

NO. A05-1074

State of Minnesota
In Supreme Court

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

v.

City of Eagan, a Minnesota municipal corporation,
Respondent.

BRIEF AND APPENDIX OF RESPONDENT CITY OF EAGAN

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SUMMARY OF ARGUMENT

Plaintiffs' Brief does nothing to refute the City's rational bases to deny the requested Comprehensive Plan amendment. Plaintiffs failed to provide a compelling reason the City should compromise the integrity of its Comprehensive Plan or the forty years of consistent zoning of the property. Plaintiffs offered nothing to adequately address significant and concrete concerns raised by the proposal, such as unsafe traffic conditions and overcrowded schools, other than to suggest that perhaps some third party, such as Dakota County or the School District, may solve the problems for them. The City's denial of the proposed Comprehensive Plan amendment was rational and supported by the record.

Plaintiffs also fail to assert a viable takings claim under any legal standard. According to Plaintiffs' own consultants, the property retains significant monetary value as a golf course. The owner's business records show that the course operated at a loss primarily due to debt service taken on by the owner. The owner had no expectations of developing the property *at all* until years into its ownership and never had any investment-backed expectations of such development. Further, it is apparent from the record that local and national trends in the economy generally and the golf industry in particular, in addition to the high debt service, led to the failure of the property as a golf course – not government action. The City has not condemned an easement over the property and it is currently, at the owners' option, entirely closed to the public. In short, the City has not taken anything. In contrast, this case arises because the City decided to not give an enormous windfall, in the form of a change to a long-established

Comprehensive Plan designation, to a property owner whose business failed. The takings clause is not an insurance policy against bad business judgment.

Plaintiffs' claims should fail and the Court of Appeals' decision in this matter should be affirmed.

STATEMENT OF THE ISSUES

1. **Whether the City's decision to deny the Comprehensive Plan amendment application was rational and should be upheld.**

The District Court ordered the City to amend its Comprehensive Plan and Zoning Ordinance to accommodate Plaintiffs' proposed development. The Court of Appeals reversed, holding that the City had rational bases to deny the application, including maintaining the integrity of its Comprehensive Plan, minimizing the overcrowding of schools serving the area, and dangerous traffic conditions adjacent to the proposed development.

Most Apposite Cases:

Mendota Golf v. City of Mendota Heights, 708 N.W.2d 162 (Minn. 2006)

White Bear Docking & Storage, Inc. v. City of White Bear Lake, 324 N.W.2d 174 (Minn. 1982)

2. **Whether Plaintiffs' takings claim fails as a matter of law.**

The District Court found a compensable taking under both Penn Central and McShane as a result of the City's denial of Plaintiffs' Comprehensive Plan amendment application. The Court of Appeals reversed, appropriately analyzing the takings issue under Penn Central, finding that no compensable taking had occurred.

Most Apposite Cases:

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992)

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

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

McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980)

3. **Whether the Comprehensive Plan review process directed by the Legislature or judicial intervention is the appropriate framework for resolving the future of the property.**

The lower courts did not rule on this issue.

Most Apposite Case and Statute:

Mendota Golf, 708 N.W.2d at 174

Minn. Stat § 473.864, subd. 2

STATEMENT OF THE CASE

Plaintiff-Appellants Wensmann Realty, Inc. and Rahn Family LP (hereinafter collectively “Plaintiffs”) commenced a declaratory judgment action against the City of Eagan (“City”) by Summons and Complaint dated October 26, 2004 alleging a taking and violations of due process and equal protection under the state and federal constitutions. App. 21-28. Plaintiffs also sought inverse condemnation. App. 26. The City removed the case to federal court. After Plaintiffs dismissed their federal claims, the case was remanded to state court and the parties moved for summary disposition of the case.

At Plaintiffs’ insistence, the parties entered into a confidentiality agreement restricting the disclosure of otherwise public information deemed confidential and so

designated by the Plaintiffs. Resp.14-20. The confidentiality agreement was incorporated into an Order by the District Court signed March 2, 2005. Resp. 14-20.

The questions presented to the District Court on cross motions for summary judgment were whether (a) the City's denial of Plaintiffs' request to amend the Comprehensive Plan was rational; (b) Plaintiff Wensmann Realty, Inc. had a protected property interest for takings purposes; (c) the denial of a requested change to the Comprehensive Plan, in place long prior to the Plaintiffs' purchase of the property at issue, constituted a taking under Minnesota law; and (d) the City's actions had violated Plaintiffs' due process or equal protection rights.

The District Court ordered the City to either (1) amend its Comprehensive Plan and rezone the property on the condition that Plaintiffs resubmit an identical application to the one that had been denied (even though the Plaintiffs had not applied for rezoning or approval of its site plan); or (2) commence eminent domain proceedings within thirty days of the date of the Court's order pursuant to Minn. Stat. Chap. 117. App. 19-20. The City appealed.

Pursuant to the terms of a Stipulation and Order Regarding Confidentiality, the City moved the Court of Appeals to re-designate as non-confidential materials submitted under seal at the District Court. The Court of Appeals denied the motion at that time and expressly permitted the City to request the re-designation in the District Court. Resp. 11-13. The City then moved the District Court, pursuant to the terms of the Stipulation and Order Regarding Confidentiality, for an Order re-designating the District Court filings and proceedings as non-confidential. The District Court issued an Order on August 10,

2005, ordering all memoranda, affidavits and exhibits filed in connection with the parties' cross-motions for summary judgment to be re-designated as non-confidential except for certain dollar figures. App. 29-30. These figures appear at the City's Confidential Appendix, p. 1 and are referenced herein by corresponding letter.

After submission of briefs and argument consistent with the District Court's order of August 10, 2005, the Court of Appeals reversed, finding that the City had rational bases to deny the application for a Comprehensive Plan amendment and that no taking had occurred.

Appellant petitioned for this Court's review on June 22, 2006. This Court granted review on August 15, 2006 and permitted participation by several *amici curiae*.

STATEMENT OF FACTS

The subject property is a 118-acre tract of generally open land with wooded areas and rolling topography. William Smith acquired an interest in the subject property in 1959 for \$62,000. Resp. 36-37. In 1962, Smith sought and obtained a rezoning of the parcel from "A, Agricultural" to "P, Public Facilities." Resp. 34-35. Thus, for over forty years, at the request of the property owner, the property has been zoned for recreational uses and residential use of the property has been largely prohibited.¹ After obtaining the rezoning, Smith constructed Carriage Hills Golf Course. Resp. 38-40. Smith remodeled

¹ On January 3, 2006, after the entry of the District Court's judgment against the City and following the completion of briefing to the Court of Appeals but before its decision, the City amended its zoning ordinance to extend the list of conditionally permitted uses in a Parks District to include, among other things, residential development with minimum lot sizes of four acres. See Eagan City Code § 11.60, subd. 19(c).

the farmhouse on the property for use as a clubhouse and eighteen holes were open for play by 1967. Resp. 38.

The City adopted a Comprehensive Plan and map in 1974. App. 179. The Comprehensive Plan designated the property as “Golf” and the map’s legend identified the property as “quasi-public.” App. 179. In 1991, the City revised the Comprehensive Plan and changed all schools, churches, parks and golf courses in the City to one of two designations: “P” (Parks) or “PF” (Public Facilities). App. 179-180. At that time, the property was designated “PF.” App. 180.

In 1995, after operating the golf course continuously since its construction, Smith approached the City about purchasing the property as a municipal golf course for \$5,000,000. Resp. 39, 41. The City performed a feasibility study and informed Smith that additional analyses and public input would be required before a final decision could be made by the City. App. 446-471; Resp. 42.

In March 1996, Pulte Homes of Minnesota (“Pulte”) requested that the City amend its Comprehensive Plan to change the property’s designation from “PF” to “D-II” (Mixed Residential). App. 525-531; Resp. 43-61. Smith, intending to sell the Carriage Hills property, supported the application. Resp. 38-40. The City, noting significant environmental concerns, impacts on infrastructure, and school system capacity issues, denied the application on a unanimous vote. Resp. 62-67.

Shortly after the denial of Pulte’s request to amend the Comprehensive Plan in 1996, Smith sold the property to Plaintiff Rahn Family LP (“Rahn”) on a contract for deed for a purchase price of \$3,644,500. Resp. 68-71. The payment terms required a

\$500,000 down payment (which Rahn paid from its own funds) with the balance to be paid, plus interest at 8.25%, in installments of \$75,000 during the months of June, July, August, and September from 1996 until 2005. App. 35-46; Resp. 68-71; Conf. App. 3-4.

Rahn purchased the property with no intention or expectation of using it for residential development. App. 42, pp. 69-70. Raymond Rahn, who negotiated with Smith on behalf of the Rahn partnership, considered the \$3.6 million purchase price as the value of the investment in the property as a golf course. App. 40, pp. 63-64. At the time of his negotiations with Smith, Mr. Rahn was aware that Pulte had attempted and failed to obtain approvals from the City to amend the Comprehensive Plan to permit residential development. App. 40, p. 64. Rahn knew at that time that the property's Comprehensive Plan designation and zoning did not permit residential development. App. 42, p. 69. Rahn had received no indication from Smith or any other source that the City would one day permit residential development on the property. App. 44, p. 77. Rahn had conducted no valuation or assessment of the property for any use other than a golf course. App. 44, p. 78.

At several points during his deposition, Mr. Rahn made clear that Rahn's investment in the property was solely for use as a golf course, with no expectation of future residential development. For example:

City's Counsel: Did you have any expectation at the time that you were acquiring the property that you could change the use of the property from golf course to residential without obtaining the approval of the city council?

Rahn's Counsel: Object to form.

Mr. Rahn: *When I bought the property, I had no intention to sell it for development.*

App. 44, p. 78 (emphasis added).

City's Counsel: And when you purchased the Carriage Hills property, did you intend to operate it as a golf course?

Mr. Rahn: Yes.

City's Counsel: And did you intend to operate it as a golf course *indefinitely into the future?*

Mr. Rahn: Yes.

App. 35, p. 44 (emphasis added).

In May 2000, Rahn refinanced the debt remaining on the property in a manner that allowed it to pay off the remaining amount of the contract for deed. App. 37, pp. 51-52; Resp. 72-89; Conf. App. 3. Using the property and another golf course as collateral, Rahn increased his overall debt by obtaining a [Conf. App. 1, "A"] loan at a term of ten years with a fixed interest rate of 8.25%. Resp. 68-71; App. 38-39, pp. 55-57; Conf. App. 4. The refinance loan was for an amount significantly greater than the remaining debt owed to Smith on the contract for deed in order to make improvements to the property and to finance improvements on another golf course property owned by Rahn. App. 37, pp. 51-52; Conf. App. 3. Congruent with its expectations for its investment in the property, Rahn engaged in several improvement projects (e.g. rebuilding nine tee boxes and refurbishing the clubhouse) during its ownership all designed to enhance the value of the property *as a golf course*. App. 44, p. 79.

The golf course was financially successful from the time of Rahn's purchase in 1996 through 2000. App. 46, pp. 94-95. The general economic downturn in 2000 and the events of September 11, 2001, coupled with an overbuilding of golf courses in the region, led to a more competitive industry. App. 46, pp. 94-95. According to Rahn, the downtrend was national. App. 47, p. 97. Estimates issued by the National Golf Association in the boom years regarding the number of golf courses required to accommodate the number of golfers caused overbuilding which was harmful to Rahn's business: "[t]his just killed us.... the overbuilding was just way, way too much for the amount of golfers we had." App. 46, p. 94-95. Rahn stated that even companies expending significant resources acquiring golf course properties on a national scale were struggling financially. App. 46, p. 94-95. Rahn stated that an additional hurdle to the golf course's continuing profitability was its topography and that all of its greens would need to be rebuilt in order to continue golf course operations. However, the first time Rahn even considered selling the golf course for development was *after* being approached by a developer. App. 48, p. 107.

The City updated its Comprehensive Plan in 2001, separating areas guided with the "PF, Public Facilities" designation into two separate designations. App. 180. Properties within the City that held that designation were re-designated as either "P (Parks, Open Space and Recreation)" or "QP (Public/Quasi-Public)." App. 180. The three golf courses in the City, including Carriage Hills, were designated as "P." App. 180. Throughout the various changes in the property's designation since the initial

change at the property owner's request in 1962, residential uses have been largely prohibited.² App. 178-180.

In September 2003, Rahn and Wensmann Realty, Inc. ("Wensmann") entered into an agreement that gave Wensmann the right to purchase the property contingent on, *inter alia*, obtaining necessary government approvals for development, including an amendment to the City's Comprehensive Plan changing the property's designation from Parks, Open Space and Recreation to mixed-use residential. App. 366-384; Conf. App. 14-16. Wensmann paid Rahn [Conf. App. 1, "B"] in earnest money which was refundable if the contingencies were not fulfilled. The Plaintiffs agreed on a purchase price of [Conf. App. 1, "C"] ([Conf. App. 1, "D"] per acre for 118 acres) – nearly [Conf. App. 1, "E"] times the amount Rahn paid for the property. App. 366-384; App.179, p. 122; Conf. App. 6, 14-16.

In May 2004, Wensmann filed a request for an amendment to the Comprehensive Plan to permit residential development of the property. The application sought to change the property's designation from "P" (Parks, Open Space and Recreation) to "LD" (Low Density Residential). App. 173-175. In its application, Wensmann asserted that the property was "no longer economically sustainable as a golf course...." App. 175.³

The City's Planning Commission held a public hearing to consider Wensmann's proposed Comprehensive Plan amendment on June 22, 2004. App. 193-195. Testimony

² See n. 1, *supra*.

³ At no point during the process did either Wensmann or Rahn apply to *rezone* the property to permit residential development. Nevertheless, the District Court's order (sought by the Plaintiffs) required the City to both reguide and rezone the site. App. 19.

at the June 22, 2004 hearing included significant criticisms of the proposal, for example: (a) the project would generate thousands of traffic trips per day on roads insufficient to handle the traffic (App. 204, p. 36; App. 208, p. 51); (b) the City's middle and high schools were already over capacity and additional large residential development would exacerbate the problem (App. 205, pp. 37-38); (c) negative impacts on wildlife and water quality as a result of the development (App. 205-207, pp. 39, 44-46); (d) the Comprehensive Plan sets forth preservation of recreational facilities as a priority (App. 203-204, pp. 32, 35); and (e) circumstances had not changed significantly since the Planning Commission had denied a similar application in 1996 (App. 208-209, pp. 52-54). The Planning Commission voted 7-0 to recommend denial of the application. App. 195.

On July 30, 2004, Plaintiffs submitted to the City the reports of two golf industry consultants – Hughes & Company, Inc. (“Hughes Report”) (App. 504-518; Conf. App. 10) and McMurchie Golf Management (“McMurchie Report”) (App. 519-524; Conf. App. 11). Review of the Hughes Report indicates that the golf course was losing money due only to the owner's financing obligations. App. 504-518; Conf. App. 10. When that debt service⁴ is excluded, the golf course was profitable in every year of Rahn's ownership except 2003. App. 512. The McMurchie Report, despite an overall negative assessment, concluded that the golf course was outperforming other comparable courses: “Ownership has adequately controlled operating expenses in the time period and as such

⁴ As noted herein above, the debt service on the property included financing of improvements to a different golf course owned by Rahn, outside of Eagan.

has achieved net operating margins *above the industry average for comparable facilities.*” App. 522; Conf. App. 11 (emphasis added). In addition, the McMurchie Report concluded that the property had a “supportable purchase price” of nearly \$1,000,000 as a golf course. App. 523.

On August 2, 2004, the City denied Wensmann’s application requesting a Comprehensive Plan amendment.⁵ In support of its decision, the City Council issued numerous findings, including:

- (a) In 1996, following the Council’s decision to deny the amendment to the Comprehensive Guide Plan, the Owner acquired the Property;
- (b) Enrollment in the middle and high schools currently exceeds capacity and is anticipated to continue to exceed capacity for the next five (5) years;
- (c) Development to the full maximum density allowed under the proposed reguiding could generate 4,800 trips per day from the Property;⁶
- (d) The Comprehensive Guide Plan identifies the City’s park system as an interweaving of natural and man-made resources provided to the City’s residents through the combined efforts of individuals and organizations (both public and private);
- (e) An LD land use designation would allow residential development up to a density of four units per acre with no restriction on the type of housing allowed. At maximum density, the Property could accommodate 480 dwelling units.

Based on those and other findings, the City drew numerous conclusions, including:

⁵ The hearing included no discussion of rezoning the property or approval of the site plan because no such application was ever submitted.

⁶ Even if Wensmann did not develop the 118-acre parcel to the full amount permitted in the requested guiding designation, its proposed project would generate approximately 3,000 trips per day, according to the City staff’s analysis of the traffic data before the Council. App. 185.

- (a) the present owner of the Property bought the Property with knowledge of the City's commitment to retaining the designation of the Property for golf course purposes;
- (b) development of the property would overly burden the school system serving the Property which already exceeds capacity;
- (c) traffic from residential development on the Property would likely disrupt existing neighborhoods surrounding the site;
- (d) the existing P, Parks, Open Space and Recreation designation is in conformance with each of the elements set forth in the Comprehensive Guide Plan;
- (e) The City has adequate inventory of property designated as LD, Low Density;
- (f) Changing the designation of the Property to LD, Low Density, would not enhance the City's goals under its Comprehensive Guide Plan;
- (g) The 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;
- (h) The Applicant's proposal does not promote the health, safety and welfare of the City and does not benefit the long term interests of the City;
- (i) The goals of the City's Comprehensive Guide Plan would be better maintained by retaining the P designation for the Property to balance the amount of residential and other types of land use classifications available within the City.

App. 351-355.

Those findings and conclusions were supported by materials and testimony in the record before the City. In relation to traffic issues at the site, Plaintiffs' own traffic study for the project indicates dramatic deterioration of the level-of-service ratings in the area if the development is approved. For example, at the intersection of Wescott Woodlands

and Yankee Doodle Road, operational analysis indicates that the intersection has an overall LOS (Level of Service) rating of “A” – the highest rating - for 2006. With the addition of the development as proposed, that LOS rating drops to an “F” – the poorest rating – designating the intersection unacceptable. App. 218-227. Plaintiffs’ traffic analysis indicates that a traffic signal would improve the situation, but neither the City nor the developer has any authority or control over the county’s decision whether to install a traffic signal at the location.

Similarly, the record included evidence reflecting classroom overcrowding and how approval of the regrading would exacerbate those problems. Enrollment projections for Dakota Hills Middle School and Eagan High School, the schools that would serve the proposed development as of June 15, 2004, indicated that they already exceeded capacity. App. 177. The school district, in a letter regarding this matter, indicated that a recently passed bond referendum would allow Eagan High School to “accommodate projected enrollment” and contemplated adjustments to boundaries may “*help* alleviate overcrowding” at Dakota Middle School (App. 214) (emphasis added). However, the “projected enrollment” at Eagan High School referenced in the letter does not include the proposed development and does not address its impact. App. 214. Moreover, the boundary adjustments were merely on the drawing board at the school district and the affect of any such effort on overcrowding at Dakota Middle School were uncertain. In addition, resident testimony revealed significant unresolved concerns about schools that were “massively over capacity.” App. 205, pp. 37-38. Residents and City Council

members speaking about the issue indicated their opinion that the bond referendum was insufficient. App. 341, p. 72; App. 205, p. 38.

In September 2004, following the City's denial of Wensmann's application, Wensmann and Rahn modified their agreement regarding Wensmann's option to purchase the property. Wensmann agreed to pay Rahn's real estate taxes, assessments and monthly interest accruing on Rahn's mortgage, which, at the time, had a balance of [Conf. App. 1, "F"]. App. 399; Conf. App. 18. Wensmann and Rahn also agreed that the [Conf. App. 1, "B"] earnest money already paid to Rahn, as well as the taxes and interest on the mortgage, would be non-refundable even if Wensmann elected not to exercise its option. App. 400. If Wensmann elected to exercise the option, the purchase price was to be [Conf. App. 1, "G"]. App. 399; Conf. App. 18. The Option Agreement terminates on September 1, 2007. App. 398; Conf. App. 17. Over the course of the Option Agreement, Rahn will receive approximately [Conf. App. 1, "L"].⁷

The record contains undisputed evidence regarding the amount that a willing buyer would pay for the property *following* the City's denial of the regarding application.

⁷ Under the Option Agreement between Rahn and Wensmann, Wensmann has paid Rahn a non-refundable option payment and is obligated to pay all real estate taxes and interest on the mortgage from and after September 1, 2004 to September 1, 2007. App. 296-417. If the transaction is closed, those payments are credited against the purchase price. If the transaction does not close, Rahn is entitled to keep all payments. The current taxes on the three parcels at issue total \$41,601.89 per annum. Resp. 23-25. The interest rate based on 1.25 percent over the Wall Street Journal Prime Rate (which is 3.0 percent over the Federal Funds Rate) has varied from 6.0 percent when the option began to its current rate of 9.5 percent. Resp. 26-29. When applied to the [Conf. App. 1, "F"] loan, that equates to an annual payment ranging from [Conf. App. 1, "J"] to [Conf. App. 1, "K"]. Thus, even if the transaction never closes and the option runs to term, Rahn will receive

In October 2004, Wensmann made an oral offer to purchase the property from Rahn for [Conf. App. 1, “H”] with no contingency regarding City approval of the application for Comprehensive Plan amendment or rezoning. App. 50, pp. 127-128; Conf. App. 7. Rahn declined the offer. App. 50, pp. 127. Had Rahn accepted the offer, it would have recouped its original investment in the property plus nearly [Conf. App. 1, “I”] for every year of its ownership. App. 249-252.

After the City Council denied Wensmann’s application, Plaintiffs brought this action seeking declaratory relief that the City’s decision was arbitrary, capricious and unreasonable. Plaintiffs alleged that the City had violated their substantive due process and equal protection rights under Minnesota law.⁸ Plaintiffs further alleged that the City’s decision amounted to a regulatory taking under Minnesota law because the City had interfered with their “investment backed expectations” and effected a regulatory taking of the property. In the alternative, Plaintiffs sought a writ of mandamus compelling the City to institute eminent domain proceedings.

The District Court ordered the City to either amend its Comprehensive Plan and rezone the property (provided that Plaintiffs resubmit an identical application to the one that had been denied) or institute eminent domain proceedings pursuant to Minn. Stat. Chap. 117. The City appealed and the Court of Appeals reversed, holding that the City

approximately [Conf. App. 1, “L”] without any change in the status or designation of the property.

⁸ The District Court did not address these claims. As noted in the Statement of the Case herein, Plaintiffs’ federal claims were dismissed on stipulation to reverse the removal to federal court.

had rational bases for its denial of the Comprehensive Plan amendment and that no compensable taking had occurred.

ARGUMENT

I. Standard of Review

“On appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the lower courts erred in their application of the law.” State by Cooper v. French, 460 N.W.2d 2, 4 (Minn. 1990). A reviewing court is not bound by and need not defer to a district court’s decision on a purely legal issue. Frost-Benco Elec. Ass’n v. Minnesota Pub. Util. Comm’n, 358 N.W.2d 639, 642 (Minn. 1984). “On appeal, the reviewing court must view the evidence in the light most favorable to the party against whom judgment was granted.” Fabio v. Bellomo, 504 N.W.2d 758, 761 (Minn. 1993).

Because this case was decided on summary judgment, findings are properly reviewed *de novo* by this Court. STAR Centers, Inc. v. Faegre & Benson, LLP, 644 N.W.2d 72, 76 (Minn. 2002).⁹

⁹ Amicus Curiae Builders Association of the Twin Cities and National Association of Industrial and Office Properties (“BATC/NAIOP”) and Midwest Golf Course Owners Association (“MGCOA”) urge this Court to reverse the District Court’s “findings” only if they are “clearly erroneous.” BATC/NAIOP Brief, p. 7; MGCOA Brief, p. 4. The case that BATC/NAIOP cites in support of the “clearly erroneous” standard was *tried* before the District Court. See Czech v. City of Blaine, 253 N.W.2d 272, 273 (Minn. 1977) (applying clearly erroneous standard to findings in a takings claim upon review *after a trial*). This matter was not. This case was before the District Court on cross motions for summary judgment. For its part, MGCOA more cleverly quotes the Court of Appeals’ assertion that findings of fact “will be upheld unless clearly erroneous and unsupported by the record” (MGCOA Brief, p. 4). But MGCOA omits the Court of Appeals’ only citation for this statement – a decision reviewing a takings case that, again, had been *tried*

As this Court recognized earlier this year, “[a] comprehensive plan contains ‘objectives, policies, standards and programs to guide public and private land use, development, redevelopment and preservation for all lands and waters within the jurisdiction of the local governmental unit.’ Minn.Stat. § 473.859, subd. 1 (stating contents of comprehensive plan). Because land use planning and regulation are within a city’s legislative prerogative, the city has broad discretion when it makes decisions in that arena.” Mendota Golf v. City of Mendota Heights, 708 N.W.2d 162, 174 (Minn. 2006). Thus, a decision about whether to amend a plan is a legislative act. Denney v. City of Duluth, 202 N.W.2d 892, 896 (Minn. 1972); see also Honn v. City of Coon Rapids, 313 N.W.2d 409, 414 (Minn. 1981) (holding that “rezoning involves a legislative determination”). Judicial review of the comprehensive plan decision is limited to the record. Mendota Golf, 708 N.W.2d at 180. This Court reviews directly the proceedings before the zoning authority, not the lower courts’ findings. Id. at 180-81. In a record review case, this Court nonetheless reviews materials underlying the decision including the historical designation, regulation, and character of the property. Id.

II. The City’s decision to deny the Comprehensive Plan amendment application was rational and should be upheld.

A. *The City had ample support in the record for its decision to deny the Comprehensive Plan amendment application.*

Plaintiffs and two of their supporting *amici* disregard the highly deferential standard of review that this Court so recently held should govern review of the denial of a

and not resolved on summary judgment. Parranto Bros. Inc. v. City of New Brighton, 425 N.W.2d 585, 591 (Minn. Ct. App. 1998), rev. denied (Minn. July 28, 1988).

comprehensive guide plan amendment.¹⁰ As this Court recognized in January 2006, a court reviews a city's decision not to amend its comprehensive guide plan to determine "whether the city had a rational basis for its decision." Mendota Golf, 708 N.W.2d at 180-81. This Court also noted that it is a city's "legislative prerogative" to "determine and plan" land uses within its boundaries and that a comprehensive plan is the "primary land use control for cities." Id. at 174-75. A comprehensive guide plan is "the basic instrument of municipal land use planning." Amcon Corp. v. City of Eagan, 348 N.W.2d 66, 74 (Minn. 1984). Such a decision will be upheld unless the party challenging it establishes that the decision is "unsupported by *any* rational basis related to promoting the public health, safety, morals, or general welfare." Id. at 180 (emphasis added and internal citation omitted).

The City in this matter cited several rational reasons for its decision to deny the application, including hazardous traffic, school overcrowding, environmental concerns, and Comprehensive Plan integrity. App. 349-355. Those statements are supported by the underlying record. This Court looks beyond the language of the resolution at issue and considers supporting documents, testimony, and other material. Mendota Golf, 708 N.W.2d at 180 (concluding that "focusing solely on the language of the resolution is too narrow" and that underlying materials should be considered).

¹⁰ See Plaintiffs' Brief, p. 26 (complaining that the decision was "arbitrary and capricious"); MGCOA Brief, p. 2 (same); MLUI Brief, p. 8 (characterizing Depression-era substantive due process rulings requiring "a substantial relation to the public health, safety, morals, or general welfare" and invalidating "arbitrary" actions as "equally as compelling and controlling today"). *Amici* BATC and NAIOP, however, acknowledge that a rational basis test is required. BATC/NAIOP Brief, p. 23.

While Plaintiffs suggest that the City lacks a rational basis for its decision,¹¹ two particular findings by the City Council demonstrate that rational reasoning supported the City's decision in this matter.

1. Dangerous Traffic Conditions

The City Council found that the proposed re-designation of the property under the Comprehensive Plan would result in a significant increase in traffic in the area of the development – over 3,000 additional trips per day if the concept plan submitted with Plaintiffs' proposal was constructed – and that this increase would disrupt existing neighborhoods. Evidence in the record supports this finding.

City staff, in assessing the concept plan's impact on the neighborhood, noted the 3,000 trips figure, that those trips would be on streets not designed to handle through traffic, and that direct access to the site from Yankee Doodle Road, the main thoroughfare adjacent to the property, would be limited to a right-in/right-out access. App. 184-185. Staff also stated that upgrades to existing streets and construction of additional collector streets would be necessitated by the proposed development. App.

¹¹ See Plaintiffs' Brief, p. 26-27. The Plaintiffs suggest that the City's reasons for denying the application at issue are "legally insufficient." *Id.*, p. 26. This is, of course, incorrect. There can be no doubt that unsafe traffic conditions and overcrowded schools are each legally sufficient reasons under Minnesota law to deny a land use application. See, e.g., *Heritage Dev. of Minnesota v. Carlson*, 269 F. Supp.2d 1155, 1161 (D. Minn. 2003) (holding that dangerous traffic conditions are a rational reason to deny a proposed land use) and Minn. Stat. § 462.358, subd. 1a (defining municipal power to plan and including adequacy of schools as a proper consideration). The only conceivable attack on the City's findings is that they are not supported by the record. However, the record contains ample evidence to conclude that the City reached a rational decision.

184-185. In addition to staff concerns, City residents raised specific, concrete safety concerns about existing traffic conditions in some areas adjacent to the property and concerns about what would happen after the addition of traffic that would be generated by the proposed development. Specifically, residents offered personal observations about present traffic conditions when making a left turn onto Yankee Doodle Road. Basing its findings on testimony from residents who actually use the roads in question is a rational decision that should have been upheld. See, e.g., SuperAmerica Group, Inc. v. City of Little Canada, 539 N.W.2d 264, 267-68 (Minn. Ct. App. 1995) rev. denied (Jan. 5, 1996) (concrete and specific neighborhood traffic concerns sufficient to reject a contrary expert report); Heritage Dev. of Minn., Inc. v. Carlson, 269 F. Supp.2d 1155, 1161 (D. Minn. 2003) (finding that traffic increases at already dangerous intersections was a rational basis to deny development).

Moreover, the *Plaintiffs' own* traffic study for the project indicates dramatic deterioration of the levels of service ratings in the area if the development is approved. For example, at the intersection of Wescott Woodlands and Yankee Doodle Road, operational analysis indicates that the intersection has an overall LOS (Level of Service) rating of "A" – the highest rating - for 2006. With the development proposed by Plaintiffs, that LOS rating drops to an "F" – the poorest rating – designating the intersection unacceptable. App. 218-227. Plaintiffs' traffic analysis indicates that a traffic signal would improve the situation, but as residents correctly noted, neither the City nor the developer has any authority or control over the county's decision whether to install a traffic signal at the location. App. 204, p. 36; App. 208, p. 51; App. 211, p. 64.

The Court of Appeals has previously recognized that a city's lack of control over an important element of traffic control provides a valid basis for denying an application for a legislative land-use change. In St. Croix Development Inc. v. City of Apple Valley, 446 N.W.2d 392 (Minn. Ct. App. 1989), rev. denied (Dec. 1, 1989), the Court reversed a District Court that had required the City to rezone property for a new residential development. Id. at 400. The applicants' plans had assumed that a county road would become a through street that would help carry part of the additional traffic burden created by the development. Id. at 395. The Court of Appeals held that the actual status of that road "provides a rational basis because completing it is not within the control of the city or the developers." Id. at 400. Similarly, in this matter, the City was not required to share the Plaintiffs' optimism (or that of the District Court¹²) that the County would solve the undisputed new traffic problems their development would create. The City need only reach a rational decision. Given the concrete and specific resident, staff, and City Council concerns about existing traffic at the site and that the Plaintiffs' own study anticipates a major deterioration to an unacceptable level of service (to a grade of "F") at a key intersection, the City's decision was rational. The Court of Appeals decision should be affirmed.

2. Overcrowded Schools

The City Council found, in support of its decision, that the middle and high school enrollment currently "exceeds capacity and is anticipated to continue to exceed capacity

¹² App. 4, ¶ 14.

for the next five (5) years.” App. 351, ¶20. Enrollment projections for Dakota Hills Middle School and Eagan High School as of June 15, 2004, the schools that would serve the proposed development, indicated that they already exceeded capacity. App. 177.

The school district, in a letter to City staff, indicated that a recently passed bond referendum would allow Eagan High School to “accommodate projected enrollment” and contemplated adjustments to boundaries may “*help* alleviate overcrowding” at Dakota Middle School. App. 214 (emphasis added). However, the “projected enrollment” at Eagan High School referenced in the letter does not include the proposed development and does not address its impact. Id. Moreover, the boundary adjustments are merely on the drawing board at the school district with no guarantee of implementation and, in any event, the school district’s letter is at best equivocal about the effect any such efforts would have on overcrowding at Dakota Middle School. The City rationally concluded from the enrollment projections and the school district’s letter that an overcrowding problem would continue or get worse.

In addition, resident testimony revealed significant unresolved concerns about schools that were “massively over capacity.” App. 205, pp. 37-38. Residents and City Council members speaking about the issue indicated that the bond referendum was but a Band-Aid on a life threatening injury: “Any person who has a kid at Dakota Hills or Eagan High School knows those schools are way over capacity and it’s disgusting that these kids have to go to a school in that condition.” App. 341, p. 72. “Adding another 158 students [the number of school-aged residents of the development upon completion] will only increase the problem within our middle and senior high schools.” App. 205, p.

38. Though the District Court offhandedly dismissed them, such concerns are concrete and significant and support the City's decision. Reliance on concrete and specific resident concerns is a rational basis for city action. See, e.g., SuperAmerica Group, Inc., 539 N.W.2d at 267-68 (approving City's reliance on residents' concrete and specific opinions as basis for decision to deny land use permit).

Moreover, the state legislature has affirmed the ability of municipalities to regulate land use specifically so that they may "facilitate adequate provision for... schools...." Minn. Stat. § 462.358, subd. 1a. The City's findings and conclusions regarding the proposed development's exacerbation of an existing overcrowding problem in the schools which would serve the proposed development are rationally based on evidence before the City Council.

This Court has repeatedly and unwaveringly recognized that municipal governments have broad discretion in land use matters and that a City need only supply some rational basis related to the public health, safety, morals, and general welfare to support its decision. See Mendota Golf, 708 N.W.2d at 179-80. Here, the City had ample evidence to conclude that the proposed development was not only contrary to the long-standing status of the property, but would cause dangerous traffic conditions and exacerbate a problem of overcrowded schools in the area. The City's decision to deny the Comprehensive Plan amendment application should be upheld.

B. *Preservation of open and recreational space and reaffirmation of historical land use designations are legitimate City interests.*

Plaintiffs and *amici* MLUI ask this Court to conclude that preservation of open and recreational space is an invalid or irrational basis for denial of their comprehensive guide plan application. Such a suggestion is both too late in the game and incorrect. The Legislature has expressly authorized local governments to pursue those objectives through planning and zoning, and this Court has recently reaffirmed that those goals are valid and constitute a rational basis to deny a guide plan amendment.

In the very first sentence of the Municipal Planning Act, the Minnesota Legislature stated that it “finds that municipalities are faced with mounting problems in providing means of guiding future development of land so as to insure a safer, more pleasant and more economical environment for residential, commercial, industrial and public activities, *to preserve agricultural and other open lands*, and to promote the public health, safety, and general welfare.” Minn. Stat. § 462.351 (emphasis added).

Accordingly, it recognized in the Act that a municipality may by ordinance regulate “the uses of buildings and structures for trade, industry, residence, *recreation*, public activities, or other purposes, and the uses of land for trade, industry, residence, *recreation*, agriculture, forestry, soil conservation, . . . *or other purposes*[.]” Minn. Stat. § 462.357 subd. 1 (emphasis added).¹³

In Mendota Golf, this Court considered another case involving the proposed

¹³ The Legislature has also found that “sound urban development and *preservation of agricultural land and open spaces through land use planning* is essential to the continued economic growth of this state[.]” Minn. Stat. § 414.01, subd. 1a (1) (emphasis added).

re-development of a golf course and declined to overturn a city's decision to reject the proposal. 708 N.W.2d at 179-80. This Court held that “[a] municipality has legitimate interests in protecting open and recreational space, as well as reaffirming historical land use designations.” 708 N.W.2d at 181.¹⁴ The Court of Appeals’ decision in this matter relied, in part, on that statement. Resp. 5. Further, Plaintiffs concede in their submission to this Court that “preservation of open space is a legitimate goal.” Plaintiffs’ Brief, p. 27.¹⁵

In this matter, the property has been recreational open space since the then-owner requested the change from an agricultural designation in 1962. Resp. 34-35. Though the specific designation has gone through a few different iterations over the past forty years, the character and status of the property has been consistent for that entire duration.¹⁶ The City’s decision in this matter reaffirmed that historical designation and preserved the

¹⁴ This Court supported its statement with both statute and case law, as follows: Minn. Stat. § 462.357, subd. 1 (including “recreation” among the legitimate objectives of zoning); In re Denial of Eller Media Co.’s Applications, 664 N.W.2d 1, 10 n. 7 (Minn. 2003) (explaining that “[g]overning bodies have the right to meet the desires of their citizens for beauty and space – even in cities); and Sun Oil Co. v. Village of New Hope, 220 N.W.2d 256, 263 (Minn. 1974) (upholding village’s denial of a rezoning petition “based upon a legislative determination to perpetuate its preexisting comprehensive zoning ordinance”). Id. at 181-182.

¹⁵ Plaintiffs inexplicably state that “while preservation of open space is a legitimate goal, there is no basis in fact for the City’s denial of Appellant’s application.” It is hard to imagine how Plaintiffs could dispute factually that the long-standing condition of the property as open space would be altered by a large residential development on it.

¹⁶ *Amicus Curiae* MGCOA states at page 5 of its brief that a 2001 change in Comprehensive Plan status had the effect of “eliminating all privately-owned uses other than the existing golf course.” This is a bald-faced misstatement of the property’s status. Numerous options for uses besides a golf course are now and have always been available for the property. Resp. 21-22. That Plaintiffs may not consider any of these other uses an attractive option does not change that fact.

property as open space. As this Court in Mendota Golf held, those objectives are legitimate and provide another rational basis in this matter – in addition to dangerous traffic conditions and overcrowded schools – to uphold the City’s decision.

Amici MLUI asks this Court to override the Legislature’s explicit delegation of authority to local governments to use their zoning authority for the purposes of recreation and the preservation of open space. In pursuit of that cause, they inject into this appeal two unpleaded claims: (1) that it is somehow beyond the “police power” of a city to pursue such objectives through zoning; and (2) that the City had a state-law duty to reguide the parcel to prevent what had allegedly become “reverse spot zoning.” MLUI Brief at 5-17.¹⁷ These arguments are not properly before this Court¹⁸ and, in any event, they are unpersuasive.

Plaintiffs cite a number of foreign cases in an attempt to support these arguments.¹⁹ Those cases are unavailing. None of Plaintiffs’ cases considered the question before this Court – whether the governing authority provided at least one

¹⁷ The MLUI admits that “Minnesota appellate courts have not addressed the concept of ‘reverse spot zoning.’” MLUI Brief, p. 15. Its interest in adding the “reverse spot zoning” issue to this case apparently rests on their discovery that the Pennsylvania Supreme Court relied solely on that doctrine when requiring a rezoning of a golf course that was completely surrounded by freeways and high-end commercial and office buildings. See In re Realen Valley Forge Greens Assoc., 838 A.2d 718 (Pa. 2003). Although that decision was published before Plaintiffs filed their applications with the City and this lawsuit, the theory was never pleaded or argued below, and the Plaintiffs’ brief to this court and various amicus briefs are the first occasion in which it was cited in this case.

¹⁸ An *amicus curiae* before this Court must take the issues as they have been pleaded by the parties and accepted by this Court. City of Minneapolis v. Church Universal and Triumphant, 339 N.W.2d 880, 882 n.3 (Minn. 1983). With all due respect to MLUI, if they wish a court to address those issues, they should bring that suit.

¹⁹ Plaintiffs’ Brief, p. 28.

rational basis for maintaining a property's land use designation. Instead, those cases challenged cities' decisions to *severely increase* zoning restrictions while the property owner was pursuing development. See City of Austin v. Teague, 570 S.W.2d 389, 390 (Tex. 1978); Pheasant Bridge Corp. v. Township of Warren, 777 A.2d 334, 340 (N.J. 2001). Bailes v. Township of East Brunswick, 882 A.2d 395 (N.J. 2005); Sheer v. Evesham Township, 445 A.2d 46 (N.J. Super. Ct. Law Div. 1982). Sheer²⁰ involved the imposition of a highly restrictive environmental zoning designation, *entirely unique* to the property at issue (it was the only property which carried that particular restrictive zoning designation), and which permitted *only* conditional uses. Id. Moreover, the court in Sheer found that none of the environmental concerns asserted by the Township had a rational basis in the record. Here, the property is zoned in the same manner as other similar properties in the City and the reasons supporting denial of the proposed development are rationally based on the record. In Pheasant Bridge Corp., 777 A.2d at 340,²¹ the court stated that it is a "legitimate goal" of zoning authority to "preserve... open space." The Court's ultimate finding that the requirement was inappropriate as applied to the property in that case was based primarily on the fact of extensive environmental regulation by other authorities. Id. In the instant case, the City is the only entity charged with balancing property uses and protecting the health, safety and welfare of City residents. City of Austin v. Teague, 570 S.W.2d at 390,²² involved an instance where a property owner bought a parcel of land zoned for commercial development

²⁰ Plaintiffs' Brief, p. 28.

²¹ Plaintiffs' Brief, p. 27.

(allowing various uses and buildings up to sixty-five feet high) and began clearing the land for that purpose. Reacting to resident complaints, the City halted construction and placed the property in a scenic easement – prohibiting any commercial or residential development. Id. After the City relented, the developer prevailed in an action for damages on a temporary taking theory. Id. at 395. Here, in contrast, and as has been discussed at length in previous submissions to this Court, Plaintiffs purchased the property with the now-complained-of zoning in place and no expectation of future development. Bailes v. Township of East Brunswick, 882 A.2d 395, involved the impermissible down-zoning of a farm to prevent residential development. Here, the status of the property has been unchanged for more than forty years and its current owner bought the property with *no expectation* of a future change in the property's status.

Gibson v. Sussex County Council, 877 A.2d 54 (Del. Ch. 2005),²³ another case cited by Plaintiffs, is also unavailing. In Gibson, the court addressed and cast aside each and every reason that a land use application had been denied with the exception of community opposition, which standing alone is not a rational reason to deny an application. Id. at 66-70. Here, as is demonstrated at some length herein, the City had legitimate concerns regarding hazardous traffic and overcrowded schools, as well as the legitimate aim to maintain a historic property designation and preserve open space.

²² Id., pp. 27-28.

²³ Id., p. 28.

None of the foreign cases Plaintiffs cite have any applicability to this matter. The City's action in preserving a long-standing and consistent balance of property uses is rational and supported by the record.

C. *Substantial change to the neighborhood surrounding the property could only benefit the current use – not render it obsolete.*

As they did at the Court of Appeals, Plaintiffs again attempt to use dicta in Sun Oil Co. v. Village of New Hope, 220 N.W.2d 256 (Minn. 1974) to show that their attack on the zoning classification of property which has been in place since 1962 is appropriate because of a substantial change in the neighborhood. Id. at 261. Plaintiffs disregard what this Court actually held in Sun Oil Co. in a very important respect. This Court recognized that it was the property owner's burden when challenging a rezoning to prove "that the neighborhood of the subject property had undergone such a substantial change since the enactment of the original LB zoning classification *as to make GB* the only reasonable classification for the subject property." 220 N.W.2d at 261 (emphasis added). Thus, it is not enough to show that the neighborhood has changed; that change in the neighborhood must also cause the surrounding zoning to be the only reasonable zoning. Here, the property is now surrounded by a variety of land uses – office park uses on the north, multifamily housing on the west, and single-family housing on the south and the east. Changes in the neighborhood have not caused guiding for parks, open space and recreation to become unreasonable; Plaintiffs could show no causal connection between the neighborhood changes and the Plaintiffs' interest in a reguiding. Indeed, 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.

Sun Oil Co. does not support Plaintiffs' claim for additional reasons. Sun Oil Co. involved a declaratory judgment action to rezone property from a limited business designation to general business – in order to allow the plaintiff to build a gasoline service station. Id. at 256. This Court in Sun Oil Co. reaffirmed a City's ability to "stand behind its comprehensive zoning ordinance" in order to resist a change in the use or designation of property. Id. at 263. Moreover, this Court held that "[b]y automatically equating a substantial change in neighborhood conditions with a need to rezone the affected property, the trial court in effect substituted its judgment for that of the village council." Id. at 263. While Sun Oil Co. suggests that zoning cannot be maintained where it leaves no reasonable use of property, nothing in the record before the City Council suggests such a condition exists in this matter.²⁴ The ability to maintain a reasonable use of property does not equate to a tax-payer guaranteed profit from the use of land. The City's decision should be upheld.

²⁴ Plaintiffs again rely on affidavits which were not before the City Council to support their argument. See Plaintiffs' Brief, p. 31-32. Plaintiffs, at page 26 of their Brief, submit that there is "no issue about the nature, fairness and adequacy of the City Council proceedings" and state that the matter is a record review under Swanson v. City of Bloomington, 421 N.W.2d 307, 312-13 (Minn. 1998), but then nonetheless submits materials which were not before the City Council on August 2, 2004. This matter is a record review for this Court. Material not submitted to the City Council has no bearing on this matter and should not be considered.

III. Plaintiffs' takings claim fails as a matter of law.

Government appropriation of private property, whether directly pursuant to statute (eminent domain) or indirectly via restrictive regulations on use (inverse condemnation), is subject to the limitations of the Fifth Amendment to the U.S. Constitution²⁵ and Minn. Const. art. I, § 13. That section states, in relevant part, that “private property shall not be taken, destroyed, or damaged for public use without just compensation.” This Court has held that the similar provisions²⁶ under both the federal and state constitutions should be interpreted similarly. Zeman v. City of Minneapolis, 552 N.W.2d 548, 552 (Minn. 1996) (applying federal precedent to assess state constitutional claims).

The “complex law” of regulatory takings in Minnesota breaks down into discrete analyses. Zeman, 552 N.W.2d at 552. Under Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), where government regulations have caused a *total deprivation of all economically viable use* of private property, it is a categorical taking and just compensation is due. If regulations impair private property’s market value, Penn Central Transp. Co. v. New York City, 438 U.S. 104, 124 (1978), and Zeman set up a three-part test to determine whether compensation is required. That three-part inquiry takes into account (1) the economic impact of government action; (2) a regulation’s interference

²⁵ As noted herein, Plaintiffs’ federal claims in this lawsuit were dismissed in order to reverse removal to federal court.

²⁶ This Court’s decision in Johnson v. City of Minneapolis, 667 N.W.2d 109, 116 (Minn. 2003), does not require a separate analysis of state and federal takings claims. Johnson involved a “narrow and rare instance” of heinous conduct by municipal officials who “specifically targeted appellants’ properties and acted in bad faith.” Id. at 116. The Johnson decision closes with the admonition that it “is limited to the particular facts presented.” Id.

with distinct investment-backed expectations; and (3) the character of the government action at issue. Penn Central, 438 U.S. at 124; Zeman, 552 N.W.2d at 552. The District Court also relied on this Court’s airport zoning-related decision in McShane v. City of Faribault, 292 N.W.2d 253, 258-59 (Minn. 1980), finding that where regulations are “designed to benefit a specific public or government enterprise,” Minnesota law required compensation in the event of a “substantial and measurable decline in market value as a result of the regulations.”

Plaintiffs have relegated discussion of Lucas and McShane to little more than a footnote²⁷ and focused their attention on Penn Central (or rather a critique of the accepted three-part inquiry). While Plaintiffs have placed nearly all of their eggs in the Penn Central basket, their *amici curiae* offer more wide-ranging arguments and the City will thus analyze herein Plaintiffs’ claims under each takings test. When properly considered, Plaintiffs’ takings claim in this matter fails regardless which precedent is applied. The Court of Appeals decision in this matter should be upheld.

A. *Plaintiffs’ property retains economic value, dooming their claim under Lucas.*

The District Court cited language from Lucas in concluding that a taking had occurred. Lucas has no applicability in this matter. The U.S. Supreme Court’s decision in Lucas requires payment of compensation where a regulation causes a total deprivation of *all* economically viable use of property. 505 U.S. at 1019. The categorical (or per se) rule in Lucas applies only in those “relatively rare situations where the government has

²⁷ Plaintiffs’ discussion of McShane and Lucas consumes less than a full page of their forty-nine page brief.

deprived the landowner of all economically beneficial uses.” Id. at 1017. See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg’l Planning Agency, 535 U.S. 302, 320 (2002) (holding that Lucas only governs those situations involving a “complete elimination of value”). See also Cooley v. United States, 324 F.3d 1297, 1304-05 (Fed. Cir. 2003) (holding that a regulation denying 98.8% of a commercial property’s value denied “less than all” economic value of the property and, thus, did not meet the categorical directives of Lucas).

No such total deprivation of economic value has occurred in this matter. Plaintiffs’ own consultant in this matter concluded that the property had a supportable purchase price of nearly \$1,000,000 as a golf course and was financially outperforming comparable golf course properties. App. 522-523, pp. 4-5. Given those conclusions and Plaintiffs’ reliance on them, Plaintiffs cannot assert a viable categorical takings claim under Lucas.

B. *Plaintiffs’ claim fails under the three-part inquiry of Penn Central.*

The U.S. Supreme Court’s benchmark 1978 decision in Penn Central applies in cases where regulations have a negative economic effect on property without depriving it of *all* economic value to its owner. 438 U.S. at 124. In Penn Central, the Court reviewed prior decisions, which it called “essentially, ad hoc, factual inquiries,” and distilled three factors that have “particular significance” in the takings analysis: (1) the extent to which the regulation has interfered with distinct investment-backed expectations; (2) the economic impact of the regulation on the claimant; and (3) the character of the government action. Id. This Court applies the Penn Central factors to takings claims

under the Minnesota Constitution. Zeman, 552 N.W.2d at 553. Penn Central is the core analysis in regulatory takings jurisprudence.

1. By Plaintiffs' own admission, they had no investment-backed expectation to develop the property for residential use.

A Penn Central claimant must demonstrate that the decision alleged to be a taking interfered with some distinct investment-backed expectation for the property. 438 U.S. at 124. Those expectations must be *both* subjectively demonstrated and objectively reasonable. See Cienega Gardens v. United States, 331 F.3d 1319, 1346 (Fed. Cir. 2003) (requiring claimant to have actually expected to achieve the desired outcome) and Ruckelshaus v. Monsanto Co., 467 U.S. 986, 1005 (1984) (requiring objectively reasonable expectation of development).

What sets this case apart from nearly every other regulatory takings challenge to a land-use decision is the complete absence of evidence of expectations. Plaintiffs cannot demonstrate either subjectively or objectively reasonable investment-backed expectations that the residential development would be permitted on the property. Raymond Rahn, who negotiated with the property's previous owner William Smith on behalf of Plaintiff Rahn, has testified that the \$3.6 million purchase price reflected the value of the investment in the property *as a golf course*. App. 40, pp. 63-64. Rahn was at that time aware that a previous prospective purchaser of the property had sought and failed to obtain approvals for residential development and that the property's Comprehensive Plan designation and zoning did not permit residential uses. App. 40, p. 64; App. 42, p. 69. Rahn had no expectation that the City would one day permit extensive residential

development on the property and had conducted no valuation or assessment of the property for any use other than a golf course. App. 44, pp. 77-78. As Mr. Rahn specifically stated in his deposition: “When I bought the property, I had no intention to sell it for development.” App. 42, p. 69. In this matter, there has been *no* expectation – let alone, given forty years of consistent zoning, any *reasonable* expectation – that dense development on the property could or would occur.²⁸ Rahn’s only investment in the property was in furtherance of a use that remains lawful to this day.

Plaintiffs and certain *amici* also imply that the Court of Appeals’ recognition that Plaintiffs had no reasonable investment-backed expectations in residential regarding disregards Palazzolo v. Rhode Island, 533 U.S. 606 (2001). Such an argument rests on a misreading of both Palazzolo and the Court of Appeals’ decision in this matter.

In Palazzolo, the U.S. Supreme Court reiterated that the Penn Central three-factor analysis applies to regulatory takings claims. 533 U.S. at 617. While the Palazzolo

²⁸ Plaintiffs’ brief contains no actual argument regarding the facts of this case and how they might meet the investment-backed expectations prong of the Penn Central analysis. But previously, Plaintiffs asserted that Rahn’s expectations for the property “evolve[d] over time” and this evolved expectation became “investment-backed” by Rahn’s later execution of a sewer and water assessment agreement with the City. See Plaintiffs’ Petition for Review, p. 1. Even setting aside Rahn’s deposition testimony, the document itself proves otherwise. What Plaintiffs say was a \$600,000 investment “solely in preparation for residential development of the property” actually involved payment only for the five-acre portion of the property which includes the clubhouse and its immediate surroundings that was improved solely for golf course purposes. That portion of the assessment totals approximately \$83,000. See City’s Response to Petition for Review, Res. App. 6-11. If the remaining 115 acres continue as a golf course or some other comparable use and are not subdivided, platted, and connected to City water and sewer, further assessment will *never become due*. *Id.* Thus, under the agreement, Plaintiffs’ only actual investment in the property was for use as a golf course, not in preparation for residential development.

decision features conflicting opinions even within its five-vote majority, its basic holding is that even where a claimant acquired the property after the enactment of the regulations, a takings claim remains a possibility, i.e., a failure to demonstrate investment-backed expectations of development is not an *absolute* bar to a viable takings claim. However, as Justice O'Connor explained, "the regulatory regime in place at the time the claimant acquires the property at issue helps shape the reasonableness" of claimant's investment-backed expectations. *Id.*, 533 U.S. at 633 (O'Connor, J., concurring). *See, e.g., Apollo Fuels, Inc. v. United States*, 381 F.3d 1338 (Fed. Cir. 2004) (citing Justice O'Connor's concurrence in *Palazzolo*). Given that reading, it is apparent that the reasonable investment-backed expectations of a claimant (or total lack of them) carry significant weight in the analysis.

Moreover, the specters raised by the Court in *Palazzolo*, i.e. that owners of property, at the time of the enactment of regulations would be forced to ripen a takings claim which could not be asserted by a successor or that the newly-regulated owner would be stripped of the ability to transfer an interest that preexisted the regulation, certainly do not apply in a case where the regulation at issue is a classification which was *requested* by the then-owner of the property thirty-four years before the sale to the claimant. Resp. 34-35; Resp. 68-71. Consistent with *Palazzolo*, the Court of Appeals in this case properly applied the full three-part analysis under *Penn Central* to Plaintiffs' claim.²⁹

²⁹ Plaintiffs and *amici* BATC/NAIOP suggest that, in light of *Palazzolo*, this Court should expressly overturn what it calls "contrary dicta" in *Myron v. City of Plymouth*, 562

Rather than addressing the damaging testimony their representative offered under oath, or indeed any other facts remotely related to this case, Plaintiffs offer an academic critique of this factor of the Penn Central inquiry and suggest that it really is not all that important. See Plaintiffs' Brief, pp. 35-39. Yet the authors of those law review articles cannot avoid recognizing that courts have continued to place significant weight on this prong of Penn Central and for good reason. The economic impact of a decision cannot properly be viewed in isolation, without regard to whether that impact affects what the property owner reasonably expected when he spent his money. See J. Podolsky, Palazzolo v. Rhode Island: Revival of Penn Central and Implications for Environmental Regulation, 35 Urb. Law. 353, 367 -368 (2003) (noting that "despite the Palazzolo Court's emphasis that lower courts must consider all three Penn Central factors, reasonable investment-backed expectations remain the central focus in such cases").

In this matter, Plaintiffs' own representative, through sworn deposition testimony, unequivocally stated that Plaintiffs had no investment-backed expectations of developing the property *at all*. Regardless of the relative level of importance attached to this particular factor, it is apparent that Plaintiffs fail miserably under it.

N.W.2d 21, 23-24 (Minn. Ct. App. 1997). Palazzolo, as noted, is a complex decision with a number of interweaving and contradictory opinions, the sum of which appears to conclude that a takings claim may be possible under certain circumstances even if the claimant purchased the property knowing about prohibitive zoning regulations. Myron held that a claimant who knew about zoning restrictions and gambled that they could be changed could not assert a takings claim based on the regulations. Id. Because reasonable investment-backed expectations remain so important today, it is certainly possible (indeed probable) that a court today would arrive at precisely the same conclusion as in Myron in the context of a full Penn Central analysis.

2. Plaintiffs cannot demonstrate an economic impact on any reasonable expectations as a result of the regulation which would support a takings claim.

This case is fundamentally different from nearly every other regulatory takings suit in a second important respect – because the alleged taking is a decision to leave in place an existing (and long-standing) designation, not the addition of new restrictions on a permissible use. As a result, this case is less about “taking” of economic value than about a decision by the City not to “give” additional value in the form of re-designation under the Comprehensive Plan.³⁰ Plaintiffs cannot show an economic impact on any reasonable expectation due to the City’s denial of their application to amend the Comprehensive Plan.

As the U.S. Supreme Court has stated with reference to this prong of the Penn Central analysis, “our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property[.]” Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Trust for So. Cal., 508 U.S. 602, 644 (1993); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 497 (1987). In this case, the Court of Appeals, like many other courts,³¹ utilized this “test” to evaluate the “economic impact” prong of Penn Central.³²

³⁰ Plaintiffs cite a series of cases regarding the measure of economic loss, but present no actual argument on the issue. See Plaintiffs’ Brief, p. 39-40. Nothing in these cases suggests that compensation is due when a government refuses to bail out a business owner by offering more favorable zoning or guiding when that business owner’s judgment about the long-term viability of a particular use turns out to be poor or the owner takes on an unsustainable debt burden.

³¹ See, e.g., Maritrans Inc. v. United States, 342 F.3d 1344, 1358 (Fed. Cir. 2003); State ex rel. R.T.G., Inc. v. State, 98 Ohio St.3d 1, 8-9, 780 N.E.2d 998, 1006 (2002); Animas

Rahn purchased the property with no expectation to use it as anything other than a golf course. App. 42, p. 69. The City's decision to maintain the current Comprehensive Plan designation for the property – Parks, Open Space, and Recreation – does nothing to impair that use, Rahn's expectations (or lack thereof), or adversely affect the property's value as a golf course.

Plaintiffs and all supporting *amici* would have this Court view this case as presenting the question of whether a guide designation must be changed if the existing designation deprives the property of all of its value. For several reasons, this case does not present that issue. First, contrary to the MLUI's assertion and as has been stated herein, the guiding and zoning has always allowed more than use of the property as a golf course.³³ Second, the appearance of "red ink" on the books of the golf course is the

Valley Sand and Gravel, Inc. v. Board of County Comm'rs of County of La Plata, 38 P.3d 59, 67 (Colo. 2001) ("both the per se economic viability test and the Penn Central factual test involve a comparative analysis between the value of the property before and after the regulation").

³² While Plaintiffs and their amici clearly do not like the U.S. Supreme Court's phrasing of the economic impact test, they offer no argument that it has been overruled or that the Court of Appeals misapplied it. For their own result-oriented reasons, they simply expect this Court to disregard it.

³³ *Amicus* MGCO raises Sanderson v. City of Willmar, 162 N.W.2d 494 (Minn. 1968), to support the proposition that a "single use" zone is unlawful. It does not. In Sanderson, the City of Willmar zoned property from business/commercial to "automobile parking." In addition, the City created what amounted to a right of first refusal in favor of the City in the event of any potential sale. The Court found that the ordinance down-zoning the property removed all commercial value, was used to depress the property value in the event of condemnation, and interfered with the owner's constitutional right to sell the property at any time for any price to whomever the owner chooses. Id. at 497. This matter is distinguishable on numerous grounds. The City has not down-zoned the property but retains its longstanding designation. The property is not limited to a single use, it retains substantial value and produces an income stream, even when closed as a golf course, due to the option agreement in place. Moreover, no right of first refusal has

product of the owner's decision to borrow against the property to fund not only its purchase and desired improvements to the course, but improvements to another course as well. It was not the guiding or zoning of the property that caused Rahn to finance his investments in this fashion. Once debt service is factored out of the financial reports Plaintiffs offered to the City, they show a deficit in only one year. Finally, and most importantly, it is undisputed that even after the City refused the Plaintiffs' reguiding application, a willing buyer (Wensmann) offered the owner (Rahn) a strikingly high price for the property, [CONF. APP. 1, "H"], free of any contingency regarding its eventual zoning or guide plan designation. App. 50, Conf. App. 7. What a willing buyer is willing to pay for it is the textbook definition of market value. The offer represents a profit of approximately [Conf. App. 1, "T"] for every year of Rahn's ownership.³⁴ Thus, the MGCOA's assertion that "the property owner has not been able to find anyone to buy it as a golf course"³⁵ is substantively incorrect. Such a buyer found him. While Wensmann may have had no interest in operating a golf course, it was undisputedly interested in paying a huge sum to buy it despite its current guiding. Like a rare stamp that maintains great value for purchase and sale but not for its original use, this parcel is anything but worthless. The U.S. Supreme Court has made it clear that the *aggregate* sources of value of property should all be considered in deciding whether a taking has

been created; Rahn can sell the property to whomever he chooses – as evidenced by its purchase agreement with Wensmann.

³⁴ Despite this non-contingent offer and the significant profit it represented, the District Court inexplicably determined that Rahn could not obtain a reasonable rate of return on its investment in its property. See Conclusion of Law (App. 15, ¶19).

³⁵ MGCOA Brief, p. 4.

occurred. Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (holding that “[a]t least where an owner possesses a full ‘bundle’ of property rights, the destruction of one ‘strand’ of the bundle is not a taking, because the aggregate must be viewed in its entirety”).³⁶ The economic impact of a decision (and the permissible uses of land) cannot be evaluated solely on the basis of what the owner can do on the land, but must also reflect the potential use of the property as an asset or commodity. See MacLeod v. Santa Clara County, 749 F.2d 541, 547 (9th Cir. 1984) (finding in the context of a takings claim that “holding property for investment purposes can be a ‘use’ of property”).

In short, there is simply no evidence that the City’s denial of the application caused an economic impact which would sustain a takings claim.

3. The character of the government action in this matter does not support a takings claim.

Plaintiffs’ takings claim also fails under the third prong of a Penn Central analysis; the nature and character of the government action does not give rise to a takings claim. By denying the Comprehensive Plan amendment application, the City simply left the existing land use designations – which represent the City’s legitimate exercise of its police power to promote the health, safety, and welfare of its residents – in place. See Outdoor Graphics, Inc. v. City of Burlington, 103 F.3d 690, 695 (8th Cir. 1996) (holding that zoning regulation is a lawful exercise of police power). The long-standing Comprehensive Plan and zoning designation of the property (initially put in place forty

³⁶ The only decision Plaintiffs could offer in support of the notion that the value of land for speculation is irrelevant to a takings analysis was from a New Jersey trial court in 1982. See Sheer, 445 A.2d 46.

years ago at the then-owner's request) reflect the City's considered policy choices to defend against adverse impacts from dangerous traffic conditions, overcrowded schools, degraded environmental standards, and reduced property values. App. 232-236.

Plaintiffs note that "courts have not been reluctant to find a taking where zoning ordinances provided only for public use of the property," citing Spaeth v. City of Plymouth, 344 N.W.2d 815, 820 n.15 (Minn. 1984). See Plaintiffs' Brief, p. 40.³⁷ Spaeth involved a claim that the city in that case had taken property for use as a stormwater holding pond. Id. at 817. Of course, that situation has no applicability to a case involving a parcel of property left entirely in private hands with a variety of available uses – both public and private. Plaintiffs also offer a tour of foreign caselaw involving cities that allegedly caused the failure of property owners' business. None of these cases supports Plaintiffs' position that the City should be required to pay compensation in this matter. See, e.g., Morris County Land v. Parsippany-Troy Hills Township, 193 A.2d 232 (N.J. 1963)³⁸ presumes that all permitted uses of the property are economically infeasible. While Plaintiffs and their *amici* repeat this mantra, no such evidence has been presented. In fact, even as a golf course, Plaintiffs' own consultants noted that prior to closing, the course had outperformed similar properties and, excluding debt service (which included improvements to another property and retirement of its debt), had turned a profit every year of Rahn's ownership except 2003, retains value and

³⁷ Appellants cite Spaeth incorrectly and fail to identify the page and footnote from which the quoted language was taken. The correct cite and location of the quote appear above.

³⁸ Plaintiffs' Brief, p. 41.

even when closed at the owner's option, will nearly generate [Conf. App. 1, "L"] over three years. App. 504-518; App. 519-524.

Plaintiff's takings claim fails under Penn Central and the District Court's decision should be reversed.

C. *Plaintiffs cannot assert a viable takings claim under McShane.*

This Court, just two years after the U.S. Supreme Court's decision in Penn Central, took up a takings claim based on the airport zoning restrictions enacted by the City of Faribault in McShane, 292 N.W.2d 253. The Court in McShane held that "where 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."³⁹ Id. First, McShane, by its own terms, does not apply to this matter because the regulation at issue is not a part of a specific government enterprise, but rather the effectuation of a comprehensive plan designed for the reciprocal benefit of all landowners. Second, even if McShane did apply here, Plaintiffs cannot meet its test for finding a taking.

³⁹ It is important to note the context in which McShane was decided in 1980. It was a mere two years following the U.S. Supreme Court's benchmark decision in Penn Central and courts across the nation were struggling to distill that case's holding into a functional test. Though McShane sets forth its own test, more recent caselaw from this Court has stated that regulatory takings jurisprudence should properly be viewed as a dichotomy: "Anything less than a complete taking of property [which would require application of Lucas] requires the balancing test set forth in Penn Central." Johnson, 667 N.W.2d at 114-15. Moreover, the facts of McShane, if presented today, would almost certainly meet the test for a taking under Penn Central as it is now universally understood: there is no doubt that the "safety zone" restriction prohibiting all commercial development of the property disappointed distinct investment-backed expectations given that the property

1. McShane does not apply where a regulation is designed to effectuate a comprehensive plan and not to benefit a specific government enterprise.

McShane explicitly recognized the efficacy of comprehensive planning and made clear that its decision should have no bearing on situations where regulations were designed in aid of a comprehensive plan and not as part of some specific government enterprise. “There is believed to be a reciprocal benefit and burden accruing to all landowners from the planned and orderly development of land use. We specifically acknowledged ‘the increasing complexity of society and the realization that property must be viewed more interdependently’” McShane, 292 N.W.2d at 257. The Minnesota Court of Appeals clarified that point in Parranto Bros. v. City of New Brighton, 425 N.W.2d at 592: a taking does not occur under McShane if the ordinance is designed to effect a comprehensive plan.

When a city acts to effect a comprehensive plan, it acts in its arbitration function, not to benefit a specific government enterprise. McShane presented a far different situation than the present case. This Court in McShane found that the ordinance at issue was intended to specifically benefit municipal airport operations and to, in effect, appropriate a public easement for air traffic without compensation. 292 N.W.2d at 258. The regulated property in McShane was immediately adjacent to the airport runway and the ordinance placed the property at issue in a “safety zone” designed to allow direct and substantial intrusions by aircraft over the property. The present case, in contrast, leaves the property entirely in private hands and authorizes no uninvited public use of it. The

was zoned for commercial, industrial, and “urban expansion” uses at the time of the

property is, at the owners' option, closed to the public. The City's decision advances no specific government enterprise.⁴⁰ It serves a legitimate objective accomplished under the City's police power: the promotion of health, safety, general welfare by balancing the various types of properties and uses available to meet the needs of City residents. The City's decision to maintain the Comprehensive Plan which had been in place for many years prior to Plaintiffs' purchase is part of its "arbitration" function, not part of some "specific government enterprise." Plaintiffs cannot properly assert a claim under McShane because no government enterprise is involved in this matter.

2. Any decline in market value suffered by Plaintiffs is a result of their own business decisions or other economic factors, not "as a result of the regulations" as required under McShane.

Plaintiffs presented no evidence that relates the decline in market value of the property to the City's refusal to change its Comprehensive Plan designation. In fact, Plaintiffs' own statements and consultants' reports indicate that whatever financial hardships are suffered by the golf course are the result of two factors: (a) the excessive debt service on the property; and (b) national and regional trends related to golf and the economy as a whole. Neither factor bears any relationship to any City action in this case

claimant's purchase. 292 N.W.2d at 255.

⁴⁰ The District Court used various Comprehensive Plan provisions which involve discussion of the necessary balance of property uses in the City to conclude that the City had somehow converted Plaintiffs' private property into a "specific government enterprise" such that a taking had occurred. See District Court's Order, Conclusion of Law (App. 15-18, ¶¶ 18-24). In doing so, the District Court misapplied McShane – an airport zoning case which involved the effective condemnation of an easement for air travel over the property at issue. 292 N.W.2d at 258. The District Court's leap of logic ignores that the most fundamental stick in the bundle of private property rights is the

and, thus, it cannot be maintained that any losses are “*the result of the regulations*” as would be required by McShane. 292 N.W.2d 253.

The studies commissioned by Rahn ostensibly in support of its request for re-designation indicate that the golf course operation is on average performing better than that of comparable properties and that the golf course would have been profitable in every year of Rahn’s ownership except one absent debt service on the mortgage, a portion of the proceeds from which were used to benefit another property owned by Rahn. App. 504-518; Conf. App. 10-11. The debt service on the property has no relationship to any City action.

During his deposition, Plaintiff Rahn’s representative testified that the golf course performed well financially during the robust economic climate of the late 1990s. App. 46, p. 94. However, according to Rahn, the golf industry is now in a national decline. App. 47, p. 97. The economy’s general downturn in 2000, compounded by the events of September 11, 2001, and the construction of numerous other golf courses in the region (which Rahn’s consultants termed “overbuilding”) had significant negative impact on the golf course’s bottom line. App. 46, p. 94-95. The City obviously has no control over national and regional trends in the golf economy or in the economy as a whole and any losses stemming from those trends have no relationship to any City action. Plaintiffs simply cannot show, as is required under McShane, that any “substantial and measurable

power to exclude others. Plaintiffs retain that power unfettered – regardless what Comprehensive Plan designation ultimately applies to the property.

decline in market value”⁴¹ has occurred “*as a result* of the regulations.” Plaintiffs’ claim therefore fails as a matter of law.

IV. The Comprehensive Plan review process as directed by the Legislature, not judicial intervention, is the appropriate framework for resolving the future of the property.

Plaintiffs demand to have the property reguided immediately and point to comments by City officials generally indicating that it may at some point in the future be appropriate to have a guide plan adjustment to allow residential development. However, Plaintiffs’ position – essentially Comprehensive Plan amendment on demand – is contrary to law and unsupported by the facts in this case.

In the planning process, cities look at all the properties within their borders, balancing existing uses and the needs to create well-balanced, ordered, and livable communities. Minn. Stat. § 473.858 requires cities in the metropolitan area to adopt comprehensive guide plans that are consistent with Metropolitan Systems Statements, placing another layer of review on the consideration and determination of land development rates and patterns cities must take into account. Moreover, under the Metropolitan Land Planning Act, all cities in the Metropolitan area, including Eagan, are required to reevaluate and update their plans every ten years to account for needed changes both within the city itself and any changes in metropolitan-wide needs. Minn.

⁴¹ Any such conclusion would be dubious in any event because of the oral offer to purchase the property for [Conf. App. 1, “H”] *after* the City declined to change the Comprehensive Plan designation or zoning for the property. The offer represents a profit of [Conf. App. 1, “I”] for each year of Rahn’s ownership of the property independent of golf course operations.

Stat § 473.864, subd. 2. The MLPA requires each jurisdiction in the seven-county metropolitan area to “review and, if necessary, amend its entire comprehensive plan and its fiscal devices and official controls” by 2008. Id. It is then, in the context of a broad review of a city’s entire panoply of land uses, that major shifts in the long-standing designation of large parcels of property within the City should be considered.

The U.S. Supreme Court has consistently recognized since 1926 that other branches of government are in a relatively better position than courts to make land-use planning decisions. See City of Euclid v. Ambler Realty Co., 272 U.S. 365, 394 (1926). See also Village of Belle Terre v. Boraas, 416 U.S. 1, 9 (1976). This Court, too, has repeatedly noted (and recently reaffirmed) the propriety of the courts’ significant deference to legislative decision-making with regard to land use. See Mendota Golf, 708 N.W.2d at 174. The comprehensive planning process allows Minnesota communities to consider their evolving needs and balance numerous and divergent land uses accordingly. The superiority of that process – undertaken pursuant to regular legislatively-mandated guide plan review – as opposed to one achieved through piece-meal litigation is apparent.

Looking ahead to that upcoming review, the City could hardly base its update on a use of the property that no longer exists. If indeed the property remains as an empty field (as opposed to the operating golf course in place when the City made the decision challenged in this case), the City would face a fundamentally different situation. In that process, it could address the guiding of the property not as part of a single developer’s request for a “spot reguiding” of a single parcel, but in an overall re-examination of the

guiding of all properties in the City, the City's goals for its own future, and how guiding can help the City attain those goals.

This Court should reject Plaintiffs' request to short-circuit that legislatively-mandated process in pursuit of its own maximum profit. Nothing in Minnesota law, either in the context of a challenge to the City's rational decision or under a takings theory, would permit Plaintiffs to do so.

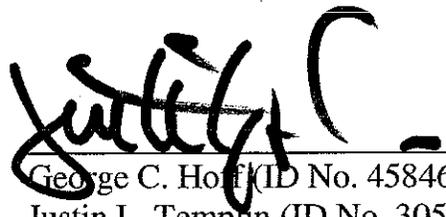
CONCLUSION

Plaintiffs cannot show that the City's Comprehensive Plan amendment denial was legally insufficient or factually unsupported. The City acted on specific facts to avoid significant consequences of the proposed development, including dangerous traffic and a growing overcrowding problem in its schools. Moreover, the City's actions were a legitimate effort to preserve open space and a historical land use designation.

Plaintiffs also fail to meet any even potentially applicable regulatory takings standard. Neither Lucas, nor Penn Central, nor McShane provides any relief to a claimant when that claimant's property retains significant value and remains entirely in private hands, when the claimant had no investment-backed expectation for development, and when external economic and industry-related factors – not the guiding and zoning of the property or any other City action – are the cause of claimant's economic loss.

The Court of Appeals' decision should be affirmed and the City's decision to deny Plaintiff's Comprehensive Plan amendment application should stand.

Dated this 16th day of October, 2006.


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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).