**COURT OF APPEALS**
**DECISION**
**DATED AND FILED**

**August 30, 2017**

**Diane M. Fremgen**
**Clerk of Court of Appeals**



**Appeal No. 2016AP666** **Cir. Ct. No. 2014CV95**

**STATE OF WISCONSIN** **IN COURT OF APPEALS**
**DISTRICT II**

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**HARTLAND SPORTSMEN'S CLUB, INC.,**

**PLAINTIFF-RESPONDENT,**

**V.**

**CITY OF DELAFIELD, CITY OF DELAFIELD COMMON COUNCIL AND CITY OF DELAFIELD PLAN COMMISSION,**

**DEFENDANTS-APPELLANTS.**

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APPEAL from an order of the circuit court for Waukesha County: MARIA S. LAZAR, Judge. *Modified and, as modified, affirmed*.

Before Neubauer, C.J., Reilly, P.J., and Gundrum, J.

¶1 NEUBAUER, C.J. The City of Delafield, the City of Delafield Common Council, and the City of Delafield Plan Commission (collectively the City) appeal from an order granting the motion of Hartland Sportmen's Club, Inc.

(HSC) to invalidate the City's revocation of HSC's conditional use permit (CUP) to operate a sport shooting range and the denial of HSC's application for a CUP to operate a sport shooting range. We conclude that the review HSC sought of the City's revocation of its CUP was untimely, and the circuit court should have dismissed it. However, the circuit court correctly invalidated the City's denial of HSC's application for a CUP because the denial was arbitrary and capricious.

## BACKGROUND

### History of HSC

¶2 In 1948, HSC was founded. It is a membership-based shooting club and range facility dedicated to education and promotion of outdoor skills, appreciation of natural resources, and the improvement of marksmanship skills. Initially, HSC operated on grounds it rented. In 1954, HSC purchased thirty-five acres in Wisconsin's Kettle Moraine area, west of County Highway E at 730 Maple Avenue. The area around HSC's property was undeveloped for many years, with some agricultural uses in the vicinity and Nickels Dump to the west. HSC constructed range facilities in the 1950s, and then the clubhouse in the early 1960s. Between 1968 and 1993, the Town of Delafield issued various permits and approvals to HSC for its operations and land use. In the 1970s, development of the Cherokee Woods Subdivision, adjacent to HSC's property, began. In 1996, HSC petitioned the City of Delafield for annexation, which the City granted. In 1997, the City granted a CUP to HSC for its operations and land use.

¶3 On April 29, 2010, a pregnant woman was dining on the outdoor patio of a pub, about 740 yards away from HSC's property, when she was grazed by a bullet.

**Revocation and Application of HSC's CUP**

¶4 On June 10, 2010, the City revoked HSC's CUP, stating that HSC should "come back with a plan that could be acceptable." HSC did not appeal that decision.

¶5 On July 8, 2011, HSC applied for a CUP for its property.

¶6 At an August 31, 2011 City Plan Commission meeting, HSC, through its counsel, proposed modifications at a cost of about $200,000, including a revamped range officer program, in order to address the safety issues that had been raised. The mayor expressed that the City would need professionally-engineered drawings and a business plan to show how HSC would fund the improvements. The city planner, Roger Dupler, outlined the criteria the Plan Commission would have to consider for a CUP, such as the effect on the health, safety, and welfare of the community and the immediate neighborhood, the compatibility with existing uses, the impact on surrounding property values, and the effect on noise, dust, smoke, or odors.

¶7 In a follow-up letter, dated September 23, 2011, Dupler outlined the three elements—compatibility, engineering, and operations—that make up consideration of a planned development or conditional use, since a shooting range is not a permitted use in the B-6 zoning district where HSC's property is located. He suggested, among other things, that design specifics, perhaps by National Rifle Association (NRA) guidelines, be designated, that engineered diagrams to

demonstrate the function of "no blue sky" baffles be provided, and that perimeter security be demonstrated.[1]

¶8 Because HSC needed additional time to file supplemental information, the public hearing on the CUP had to be delayed.

¶9 On July 3, 2013, HSC filed an amended statement of conditional use and planned development, which responded to the issues Dupler raised in his letter. It was HSC's opinion that after discussions with Dupler, the application was ready to be presented at a public hearing. Engineered drawings were attached to the application.

¶10 In anticipation of a July 31, 2013 Plan Commission meeting, Dupler sent a staff report to the city administrator, Tom Hafner, indicating that a no blue sky design principle could be achieved with additions or modifications to the existing shelters.

¶11 At the July 31, 2013 meeting before the Plan Commission, HSC presented the proposed changes to the property. A public hearing was set.

¶12 At the public hearing, on September 25, 2013, HSC represented that it would implement no blue sky technology and would apply NRA guidelines to the new proposal. HSC presented changes that would make it impossible for a bullet to leave the range. As for concerns about property valuation, HSC highlighted that the club predated other developments in the area, and that other things, such as the interstate or nearby landfill, had more of an impact on property

[1] In a no blue sky range, from the shooter's position, due to enclosures and structures, the shooter cannot see any sky.

value than the range. HSC stressed that gun safety is crucial, that hunting and shooting are key parts of Wisconsin's heritage, and that citizens need a safe place to learn to shoot, especially now that Wisconsin permits one to carry a concealed weapon. A number of residents spoke out in favor of and in opposition to the CUP application.

¶13 In anticipation of the next Plan Commission meeting, Dupler forwarded a staff report to Hafner. Dupler said, "Paramount to the Plan Commission's consideration" of the proposal was "the preservation of public safety." Thus, the City had to "ensure that the engineering and design of the ranges employ the most effective safety mechanisms." HSC had proceeded on a no blue sky design that, Dupler said *for the first time*, was "not fully sufficient to ensure public safety." Instead, "A more extensive system of projectile containment is warranted." For support, Dupler pointed to the NRA Range Sourcebook and United States Department of Energy (DOE) Office of Health, Safety and Security Range Design Criteria Manual. Dupler said that, until HSC had demonstrated compliance with the NRA or DOE guidelines, it was his recommendation that the Plan Commission should not recommend the CUP application to the Common Council.

¶14 At the Plan Commission meeting on November 20, 2013, HSC presented a letter from the NRA stating that the NRA Range Sourcebook contained suggested practices only, that these were not standards, and that failure to follow any of these suggestions did not imply that a range was being operated negligently. As for the DOE manual, that was for "security force and training and quasi-military training for [DOE] facilities." The guide is for military-grade weapons, not target-range weapons.

¶15 HSC represented that it had hired Jim Jendusa of Jendusa Engineering to redesign the range. Jendusa worked with John Neilson, a certified NRA instructor, used the NRA Range Sourcebook, researched measures used at other gun clubs around the country, and used a Minnesota best practices manual. HSC also presented information about its range officer program.

¶16 The Plan Commission noted that it considered the application for a CUP to be a new application and not a continuation of its CUP.

¶17 The Plan Commission voted to deny the application for a CUP and to recommend the same to the Common Council because the application did not "adequately meet safety and health standards."

¶18 On December 2, 2013, the Common Council upheld the Plan Commission's recommendation "because of safety[,] health and welfare." The minutes of the meeting were approved and filed on December 16, 2013.

**HSC's Petition for Certiorari and Declaratory Relief**

¶19 On January 15, 2014, HSC filed a complaint against the City seeking certiorari and a declaration that the City acted illegally in revoking HSC's CUP and then denying its application for a CUP.

**The City's Motion to Dismiss the Complaint as Time-Barred**

¶20 The City moved to dismiss the complaint, arguing that HSC had to appeal the Common Council's denial of HSC's CUP application to the board of appeals. Since HSC never did so, there was no basis for certiorari review before the circuit court. To the extent HSC was contending that the Common Council acted as the board of appeals, HSC had thirty days from the date of denial, on

December 2, 2013, to seek certiorari review. HSC, however, did not seek certiorari review until January 15, 2014.

¶21 The City also noted that HSC's petition sought review of the revocation of its CUP, but the revocation occurred on June 10, 2010, and the time for challenging the revocation had long since passed.

¶22 HSC opposed the motion, arguing that the City's own code stated that the denial of a CUP by the Common Council was final. Thus, HSC could not appeal to a board of appeals. The denial of the CUP application was not final until December 16, 2013, when the Common Council approved the minutes of December 2. What occurred on December 2 was just a voice vote; there was no official record until the vote was certified by approval of the minutes at the next meeting on December 16 just as the city clerk advised HSC. The city clerk's advice estopped the City from claiming that the statute of limitations began to run on December 2. Since the statute began to run on December 16, and the filing of the complaint occurred on January 15, 2014, HSC's request for certiorari review of the denial of its CUP application was timely.

¶23 The circuit court viewed the petition as one for common law certiorari review (as opposed to statutory), which permits a longer period within which to bring such a petition—six months—making HSC's petition timely.

**HSC's Motion to Expand the Record**

¶24 Later, HSC moved to require the City to submit a more complete record to the court. HSC argued that the documents of the proceedings resulting in its CUP being revoked in June 2010 should be made part of the record.

¶25 The City opposed the motion, arguing that HSC had not shown that these documents were considered when the City denied HSC's application for the CUP in 2013, and thus, were not appropriately considered on certiorari review of the City's decision. Moreover, HSC's CUP was revoked in June 2010, HSC did not seek certiorari review of that revocation, and the time to do so had long passed. In other words, review of the revocation was time-barred and HSC did not exhaust its administrative remedies.

¶26 The circuit court denied the motion to expand the record.[2]

**HSC's Motion for Certiorari and Declaratory Relief**

¶27 HSC then moved for certiorari and declaratory relief. It argued that the City acted beyond its authority in revoking HSC's CUP because WIS. STAT. § 895.527 (2009-10),[3] or the Range Protection Act (Act), prevented the City from doing so.[4] HSC further argued that the City's denial of its CUP application was arbitrary. The City changed its standards, initially indicating that no blue sky technology was sufficient to satisfy its safety concerns only to change course, requiring that HSC guarantee safety, even for a person "bent on breaking the rules and behaving dangerously." In addition, the City's determination was

[2] The Honorable James R. Kieffer decided it was common law certiorari review, that the six-month time limitation to challenge the 2010 revocation applied, and denied the motion to expand the record.

[3] All references to the Wisconsin Statutes are to the 2009-10 version unless otherwise noted.

[4] Although the statute is not denominated as the Range Protection Act, statutes of this type, enacted throughout the country, are generally characterized this way. *See* John R. Remakel, *A Minnesota Armstice? The Enactment and Implementation of the Minnesota Shooting Range Protection Act*, 31 HAMLINE L. REV. 197, 200-01 (2008).

unsupported by any findings of fact, demonstrating that it was the result of the City's will and not its reasoned judgment.

¶28 The circuit court granted HSC's motion. The court held that the City's decision to revoke HSC's CUP in June 2010 violated the Act, making that decision void. The court concluded that the City failed to follow the "due process procedures" in the statute "prior to unilaterally revoking" the CUP.

¶29 Although the court noted that it need not go further, anticipating that the matter would be appealed, it also held that the decision of the Common Council to recommend against approval of the CUP was void. The City arbitrarily reversed course, first treating the range as existing and then as a new entity. The City also changed its analysis and standards, creating new standards and requirements. For example, the City insisted on DOE standards for military shooting ranges and misinterpreted the NRA Range Sourcebook. At every stage of the application, HSC responded proactively, presenting engineering plans, NRA and other experts, agreeing to no blue sky protocol and even to fencing. HSC showed that its shooting range enhanced the surrounding property value. But the City ignored "all of the additional, costly and all-inclusive safety proposals" and chose to focus on a single, stray bullet.

¶30 The court noted that while it could not substitute its judgment for that of the City, the City had not set forth its decision, either in writing or orally. The City simply made no findings. This was another basis, the court said, upon which to rule the City's decision invalid. In short, the City's decision to deny the CUP was arbitrary and capricious, not supported by the record, without explanation, and reflected the will of the City, not its judgment.

## DISCUSSION

### Revocation of the CUP

¶31 The City maintains that judicial review of its June 2010 revocation of HSC's CUP is barred because the petition is untimely and HSC did not exhaust its remedies.

¶32 HSC, while apparently conceding that certiorari review of the revocation of its CUP would be untimely, an issue upon which it is silent, counters that the City's revocation was void from its inception. An act void from its inception, HSC argues, does not become valid through the passage of time. HSC could bring an action for a declaratory judgment that the City's revocation of the CUP in 2010 was without any authority, and thus not time-barred.

¶33 The City replies that revoking the CUP in June 2010 was not an act void from its inception. The Act does not prohibit a municipality from revoking a permit for any reason not prohibited under the Act, that a municipality still has zoning authority over CUPs, and a municipality can still regulate the operation of a range based on criteria outside of the Act.

¶34 We need not address HSC's argument that its declaratory judgment action challenging the revocation as void from the inception evades the time limits applicable to a certiorari action, because we reject the premise upon which it is based: we conclude that the City had authority to revoke the CUP. The Act did not prohibit the City from applying its zoning ordinance to HSC's sport shooting range to revoke the CUP in 2010.

¶35 As an initial matter, we note that the revocation itself is not in the record, nor are any of the 2010 documents relating to the revocation. Indeed,

neither party cites to the terms of the CUP granted in 1997. HSC states that the CUP was "purportedly revoked due to safety concerns," and provides a cite to its own attorney's representation from the minutes of a presentation to the City, but provides no factual information. The circuit court's decision to deny expansion of the record to include the documents relating to the 2010 revocation is unchallenged on appeal. Thus, we have no documents relating to the 2010 revocation. The only document cited is a statement made in a December 2, 2013 hearing transcript in which the 2010 revocation is noted. HSC fails to address on appeal the circuit court's conclusion that the 2010 revocation was void because the statutory "due process procedures" were not followed, denying Hartford due process, and we see nothing in its briefs filed with the circuit court to clarify the matter.[5]

¶36 Moreover, neither the circuit court nor HSC on appeal point to any specific provision of the Act that would prohibit the City from applying its zoning authority to revoke the CUP in June 2010. HSC does not develop any constitutional or statutory argument on appeal other than to baldly declare that the revocation was void because the statute precludes the exercise of a municipality's "land use authority." Our review of the statute finds no support for HSC's blanket declarations.

¶37 The relevant portions of the Act in June 2010 were as follows:

[5] HSC did not allege a constitutional due process violation in its certiorari petition. Even if the challenge was based on an alleged lack of due process in the proceedings, certiorari, rather than a declaratory judgment, is the appropriate action. *See* ***Thorp v. Town of Lebanon***, 2000 WI 60, ¶¶53-54, 235 Wis. 2d 59, 612 N.W.2d 59 (certiorari review is an adequate postdeprivation remedy for due process purposes); ***Master Disposal, Inc. v. Village of Menomonee Falls***, 60 Wis. 2d 653, 657-58, 211 N.W.2d 477 (1973).

> **(5)** Any sport shooting range that exists on June 18, 1998, may continue to operate as a sport shooting range at that location notwithstanding all of the following:
>
> (a) [WIS. STAT. §§] 167.30, 941.20(1)(d) or 948.605 or any rule promulgated under those sections regulating or prohibiting the discharge of firearms.
>
> (b) [WIS. STAT. §] 66.0409(3)(b) or any ordinance or resolution.
>
> (c) Any zoning ordinance that is enacted, or resolution that is adopted, under [WIS. STAT. §§] 59.69, 60.61, 60.62, 61.35 or 62.23 (7) that is related to noise.

WIS. STAT. § 895.527(5).

¶38 As noted, although HSC does not develop a textual argument on appeal as to the scope of the Act, it did seize on one phrase in its reply brief before the circuit court. HSC's position was that the Act laid "out sweeping categories" that exempted HSC from "any ordinance or resolution." HSC appears to contend that WIS. STAT. § 895.527(5)(b) effectively preempts all local regulatory oversight—that the City had no power to enforce the conditions of operation of the CUP granted in 1997. Sec. 895.527(5)(b). We disagree.

¶39 "[T]he purpose of statutory interpretation is to determine what the statute means so that it may be given its full, proper, and intended effect." ***State ex rel. Kalal v. Circuit Ct. for Dane Cty.***, 2004 WI 58, ¶44, 271 Wis. 2d 633, 681 N.W.2d 110. "[S]tatutory interpretation 'begins with the language of the statute.'" ***Id.***, ¶45 (quoting ***Seider v. O'Connell***, 2000 WI 76, ¶43, 236 Wis. 2d 211, 612 N.W.2d 659). "Statutory language is given its common, ordinary, and accepted meaning, except that technical or specially-defined words or phrases are given their technical or special definitional meaning." ***Kalal***, 271 Wis. 2d 633, ¶45. The context and structure of a statute are also important to the meaning of a statute. ***Id.***, ¶46. "[S]tatutory language is interpreted in the context in which it is used; not

in isolation but as part of a whole; in relation to the language of surrounding or closely-related statutes; and reasonably, to avoid absurd or unreasonable results." ***Id.*** If, after this process, the statutory meaning is clear, then there is "no ambiguity, and the statute is applied according to this ascertainment of its meaning." ***Id.*** (citation omitted). The interpretation of the statute presents a question of law, which we review de novo. ***Town of Avon v. Oliver***, 2002 WI App 97, ¶7, 253 Wis. 2d 647, 644 N.W.2d 260.

¶40 Read as a whole, WIS. STAT. § 895.527(5) of the Act prevents a municipality from enforcing certain statutes, ordinances, or resolutions that relate to the discharge of firearms and noise. HSC takes the phrase "any ordinance or resolution" in para. (5)(b) in isolation and says that a municipality cannot regulate a sport shooting range *at all*—rendering the June 2010 revocation of the CUP void. If that were the intent of the legislature, it would have been far easier for the legislature to have written that at the outset. In other words, such a broad statement would render the rest of the statute's language superfluous. ***Kelley Co. v. Marquardt***, 172 Wis. 2d 234, 250, 493 N.W.2d 68 (1992) (we are to construe a statute, where possible, so that no part of it is rendered superfluous). There would be no need to state that "[a]ny zoning ordinance that is enacted, or resolution that is adopted, under [WIS. STAT. §§] 59.69, 60.61, 60.62, 61.35 or 62.23 (7) that is related to noise" is unenforceable against a sport shooting range, because that exemption would be included in "any ordinance or resolution." But, that is not what the legislature wrote. The phrase "any ordinance or resolution" is mentioned in conjunction with WIS. STAT. § 66.0409(3)(b), which permits "a city, village or town" to enact an ordinance or adopt a resolution that restricts the discharge of a firearm. The two clauses must be read together as relating to one another. ***Town***

***of Avon***, 253 Wis. 2d 647, ¶11 (court rejected broad reading of the Act's subsec. (5) because it would render subsec. (4) superfluous).[6]

¶41 While we need not consider legislative history since the meaning of the Act is plain, legislative history may be considered to confirm the plain meaning. ***Teschendorf v. State Farm Ins. Cos.***, 2006 WI 89, ¶14, 293 Wis. 2d 123, 717 N.W.2d 258. When an amendment was proposed to the Act in 2013, an analysis of the Senate bill by the Legislative Reference Bureau said that under the current law, "if a sport shooting range lawfully existed on July 16, 2013, it may continue to operate as a sport shooting range at that location even if *certain* zoning ordinances or laws regulating the *discharge* of firearms would otherwise prohibit the operation of the sport shooting range.… [A] sport shooting range is not

[6] The Act also has grandfather provisions as it relates to zoning. Generally, if applicable to an existing and operating sport shooting range based on certain dates (for example, on June 18, 1998, which dates have consistently been made more recent), the statute prevents a municipality from zoning a sport shooting range out of existence on the basis of noncompliance with a state law or local ordinance related to use that was enacted *after* the date the shooting range was deemed a lawful or nonconforming use under zoning statutes or ordinances in effect under the applicable date, e.g., June 18, 1998. WIS. STAT. § 895.527(4) (1997-98). In other words, the range continues to be subject to the state zoning laws and ordinances that were in effect when it was a lawful use or legal nonconforming use.

HSC does not develop any argument that this grandfather provision precluded revocation of the CUP pursuant to either the conditions of the conditional grant or pursuant to the terms of the local ordinances relating to conditional uses—in other words, that the use of the sport shooting range in violation of the local ordinances, or *without* the CUP, was lawful in June 1998. The CUP was granted by the City in 1997 after the property was annexed into the City in 1996, under the state laws and ordinances that were in effect at that time. HSC fails to identify the applicable zoning ordinances relating to conditional use approvals and permits, as well as those relating to termination, both of which provide bases to disallow continuance for safety reasons as well as failure to comply with the conditions of the conditional grant. *See* DELAFIELD, WIS., CODE § 17.40 and 17.44 (2010). In short, HSC does not develop any argument that permitted conditions, such as safety conditions, etc., required in 1997 for the lawful permitted use as a sport shooting range were subsequently precluded by state law or local ordinance. ***State v. Pettit***, 171 Wis. 2d 627, 646, 492 N.W.2d 633 (Ct. App. 1992) (we may decline to consider arguments not fully developed or to review issues inadequately briefed).

subject to any state or local zoning conditions or rules related to *noise* or to nonconforming use." 2013 S.B. 527 (emphasis added). Thus, the Legislative Reference Bureau confirms our reading of the Act.[7] WISCONSIN STAT. § 895.527(5) does not exempt a sport shooting range from all statutes, ordinances, or resolutions, but only those related to discharge of firearms and noise.

¶42 In short, as the City argues, the Act "does not limit the City's ability to regulate range operation based on criteria outside of the statute." HSC has failed to identify any provision in the Act that precluded the zoning authority of the City to revoke the CUP in June 2010.[8] Since the City's decision to revoke HSC's CUP was not void from its inception, the City's decision was subject to the time-bar applicable to certiorari actions.

¶43 HSC did not seek review of the City's revocation of its CUP, occurring on June 10, 2010, until January 15, 2014, which was not within either the thirty-day or six-month time periods. Thus, HSC's petition for certiorari review of the revocation of its CUP was untimely.

## Denial of the CUP Application

[7] The legislature has amended the Act multiple times over the years to grandfather newer sport shooting ranges. The circuit court cited several 2010 analyses that sport shooting ranges may continue to operate notwithstanding subsequently enacted statutes, ordinances or resolutions related to nonconforming use, discharge of firearms, and noise. *See* Legislative Council Act Memos, dated January 15, 2010, and June 9, 2010.

[8] HSC does not develop any argument that the City was preempted from granting or revoking the CUP under the City's general zoning authority granted under WIS. STAT. § 62.23(7), or under the conditional use ordinance. More to the point, HSC has failed to develop any argument that preemption applies under the four-part test set forth in ***Anchor Sav. & Loan Ass'n v. Equal Opportunities Comm'n***, 120 Wis. 2d 391, 397, 355 N.W.2d 234 (1984). *See* ***DeRosso Landfill Co. v. City of Oak Creek***, 200 Wis. 2d 642, 651-52, 547 N.W.2d 770 (1996); *see also* ***Pettit***, 171 Wis. 2d at 646 (we may decline to consider arguments not fully developed or to review issues inadequately briefed).

*HSC's Certiorari Appeal is Not Time-Barred*

¶44 The City next argues that HSC's petition for certiorari review of the denial of its CUP application in 2013 was untimely. The City argues that, after the Common Council denied the CUP application, HSC had to seek review by the City's board of appeals before it could petition the circuit court for certiorari review. A party aggrieved by a determination of the board of appeals then has thirty days to seek certiorari review. The City denied the application on December 2, 2013, and the denial was final on that date, but HSC did not seek certiorari review until January 15, 2014.

¶45 HSC's petition for certiorari review of the denial of its CUP application was not untimely. As HSC correctly notes, the City's municipal code did not require HSC to appeal to the board of appeals from the Common Council's denial of its CUP application. The City's code provides as follows:

> *Approval of the Common Council*. Every conditional use decision rendered by the Plan Commission, whether granting the conditional use or denying it, shall be placed upon an agenda of a Common Council meeting within 45 days of the Plan Commission determination. The Common Council shall approve, reject or refer back to the Plan Commission with appropriate instructions. This procedure is not an appeal, and the Common Council's approval shall be on the record. However, the Common Council may allow time for parties to present oral or written arguments. *The decision of the Common Council shall be final, and the applicant will be deemed to have exhausted his administrative remedy upon such decision.*

DELAFIELD, WIS., CODE § 17.42(4) (2016) (second emphasis added).

¶46 As the City's code makes clear, HSC did not have to appeal to the board of appeals after the Common Council denied its application for a CUP. Notably, the City does not respond to HSC's citation of DELAFIELD, WIS., CODE

§ 17.42(4) (2016). The City's failure to respond may be deemed a concession. ***Schlieper v. DNR***, 188 Wis. 2d 318, 322, 525 N.W.2d 99 (Ct. App. 1994).

¶47 The City does not cite to a statute that places a time limit on certiorari review of a determination of a common council denying a CUP application. Rather, the City cites to WIS. STAT. § 62.23(7)(e)10. (2015-16), which governs the time limit on certiorari review of a decision of a city zoning board of appeals. That, however, is inapplicable here, as the appeal was from the Common Council's final decision. Therefore, as the circuit court correctly concluded, the six-month time limitation for common law certiorari applies, and HSC's petition seeking review of the denial of its CUP application was timely. *See* ***State ex rel. Czapiewski v. Milwaukee City Serv. Comm'n***, 54 Wis. 2d 535, 538-39, 196 N.W.2d 742 (1972); *see also* ***Ottman v. Town of Primrose***, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411 ("Common law certiorari is available whenever there is no express statutory method of review.").

*Certiorari Review*

¶48 The City argues that its denial of the CUP application was supported by the record. The City says that it "did not *feel* the plan was adequate to protect the safety of its citizens or the immediate neighborhood." (Emphasis added.) The City asserts that it worked extensively with HSC, but, in the end, HSC's plan "did not address the City's concerns, with the primary concern being safety." Again, the City says it "did not *feel* the design provided adequate safety," it was concerned that the designer of the range lacked experience, and that there was "ample evidence in the record to support" the City's conclusion that the range was not safe. (Emphasis added.) The City goes on to make generalized assertions that

it is "not anti-gun or anti-gun range," that it has "to consider the safety of its citizens," and, thus, the denial should be upheld.[9]

¶49 A conditional use is a use not permitted of right by zoning regulations, but which may be authorized by a zoning authority. ***Town of Rhine v. Bizzell***, 2008 WI 76, ¶20, 311 Wis. 2d 1, 751 N.W.2d 780. "Conditional uses are for those particular uses that a community recognizes as desirable or necessary but which the community will sanction only in a controlled manner." ***Id.*** The decision whether to grant a CUP is discretionary, and an appellate court will not substitute its judgment for that of the municipality. ***State ex rel. Earney v. Buffalo Cty. Bd. of Adjustment***, 2016 WI App 66, ¶12, 371 Wis. 2d 505, 885 N.W.2d 167.

¶50 As relevant here, certiorari review asks "whether [the municipality's] action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment." ***Ottman***, 332 Wis. 2d 3, ¶35.[10]

¶51 Under the City's code, its determination on an application for a CUP shall be based on the "health, safety and welfare of the community and of the immediate neighborhood in which such use would be located," including certain specific considerations such as "noise, dust, smoke, [and] odor." DELAFIELD, WIS., CODE § 17.42(3)(a) (2016).

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[9] The City reiterates these contentions nearly verbatim in its reply brief.

[10] Under common law certiorari, the court's review is limited to the following: (1) whether the municipality kept within its jurisdiction; (2) whether it proceeded on a correct theory of law; (3) whether its action was arbitrary, oppressive, or unreasonable and represented its will and not its judgment; and (4) whether the evidence was such that it might reasonably make the order or determination in question. ***Ottman v. Town of Primrose***, 2011 WI 18, ¶35, 332 Wis. 2d 3, 796 N.W.2d 411.

¶52 The City's denial was based on safety concerns, but it never articulated what exactly in HSC's application it found did not satisfy its concerns. Since there is no explanation for the City's denial, we assume that it was concerned that a bullet might leave the property, as it had when a pregnant woman was grazed with a bullet on April 29, 2010. HSC took steps to make it impossible for a bullet to leave the range, implementing, among other things, no blue sky technology, NRA guidelines, and a revamped range officer program. These recommendations, particularly implementing no blue sky technology and following NRA guidelines, were suggested by Dupler, the city planner, and HSC proceeded on these recommendations for over two years until Dupler said that they were not sufficient.

¶53 After years of planning, in which HSC undisputedly responded to each of the City's stated requirements, Dupler then recommended to the Plan Commission that, until HSC complied with the NRA Range Sourcebook or DOE security criteria, the Plan Commission deny the CUP application. Dupler provided no explanation for why his prior recommendations were "not fully sufficient to ensure public safety." Subsequently, HSC explained to the Plan Commission that the NRA Range Sourcebook was merely suggested practices, not standards, and that the failure to follow any of those suggestions did not imply that a range was being operated negligently. HSC also explained that the DOE criteria applied to "security force and quasi-military training" for DOE facilities, which did not apply to a sport shooting range. The City had no response to these explanations.

¶54 As HSC persuasively argues, the City "imposed ever-changing standards, issued new demands when the previous demands were met, and failed to make any findings of fact other than 'no.'" Indeed, even now on appeal, the City, instead of offering us any facts whatsoever, i.e., some "rational basis" upon

which to conclude that its decision was not "arbitrary," gives us its feelings, i.e., that it "did not *feel* the design provided adequate safety." *See* ***Westring v. James***, 71 Wis. 2d 462, 476-77, 238 N.W.2d 695 (1976). Feelings are no substitute for reason, and reason is what we seek. Since the City gives us no rational basis upon which to conclude that its decision was not arbitrary, we can only conclude that its decision was so.[11]

## CONCLUSION

¶55 The circuit court erred when it invalidated the City's revocation of HSC's CUP because HSC's challenge was not timely. The circuit court should have dismissed the writ of certiorari as it related to the City's revocation of HSC's

[11] The circuit court stated that the issue of whether HSC "may immediately resume activities at its firing ranges without implementing the proposed safety precautions" it proposed in its application "is not within this Court's province." This was based on the court's determination that the City violated the Act's "due process and other protections afforded sport shooting ranges" when it revoked the CUP in 2010. As explained above, we disagree, and as such, the application is clearly the basis for the City to provide a CUP pursuant to the applicable ordinances.

CUP. However, the circuit court correctly invalidated the City's denial of HSC's CUP application. We, therefore, modify the order accordingly.[12]

*By the Court.*—Order modified and, as modified, affirmed.

Not recommended for publication in the official reports.

[12] We need not address HSC's argument that the City failed to provide a written decision with a statement of facts, or Hartford's undeveloped Second Amendment argument, given our disposition. *See* ***Gross v. Hoffman***, 227 Wis. 296, 300, 277 N.W. 663 (1938) (if a decision on one point disposes of the appeal, we need not address the other issues raised); *see also* ***State v. Blalock***, 150 Wis. 2d 688, 703, 442 N.W.2d 514 (Ct. App. 1989) ("[C]ases should be decided on the narrowest possible ground.").