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Minn. R. Civ. App. P. 136.01, subd. 1(c).*

**STATE OF MINNESOTA
IN COURT OF APPEALS
A21-0630**

Croix Holdings, LLC,
Appellant,

vs.

City of Newport,
Respondent.

**Filed December 20, 2021
Affirmed
Gaïtas, Judge**

Washington County District Court
File No. 82-CV-20-1548

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Considered and decided by Smith, Tracy M., Presiding Judge; Slieter, Judge; and
Gaïtas, Judge.

NONPRECEDENTIAL OPINION

GAÏTAS, Judge

This appeal centers on a dispute between appellant Croix Holdings, LLC (Croix Holdings) and respondent City of Newport (the city) over the use of properties owned by Croix Holdings. After the city revoked a conditional use permit (CUP) for one property and ordered Croix Holdings to cease its nonconforming use of its other property, Croix

Holdings filed a declaratory-judgment action in the district court. The city moved for summary judgment, and the district court granted the city's motion. On appeal, Croix Holdings argues that the district court erred in granting the city's summary-judgment motion and abused its discretion in determining that email exchanges between city employees were protected by attorney-client privilege. We affirm.

FACTS¹

Imperial Camper Sales (Imperial Camper), which opened in 1972 in Newport, sold pop-up campers. The original Imperial Camper property (original property) was located in the city's general business zoning district. Within that district, camper sales was an authorized use without a CUP. The zoning classification of the original property changed over the next decade, but Imperial Camper was allowed to continue selling campers because its business activity was a preexisting legal nonconforming use.

Over time, Imperial Camper expanded its sales area to an additional property, where camper sales were not allowed under the city's zoning ordinance without a CUP. It also expanded its business from pop-up campers and custom-built truck toppers to include pull-behind travel trailers and fifth-wheel trailers. Eventually, Imperial Camper applied for a CUP that would allow trailer sales on this additional property (CUP lot). The specific request was to "[p]ave & fence lot to secure trailers for display sale & storage."

In 1986, the Newport City Council approved the CUP. The CUP authorized "a retail sales operation on Lots 1 th 10, Block 17, Newport Park Addition, subject to the expiration

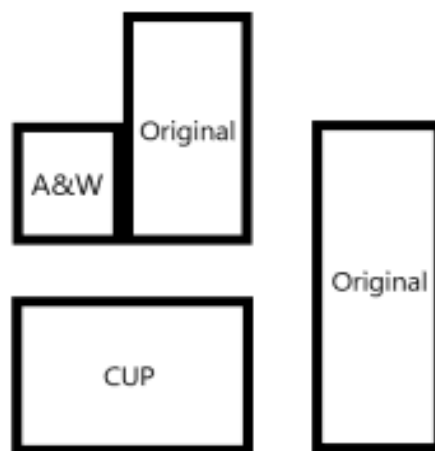
¹ The facts are derived from the summary-judgment record and are presented in the light most favorable to Croix Holdings. *See STAR Ctrs., Inc. v. Faegre & Benson, L.L.P.*, 644 N.W.2d 72, 76-77 (Minn. 2002).

of the permit upon any change of ownership of the property or change of use of the property, and subject to annual review by the City.”

Notwithstanding adverse changes to the city’s zoning ordinances over the years, Imperial Camper continued to sell campers on the original property and the CUP lot. Those sales were authorized as a legal nonconforming use of the original property. And the CUP allowed Imperial Camper to continue its retail sales operation on the CUP lot “subject to . . . change of use of the property, and subject to annual review by the City.”

In 2015, Croix Holdings purchased the original property and the CUP lot. It then leased these properties to tenants, including Imperial Camper.

In 2018, Croix Holdings began converting two existing buildings on the properties into car dealerships. Additionally, Croix Holdings purchased a vacant lot abutting the original property (A&W lot²). The following is an approximate rendering of the parcels owned by Croix Holdings.³



² The lot was previously used for an A&W restaurant.

³ This image is not to scale and is only meant to provide the reader with a sense of the areas relevant to this dispute.

The A&W lot was zoned as MX-4—a general mixed-use district. By the time Croix Holdings acquired the A&W lot, the original property and the CUP lot were also zoned MX-4 based on a zoning law that was enacted in 1994. The MX-4 classification expressly prohibits vehicle sales and service, and it prohibits vehicle storage without a CUP.

Throughout 2018 and 2019, residents filed grievances with the city about the properties, complaining about new activity that was occurring there. The grievances included residents’ concerns about loud nighttime work on cars, general noise, and increases in traffic and trash.

In March 2019, Croix Holdings applied to rezone its properties as a B-2 Business Park District and sought a CUP for the original property, the CUP lot, and the A&W lot. The city planning commission unanimously recommended denial of Croix Holdings’ requests to the council. Following this recommendation, Croix Holdings withdrew its rezoning request and CUP application.

Separately, in May 2019, the city informed Croix Holdings “that it had decided to formally review the CUP associated with the CUP property and other zoning issues with Croix Holdings’ property” and ordered Croix Holdings to submit a site plan⁴ one week

⁴ The desired site plan was described as a document

that shows the entire property that is being use[d] for vehicle sales of all types, existing buildings, and dedicated parking and display spaces. The site plan should identify the office locations of all dealers currently operating at the site and parking and display spaces for each dealer, including Imperial Camper and all motor vehicle dealers. It should show 5 display spaces for each dealer[] as well as parking space(s) for office staff and customers for each dealer. The plan should clearly show the number of display and parking spaces that may be

before a public planning-commission hearing to be held on June 6, 2019. Croix Holdings submitted a site plan, but it was deficient because it was not to scale and did not accurately show the number of parking spaces that the property designated for existing and proposed dealers. The site plan also did not illustrate the required setbacks from property lines. Although the city notified Croix Holdings about the problems with the site plan, Croix Holdings did not correct the deficiencies before the public hearing.

The June 6 public hearing was attended by the city planner, the city attorney, and Croix Holdings' counsel, among others. At that hearing, the mayor and planning commission moved to (1) "send a formal request to [Driver and Vehicle Services (DVS)] for [a] compliance review of the entire Croix Holdings site;" (2) set a public hearing for August 1, 2019, to review the CUP and zoning-compliance review of the property; and (3) "discuss a moratorium on new vehicle sales and multiple dealer lots for June 25, 2019."

Days later, the city informed Croix Holdings in writing of zoning-compliance issues on the properties. These issues pertained to parking requirements, fence requirements, exterior storage and screening, and nuisance concerns. Because Croix Holdings' first site plan had been deficient, the city requested a new site plan. Croix Holdings submitted its new site plan eight days late and acknowledged that it was only "about 90% complete."

After additional public hearings, the city gave Croix Holdings 60 days to comply with the existing CUP and zoning-ordinance requirements. The city ordered Croix Holdings to discontinue all car sales occurring on the properties and threatened to schedule

available for additional motor vehicle dealers that [Croix Holdings] propose[s] to be added in the future.

a public hearing to consider revocation of the existing CUP if the property was not brought into compliance.

Approximately two weeks before the compliance deadline, the city emailed Croix Holdings a request to cease and desist continued violations of the CUP and zoning-ordinance requirements. Two days after the deadline, city staff visited the property and took photos, which showed that Croix Holdings still housed many junked cars on the property.

The city held another public hearing in February 2020. At that hearing, the council unanimously decided:

That the Conditional Use Permit for Retail Sales (outdoor) issued by the city on February 6, 1986 for the [CUP] property . . . shall be revoked. That the nonconforming use of the [original] property . . . for automobile sales that was abandoned for more than one year beginning in 1996 shall cease and the effective date of the order is May 31, 2020.

In April 2020, Croix Holdings initiated a declaratory-judgment action in district court. Croix Holdings challenged the city's zoning decisions and alleged that the city's actions constituted an unconstitutional taking of property and tortious interference with contracts. Both parties moved for summary judgment.

In support of their cross-motions for summary judgment, the parties submitted evidence to the district court regarding the history of car sales on the original property and the CUP lot. Croix Holdings attempted to demonstrate that automobile sales had been permitted on the property in the past. It provided declarations and deposition testimony that several people purchased three cars and a motorcycle from Imperial Campers, without specifying when these purchases occurred. The city submitted aerial photographs of the

properties taken at different points in time between 1969 and 2017. In these photographs, no cars are visible in the sales lots.

Croix Holdings also sought to introduce two emails it obtained pursuant to the Minnesota Government Data Practices Act (MGDPA). *See* Minn. Stat. §§ 13.01-.99 (2020). In the emails—which were addressed to multiple people, including the city attorney—city officials expressed their opinions regarding zoning issues and sought the city attorney’s advice. The city argued that the emails were protected by attorney-client privilege and moved the district court to exclude them on that basis.

The district court concluded that both emails were protected by attorney-client privilege and denied Croix Holdings’ request to include them in the summary-judgment record. And the district court granted the city’s motion for summary judgment.

Croix Holdings appeals.

DECISION

On appeal, Croix Holdings argues that the city’s zoning decisions were unreasonable, that the district court erred in granting the city’s motion for summary judgment on Croix Holdings’ claims of unconstitutional taking of property and tortious interference with contracts, and that the district court erred in excluding Croix Holdings’ proffered emails on the ground of attorney-client privilege. We address each of these arguments in turn.

I. The city’s zoning decisions were not unreasonable.

Croix Holdings first challenges the city’s zoning decisions. It contends that the city and the district court erred in concluding that car dealerships were not a legal

nonconforming use of the original property. And it argues that the city’s revocation of the 1986 CUP was arbitrary and capricious.

A “person aggrieved” by a city council’s land-use decision is entitled to appropriate judicial review in district court. Minn. Stat. § 462.361, subd. 1. The district court examines the municipal record and may allow the parties to supplement it with additional evidence, as was the case here. *See Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988) (stating district court may receive additional evidence “on substantive issues raised and considered by the municipal body and then only on determining that the additional evidence is material and that there were good reasons for failure to present it at the municipal proceedings”). The question before the reviewing court is “whether the zoning authority’s action was reasonable.” *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981); *see also Goerke Fam. P’ship v. Lac qui Parle-Yellow Bank Watershed Dist.*, 857 N.W.2d 50, 55 (Minn. App. 2014). “[T]he nature of the matter under review has a bearing on what is reasonable.” *Honn*, 313 N.W.2d at 417. “[I]n special use permit cases, ‘reasonableness’ is measured by the standards set out in the local ordinance.” *White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982).

On appeal, the reviewing court considers the supplemented record to address specific arguments made on appeal and, applying a rational-basis standard, conducts an independent review of the zoning authority’s decision. *St. Croix Dev., Inc. v. City of Apple Valley*, 446 N.W.2d 392, 397 (Minn. App. 1989), *rev. denied* (Minn. Dec. 1, 1989); *see also VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 509 (Minn. 1983). The appellate court does not give “any special deference to the same review conducted by the

[district] court.” *Nw. Coll. v. City of Arden Hills*, 281 N.W.2d 865, 868 (Minn. 1979) (quotation omitted). Appellate courts reverse a zoning authority’s decision only if it is “unreasonable, arbitrary, or capricious.” *RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75 (Minn. 2015). There are two steps in deciding whether a city’s zoning decision was unreasonable. *Id.* First, the court determines whether “the reasons given by the city were legally sufficient.” *Id.* at 75-76. Second, “if the reasons given are legally sufficient, [an appellate court] must determine if the reasons had a factual basis in the record.” *Id.* at 76. The party challenging the zoning decision bears the burden of proving it was legally insufficient or factually unsupported. *Sagstetter v. City of St. Paul*, 529 N.W.2d 488, 492 (Minn. App. 1995).

Here, the district court granted the city’s motion for summary judgment, concluding that Croix Holdings had expanded the nonconforming use of the original property by using it for car dealerships and that the city had a rational basis for its decision to revoke the 1986 CUP. Summary judgment “is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law.” *Senogles v. Carlson*, 902 N.W.2d 38, 42 (Minn. 2017). Appellate courts review a grant of summary judgment de novo. *Com. Bank v. W. Bend Mut. Ins. Co.*, 870 N.W.2d 770, 773 (Minn. 2015). “In conducting this review, [appellate courts] view the evidence in the light most favorable to the nonmoving party and resolve all doubts and factual inferences against the moving parties.” *Fenrich v. Blake Sch.*, 920 N.W.2d 195, 201 (Minn. 2018) (quotation omitted).

Before turning to the substance of Croix Holdings’ arguments, we address its suggestion that there are disputed fact issues that the district court erroneously resolved in

the city's favor. Croix Holdings' brief to this court implies that there were material factual disputes in the proceedings below. At oral argument, counsel for Croix Holdings directly stated that there were genuine issues of material fact because the district court allegedly made factual findings. According to the district court's order, however, the parties *stipulated* that there were no material factual disputes.⁵ The order states, "The parties agreed at the January 8, 2021 hearing that there were no material disputes of fact." Because Croix Holdings, the appealing party, did not request a transcript of the January 8, 2021 hearing, we cannot review the district court's characterization of the parties' agreement for error. *Mesenbourg v. Mesenbourg*, 538 N.W.2d 489, 494 (Minn. App. 1995) (stating that the appealing party bears the burden of providing an adequate record for appellate review). Because Croix Holdings has not shown error in this regard, we limit our review to deciding whether the record evidence, viewed in the light most favorable to Croix Holdings, shows a rational basis for the city's zoning decisions.

A. The city reasonably concluded that Croix Holdings expanded the nonconforming use of the original property by leasing it to car dealerships for automobile sales.

We first consider Croix Holdings' argument that its use of the original property was not an expansion of the use that existed before the zoning change.

Local governments have authority to enact and change zoning ordinances, as well as to allow and, under some circumstances, to terminate, legal nonconforming uses. *White*

⁵ The order goes on to note that the only "potential disputed fact was whether Croix Holdings represented to the city that they intended to use the property for multiple used car dealerships." But it concludes that this potential disputed fact was immaterial.

v. City of Elk River, 840 N.W.2d 43, 49 (Minn. 2020). “A [legal] nonconforming use is a use of land that is prohibited under a current zoning ordinance but nonetheless is permitted to continue because the use lawfully existed before [an adverse zoning change] took effect.” *Id.* (citing *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010)). Because a property owner has a vested interest in a legal nonconforming use, there are limits to a city’s authority to terminate it, however. “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.” *AIM Dev. (USA), LLC v. City of Sartell*, 946 N.W.2d 330, 336 (Minn. 2020) (quoting *Hooper v. City of St. Paul*, 353 N.W.2d 138, 140 (Minn. 1984)) (emphasis omitted). The scope of the use at the time of the zoning change is the point against which all subsequent uses are compared. *Id.*

“An established nonconforming use runs with the land, and hence a change in ownership will not destroy the right to continue the use.” 8A Eugene McQuillin, *The Law of Mun. Corp.* § 25.256, at 66 (3d rev. ed. 2020). “However, generally speaking, the character of the nonconforming use must be the same for the change in ownership not to effect a valid nonconforming use.” *Id.* at 66-68; *see also* 2 Patricia E. Salkin, *Am. Law. of Zoning* § 12:18, at 12-119 (5th ed. 2021) (observing that a nonconforming use generally “may not be changed to a different nonconforming use” if the change is “substantial”).

A nonconforming use must be continuous from the time the adverse zoning change occurred. If “the nonconformity or occupancy is discontinued for a period of more than one year,” a city may take action to prohibit that use. Minn. Stat. § 462.357, subd. 1e(a)(1)

(2020). Additionally, a landowner is not entitled to expand a nonconforming use. *See* Minn. Stat. § 462.357, subd. 1e(a) (2020) (“Except as otherwise provided by law, any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control . . . may be continued, including through repair, replacement, restoration, maintenance, or improvement, *but not including expansion.*” (emphasis added)); *AIM Dev.*, 946 N.W.2d at 336. “Rather, to further the public policy interests underlying comprehensive zoning plans, the law disfavors the expansion or enlargement of pre-existing nonconforming uses and instead favors the gradual elimination of such uses through obsolescence, exhaustion, or destruction.” *Northgate Homes, Inc. v. City of Dayton*, 126 F.3d 1095, 1100 (8th Cir. 1997) (quoting *County of Freeborn v. Claussen*, 203 N.W.2d 323, 325 (Minn. 1972)). “The [landowner] seeking to continue a nonconforming use has the burden of proving that an exception to a zoning law is warranted.” *Id.*

Here, the city notified Croix Holdings that the use of the original property was not a legal nonconforming use for the following reasons:

- “Multiple dealer auto sales is a different primary use than camper sales as a primary use in definition.”
- “Croix Holdings is operati[ng] outside of its legal non-conforming use by changing its primary use from camper sales to multiple dealership automotive sales on the non-CUP areas of the Croix Holdings site.”
- “Auto sales use was abandoned on the Croix Holdings site as it has not existed as a use for at least one year.”
- “Croix Holdings is operating outside the scope of the CUP and as a legal non-conforming use allowed on the site due to intensification.”

The district court agreed that the record evidence indisputably showed an expansion of the legal nonconforming use. It noted that there was no evidence that the property was used for car sales for at least one year after 1994, when the zoning change prohibiting vehicle sales was enacted. Moreover, the district court observed that Croix Holdings failed to present evidence that automobile sales was ever “an established, pre-existing, legal, non-conforming use prior to the adverse zoning change in 1994.”⁶

Croix Holdings argues that the city and the district court were wrong. According to Croix Holdings, it did not expand the legal nonconforming use of the original property because there is virtually no distinction between camper sales and car sales. Moreover, pointing to evidence in the record that car sales occasionally occurred at Imperial Camper over the years, it contends that car sales were an existing nonconforming use at the time of the adverse zoning change.

In considering Croix Holdings’ argument, we briefly review the caselaw in this area. In *Hawkins v. Talbot*, the Minnesota Supreme Court concluded that the landowner—who operated a gravel pit—did not expand the nonconforming use by enlarging the size of the pit and using a new rock crusher on the property because the activity remained the same and was still confined to the gravel bed. 80 N.W.2d 863, 866 (Minn. 1957). And more

⁶ Croix Holdings contends that the district court erroneously weighed the evidence in reaching its conclusions. If the district court weighed the evidence in considering the city’s summary-judgment motion, it erred. See *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995) (“[O]n a summary judgment motion a court may not weigh the evidence or make factual determinations.”). But because we apply a de novo standard of review in considering the city’s decision, we review the record in the light most favorable to Croix Holdings without deferring to any factual determinations made by the district court.

recently, in *AIM Development*, the supreme court determined that a landfill would not expand its nonconforming use by accepting waste from new sources, which would lead to an increase in its physical size. *AIM Dev.*, 946 N.W.2d at 339-40. The court clarified that a “more flexible approach” was appropriate for the nonconforming rights of “special use properties,” such as quarries, gravel pits, and landfills, which necessarily increase in size as operations continue. *Id.* at 339. But the court emphasized that the “nature and purpose of the original use” must remain unchanged, even if materials and equipment are “substitut[ed].” *Id.* at 340.

On the other hand, in *Claussen*, the supreme court determined that there had been an expansion of the nonconforming use. 203 N.W.2d at 326. There, the nonconforming use was outdoor storage and repair of digging equipment, and the landowner intended to construct a building on the land to house the equipment. *Id.* at 324. In concluding that this amounted to an expansion, the supreme court noted that the building would physically expand the nonconforming use of the property. *Id.* at 326. And it observed that a building would increase the landowner’s use of the property by enabling work to be performed even in the winter. *Id.* Similarly, in *Hawkinson v. County of Itasca*, the supreme court held that the property owner could continue “the precise business in which he was engaged” before the new zoning ordinance—a “small recreational-commercial business on his lakeshore lots.” 231 N.W.2d 279, 280 (Minn. 1975). But he could not expand the business into a larger resort. *Id.* at 282. The supreme court explained that allowing such an expansion “would do violence to the well-established rule that nonconforming uses are to be restricted in a way which will be conducive to their ultimately being phased out.” *Id.*

The district court found the Eighth Circuit’s decision in *Northgate Homes* to be persuasive. In that case, applying Minnesota law, the Eighth Circuit affirmed the lower court’s determination that the landowner had expanded the nonconforming use of property. 126 F.3d at 1100-01. A previous owner had developed the property into a mobile home park. Years later, the city passed an ordinance prohibiting the “sale, storage, or display” of mobile homes in mobile home parks. *Id.* at 1097. Northgate Homes acquired the mobile home park and began selling mobile homes from the property. *Id.* The district court found, and the Eighth Circuit agreed, that the sale of mobile homes was not a continuation of the previous use, but was a new use of the property, and thus an expansion. *Id.* at 1100-01.

The caselaw instructs that a property owner expands a nonconforming use by utilizing the property for an activity that is different in nature and different in scope than the nonconforming use. Here, the undisputed evidence shows that Croix Holdings changed the primary use of the original property in both nature and scope. Before and after the zoning ordinance was enacted, the original property was consistently used for the sale of nonmotorized campers and trailers by one entity. The city rationally concluded that the use of the property for car sales by multiple dealerships was qualitatively different and broader in scope than the sale of nonmotorized trailers and campers by a single retailer. And although Croix Holdings argues that camper-trailers are no different than cars, the record confirms that they are. Local residents observed a difference in the amount of traffic, activity, and noise in the area when Croix Holdings began leasing to car dealerships. Because Croix Holdings substantially changed the use of the original property—in both

nature and scope—the city reasonably determined that there was an expansion of the legal nonconforming use.

Croix Holdings further argues that the city and the district court overlooked the conduct of the city’s own employees, which is evidence that the operation of car dealerships was a legal nonconforming use. Before Croix Holdings purchased the original property, it received a letter from a city employee stating that vehicle sales was no longer a permitted use of the property. According to Croix Holdings, the letter was misleading because it also stated “that the Property is classified as a legal nonconforming use.” Additionally, Croix Holdings points to the fact that city employees provided multiple zoning verifications to tenants of the properties before the city determined there was an expansion of the nonconforming use.

Croix Holdings overstates the contents of the letter from the city employee. It did not suggest that *automobile sales* was a legal nonconforming use. The letter states, “Since Imperial Campers was a permitted use in a zoning district when it was established, it is classified as a legal nonconforming use in a zoning district.” It also emphasizes that any new use of the property “must conform to the zoning ordinance.” Moreover, a “municipality cannot be estopped from correctly enforcing [an] ordinance even if the property owner relied to his detriment on prior city action.” *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 607 (Minn. 1980). And appellate courts have rejected the argument that cities should be estopped from enforcing ordinances where permit applicants relied on mistakes by city employees. *See City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 22, 25-26 (Minn. 2011); *Mohler v. City of St. Louis Park*, 643 N.W.2d 623, 638 (Minn.

App. 2002). We therefore reject Croix Holdings’ argument that the conduct of the city’s employees rendered the city’s ultimate determination of expansion unreasonable.

The law and the record support the city’s conclusion that Croix Holdings impermissibly expanded the use of the original property by changing the nature and scope of its use. Thus, the city’s decision was reasonable, and the district court did not err in granting summary judgment on this issue.

B. The city’s revocation of the 1986 CUP was not arbitrary, capricious, or unreasonable.

Next, we turn to Croix Holdings’ assertion that the city had no rational basis for revoking the 1986 CUP.

“A conditional use permit shall remain in effect as long as the conditions agreed upon are observed, but nothing in this section shall prevent the municipality from enacting or amending official controls to change the status of conditional uses.” Minn. Stat. § 462.3595, subd. 3 (2020); *see Upper Minnetonka Yacht Club v. City of Shorewood*, 770 N.W.2d 184, 187 (Minn. App. 2009) (stating that a CUP is “perpetual in nature” and remains in effect as long as the conditions of the CUP are observed); *Dege v. City of Maplewood*, 416 N.W.2d 854, 856 (Minn. App. 1987) (stating that a CUP “remains in effect until its provisions are violated”). The city’s zoning ordinance allows the city to inspect a conditionally permitted use at any time. Newport, Minn., Code of Ordinances § 36-45(h) (2021). If a property is out of compliance with the permit or conditions after the owner has been given a reasonable opportunity to make corrections, the ordinance allows the city to revoke the CUP after a public hearing. *Id.*

Here, Imperial Camper applied for the CUP to “[p]ave & fence lot to secure trailers for display sale & storage.” The city granted the application and issued a CUP authorizing “a retail sales operation . . . subject to . . . change of use of the property, and subject to annual review by the City.”

In 2020, the city notified Croix Holdings that it was in violation of the 1986 CUP for the following reasons:

- “The CUP [h]as a condition that the primary use . . . be camper sales” and “Croix Holdings is in violation of the CUP by changing the primary use from camper sales to multi dealer automotive sales.”
- “Croix Holdings is operating in violation of the CUP by failing to comply with required zoning standards.”
- “Croix Holdings is operating outside the scope of the CUP and as a legal non-conforming use allowed on the site due to intensification.”

The city issued an order requiring Croix Holdings to bring the CUP lot into compliance within 60 days. To comply with the CUP, the city notified Croix Holdings that automobile sales on the lot would have to cease as the only permitted use was retail sales of campers. When Croix Holdings did not bring the CUP lot into compliance, the city held a lengthy public hearing and then revoked the CUP.

In granting the city’s motion for summary judgment, the district court concluded that the city provided a sufficient reason to revoke the CUP. And because the city interpreted the 1986 CUP as being limited to camper sales, and the record evidence showed that Croix Holdings’ use of the CUP lot was different, the district court determined that the city had a rational basis for its decision.

Croix Holdings argues that the city's decision was unreasonable. It contends that the very broad CUP language placed no restrictions on the type of retail sales that were permitted, that it never violated any explicit CUP condition, and that the city failed to articulate which express CUP condition was violated. We disagree.

In special-use-permit matters, we consider the standards in a local ordinance to assess reasonableness. *White Bear Docking*, 324 N.W.2d at 176. We observe that the city followed the procedures required under its own ordinances—notifying the property owner of the compliance issues, giving the property owner a reasonable opportunity to correct the problems, and then holding a public hearing on the issue of revocation.

And contrary to Croix Holdings' assertion, an express condition of the CUP was that there be no change in the use of the property. Based on citizen complaints, public hearings, and site visits, among other evidence, the city concluded that Croix Holdings had changed the use of the property by leasing it to multiple car dealerships for automobile sales. Despite the city's warning, Croix Holdings did not bring the property into compliance by ceasing these car sales. Because the city supplied a sufficient reason for the revocation, and that reason is supported by the record, the city's decision to revoke the CUP was not arbitrary, capricious, or unreasonable. *See RDNT, LLC*, 861 N.W.2d at 75-76.

Croix Holdings argues that the plain language of the CUP itself placed no explicit restrictions on the type of retail sales that could occur. And, according to Croix Holdings, the city could not look beyond the four corners of the CUP to determine whether there was a "change of use of the property." In other words, because the CUP itself did not specify

the nature of the original use, the city was not permitted to look to other evidence of original use, such as the CUP application or historical information. For this proposition, Croix Holdings cites our decision in *Upper Minnetonka Yacht Club*, 770 N.W.2d 184.

There, we held that a municipality could not unilaterally add a new condition to an existing CUP. *Id.* at 190. While we did state that an applicant’s representations in applying for a CUP “are irrelevant because interested parties or future purchasers may have no notice of the representations and use restrictions on the property,” *id.* at 189, we did not hold that a city can never look beyond the four corners of a CUP to identify the original conditional use of the property.

Although the 1986 CUP could have been more explicit about the nature of the original permitted use, the CUP was expressly conditioned on that use remaining the same. And in this case—where Croix Holdings stipulated that there are no genuine issues of material fact—there is no factual dispute that Imperial Camper applied for the CUP so that it could sell nonmotorized campers on the lot. We therefore reject Croix Holdings’ argument that the city unreasonably went beyond the plain language of the CUP in determining that multi-dealer car sales was a “change of use.”

Croix Holdings has not shown that the city’s decision to revoke the 1986 CUP was arbitrary and capricious. Because the city had a legally sufficient basis for its decision, and the record supports that basis, the city’s decision to revoke the CUP was not unreasonable. Thus, the district court did not err in granting summary judgment in favor of the city on this issue.

II. The district court did not err in granting the city’s motion for summary judgment on Croix Holdings’ constitutional taking-of-property claim.

Croix Holdings next argues that the district court erred in dismissing its constitutional taking claim on summary judgment. According to Croix Holdings, even if the city’s zoning decisions were reasonable, they effectively constituted a regulatory taking of its properties for public use entitling Croix Holdings to compensation under the Takings Clause of the Minnesota Constitution.

We again apply our summary-judgment standard of review, considering the evidence in the light most favorable to Croix Holdings, resolving doubts against the city, and considering de novo whether the city is entitled to judgment as a matter of law. *See Fenrich*, 920 N.W.2d at 201. “Whether a governmental entity’s action constitutes a taking is a question of law that [appellate courts] review de novo.” *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623, 631 (Minn. 2007) (citing *Alevizos v. Metro. Airports Comm’n*, 216 N.W.2d 651, 660 (Minn. 1974)).

The Minnesota Constitution provides that “Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.” Minn. Const. art. I, § 13. “The government need not directly appropriate or physically invade private property to effectuate a taking.” *Wensmann Realty*, 734 N.W.2d at 632. But regulatory takings—where government action taken in the interest of the public effectively deprives a property owner of the use of private property—are rare. *See id.* at 630. To determine whether such a taking has occurred, a court should consider the factors outlined in the United States Supreme Court’s *Penn Central* case. *Id.*; *see Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). Those factors are (1) “[t]he

economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” and (2) “the character of the governmental action.” *Wensmann Realty*, 734 N.W.2d at 632-33 (quotation omitted).

However, the Takings Clause does not require compensation for property rights that a property owner never had. *Minn. Sands, LLC v. County of Winona*, 940 N.W.2d 183, 200 (Minn. 2020). Croix Holdings was never entitled to operate car dealerships on the original property or the CUP lot. When Croix Holdings purchased the property, the zoning laws in effect prohibited this use of the property. And the city reasonably concluded that Croix Holdings’ business was an expansion of the legal nonconforming use and a violation of the CUP. Because Croix Holdings did not have a right to use the property for car dealerships, it is not entitled to compensation for its inability to exercise that nonexistent right.

Moreover, although Croix Holdings asserts that the city’s decisions effectively deprived it from using its property, this is a conclusory assertion unsupported by the record. As the district court observed, the MX-4 zoning classification currently in place allows numerous other economically viable property uses, including “residential, commercial, and office uses.” *See* Newport, Minn., Code of Ordinances, § 36-238 (2021). Croix Holdings presented no evidence to support its claim that while other property uses may be economically viable in theory, they are “unrealistic” and “cost prohibitive” in practice. A party cannot overcome a motion for summary judgment with “unverified and conclusory

allegations.” *Lubbers v. Anderson*, 539 N.W.2d 398, 401 (Minn. 1995) (quoting *Rosvall v. Provost*, 155 N.W.2d 900, 904 (Minn. 1968)).

Because Croix Holdings did not have a legal right to operate car dealerships on its properties and produced no evidence to support its conclusory claim that the city’s zoning regulations prevent it from making other economically viable use of the properties, it failed to establish its constitutional taking claim. Accordingly, the district court appropriately granted the city’s summary-judgment motion on that claim.

III. The district court did not err in granting summary judgment on Croix Holdings’ tortious-interference-with-contract claim.

Croix Holdings also contends that the city’s zoning decisions tortiously interfered with its contractual relationships with its tenants. Thus, Croix Holdings argues, the district court erred in granting the city’s motion for summary judgment on this claim.

A prima facie case of tortious interference with contract requires a showing of: “(1) the existence of a contract; (2) knowledge of the contract by the alleged wrongdoer; (3) intentional procurement of the contract’s breach; (4) absence of justification; and (5) damages caused by the breach.” *Metge v. Cent. Neighborhood Improvement Ass’n*, 649 N.W.2d 488, 500 (Minn. App. 2002) (citing *Furlev Sales & Assoc., Inc. v. N. Am. Auto. Warehouse, Inc.*, 325 N.W.2d 20, 25 (Minn. 1982)). “A successful claim requires proof of all five elements.” *Bebo v. Delander*, 632 N.W.2d 732, 738 (Minn. App. 2001), *rev. denied* (Minn. Oct. 16, 2001).

Applying our summary-judgment standard of review, we agree with the district court that Croix Holdings has failed to identify specific facts in the record that show the city’s knowledge of the contracts between Croix Holdings and its tenants, which is fatal to

the claim. See *Bob Useldinger & Sons, Inc. v. Hangsleben*, 505 N.W.2d 323, 328 (Minn. 1993) (“Mere speculation, without some concrete evidence, is not enough to avoid summary judgment.”). Furthermore, because we have concluded that the city reasonably enforced its zoning laws—the action that allegedly caused Croix Holdings to breach its tenant contracts—there is no factual dispute as to the fourth element, justification. Accordingly, the district court’s grant of summary judgment on this issue was appropriate.

IV. Because emails among city employees about the 1986 CUP were not relevant to the legal issues before the district court, the district court’s decision to exclude them did not prejudice Croix Holdings.

Finally, Croix Holdings argues that the district court erred in excluding emails disclosed by the city in response to a MGDPA request. According to Croix Holdings, the district court improperly concluded that the emails were protected by attorney-client privilege, and the exclusion of the emails prejudiced Croix Holdings.

“Communications that seek to elicit legal advice from an attorney acting in that capacity, that relate to that purpose, and that are made in confidence by the client are protected from disclosure, unless the privilege is waived.” *Nat’l Texture Corp. v. Hymes*, 282 N.W.2d 890, 895 (Minn. 1979) (citing *Brown v. St. Paul City Ry.*, 62 N.W.2d 688, 700 (Minn. 1954)). Attorney-client privilege exists in a communication: “(1) Where legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.” *Kobluk v. Univ. of Minn.*, 574 N.W.2d 436, 440 (Minn. 1998).

The MGDPA presumes all government data to be public unless classified as nonpublic, private, or confidential. Minn. Stat. § 13.03, subds. 1, 3. Government data is defined as “all data collected, created, received, maintained or disseminated by any government entity regardless of its physical form, storage media or conditions of use.” Minn. Stat. § 13.02, subd. 7.

The district court has wide discretion to issue discovery orders and, absent a clear abuse of that discretion, its discovery orders will not be disturbed. *In re Comm’r of Pub. Safety*, 735 N.W.2d 706, 711 (Minn. 2007). “We review a district court’s order for an abuse of discretion by determining whether the district court made findings unsupported by the evidence or by improperly applying the law.” *Id.* Additionally, the party challenging the exclusion bears the burden of showing that the alleged error was not harmless and “that such evidence might reasonably have changed the result” of the case if the district court had admitted it. *Poppenhagen v. Sornsin Constr. Co.*, 220 N.W.2d 281, 285 (Minn. 1974) (referencing exclusion of evidence at trial).

Croix Holdings cannot show that the emails—which included discussions among city employees about their interpretation of the 1986 CUP—would have changed the outcome of its challenge to the CUP revocation. In determining whether the city acted reasonably in revoking the CUP, the district court was required to consider the original use of the CUP lot in 1986 and whether the use of the CUP lot in February 2020 reflected a “change of use.” The impressions of city employees in 2019 regarding the scope of the 1986 CUP were not relevant to these issues. *See* Minn. R. Evid. 401 (defining relevant evidence as “evidence having any tendency to make the existence of any fact that is of

consequence to the determination of the action more probable or less probable than it would be without the evidence”). Moreover, based on our review of the emails, we conclude that they would not have affected the district court’s decision or our disposition of the appeal. Because Croix Holdings cannot show any prejudice resulting from the district court’s exclusion of the emails, we reject the request to reverse on this basis.

Affirmed.