

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.

**JOINT BRIEF OF AMICI CURIAE THE BUILDERS ASSOCIATION
OF THE TWIN CITIES AND THE NATIONAL ASSOCIATION
OF INDUSTRIAL AND OFFICE PROPERTIES**

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I. STATEMENT OF INTEREST

The Builders Association of the Twin Cities (“BATC”), formed in 1948 as a small group of builders in the metropolitan area, today represents over 1,850 members, including developers, builders, remodelers, subcontractors, suppliers and other building industry professionals. BATC is well known to the public as presenter of the Parade of Homes Spring PreviewSM, Parade of Homes Fall ShowcaseSM, Parade of Homes EasyStreetSM, and Parade of Homes Remodelers ShowcaseTM. BATC is dedicated to providing a diverse selection of quality and affordable housing in the Twin Cities area.

The National Association of Industrial and Office Properties (“NAIOP”), with over 13,000 members in 52 chapters, represents developers and owners of industrial, office and related commercial real estate throughout North America. Its Minnesota chapter has over 850 members that own or manage 157 million square feet of commercial and industrial space with a current market value of over \$10 billion, house 8,600 individual businesses, pay more than \$350 million annually in property taxes, and employ nearly 30,000 people. NAIOP seeks to provide communication, networking and business opportunities for all real estate-related professionals; provide a forum for continuing education; and promote effective public policy to create, protect and enhance property values.

BATC and NAIOP (collectively the “Amici”)¹ work to represent the interests of their member firms and the public. Among other things, BATC focuses on the land

¹ In accordance with Minn. R. Civ. App. P. 129.03, the Amici hereby certify that their counsel authored this whole amicus brief and that no person or entity, other than Amici, has made a monetary contribution to the preparation or the submission of this brief.

supply in the Twin Cities, participating in the public discussion about housing affordability and land redevelopment. NAIOP is concerned generally with issues affecting land values throughout the state.

The Amici's interest in this litigation is therefore both public and private in nature. Their interest arises out of the City of Eagan's ("City") denial of Appellants' request for an amendment to the City's Comprehensive Guide Plan, despite the overwhelming evidence that the only currently permitted use of the subject property is economically unviable, making it impossible for Appellants to use the property profitably. The City's stated reasons for denying the amendment centered on preserving the subject property as open, recreational space, relying on the City's power to provide parks and open space for its citizens. Under the Constitution, however, no city may take private property for a public purpose without paying just compensation to the property owner. The City's insistence that Appellants bear the financial burden of providing open space and recreation for the City's residents represents a classic example of unconstitutionally singling out one owner to bear the burden of providing a public benefit.

Many of the Amici's members seek comprehensive plan amendments and zoning changes in order to proceed with development and construction projects. The comprehensive plan amendment process is an integral tool in the process of implementing well-planned and staged development. The Amici's members rely on the availability of appropriate amendments to change land uses from open space or other uses, in order to provide the new housing and employment centers needed to accommodate the growing population in the Twin Cities and beyond. Furthermore, they

rely on such amendments to permit new, economically viable uses where, due to changed circumstances, the previously permitted uses of particular properties have become economically unsustainable. Such amendments are especially appropriate to allow “infill” of close-in suburbs, such as Eagan, rather than forcing those desiring to purchase a new home or construct a new office building to move to the metropolitan fringe, thereby necessitating larger public investments in new roads, sewers, and other infrastructure. See, e.g., App. 117, 124 (Metropolitan Council’s 2030 Regional Development Framework, emphasizing the importance of “reinvesting in underused land” within the metropolitan area, as a means for the region to “accommodate growth on a smaller urban ‘footprint’” and to save on costs of building new infrastructure).

The Amici’s members also rely on the fair application of a city’s rules for dedication of park land, such that no landowner will bear a disproportionate burden in supplying the land deemed necessary by a city for its citizens’ recreational activities. Park land may either be acquired by a city directly, through purchase, or indirectly, through dedication according to a reasonable and proportional formula applied equitably through the process of subdivision. No single owner should be required to dedicate land, without compensation, to a recreational use for the benefit of the public, where that use has become economically unsustainable as a privately-operated business, and the city refuses to permit any other use of the property.

II. SUMMARY OF DISCUSSION

At issue in this case is whether the City committed a regulatory taking in refusing to amend its comprehensive plan in response to compelling evidence that Appellants

could no longer operate their property profitably as a private enterprise under its land use designation of P (Parks, Open Space and Recreation). This Court recognized that a comprehensive planning decision might result in a regulatory takings claim in Mendota Golf, LLP v. City of Mendota Heights, 708 N.W.2d 162, 182 n.14 (Minn. 2006) (though not yet raised, “Mendota Golf might ultimately have a valid takings claim based on . . . the restrictions on the use of its land to a golf course”). Here, Appellants expressly raised a takings claim, both before the City and before the District Court, and the District Court made findings of fact that a taking occurred.

In contrast to the rational basis standard of review applied de novo on appeal in reviewing municipal land use decisions, a lower court’s findings of fact on a takings claim are entitled to the more deferential clearly erroneous standard of review, and should be upheld unless clearly erroneous and unsupported by the record. Czech v. City of Blaine, 312 Minn. 535, 539, 253 N.W.2d 272, 274-75 (1977). Here, the Court of Appeals improperly overruled the District Court’s findings of fact on Appellants’ takings claim, where such findings were supported by ample evidence in the record. The Amici submit that this Court should reverse the Court of Appeals and restore the District Court’s findings that the City’s denial amounted to an unconstitutional taking under Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978), and McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).

III. DISCUSSION

The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public

use without just compensation. See also Minn. Const., art. I, § 13 (“Private property shall not be taken, destroyed or damaged for public use without just compensation therefor, first paid or secured.”). The Takings Clause keeps the 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.” Armstrong v. United States, 364 U.S. 40, 49 (1960).

Here, the Court of Appeals turned that purpose on its head, holding that Appellants could be forced to bear a public burden to enable the City to maintain the subject property as open, recreational space for the good of other residents: “In light of the city’s broad and substantial interests, 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.” Slip op. at 10. The Court of Appeals recognized that the City sought to maintain the designation of this property as a golf course based on its “interests in protecting open and recreational space . . .” Slip op. at 5, quoting Mendota Golf, 708 N.W.2d at 181. But while the City has a “legitimate interest” in providing public recreational opportunities, the Court of Appeals improperly permitted the City to force an individual property owner to bear the cost of providing that public benefit.

The Takings Clause extends beyond direct encroachment upon or occupation of land by a government for its own use. See, e.g., Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 125 S.Ct. 2074 (2005) (summarizing Takings Clause jurisprudence). It also extends to regulatory action which either “denies all economically beneficial or productive use of land,” Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1015 (1992), or meets the test established Penn Central to determine when governmental action causes

economic injuries with respect to land that are “disproportionately concentrated on a few persons.” 438 U.S. at 124. As Lingle summarized, each of the regulatory taking lines of authority “focuses directly upon the severity of the burden that government imposes upon private property rights.” 125 S.Ct. at 2082.

This Court has added another category of regulatory takings, applicable when a regulation of land use is designed to benefit a public or governmental enterprise.

“[W]here land use regulations . . . are designed to benefit a specific public or governmental enterprise, there must be compensation to landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.” McShane, 292 N.W.2d at 258-59. Neither Penn Central nor McShane requires a finding that property has become valueless as a result of governmental regulation; a showing of a substantial and measurable loss of value suffices.

The District Court correctly found that the City’s decision to require Appellants to maintain their property as a golf course qualified as a taking under both the Penn Central and McShane tests. Compelling evidence established that beginning in 1999, the local and national golf course markets changed to the point where they no longer permitted the continued operation of the Carriage Hills golf course as a profitable enterprise. If confined to use as a golf course, the property will lose all of its value. But if residential development is permitted, the property will have substantially greater value. Therefore, the governmental insistence that the property continue to be maintained as a recreational amenity for the public benefit of the City’s residents has caused a substantial and measurable economic injury to Appellants, compensable under the Takings Clause. The

refusal to change the comprehensive plan creates a regulatory taking because none of the currently-permitted uses of the property can be operated privately at a profit. App. 93 (permitted uses in “Parks, Open Space, and Recreation” category include parks, trails, open space and natural areas, athletic complexes, ice arenas, and golf courses).

A. The Court of Appeals Applied the Wrong Standard of Review.

The Court of Appeals relied on Mendota Golf to conclude that its standard of review was “narrow,” requiring the City’s land use decision to be upheld unless it was unsupported by any rational basis related to public health, safety, or welfare. Slip op. at 4. While acknowledging in passing that a reviewing court must follow the more deferential “clearly erroneous” standard of review in reviewing district court findings on a takings claim, slip op. at 6, the Court of Appeals went on to overturn the District Court without actually giving any deference to the District Court’s findings.

In contrast, this Court applied both of these two differing standards of review in Czech v. City of Blaine, 312 Minn. 535, 253 N.W.2d 272 (Minn. 1977), to hold that even where a district court erred in its construction of a zoning ordinance as unconstitutional, its findings of fact in support of a takings claim must nevertheless be upheld, because they were not clearly erroneous. At issue in Czech, like here, was a city’s refusal to rezone or re-guide certain property where the only permitted use was not economically feasible. In Czech, the property owner sought to build a mobile home park on land adjacent to two existing mobile home parks. The undisputed evidence, as found by the trial court, was that “the only reasonable and economical use of the subject tract is for use as a mobile home park.” 253 N.W.2d at 275. Because the record supported the finding

that the existing zoning prohibited the landowner from making any reasonable use of the property, this Court affirmed the finding of a taking as “not clearly erroneous and . . . amply supported by the evidence.” Id.

Applying the clearly erroneous standard of review to the District Court’s findings on Appellants’ takings claim, as this Court must under Czech, those findings should be affirmed, just as the findings in Czech were affirmed. Here, as there, the evidence amply supported the District Court’s findings that “[t]he effect of the City’s denial of Wensmann’s application is to force Rahn to either continue to incur substantial and increasing annual losses or cease any use of the property at all so that the City and its residents can benefit from maintaining the property as open space without the City having to acquire the property,” that “[o]perating a golf course on the property is no longer a reasonable use,” and that the City’s denial “leaves Rahn with only the option of either continuing to operate the golf course at substantial annual losses or let the property sit economically idle.” App. 11, 12, 15. These findings were supported by the undisputed expert affidavits of Garfield Clark and Philip Carlson. App. 54 at ¶ 4; App. 64-5 at ¶¶ 2-6. Additionally, these findings were supported by Mr. Rahn’s uncontradicted affidavit that the subject property “cannot be operated profitably as a golf course” and is only saleable as a site for future residential development. App. 62 at ¶ 16.

Similar evidence was presented to the City at the time of Appellants’ application for a comprehensive plan amendment, through two studies by golf course experts on the feasibility of continuing to operate a golf course at the subject property. The District Court found that both studies showed “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.” App. 4 at ¶ 13; see also App. 505-518 (Hughes study); App. 519-24 (McMurchie study).

In light of the extensive evidence supporting the District Court’s findings that operating the subject property as a golf course is no longer a reasonable use, the Court of Appeals’ passing comment in a footnote that “the golf course was recently valued as a golf course at nearly \$1 million” cannot suffice to meet the clearly erroneous standard of review for reversing the District Court’s findings. That standard does not permit a reviewing court to step in as an alternate fact-finder, or to substitute its view of the competing evidence for that of the District Court. The Amici ask this Court to reaffirm the appropriate standard of review for findings of fact on takings claims, and to affirm such findings where, as here, they are amply supported by the record.

B. The Court of Appeals Mistakenly Held that Awareness of a Zoning Restriction at the Time of Purchase Precludes a Takings Claim.

In addition to misapplying the standard of review, the Court of Appeals incorrectly held that Rahn could not make a takings claim based upon a zoning restriction of which it was aware at the time of purchase. Slip op. at 8. The argument that postenactment purchasers cannot challenge regulations under the Takings Clause was overruled by the United States Supreme Court in Palazzolo v. Rhode Island, 533 U.S. 606, 626-31 (2001). In rejecting Rhode Island’s attempt to dismiss the claim of a landowner who acquired title after enactment of wetlands regulations that allegedly constituted a regulatory taking, the Supreme Court held:

The State's rule would work a critical alteration to the nature of property, as the newly regulated landowner is stripped of the ability to transfer the interest which was possessed prior to the regulation. The State may not by this means secure a windfall for itself.

533 U.S. at 627.

The Court of Appeals relied on pre-Palazzolo cases, all of which are inconsistent with, and therefore implicitly overruled by, Palazzolo's ruling that those who purchase land with knowledge of zoning restrictions are not prohibited from claiming a regulatory taking has occurred. See slip op. at 8-9. The Amici respectfully request this Court to clarify Minnesota law following Palazzolo, by reversing 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), and any similar cases to the extent they are inconsistent with the controlling precedent of Palazzolo on this issue.

C. The City Council's Avowed Goal to Preserve the Golf Course as Open Space for the Benefit of the Public Constitutes a Regulation for the Benefit of a Governmental Enterprise Under McShane.

The Court of Appeals seemed reluctant to find a taking in this case because of its belief that the golf course had not yet lost 100% of its value as a result of its restrictive comprehensive plan designation as P, "Park, Open Space and Recreation." Slip op. at 7 n.3 ("the property continues to have an economically beneficial use"). However, neither Penn Central nor McShane requires a total loss of value; both permit takings claims based upon a substantial and measurable decline in value. Under McShane, this Court has held that where the burden of governmental activities "falls on just a few individuals while the public as a whole receives the advantage of property rights for which it did not pay," the

Takings Clause applies, and accordingly “there must be compensation to landowners whose property has suffered a substantial and measurable decline in market values as a result of the regulations.” 292 N.W.2d at 258-59.

The Court of Appeals attempted to distinguish McShane as confined to cases involving ordinances “for the sole benefit of a governmental enterprise.” Slip op. at 7 n.3. The distinction backfires, however, because here, the regulation in question, by the City’s own admission, is for the benefit of a governmental enterprise – namely, providing open space and recreational opportunities for its citizens.

In recognition of its obligation to provide a rational basis for its decision to deny the requested amendment to its Comprehensive Guide Plan, the City Council orally stated a number of reasons for its denial of Appellants’ request (see App. 347-48), and subsequently adopted formal Findings of Fact, Conclusions and Resolution confirming those reasons (see App. 349-65). The City’s findings in support of its denial of Appellants’ application repeatedly emphasize the City’s desire to maintain the subject property as a golf course for the benefit of the public, but without any shared burden of the costs of continuing what had become a money-losing proposition for the landowner. This goal, of providing a public benefit without compensating the private landowner who bears the financial burden, is a compensable regulatory taking based upon a governmental enterprise under McShane.

On appeal below, the City sought to shift the focus from its desire to maintain the property as a component of its park and recreational system to its supposed concern for potential traffic problems and school overcrowding that might result from this

development, as justifications that would not trigger the Takings Clause. Those concerns are straw men that cannot overcome the evidence supporting the District Court's findings that the subject property "has always been considered a community recreational opportunity and a component of the City's parks and recreation system," amounting to a "governmental enterprise . . . benefited by the City's denial . . ." App. 8 at ¶ 24, App. 18 at ¶ 18. Traffic and school issues arise with every new residential development. In this case, they are readily solvable, as found by the District Court. See, e.g., App. 5 at ¶ 16; App. 320 (school district could accommodate projected enrollment generated by the proposed development), App. 218-27, (added traffic could be handled by signaling one intersection). No evidence, other than the unsubstantiated opposition of city residents, rebutted this evidence of the school district and traffic engineer.

As noted in Yang v. County of Carver, 660 N.W.2d 828, 834 (Minn. Ct. App. 2003), "neighbors' anecdotal comments" are "insufficiently concrete" to support a finding that a proposed development would generate excessive traffic. See also C.R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320, 325-28 (Minn. 1981) (no concrete evidence of traffic problems to support finding), Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee, 303 Minn. 79, 85, 226 N.W.2d 306, 309 (1975) (unsubstantiated speculation about potential traffic problems did not support denial of land use request). Neither the school nor the traffic evidence provided a basis for overturning the District Court findings. App. 5 at ¶ 16. When these unsupported issues are dispelled, the balance of the City's reasons for its denial centered on its desire to keep the subject property as open space, as an amenity desired by the City's residents. As the

District Court found, this constitutes a governmental enterprise within the meaning of McShane. App. 18 at ¶ 25.

First, the City stated that it sought to “maintain the integrity of the city park and recreation plan,” including the “substantial open space and natural amenities” of the subject property. App. 347; see also App. 353 (subject property “provides an important amenity to the residents of the City of Eagan” and “provides the benefit of open space”). Maintaining a park and recreation system is a public responsibility, not the responsibility of any individual landowner. As discussed in Section D below, no single landowner can be required to bear a disproportionate economic burden in order to provide a city with a desired park or recreational opportunity.

Second, the City stated it desired to “maintain the goals set forth in the city’s comprehensive guide plan,” by “balancing the amount of residential and other types of land use classifications.” App. 347-48; see also App. 354 (“integrity of the City Comprehensive Guide Plan is maintained through the retention of the designation of the Property as P, Park, Open Space and Recreation” which serves “to balance the amount of residential and other types of land use classifications available within the City”). Once again, while the Comprehensive Guide Plan may confirm the City’s goal of providing parks and recreational opportunities for its citizens, that is not a burden the City may impose on an individual landowner. The City may choose to balance residential and park land uses, but the appropriate way to do so, without overly burdening any particular landowner, is through either directly purchasing park land to be owned and operated by

the City, or through establishing a park dedication formula, applied equitably to any landowner who opts to take land through the city's residential subdivision process.

Third, the City stated its goal to "maintain the recreational use of the property as a golf course." App. 348; see also App. 353 (property "has long been recognized as a recreational facility and 18-hole golf course under the City's Comprehensive Guide Plan"). In addition, the City stated that allowing residential development instead of a golf course at the subject property would result in a "decrease in the amount of public facilities," which "does not benefit the long-term interests of the city." App. 348. Again, this goal focuses on the public benefit to the City's residents of having a particular recreational amenity nearby and open to the public. The public burden of providing parks and recreational opportunities for its citizens may not, however, be imposed disproportionately on a single landowner.

D. The Cost of Providing Parks and Open Space Should be Shared by the Public, Not Imposed on a Single Landowner.

Each Minnesota city is permitted, by statute, to use its powers to ensure that a reasonable amount of land is available to the public for use as parks and playgrounds. Ordinarily, cities accomplish that goal either by purchasing park land outright or by adopting subdivision regulations imposing a park dedication requirement, as permitted by Minn. Stat. § 462.358, subd. 1a, 2b(b). See App. 65-66 at ¶ 7. A typical park dedication regulation requires either dedication of a certain percentage of land being proposed for subdivision, or payment of its cash value to be used to acquire park land equivalent to the dedication requirement. See Minn. Stat. § 462.358, subd. 1a, 2b(b). A park dedication

regulation may not, however, be used to visit the burden of providing parks and recreational space disproportionately on a specific landowner, or it will run afoul of the Takings Clause, as well as the Minnesota statute authorizing park dedications. “The fee or dedication must bear a rough proportionality to the need created by the proposed subdivision or development.” Minn. Stat. § 462.358, subd. 2c(a). See also Annot., “Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof,” 43 A.L.R. 3d 862, 865 (noting that courts construing constitutionality of park dedication laws often state that land to be dedicated must be used for direct benefit of future inhabitants of subdivision and not for benefit of community at large).

This Court has upheld the constitutionality of Minnesota’s park dedication statute against a challenge under the Takings Clause, provided that the dedication requirement is reasonable and is not administered arbitrarily or unfairly. Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19, 26 (1976). The City of Bloomington had adopted an ordinance requiring dedication of 10 percent of undeveloped land, or its cash equivalent, in order to receive the city’s permission to subdivide and develop land for residential purposes. While upholding Bloomington’s park dedication requirement, the Court in Collis, expressed concern for possible discrimination among landowners, which could result in a taking. “To avoid discrimination all developers should be required to make dedications for this purpose according to criteria which will result in equal treatment.” 246 N.W.2d at 27, quoting Heyman and Gilhool, *the Constitutionality of Imposing*

Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 Yale L.J. 1119, 1142. Thus, the Court warned that:

A municipality could use dedication regulations to exact land or fees from a subdivider far out of proportion to the needs created by this 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.*

246 N.W.2d at 26 (emphasis added). The Court upheld the statute and ordinance at issue in Collis, notwithstanding this risk, because both were limited to a “reasonable” exaction, and both were subject to challenge in court by individual landowners, to rebut the reasonableness of any particular exaction by a city. Id. at 27.

Eagan’s park dedication policy requires dedication of parkland based on a sliding scale of percentages, from 8% to 14%, depending upon the density of a proposed residential development.² In no instance does Eagan’s policy allow the imposition of a 100% park dedication requirement. Yet in this case, the City has effectively imposed such a requirement on Appellants.

The City allowed all of the owners of undeveloped land surrounding the subject property to develop their land into residential subdivisions. These subdivisions gave rise to the need and desire for additional open space, as evidenced by the adjoining residents’ request that the City require Appellants’ property to be kept as open space. See, e.g.,

² A copy of Eagan’s current Park Dedication Policy is attached to this brief. This is an official publication of the City of Eagan, of which this Court may take judicial notice. Even though the Wensmann development proposal for the subject property was for low density housing, it far exceeded the City’s park dedication requirement for even high density housing, by proposing to set aside more than 40 of the site’s 120 acres as parks and open space. See App. 3 at ¶ 8.

App. 342 (Councilperson Carlson objected that Wensmann’s proposal gives open space benefits to those who would move into the neighborhood, as opposed to providing it to the existing residents “who had been used to . . . the open space next to their home”), App. 344 (Ms. Isabart, spokesperson for coalition of neighbors, states “we all bought our properties with the idea that this was open space”).³ In essence, the City told Appellants that because they are the last to seek to develop their property, 100% of their property should be dedicated as open space for the benefit of other residents.

By denying Appellants’ request for a comprehensive plan amendment, notwithstanding compelling evidence that the operation of the subject property as a golf course had become economically unviable, the City furthered its goal of providing a public benefit to its citizens by keeping the golf course as part of the municipal park and recreational system at the expense of Appellants’ right to make use of their property in an economically sustainable way. This de facto dedication requirement violates the Takings Clause.

A park dedication regulation which, instead of imposing a 10% park dedication requirement on every subdivider, randomly imposed a 100% park dedication requirement on one out of every ten subdividers, certainly would be unconstitutional. Such a scheme could only be viewed as “far out of proportion to the needs created by this subdivision” and would be tantamount to “grand theft,” as hypothesized in Collis. 246 N.W.2d at 26.

³ The Amici recognize the political pressure placed upon the City Council to keep the subject property as open space for the benefit of current city residents and voters. The proper role of the Court, however, is to step in when those political pressures result in actions that violate the Constitution.

Yet that is the functional equivalent of what has happened here. The City, by emphasizing its desire to maintain the property as open space and a recreational opportunity for its citizens, without compensating or even acknowledging the serious financial burden borne by Appellants in operating a golf course at a continual financial loss, has effectively imposed a 100% park dedication on Appellants.

As the Court noted in Collis, “[w]hile in general subdivision regulations are a valid exercise of the police power, made necessary by the problems subdivisions create – i.e., greater needs for municipal services and facilities –, the possibility of arbitrariness and unfairness in their application is nonetheless substantial.” 246 N.W.2d at 26. Here, the arbitrariness and unfairness of applying the City’s Comprehensive Guide Plan to require Appellants to subsidize the municipal services and facilities needed by other landowners and residents of the City, while denying Appellants the opportunity to benefit economically from the use of their own land, cannot be countenanced. The need for public recreational facilities was not generated by development of the subject property; yet the City expects Appellants to bear the expense of fulfilling the recreational needs generated by other properties within the City. That is neither fair nor permissible under the Takings Clause.

E. The City May Not Deny Appellants the Opportunity to Realize a Reasonable Return on their Investment in the Property.

A wealth of case law under the Takings Clause recognizes that property owners are entitled to an opportunity to earn a reasonable return on their investment in property. Under Penn Central, financial injury imposed on a property owner by regulation, as well

as the investment-backed expectations of that property owner, are important factors in determining whether the burden imposed by governmental regulation rises to the level of a taking:

[T]he Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. . . . So, too, is the character of the governmental action.

438 U.S. at 124. See also Palazzolo, 533 U.S. at 633 (O'Connor, J., concurring) (under regulatory takings case law, the polestar remains Penn Central factors, and "interference with investment-backed expectations is one of a number of factors that a court must examine"); Tahoe-Sierra Preservation Council, Inc., v. Tahoe Regional Planning Agency, 535 U.S. 302, 327 (2002) (same).

The Court of Appeals held that Appellants had no investment-backed expectation that the property's use designation might one day be converted from park to residential, because the property was purchased as a golf course, with the intention to continue operating it as such. Palazzolo, see section B above, invalidates the Court of Appeals' analysis on this point. The Court of Appeals further held that any financial losses incurred by Appellants are not the City's fault, but rather result from external market factors. See slip op. at 8 ("other factors impacted the value, including national trends, overbuilding in the area, and the size of the golf course"). The Court of Appeals concluded that "government action or inaction did not change the status of the property, so there was no economic impact attributable to the city." Slip op. at 7.

The Amici submit that the “investment-backed expectations” factor should not be viewed so narrowly. Here, as in Czech, an unconstitutional taking may result from either “governmental action or inaction,” where the result is to deprive a landowner “of all the reasonable uses of his land.” 253 N.W.2d at 274. In Czech, the city could have argued that the land was not rendered valueless by the city’s refusal to rezone it to allow construction of a mobile home park, but rather by its natural conditions – flat, with sandy soils and a shallow water table, making impossible construction of single-family homes or of any commercial or industrial business buildings of any size. But this Court concluded that because the only reasonable use of the property was as a mobile home park, the city’s refusal to rezone it as such constituted a taking through inaction. Likewise here, the only reasonable use of Appellants’ property is other than a golf course, and the City’s refusal to permit Appellants to use the property as anything but a golf course deprives them of any opportunity to make a reasonable use of the land. While in past decades, it was possible to make a positive return on the property as a golf course, changed conditions as established in the record to the satisfaction of the District Court showed that forces beyond Appellants’ control inexorably changed the golf course market, to the point where this facility was no longer economically feasible.

The record before the District Court, like that before the City Council, unequivocally documented the serious financial trouble recently experienced by the Carriage Hills Golf Course. The golf course began to lose money in 1999, and its losses mounted in subsequent years, to the point where Rahn could no longer afford to keep it open. The property was offered for sale to the City in 2001, but the City declined to buy

it. In 2004, Appellants commissioned two studies of the golf course's continued economic vitality, and both concluded that it was in deep financial trouble. According to the Hughes study,

The subject is functionally obsolete and has significant physical deterioration. . . . [I]t is recommended the course be redeveloped. The current golf course is definitely not the highest and best use of the site. Even if the course is improved over time, there is barely enough cash to upgrade and effectively no return to ownership for taking such a risk.

App. 505. Similarly, the McMurchie study concluded:

The physical viability of this golf facility is limited due to several factors. The small size of the site greatly limits both length and design remedies. In addition, modern design features are lacking in all green and tee complexes and would be prohibitively expensive to correct. Lastly, infrastructure items such as the clubhouse, maintenance equipment, and the irrigation system all require a large reinvestment in order to contribute to the future quality of the golf course product.

App. 520. After the end of the 2004 season, Rahn closed the golf course because of its significant losses from the previous years' operations and its dim prospects for the future.

App. 61-62. The property now sits idle.

The Court of Appeals apparently relied on the McMurchie Report's valuation opinion as evidence that the subject property retains at least some value as a golf course. Slip op. at 7 n.3. Contrary to this footnote, as noted above, the McMurchie Report confirms the significant economic injury sustained by Appellants as a result of the City's refusal to permit any other use of the property. The financial impact of the regulatory burden imposed on Appellants by the City, through its insistence that the site remain open space as a public recreational amenity, is both substantial and measurable. Based upon this record, the District Court's findings that the City's inaction deprived Appellants

of any reasonable use of the property are not clearly erroneous, and the Court of Appeals should not have overturned those findings.

F. Maintaining a City’s Comprehensive Plan Unchanged is Not a Sufficient Reason for Denying a Takings Claim.

The Court of Appeals relied on Mendota Golf to conclude that the City has “legitimate interests in protecting open and recreational space, as well as reaffirming historical land use designations.” Slip op. at 5, citing 708 N.W.2d at 181. This statement ignores that Mendota Golf did not present a takings claim. Whatever legitimate interests a city may have, it does not have the right to take private property to accomplish its goals without just compensation. The takings claim in this case should have required the Court of Appeals to affirm the District Court’s findings that continuing the City’s comprehensive plan designation of the subject property as a golf course deprived Appellants of any reasonable use of the property, due to the changed conditions in the local golf course market.

Defending the integrity of the comprehensive plan cannot, in and of itself, justify an unconstitutional taking of Appellants’ private property. Comprehensive planning is a form of land-use regulation akin to zoning, which the United States Supreme Court has long held is permissible, see Euclid v. Ambler Realty Co., 272 U.S. 365 (1926), but only up to a point. See Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (zoning will be invalidated where it allows no practical use of land). When regulation crosses the line and unfairly interferes with the property rights of an individual landowner, effectively depriving the landowner of the opportunity to reap any economic value from the

property, then the Takings Clause requires a city either to change its regulation to permit some economic use of the property, or to compensate the landowner for the resulting loss of value. See, e.g., Lucas, Penn Central, and McShane.

While the comprehensive planning process is an important function of city government, comprehensive plans are not set in stone, but are in a continual state of evolution. At a minimum, cities are required to review and revise their comprehensive plans at least once every ten years. See Minn. Stat. § 473.864, subd. 2. In addition, cities are permitted to amend their comprehensive plans “whenever necessary,” to address changing circumstances within their boundaries. See Minn. Stat. § 462.355, subd. 1.

The law requires cities to have a rational basis for denying requested amendments to land use planning documents. See, e.g., Honn v. City of Coon Rapids, 313 N.W.2d 409, (Minn. 1981) (legislative zoning decisions are reviewed under a rational basis test). The law further requires cities to compensate landowners for land use decisions which constitute regulatory takings under the case law discussed above. See, e.g., Lingle, 125 S. Ct. at 2087, McShane, 292 N.W.2d at 258-59. The City cannot hide behind its current Comprehensive Guide Plan and defend all future land use decisions based solely on conformance to the plan. The comprehensive plan alone cannot insulate a city from takings claims. Otherwise, cities would have a financial incentive to designate property as “Parks, Open Space, and Recreation” as Eagan has done here, thereby providing parks or open space without having to pay for them. Similarly, when circumstances change to deprive a landowner of any reasonable use of its land under the existing plan, the plan must change as well.

IV. CONCLUSION

The Amici's members rely upon the availability of comprehensive plan amendments and zoning changes to enable them to make economic use of property that cannot be used economically consistent with existing permitted uses. To deny a landowner the opportunity to make economic use of property, because the City wishes to maintain that property as open, recreational space for the benefit of its residents, ignores the City's constitutional obligation to pay for property which it takes or dedicates to a public purpose.

The District Court's findings on Appellants' takings claim were amply supported by the record and should have been upheld under the clearly erroneous standard of review. Based upon those findings and the evidence supporting them, this Court should hold that the District Court properly ordered the City either to permit a use that would be economically viable, or to condemn the property and compensate Appellants for the diminution in value as a result of the City's regulatory taking.

Respectfully submitted,

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