

NO. A05-1074

State of Minnesota
 In Supreme Court

Wensmann Realty, Inc., and Rahn Family LP,
Appellants,

vs.

City of Eagan,
Respondent.

AMENDED BRIEF OF AMICUS CURIAE
 MINNESOTA LAND USE INSTITUTE

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

and

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

Attorneys for Respondent

William Christopher Penwell (#164847)
 SIEGEL, BRILL, GREUPNER,
 DUFFY & FOSTER P.A.
 1300 Washington Square
 100 Washington Avenue South
 Minneapolis, MN 55401
 (612) 337-6100

Attorneys for Appellants

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

*Attorneys for Amicus Curiae
 Metropolitan Council*

(Additional Counsel Listed on Following page)

Susan L. Naughton (#259743)
LEAGUE OF MINNESOTA CITIES
145 University Avenue West
St. Paul, MN 55103-2044
(651) 281-1232

and

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

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

Bruce D. Malkerson (#066862)
Howard A. Roston (#260460)
Patrick B. Steinhoff (#340352)
MALKERSON GILLILAND MARTIN LLP
220 South Sixth Street, Suite 1900
Minneapolis, MN 55402
(612) 344-1111

*Attorneys for Amicus Curiae
Minnesota Land Use Institute*

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

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

Peter K. Beck (#0005927)
GRAY PLANT MOOTY
500 IDS Center
80 South Eighth Street
Minneapolis, MN 55402
(612) 632-3001

*Attorneys for Amicus Curiae
Midwest Golf Course Owners Association*

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I. STATEMENT OF THE LEGAL ISSUES

- A. May a municipality force the responsibility for providing the public benefit of open space and park preservation on a private property owner without purchasing the property or taking the property by eminent domain?

The Court of Appeals held that the City acted reasonably when it denied Appellants' application to amend the City's Comprehensive Plan because preserving open space and maintaining historical land use designations are legitimate government interests.

Most apposite cases: *Mendota Golf LLP v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006); *In re Realen Valley Forge Greenes Assoc.*, 838 A.2d 718 (Pa. 2003).

- B. Does adopting or maintaining a land use regulation that substantially reduces the market value of private property constitute an unconstitutional regulatory taking where the regulation is adopted to benefit a specific public or governmental enterprise like providing parks and open space?

The Court of Appeals stated in a footnote that the City acted "to effect a comprehensive plan" and that the denial of Appellants' application was not solely to benefit a government enterprise.

Most apposite cases: *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980); *Pratt v. State*, 309 N.W.2d 767 (Minn. 1981).

II. STATEMENT OF THE CASE

This case relates to the request of Appellants, Wensmann Realty, Inc. and Rahn Family LP (“Appellants”) to Respondent, the City of Eagan (the “City”), to allow residential development on 120 acres of land (the “Property”) that is presently the site of an 18-hole golf course. The Minnesota Land Use Institute (“MLUI”) is a group of attorneys who dedicate substantial portions of their practices to advising and representing private property owners regarding municipal land use issues.¹

The City, seeking to force the burdens of providing public open space on a private property owner, has imposed land use regulations on the Property that effectively restrict the Property to a single use: a golf course.²

Though not admitted by the City, the practical effect of the City’s land use regulations is to impose upon Appellants the responsibility of providing public open space by means of a “shorter cut” than acquiring the Property through purchase or condemnation.

It is the experience of the members of MLUI that, throughout the Twin Cities Metropolitan area, municipalities are unlawfully shifting public burdens that have long been shouldered by the public (such as providing open space) to private property owners.

¹ In accordance with Minn. R. Civ. App. P. 129.03 none of the parties to this action have made a monetary contribution for the preparation or submission of this brief.

² All of the other uses besides golf courses permitted for the Property under the City’s Comprehensive Plan and Zoning Ordinance are either indisputably public in nature or in direct competition with public facilities (e.g. parks, playgrounds, tennis courts, etc.). Consequently, MLUI will treat the City’s land use regulations as imposing a single permitted use (a golf course) on the Property.

III. STATEMENT OF FACTS³

According to the Metropolitan Council, the Twin Cities metropolitan area will experience an increase in population of more than 700,000 people between the year 2000 and 2020. (Metropolitan Council Regional Development Framework – Revised Forecasts, March 8, 2006)⁴ During the same time period, the corresponding number of households will increase by more than 350,000. *Id.*

The comprehensive plans for the City of Eagan, as well as other developing communities, demonstrate that the demand for housing during the next decade (and beyond) will be significant. For example, the City of Eagan anticipates the need for an additional 3,175 housing units between 1999 and 2020. (City of Eagan Comprehensive Plan, Table 2.3 n. 5) The City of Eden Prairie anticipates the need for more than 3,000 additional homes by 2010. (City of Eden Prairie Comprehensive Plan, p. 1-7, table 1.6) The City of Chaska estimates a population increase of nearly 8,000 people, corresponding to an additional 4,000 households. (Chaska Comprehensive Plan, Chapter 2, p. 11) The City of Blaine anticipates a population increase of more than 20,000 people from 2000 to 2020. (City of Blaine Comprehensive Plan, June 2000, p. 11) The City of Elk River anticipates the need for 6,226 new households. (City of Elk River Comprehensive Plan, p. 4♦8)

³ Appellants' Statement of Facts is incorporated by reference and adopted by MLUI.

⁴ MLUI's references to the documents cited are readily available on the internet.

As these and other similar communities have developed and continue to develop, local government planning agencies have naturally sought to preserve open space for the benefit of the residents of these communities. MLUI agrees that preserving open space is and should be considered a worthwhile public goal. However, cities throughout the Twin Cities metropolitan area, faced with budget challenges, more and more are seeking to place the burden of providing public parks and open space on a select few private property owners who, for personal, financial or strategic reasons, elected initially not to develop their properties at the same time as the surrounding locality developed.

As development continues, the issues presented in this case will trouble property owners and government planners for the foreseeable future. These issues cry out for a resolution by this Court that adequately protects private property interests from the inevitable tendency of government planning agencies to succumb to the temptation to “improve the public condition ... by a shorter cut than the constitutional way of paying for the change.” *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416, 43 S.Ct. 158, 160 (1922) (J. Holmes).

The position of MLUI is that the cost of achieving the public goals of acquiring parks and open space should be borne by the public at the public’s expense and not by individual property owners.⁵ The United States Supreme Court long ago recognized that

⁵ As the StarTribune newspaper observed in a recent article, municipalities throughout the metropolitan area, including the City, are undertaking efforts to acquire open space in a correct and lawful manner: acquiring property (or negative easements) through purchases paid by tax revenues collected from the general public rather than through coercive regulations which force individual property owners to solely bear the cost.

once governmental regulatory interference with private property interests “goes too far,” the regulation constitutes an unconstitutional taking. *Pennsylvania Coal Co.*, 260 U.S. at 415, 43 S.Ct. at 160. This case presents a classic example of such government regulatory action that “goes too far.”

IV. LEGAL ARGUMENT

This Court should reverse the Court of Appeals for two independent reasons. First, in seeking to preserve such a large swath of open space through the enforcement of its Zoning Ordinance and Comprehensive Plan, the City has exceeded its lawful authority to regulate the use of private property. Second, the City’s actions constitute an unconstitutional taking of the Property without just compensation because the City has acted to benefit a specific government enterprise and has caused a substantial diminution in the market value of the Property.

A. The City Has No Authority To Adopt Land Use Regulations That Limit The Property To A Single Use As A Golf Course.

The government’s legislative authority to regulate private property is not without limits. From the earliest days of the United States, the judiciary has traditionally respected the separation-of-powers and accorded substantial deference to legislative branches of government. However, this deference must have its limits, as the United States Supreme Court recognized in 1798 when it stated that it

... cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control ... There are acts which the Federal or State Legislature cannot do, without exceeding their

“Plymouth Will Ask Voters for Money to Preserve Land,” *Minneapolis-St. Paul StarTribune*, September 19, 2006.

authority ... There are certain vital principles in our free Republican governments, which will determine and over-rule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; to take away that security for personal liberty, or private property, for the protection whereof the government was established.

Calder v. Bull, 3 U.S. 386, 387-88 (1798).

MLUI respectfully submits that forcing the responsibility of providing a public amenity on private property owners by adopting land use regulations that restrict private property to a single use is a “flagrant abuse of legislative power” that inflicts a “manifest injustice” through the elimination of the very property interests the government was established to protect.

The Court of Appeals suggests that the question of whether the City acted within its authority to zone property begins and ends with *Mendota Golf LLP v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006), in which this Court stated that preserving open and recreational space is a legitimate government interest. *Id.* at 181. However, in *Mendota Golf LLP*, the only issue properly decided by this Court was that the City of Mendota Heights had a duty to reconcile inconsistent provisions of its comprehensive plan and its zoning ordinance.

Here, on the other hand, the City of Eagan *is requiring* Appellants to operate a golf course (or similar public amenity) now and in the future for the sole purpose of providing open and recreational space for the residents of the community. Accordingly, the questions this Court did not have occasion to answer in *Mendota Golf LLP* are now squarely before it: Is it within the authority of a municipality to limit the use of private

property to a golf course (or any other single use) for the purpose of preserving open space for the benefit of the general public? May a municipality do so regardless of economic conditions that (as here) make that use economically infeasible? MLUI submits that the answers to these questions are plainly “no.”

It is arbitrary and unlawful for a municipality to freeze economic conditions in time with respect to a parcel of private property by limiting it to a single use that the laws of supply and demand have rendered infeasible. Here, the City is not limiting Appellants’ property to a single broad *category* of uses (e.g. office or residential), as land use regulations typically do. Within typical use districts there are always a multitude of other uses allowed as permitted or conditional uses. For example, a typical single-family use district allows single-family homes, home occupations, government buildings, churches, and schools.⁶ Here, the City is effectively limiting the Property to *a* single use, period. This is analogous to a situation in which a municipality zones a large tract of land (such as the Property) as “typewriter sales” instead of “commercial.” Eventually, either the supply of typewriter shops in the area will increase such that the market is saturated or the demand for typewriters will decrease (due to external market forces such as the advent of the personal computer) to the point that even one shop is not a viable use.

Independent of whether the municipality’s “typewriter sales” zoning designation constitutes a taking or not (which as discussed below it would), it is beyond the authority of a municipality to adopt such a regulation at all. This type of single use zoning district crosses the line from planning and regulations that one would expect to find in a free

⁶ The permitted uses or conditionally permitted uses vary from city to city.

market and capitalist society (such as our society) to the type of regulations that one would expect to find in a communist planned economy such as in the former U.S.S.R.

The United States Supreme Court has recognized on several occasions that it is arbitrary and unlawful for the government to fail to respond to changing economic circumstances and conditions when it adopts regulations that affect private property. In *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 55 S. Ct. 486 (1935), the Court found it was beyond the police power of a state to adopt and enforce regulations (in this case related to railroad grade crossings) that did not account for “the revolutionary changes incident to transportation wrought in recent years by the wide spread introduction of motor vehicles.” *Id.* at 416, 489. The Court noted that “when particular individuals are singled out to bear the cost of advancing the public convenience, that imposition must bear some reasonable relation to the evils to be eradicated or the advantages to be secured.” *Id.* at 429, 495.

In *Nectow v. City of Cambridge*, 277 U.S. 183, 48 S.Ct. 447 (1928), the United States Supreme Court found that a municipality exceeded its authority to regulate private property when due to the zoning at issue the property had “comparatively little value for the limited uses permitted by the ordinance.” *Id.* at 187, 448. The Court noted that “[t]he governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use is not unlimited, and, other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.” *Id.* at 188, 488. The principles in *Nectow* are equally as compelling and controlling today.

It has also long been the law in Minnesota that the government may not “invade the fundamental liberties of citizens” by adopting zoning regulations that unreasonably restrict the use of private property or otherwise unreasonably infringe on the private property interests. *Gunderson v. Anderson*, 190 Minn. 245, 251 N.W. 515 (1932), citing *State v. City of Minneapolis*, 190 Minn. 138, 251 N.W. 121 (1933). State courts in other jurisdictions have more recently recognized that it is unlawful for a municipality to adopt land use regulations that restrict private property to a single use or a use that is economically obsolete or infeasible. “Zoning is not static.” *Stone v. City of Wilton*, 331 N.W.2d 398, 403 (Iowa 1983). A municipality’s zoning regulations are “always subject to reasonable revisions designed to meet the ever-changing needs and conditions of a community.” *Id.* “[O]utmoded zoning regulations can become unreasonable, and the zoning authority’s failure to suitably amend or modify their ordinances can become arbitrary, in which event courts can and should grant appropriate relief.” *Jefferson Co. v. O’Rorke*, 394 So.2d 937, 939 (Ala. 1981), quoting Metzenbaum, *Law of Zoning*, 1125 (2d Ed. 1955).

The Supreme Court of Pennsylvania has held that land use regulations that are “exclusionary” or “unduly restrictive” are unlawful, even if the regulations may not be “arbitrary” or “capricious” as a matter of procedural due process. See *In re Realen Valley Forge Greenes Assoc.*, 838 A.2d 718 (Pa. 2003); *C&M Dev., Inc. v. Bedminster Township*, 820 A.2d 143 (Pa. 2002) (concluding that a municipality’s one-acre minimum lot size requirement was unlawful); *Nat’l Land & Inv. Co. v. Kohn*, 215 A.2d 597 (Pa.

1966) (concluding that a municipality's four-acre minimum lot size requirement was unlawful).

In *In re Realen Valley Forge Greenes Assoc.*, a case that is strikingly similar to the present case, the Pennsylvania Supreme Court declared that it was unlawful for a municipality to maintain zoning regulations that limited private property to agricultural and residential uses after the property owner had presented unambiguous, unrebutted testimony that "single-family detached homes [were] not a feasible use" for such an "intensely developed, commercial" area of the municipality.⁷ *Id.*, 838 A.2d at 731-732.

Courts in other jurisdictions have reached similar conclusions. See *Vernon Park Realty, Inc. v. City of Mount Vernon*, 121 N.W.2d 517 (N.Y. 1954), *Fried v. Scott*, 223 N.W.S. 816 (N.Y. S. Ct. 1961); *Town of Vienna v. Kohler*, 244 S.E.2d 542 (Va. 1978); *Barratt v. Hamby*, 219 S.E.2d 399, 402 (Ga. 1975); and *Opgal, Inc. v. Burns*, 173 N.E.2d 50 (N.Y. 1961) (finding it unlawful for a municipality to maintain an industrial zoning classification for property that held no possibility for industrial use).

Restricting private property to a single use as the City has effectively done here leaves property owners at the mercy of economic forces that are beyond the property owners' control and beyond the capability of government land use planners to forecast. This Court has previously expressed its disapproval of government efforts to manipulate market forces through the adoption of land use regulations, specifically in the context of quasi-judicial conditional use permit decisions.

⁷ As discussed below, the Pennsylvania Supreme Court also concluded that the municipality's action in this case constituted unlawful "reverse spot zoning."

In *Metro 500, Inc. v. City of Brooklyn Park*, 297 Minn. 294, 211 N.W.2d 358 (1973), this Court concluded that it was beyond the authority of a municipality to second-guess the law of supply and demand by regulating through its zoning controls the number of gas stations in a municipality. The city denied an owner's application for approval to operate a gas station because there were already a sufficient number of gas stations in the area and that it was not good planning for the city to permit a "surplus" of any single type of use. *Id.* at 298, 361. This Court responded as follows:

It is difficult to conceive of a use which would be more compatible with the basic use authorized in this area. It is zoned for commercial uses and presently contains many varied retail shops and services. Among the businesses in the vicinity of the subject property are a number of gasoline stations, to which similar permits were granted.

Id. at 301, 363. This Court stated further that:

We hold that the limitation of the number of one type of use in a particular area does not bear a sufficient relationship to the public health, safety, or general welfare of a community and that the denial of a special use permit for such a reason is therefore arbitrary. The number and type of gas stations and other permissible uses within a zone should be determined by the interaction of the economic law of supply and demand rather than by the collective opinion of the members of a municipal governing body concerning the needs of the community.

Id. at 301-02, 363.

If it is arbitrary and unlawful for a municipality to defy the laws of economics by limiting the number of any one particular use within its boundaries, the inverse must also be true. It is equally unlawful for a municipality to require through its zoning regulations that private property owners maintain a particular use that economic forces have rendered infeasible and obsolete. MLUI urges this Court to follow the lead of the Pennsylvania

Supreme Court and adopt a rule that provides adequate protection for private property owners by prohibiting local government zoning authorities from adopting land use regulations that are exclusionary or unduly restrictive because they restrict the use of private property to a use or uses that are economically infeasible.

According to the Court of Appeals in this case, regulations adopted to preserve open space would be valid so long as they are adopted in a deliberative manner for the purpose of advancing a legitimate government interest (which includes preserving open and recreational space), subject only to the law of regulatory takings. *Wensmann Realty, Inc. v. City of Eagan*, A05-1074 at 2.

MLUI respectfully submits that this is not and cannot become the law in Minnesota. Such regulations, rather, should be unlawful on their face. While, as further discussed below, inverse condemnation is certainly an available remedy (See e.g. *Steel v. Cape Corp.*, 677 A.2d 636 (Md. Ct. App. 1996)), MLUI objects to the idea that citizens should be forced to endure the expense, delay, and uncertainty of an inverse condemnation action to protect their interests when the government limits their property to use as a public amenity through the adoption of land use regulations.

MLUI urges this Court to conclude that it is beyond the legislative authority of local government entities in Minnesota to adopt land use regulations that force private property owners to bear the burden of providing public park and open space amenities (or zoning regulations that have this effect, like regulations that require property to be used as a golf course when a golf course is economically infeasible), independent of whether the adoption of such regulations are unconstitutional under the law of regulatory takings.

This is consistent with other courts. For example, in *French Inv. Co., Inc. v. City of New York*, 350 N.E.2d 381 (N.Y. 1976), New York City rezoned the two private parks exclusively as parks open to the public, while granting the property owner transferable above-surface development rights. According to the Court “[t]he issue is whether the rezoning of buildable private parks exclusively as parks open to the public, thereby prohibiting all reasonable income productive or other private use of the property, constitutes a deprivation of property rights without due process of law in violation of constitutional limitations.” *Id.* at 382.

“The broad police power of the State to regulate the use of private property is not unlimited.” *Id.* at 386. Because the facts in the *French* case did not support a takings claim the Court considered whether the rezoning was a valid exercise of police power.

Id. The Court noted:

The ultimate evil of a deprivation of property, or better, a frustration of property rights, under the guise of an exercise of the police power is that it forces the owner to assume the cost of providing a benefit to the public without recoupment. * * * In other words, the removal from productive use of private property has an ultimate social cost more easily concealed by imposing the cost on the owner alone. When successfully concealed, the public is not likely to have any objection to the “cost free benefit.”

Id. at 387. The Court held the zoning amendment unreasonable and unconstitutional because, “without due process of law, it deprives the owner of all his property rights, except the bare title and a dubious future reversion of full use.” *Id.*

The same is true in this case. The unduly restrictive regulations have deprived Appellants from anything but the bare title to the property and the equally dubious right to use it for an economically infeasible purpose (which is no right at all).

In adopting regulations that preserve the Property as a public amenity, the City has subjected Appellants to years of uncertainty. It has forced Appellants to bring an inverse condemnation action and assert claims under the law of regulatory takings, which is extraordinarily complicated and tends to favor the government to an extreme degree at the expense of private property interests. To prove these regulatory takings claims, it has forced Appellants to spend substantial amounts of money on experts to prove the extent of the economic devastation they have suffered as a result of the City's actions. Other landowners will be forced to do the same. Many will not have the financial resources to do so. For example, as discussed below, a *McShane* analysis requires the owner to demonstrate a measurable decline in market value. Doing so requires expert witnesses such as appraisers and brokers. Inevitably, the case becomes an expensive "battle of experts" for which the property owner is forced to pay.

As in the *French* case, this Court should conclude that land use regulations adopted for the purpose of providing public amenities like parkland and open space are unreasonable as a matter of law, independent of whether they might also be unconstitutional if the property owner can establish a regulatory taking.

B. The City's Action Constitutes Unlawful Reverse Spot Zoning.

Minnesota appellate courts have not addressed the concept of “reverse spot zoning,” although they have recognized that “spot zoning” is unlawful. As described by this Court:

“Spot Zoning” is a label applied to certain zoning amendments invalidated as legislative acts unsupported by any rational basis related to promoting public welfare. The term applies to zoning changes, typically limited to small plots of land, which establish a use classification inconsistent with surrounding uses and create an island of nonconforming use within a larger zoned district, and which dramatically reduce the value for uses specified in the zoning ordinance of either the rezoned plot or abutting property.

State, by Rochester Assoc. of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 891 (1978). In *Rochester Assoc. of Neighborhoods*, supra, this Court recognized the doctrine of spot zoning, but refused to apply it to invalidate the zoning decision at issue in that case because the property owners had failed to establish a substantial diminution in the value of their properties or that the decisions of the City of Rochester “would create an island of nonconforming use.” *Id.* at 891-92. Here, by limiting the Property to an economically obsolete use, the City’s actions have destroyed the value of the Property. Moreover, the City’s actions have left the Property an “island” of open space in a residential locality.⁸

Courts in other jurisdictions have applied the label of “reverse spot zoning” to a municipality’s unlawful refusal to rezone property in a manner consistent with the

⁸ There is obviously nothing wrong with maintaining an “island” of open space (e.g. a park) in a residential locality. However, the “island” must be owned and maintained by the government and not forced upon private property owners at their own expense.

surrounding land. See in *In re Realen Valley Forge Greenes Assoc.*, supra; See also *Jefferson Co. v. O'Rorke*, 394 So.2d 937, 939 (Ala. 1981) (it was unreasonable for a county to refuse to rezone a 17-acre parcel of property from residential/agricultural to commercial where the character of the locality had changed so that the subject property was surrounded by commercial uses) quoting Metzenbaum, *Law of Zoning*, 1125 (2d Ed. 1955); see also *City of Miami v. Woodland Park Cemetery Co.*, 553 So. 2d 1227 (Fla. Ct. App. 1989) (applying reverse spot zoning to a municipality's refusal to rezone a cemetery to the same commercial zoning classification as the surrounding properties); *City of Conway v. Hous. Auth. of the City of Conway*, 584 S.W.2d 10 (Ark. 1979) (applying reverse spot zoning to a municipality's refusal to rezone a residential property to the same commercial zoning classification as the surrounding properties); and *Stokes v. City of Jacksonville*, 276 So.2d 200 (Fla. Ct. App. 1973) (applying reverse spot zoning to a municipality's refusal to rezone a residential property to the same commercial zoning classification as the surrounding properties).

Forcing property owners such as the Rahn Family LP to forever provide public open space because the owners did not develop their property at the same time as others is arbitrary and unfair.⁹ Refusing to amend the applicable zoning regulations to be consistent with the regulations affecting the surrounding properties when the current

⁹ Moreover, as recently noted in a recent journal article, the law currently encourages property owners to "get a shovel in the ground" immediately to avoid the risk of more restrictive future government regulations. J. David Breemer, *Playing the Expectations Game: When are Investment-Backed Land Use Expectations (Un)reasonable in State Courts?*, 38 Urb. Law. 1, 98 (2006).

allowed use becomes infeasible constitutes illegal spot zoning by the City. Accordingly, this Court should reverse the decision of the Court of Appeals.

C. Requiring The Dedication Of Private Property As Parkland Through Regulations Constitutes An Unconstitutional Taking In Violation Of Article 1, Section 13 Of The Minnesota Constitution.

This case places squarely before the Court the question left unresolved by this Court in *Mendota Golf, LLP*. In that case, this Court held that the owner of the golf course did not have the right to develop the property in accordance with the relevant zoning code where the city's comprehensive plan guided the subject property Golf Course. In this narrow context, this Court held that where there is an inconsistency between a city's comprehensive plan and the zoning code, the comprehensive plan trumps the zoning code.¹⁰ Expressly left unresolved by this Court is whether restricting the use of property to golf course or open space comports with constitutional prohibitions. According to this Court "[o]ur decision also does not foreclose Mendota Golf from asserting a regulatory takings claim if the parties cannot resolve their dispute . . . Our decision simply resolves the narrow issue that is properly before the court – whether the city had a rational basis to deny Mendota Golf's proposed amendment to the comprehensive plan." *Id.* at 182.

This Court has long recognized that onerous regulations can constitute an unconstitutional taking. See e.g. *State v. Casey*, 263 Minn. 47, 51, 115 N.W.2d 749, 753 (1962) ("if damage to the property [from a regulation] is extensive enough it will be

¹⁰This Court relied on MINN. STAT. § 473.858 providing that the comprehensive plan supersedes the zoning code.

regarded as an exercise of the power of eminent domain”). Separate and apart from any federal claims based on the United States Constitution, this Court has construed the Minnesota Constitution as providing more protection to private property owners. Taking or damage under the Minnesota Constitution can “arise out of any interference by the state with the ownership, possession, enjoyment or value of private property.” *Johnson v. City of Plymouth*, 263 N.W.2d 603, 605 (Minn. 1978).¹¹

In other words, this Court’s interpretation of the Takings Clause of the Minnesota Constitution is not bound by the United States Supreme Court’s interpretation of the Takings Clause in the Fifth Amendment to the United States Constitution. One example of a way in which the decisions of this Court differ from those of the United States Supreme Court is this Court’s recognition of “government enterprise” regulatory takings in *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). In *McShane*, this Court addressed regulations adopted for the purpose of facilitating the operation of a municipal airport. This Court concluded that those regulations constituted a regulatory taking, stating in relevant part as follows:

[W]here a specific governmental enterprise is involved, the burden of its activities falls on just a few individuals while the public as a

¹¹This Court’s broad construction of the protections afforded by the Minnesota Constitution is logical since the relevant Minnesota Constitutional provision, by its plain language, is broader than the United States Constitution. Under the Minnesota Constitutional, private property shall not be “*taken, destroyed or damaged . . .*” without just compensation. *MINN. CONST. art I, § 13*. The corresponding provision in the United States Constitution provides that private property shall not be “*taken*” without just compensation. *U.S. CONST. amend V*. As this Court concluded in a damages context in *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 115 (Minn. 2003) “even if appellants’ takings claim under the United States Constitution fails under *Penn Central*, appellants are entitled to compensation under the Minnesota Constitution.”

whole receives the advantage of property rights for which it did not pay. In essence, the public has appropriated an easement. In such cases, ... the burden of the landowner is grossly disproportionate to the burden he should be expected to bear as an ordinary citizen, and the use of regulation to take is property rights is, in effect, a shortcut to avoid compensation.

Id. at 258.

This Court restated the arbitration/government enterprise distinction in *Pratt v. State*, 309 N.W.2d 767 (Minn. 1981) as follows:

[W]here the regulation only serves an arbitration function, regulating between competing private uses for the general welfare, ordinarily no taking is involved; but where the regulation is for the benefit of a governmental enterprise, where a few individuals must bear the burden for a public use, then a taking occurs.

Id. at 773.¹² This Court stated further that it is possible for regulations to serve both arbitration and government enterprise functions, and that such dual-function regulations constitute unconstitutional takings if the government enterprise function is prominent. *Id.* at 774.

This Court should now take this opportunity to reaffirm that the Minnesota Constitution, in accordance with *McShane*, prohibits government entities from transferring the primary burden of providing a public amenity on a private property owner without providing just compensation to the owner, and that the “government enterprise” takings analysis set forth in *McShane* is separate from and independent of the regulatory takings rule developed by the United States Supreme Court under the United

¹²As this Court noted in *Spaeth v. City of Plymouth*, courts in other jurisdictions “have not been reluctant to find a taking where zoning ordinances provided only for public use of the property.” 344 N.W.2d 815, 820 (1984).

States Constitution in *Penn Central* and subsequent cases.¹³ This Court should further conclude that regulations adopted for the primary purpose of preserving open space are “government enterprise” regulations as a matter of law and constitute an unconstitutional taking if they result in a substantial decline in the market value of private property in accordance with *McShane*.

1. The City’s Actions Constitute An Unconstitutional “Government Enterprise” Taking Under *McShane*.

While Appellants have established that the City’s actions constitute a taking under *Penn Central* for the reasons discussed in Appellants’ brief, even if that were not the case, the actions of the City also clearly constitute a taking under *McShane* as the District Court concluded. Here, the City has acted for the primary purpose of advancing the government enterprise of providing open space for the residents of the City, and the City’s actions have resulted in a substantial decrease in the market value of Appellants’ property. Accordingly, the City’s actions constitute a taking under *McShane*, and this Court should reverse the decision of the Court of Appeals.

¹³Contrary to the suggestion in the City’s brief to the Minnesota Court of Appeals (and its anticipated arguments in this case), *McShane* has not been subsumed by United States Supreme Court cases interpreting *Penn Central*. Rather, it establishes a “government enterprise” test separate from the *Penn Central* factors that apply to “arbitration” type regulations. Most significantly, it effectively eliminates the “distinct investment-backed expectations” factor of *Penn Central*.

2. Providing Parks And Open Space Is A Government Enterprise.

Providing and maintaining parks and open space is a core *government* function, much as establishing and operating an airport in *McShane*.¹⁴ Any other conclusion would permit a city to zone and guide all of its property as open space, thereby eliminating any use of property until such time as the city deems a particular use worthy by amending the zoning code to permit a particular use. Though admittedly an extreme example, this is precisely what the City of Eagan in this case has done and what countless other cities will do if permitted by this Court. While cities undoubtedly have the power to condemn property for public parks and open space, or condemn a negative or restrictive easement to limit the uses of the property to open space type uses, why do so when the same thing can be accomplished by so regulating the property at no cost to the city? Such regulations clearly constitute a taking (regardless of the *Penn Central* factors) because in pursuit of the government enterprise, the property owner is forced to endure a substantial and measurable decline in the market value of the property without any benefit to the owner.

The flaw in the Minnesota Court of Appeal's decision in this case is the short shrift it paid to *McShane* in its analysis while placing significant reliance on *Mendota Golf LLP* (which as noted above did not involve a takings claim). In a footnote, the Court of Appeals concluded that *McShane* does not apply because an ordinance adopted "to effect a comprehensive plan" does not "solely" benefit a government enterprise.

¹⁴*McShane* involved regulations restricting approach plans for public airports to eliminate hazards associated with landings and take offs.

Wensmann, A05-1074 at n3. Accordingly, the Court of Appeals limited its takings analysis to the test set forth in *Penn Central*.¹⁵

The Court of Appeals' reasoning is circular. It essentially concludes that a government regulation does not benefit a government enterprise merely because it is adopted pursuant to another government regulation (the comprehensive plan), thereby elevating form over substance. This is a misinterpretation of *McShane*. In *McShane*, this Court made reference to ordinances adopted to effect a comprehensive plan as an example of a way in which a government zoning authority "arbitrates" between competing land uses. When the government acts in its arbitration capacity, this Court held in *McShane* that the government action is not an unlawful regulatory taking. *McShane*, 292 N.W.2d at 258-59. Certainly, one way the government can act in an arbitration capacity is by adopting a comprehensive plan that arbitrates between competing land uses. However, when a municipality's comprehensive plan designates private property as a particular use in order to benefit and advance a specific government enterprise (e.g. providing open space or parks to the general public) and then adopts zoning regulations to effect that designation, then the municipality cannot be said to be acting as an "arbitrator." Otherwise, a city could designate the property at issue in the comprehensive plan as a police station or school or some other public use and avoid an inverse condemnation claim under *McShane* by simply relying on the comprehensive

¹⁵This brief does not address *Penn Central*. However, to the extent this Court chooses to address *Penn Central*, MLUI fully endorses and adopts by reference the analysis under *Penn Central* contained in Appellants' brief.

plan it has adopted.¹⁶ The determination of whether a regulation fulfills a government enterprise or an arbitration function must be based on its nature, not its inclusion in a planning document.

Second, the Court of Appeals seems to suggest that a regulation must be adopted *solely* to benefit a government enterprise in order to constitute a taking. However, in *Pratt*, this Court explicitly rejected the notion that a regulation must exclusively benefit a government enterprise in order to constitute an unconstitutional regulatory taking. *Pratt*, 309 N.W.2d at 774 (“We think that here, where the governmental enterprise function is prominent, a taking may occur if the landowner’s property is substantially diminished in value”). Indeed, this Court stated that the regulation at issue in *Pratt* could constitute an unconstitutional taking even if the regulation did not *predominately* benefit a government enterprise. *Id.* Therefore, where a regulation has both prominent arbitration *and* government enterprise functions, that regulation may constitute an unconstitutional taking even if the government enterprise function is a secondary function. Accordingly, even if this Court concludes that the City’s actions in this case served an arbitration function because they were taken “to effect” its Comprehensive Plan, it should nevertheless conclude that the City’s actions constitute an unconstitutional

¹⁶As the United States Supreme Court has noted, formulations like the Court of Appeals’ interpretation of *McShane* that elevate form over substance essentially “amount to a test of whether the [government entity] has a stupid staff.” *Lucas v. South Carolina Coastal*, 505 U.S. 1003, 112 S. Ct. 2886, n12 (1992). Whether a regulation is lawful or unlawful should not depend on whether a municipality makes the correct recitations in the appropriate form, e.g. its comprehensive plan.

taking under *McShane* because they also served the prominent government enterprise function of providing open space for the benefit of the City's residents.

3. The Appellants Have Sustained A Measurable Decline In The Market Value Of The Property.

MLUI incorporates the facts in Appellants' brief demonstrating the severe impact and economic devastation caused by the City through its actions regarding the Property.

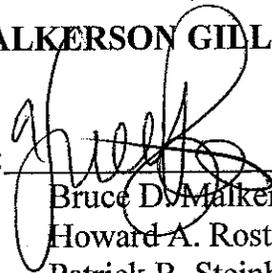
V. CONCLUSION

Based on the foregoing, MLUI respectfully urges this Court to reverse the decision of the Court of Appeals.

Respectfully submitted,

MALKERSON GILLILAND MARTIN, LLP

Dated: October 4, 2006

By: 

Bruce D. Malkerson (#066862)

Howard A. Roston (#260460)

Patrick B. Steinhoff (#340352)

220 South Sixth Street, Suite 1900

Minneapolis, MN 55402

(612) 344-1111

Attorneys for Amicus Curiae

Minnesota Land Use Institute