

State Of Minnesota
In Supreme Court
 No. A05-1074

Wensmann Realty, Inc., a Minnesota corporation,
 and Rahn Family LP, a Minnesota Limited Partnership,

Appellants,

v.

City of Eagan, a Minnesota municipal corporation,

Respondent.

BRIEF OF APPELLANTS WENSMANN REALTY, INC.
AND
RAHN FAMILY, LP

George C. Hoff (#45846)
 Justin L. Templin (#0305807)
 Hoff, Barry & Kuderer, P.A.
 160 Flagship Corporate Center
 777 Prairie Center Drive
 Eden Prairie, MN 55344-7319
 (952) 941-9220

and

John M. Baker (#174403)
 Greene Espel, P.L.L.P.
 200 South Sixth Street, Suite 1200
 Minneapolis, MN 55402
 (612) 373-0830

Attorneys for Respondent

Wm. Christopher Penwell (#164847)
 Siegel, Brill, Greupner, Duffy & Foster, P.A.
 100 Washington Avenue South
 Suite 1300
 Minneapolis, MN 55401
 (612) 337-6100

Attorneys for Appellants

Andrew D. Parker (#195042)
 Nancy V. Mate (#295711)
 Parker Rosen, LLC
 133 First Avenue North
 Minneapolis, MN 55401
 (612) 767-3000

Attorneys for Amicus Curiae Met Council

(Additional Counsel listed on following page)

Susan L. Naughton (#259743)
League of Minnesota Cities
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

and

Timothy J. Dowling, Chief Counsel
Community Rights Counsel
1301 Connecticut Avenue N.W.
Suite 502
Washington, D.C. 20036
(202) 296-6889

*Attorneys for Joint Amicus Curiae
League of Minnesota Cities,
Community Rights Counsel,
American Planning Association,
and Minnesota Planning Association*

Bruce D. Malkerson
Malkerson Gilliland Martin, LLP
U.S. Bank Plaza, Suite 1900
220 South Sixth Street
Minneapolis, MN 55402
(612) 344-1111

*Attorneys for Amicus Curiae
Minnesota Land Use Institute*

Joseph G. Springer (#213251)
Laurie J. Miller (#135264)
Fredrikson & Byron, P.A.
200 South Sixth Street, Suite 4000
Minneapolis, MN 55402-1425
(612) 492-7000

*Attorneys for Amicus Curiae
Builders Association of the Twin Cities
and National Association of Industrial
and Office Properties*

Peter K. Beck (#0005927)
Gray Plant Mooty Mooty & Bennett P.A.
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 632-3001

*Attorneys for Amicus Curiae
Midwest Golf Course Owners Association*

TABLE OF CONTENTS

STATEMENT OF ISSUES	1
STATEMENT OF THE CASE	2
FACTS.....	2
A. The City has always considered Carriage Hills Golf Course as a component of the community’s parks and recreation system	8
B. The City has always considered the golf course a part of a public-private partnership in which the private sector has been given the first option to provide desired recreational opportunities in the community	8
C. The subject property has no economic viability as a golf course	9
D. One of the goals and policies of the City’s Comprehensive Guide Plan is “to acquire land, if feasible, for parks...” and to “pursue the acquisition and development of neighborhood parks.”	12
E. The state, county and city have the statutorily based authority to acquire property through eminent domain for parks, recreation and open space	13
F. The City, by its own admission, will someday permit residential development on the subject property; it is only a question of when. To that end, Rahn has paid assessments to bring streets, sewer and water to the Property in anticipation of future development of the Property	15
G. Wensmann’s proposed development plan maintains the integrity of the Comprehensive Guide Plan and meets all of the goals and policies set forth in the Guide Plan which apply to the subject property	18

1.	The proposed low density housing and park development is consistent with Eagan’s Comprehensive Guide Plan and would have a positive impact on the community.....	18
2.	The proposed development would not have a negative impact on traffic, the environment, the Eagan schools or the infrastructure of the neighborhood.....	19
3.	Wensmann’s proposed development meets the goals and policies of the Comprehensive Guide Plan, and thereby maintains its integrity	21
a.	Housing Plan	21
b.	Park and Recreation System Plan	22
	SUMMARY OF ARGUMENT	22
	ARGUMENT.....	26
I.	THE CITY’S DENIAL OF APPELLANTS’ APPLICATION WAS ARBITRARY AND CAPRICIOUS	26
A.	The Record Before The City	26
B.	Standard of Review	26
C.	The City’s Denial Of Appellants’ Application Is Legally Insufficient And Unsupported By Facts In The Record	26
D.	Substantial Change to the Neighborhood Surrounding the Property Makes Amendment of the Guide Plan to Low Density the Only Reasonable Classification	31

II.	THE CITY’S DENIAL EFFECTED A REGULATORY TAKING OF THE PROPERTY FOR WHICH JUST COMPENSATION MUST BE PAID	32
A.	<i>Penn Central</i>	32
1.	Investment-backed expectations	35
2.	Economic Impact	39
3.	Character of the Governmental Action	40
B.	<i>McShane and Lucas</i>	47
	CONCLUSION	47

TABLE OF AUTHORITIES

CASES

<i>Almota Farmers Elevator & Whse. Co. v. U.S.</i> 409 U.S. 470 (1973)	1, 40
<i>Bailes v. Township of East Brunswick</i> 882 A.2d 395 (NJ 2005)	29
<i>Burrows v. City of Keene</i> 121 N.H. 590 (1981).....	42
<i>Citizens Committee v. District of Columbia</i> 432 A.2d 710 (D.C. 1981)	42
<i>City of Austin v. Teague</i> 570 S.W.2d 389 (Tex. 1978)	27
<i>Corrigan v. City of Scottsdale</i> 149 Az. 553 (App. 1985).....	43
<i>Drogos v. Village of Bensenville</i> 100 Ill. App. 3d 48, 426 N.E. 2d 1276 (1981).....	39
<i>Eastern Enters. v. Apfel</i> 524 U.S. 498, 541 (1998)	34
<i>French Investing Co. v. City of New York</i> 39 N.Y. 2d 587, 350 N.E. 2d 381 (1976)	30
<i>Freundshuh v. City of Blaine</i> 385 N.W.2d 6 (Minn. Ct. App. 1986)	2, 31
<i>Gibson v. Sussex County Council</i> 877 A.2d 54 (Del. Ch. 2005)	28
<i>Hodel v. Irving</i> 481 U.S. 704 (1987)	37

<i>In Re Appeal of Realen Valley Forge Greenes Associates</i> 838 A. 2d 718 (Pa. 2003).....	33, 44
<i>Kaiser Aetna v. United States</i> 444 U.S. 164 (1979)	1, 39
<i>Lucas v. South Carolina Coastal Council</i> 505 U.S. 1003 (1992)	35, 48
<i>Mansoldo v. State</i> 187 N.J. 50, 898 A.2d 1018 (2006)	1, 39
<i>McShane v. City of Faribault</i> 292 N.W.2d 253 (Minn. 1980)	1, 47, 48
<i>Mendota Golf v. City of Mendota Heights</i> 708 N.W.2d 162 (Minn. 2006)	2, 22
<i>Morris County Land v. Parsipanny-Troy Hills Township</i> 40 N.J. 539 (1963)	41
<i>Mount Laurel Township v. Mipro Homes</i> 379 N.J. Super. 357, 878 A. 2d 38 (2005).....	15
<i>Myron v. City of Plymouth</i> 562 N.W.2d 21 (Minn. Ct. App. 1997)	1, 39
<i>Nollan v. Calif. Coastal Commission</i> 483 U.S. 825 (1987)	33
<i>Paalan v. United States</i> 51 Fed. Cl. 738 (2002).....	40
<i>Palazzolo v. Rhode Island</i> 533 U.S. 606 (2001)	passim
<i>Parranto Bros. v. City of New Brighton</i> 425 N.W.2d 585 (Minn. Ct. App. 1988)	2

<i>Penn Central Transportation Co. v. New York City</i> 438 U.S. 104 (1978)	passim
<i>Pennsylvania Coal Co. v. Mahon</i> 260 U.S. 393 (1922)	36
<i>Pheasant Bridge Corp. v. Township of Warren</i> 169 N.J. 292 (2001)	27
<i>Poirier v. Grand Blank Township</i> 192 Mich. App. 539, 481 N.W.2d 762 (1992)	1, 40
<i>Rippley v. City of Lincoln</i> 330 N.W.2d 505 (N.D. 1983)	42
<i>Roeser v. Anne Arundel</i> 368 Md. 294, 793 A. 2d 545 (2002)	33, 46
<i>Sheffield Development Corp. v. City of Glen Heights</i> 140 S.W.3d 660 (Tex. 2004)	1, 38
<i>Sheerr v. Evesham Township</i> 184 N.J. Super. 11 (1982)	28
<i>Spaeth v. City of Plymouth</i> 340 N.W. 2d 815 (Minn. 1984)	40
<i>State Ex. Rel. Shemo v. Mayfield Heights</i> 95 Ohio St. 3 rd 59, 765 N.E. 2d 345 (2002)	39
<i>Steel v. Cape Corp.</i> 111 Md. App. 1 (1996)	41
<i>Sun Oil Co. v. Village of New Hope</i> 220 N.W.2d 256 (Minn. 1974)	2, 31, 32
<i>Swanson v. City of Bloomington</i> 421 N.W.2d 307 (Minn. 1998)	26, 32

Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Regional Planning Agency
535 U.S. 302 (2002) 35, 37

Vernon Park Realty v. City of Mount Vernon
307 N.Y. 493, 121 N.E. 2d 517 (1954) 46

Wagner v. Milwaukee Mutual Ins. Co.
479 N.W.2d 38 (Minn. 1991) 32

Zeman v. City of Minneapolis
552 N.W.2d 548 (Minn. 1996) 34

STATUTES

Minn. Stat. § 117.025, subd. 2 32

Minn. Stat. § 473.147, subd. 1 14

Minn. Stat. § 473.302 14

Minn. Stat. § 473.313, subd. 1 15

Minn. Stat. § 473.315 15

Minn. Stat. § 331 15

CONSTITUTIONAL AUTHORITY

Minn. Const. Art. I, § 13 32

OTHER AUTHORITIES

4 Tiffany Real Prop. § 1254, p. 3 (1975) 40

J. David Breemer & R.S. Radford, <i>The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, And The Lower Court's Disturbing Insistence On Wallowing In The Pre-Palazzolo Muck</i> 34 S.W. U. L. Rev. 351 (2005).....	30, 36
<i>Takings in the 21st Century: Reasonable Investment-Backed Expectations After Palazzolo and Tahoe-Sierra</i> 69 Tenn. L. Rev. 891 (2002)	33, 34
<i>The Need For Pragmatism, Symbolism, and Ad Hoc Balancing</i> 80 Neb. L. Rev. 465 (2001).....	35
R.S. Radford & J. David Breemer, <i>Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations and Regulatory Takings Law?</i> 9 N.Y.U. Envtl. L.J. 449 (2001)	35
Gideon Kanner, <i>Hunting The Snark Not The Quark: Has The U.S. Supreme Court Been Competent In Its Efforts To Formulate Coherent Regulatory Takings Law?</i> 30 Urb. Law. 307 (1998)	35
Lynda J. Oswald, <i>Cornering The Quark: Investment-Backed Expectations And Economically Viable Uses In Takings Analysis</i> 70 Wash. L. Rev. 91 (1995)	35
<i>From Grand Central to the Sierras: What Do We Do With Investment-Backed Expectations In Partial Regulatory Takings?</i> 23 Va. Envtl. L. J. 43 (2004)	38
J. David Breemer, <i>Playing The Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable In State Courts?</i> 38 Urb. Law. 81 (2006)	38

STATEMENT OF ISSUES

1. Was it a regulatory taking for Respondent to restrict the use of the property to a golf course in order to preserve a public recreational opportunity for residents of the community without any compensation to the owner?

The District Court held that it was.

Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978).

2. Can a property owner's reasonable investment-backed expectations evolve over time, particularly when those expectations align with the City's expectations concerning future use of the property?

The District Court did not decide this issue.

Sheffield Development Corp. v. City of Glen Heights, 140 S.W.3d 660, 668 (Tex. 2004); *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979).

3. Should the economic impact of Respondent's denial be measured by comparing the value of the property as a golf course with the value if residential development were allowed?

The District Court held that the subject property was substantially diminished in value measured by the value of the property if residential development is permitted and the value of the property if it is not.

Mansoldo v. State, 187 N.J. 50, 898 A.2d 1018 (2006); *Poirier v. Grand Blank Township*, 192 Mich. App. 539, 481 N.W. 2d 762 (1992); *Almota Farmers Elevator & Whse. Co. v. U.S.*, 409 U.S. 470 (1973) (citation omitted).

4. Does *Palazzolo* effectively overrule the dicta in *Myron v. City of Plymouth* stating that those who purchase property within awareness of the restrictions on its use cannot claim that a taking has occurred?

The District Court did not decide this issue.

5. Does Respondent's restriction of the use of the property to a golf course benefit a public or governmental enterprise under the test set forth in *McShane v. City of Faribault*?

The District Court held that a governmental enterprise is benefited by Respondent's denial inasmuch as Respondent has identified the golf course as a

community recreational opportunity and has always acknowledged the need for golf courses as part of the overall recreation system.

6. Does this Court's decision in *Mendota Golf* permit the City to disregard the record and deny Appellants' application simply because the property has long been designated as a golf course; the Comprehensive Guide Plan states, as one of many generic goals, the preservation of open space and recreational amenities; and the neighbors have asserted they enjoy the open space?

The District Court held that Respondent's denial of Appellants' application was arbitrary and capricious.

Freundshuh v. City of Blaine, 385 N.W.2d 6 (Minn. Ct. App. 1986); *Parranto Bros. v. City of New Brighton*, 425 N.W.2d 585 (Minn. Ct. App. 1988); *Sun Oil Co. v. Village of New Hope*, 220 N.W.2d 256 (Minn. 1974).

STATEMENT OF THE CASE

Appellants commenced this lawsuit against Respondent on October 26, 2004. The parties brought cross-motions for summary judgment on whether Respondent's denial of Appellants' application to amend the Comprehensive Guide Plan to allow low density residential development on the property was, among other things, arbitrary and capricious and a regulatory taking. The District Court issued a decision on April 28, 2005 denying Respondent's motion and granting Appellants' motion. Respondent appealed and the Court of Appeals reversed the District Court in all respects on May 23, 2006.

FACTS

Appellant Rahn Family, LP is the owner of the Carriage Hills Golf Course, the property which is the subject of this litigation. The property is located on 120 acres in Eagan, Minnesota.

The original owner began construction of the golf course in 1959. The course opened in 1965 as a 9-hole course and was expanded two years later to its present 18 holes.¹

When the golf course was built, the surrounding area consisted of large rural parcels. Until 1979, there was only one platted subdivision in the area, consisting of several 10 acre lots, some with residences. Between 1979 and 1990, nearly all of the land surrounding the golf course was developed, either as single family or multi-family residential developments.² Since 1990, land east of the golf course has been developed and redeveloped into residential uses.³ (See aerial photo with overlay of the residential neighborhoods surrounding the golf course and the densities of those developments at App. 309-311).

The golf course property was rezoned in 1962 from Agricultural to Public and the golf course became a preexisting nonconforming use.⁴ From 1974 until 1991, the City's Comprehensive Guide plan designated the subject property "Golf". In 1991, the Comprehensive Guide Plan was revised to designate the golf course as PF (Public Facilities). In a 2001 update, the PF designation was eliminated and the three golf courses in the City, including Carriage Hills, were designated P (Parks Open Space and Recreation).⁵

¹ (City Planning Report, App. 178-92).

² *Id.*

³ *Id.*

⁴ *Id.*

⁵ *Id.*

Rahn purchased the Carriage Hills golf course in 1996.⁶ Rahn had previously designed, built, operated and sold two other golf courses and owns a third golf course, Rich Valley Golf Club located in Rosemount, Minnesota.⁷ Based upon Rahn's successful operation of these three golf courses, Rahn purchased Carriage Hills with the expectation that it could be operated at a profit and would achieve a positive rate of return on Rahn's investment in the property and the golf course.⁸

After purchasing the golf course, Rahn made significant capital improvements to the course in an amount in excess of \$300,000.⁹ For the first year or two, Rahn realized a small profit on the operation of Carriage Hills. However, from 1999 to 2003, the course suffered significant cumulative losses of over \$775,000. The estimated losses for 2004 were approximately \$183,000.¹⁰ In 1999, Rahn obtained a loan and used over \$3 million of the proceeds to pay off the Carriage Hills contract for deed and to pay for capital improvements to the course.¹¹ In June 2001, Rahn offered to sell the course to the City but the offer was rejected.¹² Because Carriage Hills had been operated at a significant loss for five years, in 2003 Rahn approached Appellant Wensmann Realty, Inc. with an offer to sell the golf course property.¹³ Wensmann, a developer and builder of quality

⁶ Rahn Aff., ¶ 3, App. 58-62.

⁷ Rahn Aff., ¶ 2, *Id.*

⁸ Rahn Depo., pp. 17-28 App. 32-52; Rahn Aff., ¶ 4, App. 58-62.

⁹ Rahn Aff., ¶ 7, App. 58-62.

¹⁰ Rahn Aff., ¶ 6 and Exhibit 6 attached thereto, *Id.*

¹¹ Rahn Aff., ¶ 10, *Id.*

¹² Memo from City Planner Ridley to City Administrator Hedges dated 12/9/03, App. 532-539.

¹³ Letter from Wensmann to City Planner Ridley dated 5/18/04 and supporting documents and Wensmann power point presentation. (App. 246)

residential homes, entered into a purchase agreement with Rahn for the purchase of the property contingent upon the City amending the Comprehensive Guide Plan to allow for low density residential development of the property.¹⁴

Wensmann then prepared a proposed development plan to present to the City. After consulting with a professional planner and meeting with interested parties who reside in the neighborhood of the golf course, Wensmann and Rahn revised an earlier proposal to build 720 units and presented a development plan to the City for a low density development consisting of 480 housing units and 45 acres of park and open green space.¹⁵ The development plan included the following mix of housing types: 84 “empty-nester” condominiums, 68 urban row homes, 194 row townhomes, 43 traditional single-family homes, 32 villa-style single-family homes, 26 luxury rambler twin-homes and 32 custom single-family homes.¹⁶ A review of the surrounding neighborhoods was used to determine the placement of products for the development so that the densities of the housing types in Wensmann’s proposed plan conformed to the densities of the surrounding residential neighborhoods.¹⁷

Perhaps the most significant aspect of Wensmann’s proposed plan was that it retained approximately 40-45 acres of park land.¹⁸ Trailways would provide public

¹⁴ Rahn Depo., pp. 122-23, (App. 32-52); Purchase Agreement dated 12/5/03 and amendments thereto. (App. 366-395)

¹⁵ Wensmann power point presentation (App. 246-247); Wensmann letter to Ridley dated 5/18/04 (App. 173-175); Wensmann Carriage Hills development proposal.

¹⁶ Wensmann power point presentation (App. 250).

¹⁷ Pioneer Engineering Carriage Hill’s infrastructure review dated 7/23/04, p. 11. (App. 238)

¹⁸ *Id.*

access to the proposed public parks and open space/natural areas of the site as well as to several surrounding schools and an athletic complex.¹⁹ The park would include an active park (7.5 acres), softball field, soccer field, playground equipment, picnic shelter and natural features. Approximately two miles of public trails with greenway corridors along the periphery and between neighborhoods of the development is included. These greenway corridors, ranging from 50-150 feet, maintain the natural areas on the periphery and provide a buffer between the surrounding residential developments and Wensmann's proposed development. The open space would preserve existing wetlands; restore natural buffers and upland vegetation around wetlands and storm water basins; and would convert the heavily maintained lawns of the golf course to landscaped greenway corridors and prairies.²⁰

Wensmann submitted its proposed development plan to the City as part of an application to amend the Comprehensive Guide Plan from P – Parks, Open Space and Recreation, to LD – Low Density Residential. This land use category would allow for the proposed development.²¹ *Wensmann represented to the City that it would make the development plan it submitted with the application a condition of the amendment.*

The Eagan City Planner evaluated the proposal and submitted a report to the Eagan Advisory Planning Commission dated July 17, 2004.²² The City Staff Planning Report's summary of findings is contained at App. 188-191. The Planning Report

¹⁹ *Id.* at p. 12.

²⁰ *Id.* at pp. 12-13.

²¹ Letter dated 5/18/04 from Wensmann to City Planner with attached Planning Report. (App. 173-175)

²² Planning Report dated 6/17/04 (App. 178-192).

expresses no reservations or concerns about Wensmann's plan, with the one exception of the issue of school capacity which will be addressed, *infra*. Significantly, the planning report did not raise any traffic safety issues. That issue will also be discussed, *infra*. The City staff found that the trunk sanitary sewer lines had sufficient capacity and that water lines could be extended to service the development. The City staff also found that existing park and school facilities could accommodate the additional influx of residents for purposes of the City's park planning. It did recommend that the development include a public or private open space park but the development plan submitted by Wensmann to the City included 40-45 acres for the park described above as well as open space which would preserve existing wetlands, restore prairie and actually increase habitat diversity.²³

The last page of the City Staff Planning Report has the heading "ACTION TO BE CONSIDERED." Below that heading, the report states "to recommend approval of a Comprehensive Guide Plan Amendment to change the land-use designation from P, Park to LD, Low Density residential . . ." ²⁴ Appellants submit that there is no other way to interpret this language other than that the City staff recommended approval of Wensmann's application.

Appellants' application came before the Eagan City Council on August 2, 2004 and on August 17, 2004 the City issued a Resolution denying the application for the

²³ Pioneer Engineering Carriage Hills infrastructure review dated July 23, 2004, App. 228-242; Pioneer Engineering Memorandum dated July 22, 2004. (App. 215-217)

²⁴ App. 61. (Emphasis added).

amendment to the Comprehensive Guide Plan.²⁵ Rahn closed the golf course at the end of the 2004 season.

A. The City has always considered Carriage Hills Golf Course as a component of the community's parks and recreation system.

The property is guided Parks, Open Space and Recreation which “provides areas for public and private parks, open space and recreational facilities. Parks, trails, open space and natural areas, ...and golf courses are examples of desired uses in this category.”²⁶ The City Staff Planning Report dated June 17, 2004 prepared in connection with Wensmann's application for an amendment to the Guide Plan states: “The City's Park System Plans have always acknowledged the need for golf courses as part of the overall recreation system, and have consistently recognized Carriage Hills, a privately owned, open to the public golf course, as a component of the community's parks and recreation system.”²⁷ This language appears almost verbatim in the City's August 17, 2004 Findings of Fact, Conclusions and Resolution denying Wensmann's application for an amendment to the Guide Plan.²⁸

B. The City has always considered the golf course a part of a public-private partnership in which the private sector has been given the first option to provide desired recreational opportunities in the community.

The June 17, 2004 City Staff Planning Report states:

²⁵ App. 349-365.

²⁶ Comprehensive Guide Plan, App. 93.

²⁷ App. 187.

²⁸ App. 351, ¶ 22. See also, golf course study commissioned by the City, dated September 1995, which states “municipal golf courses, nationally as well as locally, are considered to be a legitimate part of the mix of services, programs and facilities offered by a municipality through its parks and recreation department.” (App. 448)

A key principle, implicit in all the City's park planning over the years, has been that of a public-private partnership in which the private sector has always been given the first option to provide desired recreational opportunities in the community.²⁹

This public private partnership was acknowledged in the City's August 17, 2004 Resolution denying Wensmann's application: "The Comprehensive Guide Plan identifies the City's park system as an interweaving of natural and man-made resources provided to the City's residents through the combined efforts of individuals and organizations (both public and private)".³⁰ The Comprehensive Guide Plan itself also recognizes this public private partnership:

The park plan... contains a number of investment proposals to further Eagan's fundamental system built around the neighborhood parks, extend opportunities for outdoor recreation, and promote protection of environmental and natural resources. *** It also acknowledges the need for creative pursuit of funding and partnership with outside providers (e.g., county, state, schools, private).³¹

C. The subject property has no economic viability as a golf course.

Appellants presented the City with two feasibility studies of the Carriage Hills Golf Course prepared by reputable golf course analysts.³²

The Hughes Study evaluated the national and local golf market, and the physical condition and the cash flow projections for the Carriage Hills course. This study found that the golf course industry "is currently in decline" and that "[s]ince late 2000 demand

²⁹ App. 187.

³⁰ App. 351, ¶ 21.

³¹ App. 579.

³² Hughes & Company, Inc. Feasibility Study dated July 17, 2004 (App. 504-518) and McMurchie Golf Management, Inc. Analysis of Market and Financial Factors dated July 27, 2004, (App. 519-524)

for investment in golf courses has decreased...”³³ With respect to the local golf market, the study referenced a number of sources that concluded that the Twin Cities golf market is overbuilt and is characterized by a decreasing number of golfers.³⁴ As to Carriage Hills itself, the study found that the decrease in golf course performance was exaggerated at this course “due to the older style (short, grains, difficult terrain) and aging irrigation and maintenance equipment.”³⁵ The study noted the course’s significant losses from 2000 to 2003, the monthly debt service of \$34,807 and a \$3 million bank debt to support its conclusion that “...Rahn has been ‘feeding’ cash into the property for years.”³⁶ The study determined that, based on past performance and cash flow projections, “[t]he current debt on the property is significantly higher than the probable value of the golf course as a going concern.”³⁷ The study reached the conclusion that “the financial feasibility of the future operation [of Carriage Hills] as a golf course is seriously impaired due to the overbuilding of the local golf course market and the ‘functionally obsolete’ nature of the course” and recommended that the course be redeveloped.³⁸

The record also included two other studies that had been commissioned by the City itself to determine whether the City should purchase the Carriage Hills Course.³⁹

³³ Hughes & Company, Inc. Feasibility Study, p. 5 (App. 508).

³⁴ *Id.*, p. 6.

³⁵ *Id.*, p. 7.

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.*, pp. 2, 10.

³⁹ See, Analysis of Key Issues Important to the Possible Acquisition of Carriage Hills Golf Course by the City of Eagan, Minnesota, September 1995 (App. 446-471) and Alternatives for a Municipal Golf Course in the City of Eagan, Minnesota, April 1996 (App. 472-503)

Both studies concluded that the City could not purchase and operate the course at a profit.⁴⁰ In fact the City referenced its determination that it could not operate the golf course profitably when it rejected Rahn's offer to sell the course in 2001.⁴¹

Rahn attempted to attract golfers through a number of marketing efforts including discount rates for juniors and senior citizens, weekday discounts, tournaments and leagues, flat fee annual memberships, joint memberships at Carriage Hills and Rich Valley and a live radio broadcast from Carriage Hills.⁴²

City officials represented that the City would support Rahn's purchase of the course by holding events there such as police golf tournaments and school activities. Unfortunately, no City entity ever sponsored an event at the course.⁴³ At the August 2, 2004 City Council hearing, Council Member Carlson stated: "If we want to keep an amenity in our city, we need to support it" and suggested an emphasis on city programming, partnership with schools and the Eagan Athletic Association.⁴⁴ The fact is neither the City nor the residents supported the course. Eagan High School practices and plays its matches at Valley Wood Golf Course in Apple Valley.⁴⁵ As of August 2, 2004, there was not one junior member that resided in the City of Eagan.⁴⁶ Only one person living within a 600 foot radius of Carriage Hills was a member.⁴⁷ Only 18 people in the

⁴⁰ *Id.*

⁴¹ Rahn Aff., ¶ 13, App. 58-62.

⁴² Rahn Aff., ¶ 8, *Id.*

⁴³ Rahn Aff., ¶ 5, *Id.*

⁴⁴ App. 348, p. 98 ll. 19-20, 22-25.

⁴⁵ Powerpoint, App. 298.

⁴⁶ *Id.*, App. 299.

⁴⁷ *Id.*, App. 301.

entire city of Eagan with a population of nearly 63,000 were Carriage Hills members.⁴⁸ The City is not deprived of a recreational opportunity by the loss of Carriage Hills as there are two other golf courses in Eagan and 120 public golf courses and 39 private golf courses within 25 miles of Carriage Hills.⁴⁹

Rahn did not open the golf course for the 2005 season. Since the loan with the Vermillion State Bank is secured by the Rich Valley Golf Club as well as Carriage Hills, Rahn faces the serious risk of losing both properties.⁵⁰ No potential buyer has shown any interest in the property other than for development for residential purposes.⁵¹ No buyer would be interested in purchasing the subject property for the uses identified in the City zoning ordinance and Comprehensive Guide Plan.⁵² None of the uses identified in the City's zoning regulations or the Comprehensive Guide Plan provide a reasonable or viable use of the subject property.⁵³ Due to the substantial financial losses incurred in previous years and the conclusion of the golf course studies that the golf course was not a financially viable use for the subject property, the course closed after the 2004 season.

D. One of the goals and policies of the City's Comprehensive Guide Plan is "to acquire land, if feasible, for parks..." and to "pursue the acquisition and development of neighborhood parks."

The Park and Recreation System Plan, which is part of the City's Comprehensive Guide Plan, identifies as one of the City's goals: "To acquire land, if feasible, for parks

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Rahn Aff., ¶ 15, App. 58-62.

⁵¹ Rahn Aff., ¶ 16, *Id.*

⁵² Affidavit of Garfield Clark, ¶ 4, App. 53-55.

⁵³ Affidavit of Philip Carlson, ¶¶ 3-6, App. 63-68.

in those areas of the City identified as deficient in the Parks System Plan or expansion of an existing park as determined to be beneficial.”⁵⁴ One of the policies under the Park System Plan is: “The City will pursue the acquisition and development of neighborhood parks in order that each neighborhood service area, as illustrated in the Park System Plan, is adequately served with appropriate recreational facilities.”⁵⁵ Unfortunately, the City did not heed the warning in the golf course study it commissioned in 1995:

The question of whether a privately owned public course for public play in Eagan will remain affordable and in place is a real concern, given present land values and economic trends. A community with rapid growth and escalating land values must set aside open space early before “buildout” or it will not be able to afford such an endeavor later.⁵⁶

E. The state, county and city have the statutorily based authority to acquire property through eminent domain for parks, recreation and open space.

The Metropolitan Council 2030 Development Framework asks the following question: “How can the region capitalize on opportunities for economic development while preserving its vital natural assets and abundant opportunities for outdoor recreation?”⁵⁷ Throughout this Framework, there is a recognition of the inevitable tension between development of property, on the one hand, and preservation of parks and open space, on the other. The Metropolitan Council encourages taking measures whereby “new development can be located and designed in a way that preserves and

⁵⁴ App. 571.

⁵⁵ App. 572.

⁵⁶ App. 449.

⁵⁷ App. 121.

benefits from the natural environment.”⁵⁸ One of these measures is for each region “to identify natural areas that could be added to the regional park system and plan for their acquisition before the opportunity is lost.”⁵⁹ The Metropolitan Council has a policy of “work[ing] with local and regional partners to conserve, protect and enhance the region’s vital natural resources” which includes “invest[ing] in acquisition and development of land for the regional park system.”⁶⁰ The Metropolitan Council has established a Capital Improvement Program Fund for the express purpose of acquiring park lands.⁶¹ As part of its policy to acquire land for the park system, the City has developed a five year capital improvement plan.⁶² The Metropolitan Council has developed a 2030 Regional Parks Policy Plan which has earmarked \$435.7 million in public funds to, in part, acquire land for parks.⁶³ Dakota County has recently sought the assistance of the Metropolitan Council to purchase 460 acres from private sellers for park space.⁶⁴

The Minnesota Legislature has enacted statutes which authorize the Metropolitan Council to “identify generally the areas which should be acquired by a public agency...which...reasonably will meet the outdoor recreation needs of the people of the Metropolitan area...” (Minn. Stat. § 473.147, subd. 1); recognize that “immediate action is therefore necessary to provide funds to acquire...regional recreational open space for public use” (Minn. Stat. § 473.302); require each park district to submit to the

⁵⁸ App. 138.

⁵⁹ App. 139.

⁶⁰ App. 143.

⁶¹ App. 160-161.

⁶² App. 578-579.

⁶³ See March 14, 2005 St. Paul Pioneer Press Article. App. 567-568.

⁶⁴ *Id.*

Metropolitan Council “a master plan and annual budget for the acquisition and development of regional recreational open space located within the district or county...” (Minn. Stat. § 473.313, subd. 1); authorize the Metropolitan Council to “make grants...to any municipality, park district or county...to cover the cost...of acquiring...regional recreation open space...” (Minn. Stat. § 473.315); and authorize park districts, municipalities and counties to “acquire...land...comprising regional recreation open space...” (Minn. Stat. § 331). It is a goal of the state, counties and cities to acquire property for park, recreation and open space and the Minnesota Legislature has provided the statutory authority for achieving that goal.⁶⁵

F. The City, by its own admission, will someday permit residential development on the subject property; it is only a question of when. To that end, Rahn has paid assessments to bring streets, sewer and water to the Property in anticipation of future development of the Property.

Several documents explicitly acknowledge that the City will someday permit residential development on the subject property. The City Staff Planning Report prepared in connection with Wensmann’s proposed development states:

“[E]xisting street extensions and property designations have been planned with adjacent development to accommodate the possibility of changing conditions at Carriage Hills.”⁶⁶

In December of 2002, the City entered into an Assessment Agreement with Rahn that states that the City “has agreed to defer the collection of utility charges until

⁶⁵ See, *Mount Laurel Township v. Mipro Homes*, 379 N.J. Super. 357, 878 A. 2d 38 (2005) (municipality had statutory authority to condemn property for open space even though there was no present plan to devote the property to active recreational uses and even though the primary goal of the open space acquisition program was to slow down residential development in the municipality).

⁶⁶ App. 183.

subdivision or development...” and that the deferred assessments “will be collected as connection charges and paid...when [the subject property] is subdivided, platted or connects to City sewer and/or water services,”⁶⁷ Rahn was assessed for the installation of sewers, watermain improvements and street upgrades. Rahn cooperated with the City as these improvements were being installed by providing access and permanent easements to the City.⁶⁸ In response to Ray Rahn’s question to the City engineer as to why these improvements were being made, the engineer responded that it was being done to accommodate future development of the Carriage Hills property.⁶⁹

Review of the planning report for the preliminary plat of Lexington Place, a residential development adjacent to the subject property, proposes a street extension and sanitary and storm sewer installation to provide access “when and if the Carriage Hills Golf Course is ever converted to a different use.”⁷⁰

Review of the planning report of the Sunrise Development, adjacent to the subject property, states “a sanitary sewer lateral should be stubbed to the west line in the extreme northwest corner for future extension and service by the potential development of the golf course.”⁷¹ In fact, the site has several sanitary sewer laterals stubbed to service the site.⁷² The lateral watermain was extended in 1999 with the Westcott Woodlands

⁶⁷ App. 440-445. The City represented to the District Court that Rahn has paid almost \$150,000 in assessments so far.

⁶⁸ Rahn Aff., ¶ 10. App. 58-62.

⁶⁹ Rahn Aff., ¶ 11. *Id.*

⁷⁰ App. 426, 429.

⁷¹ App. 419.

⁷² Pioneer Engineering Report dated 7/23/04, App. 233.

reconstruction.⁷³ The Sunrise Add. planning report also states “[T]he water main shall be stubbed...for future extension with the development of the...golf course.”⁷⁴

Review of the planning report for the preliminary plat of the Greensboro Addition, also adjacent to the property, states “stubs for utilities be placed to the west and north should Carriage Hills Golf Course change use in the future.”⁷⁵

When the Eagan planning commission considered Wensmann’s application on June 22, 2004, planning commission member Gladhill stated: “This guide plan amendment proposal will come back, we don’t know when but it’s going to come back. Expect it. And it’s going to come back in some other form that is going to survive at some point.”⁷⁶ Similarly, planning commission member Leeder stated that Wensmann’s development plan “is an excellent choice and a good effort put in, but now is not the time.”⁷⁷ Planning commission member Hansen stated he “was very impressed with [Wensmann’s] proposal,”⁷⁸ however, he “agree[s] with the other commissioners...now is not the time....”⁷⁹

When the City Council considered Wensmann’s application on August 2, 2004, Councilmember Maguire stated:

I want to suggest to the neighborhood that I don’t think that that test of [the golf course’s] viability is too far away necessarily and that we are coming up on a comprehensive plan review that is due in 2008, and I have no

⁷³ Pioneer Engineering Report dated 7/23/04, App. 235.

⁷⁴ App. 419.

⁷⁵ Pioneer Engineering Report dated 7/23/04, p. 8. App. 235.

⁷⁶ App. 213, p. 69, ll. 11-14.

⁷⁷ App. 212, p. 65, ll. 5-7.

⁷⁸ App. 212, p. 68, ll. 11-12.

⁷⁹ App. 212, p. 68, ll. 15-17.

allusions, nor I think should the neighbors, that some question on how this land will be used at that time will come up. And I would encourage everybody involved to have a more productive dialogue about what will happen with that land. Because right now I honestly don't think its all that far away from that viability measure. It is just short in my mind.⁸⁰

The question is not if residential development will occur on the property, the question is when.

G. Wensmann's proposed development plan maintains the integrity of the Comprehensive Guide Plan and meets all of the goals and policies set forth in the Guide Plan which apply to the subject property.

1. The proposed low density housing and park development is consistent with Eagan's Comprehensive Guide Plan and would have a positive impact on the community.

Evidence presented by Wensmann showed:

(a) that the proposed development would consist of well-built and attractive housing with amenities that would contribute to the high quality of life in Eagan;

(b) that the proposed development would consist of a "life-cycle" housing mix including a variety of empty-nester housing that is lacking in the City of Eagan;

(c) that the plan provided for 40 - 45 acres of park and open green spaces including over two miles of trails and undisturbed natural areas with trees and ponds; and,

(d) by developing the property, the City of Eagan would realize an increase of several millions of dollars in real estate taxes.⁸¹

⁸⁰ App. 347, p. 95, ll. 1-13.

⁸¹ The Court is encouraged to review Wensmann's PowerPoint presentation in its entirety. (App. 243-308).

2. **The proposed development would not have a negative impact on traffic, the environment, the Eagan schools or the infrastructure of the neighborhood.**

(a) **Traffic.** Wensmann presented a traffic analysis of the proposed development that concluded that the increase in traffic and change in traffic patterns associated with the development would not cause unacceptable conditions. The analysis also concluded that the addition of the proposed neighborhood would, in fact, ameliorate an existing traffic problem by increasing numbers that would warrant a new traffic signal.⁸²

(b) **Water and Wildlife.** A report addressing environmental concerns determined that proposals for the planned development would improve the quality of the water currently on the site and would reduce current drainage problems. The same report found that the wildlife that currently inhabits the golf course would likely continue in the proposed development.⁸³

⁸² Conclusion of RLK KUUS ISTO 4/23/04 Carriage Hills Traffic Analysis (App. 218-227).

⁸³ Pioneer Engineering Memorandum (7/22/04) regarding Carriage Hills Habitat Assessment (App. 215-217): "The habitat value of these areas is comparable to that of the neighborhood surrounding the golf course with mowed lawns and scattered trees. This habitat does provide some value for wildlife species seen in urban and suburban areas. Conversion of these areas to comparable land uses as the abutting properties would not substantially change the amount of habitat seen within golf course areas." (Page 1.)

"Therefore, no significant impacts to wetland habitat is expected. Should replacement wetlands be necessary, these will be planted with greater species diversity than currently exists, and will have more extensive buffers than presently occur." (Page 2).

"The proposed site plan provides for an open space corridor running from north to south. This open space will include extensive tree plantings, some prairie restorations, and wetlands. By providing a broader pallet of arboreal, shrub and herbaceous plantings, habitat diversity will be increased from the current turf monoculture that dominates the

(c) **Education.** A letter from the Eagan School District to the City Planner dated July 12, 2004⁸⁴ was submitted to the City Council. This letter found that with slight boundary shifts and with the addition of classrooms that is to occur as a result of a recent bond referendum, projected enrollment could be accommodated even with the addition of the Carriage Hills development. This letter was submitted to amend the conclusions of an earlier report that identified enrollment concerns at the middle school and the Eagan High School.

(d) **Infrastructure.** Pioneer Engineering concluded that the infrastructure necessary for the redevelopment of the golf course was clearly planned. Adequate capacity for sanitary sewers; water mains; storm water management and street connections, next to or within the golf course, are available to support the redevelopment of the golf course to 480 residential units. The Pioneer report further states that the development plan meets the MUSA goal of maximizing the in-place infrastructure, so as not to incur the additional cost to communities of extending services. Finally, the project would adhere to a series of best management practices and stricter regulations that encompass the 1991 Wetland Conservation Act and the Clean Water Acts, National Pollutant Discharge Elimination System.

site. Currently, the site does not demonstrate significant habitat diversity. By providing nature prairie plantings, a new habitat type will be reintroduced to the site and a number of new avian, mammalian and entomological species will be attracted to those areas.” (Pages 2-3).

⁸⁴ App. 214.

3. **Wensmann's proposed development meets the goals and policies of the Comprehensive Guide Plan, and thereby maintains its integrity.**

Wensmann's development plan meets the two applicable overall planning priorities set forth in the Comprehensive Guide Plan: "promote upscale housing and work to strengthen neighborhoods" and "develop major amenities with community-wide focus."⁸⁵ Wensmann's development plan also meets almost all of the goals and policies set forth in the Housing Plan and the Park and Recreation System Plan, both of which are a part of the Comprehensive Guide Plan.

a. Housing Plan.

As discussed above, Wensmann's development plan would insure "the preservation and maintenance of significant woodlands, wetlands and other natural features" and "that the existing environment is properly protected and preserved."⁸⁶ The plan provides "a diverse mix of housing types" which "provide a good fit for the present and projected demographic profile of our residents."⁸⁷ With respect to the mix of housing types, the Housing Plan identifies seniors and emptynesters "who will need or want types of housing that are currently not available or are in short supply."⁸⁸ It also identifies the need for "additional lower density, detached housing units to ensure sufficient balance of housing density throughout the community."⁸⁹ Wensmann's plan meets all of these goals and policies.

⁸⁵ App. 171.

⁸⁶ Housing Plan, App. 105.

⁸⁷ Housing Plan, App. 106.

⁸⁸ Housing Plan, App. 114.

⁸⁹ Housing Plan, App. 106.

b. Park and Recreation System Plan.

Wensmann's development plan meets the goal of "develop[ing] appropriate park and recreation facilities to serve the existing and future needs of even citizens."⁹⁰ It meets the policy of "acqui[ring] and "develop[ing] neighborhood parks in order that each neighborhood service area . . . is adequately served with appropriate recreational facilities"; "provid[ing] special use recreation facilities for broad community use"; and "develop[ing] park and recreational facilities which minimize the maintenance demands on the City . . . while maintaining high standards of quality of appearance and conditions."⁹¹

At the August 2, 2004 City Council meeting, Wensmann made a lengthy presentation which included a discussion of how Wensmann's development plan met the specific goals and policies of the Housing Plan and the Park and Recreation System Plan.⁹²

SUMMARY OF ARGUMENT

At issue in this appeal is (1) whether *Mendota Golf* insulates the City against an arbitrary and capricious challenge so long as the City uses the words "preservation of open space" or similar language in its resolution, without regard to the record before it and (2) whether a city can deny a property owner the right to make reasonably productive

⁹⁰ Park Plan, App. 571.

⁹¹ *Id.*, App. 572.

⁹² See, Wensmann's application, the Powerpoint presentation Wensmann made at the August 2 City Council hearing and the aerial photos showing the Property's surrounding neighborhoods and a rough sketch of the layout of units in Wensmann's development plan. (App. 173-175, 243-308, 309-311).

use of land and thereby force the property owner to continue operation of a public amenity on the property, even though such use is not, and can never again be, viable, or make no use of the property at all, effectively returning it to raw land.

For almost 40 years the Carriage Hills Golf Course was operated on the subject property. In that 40 years, the property surrounding the golf course has transformed dramatically, going from agricultural land to mixed density residential development. Following its purchase of the course, Appellant Rahn, an experienced builder, operator and owner of golf courses, made significant capital improvements to the golf course and undertook substantial marketing and promotional efforts to attract golfers. Despite these efforts, the golf course operation lost nearly \$1 million in the six years leading up to the property owner's eventual decision to close the golf course. The golf course, one of three in the City of Eagan, was not supported by the community, neither by the City nor its residents. This may, in part, be due to the existence of well over 100 golf courses in the Twin Cities area and the fact that the Carriage Hills Golf Course was so obsolete compared to newer courses that no amount of capital improvements could make it competitive.

Faced with the ruinous financial performance of the golf course, Appellant Rahn entered into a purchase agreement with Appellant Wensmann contingent upon the City's Comprehensive Guide Plan being amended to allow for low density residential development of the property. Although the developer initially intended to propose a development plan calling for over 700 housing units, after receiving neighborhood input the developer reduced the number of housing units to 480. Significantly, the proposed

development plan included 40-45 acres of park, recreation and open space and a greenway corridor that would act as a buffer between the existing residential neighborhoods and the proposed development. The park area would include athletic fields, picnic shelters, playgrounds, trailways and the like accessible to the entire community without charge as opposed to only those who played golf and were willing to pay a green fee.

The City denied the application to amend the guide plan, repeatedly citing its desire to preserve open space. Despite the fact that the proposed development maintained considerably more park, recreation and open space than the City could obtain through statutory dedication, the City denied Appellants' application. Significantly, the City has long planned for residential development of the subject property as expressly stated in several City documents relating to the neighborhoods surrounding the golf course. The best expression of the City's intent to eventually allow residential development on the property is an assessment agreement entered into between the City and Appellant Rahn under which the property owner is assessed hundreds of thousands of dollars for the purpose of making street and water and sanitary sewer improvements. The only purpose of these improvements is in preparation for residential development of the property.

Comments from many members of the planning commission and City council during the hearings on the application candidly acknowledged that residential development of the subject property will occur in the future. However, because of well organized neighborhood opposition, the City council left residential development of the property for a future City council. The proposed development plan meets all of the goals

and policies of the City's Comprehensive Guide Plan, both the housing plan and the park and recreation system plan. The plan provides housing types that are in short supply in the City and meets all environmental and infrastructure requirements.

The City has always recognized the Carriage Hills golf course as a community recreational amenity and a part of the City's park and recreation system. The City has always considered the private ownership and operation of this community recreational amenity as part of a public-private partnership. However, the partnership ceased when there ceased to be any benefit to the property owner. Inherent in all private property is the fundamental right to make profitable use of the property or a reasonable return on investment in property. This fundamental right shapes the expectations of all private property owners.

The City and its residents no longer use or support the golf course; therefore, any supposed desire to preserve a community recreational opportunity for the residents is a pretext. The only reason for the City's denial of Appellants' request to amend the guide plan is to force the property owner to keep the property vacant land for the exclusive and one-sided benefit of the neighborhoods surrounding the property. Such a reason is an arbitrary and capricious exercise of the City's police power.

Although Appellant Rahn purchased the subject property for the purpose of operating the golf course, its expectation remained that of all property owners: that it could make some economically viable use of the property. This expectation was further shaped by the assessment agreement under which Appellant Rahn has paid for improvements in preparation for residential development of the property. This

expectation aligns with the City's oft-acknowledged expectation and intent to eventually approve residential development of the property. To deny Appellant this right at the whim of surrounding property owners who want their open space, thereby forcing Appellant to bear a burden which should be born by the entire community, is a regulatory taking without just compensation.

ARGUMENT

I. THE CITY'S DENIAL OF APPELLANTS' APPLICATION WAS ARBITRARY AND CAPRICIOUS

A. The Record Before The City.

There is no issue about the nature, fairness and adequacy of the City council proceedings. Therefore, the record is limited to what was presented to the City council on August 2, 2004.⁹³ The *Swanson* record is comprised of the documents set forth at App. 569-70.

B. Standard of Review.

The District Court set forth the proper scope of review at Conclusion of Law No. 1. App. 9-10.

C. The City's Denial Of Appellants' Application Is Legally Insufficient And Unsupported By Facts In The Record.

In *Mendota Golf v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006), this Court determined that the City's legitimate interests in protecting open and recreational space, as well as reaffirming historical land use designations, supported the city's denial of Mendota Golf's application for an amendment to the city's comprehensive plan.

⁹³ *Swanson v. City of Bloomington*, 421 N.W.2d 307, 312-13 (Minn. 1998).

However, unlike that case, in the present case the Court has before it a sufficiently detailed record to show that, although preservation of open space is a legitimate goal, there is no basis in fact for the City's denial of Appellants' application. In the present case, the City's decision was arbitrary and capricious as applied to the subject property. The detailed fact record demonstrates that the City does not need this recreational amenity, that the application sought the next lowest density classification which would allow viable use of the property and that the proposed development struck a perfect balance between the City's desire to maintain park and open space, as well as a greenway buffer for the surrounding neighbors, while allowing the property owner to make profitable use of the property.

In *Pheasant Bridge Corp. v. Township of Warren*, 169 N.J. 292 (2001), the New Jersey Supreme Court invalidated a zoning ordinance because it was arbitrary, capricious and unreasonable as applied to the plaintiff's property. The ordinance in that case required plaintiff's property to be preserved as open space. The court found that the operation of the ordinance was "unreasonable and oppressive" as applied to plaintiff's property.⁹⁴ Similarly, in *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978), the Supreme Court of Texas ruled that an ordinance which prevented all development of a piece of property to preserve it as a scenic easement for the benefit of the public was arbitrary and unreasonable. The court found that the city "singled out plaintiffs to bear all of the costs for the community benefit without distributing any cost among the

⁹⁴ *Id.* at p. 291.

members of the community.”⁹⁵ The court cited to a statute which provided for acquisition of property for the city’s purposes and held that the city could not “take or hold another’s property without paying for it just because the land is pretty.”⁹⁶

In *Sheerr v. Evesham Township*, 184 N.J. Super. 11 (1982), the zoning ordinance applied a public parks and recreation classification to the subject property. Under an arbitrary and unreasonable analysis, the court stated that a desire to preserve open space must be substantial in order to support the adoption of the regulation at issue.⁹⁷ The court quoted from an earlier case:

[T]he danger and impact must be substantial and very real...not simply a make weight to support exclusionary housing measures or preclude growth – and the regulation adopted must be only that reasonably necessary for public protection of a vital interest. (citation omitted).⁹⁸

In support of the finding that the regulation was arbitrary, the court pointed to the fact that the property was “an island surrounded by permitted commercial and residential uses.”⁹⁹ The court concluded “this regulation was clearly a denial of due process and equal protection. *** Its purpose was to create a public benefit – the establishment of a public park and recreation area for the community.”¹⁰⁰

In *Gibson v. Sussex County Council*, 877 A.2d 54 (Del. Ch. 2005), the court found the reasons given by the county council to justify denial of the property owner’s

⁹⁵ *Id.* at p. 394.

⁹⁶ *Id.*

⁹⁷ *Id.* at p. 35.

⁹⁸ *Id.*

⁹⁹ *Id.* at p. 36.

¹⁰⁰ *Id.* at p. 37. Note that the court also found that the conditionally permitted recreational uses also allowed under the ordinance were at best marginal. *Id.* at p. 45.

application for a conditional use permit not supported by a sufficient record to justify the decision, making the decision arbitrary and capricious.¹⁰¹ In finding that the property owner's application "simply reinforce[d] the directional trend prior residents have set in motion", the court found that the council's decision was motivated primarily by community opposition.¹⁰²

In *Bailes v. Township of East Brunswick*, 882 A.2d 395 (NJ 2005), the court found that the township's downzoning of the permitted densities of certain properties did not reflect reasonable consideration of existing development in the areas where the plaintiff's property was located. The court cited to testimony that the downzoning of plaintiffs property was for protection of natural resources, preservation of rural character, and preservation of open space; that plaintiffs property was an island surrounded on all sides by intense residential development; and that the downzoning would place an inequitable burden on land owners who have continued to farm, while rewarding land owners who quickly sold their land for development. The court found that the township's decision was arbitrary and capricious because it was not required by environmental constraints and "does not reasonably conform with the character of existing development..."¹⁰³ For that reason, the court ruled that "the municipality should acquire any properties that it deems necessary for open space preservation by payment of fair market value to the owners."¹⁰⁴

¹⁰¹ *Id.* at p. 66.

¹⁰² *Id.* at 79.

¹⁰³ *Id.* at 407.

¹⁰⁴ *Id.* at 405.

In *French Investing Co. v. City of New York*, 39 N.Y. 2d 587, 350 N.E. 2d 381 (1976), the New York Court of Appeals held that it was arbitrary and capricious for the city to rezone buildable private parks exclusively as parks open to the public, thereby prohibiting all reasonable income productive or other private use of the property. The court stated that “the state may not, under the guise of regulation by zoning, deprive the owner of the reasonable income productive or other private use of its property and thus destroy all but a bare residue of its economic value.”¹⁰⁵ As in the present case, the property owner had only the possibility of “a dubious future reversion of full use.”¹⁰⁶

The court observed:

“The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. There is no attempt to share the cost of the benefit among those benefited, that is, society at large. Instead, the accident of ownership determines who shall bear the cost initially. Of course, as further consequence, the ultimate economic cost of providing the benefit is hidden from those who in a democratic society are given the power of deciding whether or not they wish to obtain the benefit despite the ultimate economic cost, however initially distributed (citation omitted). In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the ‘cost-free’ benefit.”¹⁰⁷

¹⁰⁵ *Id.* at 591.

¹⁰⁶ *Id.* at 597.

¹⁰⁷ *Id.* at 596-97. See also, J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, And The Lower Court’s Disturbing Insistence On Wallowing In The Pre-Palazzolo Muck*, 34 S.W. U. L. Rev. 351 (2005): “We should expect strong preferences to be expressed for holding productive resources idle when the entire cost can be imposed on others. *** Unless an attempt is made to determine how these preferences might shift if the full costs of implementing them were taken into account, their authenticity as expressions of distinct, justifiable community expectations should be considered dubious.” *Id.* at 417-24.

D. Substantial Change to the Neighborhood Surrounding the Property Makes Amendment of the Guide Plan to Low Density the Only Reasonable Classification.

In *Sun Oil Co. v. Village of New Hope*, 220 N.W.2d 256 (Minn. 1974), this Court ruled that a property owner can attack a city's refusal to rezone property by showing that the "neighborhood of the subject property had undergone such a substantial change since the enactment of the original . . . zoning classification as to make [the requested zoning classification] the only reasonable classification for the subject property."¹⁰⁸ This Court in *Freundshuh* restated the test in *Sun Oil Co.* as whether "the character of the neighborhood is changed to such an extent that no reasonable use can be made of the property in its current zoning classification."¹⁰⁹

Though the golf course has been operated on the property since it was rezoned from Agricultural to Public in 1962, the nature and use of the surrounding property has changed dramatically from agricultural to mixed density residential. To slightly paraphrase *Sun Oil Co.*, Rahn's property is "virtually surrounded by [residential] zoning and [is] characterized as a 'peninsula' among [residential] uses."¹¹⁰ The affidavits of Garfield Clarke and Philip Carlson both affied that none of the other conditional or

¹⁰⁸ *Id.* at 261.

¹⁰⁹ 385 N.W.2d at 8-9.

¹¹⁰ 220 N.W.2d at 262. The property is bounded by Yankee Doodle to the north and by residential developments to the east, west and south. The placement of the various housing types in Wensmann's development plan is designed to blend with the housing types in the surrounding neighborhoods. See, aerial photos App. 309-311.

permitted uses allowed under the zoning ordinance would be reasonable or allowed.¹¹¹

The City has acknowledged that residential development will eventually occur on the Property, making LD – Low Density the only reasonable classification for the Property under *Sun Oil Co.*

II. THE CITY'S DENIAL EFFECTED A REGULATORY TAKING OF THE PROPERTY FOR WHICH JUST COMPENSATION MUST BE PAID

A. *Penn Central.*

The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, states: “Nor shall private property be taken for public use, without just compensation.” Minn. Const. Art. I, § 13 states: “Private property shall not be taken, destroyed or damaged for public use without just compensation. Minn. Stat. § 117.025, subd. 2 states: “A taking includes every interference, under the right of eminent domain, with the possession, enjoyment or value of private property.” Once a taking is found, compensation is required by operation of law. *Wagner v. Milwaukee Mutual Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1991).

The United States Supreme Court, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), has stated that “the Fifth Amendment’s guaranty...[is] designed to bar government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.” *Id.* at 124. The test articulated in *Penn Central* to determine whether a taking has occurred considers

¹¹¹ App. 53-55, 63-68. If there is any question about the adequacy of the *Swanson* record, it would be in this area. If the Court finds this to be the case, it can consider the Clarke and Carlson affidavits even though they were not submitted to the City Council.

(1) the economic impact of the regulation on the property owner, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. This takings analysis “depends largely upon the particular circumstances” of each case and involves “essentially ad hoc, factual inquiries.”¹¹²

“Property owners start out with the unrestricted right to use their land as they see fit. [Although] reasonable regulation is constitutional [,]... it must, nonetheless, be recognized that regulation of land, including zoning regulations, are limitations on the full exercise of a property owner’s constitutional rights as well as his or her rights under the common law.” *Roeser v. Anne Arundel*, 368 Md. 294, 318-19, 793 A. 2d 545 (2002). The right to build on one’s property is not a governmentally conferred benefit. *Nollan v. Calif. Coastal Commission*, 483 U.S. 825, 833, n.2 (1987). Landowners have the right “to use their property as they wish, unfettered by governmental interference except as necessary to protect the interests of the public and of neighboring property owners...” and any exercise of the police power must “accord substantial deference to the preservation of rights of property owners...” *In re Appeal of Realen Valley Forge Greenes Associates*, 838 A.2d 718, 727-28 (Pa. 2003). “Thus, the closer a property interest is to core property rights, the more reasonable it is for an owner to develop expectations as to its use of that interest and the greater the likelihood a court will find a deprivation of that interest to be a taking.” *Takings in the 21st Century: Reasonable*

¹¹² *Id.* at 124.

Investment-Backed Expectations After Palazzolo and Tahoe-Sierra, 69 Tenn. L. Rev. 891, 893 (2002). See also, District Court Conclusion of Law No. 16.

The *Penn Central* court acknowledged that determining whether a regulation goes “too far”

has proved to be a problem of considerable difficulty. While this Court has recognized that the “Fifth Amendment’s guaranty...[is] designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole,” this Court, quite simply, has been unable to develop any “set formula” for determining when “justice and fairness” require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government’s failure to pay for any losses proximately caused by it depends largely “upon the particular circumstances [in that] case” . . . [involving] “essentially ad hoc, factual inquiries” *Penn Central*, 438 U.S. at 123-24.

As a result, the Supreme Court has admitted, “[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law.” *Eastern Enters. v. Apfel*, 524 U.S. 498, 541 (1998). A Westlaw search shows 1,622 cases and 3,409 secondary sources citing to *Penn Central*. The Minnesota Supreme Court has similarly stated:

Unfortunately, the law does not become clear with later cases. In general, it can be said that no firmly established test exists for determining when a taking has occurred, instead takings law turns largely on the particular facts underlying each case. *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 552 (Minn. 1996) (citing *Penn Central*).

The three factor test set forth in *Penn Central* does not comprise a formulaic test:

Penn Central does not supply mathematically precise variables, but instead provides important guide posts that lead to the ultimate determination whether just compensation is required. *** The temptation to adopt what

amount to *per se* rules in either direction must be resisted. *Tahoe-Sierra*, 535 U.S. at 326-27, n. 23.

Numerous commentators have addressed the courts' struggle with applying *Penn Central*'s three factor test. See, *Palazzolo, Lucas and Penn Central: The Need For Pragmatism, Symbolism, and Ad Hoc Balancing*, 80 Neb. L. Rev. 465 (2001) an article entirely devoted to discussing the problems inherent in the test, including how little guidance the balancing test provides and how inconsistently state courts around the country have applied the test; and R.S. Radford & J. David Breemer, *Great Expectations: Will Palazzolo v. Rhode Island Clarify the Murky Doctrine of Investment-Backed Expectations and Regulatory Takings Law?*, 9 N.Y.U. Envtl. L.J. 449, 449 (2001): "Although more than two decades have elapsed since *Penn Central*, neither courts nor commentators have been able to agree on the meaning or applicability of investment-back expectations in takings law."¹¹³

1. Investment-backed expectations.

Too often, the investment-backed expectations factor has been the primary or sole focus of the takings analysis. This was not the intent of the *Penn Central* decision as affirmed in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). In Justice O'Connor's view, the lower court erred in two ways: (1) by "adopting the sweeping rule that the pre-acquisition enactment of the use restriction *ipso facto* defeats any takings claim based on

¹¹³ For further reading, see Gideon Kanner, *Hunting The Snark Not The Quark: Has The U.S. Supreme Court Been Competent In Its Efforts To Formulate Coherent Regulatory Takings Law?*, 30 Urb. Law. 307, 337-38 (1998); Lynda J. Oswald, *Cornering The Quark: Investment-Backed Expectations And Economically Viable Uses In Takings Analysis*, 70 Wash. L. Rev. 91, 107 (1995).

that use restriction,” and (2) by “elevating what it believed to be ‘[the landowner’s] lack of reasonable investment-backed expectations’ to ‘dispositive’ status.”¹¹⁴ Properly considered, “the degree of interference with investment-backed expectations instead is one factor that points toward the answer to the question whether the application of a particular regulation to a particular property ‘goes too far.’”¹¹⁵ Ultimately, the court found that, in analyzing the investment-backed expectations of property owners, “[c]ourts...must attend to those circumstances which are probative of what fairness requires.”¹¹⁶ Thus, courts must look at the specific facts of each case and balance all three factors in reaching what “justice and fairness” require.

No one of the *Penn Central* factors is dispositive. Although Justice O’Connor’s concurring opinion in *Palazzolo* clarified that the existence of a regulation at the time of purchase is relevant to reasonable expectations analysis, she also stressed the importance of “the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant.” 533 U.S. at 634. In other words, “a land owner has a reasonable expectation to use property in the same manner as similarly situated land owners.” J. David Breemer & R.S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, And The Lower Court’s Disturbing Insistence On Wallowing In The Pre-Palazzolo Muck*, 34 S.W. U. L. Rev. 351, 392 (2005). Thus, a property owner should not be held to the historical uses of property and

¹¹⁴ *Id.* at 632, 634.

¹¹⁵ *Id.* at 634 (emphasis in original) (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)).

¹¹⁶ *Id.* at 635.

the measure of the property owner's reasonable expectations should include the "the prevailing pattern of development and permitted uses under existing regulatory regimes."¹¹⁷ "If anything, expectations of development should increase with the passage of time when property is in an area anticipated to experience future growth."¹¹⁸

In *Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the court affirmed its aversion to "*per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula."¹¹⁹ According to the court, its guide "remains the principles set forth in *Penn Central* itself and [its] other cases that govern partial regulatory takings. Under these cases, interference with investment-backed expectations is one of a number of factors that a court must examine."¹²⁰

At least one court and several recent commentators have confirmed that, not only is the property owner's investment-backed expectations one of three factors to be weighed, but that factor need not be proven at all if the other two factors are strong enough. *Hodel v. Irving*, 481 U.S. 704, 714-18 (1987) (holding that although the claimants lacked investment-backed expectations, the economic impact and the character of the governmental action weighed in their favor and, therefore, the regulation effected a taking without compensation).

¹¹⁷ *Id.* at 414.

¹¹⁸ *Id.* at pp. 395-96.

¹¹⁹ *Id.* at 326.

¹²⁰ *Id.* at 336 (quoting *Palazzolo* at 633).

Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do With Investment-Backed Expectations In Partial Regulatory Takings?*, 23 Va. Env'tl. L. J. 43, 66-67 (2004): because the investment-backed expectations factor in *Penn Central* is simply one of three factors to be weighed and balanced, “a land owner need not necessarily prove that the regulation frustrated distinct investment-backed expectations in order to prevail on her partial takings claim. Where the economic impact is severe, but short of a total deprivation of economically viable use, and the governmental action is either extreme or poorly founded, the claimant should prevail without demonstrating interference with investment-backed expectations.”

J. David Breemer, *Playing The Expectations Game: When Are Investment-Backed Land Use Expectations (Un)reasonable In State Courts?*, 38 Urb. Law. 81, 108 (2006): “There is no inherent limitation in the investment-backed expectation doctrine that prevents parties from proposing their own criteria for reasonableness. On the contrary, because reasonable expectations analysis is rooted in fairness and ‘requires careful examination and weighing of all of the relevant circumstances,’ the *doctrine appears designed to accommodate any plausible reasonableness factors arising from the facts.*” (emphasis added) citing *Palazzolo*, 533 U.S. at 636.

In at least two cases, courts have held that representations by government can establish expectations even if those expectations did not exist when the property was purchased. *Sheffield Development Corp. v. City of Glen Heights*, 140 SW 3d 660, 668 (Tex. 2004) (although the property owner lost its takings claim, the court said “evidence of Sheffield’s dealings with the City is not, as the City argues, an improper basis to estop

the City, but proof of the reasonableness of Sheffield's expectations"; *Kaiser Aetna v. United States*, 444 U.S. 164, 179 (1979) (observing that government representations "can lead to the fruition of a number of expectancies embodied in the concept of 'property'....").

And, of course, *Palazzolo* held that a property owner could bring a takings claim even though the challenged regulation existed at the time the property was acquired.¹²¹ See, *State Ex. Rel. Shemo v. Mayfield Heights*, 95 Ohio St. 3rd 59, 765 N.E. 2d 345 (2002) in which the city denied the property owners' application to rezone property from single family residential to commercial. The court cited *Palazzolo* with approval in ruling that the plaintiffs could bring a takings claim even though the challenged single family residential zoning existed at the time plaintiffs acquired the property and even though the city did not further restrict the pre-existing residential use of the property after plaintiffs' acquisition of it.¹²²

2. Economic Impact.

The economic impact of the City's denial must be measured by comparing the value of the property as a golf course with the value if residential development were allowed because that is the only way to measure the actual impact of the denial on the property's value. *Mansoldo v. State*, 187 N.J. 50, 53-54, 898 A.2d 1018 (2006) (property owner's compensation not limited to the value of the permitted uses, which were

¹²¹ Appellants request that the Court expressly overturn contrary dicta in *Myron v. City of Plymouth*, 562 N.W.2d 21 (Minn. Ct. App. 1997), *aff'd* without opinion, 581 N.W. 2d 815 (Minn. 1998).

¹²² *Id.* at 65. See also, *Drogos v. Village of Bensenville*, 100 Ill. App. 3d 48, 426 N.E. 2d 1276 (1981).

worthless, but would rather be valued as a buildable lot); *Poirier v. Grand Blank Township*, 192 Mich. App. 539, 543, 481 N.W. 2d 762 (1992) (“it is well settled that just compensation is compensation that places the property owner in as good a condition as he would have been had the injury not occurred”); *Almota Farmers Elevator & Whse. Co. v. U.S.*, 409 U.S. 470, 473-74 (1973) (“and ‘just compensation’ means the full monetary equivalent of the property taken. The owner is to be put in the same position monetarily as he would have occupied if his property had not been taken” (citation omitted)). *4 Tiffany Real Prop.* § 1254, p. 3 (1975): “The potential use of expropriated property may be deemed its best and highest use for purpose of evaluation provided that there is a reasonable expectation that the property may be so used, developed or employed in the reasonably foreseeable future.”

3. Character of the Governmental Action.

As the District Court’s Conclusion of Law No. 23, and cases cited therein, explains, the City’s denial was not designed to prevent harm to the public but is instead designed to benefit the public at the sole cost of Appellant Rahn. See also, *Paalan v. United States*, 51 Fed. Cl. 738, 750-51 (2002) (“whether the character of the government’s conduct amounts to the appropriation of private property... is often framed as the distinction between the compensable exercise of... eminent domain to benefit the public and the non-compensable exercise of its police power to protect the public.”)

In *Spaeth v. City of Plymouth*, 340 N.W. 2d 815 (Minn. 1984) this Court noted that “courts have not been reluctant to find a taking where zoning ordinances provided only for public use of the property. (citations omitted). Two themes dominate those cases:

(1) the regulation left land owners with no reasonable use of the property, and (2) the regulation treated the property as a public facility for the benefit of the local government and its people under the guise of regulation.” *Id.* at 820. The following cases have found a taking in circumstances similar to this case.

In *Morris County Land v. Parsipanny-Troy Hills Township*, 40 N.J. 539, 557 (1963) the court held that a regulation constituted a taking when the purpose and practical effect was to appropriate private property for open space. The court said this result followed when land could not be utilized for any reasonable purpose or when permitted uses are economically infeasible.

In *Steel v. Cape Corp.*, 111 Md. App. 1 (1996), a case in which property was rezoned from residential to open space, the court found:

The instant property is neither public nor community property. It is purely private property, irrespective of the wishes of neighboring property owners. *** Moreover, the area sought to be rezoned...is virtually surrounded by the development that itself apparently contains thousands of lots and units zoned [residential] – the classification sought by Appellee. *** We hold that none of the uses permitted in the open space classification afford to Appellee any viable economic use of the subject property that would avoid the impermissible taking of Appellee’s property without just compensation.¹²³

In an illuminating footnote, the court found there was no doubt that government could not “compel a private property owner to use that property for community recreational purposes without compensating the property owner.... It would, therefore, be unreasonable to require the property to maintain open space zoning under the

¹²³ *Id.* at pp. 32-33.

circumstances here presented.”¹²⁴ See also, *Citizens Committee v. District of Columbia*, 432 A.2d 710 (D.C. 1981) (“requiring private parties to spend substantial sums of money to preserve landmark structures – with little or no public assistance – could rise to the level of an unconstitutional taking.”) The words “public recreational amenity” could easily be substituted for “landmark structure” in the above quote.

In *Ripley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983), the court considered a City’s denial of a request to rezone the property from public use to commercial. The court found, “the public use zoning of the Ripples’ property is a classic example of the type of land use regulation which other jurisdictions have found to constitute a taking of private property for public use without just compensation.”¹²⁵ The court then reviewed numerous cases finding a taking and then concluded: “Accordingly, we hold that by zoning the Ripples’ property public use Lincoln has deprived the Ripples of all reasonable use of their property and has thereby accomplished a taking of the property for which just compensation is constitutionally required.”¹²⁶

In *Burrows v. City of Keene*, 121 N.H. 590 (1981), the court held:

It is plain that the City and its officials were attempting to obtain for the public the benefit of having this land remain undeveloped as open space without paying for that benefit in the constitutional manner. The City sought to enjoy that public benefit by forcing the plaintiffs to devote their land to a particular purpose and prohibiting all other economically feasible uses of the land, thus placing the entire burden of preserving the land as open space upon the plaintiffs. The trial court found, in a well considered opinion, that the uses permitted were “so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the land”

¹²⁴ *Id.* at n. 17.

¹²⁵ *Id.* at p. 507.

¹²⁶ *Id.* at p. 509.

and that they prevented a private owner from enjoying “any worthwhile rights or benefits in the land.” *** The purpose of the regulation is clearly to give the public the benefit of preserving the plaintiff’s land as open space. Its purpose is not to restrain an injurious use of the property.”¹²⁷

In *Corrigan v. City of Scottsdale*, 149 Az. 553 (App. 1985), the court phrased the issue as follows: “Although the preservation of open space in the McDowell Mountains is a legitimate state interest, we must determine whether it can be done through the exercise of police power or whether it must be done through eminent domain with the required payment of just compensation.”¹²⁸ Since the regulation had the effect of setting aside the property solely for the conservation of permanent natural open space, the court held that the ordinance was “void as an unconstitutional taking of appellant’s property without just compensation.”¹²⁹

Appellants’ expert, Philip Carlson, whose affidavit was unrebutted by Respondent, addressed the customary methods for a governmental entity achieving open space. Mr. Carlson has been a planning consultant for 28 years and has assisted in the preparation of dozens of comprehensive plans and zoning ordinances on behalf of cities and has taught seminars to city staff, planning commissioners and city councilmembers on comprehensive planning, zoning and the proper and legal use of these tools. He has also assisted in the design of numerous residential subdivisions, shopping centers, industrial parks and mixed use areas.

¹²⁷ *Id.* at pp. 600-01.

¹²⁸ *Id.* at p. 562.

¹²⁹ *Id.* at p. 565.

Based on his experience, Mr. Carlson affied that the language in the Comprehensive Plan and in the P, Park District is typical of language used in comprehensive plans and zoning ordinances to describe public parks and publicly owned uses, not private business uses. In his opinion, it is appropriate for the City to set aside areas for the use and enjoyment of the public as open space and recreational areas, but typically these areas are purchased by the City or dedicated as part of the process of subdivision. In his experience, although the land use designation of Park, Open Space and Recreation is typical and reasonable in a comprehensive plan, the P, Park zoning district created by the City is extremely unusual and represents an approach he strongly urges cities to avoid. Park areas designated on a comprehensive land use plan are often zoned residential, so that some reasonable use of the land is allowed as a matter of right. If park and open space areas are to be provided for in a city, then the city must be prepared to pay for them or have them dedicated according to a reasonable and proportional formula based on a comprehensive park plan and study of the recreational needs in the city.¹³⁰

The following cases found a taking where the changed circumstances of the area surrounding the property made the property's classification no longer appropriate. In *In Re Appeal of Realen Valley Forge Greenes Associates*, 838 A. 2d 718 (Pa. 2003), a golf course and all of the land surrounding the golf course was zoned agricultural in the early 1950's. Between 1955 and 1990 the vast majority of the properties around the golf course were rezoned to permit intense commercial development. The township passed an

¹³⁰ App. 63-68.

ordinance to preclude any further development of the golf course in order to preserve open space and to freeze the value of the property so additional improvements could not be charged to the township tax payers in acquiring the land. The township denied various petitions by a prospective purchaser of the golf course to rezone the property to allow for commercial development. The township's land planner determined that the proposed development would not have a negative impact on infrastructure and the issue was really loss of open space "which is an issue of significant public impact or visual loss *because so few of the area residents use the Golf Course.*" (emphasis added).¹³¹ The court characterized the question as "whether any difference in [the golf course] zoning from that of adjoining properties can be justified with reference to the characteristics of the tract and its environs" and observed that the golf course's status "as an island of agricultural zoning was the product of a series of rezonings of surrounding properties beginning in the 1950's and ending in about 1985."¹³² The court remanded the case to determine whether "reverse spot zoning" had occurred where an "island" develops as a result of a municipality's "failure to rezone a portion of land to bring it into conformance with similar surrounding parcels that are indistinguishable."¹³³ If so, not even "community wide concerns that serve as the legitimate basis for zoning and conformance with a comprehensive plan" can justify the rezoning and development of surrounding lands but not the subject property.¹³⁴

¹³¹ *Id.* at 726.

¹³² *Id.* at 730-31.

¹³³ *Id.* at 731 (citation omitted).

¹³⁴ *Id.*

In *Vernon Park Realty v. City of Mount Vernon*, 307 N.Y. 493, 121 N.E. 2d 517 (1954), the subject property, used for a parking lot, was an island completely surrounded by business buildings. The property had been zoned residential for almost 30 years and the parking lot was a pre-existing non-conforming use. The city council then amended the zoning ordinance, the effect of which was to prohibit the use of the property for any purpose except the parking and storage of automobiles, a service station within the parking area and the continuance of prior non-conforming uses.¹³⁵ Important to this case is the court's ruling that "an ordinance valid when adopted will nevertheless be stricken down as invalid when, at a later time, its operation under changed conditions proves confiscatory..."¹³⁶ In restricting the use of the property to parking and incidental services, "it necessarily permanently precludes the use for which it is most readily adapted, i.e., a business use such as permitted and actually carried on by the owners of all the surrounding property."¹³⁷ The dissenting judge would have upheld the constitutionality of the ordinance, citing "the community's obvious need for parking facilities", a statement which cannot be said of the golf course in the present case.

In summary, the present case is not one in which "time [has] confirmed the reasonableness of the original zoning, instead of demonstrating the contrary or a contrary change" but is rather one in which "unique circumstances have already zoned the land into a state of uselessness." *Roeser v. Anne Arundel*, 368 Md. 294, 300, 305, 793 A.2d 545 (2002). The present case fits within the theme of these cases which focus on the

¹³⁵ *Id.* at 498.

¹³⁶ *Id.* at 499 (citation omitted).

¹³⁷ *Id.* at 499.

unfairness of closing the door on the last property owner who seeks development of her property when to do so deprives the land of being utilized for any reasonable purpose and further leaves the property owner bearing the entire cost of preserving the property as open space.

B. *McShane and Lucas.*

Appellants concur with the District Court's analysis of *McShane* found at App. 20-21, ¶ 25. Appellants sought from the District Court a declaratory and summary judgment on the issue of whether a specific governmental enterprise is involved and whether Rahn has had to bear a grossly disproportionate burden while the City has avoided having to pay compensation. Appellants took the position that, if the court granted declaratory and summary judgment on this issue, a genuine issue of material fact would still remain as to the amount of diminution in value and would require appraisal testimony. Similarly, Appellants suggested to the District Court that appraisal testimony may be necessary to determine whether the City's denial of Wensmann's application had denied Appellants all economically viable use of the property resulting in a categorical taking under *Lucas*. If appraisal testimony is necessary as to these issues, Appellants would seek a remand to the District Court only if this Court did not reinstate the District Court's Order in all respects.

CONCLUSION

Perhaps this case is best summarized by comments made by Wensmann at the August 2, 2004 City Council hearing:

And, you know, the bottom line and as my father stated earlier, Ray Rahn is losing money. He has lost \$775,000 the last five years, \$150,000 a year. How long are we going to ask him to subsidize this golf course because the people feel they need it as a recreational amenity when they are not even supporting it? I don't think anyone else here in this room would be willing to take any of their hard earned savings, their retirement, and subsidize this as a recreational amenity for somebody else's use.¹³⁸

The City may not force Rahn to subsidize this recreational amenity under either an arbitrary and capricious analysis or a takings analysis.

Appellants seek an order from this Court affirming in all respects the District Court's Order. If the District Court's Order is reversed in all respects, Appellants seek a remand to the District Court on the following issues:

1. A determination as to the amount of diminution in value of the Property under *McShane*.
2. A determination whether the City's denial of Wensmann's application has denied Respondents' all economically viable use of the Property resulting in a categorical taking under *Lucas*.
3. A determination of whether Appellants have met the *Penn Central* test.
4. Appellants' equal protection claim after discovery has been completed as described in the Rule 56.06 Affidavit at App. 565-566.
5. Whether the change in the City's Comprehensive Guide Plan in 2001, redesignating the golf course from PF – Public Facilities to P – Parks, Recreation and Open Space, constitutes a taking.

¹³⁸ App. 339, p. 63, l. 22 – p. 64, l. 8.

Dated: September 14, 2006.

By:



Wm Christopher Penwell (#164847)
**Siegel, Brill, Greupner,
Duffy & Foster, P.A.**
100 Washington Avenue South
Suite 1300
Minneapolis, MN 55401
(612) 337-6100

*Attorneys for Appellants
Wensmann Realty, Inc. and
Rahn Family LP*