

NO. A05-1074

STATE OF MINNESOTA
IN SUPREME COURT

Wensmann Realty, Inc., Rahn Family LP,

Appellants,

vs.

City of Eagan,

Respondent.

BRIEF OF AMICUS CURIAE
MIDWEST GOLF COURSE OWNERS ASSOCIATION

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I. STATEMENT OF INTEREST.

The Midwest Golf Course Owners Association (“MWGCOA” or “Association”) is a chapter of the National Golf Course Owners Association.¹ MWGCOA members own and operate golf courses in Minnesota, Nebraska, Iowa, North Dakota and South Dakota, including approximately 90 golf courses in Minnesota owned by approximately 79 owners. Approximately 40 percent of the private golf courses in Minnesota are members of the Association. The Association’s purpose is to promote, protect and educate its members. Its goal is to serve its members by meeting their educational and informational needs and by concentrating and focusing their influence in legislative and regulatory matters.

The typical Association member is a family-owned business with one golf course. In many, if not most, instances the golf course represents a majority, if not the entire, net worth of the family. The Court of Appeals Decision², which would allow local governments to prevent the sale of this asset for any economically viable use, would have a devastating impact on these families.

The record in this case documents the recent decline in the golf business overall, the impact of over building of golf courses on the golf business, and the impact which

¹ This brief is submitted on behalf of the Midwest Golf Course Owners Association, which has retained Gray, Plant, Mooty, Mooty & Bennett, P.A. for the purpose of preparing and submitting the brief. Gray, Plant, Mooty, Mooty & Bennett, P.A. represented plaintiff Rahn Family LP, a member of the Association, before the Eagan Planning Commission and City Council with respect to the Application to amend the Comprehensive Plan.

² *Wensmann Realty, Inc. v. City of Eagan*, No. A05-1074, 2006 WL 1390278 (Minn. Ct. App. May, 23, 2006).

new golf equipment technology has had on older golf courses, rendering many of them obsolete.³ The result is that many older, family-owned golf courses which have operated on thin margins for many years are no longer economically viable and are failing as newer, longer golf courses attract the declining number of golfers.

Many Association members face the same situation which faced the Rahn Family: their golf courses are no longer economically viable businesses and years of losses leave them with no option but to sell the property. The Court of Appeals decision, which would prevent the Rahn Family from selling its golf course for any economically viable use, could be used by communities all over the state to prevent Association members from selling their golf courses for a fair price and exiting an unprofitable business. This will have a devastating impact on Association members who have invested their livelihood in the golf business with the expectation that it will yield a reasonable return and that the sale of the business, or the land on which the business is operated, will provide for their retirement. If the golf course no longer has any significant value as a business, and they are prevented from selling the land for an economically viable use, their investment backed expectations and their futures will be destroyed.

II. SUMMARY OF DISCUSSION.

It is MWGCOA's position that the record before the Court more than adequately supports a finding that the City's refusal to reguide the golf course for residential uses is arbitrary and capricious. The City has planned for the future residential development of

³ Feasibility Studies, App. 504-524.

the golf course property by installing the necessary infrastructure,⁴ and several City officials have acknowledged that residential development of the property is inevitable.⁵

However, the issue of greatest concern to the Association, and the issue on which it will focus its discussion in this brief, is whether designation of the golf course for “public parks, recreation and open space uses” constitutes a taking where the record demonstrates, and the District Court found, that the only privately operated use allowed under that designation, a golf course, is not economically viable.⁶

III. DISCUSSION.

A. The Designation of Property for, “Public Parks, Recreation, and Open Space Uses” Constitutes a Taking Under Federal Law.

The Court of Appeals takings analysis focuses on the United States Supreme Court decision in *Penn Cent. Trans. Co. v. New York City*, 438 U.S. 104 (1978). The Court of Appeals analyzed the takings claim under the three factor framework set forth in *Penn Central*: (a) The economic impact of government action on the one suffering the loss; (b) The extent of a regulation’s interference with distinct investment backed expectations; and (c) The character of the government action at issue. 438 U.S. 104, 124.

The Court of Appeals prefaces its takings analysis with the statement that, “Here, the property continues to have an economically beneficial use (the golf course was

⁴ District Court Finding of Fact No. 5, App. 2-3.

⁵ Finding of Fact No. 25, App. 8.

⁶ Finding of Fact No. 13, App. 4

recently valued as a golf course at nearly \$1 million).”⁷ This statement, which virtually predetermines the outcome of the takings analysis, is not supported by the record.

Plaintiff Rahn Family LP submitted two separate financial analyses which concluded that the golf course is no longer economically viable.⁸ The City of Eagan and the District Court had no contrary evidence before them on this issue. The District Court in its Findings of Fact (which, as the Court of Appeals points out, “will be upheld unless clearly erroneous and unsupported by the record”)⁹, found that, “the financial feasibility of the future operation of the golf course is seriously impaired due to the overbuilding of the local golf course market and the functionally obsolete nature of the course”.¹⁰ The record clearly demonstrates that the entire effort to have the comprehensive plan amended to allow residential development is due to the fact that the golf course is no longer economically viable. The property owner has not been able to find anyone to buy it as a golf course. Even the City has declined to purchase the golf course, on two occasions.¹¹ The Court of Appeals had no basis on which to summarily conclude that the property, which can only be used for “public parks, recreation and open spaces”, continues to have an economically beneficial use.

1. Economic Impact of Government Regulation.

In its analysis of the first of the three *Penn Central* factors, the economic impact of the governmental action, the Court of Appeals states that: “Here, government action or

⁷ *Wensmann Realty*, 2006 WL 1390278, at *3.

⁸ App. 504-524.

⁹ *Wensmann Realty*, 2006 WL 1390278, at *3.

¹⁰ Finding of Fact No. 13, App. 4.

¹¹ Finding of Fact No. 2, App. 2 and No. 6, App. 3

inaction did not change the status of the property, so there was no economic impact attributable to the City”, and that “The record does not establish that the denial of the application in 2004, which maintained the existing long-term use of the property, diminished the property’s value.”¹² Once again, these statements are inconsistent with the Findings of Fact of the District Court and the record before the Court of Appeals

The record shows that the golf course was designated PF, Public Facilities, in the City’s Comprehensive Guide Plan in 1991.¹³ The City’s Comprehensive Guide Plan states that the PF, Public Facilities category, “provides for public and privately owned uses that are meant to be used by the general public, including institutional uses”¹⁴ (Emphasis added). The Rahn Family acquired the golf course in 1996.¹⁵ In 2001, the City amended its Comprehensive Guide Plan and the property was designated P, Parks.¹⁶ The City’s Comprehensive Guide Plan states that the P, Parks category “provides for public parks, recreation and open space uses”¹⁷ (Emphasis added).

The fact is that there was a government action. The Comprehensive Plan designation of the property changed in 2001 from PF-Public Facilities to P-Parks, eliminating all privately-owned uses other than the existing golf course. This did change the status of the property, resulting in a significant economic impact attributable to the City. The record before this Court shows that the Rahn Family paid approximately \$3.6

¹² *Wensmann Realty*, 2006 WL 1390278, at *3.

¹³ Finding of Fact No. 1, App. 2.

¹⁴ Comprehensive Plan, App. 87.

¹⁵ Finding of Fact No. 1, App. 1-2.

¹⁶ Finding of Fact No. 1, App. 2.

¹⁷ Comprehensive Plan, App. 87.

million for the golf course in 1996¹⁸ and, that the golf course, if required to be operated as a golf course, had a value of less than \$1 million in 2004.¹⁹ It is not accurate to say that there has been no economic impact attributable to the City.

Nor is it accurate to say that the record does not establish that the denial of the application in 2004 diminished the property's value. The denial of the 2004 application means that the property can be used only for "public parks, recreation and open space uses". A privately-owned public golf course is, apparently, the only income generating use of the property allowed. Yet the record shows that the financial feasibility of the golf course is seriously impaired,²⁰ and that the property is worth less than \$1 million as a golf course. This is millions of dollars less than the property valuation in 1996, and the property's value if the request to reguide it for low density residential uses had been granted.

2. Interference With Investment Backed Expectations.

In the course of its discussion of the second of the three *Penn Central* factors, the Court of Appeals states that, "the purchaser is presumably paying a price for the property that reflects the current zoning and is gambling that future rezoning will add value" (emphasis added); . . . and that, "Rahn and Wensmann argue that Wensmann was entitled to a reasonable rate of return on its investment property but they provide no legal support for this argument".²¹

¹⁸ Rahn deposition, p. 44, App. 35.

¹⁹ McMurchie Study, p. 5, App. 523.

²⁰ Finding of Fact No. 13, App. 4.

²¹ *Wensmann Realty*, 2006 WL 1390278, at *3-4.

This is the language in the Court of Appeals opinion which is of the most concern to the MWGCOA. If the law in this state is that the owner of a golf course is gambling that the game of golf will continue to be popular enough, and his course will continue to be competitive enough, to attract golfers and sustain itself perpetually, with no opportunity to change the golf course to a different use as the economics of the business of golf evolve; and that the owner of a golf course is not entitled to make a reasonable return on his investment in the property on which the golf course sits, even if circumstances change, then the members of MWGCOA are all at risk.

However, we do not believe this to be either the federal or state rule of law. The United States Supreme Court emphasized, in its *Penn Central* opinion, the importance of the fact that:

. . . On this record, we must regard the New York City law as permitting Penn Central not only to profit from the terminal but also to obtain a “reasonable return” on its investment.²²

More importantly, it has never been the position of this Court that local government can deny all economically viable uses of private property in order to achieve its goals. In *Sanderson v. City of Wilmar*, 162 N.W.2d 494 (Minn. 1968) , this Court stated that

The power to regulate by zoning may not be applied to appease the city’s desire to restrain the natural operation of the laws of economics.²³ *Id.*, at 497.

²² 438 U.S. 104, 134.

²³ 462 N.W.2d 494, 497.

We are aware of no decisions of the United States Supreme Court or the Minnesota Supreme Court which hold that local government may designate a property exclusively for use for “public parks, recreation and open space uses”, regardless of whether the property owner can receive a reasonable rate of return on its investment, without acquiring the property and compensating the owner therefore.

3. Character of Regulation.

The Court of Appeals breezes through the third of the *Penn Central* factors in three sentences, concluding that the City’s adopted plan reflects the legitimate interests of the City and, “any harm to the individual property owner in maintaining the existing restriction does not appear to be one that should be borne by the entire community”.²⁴ There is no citation to authority to support this proposition.

In fact, this concluding statement of the Court of Appeals is directly contrary to many decisions of this Court, which have emphasized that the impacts of governmental regulation or action which severely impacts or destroys the value of private property for the benefit of the community should be borne by the community at large. Even in the instance where public necessity required the destruction of a home by police during the course of apprehending armed suspects, this Court stated:

The policy considerations in this case center around the basic notions of fairness and justice. At its most basic level, the issue is whether it is fair to allocate the entire risk of loss to an innocent homeowner for the good of the public. We do not believe the imposition is such a burden on the innocent citizens of this state would square with the

²⁴ *Wensmann Realty*, 2006 WL 1390278, at *4.

underlying principles of our system of justice. Therefore, the city must reimburse Wegner for the losses sustained.²⁵

Similarly, in a regulatory taking case not unlike the *Penn Central* case, this Court concluded, in the final sentence of its opinion:

Where control or acquisition of property is for the benefit of the many, it makes sense that the cost of the control or acquisition should be borne by all of the taxpayers and not fall on the few directly affected.²⁶

It is clear from the record in this case that the City denied the requested Comprehensive Plan amendment, “for the benefit of the many”. Conclusion No. 8 in the City Council’s Resolution denying the requested amendment states that, “The property provides an important amenity to the residents of the City of Eagan.”²⁷ The Association does not challenge the City’s right to make such a determination. The Association simply takes the position that the law requires the City, if it wishes to preserve this amenity for its residents, to spread the cost of doing so over all the taxpayers and not just on the current property owner.

B. The Designation of Property for “Public Parks, Recreation and Open Spaces Uses” Constitutes A Taking Under Minnesota Law.

As discussed above, this Court has many times stated its position that the cost of governmental actions or regulations which severely diminish or destroy the value of private property must be borne by the taxpayers and not fall wholly on the property owners. In addition to the *Wegner* and *Powderly* cases discussed above, in the case of

²⁵ *Wegner v. Milwaukee Mutual Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1991).

²⁶ *State by Powderly v. Erickson*, 285 N.W. 2d 84, 90-91 (Minn. 1979).

²⁷ App. 353.

Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976), this Court, in the course of discussing dedication requirements imposed in connection with subdivision approvals, stated:

While in general subdivision regulations are a valid exercise of the police power. . .the possibility of arbitrariness and unfairness in their application is nonetheless substantial: A municipality could use dedication regulations to exact land and fees from a subdivider far out of proportion to the needs created by his subdivision in order to avoid imposing the burden of paying for additional services on all citizens via taxation. To tolerate this situation would be to allow an otherwise acceptable exercise of police power to become grand theft.²⁸

The MWGCOA submits that a regulatory scheme which requires privately owned golf courses to remain a public amenity in perpetuity, regardless of the economic impact on the owners of the golf course, constitutes an effort to impose the burden of providing this amenity on an individual landowner in order to avoid imposing the cost of maintaining this amenity on all the benefited citizens and, in the words of this Court, amounts to grand theft.

The decision of this Court most closely on point to the case presently before the Court is that of *Sanderson v. City of Wilmar*, 162 N.W.2d 494 (Minn. 1968). In that case, the City of Wilmar sought to preserve Sanderson's property for parking, and did so by attempting to rezone the property to "AP Automobile Parking District". The District Court enjoined the city from doing so, and this Court considered the city's appeal. The Court found that the evidence supported the trial court's finding that the reclassification of land would substantially decrease its value, and stated:

²⁸ 246 N.W.2d 19, 26.

This court supports the policy that an amendment to a comprehensive zoning plan under the police powers which results in a total destruction or substantial diminution of value of the property affected thereby without just compensation therefore constitutes a taking of the property without due process.²⁹ (*citations omitted*).

The Court concluded its opinion in the *Sanderson* case by stating the rule set forth by the United States Supreme Court in *Pa. Coal Co. v. Mahon*, 260 U.S. 393 (1922) as follows:

The general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.³⁰

IV. CONCLUSION

The City of Eagan desires to maintain the Carriage Hills Golf Course as an amenity for the residents of the City, yet has twice declined to purchase the golf course for this purpose. The City now seeks to achieve the goal of preserving the golf course by denying the property owner the right to use the property for any other purpose, in spite of the fact that the golf course is no longer economically viable.

This constitutes a taking. The District Court's decision should be upheld. The City should be required to either regulate the property so that it can be put to an economically viable use, or acquire the golf course under its powers of eminent domain.

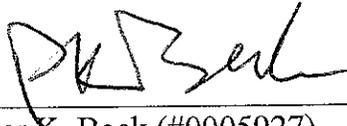
²⁹ 162 N.W.2d 494, 497.

³⁰ *Sanderson*, 162 N.W.2d 494, 498.

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Dated: September 21, 2006

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