

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.

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AND
RAHN FAMILY, LP

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I. The City Did Not Have A Rational Basis For Denying Appellants' Application To Amend The Comprehensive Guide Plan.

A. Standard Of Review.

Appellants do not dispute that this Court's review of the City's decision involves a determination of whether the City had a rational basis for its decision. The City's decision "lacks a rational basis if it is unsupported by substantial evidence in the record, premised on a legally insufficient reason, or based on subjective or unreasonably vague standards."¹ The test for whether a city's decision had a rational basis "is whether the reasons given by the city council are legally sufficient and supported by facts in the record."²

As in *Parranto*, Appellants are not arguing that the reasons given by the City were legally insufficient, only that they were not supported by the facts.³ As this Court did in *Mendota Golf*, review must go beyond "focusing solely on the language of the resolution" to a review of the record to determine if there is a factual basis for the City's decision.⁴ The City argues that, according to *Mendota Golf*, because it had "legitimate interests in protecting open and recreational space, as well as reaffirming historical land use designations," it had a rational basis for denying the guide plan amendment.⁵ This Court underscored its intention not "to prescribe a permanent comprehensive plan

¹ *PTL v. Chisago County Board of Commissioner*, 656 N.W.2d 567, 571 (Minn. Ct. App. 2003) (citations omitted).

² *Parranto Bros. v. City of New Brighton*, 425 N.W.2d 585, 589 (Minn. Ct. App. 1988). See also, *Mendota Golf v. City of Mendota Heights*, 708 N.W.2d 162, 180 (Minn. 2006) ("Our review focuses 'on the legal sufficiency and factual basis for the reasons given.'").

³ *Id.*

⁴ *Id.* at 180.

⁵ *Id.* at 181.

designation for the property” in *Mendota Golf*.⁶ However, the City’s argument is premised primarily upon its assertion that preserving the 40 year historical designation of the property as a golf course provides a rational basis in an of itself without further inquiry. There is nothing about the passage of time alone that imbues a comprehensive guide plan with more “integrity.” If that were the case then no land use designation would ever change. On the contrary, as the population of the City of Eagan grew the area transformed from largely agricultural and rural to a mix of residential, commercial and industrial. Most of this involved the usual adjustment of the economic benefits and burdens inherent in regulation. But when a single use, public recreational amenity which has benefited the community for several decades is no longer used by the community, the door should not be shut to the property owner being allowed to make the same productive use of property that has been granted to all other property owners in the surrounding area. Appellants assert that the City must still establish factual support for continuing the historical designation of the property. The only facts which the City’s Brief discusses are “dangerous traffic conditions” and “overcrowded schools.”⁷

⁶ *Id.* at 182. This Court also underscored its intent to “not foreclose discussion and negotiation between Mendota Golf and the city regarding the use of the property.” *Id.* As detailed in the Petition For Review, the *Mendota Golf* decision had the opposite effect on the City.

⁷ Respondent’s Brief pp. 20-24.

B. The City's "Facts"

1. Traffic Safety.

The City Staff Planning Report provides a detailed analysis of the potential impact of Wensmann's plan on traffic in the area but cites to no safety concerns.⁸ More importantly, the City's August 17 Resolution does not even list traffic safety as a basis for the denial of Wensmann's application. Conclusion No. 11 merely states that "traffic from residential development on the Property would likely *disrupt* existing neighborhoods surrounding the site."⁹ Disruption is not equivalent to a lack of safety.

Footnote five of the City's Brief points out that Wensmann's site plan was not submitted for approval with the application to amend the guide plan. But the City repeatedly uses the specifics of that site plan in its argument. The issue is whether the City should have approved amending the guide plan from Parks, Open Space and Recreation to Low Density residential, not whether Wensmann's site plan would work on that site. Although Wensmann agreed to make its site plan a condition of amending the guide plan, the City would not have been deprived of its ability to follow the additional and lengthy process necessary for approval of a site plan if it had approved the guide plan amendment. Nonetheless, Appellants discuss below the City's arguments specific to the site plan.

Appellants' expert, a professional engineer from RLK-KUUSISTO, concluded that "the increase in traffic due to the potential development of the site will warrant a

⁸ App. 183-85, 190.

⁹ App. 354 (emphasis added).

signal at CR 28 [Yankee Doodle Road] and Westcott Woodlands intersection in the year 2006, assuming the site is 65% developed.”¹⁰ The City misleadingly states that Wensmann’s proposed development would reduce the Level of Service (LOS) “A” rating at that intersection to a LOS “F” rating. However, that assumes no traffic signal is installed. Installation of a traffic signal would indicate “the overall operation is forecasted at LOS “A” with all movements operating at LOS “B” or better.”¹¹ It is also misleading to point to the City’s lack of control over whether a traffic signal is installed as that is always the case for county and state roads and no development would ever be approved if that were a basis for denial.

Increased traffic alone caused by development cannot be a basis for denial because all developments cause increased traffic. In deciding when to install a light, the county requires a certain number of trip ends at an intersection to warrant a light. As the RLK-KUUSISTO traffic analysis shows, a development increases traffic over time; therefore, it is not as though the City’s mere *approval* of the development requires a traffic signal.

It is not the City’s responsibility to decide for the county if a signal is warranted. In the Court of Appeals, amicus curiae Metropolitan Council’s brief was devoted almost exclusively to the proposition that local governmental units like the City must “insure that their official controls, including zoning ordinances, conform to their local comprehensive plan and, by extension, to the council’s MDG [Metropolitan Development

¹⁰ App. 221.

¹¹ App. 220.

Guide] and Metropolitan System Plans.”¹² The Met Council’s brief highlights the requirement that the City send proposed amendments to its Comprehensive Guide Plan and zoning ordinance to other agencies to insure consistency with the plan at every level of government: state, county and city. Thus, the county will engage in its usual process in determining when a stop light is warranted.

Vague testimony by a few residents about a condition which may arise in the future and which would be eliminated by a traffic signal at the appropriate time cannot provide a basis for the City’s decision. See, *Yang v. County of Carver*, 660 N.W.2d 828, 834 (Minn. Ct. App. 2003) (holding that a county board acted arbitrarily in concluding, based on resident testimony, that excessive traffic generated by the proposed use was a valid reason to deny the property owner’s application). *Yang* cited *CR Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981) (overturning conditional-use permit denial where residents provided no concrete evidence warranting an inference that the proposed use would substantially aggravate traffic) and *Minnetonka Congregation of Jehovah’s Witnesses, Inc. v. Svee*, 226 N.W.2d 306, 309 (Minn. 1975) (holding that unsubstantiated resident speculation about increased traffic did not support denial of a conditional-use permit application).¹³

¹² Page 8.

¹³ Note that the RLK-KUUSISTO traffic analysis estimates the number of trips generated by the development at 2,811, lower than the 3,000 trips contained in the City Staff Planning Report. App. 219. These trips would be distributed over a number of different roads around the development.

2. School Overcrowding.

The chart at App. 177 shows current projected enrollment for the elementary, middle and high schools as of June 15, 2004. There is no capacity issue as to the 73 elementary aged children estimated to be added by the Wensmann development.¹⁴ The only potential issue was as to the 37 middle school aged children and 48 high school aged children which were estimated to be added.¹⁵ The City misreads a letter from Independent School District 196 addressing the school building capacity issue and relies again on unsubstantiated resident testimony.

As with any residential development, the units will be built over time and any new students added by the development would be enrolled over time. Only 37 middle school aged children would have been added by the Wensmann development up through the projected build-out of the development in 2008.¹⁶ The school district projections at App. 177 show enrollment at the middle school almost back to capacity in 2008 and below capacity in 2009. This is without allowing for the impact of boundary adjustments referenced in App. 214. There is nothing in the record to support the City's statement that "boundary adjustments are merely on the drawing board at the school district . . ."¹⁷

The school district passed a bond referendum to accommodate the projected enrollment at the high school.¹⁸ Projected enrollment for 2006 exceeds capacity by 362 students without including the 48 students estimated to be added by Wensmann's

¹⁴ City Staff Planning Report, App. 187.

¹⁵ *Id.*

¹⁶ App. 280.

¹⁷ Resp.'s Brief, page 23.

¹⁸ App. 214.

development. This means that, first, when residents complain about schools being “massively over capacity,” they are talking about an existing condition at the high school that will be remedied by passage of the bond referendum. Second, a bond referendum which accommodates an existing 20% over capacity can certainly accommodate an additional 1% increase per year over two years.

In a letter dated July 12, 2004, ISD 196 states the passage of the bond referendum adding new classrooms at the high school “should accommodate projected enrollment.”¹⁹ The City claims that the reference to “projected enrollment” does not include the students that will be added by Wensmann’s development. However, the letter was obviously prepared for the express purpose of addressing the impact of Wensmann’s development. The letter states: “Aside from the above information, School District 196 will not express an official position regarding *this development*.”²⁰ In other words, the school district declined to weigh in on Wensmann’s proposed development other than to state that the boundary adjustments and passage of the bond referendum should accommodate the students added by “this development”.

C. There Is No Factual Support In The Record For The City’s Decision.

The primary reasons, in addition to traffic safety and school overcrowding, given by the City for its denial of Appellants’ application for a guide plan amendment are:

1. *Appellants failed to show that the subject property is not viable for use as a golf course (Conclusion No. 4).*²¹

¹⁹ *Id.*

²⁰ *Id.* (emphasis added).

²¹ The City Council Resolution is at App. 353-54.

The two golf course studies commissioned by Appellants and submitted as part of the record before the City Council are discussed in Appellants' initial Brief at pp. 9-12. The redacted portion of the Hughes & Company feasibility study is contained at Resp. Conf. App. 11 and shows the massive losses the golf course operation experienced from 1999 through 2003. Even the City's own golf course studies showed that the golf course operation was not a viable use. App. 472-503. The City would not sponsor events at the golf course, the high school would not practice or play its matches at the golf course, there was not a single junior member that resided in the City, only one person within a 600 foot radius of the golf course was a member and only 18 people in the entire City were members.²²

2. *The golf course benefits both Rahn and the City (Conclusion No. 6).*

See discussion in preceding paragraph. The golf course did not benefit Rahn, the City or its residents and closed after the 2004 season.

3. *The golf course provides an important amenity to the City's residents (Conclusion No. 8).*

See discussion under paragraph 1 above. The City's residents did not use the golf course.

4. *There has not been a significant change in the property surrounding the golf course (Conclusion No. 10).*

Appellants' initial Brief at page three discusses the radical transformation that occurred over 40 years from agricultural and rural to the single and multi-family residential uses which now surround the golf course.

These reasons are plainly a pretext for the City's real goal of preserving the property as open space without having to acquire it.

²² App. Brief pp. 11-12.

II. *Sun Oil*

The City argues that the substantial changes to the area surrounding the subject property have actually benefited by its use as a golf course.²³ The City emphatically states “it is hard to imagine how the additional residential and office park development can be detrimental to a public golf course that relies on customers for its business.”²⁴ This, of course, ignores the fact that the City’s residents do not use or support the golf course despite Rahn’s substantial expenditure on capital improvements and marketing efforts.²⁵ LD-Low Density is the next lowest density classification for this property and is the only reasonable classification for the property. The property cannot be used for any purpose other than a golf course. The City plainly does not need a golf course and its residents do not use the golf course. Wensmann’s proposal blends perfectly with the surrounding housing types while preserving a very generous one-third of the property for park and open space which, unlike the golf course, will certainly be utilized and enjoyed by the City’s residents. Not only does the record developed by Appellants before the City Council overwhelmingly support these facts, neither the City nor the neighborhood coalition submitted to the City Council any facts in rebuttal.

The City claims Appellants are relying on *dicta* in *Sun Oil*. However, the *Sun Oil* court’s focus on substantial changes to the area surrounding the subject property was restated in *Freundshuh v. City of Blaine*, 385 N.W.2d 6 (Minn. Ct. App. 1986). Other

²³ This admission that there have been substantial changes to the area surrounding the golf course directly contradicts the City Council’s Conclusion No. 10 discussed in the preceding section.

²⁴ Resp. Brief pp. 30-31.

²⁵ App. Brief pp. 11-12.

very recent cases in other jurisdictions, applying an arbitrary, capricious and unreasonable standard, have undertaken the same analysis. *See, Bailes v. Township of East Brunswick*, 882 A.2d 395 (N.J. 2005) (downzoning of plaintiff's property did not reflect reasonable consideration of existing development in the areas where plaintiff's property was located); *In re Appeal of Realen Valley Forge Greenes Associates*, 838 A.2d 718 (Pa. 2003) (singling out of property for different treatment from that accorded to similar surrounding land was arbitrary and unreasonable).²⁶

III. The City's Denial Of Appellants' Application For A Guide Plan Amendment Effected A Regulatory Taking.

A. *Penn Central*.

Amici curiae argue directly what the City only argues indirectly. Their position is that a regulatory taking occurs only when a landowner challenges a new regulation that restricts previously permissible uses of land.²⁷ The City's position that it merely left a longstanding historical designation of property in place is a recasting of Amici Curiae's argument that there was no government action that could constitute a taking in this case. The City wants to characterize this case as being in the traditional regulatory takings context in which a city passes a regulation which downzones the property or otherwise

²⁶ The City attempts to dismiss the application of *In re Realen* by seizing upon the term "reverse spot zoning" employed in that case and claiming that Appellants did not allege reverse spot zoning at the district court level. Resp. Brief, p. 27. *In re Realen* applied an arbitrary and unreasonable standard and the fact that the court attached a particular label in that case does not make it something other than an arbitrary an unreasonable standard case.

²⁷ Amici Curiae's brief p. 6. "Amici Curiae" will refer to the League of Minnesota Cities, American Planning Association, Minnesota Chapter of American Planning Association and Community Rights Counsel.

restricts a use of the property that had been allowed before the regulation was passed. Viewed in that context, the City argues, there can be no taking in this case because nothing was taken away from the property owner. However, Appellants have cited to ample authority in which the City's failure to change the classification of the property has resulted in a taking including cases in which a request for rezoning has been denied.²⁸ Those cases focus primarily on both changes in the surrounding property and the loss of viability of the use on the subject property. That is precisely the context in which this Court should view this case. The bottom line is that the use of the property as a golf course no longer makes sense because the very community which is intended to be benefited by the presence and availability of this community recreational amenity no longer uses the amenity.

This Court is presented with a very clear contrast in positions as between Appellants and the City. The City's view of the world is that its denial simply left a long standing historical designation of the property in place in order to preserve a public recreational amenity and to protect the integrity of the comprehensive guide plan. According to the City, Rahn purchased the property with the sole expectation of continuing the golf course operation and the fact that the course is no longer financially viable should not make the City a guarantor of the success of Rahn's business. In any

²⁸ *State Ex Rel. Shemo v. Mayfield Heights*, 765 N.E.2d 345 (Ohio 2002) (regulatory taking found where city denied request to rezone property from single family residential to retail and warehouse development); *Steel v. Cape Corp.*, 677 A.2d 634 (Md. App. 1996) (regulatory taking found when county denied request to rezone property from open space to residential).

event, according to the City, its denial had no economic impact on Rahn inasmuch as the property remained a golf course after the denial as it had been before.

Even though *Penn Central* ruled that regulatory takings analysis requires an *ad hoc* factual inquiry, the City devotes much of its argument to distinguishing the facts of Appellants' cases and ignoring the general principles that have application to this case.

Those general principles include:

1. *Penn Central* must be applied against the backdrop of the Fifth Amendment's guaranty that government cannot force some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.²⁹
2. The *Penn Central* analysis requires an *ad hoc* factual inquiry which depends largely on the particular circumstances of each case.³⁰
3. *Penn Central* did not adopt *per se* rules or a mathematical formula.³¹
4. The property owner's reasonable investment-backed expectations should not be elevated to dispositive status.³² This is one of a "number of factors" a court must examine.³³

Nor are the three *Penn Central* factors the only ones relevant in determining whether the burden of regulation ought "in all fairness and justice" to be borne by the public. (citation omitted). Whether a regulatory taking has occurred, the Supreme Court has said, "depend[s] on a complex of factors *including*" the three set out in *Penn Central* (*Palazzolo*, 533 U.S. at 617) (emphasis added). The analysis "necessarily requires a weighing of private and public interests" (citation omitted) and a "careful examination and weighing of all of the relevant circumstances in this context." (*Tahoe-Sierra*, 533 U.S. at 326, n. 23). As we have ourselves said of

²⁹ *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978).

³⁰ *Penn Central*.

³¹ *Tahoe-Sierra Preservation Counsel, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002).

³² *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001).

³³ *Tahoe-Sierra*.

regulatory takings issues, “we consider all of the surrounding circumstances” (citation omitted) in applying “a fact-sensitive test of reasonableness” (citation omitted).³⁴

5. Every private property owner has an expectation of using their property unfettered by governmental interference except as necessary to protect the interests of the public.³⁵ A city’s exercise of the police power must accord substantial deference to the preservation of rights of the property owner.³⁶
6. A property owner’s expectations are objectively reasonable if they align with the city’s own expectations.³⁷
7. A property owner also has an objectively reasonable expectation of obtaining a zoning classification which is consistent with the area surrounding the property. A court may look at:
 - a. What is the nature and extent of permitted development under the regulatory regime vis-à-vis the development sought by the claimant?³⁸
 - b. Does the requested classification simply reinforce the directional trend prior residents have set in motion?³⁹
 - c. Will rezoning the land bring it into conformance with similar surrounding parcels that are indistinguishable?⁴⁰
 - d. Is an inequitable burden placed on a land owner who has continued a longstanding designation while other land owners who developed earlier are rewarded?⁴¹

³⁴ *Sheffield Development Corp. v. City of Glen Heights*, 140 S.W.3d 660 (Tex. 2004). Cases like *Good*, *District Intown Props* and *Sanderson*, cited by Amici Curiae, stubbornly adhere to the so called “regulatory notice rule” notwithstanding that *Palazzolo* held that preacquisition enactment of a use restriction does not *ipso facto* defeat a takings claim.

³⁵ *In re Appeal of Realen Valley Forge Greenes Associates*, 838 A. 2d 718 (Pa. 2003).

³⁶ *Id.*

³⁷ *Sheffield and Kaiser Aetna v. United States*, 444 U.S. 164 (1979).

³⁸ *Palazzolo*.

³⁹ *Bailes v. Township of East Brunswick*, 882 A.2d 395 (NJ 2005).

⁴⁰ *In re Appeal of Realen*.

⁴¹ *Bailes*.

- e. Is the subject property an island surrounded by property which has the zoning the property owner is seeking?⁴²
 - f. Is the requested zoning classification the only reasonable one in view of substantial changes in the surrounding area?⁴³
8. The determination of the economic impact of a city's decision under *Penn Central* involves an analysis of whether the property owner has been forced to devote their land to a particular purpose (single use), thus placing the entire burden of preserving the land as open space on the property owner.⁴⁴
 9. Government cannot compel a private property owner to use property for community recreational purposes without compensation.⁴⁵ Nor can it attempt to obtain for the public the benefit of having property remain undeveloped as open space without paying for that benefit.⁴⁶
 10. This goes as well to the character of the government action under *Penn Central*. Courts differentiate between actions that restrain an injurious use of the property, e.g., because of environmental concerns⁴⁷ and those which benefit the local government and its people under the guise of regulation.⁴⁸
 11. 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 to the exclusion of the subject property.⁴⁹

The golf course was built when the surrounding area was zoned agricultural. Over the 20 or so years in which the heaviest residential development occurred, the golf course provided a convenient and accessible recreational amenity for the benefit and enjoyment

⁴² *Sheerr v. Evesham Township*, 184 N.J. Super. 11 (1982); *Bailes*; *Sun Oil Co. v. Village of New Hope*, 220 N.W.2d 256 (Minn. 1974); *Freundshuh*; *Steel v. Cape Corp.*, 677 A.2d 634 (Md. App. 1996); *In re Realen*.

⁴³ *Sun Oil and Freundshuh*.

⁴⁴ *Ripley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983).

⁴⁵ *Steel*.

⁴⁶ *Burrows v. City of Keene*, 121 N.H. 590 (1981).

⁴⁷ *Burrows and Bailes*.

⁴⁸ *Spaeth v. City of Plymouth*, 340 N.W. 2d 815 (Minn. 1984).

⁴⁹ *In re Realen*.

of the residents moving into those new neighborhoods. In the mid-1990's, the City investigated the possibility of purchasing the property for operation as a municipal golf course. However, two studies commissioned by the City concluded that use of the property as a golf course was not a financially viable option. Rahn then purchased the golf course believing he could operate it profitably and, in fact, he did so for the first few years of operation. However, despite significant capital improvements and marketing efforts, the course lost just under \$1 million from 1999-2004 for reasons beyond Rahn's control.

Although Rahn purchased the property with the expectation of operating a golf course, he had two objectively reasonable expectations. First, he had the expectation that all owners of private property have, *i.e.*, that they will be able to make some productive use of their property. Second, Rahn had a right to align his expectations with the City's expectations concerning future use of the property. Not only were street extensions and residential developments surrounding the golf course planned with a view toward future residential development of the subject property, Rahn entered into an assessment agreement with the City for sewer, water and street improvements solely in preparation for eventual residential development of the property. Numerous comments by Planning Commission and City Council members attest that residential development is not a question of if, but when.⁵⁰ In fact, footnote 1 in the City's Brief cites to an ordinance passed on January 3, 2006 allowing residential development with minimal lot sizes of

⁵⁰ App. Brief pp. 17-18.

four acres. This is a clear admission that the City has long expected to allow residential development on the property, the only questions being when and to what degree.⁵¹

If the City's denial of Appellants' application to amend the comprehensive guide plan to allow for low density residential development constitutes a regulatory taking, the only way to measure the economic impact of the taking is to determine what was taken. In this case, what was taken was the right to develop the property. The measure of what was taken has to be the difference between the value of the property as a golf course and the value of the property if residential development is allowed.

In the end, the City's avowed intent to preserve a public recreational amenity is, in reality, an attempt to preserve open space without compensating the property owner. The takings clause is designed to bar government from forcing some people alone to bear public burdens which should be borne by the public as a whole. If the City wants to preserve the property as open space, it should acquire the property and not foist on Rahn alone a burden that should be borne by the public as a whole.

A finding by this Court that the City's denial constitutes a regulatory taking will not, as the City and Amici Curiae urge, severely restrict municipalities' planning process

⁵¹ It is assumed that the City cited to this ordinance, passed long after the City's August 2, 2004 denial, as a way of alerting this Court that Rahn will not be left without a use of the property should the Court rule in the City's favor. Although Appellants have no means of rebutting this from a record developed long before the ordinance was passed, Appellants must point out that residential development is not feasible under the conditions of the ordinance. In addition, the zoning ordinance violates Minn. Stat. § 473.858, subd. 1 which requires zoning laws to be brought into conformity with the City's comprehensive guide plan, the latter of which does not allow residential development. Finally, even if passage of the ordinance did rectify the taking, Appellants would still be entitled to compensation for the period between August 2, 2004 and January 3, 2006. *First Lutheran Church v. Los Angeles County*, 482 U.S. 304 (1987).

and turn municipalities into guarantors of the success of businesses. The subject property is unique in that it is limited to a single use; either it must be operated as a golf course or it must be left economically idle as raw land. This is very unlike, for example, property zoned commercial. When one business fails in a particular location, a wide variety of other types of businesses can take its place.

When the golf course was built, Yankee Doodle Road was a dirt road, Eagan was not a city and had no comprehensive guide plan.⁵² For the City to claim that it can indefinitely restrict the property to the single use of a golf course is to do exactly what this Court in *Mendota Golf* assured the dissent it was not doing, *i.e.*, prescribe a permanent comprehensive plan designation for the property.

The last argument in the City's brief is that a determination about the appropriate use of the subject property is best left until the City's 2008 review and update of its comprehensive guide plan under the Metropolitan Land Planning Act. This is tantamount to a *de facto* permanent moratorium on any use of the property without satisfying the statutory conditions for a moratorium. Either the City's denial on August 2, 2004 was a taking or it was not. If it was a taking, that fact cannot be mitigated by the possibility that a guide plan review four years later may yield a different result.⁵³

1. Reasonable Investment-Backed Expectations.

Although Rahn purchased the property with the expectation of continuing the golf course operation, he did not abandon the fundamental right of every owner of private

⁵² Resp. 38.

⁵³ See, discussion of *First English* at footnote 51.

property to make profitable and productive use of that property. Nor can the City hold Rahn to an expectation held at the time the property was purchased when the City's own expectation concerning future use of the property was that residential development would eventually be allowed. The City staff planning report recognized that street extensions in residential developments surrounding the golf course were planned with a view toward future residential development of the property.⁵⁴ More directly to the point is that Rahn entered into an assessment agreement with the City for sewer, water and street improvements solely in preparation for eventual residential development of the property.⁵⁵ The City's focus on how much Rahn has paid to date under the assessment agreement misses the point. The document itself evidences the City's clear expectation that residential development was not a question of if, but when. The City's reference in footnote 1 of its brief to a zoning amendment allowing limited (but infeasible) residential development on the property only confirms this expectation. Even the City's suggestion that this issue should be tabled until the overall guide plan review in 2008 confirms that the City expects residential development will be allowed, but only on its timetable and terms.

2. Economic Impact.

As discussed above, if a regulatory taking occurred, compensation must be paid. The only way to measure the amount of the compensation owed is to determine what was taken. The City's argument that there was no economic impact because it simply left in

⁵⁴ App. 183. See, App. 418-39 and App. Brief pp. 15-17.

⁵⁵ App. 440-45.

place the historical designation of the property for use as a golf course assumes no taking occurred. In fact, it is simply another way of arguing that no taking occurred because the City left the historical designation in place. However, if a regulatory taking occurred, what was taken was the right to develop the property. The value of the property if residential development is permitted is measured by the written purchase agreement between Rahn and Wensmann. That amount is found at “G” in Resp. Conf. App. 1.⁵⁶

There is an inherent inconsistency in claiming, on the one hand, that debt service cannot be factored into the issue of economic viability but, on the other hand, Wensmann’s agreement to offset some of that debt service should be treated as generating an income stream for Rahn. Wensmann’s agreement to pay interest and taxes on the property while this litigation is pending would not have been necessary but for the City’s denial. If that denial is a regulatory taking, or if the denial had no rational basis, then the City should have approved the guide plan amendment and the sale of the property would have closed. Debt service should not be excluded from the determination of whether operation of a golf course is an economically viable use of the property. Since property owners are entitled to a reasonable rate of return on investment,⁵⁷ debt service must be factored in.

⁵⁶ The City suggests that Wensmann’s oral offer to purchase the property is germane to the issue of economic impact. The very reasons why the statute of frauds prohibits enforcement of oral offers to purchase land are the very reasons why the putative seller’s recitation of this event should not be given any weight. The seriousness of this oral offer is belied by the existence of a written purchase agreement that contains important contingencies protecting the buyer.

⁵⁷ *State, by Powderly v. Erickson*, 285 N.W.2d 84, 90 (Minn. 1979); *Alabama Dept. of Transp. v. Land Energy*, 886 So.2d 787, 799 (Ala. 2004) both citing to *Penn Central*.

In another one of many inconsistencies in the City's brief, it claims that economic impact must include an evaluation of the potential use of the property as an asset or commodity, e.g., holding the property for investment.⁵⁸ The City cannot make this argument in the face of the predominant theme of its brief that Rahn could never have an expectation of using, or right to use, the property for anything other than a golf course in view of the longstanding 40 year designation of the property.

3. Character Of The Government Action.

The City repeats its theme that it "simply left the existing land use designations...in place."⁵⁹ Then the City claims that this long-standing guide plan designation reflects "the City's considered policy choices to defend against adverse impacts from dangerous traffic conditions, overcrowded schools, degraded environmental standards, and reduced property values."⁶⁰ The traffic and school issues have been addressed above at pp. 3-7. The reference to degraded environmental standards has no support in the record. On the contrary, Appellants' engineering report states that environmental standards will either be maintained or improved.⁶¹ There is nothing to support the reference to reduced property values. Certainly, Wensmann's proposal for the site would not provide any basis for such a conclusion.

⁵⁸ Resp. Brief p. 42.

⁵⁹ Resp. Brief p. 42.

⁶⁰ *Id.*

⁶¹ App. Brief p. 19.

Inexplicably, the City contends that no evidence has been presented that all permitted uses of the property are economically infeasible. This is exactly what the affidavits of Philip Carlson and Garfield Clark establish.⁶²

As the *Paalan* case, cited at p. 40 of Appellants' initial brief, states "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." Despite the City's efforts to cast its denial as protecting the public, the City's denial was intended to benefit the public by preserving open space while forcing Rahn alone to bear the burden.

B. *McShane*

The Court should not assume, as the City apparently did, that the brevity of Appellants' argument on this issue is some reflection on Appellants' belief in the strength of the argument. On the contrary, Appellants strongly believe that the City's denial of the guide plan amendment benefited a governmental enterprise. Both the district court decision and the brief of Amicus Curiae Minnesota Land Use Institute very adequately address the application of *McShane* to this case.

For the foregoing reasons, Appellants respectfully request that this Court reverse the Court of Appeals and affirm the district court's decision.

⁶² App. 53-55, 63-68.

Dated: November 6, 2006.

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