were—at that point—entirely subordinate to the conditions imposed on the permit.[32] But such a rule would create a perverse incentive, allowing local officials to coerce individuals into waiving their rights by demanding they submit to a CUP.

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[29] *See Hawkins*, 248 Minn. at 551-52, 80 N.W.2d at 865.
[30] *See Connor*, 249 Minn. at 215-16, 81 N.W.2d at 797-98 (municipality had no authority to impede landowner from continuing business operations).
[31] *See State v. Byers*, 570 N.W.2d 487, 494 (Minn. 1997) (citing *Illinois v. Allen,* 397 U.S. 337, 343 (1970)) ("Courts must indulge every reasonable presumption against" loss of constitutionally protected rights); *see also Connor*, 249 Minn. at 217, 81 N.W.2d at 798 (rejecting the suggestion that intervening events should deprive a landowner of constitutionally protected vested rights).
[32] *White v. City of Elk River*, 822 N.W.2d 320, 323-24 (Minn. App. 2012).

Local officials could quite literally hold the landowners' vested rights hostage by threatening to bring enforcement actions unless the landowner submits to the terms of a CUP.[33] The mere threat of an enforcement action would compel most landowners into capitulating.[34] This would result in an inadvertent waiver of vested rights for those landowners who cannot afford legal counsel. And for those who might realize the possible adverse implications of accepting a CUP, such a rule would prompt litigation that is costly for both the local authority and the landowner. Furthermore, in the present case, it would be inequitable to construe acceptance of the CUP as rendering the Whites' vested rights contingent upon the continued validity of the 1984 CUP because the permit does not—on its face—suggest that the family was waving any rights with acceptance.[35]

iii. The 1984 Conditional Use Permit Had No Legal Effect

For the reasons set forth in the foregoing sections, the 1984 CUP should not be viewed as altering the Whites' vested rights. The 1984 CUP had no independent legal effect. It would have been valid only if it had authorized a new development or an

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[33] *See Nollan*, 483 U.S. at 837 (1987) (referring to permit conditions as extortionate where they require waiver of constitutionally protected property rights).

[34] *See* Damien M. Schiff and Luke A. Wake, *Leveling the Playing Field in David v. Goliath: Remedies to Agency Overreach*, 17 Tex. Rev. L. & Pol. 97, 112 -113 (2012) (discussing the reality that small business owners are often compelled to capitulate to inappropriate government positions because it does not make economic sense to litigate the issue).

[35] *See Olsen,* 276 Minn.163, 149 N.W.2d 394; *Hooper*, 353 N.W.2d at 140 (rejecting an otherwise plausible interpretation because it would "fail to honor the constitutional protection afforded existing uses.").

expansion of the preexisting use.[36] In any event, it could not have rendered the Whites' vested rights revocable.

c. The Family Had Vested Rights to Continue Their Non-Conforming Use After the City Amended its Zoning Code in 1988

Even assuming that acceptance of the 1984 CUP somehow limited the Whites' rights, it is undisputed that the family was legally using their property as a commercial campground in 1988 when the City amended its zoning code ("1988 Amendments").[37] While the 1988 Amendments disallowed conditional use permits, the family was nonetheless entitled to continue running their campground because they had a vested right to do so.[38] To be sure, Minnesota has codified the vested rights doctrine as allowing the continuation of any non-conforming use of land if it was "lawful" at the time a more restrictive ordinance was enacted.[39]

Accordingly, the Whites were entitled to continue operating their campground as they had since the 1970s because they were doing so lawfully at the time the 1988 Amendments came into effect.[40] The City was bound to respect their continued right of operation. The local authorities could act only to enjoin new uses, or expansions of pre-existing uses.[41]

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[36] *Hawkins*, 248 Minn. at 552-54, 80 N.W.2d at 865-67 (recognizing local authorities may only enjoin expansions or new uses).
[37] *City of Elk River*, 822 N.W.2d at 321-322 ("the parties agree that the campground has been a non-conforming use since 1988.").
[38] *Freeborn County*, 295 Minn. at 99, 203 N.W.2d at 325-26.
[39] *See* Minn. Stat. § 462.357 subd. 1e (2008); *see also* Minn. Stat. § 645.17 (2010) (ambiguous language should be interpreted to avoid constitutional problems).
[40] *Hooper*, 353 N.W.2d at 140; *Hawkins*, 248 Minn. at 551-52, 80 N.W.2d at 865-66
[41] *Connor*, 249 Minn. at 215-16, 81 N.W.2d at 797-98.

II. THE VESTED RIGHTS DOCTRINE GUARANTEED THE FAMILY'S RIGHT TO REBUILD

a. The Vested Rights Doctrine Protects the Right to Continue Business Operations and to Repair and Replace All Necessary Facilities

The parties in this dispute have largely focused on the White's statutory right to rebuild a building on their campground after it was destroyed by a fire in 1999; however, it is important to recognize that this statutory right is rooted in a constitutional principle.[42] The vested rights doctrine allows business owners to maintain buildings on their property, and to rebuild, when necessary for the continued operation of a non-conforming use.[43] When faced with a similar situation in *Connor v. City of Chanhassen*, this Court held that a landowner's vested rights to continue operating an ongoing business entails the right to rebuild a structure or facility so long as it will not expand the footprint.[44]

In *Connor*, the landowner lost a building that had previously been used for his lawnmower repair business.[45] The building was razed when the State took a section of the owner's land through eminent domain.[46] At that point, the owner would have been unable to continue operating his business without rebuilding. But, the local authorities took the position that he could not rebuild the lost building, elsewhere on his property, on the theory that this would constitute an expansion of the non-conforming use under the city code.[47] This Court rejected that argument because the eminent domain proceedings had

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[42] *Hooper*, 353 N.W.2d at 140.
[43] *Connor*, 249 Minn. at 215-16, 81 N.W.2d at 797-98.
[44] *Id.*
[45] *Connor*, 249 Minn. at 206-08, 81 N.W.2d at 792-93.
[46] *Id.*
[47] *Id.*

not taken his vested rights to continue business operations on the remainder of his land.[48] Accordingly, the owner was entitled to rebuild.[49]

In the same manner, this Court should hold the Whites' vested rights to continue running their campground include the constitutionally protected right to rebuild structures that had been important to their ongoing business operations.[50] The Whites have every right to continue running their campground as they have since the 1970s.[51] If the City should seek to take away that right—including the right to rebuild and maintain an essential structure—the city would be taking the family's vested rights without due process of law.[52]

b. To Avoid a Constitutional Problem, Minnesota's Non-Conforming Use Statutes Should Be Interpreted so as to Allow the Family to Rebuild

With these constitutional principles in mind, the Elk River City Code and Minn. Stat. § 462.357 should be interpreted so as to recognize the Whites' right to rebuild. The canons of construction—codified as Minn. Stat. § 645.17—provide that any ambiguities in a statute should be resolved so as to avoid constitutional problems. Accordingly, the Court should recognize that the pertinent code sections and statutes authorize the Whites

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[48] *Id.* at 215-16, 81 N.W.2d at 797-98 (holding that the owner had not been compensated for "the loss of the right to continue" his business, which the Court recognized remained a protected right "within the due process clause of the Constitution.").

[49] *Id.*

[50] *Id.* (vested rights also entail the right to "goodwill").

[51] *Id.*

[52] It should be noted that the building in question "contained showers and other facilities required of campgrounds by the Minnesota Department of Health." *City Elk River*, 822 N.W.2d at 322. As such, the White's cannot continue lawfully operating their campground if they are denied the right rebuild here. Denial of their right to rebuild would itself extinguish their right to maintain the campground.

to rebuild their building in this case.[53] Yet in any event, the background principles of property law hold that the family had a constitutionally protected right to rebuild, regardless of what is explicitly authorized by statute.[54]

III. THE CITY CAN ENJOIN EXPANSIONS OF THE NONCONFORMING USE, BUT CANNOT TAKE AWAY THE FAMILY'S VESTED RIGHTS

The vested rights doctrine guarantees landowners the right to continue using their property as they had prior to the adoption of a more restrictive zoning regime.[55] As such, a municipality may enjoin a landowner from *expanding* a grandfathered use, but can never take away the constitutionally protected right to continue with the *original* non-conforming use—except upon payment of just compensation.[56] This rule has been interpreted so as to allow business owners to continue with the ordinary course of business, so long as they do not fundamentally expand the nature of their enterprise.[57]

Here the City has taken issue with campers allegedly staying on the property for indefinite time periods; however, the record may support the conclusion that the

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[53] *See Hooper*, 353 N.W.2d at 140 (interpreting ambiguous language so as to avoid casting "grave doubt on the validity" of the zoning code).
[54] *Connor*, 249 Minn. at 216, 81 N.W.2d at 797 (holding the police power subordinate to constitutionally protected vested rights).
[55] *Hooper*, 353 N.W.2d at 140.
[56] A landowner with vested rights is limited only from expanding existing uses or from adopting new uses that may be inconsistent with zoning restrictions. See *Hawkins*, 248 Minn. at 552-54, 80 N.W.2d at 865-67.
[57] *Id.* (holding that further excavation of quarry and implementation of new equipment does not constitute an expansion of the non-conforming use, provided the "original nature and purpose of the undertaking remain unchanged.").

campground has always allowed visitors to stay indefinitely.[58] Such a finding would preclude the City from interfering with the family's vested right to allow guests to stay as long as they should like.[59] That is because this activity would be within the scope of their original non-conforming use—not an expansion.[60]

In the event that a reviewing court should determine that the campground did not allow for guests to remain indefinitely at the time it became a non-conforming use—or if the family subsequently abandoned that use—the City may then have an action to enjoin the campground from allowing guests to remain indefinitely.[61] But, even if allowing guests to remain indefinitely constitutes an expansion of the grandfathered use, that does not give licenses to terminate vested rights.[62] The appropriate remedy would be to enjoin the expansion alone—allowing the family to continue their campground operations consistent with their long-standing business practices.[63]

CONCLUSION

For the reasons described above, the National Federation of Independent Business Small Business Legal Center and Minnesota Vacation Rental Association, as *amici curiae*, urge this Court to reverse the decision of the Court of Appeals and hold that

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[58] *See* Exh. B to Woodford affidavit at p. 5 (indicating that, in 1984, City Planning Commission officials questioned whether, and to what extent, people were living in the "campground in year-round camping trailers.").
[59] *Freeborn*, 295 Minn. at 99, 203 N.W.2d at 325.
[60] *Hawkins*, 248 Minn. at 552-54, 80 N.W.2d at 865-67.
[61] Perhaps the 1984 CUP—and the record of its deliberations—may be offered as relevant evidence as to this factual question.

[62] *Hawkins*, 248 Minn. at 552-54, 80 N.W.2d at 865-67.
[63] *Id.*

(1) the City lacked the power to terminate the Whites' grandfathered rights; and (2) the Whites have constitutionally protected vested rights to continue operating their campground, which guaranteed their right to rebuild.

Dated: March 18, 2013

Respectfully submitted,

By _____

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CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minnesota Rule of Civil Appellate Procedure 132.01, subds. 1 and 3(a), for a brief produced with a 13 point proportional font, Times New Roman. The brief is printed on 8-1/2 by 11 inch paper with written matter not exceeding 6-1/2 by 9-1/2 inches. The length of the brief is 4,799 words, as determined by the word counter of the word processing software, Microsoft® Office Word 2003, which was used to prepare the brief.

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