STATE OF MINNESOTA
COUNTY OF DAKOTA

FIRST JUDICIAL DISTRICT
HASTINGS, MINNESOTA 55033

In Re: WENSMANN REALTY, INC., A MINNESOTA CORPORATION et al.
vs. EAGAN, CITY OF, A MINNESOTA MUNICIPAL CORPORATION
Case Number: 19-C4-04-010035

JOHN MICHAEL BAKER
GREENE ESPEL
200 S 6TH ST STE 1200
MINNEAPOLIS MN 55402-1415

N O T I C E O F F I L I N G O F O R D E R

You are hereby notified on April 28, 2005 a FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND JUDGMENT

was filed in the above entitled matter.

A true and correct copy of this notice has been served by mail upon the parties named herein at the last known address of each, pursuant to the Minnesota Rules of Civil Procedure.

Sue Lawrence, Chief Deputy

By _____DEBORAH MCNAUGHTON_____
Deputy

Dated: April 28, 2005

STATE OF MINNESOTA | DISTRICT COURT

COUNTY OF DAKOTA | FIRST JUDICIAL DISTRICT

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

Plaintiffs,

v.

City of Eagan, a Minnesota municipal corporation,

Defendant.

Court File No. 19 C4-04-10035

FINDINGS OF FACT, CONCLUSIONS OF LAW, ORDER FOR JUDGMENT AND JUDGMENT

This matter came before the Court on March 30, 2005 at which time the Court heard argument on the parties' cross-motions for summary judgment.

Appearing and arguing on behalf of Plaintiffs was Wm. Christopher Penwell, Esq., Siegel, Brill, Greupner, Duffy & Foster, P.A., 100 Washington Avenue South, Suite 1300, Minneapolis, MN 55401.

Appearing and arguing on behalf of Defendant was John M. Baker, Esq. and Stacy Lynn Bettison, Esq., Green & Espel, P.L.L.P., 200 South Sixth Street, Suite 1200, Minneapolis, MN 55402.

Based upon the memoranda, affidavits, exhibits and arguments submitted by the parties, the Court makes the following:

FINDINGS OF FACT

1. Plaintiff Rahn Family, LP ("Rahn") is the owner of the Carriage Hills Golf Course located on 120 acres in Eagan, Minnesota. Prior to Rahn's purchase of the golf

course in 1996, Carriage Hills was originally developed as a 9-hole golf course in 1965 and was later redeveloped into an 18-hole course. In 1962, the property was rezoned from A, Agricultural to P, Public. In 1991, the property was designated PF, Public Facilities in the Comprehensive Guide Plan. In 2001, the Comprehensive Guide Plan was amended and the property was designated P, Park, Open Space and Recreation. The property was also given the zoning classification P, Park District.

2. Prior to Rahn's purchase of the golf course in 1996, the City considered acquiring and operating Carriage Hills as a municipal golf course. As the City was considering the possible purchase of Carriage Hills for a municipal golf course, Rahn expressed interest in buying the course as well.

3. Rahn had previously designed, built, operated and sold two other golf courses and, at the time Carriage Hills was purchased, owned a third golf course, Rich Valley golf course located in Rosemount, Minnesota. Based upon Rahn's successful operation of three other golf courses, Rahn purchased Carriage Hills with the expectation that it could be operated at a profit and would achieve a positive rate of return on Rahn's investment in the property and the golf course.

4. Although Rahn initially realized a small profit on the operation of Carriage Hills, from 1999 through 2004 the course experienced significant cumulative losses in the hundreds of thousands of dollars. In 1999, Rahn refinanced Carriage Hills through a bank loan, the proceeds of which went primarily to satisfy a contract for deed on the property and to pay for capital improvements to the course.

5. The golf course has been assessed several hundred thousand dollars for the installation of sewers, water main improvements and street upgrades. Rahn provided

access and permanent easements to the City for these infrastructure improvements. These improvements were made in anticipation of future residential development of the Carriage Hills property.

6. The City rejected an offer from Rahn to sell the golf course in June 2001.

7. Due to the substantial operating losses experienced by the course since 1999, Rahn approached Plaintiff Wensmann Realty, Inc. ("Wensmann") with an offer to sell the golf course property. Wensmann entered into a purchase agreement with Rahn for the purchase of the property.

8. Wensmann initially prepared a development plan for the construction of 720 housing units on the property. However, after meeting with residents in the neighborhoods around the golf course, Wensmann presented a development plan to the City consisting of 480 housing units and 40-45 acres of park and open green space. That development plan included the following mix of house types: "empty-nester" condominiums, urban row homes, row townhomes, traditional single-family homes, villa style single-family homes, luxury rambler twinhomes and custom single family homes. The various densities represented by these housing types were positioned to match the density of housing types in the surrounding neighborhoods.

9. Trailways within the 40-45 acres of parkland would provide public access to the park and open space as well as to Woodlands Elementary School, Eagan High School and Associated Athletic Complex. The parkland includes a softball field, soccer field, playground equipment, and picnic shelter. Wide greenway corridors maintain the natural areas on the periphery for screening from neighboring developments as well as

providing habitat connection for existing fauna. The preservation of existing wetlands also provides additional open space.

10. Along with the submission of this development plan, Wensmann submitted an application to the City requesting that the Comprehensive Guide Plan be amended to change the land use designation of the property from P – Parks, Open Space and Recreation, to LD – Low Density Residential. Wensmann represented to the City that it would make the development plan it submitted with the application a condition of the City's approval of the amendment.

11. The City planner evaluated the application and submitted a report dated July 17, 2004 to the Advisory Planning Commission. Thereafter, Wensmann's application was the subject of hearings before both the Advisory Planning Commission and the City Council.

12. The record before the City Council includes two feasibility studies of the Carriage Hills golf course commissioned by Rahn. The City declined to table its decision on Wensmann's application to allow time to commission its own feasibility study.

13. The studies commissioned by Rahn showed that the current debt on the property is significantly higher than the probable value of the golf course as a going concern and the financial feasibility of the future operation of the golf course is seriously impaired due to the overbuilding of the local golf course market and the functionally obsolete nature of the course.

14. Wensmann's proposed development would not have a negative impact on traffic. The traffic analysis prepared by Wensmann's engineer shows that the increase in traffic and change in traffic patterns associated with the development would not cause

unacceptable conditions. The 2,811 trips per day generated by the development would be distributed over three main collector streets (Yankee Doodle, Wescott Woodlands and Duck Woods). The development would eliminate an existing traffic problem. The City staff's planning report does not identify any safety concerns regarding traffic. The only support for the City's finding that the development would likely disrupt existing neighborhoods surrounding the site is the testimony of a single individual. Though he spoke on behalf of the coalition of people opposed to the development, he only identified the existing safety condition that would be eliminated by Wensmann's development plan.

15. Wensmann's proposed development plan would improve the quality of the water currently on the site and would reduce current drainage problems. Wildlife that currently inhabits the golf course would likely continue in the proposed development. Habitat diversity would be increased by the introduction of new plant and animal species.

16. In the record before the City council was a letter from the Eagan school district to the City planner dated July 14, 2004. This letter stated that, with slight boundary shifts and with the addition of classrooms that will occur as a result of a recent bond referendum, projected enrollment could be accommodated even with the addition of Wensmann's proposed development. Although one individual testified before the Advisory Planning Commission that the middle and senior high schools are massively over capacity, that comment is unsupported by any data or statistics and is contradicted by the school district letter. The City's planning report shows that enrollment at the elementary and middle schools will fall below capacity after 2006, well before Wensmann's projected 2008 build-out.

17. There is sufficient capacity and depth within the existing trunk and lateral sanitary sewer to accommodate the proposed development. The development plan meets the MUSA goal of maximizing the in-place infrastructure so as not to incur the additional cost to communities of extending services. The development plan has also anticipated the storm water storage volume required for the site and, as such, would meet the storm water requirements of the site. Adequate capacity for sanitary sewers; watermains; storm water management and street connections, next to or within the golf course, are available to support the proposed development.

18. The City of Eagan's planning report dated June 22, 2004 states:

> A key principle, implicit in all the City's park planning over the years, has been that of a public-private partnership in which the private sector has always been given the first option to provide desired recreational opportunities in the community. Thus, the City's Park System Plans have consistently recognized Carriage Hills, a privately owned, open to the public golf course, as a component of the community's parks and recreation system.
>
> The City's park and recreation system is that of a public – private partnership in which the private sector has always been given the first option to provide desired recreational opportunities in the community and the City has avoided competing with the private provision of these services. The City's park system plans have always acknowledged the need for golf courses as part of the overall recreation system, and have consistently recognized Carriage Hills, a privately owned, open to the public golf course, as a component of the community's parks and recreation system.

19. In 1996, when the City denied a similar application by Pulte to amend the Comprehensive Guide Plan, the City's resolution stated, "It has been the goal of the community to cooperate with private enterprise wherein private individuals would provide certain community facilities...."

20. The City's Comprehensive Guide Plan authorizes the City "to acquire land, if feasible, for parks..." and to "pursue the acquisition and development of neighborhood parks." The plan states:

> The park plan proposes an investment strategy that views the park system as an integral part of the development context of the community. It contains a number of investment proposals to further Eagan's fundamental system built around the neighborhood parks, extend opportunities for outdoor recreation, and promote protection of environmental and natural resources. *** It also acknowledges the need for creative pursuit of funding and partnership with outside providers (e.g., county, state, schools, private).

21. The Metropolitan Council's 2030 Regional Development Framework encourages taking measures whereby "new development can be located and designed in a way that preserves and benefits from the natural environment." One of these measures is for each region "to identify natural areas that could be added to the regional park system and plan for their acquisition before the opportunity is lost." Two of the policies set forth in the Regional Development Framework are to "encourage expanded choices and housing location and types" and "work with local and regional partners to conserve, protect and enhance the regions vital natural resources." The second policy includes "invest[ing] in acquisition and development of land for the regional park system." The Framework recognizes that "protection of these natural resource lands would require the designation of additional acres for residential development.

22. The Minnesota Legislature has enacted numerous statutes which authorize the acquisition of land for parks, open space and recreation. Minn. Stat. §§ 473.147, subd. 1; 473.302; 473.313, subd. 1; 473.315; 331.

23. The Housing Plan, incorporated into the City's Comprehensive Guide Plan, sets forth the following policies:

1. The City will support the preservation and maintenance of significant woodlands, wetlands and other natural features within all developments in order to maintain a high quality living environment within the City.

2. The City will review preliminary residential subdivision proposals and corresponding drainage, grading, utility and similar plans to insure that the existing environment is properly protected and preserved.

3. The City will work with developers to modify engineering standards where appropriate to insure adequate protection of natural resources.

The Housing Plan also states that the City "will encourage development of additional lower density...." The Housing Plan recognizes that there are currently housing types which are not available for seniors and empty-nesters.

24. The clear import of the documents and statutes described in paragraphs 18-23 above is that land must either be acquired through eminent domain for park, recreation and open space purposes or dedicated for such uses as part of residential development of land. An exception to this is when such uses can be provided through public-private partnership. Carriage Hills has always been considered a community recreational opportunity and a component of the City's parks and recreation system and, therefore, one example of a public-private partnership.

25. The Assessment Agreement between Rahn and the City, the City's Planning Report on the Wensmann application, and the planning reports for the three existing developments surrounding the golf course all explicitly anticipate residential development of the golf course in the future. This was acknowledged by members of both the Advisory Planning Commission and the City Council.

26. Though the golf course has been operated on the property since 1959, the nature and use of the surrounding property has changed dramatically from agricultural to mixed density residential. When the golf course was established, the surrounding area consisted of large rural parcels. Until 1979, the only platted subdivision was east of the course and it consisted of several 10-acre lots, only some of which had residences built on them. Not until 21 years after the course was constructed did significant residential development begin, continuing rapidly until 1990.

27. There are two other golf courses in Eagan and 120 public golf courses and 39 private golf courses within 25 miles of Carriage Hills. The impact of the over-saturation of new golf courses in Eagan and the Twin Cities has directly impacted the area surrounding the golf course by causing residents to play golf somewhere other than Carriage Hills. Only one person living within a 600-foot radius of Carriage Hills is a member and only 18 in the entire City are members. Eagan High School neither practices nor plays their matches at Carriage Hills. There is not a single junior member that resides in the City of Eagan.

28. Following the City Council hearing on Wensmann's application on August 2, 2004, the City issued its Findings of Fact, Conclusions and Resolution dated August 17, 2004 denying the application.

CONCLUSIONS OF LAW

1. "Where a city acts in its fact finding or legislative policy making capacity under its delegated powers, the scope of [this Court's] review is very narrow, and the city's actions are subject only to the broad limits of the arbitrary and capricious standard." *Freundshuh v. City of Blaine*, 385 N.W.2d 6, 8 (Minn. Ct. App. 1986). This

standard has variously been expressed as: "Is there a 'reasonable basis' for the decision? or is the decision 'unreasonable, arbitrary or capricious'? or is the decision 'reasonably debatable'?" *Hoskin v. City of Eagan*, 632 N.W.2d 256, 258-59 (Minn. Ct. App. 2001). "The test, then, is whether the reasons given by the city council are legally sufficient and supported by facts in the record." *Parranto Bros. v. City of New Brighton*, 425 N.W.2d 585, 589 (Minn. Ct. App. 1988).

2. The proceedings before the City Council were fair and the record is clear and complete. Therefore, this Court's review is limited to that record. *Swanson v. City of Bloomington*, 421 N.W.2d 307 (Minn. 1988). This rule does not apply to the takings analysis below.

3. The City has argued that residential development on the property would be inconsistent with the goals, and would compromise the integrity, of the Comprehensive Guide Plan; residential development of the property would cause a significant increase in traffic, and would disrupt existing neighborhoods surrounding the property; and residential development of the property would create additional strain on the already overburdened school system. These reasons, as well as all of the other reasons set forth in the City Council's August 17, 2004 Finding of Fact, Conclusions and Resolution, are legally insufficient and are not supported by facts in the record.

4. Wensmann's proposed development plan advances all of the applicable goals and policies set forth in the Housing Plan attached to the Comprehensive Guide Plan while also advancing the Guide Plan's goals and policies intended to preserve park and recreational land uses.

5. The vague, unsupported testimony of two individuals about traffic and school capacity do not provide a basis for the City's denial of Plaintiffs' application, particularly in view of the traffic study submitted by Plaintiffs' engineer and the school district's letter. *Yang v. County of Carver*, 660 N.W.2d 828, 834 (Minn. Ct. App. 2003); *C.R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981); *Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee*, 226 N.W.2d 306, 309 (Minn. 1975); *Northwestern College v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979).

6. The City's Conclusion number 4 is contradicted by the *Hughes* and *McMurchie* studies which the City chose not to rebut. Conclusion number 10 is contradicted by the City planning report (see, Finding of Fact No. 14). Conclusion number 15 is not a legally sufficient reason. *Larson v. County of Washington*, 387 N.W.2d 902, 906 (Minn. Ct. App. 1986). Conclusion number 16 relies on a fact that occurred 40 years ago and cannot support the City's decision. Conclusion numbers 19 and 20 are legally insufficient. *Palazzolo v. Rhode Island*, 533 U.S. 606, 630 (2001); *Communications Properties v. Steel County*, 506 N.W.2d 670, 672 (Minn. Ct. App. 1993).

7. The City's Conclusion numbers 6, 8, 9, 13, 14 and 18 all relate to the benefit to the City, the goals of the City and the quality of life for the City's residents. The effect of the City's denial of Wensmann's application is to force Rahn to either continue to incur substantial and increasing annual losses or cease any use of the property at all so that the City and its residents can benefit from maintaining the property as open space without the City having to acquire the property. This one-sided benefit to the City

is not only at odds with its goal of preserving public amenities such as parks and open space through private-public partnerships, it is arbitrary and capricious as a matter of law. See, *Pheasant Bridge Corp. v. Township of Warren*, 169 N.J. 292 (2001); *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978); *Sheerr v. Eveshan Township*, 184 N.J. Super. 11 (1982); and *Communications Properties*, supra.

8. Wensmann's proposed development plan, in effect, reestablishes the private-public partnership on this property by both advancing the goals and policies set forth in the Housing Plan to the Comprehensive Guide Plan and the goals and policies in the Guide Plan of preserving park, recreation and open space which can be utilized by all residents at any time without charge.

9. In addition to the arbitrary and capricious standard, *Sun Oil Co. v. Village of New Hope*, 220 N.W.2d 256 (Minn. 1974) sets forth another test for challenging a city's refusal to rezone property. The test is whether "the character of the neighborhood has changed to such an extent that no reasonable use can be made of the property in its current zoning classification." *Freundshuh*, supra., 385 N.W.2d at 8-9, citing *Sun Oil*, 220 N.W.2d at 261.

10. Operating a golf course on the property is no longer a reasonable use; neither capital improvements nor increased marketing can reverse the substantial annual losses experienced by the course. The City has not challenged the Affidavits of Philip Carlson or Garfield Clark which state that none of the conditional or permitted uses currently allowed under the City Code would be reasonable uses.

11. In the last 40 years, the subject property has undergone a substantial change since the enactment of the original zoning classification. Similar to the *Pearce*

case cited in *Sun Oil*, the subject property is virtually surrounded by residential zoning and is a "peninsula" among residential uses. As such, rezoning the subject property LD – Low Density, is the most reasonable zoning classification for the property. (See Finding of Fact Nos. 26 and 27).

12. The Fifth Amendment to the United States Constitution, made applicable to the states through the Fourteenth Amendment, states: "Nor shall private property be taken for public use, without just compensation." Minn. Const. Art. I, § 13 states: "Private property shall not be taken, destroyed or damaged for public use without just compensation. Minn. Stat. § 117.025, subd. 2 states: "A taking includes every interference, under the right of eminent domain, with the possession, enjoyment or value of private property." Once a taking is found, compensation is required by operation of law. *Wagner v. Milwaukee Mutual Ins. Co.*, 479 N.W.2d 38, 42 (Minn. 1991).

13. Actions for inverse condemnation must be brought to the court through an action in mandamus. District courts reviewing a petition for writ of mandamus must decide whether a taking of property has occurred in a constitutional sense. *Nolan v. City of Eagan*, 673 N.W.2d 487 (Minn. Ct. App. 2003). Property owners who believe their property has been taken within the meaning of Minn. Const. Art. I, § 13 may petition the court for a writ of mandamus to compel the state to initiate condemnation proceedings under Minn. Stat. Chapter 117. *Grossman Investments v. State*, 571 N.W.2d 47, 50 (Minn. Ct. App. 1997).

14. The United States Supreme Court, in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), has stated that "the Fifth Amendment's guaranty...[is] designed to bar government from forcing some people alone to bear public

burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 124. The test articulated in *Penn Central* to determine whether a taking has occurred considers (1) the economic impact of the regulation on the property owner, (2) the extent to which the regulation has interfered with distinct investment-backed expectations, and (3) the character of the governmental action. This takings analysis "depends largely upon the particular circumstances" of each case and involves "essentially *ad hoc*, factual inquiries." *Id.* at 124.

15. In *Agins v. Tiburon*, 447 U.S. 255 (1980), the U.S. Supreme Court stated that "although no precise ruling determines when property has been taken, the question necessarily requires a weighing of private and public interests." *Id.* at 261. A use restriction on real property may constitute a taking "if not reasonably necessary to the effectuation of a substantial public purpose or perhaps if it has an unduly harsh impact upon the owner's use of the property." *Palazzolo v. Rhode Island*, 533 U.S. at 627. The proper weighing of private and public interest would include consideration by a city of "how well the proposed development would preserve the surrounding environment and whether the density of new construction will be offset by adjoining open spaces." *Agins*, 447 U.S. at 262.

16. "As affirmed in *Palazzolo*, rights to use property are not gifts of governmental largesse; they are, in the Lockean sense, rights that precede government. To suggest that government can destroy the uses of property, including the long-standing common law right to develop it, leaving behind only the marginal value of the ability to resell useless property, is utterly inconsistent with these principals." *Taking Sides on Takings Issues*, p. 466. "Justice Steven's lengthy review of 'fairness and justice'

concerns [in *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002)], is a reminder that local governments have a serious responsibility to review their regulatory decision-making processes and to make sure that land use regulations not only foster articulated public goals but also permit private landowners to use their property in some reasonable economic manner." Salsich and Trynieck, *Land Use Regulation* (2nd Edition 2003) at p. 116.

17. Governmental inaction can constitute an unconstitutional taking the same as governmental action. *Czech v. City of Blaine*, 253 N.W.2d 272, 273 (Minn. 1977). The City's denial of Wensmann's application to amend the City's Comprehensive Guide Plan constitutes governmental inaction which has effected an unconstitutional taking of the subject property under *Penn Central.*

18. With respect to the economic impact of the City's denial on Rahn, the denial leaves Rahn with only the option of either continuing to operate the golf course at substantial annual losses or let the property sit economically idle.

19. With respect to the extent to which the City's denial interferes with distinct investment-backed expectations, the Minnesota Supreme Court has characterized this part of the test as "the owner is not permitted to obtain a reasonable rate of return on his investment." *State by Powderly v. Erickson*, 285 N.W.2d 84, 90 (Minn. 1979). Rahn cannot obtain a reasonable rate of return on his investment in the property.

20. The City itself has defined the reasonable investment-backed expectations of the owner of the subject property. First, a goal and policy set forth in the City's Comprehensive Guide Plan is "to acquire land, if feasible, for parks..." and to "pursue the acquisition and development of neighborhood parks." This is consistent with the

system of laws of procedures which are integrated from the state level down to the level of local government which govern land use planning and which contemplate acquisition of property for parks, open space and recreation. (Finding of Fact Nos. 20-22). The conclusion set forth in the affidavit of Phillip Carlson at ¶¶ 7 and 8 is adopted by the Court: "It is appropriate for the City to set aside areas for the use and enjoyment of the public as open space and recreational use areas, but typically these areas are purchased by the City or dedicated as part of the process of subdivision. *** If park and open space areas are to be provided for in a city, then the city must be prepared to pay for them or have them dedicated according to a reasonable and proportional formula based on a comprehensive park plan and study of the recreational needs in the city."

21. The Guide Plan provides that a potential way to avoid having to acquire land for use as park, recreation or open space is through a partnership with outside providers. The City planning report expressly recognizes this option: "Since 1973, a key principal, implicit in all the City's park planning has been that of a public-private partnership in which the private sector has always been given the first option to provide desired recreational opportunities in the community." The City had the benefit of availing itself of this public-private partnership with the owner of the subject property for 40 years. However, the partnership ended when circumstances changed so that the City has the sole benefit of the partnership while Rahn must either operate the golf course at a substantial loss or let the property sit economically idle while continuing to be responsible for the bank debt on the property. Without the mutual benefit of the public-private partnership, the City must acquire the property if it wants to preserve all 120 acres as open space.

22. Second, Finding of Fact number 24 establishes that the City has anticipated for some time residential development of the subject property. Whether or not this gives the property some speculative value is not a consideration in the takings analysis. *Sheerr*, 184 N.J. Super. at 53-54; *Taking Sides on Takings Issues* at p. 429. To delay what the City has admitted will be the eventual use of the property would have "an unduly harsh impact upon the owner's use of the property." *Palazzolo*, 533 U.S. at 627.

23. With respect to the character of the governmental action, the Minnesota Supreme Court has said, "if the state regulation appears genuinely designed to prevent harm to the public and is likely to achieve that goal and the harm suffered by the property owner does not appear to be one that should be borne by the entire community, we will not find a taking." *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 554 (Minn. 1996). The City's denial of Wensmann's application is not designed, e.g., to protect an endangered species or prevent harm to the environment. This is the same as cases which have found a taking where the governmental action was designed to preserve open space or a community recreational opportunity. See, *Morris County Land v. Parsippany-Troy Hills Township*, 40 N.J. 539 (1963); *Steel v. Cape Corp.*, 111 Maryland App. 1 (1996); *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983); *Burroughs v. City of Keen*, 121 N.H. 590 (1981); *Corrigan v. City of Scottsdale*, 149 Az. 553 (App. 1985). The following quote from *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) applies to the City's denial of Wensmann's application:

> On the other side of the balance, affirmatively supporting a compensation requirement, is the fact that regulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them heightened risk that private property is being pressed into some form of pubic service under the guise of mitigating

> serious public harm. (citations omitted). As Justice Brennen explained: from the government's point of view, the benefits flowing to the public from preservation of open space through regulation may be equally great as from creating a wild life refuge through formal condemnation.... (citation omitted). The many statutes on the books, both state and federal, that provide for the use of eminent domain to impose servitudes on private scenic lands preventing developmental uses, or to acquire such lands altogether, suggest the practical equivalence in this setting of negative regulation and appropriation. (citing to laws which authorize acquisition for, e.g., scenic easements, wetlands and easements to protect historic, architectural, archeological, or cultural resources). *Id.* at 1017-20.

24. Finding of Fact number 22 cites to the many statutes passed by the Minnesota Legislature authorizing acquisition of land for open space. It is a taking for the City to deny Wensmann's application, requiring Rahn to leave the property "substantially in its natural state." Rahn cannot obtain a reasonable rate of return on its investment through operation of the property as a golf course; if the City wants the property to remain as exclusively open space or a community recreational opportunity, it must acquire the property through eminent domain. The proper weighing of private and public interests under *Agins* would weigh in favor of Wensmann's proposed development plan which advances the goals and policies of the Comprehensive Guide Plan, including development of low density housing, providing housing types not currently available, and preserving a third of the property as park and open space.

25. The City's denial of Wensmann's application, in addition to being a taking under the *Penn Central* test, is also a taking under *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980). A governmental enterprise is benefited by the City's denial inasmuch as the City has identified the golf course as a community recreational opportunity and has "always acknowledged the need for golf courses as part of the overall recreation system." (Finding of Fact No. 18). See, *Johnson City v. Cloninger*,

372 S.W.2d 281 (Tenn. 1963): in finding a golf course to be a public use, the court stated that the word "park" is "certainly broad enough, in the every day sense of the word, to include a golf course...and the host of other recreational facilities to which the public normally turned for relaxation and recreation." The subject property is substantially diminished in value measured by the value of the property if residential development is permitted and the value of the property if it is not. The burden on Rahn is grossly disproportionate to the burden it should be expected to bear while the City receives the advantage of property rights for which it did not pay. The Court need not reach the question of the dollar amount by which the property has been substantially diminished since the Court has concluded there is a taking under *Penn Central.*

ORDER FOR JUDGMENT AND JUDGMENT

1. Plaintiffs' Motion for Declaratory Judgment is hereby granted and the City is ordered to immediately amend its Comprehensive Guide Plan to change the land use designation for the subject property from P – Parks, Open Space, and Recreation to LD, Low Density, and further to rezone the property consistent with the amended Comprehensive Guide Plan. Following amendment of the Comprehensive Guide Plan, Defendant shall diligently submit the amendment for review and adoption by the Metropolitan Council in accordance with the provisions of Minn. Stat. § 473.864.

2. The relief granted in paragraph 1 above is expressly conditioned upon Wensmann resubmitting to the City the same development plan it submitted in connection with its application to amend the Comprehensive Guide Plan.

3. If, within thirty (30) days of the date of this Order for Judgment and Judgment, the City fails to comply with paragraph 1 above, the City shall immediately

commence eminent domain proceedings against the subject property pursuant to Minn. Stat. Chap. 117.

4. Pursuant to Minn. Stat. § 586.03, the City shall appear and show cause before this Court at a special term hearing thereof to be held at the Dakota County Government Center on June 27, 2005 at 9:00 a.m. why the City has not either complied with paragraph 1 above or commenced eminent domain proceedings, or else return this Writ of Mandamus with a certificate on such return of having complied with this Order. If the City fails to comply with this Order or commences eminent domain proceedings, the Court will consider a petition by Plaintiffs for reimbursement of their reasonable costs and expenses, including reasonable attorney, appraisal and engineering fees incurred in bringing this action, pursuant to Minn. Stat. § 117.045.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: 4/27, 2005.

BY THE COURT:

Patrice K. Sutherland
Judge of District Court

JUDGMENT

I HEREBY CERTIFY THAT THE ABOVE ORDER CONSTITUTES THE JUDGEMENT OF THIS COURT.

JAN A. BROSTROM, COURT ADMINISTRATOR

BY: Deborah Malquist DEPUTY

DATED: April 27, 2005 (SEAL)