State Of Minnesota
In Court of Appeals
NO. A05-1074

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

Respondents,

City of Eagan, a Minnesota municipal corporation,

Appellant.

BRIEF OF RESPONDENTS WENSMANN REALTY, INC. AND RAHN FAMILY, LP

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 Appellant

Wm. Christopher Penwell (#164847)
Siegel, Brill, Greupner, Duffy & Foster, P.A.
100 Washington Avenue South
Suite 1300
Minneapolis, MN 55401
(612) 337-6100
Attorneys for Respondents

Andrew D. Parker (#195042)
Nancy V. Mate (#295711)
Smith Parker, P.L.L.P.
808 Colwell Building
123 North Third Street
Minneapolis, MN 55401
(612) 344-1400
Attorneys for Amicus Curiae Met Council

(Additional Counsel listed on following page)

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STATEMENT OF ISSUES

Appellant's issue number 1 incorrectly states that "the District Court ordered the City to rezone the property and to approve a site plan for the property." First, the District Court ordered the City "to rezone the property consistent with the amended Comprehensive Guide Plan."[1] As the Metropolitan Council points out in its Amicus Brief, Minnesota law "requires zoning ordinances to be brought into compliance with comprehensive plans...."[2] The District Court only ordered the City to do what is statutorily mandated. Second, the District Court did not order the City to approve a site plan for the property. Rather, the District Court expressly conditioned amendment of the Comprehensive Guide Plan upon "Wensmann resubmitting to the City the same development plan it submitted in connection with its application to amend the Comprehensive Guide Plan."[3] There is nothing in the District Court's Order which restricts the City in any way from applying to Wensmann's plan the same process it applies to a development plan submitted by any other property owner.

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[1] App. 21.
[2] Brief of Amicus Curiae Metropolitan Council, p. 14, n. 12.
[3] App. 21.

STATEMENT OF FACTS

The City has selectively recited facts which underscore its two primary themes: (1) Rahn purchased the subject property with the sole expectation of operating it as a golf course; and (2) Rahn now expects the City to bail it out of a bad investment, or at least an investment which is no longer profitable due to events and circumstances unrelated to any action or inaction on the part of the City.

Respondents provide below a full recitation of the facts to show that:

1. The City has always considered Carriage Hills Golf Course as a component of the community's parks and recreation system.

2. The City has always considered the golf course a part of a public-private partnership in which the private sector has been given the first option to provide desired recreational opportunities in the community.

3. The Carriage Hills Golf Course will continue to incur substantial annual losses regardless of the amount of advertising, promotion and capital improvements that have been made or could be made in the future. The course did not open for the 2005 season and remains economically idle.

4. The public-private partnership between the City and Rahn is no longer a partnership, i.e., the City expects Rahn to massively subsidize a public recreational amenity at a substantial loss to Rahn.

5. One of the goals and policies of the City's Comprehensive Guide Plan is "to acquire land, if feasible, for parks..." and to "pursue the acquisition and development of neighborhood parks."

6. The state, county and city have the statutorily based authority to acquire property through eminent domain for parks, recreation and open space.

7. The City denied Wensmann's application for an amendment to the Comprehensive Guide Plan solely so that the City could retain park, recreation, and open space without acquiring the subject property.

8. Rahn cannot conduct any of the other permitted or conditional uses under the current guiding and zoning of the property and Wensmann's application to amend the Guide Plan seeks the next lowest density use of the subject property, i.e., low density residential.

9. The City, by its own admission, will someday permit residential development on the subject property; it is only a question of when. To that end, Rahn has paid assessments to bring streets, sewer and water to the Property in anticipation of future development of the Property.

10. With one exception, the City staff planning report expressed no reservations or concerns about Wensmann's development plan and, though the issue was disputed at the District Court level, Respondents' believe that staff recommended approval of the plan.

11. Wensmann's proposed development plan maintains the integrity of the Comprehensive Guide Plan and meets all of the goals and policies set forth in the Guide Plan which apply to the subject property.

A. The City has always considered Carriage Hills Golf Course as a component of the community's parks and recreation system.

The Property is guided Parks, Open Space and Recreation which "provides areas for public and private parks, open space and recreational facilities. Parks, trails, open space and natural areas, ...and golf courses are examples of desired uses in this category."[4] The City Staff Planning Report dated June 22, 2004 prepared in connection with Wensmann's application for an amendment to the Guide Plan states: "The City's Park System Plans have always acknowledged the

[4] Comprehensive Guide Plan, Resp. 125.

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."[5] This language appears almost verbatim in the City's August 17, 2004 Findings of Fact, Conclusions and Resolution denying Wensmann's application for an amendment to the Guide Plan.[6]

B. The City has always considered the golf course a part of a public-private partnership in which the private sector has been given the first option to provide desired recreational opportunities in the community.

The June 22, 2004 City Staff Planning Report 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.
>
> ***
>
> 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 opportunity to provide desired recreational opportunities in the community and the City has avoided competing with the private provision of these services.[7]

This public private partnership was acknowledged when Pulte Homes of Minnesota applied to the City in 1996 for an amendment to the Guide Plan in connection with the subject property: "It has been the goal of the community to cooperate with private enterprise wherein private individuals would provide

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[5] App. 60.
[6] App. 232, ¶ 22.
[7] App. 56-57.

certain community facilities such as daycare centers, commercial recreational facilities, golf courses and similar public uses...."[8] Similar language appears in the City's August 17, 2004 Resolution denying Wensmann's application: "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)".[9] The Comprehensive Guide Plan itself also recognizes this public private partnership:

> 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).[10]

C. The Carriage Hills Golf Course will continue to incur substantial annual losses regardless of the amount of advertising, promotion and capital improvements that have been made or could be made in the future. The course did not open for the 2005 season and remains economically idle.

Prior to Rahn's purchase of the golf course in 1996, the City commissioned two studies for the express purpose of determining whether to acquire and operate

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[8] See, Findings of Fact, Conclusions and Resolution dated April 2, 1996 which is attached as Exhibit A to the City's August 17, 2004 Resolution denying Wensmann's application for an amendment to the Guide Plan, App. 238, ¶ 2(b).
[9] Resp. 232, ¶ 21.
[10] App. 70.

the subject property as a municipal golf course.[11] As the City was considering the possible purchase of the subject property, Rahn expressed interest in buying the course as well. Rahn had previously designed, built, operated and sold two other golf courses and currently owned a third golf course, Rich Valley Golf Club located in Rosemount, Minnesota.[12] The City was "just ecstatic" that Rahn was interested in purchasing Carriage Hills.[13] In fact, City officials represented that the City would support Rahn's purchase of the course by holding events there such as police golf tournaments and school activities. Unfortunately, no City entity ever sponsored an event at the course.[14]

Rahn purchased Carriage Hills from William Smith for $3.6 million in 1996. Rahn has also made significant capital improvements to the property in an amount in excess of $300,000.[15]

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.[16] For the first year or two, Rahn realized a small profit on the operation of Carriage Hills. However, from 1999 to 2003, the course suffered significant cumulative losses of over [Conf. Resp. 1, "A"]. It is estimated that losses for 2004 were approximately [Conf. Resp., "B"].

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[11] See, App. 77-102; Resp. 152-83.
[12] Rahn Aff., ¶ 2, Resp. 6-7.
[13] Rahn Depo. p. 75, Resp. 307.
[14] Rahn Aff., ¶ 5, Resp. 7.
[15] Rahn Aff., ¶ 7, Resp. 7-8.
[16] Rahn Aff., ¶ 4, Resp. 7.

Rahn attempted to attract golfers through a number of marketing efforts including discount rates for juniors and senior citizens, weekday discounts, tournaments and leagues, flat fee annual memberships, joint memberships at Carriage Hills and Rich Valley and a live radio broadcast from Carriage Hills.[17]

In June 2001, following communication with home builder D.R. Horton about the possible purchase of the property, Rahn offered to sell the golf course to the City but the offer was rejected. Also in 2001, the City changed its Comprehensive Guide Plan to change the Property's land use designation from PF – Public Facilities, to P – Parks, Open Space and Recreation.[18] Rahn did not know about the change until 2003.[19] This change eliminated the possibility that Rahn could sell the Property for use as a site for a hospital, church, or school.

In connection with Wensmann's application for an amendment to the Guide Plan, the City was presented with two feasibility studies of the Carriage Hills Golf Course prepared by reputable golf course analysts.[20] The Hughes study concluded that "the financial feasibility of the future operation [of Carriage Hills] as a golf course is seriously impaired" due to the overbuilding of the local golf course market and the "functionally obsolete" nature of the course and recommended that

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[17] Rahn Aff., ¶ 8, Resp. 8; Powerpoint presentation, Resp. 252-53.
[18] Memo from City Planner Ridley to City Administrator Hedges dated 12/9/03. Resp. 265-72.
[19] Rahn Aff. ¶ 14, Resp. 9.
[20] Hughes & Company, Inc. Feasibility Study dated July 17, 2004. Resp. 209-23 and McMurchie Golf Management, Inc. Analysis of Market and Financial Factors dated July 27, 2004. Resp. 224-29.

the course be developed.[21] The study states: "The current golf course is definitely not the highest and best use of this site. Even if the course is improved over time, there is barely enough cash to upgrade and effectively no return to ownership for taking such a risk."[22] The same conclusion was reached almost ten years earlier in two studies that had been commissioned by the City to determine whether the City should purchase the Carriage Hills Golf Course, i.e., both studies concluded that the City could not purchase and operate the course at a profit.[23]

Rahn did not open the golf course for the 2005 season. Since the loan with the Vermillion State Bank is secured by the Rich Valley Golf Club as well as Carriage Hills, Rahn faces the serious risk of losing both properties.[24] No potential buyer has shown any interest in the property other than for development for residential purposes.[25] No buyer would be interested in purchasing the subject property for the uses identified in the City zoning ordinance and Comprehensive Guide Plan.[26] None of the uses identified in the City's zoning regulations or the Comprehensive Guide Plan provide a reasonable or viable use of the subject

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[21] Resp. 218.
[22] Resp. 210.
[23] Analysis of Key Issues Important to the Possible Acquisition of Carriage Hills Golf Course by the City of Eagan, Minnesota, September 1995. Resp. 95-96; Alternatives for a Municipal Golf Course in the City of Eagan, Minnesota, April 1996, using option 2 which assumes the most pressing improvements are made to the course. Resp. 165, 183.
[24] Rahn Aff., ¶ 15. Resp. 9-10.
[25] Rahn Aff., ¶ 16. Resp. 10.
[26] Affidavit of Garfield Clark, ¶ 4. Resp. 2.

property.[27] Due to the substantial financial losses incurred in previous years and the conclusion of the golf course studies that the golf course was not a financially viable use for the subject property; the course did not open for the 2005 season.

D. The public-private partnership between the City and Rahn is no longer a partnership, i.e., the City expects Rahn to massively subsidize a public recreational amenity at a substantial loss to Rahn.

Black's Law Dictionary defines partnership as "a voluntary contract between two or more competent persons to place their money, effects, labor, and skill, or some or all of them, in lawful commerce or business, with the understanding that there shall be a proportional sharing of the profits and losses between them." In several documents cited above, the City has expressed its desire to provide community recreational opportunities such as golf courses to the public through a private-public partnership. However, in the case of the Carriage Hills Golf Course, there is no longer a partnership because Rahn incurs all of the loss and receives no benefit while the City does not share in any of the loss and gains all of the benefit of having park, recreation and open space without having to acquire the property.

E. One of the goals and policies of the City's Comprehensive Guide Plan is "to acquire land, if feasible, for parks..." and to "pursue the acquisition and development of neighborhood parks."

The Park and Recreation System Plan, which is part of the City's Comprehensive Guide Plan identifies as one of the City's goals: "To acquire land, if feasible, for parks in those areas of the City identified as deficient in the Parks

[27] Affidavit of Philip Carlson, ¶¶ 3-6. Resp. 12-13.

System Plan or expansion of an existing park as determined to be beneficial."[28] One of the policies under the Park System Plan is: "The City will pursue the acquisition and development of neighborhood parks in order that each neighborhood service area, as illustrated in the Park System Plan, is adequately served with appropriate recreational facilities."[29] Consistent with the City's goals and policies, the City has purchased private property for park purposes.[30]

F. The state, county and city have the statutorily based authority to acquire property through eminent domain for parks, recreation and open space.

The Metropolitan Council 2030 Development Framework asks the following question: "How can the region capitalize on opportunities for economic development while preserving its vital natural assets and abundant opportunities for outdoor recreation?"[31] Throughout this Framework, there is a recognition of the inevitable tension between development of property, on the one hand, and preservation of parks and open space, on the other. The Metropolitan Council encourages taking measures whereby "new development can be located and designed in a way that preserves and benefits from the natural environment."[32] 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

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[28] App. 62.
[29] App. 63.
[30] See, City's purchase of approximately 25,000 square feet for park purposes for a maximum of $50,000, Eagan City Council Meeting Minutes of January 18, 2000. Resp. 273-74.
[31] Resp. 21.
[32] Resp. 38.

opportunity is lost."[33] The Metropolitan Council has a policy of "work[ing] with local and regional partners to conserve, protect and enhance the region's vital natural resources" which includes "invest[ing] in acquisition and development of land for the regional park system."[34] The Metropolitan Council has established a Capital Improvement Program Fund for the express purpose of acquiring park lands.[35] As part of its policy to acquire land for the park system, the City has developed a five year capital improvement plan.[36] The Metropolitan Council has developed a 2030 Regional Parks Policy Plan which has earmarked $435.7 million in public funds to, in part, acquire land for parks.[37] Dakota County has recently sought the assistance of the Metropolitan Council to purchase 460 acres from private sellers for park space.[38]

The Minnesota Legislature has enacted statutes which authorize the Metropolitan Council to "identify generally the areas which should be acquired by a public agency...which...reasonably will meet the outdoor recreation needs of the people of the Metropolitan area..." (Minn. Stat. § 473.147, subd. 1); recognize that "immediate action is therefore necessary to provide funds to acquire...regional recreational open space for public use" (Minn. Stat. § 473.302); require each park district to submit to the Metropolitan Council "a master plan and

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[33] Resp. 39.
[34] Resp. 43.
[35] Resp. 60-61.
[36] App. 69-70.
[37] See March 14, 2005 St. Paul Pioneer Press Article. Resp. 298.
[38] *Id.*, Resp. 299.

annual budget for the acquisition and development of regional recreational open space located within the district or county..." (Minn. Stat. § 473.313, subd. 1); authorize the Metropolitan Council to "make grants...to any municipality, park district or county...to cover the cost...of acquiring...regional recreation open space..." (Minn. Stat. § 473.315); and authorize park districts, municipalities and counties to "acquire...land...comprising regional recreation open space..." (Minn. Stat. § 331). It is a goal of the state, counties and cities to acquire property for park, recreation and open space and the Minnesota Legislature has provided the statutory authority for achieving that goal.

G. The City denied Wensmann's application for an amendment to the Comprehensive Guide Plan solely so that the City could retain park, recreation, and open space without acquiring the subject property.

Two of the conclusions contained in the City's August 17, 2004 Findings of Fact, Conclusions and Resolution denying Wensmann's application were that the Property "provides an important amenity to the residents of the City" and "provides the benefit of open space...."[39] The September 1995 golf course study commissioned by the City in connection with its potential purchase of the subject property for a municipal golf course states:

> (1) A municipal golf course would be the best assurance of the preservation of green space in the community.
>
> (2) With public accountability, a course owned and operated by the City may be the surest mechanism for ensuring that the land will continue to be used for recreational purposes for its residents. If owned as private enterprise, the owners could

[39] App. 234.

> decide to sell out or convert the land for non-golf, non-recreational uses.[40]

The study further states:

> The question of whether a privately owned public course for public play in Eagan will remain affordable and in place is a real concern, given present land values and economic trends. A community with rapid growth and escalating land values must set aside open space early before "buildout" or it will not be able to afford such an endeavor later.[41]

The study also states that the City's purchase of the property for a municipal golf course "would ensure the preservation of open space."[42] Except for the City's denial of Wensmann's application, this study would have been prophetic: the City passed on acquiring the property and the subsequent growth of Eagan and the corresponding escalation of land values made the Property ripe for residential development. The study is at least instructive as to what usually happens in the circumstances of this case. If a city wants to preserve open space or a community recreational opportunity, it must acquire land for that purpose. Otherwise, at some point in the development of the community, the land will be "built out."[43]

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[40] Resp. 79.
[41] Resp. 80.
[42] Resp. 81.
[43] See also, pp. 47-49, infra., for a further discussion of the customary methods for a governmental entity to obtain open space.

H. Rahn cannot conduct any of the other permitted or conditional uses under the current guiding and zoning of the property and Wensmann's application to amend the Guide Plan seeks the next lowest density use of the subject property, i.e., low density residential.

As set forth in Section C above, none of the uses identified under the City's Guide Plan and zoning ordinance can be conducted on the subject property. The golf course is not a viable use and the only potential buyers that have shown interest are residential real estate developers such as Pulte, D.R. Horton and Wensmann.

Wensmann's application requested an amendment to the Comprehensive Guide Plan to change the land use designation from P, Parks, Open Space and Recreation, to LD, Low Density Residential and P, Parks, Open Space and Recreation. Wensmann's first proposal was to build 720 units but, after consulting with residents around the golf course, Wensmann reduced the proposal to 480 housing units and 45 acres of park and open green space.[44] After P, Parks, Open Space and Recreation, the next lowest density designation is LD, Low Density Residential.[45]

[44] Resp. 202-03.
[45] Comprehensive Guide Plan, Land Use Plan, Resp. 119, 125-26.

I. **The City, by its own admission, will someday permit residential development on the subject property; it is only a question of when. To that end, Rahn has paid assessments to bring streets, sewer and water to the Property in anticipation of future development of the Property.**

Several documents explicitly acknowledge that the City will permit residential development on the subject property. The City Staff Planning Report prepared in connection with Wensmann's application states:

> "[E]xisting street extensions and property designations have been planned with adjacent development to accommodate the possibility of changing conditions at Carriage Hills."[46]

In December of 2002, the City entered into an Assessment Agreement with Rahn that states that the City "has agreed to defer the collection of utility charges until subdivision or development..." and that the deferred assessments "will be collected as connection charges and paid...when [the subject property] is subdivided, platted or connects to City sewer and/or water services, ..."[47] Rahn was assessed for the installation of sewers, watermain improvements and street upgrades. Rahn cooperated with the City as these improvements were being implemented by providing access and permanent easements to the City.[48] In response to Ray Rahn's question to the City engineer as to why these improvements were being made, he responded that it was being done to accommodate future development of the Carriage Hills property.[49]

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[46] Resp. 52.
[47] Resp. 96-97. The City represented to the District Court that Rahn has paid almost $150,000 in assessments so far.
[48] Rahn Aff., ¶ 10. Resp. 8-9.
[49] Rahn Aff., ¶ 11. Resp. 9.

Review of the planning report for the preliminary plat of Lexington Place, a residential development adjacent to the subject property, proposes a street extension and sanitary and storm sewer installation to provide access "when and if the Carriage Hills Golf Course is ever converted to a different use."[50]

Review of the planning report of the Sunrise Development, adjacent to the subject property, states "a sanitary sewer lateral should be stubbed to the west line in the extreme northwest corner for future extension and service by the potential development of the golf course."[51] The lateral watermain was extended in 1999 with the Westcott Woodlands reconstruction.[52] The Sunrise Add. planning report also states "[T]he water main shall be stubbed...for future extension with the development of the...golf course."[53]

Review of the planning report for the preliminary plat of the Greensboro Addition, also adjacent to the Property, states "stubs for utilities be placed to the west and north should Carriage Hills Golf Course change use in the future."[54]

When the Eagan planning commission considered Wensmann's application on June 22, 2004, planning commission member Gladhill stated: "This guide plan amendment proposal will come back, we don't know when but it's going to come back. Expect it. And it's going to come back in some other form that is going to

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[50] Resp. 81, 84.
[51] Resp. 74.
[52] Pioneer Engineering Report dated 7/23/04, Resp. 191.
[53] Resp. 74.
[54] Pioneer Engineering Report dated 7/23/04, p. 8. Resp. 191.

survive at some point."[55] Similarly, planning commission member Leeder stated that Wensmann's development plan "is an excellent one, however, now is not the time."[56] Planning commission member Hansen "stated he was impressed with [Wensmann's] proposal, however, and he agrees with Chair Heyl, Member Bendt, and Member Leeder in that this is not the time."[57]

When the City Council considered Wensmann's application on August 2, 2004, Councilmember Maguire stated:

> I want to suggest to the neighborhood that I don't think that that test of [the golf course's] viability is too far away necessarily and that we are coming up on a comprehensive plan review that is due in 2008, and I have no allusions, nor I think should the neighbors, that some question on how this land will be used at that time will come up. And I would encourage everybody involved to have a more productive dialogue about what will happen with that land. Because right now I honestly don't think its all that far away from that viability measure. It is just short in my mind.[58]

The question is not if residential development will occur on the Property, the question is when.

J. With one exception, the City staff planning report expressed no reservations or concerns about Wensmann's development plan and, though the issue was disputed at the District Court level, Respondents' believe that staff recommended approval of the plan.

The City Staff Planning Report's summary of findings is contained at App. 57-60. Although the City staff cites to a number of laws and regulations with which Wensmann's development plan would have to comply, the Planning Report

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[55] App. 206.
[56] App. 187.
[57] App. 187.
[58] App. 161.

expresses no reservations or concerns about Wensmann's plan, with the one exception of the issue of school capacity. That issue will be addressed in this brief, *infra*. Significantly, the planning report did not raise any traffic safety issues. That issue will also be discussed, *infra*. The requirements the City identified included, e.g., constructing storm drainage outlet pipes and on-site detention basins, preparing an EAW, upgrading a street and connecting the Property to existing streets. The City staff found that the trunk sanitary sewer lines had sufficient capacity and that water lines could be extended to service the development. The City staff also found that existing park and school facilities could accommodate the additional influx of residents for purposes of the City's park planning. It did recommend that the development include a public or private open space park but the development plan submitted by Wensmann to the City included 40-45 acres for an active park, softball field, soccer field, playground equipment, picnic shelter, two miles of public trails and greenway corridors to provide a buffer between existing neighborhoods and the development. Additionally, the development plan provides open space which would preserve existing wetlands, restore prairie and actually increase habitat diversity.[59]

The last page of the City Staff Planning Report has the heading "**ACTION TO BE CONSIDERED**." Below that heading, the report states "to *recommend approval* of a Comprehensive Guide Plan Amendment to change the land-use

[59] Pioneer Engineering Carriage Hills infrastructure review dated July 23, 2004, Resp. 195-96; Pioneer Engineering Memorandum dated July 22, 2004, Resp. 149-51.

designation from P, Park to LD, Low Density residential . . ."[60] Respondents submit that there is no other way to interpret this language other than that the City staff recommended approval of Wensmann's application.

K. Wensmann's proposed development plan maintains the integrity of the Comprehensive Guide Plan and meets all of the goals and policies set forth in the Guide Plan which apply to the subject property.

Wensmann's development plan meets the two applicable overall planning priorities set forth in the Comprehensive Guide Plan: "promote upscale housing and work to strengthen neighborhoods" and "develop major amenities with community-wide focus."[61] Wensmann's development plan also meets almost all of the goals and policies set forth in the Housing Plan and the Park and Recreation System Plan, both of which are a part of the Comprehensive Guide Plan.

1. Housing Plan.

As discussed above, Wensmann's development plan would insure "the preservation and maintenance of significant woodlands, wetlands and other natural features" and "that the existing environment is properly protected and preserved."[62] The plan provides "a diverse mix of housing types" which "provide a good fit for the present and projected demographic profile of our residents."[63] With respect to the mix of housing types, the Housing Plan identifies seniors and emptynesters "who will need or want types of housing that are currently not

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[60] App. 61. (Emphasis added).
[61] Resp. 103.
[62] Housing Plan, Resp. 137.
[63] Housing Plan, Resp. 138.

available or are in short supply."[64] It also identifies the need for "additional lower density, detached housing units to ensure sufficient balance of housing density throughout the community."[65] Wensmann's plan meets all of these goals and policies.

2. Park and Recreation System Plan.

Wensmann's development plan meets the goal of "develop[ing] appropriate park and recreation facilities to serve the existing and future needs of even citizens."[66] It meets the policy of "acqui[ring] and "develop[ing] neighborhood parks in order that each neighborhood service area . . . is adequately served with appropriate recreational facilities"; "provid[ing] special use recreation facilities for broad community use"; and "develop[ing] park and recreational facilities which minimize the maintenance demands on the City . . . while maintaining high standards of quality of appearance and conditions."[67]

At the August 2, 2004 City Council meeting, Wensmann made a lengthy presentation which included a discussion of how Wensmann's development plan met the specific goals and policies of the Housing Plan and the Park and Recreation System Plan.[68]

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[64] Housing Plan, Resp. 146.
[65] Housing Plan, Resp. 138.
[66] App. 62.
[67] App. 63.
[68] Resp. 208-14. See, Wensmann's application, the Powerpoint presentation Wensmann made at the August 2 City Council hearing and the aerial photos showing the Property's surrounding neighborhoods and a rough sketch of the

Although at the August 2, 2004 City Council hearing, Council Member Carlson stated: "If we want to keep an amenity in our city, we need to support it" and suggested an emphasis on city programming, partnership with schools and the EAA, the fact is neither the City nor the residents supported the course.[69] Eagan High School practices and plays its matches at Valley Wood Golf Course in Apple Valley.[70] As of August 2, 2004, there was not one single junior member that resided in the City of Eagan.[71] Only one person living within a 600 foot radius of Carriage Hills was a member.[72] Only 18 people in the entire city of Eagan with a population of nearly 63,000 were Carriage Hills members.[73] The City is not deprived of a recreational opportunity by the loss of Carriage Hills as there are two other golf courses in Eagan and 120 public golf courses and 39 private golf courses within 25 miles of Carriage Hills.[74]

With the golf course being closed, it will simply be an eyesore. Wensmann's development plan takes unproductive land and strikes a balance between the development goals and policies set forth in the Housing Plan and the goals and policies related to the preservation and protection of wetlands, prairie and wildlife habitat set forth in the Park and Recreation System Plan. The plan

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layout of units in Wensmann's development plan. (App. 193-85; Resp. 199-264 and 308-12).

[69] App. 75 and 98.

[70] Powerpoint, Resp. 254.

[71] *Id.*, Resp. 255.

[72] *Id.*, Resp. 257.

[73] *Id.*

[74] *Id.*

does so by offering a low density mix of housing types, some of which are currently unavailable; a free, accessible park with a wide variety of uses as opposed to a single use golf course; and open space which provides new plantings, restores wetlands and prairie and increases habitat diversity.

ARGUMENT

Respondent's concur with the detailed analysis of the case law applied to the facts of this case set forth in the District Court's Findings of Fact, Conclusions of Law, Order for Judgment and Judgment dated April 27, 2005.[75] The remainder of Respondents' brief will chiefly address the arguments raised by the City and Amici Curiae.

At the outset, Respondents note that the bulk of the brief of Amicus Curiae Metropolitan Council is devoted to urging this Court not to allow a "course of action that is contrary to the legislatively mandated scheme for regional land use planning." (p. 1). Respondents are not seeking, nor do they believe the District Court ordered, such a course of action. The District Court merely ordered that the City "diligently submit the amendment [to the Comprehensive Guide Plan] for review and adoption by the Metropolitan Council in accordance with [Minnesota law]."[76] Respondents acknowledge that an amendment to the Comprehensive Guide Plan must, thereafter, undergo review by the Metropolitan Council and others pursuant to statute.

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[75] App. 3-22.
[76] App. 21, ¶ 1.

Similarly, Respondents disagree with the City's position that the District Court ordered it "to approve a site plan for the property."[77] The District Court conditioned its order that the City's Comprehensive Guide Plan be amended upon Wensmann "resubmitting to the City the same development plan it submitted in connection with its application to amend the Comprehensive Guide Plan."[78] Respondents voluntarily offered to make this condition a part of the District Court's Order and the condition is an advantage to the City since it ensures a lower density development than would otherwise be allowed under LD – Low Density. In fact, Wensmann's initial development plan called for 720 units but, after discussion with neighbors, Wensmann reduced the density to 480 units.[79]

I. The City's Denial of Wensmann's Application Was Arbitrary and Capricious.

A. The Record Before the City.

There is no issue about the nature, fairness and adequacy of the City Council proceedings. Therefore, the record is limited to what was presented to the City Council on August 2, 2004. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 312-13 (Minn. 1988). The *Swanson* record is comprised of the following:

1. Eagan Comprehensive Guide Plan dated 2/22/01 (App. 62-70; Resp. 101-148)

2. Letter from Terry Wensmann, Wensmann Homes, to Mike Ridley, City Planner and City Officials, dated 5/18/04, (Application to

[77] Brief of Appellant, p. 1.
[78] App. 21, ¶ 2.
[79] Resp. 202-03.

Amend the Comprehensive Guide Plan) and supporting documents: (App. 183-84)

a) Reasons why low density residential and park land use is appropriate for the Carriage Hills property (App. 185)
b) Wensmann Homes-Carriage Hills Development Proposal dated 6/10/04 (Resp. 312-13)
c) Location, Zoning and Comprehensive Guide Plan Maps (supplied by the City) (Resp. 314-15)
d) Survey (Resp. 316)
e) Concept Plan (Resp. 317)
f) Surrounding Densities Map (Resp. 318)

3. Wensmann Homes PowerPoint Presentation, dated 8/2/04 (Resp. 199-264)

4. Analysis of Key Issues Important to the Possible Acquisition of Carriage Hills Golf Course by the City of Eagan, Minnesota, September 1995 (App. 77-102)

5. Alternatives to a Municipal Golf Course in the City of Eagan, Minnesota, April 1996 (Resp. 152-183)

6. Hughes & Company, Inc. Feasibility Study dated 7/17/04 (App. 209-23)

7. McMurchie Golf Management, Inc. Analysis of Market and Financial Factors dated 7/27/04 (App. 224-29)

8. City of Eagan Planning Report dated 6/17/04 Re: Wensmann Amendment Request (App. 47-61)

9. RLK KUUSISTO Ltd. Carriage Hills Traffic Analysis dated 7/23/04 (App. 340-49)

10. Memo to Tom Hedges, City Administrator, from Mike Ridley, City Planner, dated 12/9/03 Re: Carriage Hills History (App. 265-72)

11. Letter from Mark Parr, Director of Secondary Education for Independent School District 196 to Pamela Dudziak, Eagan City Planner, dated 7/12/04 (App. 339)

12. Pioneer Engineering Carriage Hills Infrastructure Review dated 7/23/04 (Resp. 184-98)

13. Pioneer Engineering Carriage Hills Habitat Assessment dated 7/22/04 (Resp. 149-51)

14. Eagan Sunrise Addition Preliminary Plat Report dated 2/17/87 (Resp. 73-80)

15. Eagan Lexington Place Preliminary Plat Report dated 2/17/82 (Resp. 81-94)

16. 2000 City of Eagan/Rahn Assessment Agreement (Resp. 95-100)

17. Carriage Hills Coalition Response to Wensmann Homes Application to Change Eagan's Comprehensive Guide Plan dated 6/22/04

18. Petition to City entitled "Keep Carriage Hills Golf Course Public Use"

19. Letters, emails, etc. from the public expressing opinions regarding Wensmann's Comprehensive Guide Plan Amendment Request

20. Transcript of the Eagan Planning Commission Meeting dated 6/22/04 (App. 189-206)

21. Transcript of the Eagan City Council Meeting dated 8/2/04 (App. 138-62)

B. Standard of Review.

"When a municipality acts in its fact finding or legislative policy making capacity under its delegated powers, the scope of review is very narrow and the City's actions are subject only to the broad limits of the arbitrary and capricious standard."[80] The City's decision must be upheld unless it is "unsupported by any rational basis related to promoting the public health, safety, morals, or general

[80] *Freundshuh v. City of Blaine*, 385 N.W.2d 6, 8 (Minn. Ct. App. 1986) (citation omitted).

welfare, or that the classification amounts to a taking without compensation."[81] The City's decision lacks a rational basis "if it is unsupported by substantial evidence in the record, premised on a legally insufficient reason, or based on subjective or unreasonably vague standards."[82] The test has been summarized as "whether the reasons given by the city council are legally sufficient and supported by facts in the record."[83]

C. The City's Denial of Wensmann's Application is Legally Insufficient and Unsupported by Facts in the Record.

As it did before the District Court, the City focuses exclusively on a traffic safety issue and school overcrowding, relying primarily on vague, unsubstantiated resident testimony.

1. Traffic Safety.

The City first cites to resident testimony that the City has no control over whether a stop light would be added at the intersection of Yankee Doodle Road and Westcott Woodlands. However, the City Staff Planning Report provides a detailed analysis of the potential impact of Wensmann's plan on traffic in the area but cites to no safety concerns.[84] More importantly, the City's August 17 Resolution does not even list traffic safety as a basis for the denial of Wensmann's application. Conclusion No. 10 merely states that "traffic from residential

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[81] *Id.*
[82] *PTL v. Chisago County Board of Commissioner*, 656 N.W.2d 567, 571 (Minn. Ct. App. 2003) (citations omitted).
[83] *Parranto Brothers v. City of New Brighton*, 425 N.W.2d 585, 589 (Minn. Ct. App. 1988).
[84] App. 52-54, 59.

development on the Property would likely *disrupt* existing neighborhoods surrounding the site."[85] Disruption is not equivalent to a lack of safety.

Respondents' expert, a professional engineer from RLK-KUUSISTO, concluded that "the increase in traffic due to the potential development of the site will warrant a signal at CR 28 [Yankee Doodle Road] and Westcott Woodlands intersection in the year 2006, assuming the site is 65% developed."[86] The City misleadingly states that Wensmann's proposed development would reduce the LOS "A" rating at that intersection to a LOS "F" rating. However, that assumes no traffic signal is installed. Installation of a traffic signal would indicate "the overall operation is forecasted at LOS "A" with all movements operating at LOS "B" or better."[87] Is also misleading to point to the City's lack of control over whether a traffic signal is installed as that is always the case and no development would ever be approved if that were a basis for denial.

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

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[85] App. 235 (emphasis added).
[86] App. 343.
[87] App. 342.

It is not the City's responsibility to decide for the county if a signal is warranted. Amicus Curiae Metropolitan Council's brief is devoted almost exclusively to the proposition that local governmental units like the City must "insure that their official controls, including zoning ordinances, conform to their local comprehensive plan and, by extension, to the council's MDG [Metropolitan Development Guide] and Metropolitan System Plans."[88] The Met Council's brief underscores the fact that the City must send proposed amendments to its Comprehensive Guide Plan and zoning ordinance to other agencies to insure consistency with the plan at every level of government; state, county and city. Thus, the county will engage its usual process in determining when a stop light is warranted.

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

[88] Page 8.

Jehovah's Witnesses, Inc. v. Svee, 226 N.W.2d 306, 309 (Minn. 1975) (holding that unsubstantiated resident speculation about increased traffic did not support denial of a conditional-use permit application).[89]

2. School Overcrowding.

There is no issue as to the 73 elementary aged children estimated to be added by the Wensmann development. The issue is as to the 37 middle school aged children and 48 high school aged children which are estimated to be added.[90] The City discounts as "equivocal" a letter from Independent School District 196 addressing the school building capacity issue and relies again on unsubstantiated resident testimony.

As with any residential development, the units will be built over time and any new students added by the development would be enrolled over time. The earliest any students from the development would be enrolled is the 2006-07 school year. The school district projections at App. 248 show enrollment at the middle school almost back to capacity in 2008 and below capacity in 2009. This is without allowing for the impact of boundary adjustments referenced in App. 339. There is nothing in the record to support the City's statement that "boundary adjustments are merely on the drawing board at the school district . . ."[91] Even so,

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[89] Note that the RLK-KUUSISTO traffic analysis estimates the number of trips generated by the development at 2,811, lower than the 3,000 trips contained in the City Staff Planning Report. App. 341. These trips would be distributed over a number of different roads around the development.

[90] App. 248.

[91] Appellant's Brief, page 21.

the 37 middle school aged children estimated to be added by the Wensmann development would only be about 2½% of the total projected enrollment even assuming all of them enroll in 2006.

Unlike the middle school, there is no issue about what *may* be done to alleviate classroom capacity at the high school. The school district passed a bond referendum to accommodate the projected enrollment at the high school.[92] Projected enrollment for 2006 exceeds capacity by 362 students without including the 48 students estimated to be added by Wensmann's development. This means that, first, when residents complain about schools being "massively over capacity," they are talking about an existing condition at the high school that will be remedied by passage of the bond referendum. Second, a bond referendum which accommodates an existing 20% over capacity can certainly accommodate an additional 2% increase. That is again assuming that all 48 students enroll at the high school in 2006 which will not occur. Note that when Wensmann made its presentation to the City Council on August 2, 2004, the projected completion of the project was 2008.[93]

3. Integrity of the Comprehensive Guide Plan.

The City claims that defending the integrity of the Comprehensive Plan is, in and of itself, a rational basis for denial of Wensmann's application. If this were the case, it is certain that every legislative decision of every city would include the

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[92] App. 339.
[93] Resp. 236.

language of Conclusion No. 14 of the City Council's Resolution: "The integrity of the City Comprehensive Guide Plan is maintained through the retention of the [current] designation of the Property . . . ."[94] According to the City, this mantra is a bullet-proof vest for the City against any legal challenge to a denial of a request for an amendment to the Guide Plan. The City's citation to the *Fisher* case at page 17 of its brief is inapposite. Denial of a request to rezone because it would be inconsistent with the comprehensive guide plan is not the same as seeking an amendment to the comprehensive guide plan itself. As the Metropolitan Council's brief points out, by statute a zoning ordinance must be in compliance with the comprehensive plan.[95] Therefore, a landowner's request for a change in zoning classification which is inconsistent with the guide plan would have to be denied. This is not such a case.

To claim that the City's denial of Wensmann's application maintains the integrity of the City Comprehensive Guide Plan is a legal conclusion akin to the language "does not promote the health, safety and welfare of the City" (Conclusion No. 15) which this Court has found to be legally insufficient as a basis for denial.[96]

Section K above describes in detail how Wensmann's plan does, in fact, maintain the integrity of the Comprehensive Guide Plan and meets almost all of

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[94] App. 235.
[95] Brief of Amicus Curiae Metropolitan Council, 14, n.12.
[96] *Larson v. County of Washington*, 387 N.W.2d 902, 906 (Minn. Ct. App. 1986).

the goals and policies of the Housing Plan and Park and Recreation System Plan, which are a part of the Comprehensive Guide Plan.

4. Preservation of Open Space is an Arbitrary And Capricious Basis for Denying Wensmann's Application

Providing an important amenity and the benefit of open space to residents of the City are not rational bases for the City's decision.[97]

In *Pheasant Bridge Corp. v. Township of Warren*, 169 N.J. 292 (2001), the New Jersey Supreme Court invalidated a zoning ordinance because it was arbitrary, capricious and unreasonable as applied to the plaintiff's property. The ordinance in that case required plaintiff's property to be preserved as open space. The court found that the operation of the ordinance was "unreasonable and oppressive" as applied to plaintiff's property.[98] Similarly, in *City of Austin v. Teague*, 570 S.W.2d 389 (Tex. 1978), the Supreme Court of Texas ruled that an ordinance which prevented all development of a piece of property to preserve it as a scenic easement for the benefit of the public was arbitrary and unreasonable. The court found that the city "singled out plaintiffs to bear all of the costs for the community benefit without distributing any cost among the members of the community."[99] The court cited to a statute which provided for acquisition of

[97] August 17 Resolution, Conclusion Nos. 8 and 9.
[98] *Id.* at p. 291.
[99] *Id.* at p. 394.

property for the city's purposes and held that the city could not "take or hold another's property without paying for it just because the land is pretty."[100]

In *Sheerr v. Evesham Township*, 184 N.J. Super. 11 (1982), the zoning ordinance applied a public parks and recreation classification to the subject property. Under an arbitrary and unreasonable analysis, the court stated that a desire to preserve open space must be substantial in order to support the adoption of the regulation at issue.[101] The court quoted from an earlier case:

> [T]he danger and impact must be substantial and very real...not simply a make weight to support exclusionary housing measures or preclude growth – and the regulation adopted must be only that reasonably necessary for public protection of a vital interest. (citation omitted).[102]

In support of the finding that the regulation was arbitrary, the court pointed to the fact that the property was "an island surrounded by permitted commercial and residential uses."[103] The court concluded "this regulation was clearly a denial of due process and equal protection. *** Its purpose was to create a public benefit – the establishment of a public park and recreation area for the community."[104]

In *Communications Properties v. Steel County*, 506 N.W.2d 670 (Minn. Ct. App. 1993), this Court upheld a district court's issuance of a writ of mandamus ordering the county to rezone to allow construction of a radio tower, finding the

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[100] *Id.*
[101] *Id.* at p. 35.
[102] *Id.*
[103] *Id.* at p. 36.
[104] *Id.* at p. 37. Note that the court also found that the conditionally permitted recreational uses also allowed under the ordinance were at best marginal. *Id.* at p. 45.

county's denial to be arbitrary and capricious. The reasons stated for the county's denial in that case mirror many of the reasons cited by the City for its denial: The land was zoned agricultural at the time of purchase; surrounding land values could be affected; safety would be compromised; rezoning would affect future development in the area; and there would be unknown affects on the environment.[105]

This Court ruled that the fact that the land was already zoned agricultural when the property was purchased was not a basis for denying the application for rezoning.[106] This eliminates the City's Conclusion No. 19 as a valid basis for the denial of Wensmann's application. The Court of Appeals also looked at the change in the properties surrounding the subject property in ordering the property to be rezoned.[107]

The Court pointed out that the district court's order required certain actions regarding the construction of the tower as a condition of the rezoning.[108] The Court noted that "such equitable relief is specifically permissible in addition to any declaratory judgment."[109] In the present case, Wensmann expressly agreed that it would make the development plan it submitted to the City a condition of the

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[105] *Id.* at p. 671.
[106] *Id.* at p. 672.
[107] *Id.* at p. 673.
[108] *Id.*
[109] *Id.*

amendment of the Comprehensive Guide Plan. The District Court inserted this condition into its Order.[110]

D. Substantial Change to the Neighborhood Surrounding the Property Makes Amendment of the Guide Plan to Low Density the Only Reasonable Classification.

In *Sun Oil Co. v. Village of New Hope*, 220 N.W.2d 256 (Minn. 1974), the Minnesota Supreme Court ruled that a property owner can attack a city's refusal to rezone property by showing that the "neighborhood of the subject property had undergone such a substantial change since the enactment of the original . . . zoning classification as to make [the requested zoning classification] the only reasonable classification for the subject property."[111] The City's brief does not even address this issue and only cites *Sun Oil Co.* as applying with "even more force" in the case of a requested amendment to the Comprehensive Guide Plan than to a request for rezoning.[112] This Court in *Freundshuh* restated the test in *Sun Oil Co.* as whether "the character of the neighborhood is changed to such an extent that no reasonable use can be made of the property in its current zoning classification."[113]

Though the golf course has been operated on the Property since it was rezoned from Agricultural to Public in 1962, the nature and use of the surrounding property has changed dramatically from agricultural to mixed density residential. The June 22, 2004 City Staff Planning Report states that when the golf course was

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[110] App. 21, ¶ 2.
[111] *Id.* at 261.
[112] Appellant's Brief at p.17.
[113] 385 N.W.2d at 8-9.

established the surrounding area consisted of large rural parcels. Until 1979, the only platted subdivision was east of the course and 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.[114] To slightly paraphrase *Sun Oil Co.*, Rahn's property is "virtually surrounded by [residential] zoning and [is] characterized as a 'peninsula' among [residential] uses."[115]

Going beyond the immediate neighborhood, 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 other than at Carriage Hills. As discussed in section K above, the City and its residents do not play at or support the Carriage Hills Golf Course.

Forty years ago when the golf course was built, the area was rural and the golf course was the only one around. The City did not rebut the affidavits of Garfield Clarke and Philip Carlson submitted to the District Court, both of which affied that none of the other conditional or permitted uses allowed under the

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[114] App. 48.

[115] 220 N.W.2d at 262. The Property is bounded by Yankee Doodle to the north and by residential developments to the east, west and south. The placement of the various housing types in Wensmann's development plan is designed to blend with the housing types in the surrounding neighborhoods. See, aerial photos Resp. 308-11.

zoning ordinance would be reasonable or allowed.[116] Through the many documents and testimony of planning commission and council members discussed in section I above (pp. 14-17), the City has acknowledged that residential development will eventually occur on the Property, making LD – Low Density the only reasonable classification for the Property under *Sun Oil Co.*

II. Takings Analysis.

A. Penn Central.

The *Penn Central* court acknowledged that determining whether a regulation goes "too far"

> has proved to be a problem of considerable difficulty. While this Court has recognized 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," this Court, quite simply, has been unable to develop any "set formula" for determining when "justice and fairness" require that economic injuries caused by public action be compensated by the government, rather than remain disproportionately concentrated on a few persons. Indeed, we have frequently observed that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case" . . . [involving] "essentially ad hoc, factual inquiries . . . ."[117]

[116] Resp. 1-3; 11-14. If there is any question about the adequacy of the *Swanson* record, it would be in this area. If the Court finds this to be the case, it can consider the Clarke and Carlson affidavits even though they were not submitted to the City Council.

[117] *Penn Central*, 438 U.S. at 123-24.

As a result, the Supreme Court has admitted, "[c]ases attempting to decide when a regulation becomes a taking are among the most litigated and perplexing in current law."[118] The Minnesota Supreme Court has similarly stated:

> Unfortunately, the law does not become clear with later cases. In general, it can be said that no firmly established test exists for determining when a taking has occurred, instead takings law turns largely on the particular facts underlying each case.[119]

The three factor test set forth in *Penn Central* does not comprise a formulaic test:

> Penn Central does not supply mathematically precise variables, but instead provides important guide posts that lead to the ultimate determination whether just compensation is required. *** The temptation to adopt what amount to *per se* rules in either direction must be resisted.[120]

A *per se* rule is exactly what the City and Amici Curiae League of Minnesota Cities and Community Rights Council[121] want this court to adopt, i.e., a buyer of property who expects to use the property as it is guided and zoned at the time of purchase can never, under any circumstances, have an expectation that the property will be reguided or rezoned if he can no longer make reasonable or economically productive use of the property. This ignores the fundamental expectation inherent in every piece of private property: "The value of property, generally speaking, is determined by its productiveness – the profits which its use

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[118] *Eastern Enters. v. Apfel*, 524 U.S. 498, 541 (1998).

[119] *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 552 (Minn. 1996) (citing *Penn Central*).

[120] *Tahoe-Sierra*, 535 U.S. at 326-27, n. 23.

[121] Amici Curiaes' Brief is unabashedly adversarial, even calling Respondents' takings claim "meritless." (p. 26). Amici Curiaes' Brief effectively gives the City an additional twenty-six pages of argument on the takings issue.

brings to the owner."[122] This is consistent with the Minnesota Supreme Court's characterization of *Penn Central's* investment-backed expectations test as "the owner is not permitted to obtain a reasonable rate of return on his investment."[123] Certainly, Rahn had an expectation that he would obtain a reasonable rate of return on his investment in the Property.[124]

All of the City's and Amici Curiaes' cases cited in their briefs involve buyers of property who purchased with knowledge of the restriction on use of the property but took the risk that the governmental entity would rezone the property; property owners whose property was subjected to more restrictive regulations after their purchase of the property but who still had viable uses of the property available to them; or property owners who could not make any use of a portion of their property but who could still make use of other portions of their property. None of the City's or Amici Curiaes' cases involve a landowner whose property is restricted to the sole use of providing a public recreational opportunity which is no longer viable and who is prevented from using the property for the next lowest density use, a use which the City has expressly acknowledged will be permitted in the future and has already planned for by stubbing streets, water and sewer to the

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[122] *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 328 (1892).
[123] *State by Powderly v. Erickson*, 285 N.W.2d 84, 90 (Minn. 1979) (citing *Penn Central*). In *Johnson v. City of Minneapolis*, 667 N.W.2d 109, 116 (Minn. 2003), the Minnesota Supreme Court ruled that "even if Appellants' takings claim under the United States Constitution fails under *Penn Central*, Appellants are entitled to compensation under the Minnesota Constitution", suggesting that the reach of the Minnesota takings clause goes beyond that of the Fifth Amendment.
[124] Rahn Aff. ¶ 4, Resp. 7.

Property. This is the epitome of a unique set of facts calling for an *ad hoc*, factual inquiry.

The City and Amici Curiae suggest that the City's denial of Wensmann's application for an amendment to the Comprehensive Guide Plan cannot be a taking because it simply leaves in place the existing regulation. However, in *Czech v. City of Blaine*, 253 N.W.2d 272, 273 (Minn. 1977), the Minnesota Supreme Court ruled "for there to be an unconstitutional taking a landowner must demonstrate that he has been deprived, through governmental action or *inaction*, of all the reasonable uses of this land." (Emphasis added). See also, *Communications Properties, supra*, finding denial of a request for rezoning to be arbitrary and capricious. It is Respondents' position that the City's denial of Wensmann's application is tantamount to "stockpiling" the Property for "future use" (i.e., residential development) which this Court disallowed in *University of Minnesota v. Chicago and N.W. Transp.*, 552 N.W.2d 578, 580 (Minn. Ct. App. 1996).

The City and Amici Curiae create a "catch 22" by claiming, on the one hand, that Rahn's lack of expectation when he bought the Property that the Property would be reguided and rezoned to permit residential development is fatal to his claim while, on the other hand, citing two cases in which a buyer of property who does have such an expectation cannot bring a takings claim.[125] Therefore,

[125] See, e.g., *Sanderson* and *Forest Props* on pages 7 and 8 of Amici Curiae's brief and the *Myron* case on page 28 of Appellant's Brief.

according to the City and Amici Curiae, Rahn cannot bring a takings claim because he had no expectation of developing the property. But if he had had that expectation, his takings claim would also fail.

Both the City and Amici Curiae rely heavily on Federal Circuit cases to support their investment backed expectations argument. In particular, Amici Curiae rely on *Good v. United States*, 189 F.3d 1355 (Fed. Cir. 1999) for the proposition that a property owner cannot satisfy the expectations test unless he bought the property in reliance on the non-existence of the challenged regulation.[126] However, that case actually supports Respondents' claim. The Federal Circuit Court found that the property owner's expectations should have evolved based on events that occurred in the seven years *following* the owner's purchase of the property.[127] The court cited the following language from an earlier case which it found had similar facts:

> [W]hen Deltona acquired the property in 1964, it knew that the development it contemplated could take place only if it obtained the necessary permits from the Corps of Engineers. Although at that time, Deltona had every reason to believe that those permits would be forthcoming when it subsequently sought them, it also must have been aware that the standards and conditions governing the issuance of permits could change.[128]

The court concluded that the property owner must "have been aware that [regulatory] standards could change to his detriment . . . ."[129]

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[126] Brief of Amici Curiae, 11.
[127] *Id.* at 1363.
[128] *Id.*
[129] *Id.*

If a landowners expectations could change because conditions got worse following the purchase of property, they could also change because conditions got better, which is precisely what occurred in the present case. As discussed above in section I, Rahn signed an Assessment Agreement with the City under which he has paid almost $150,000, and which deferred several hundred thousand additional dollars, to make street, sewer and water improvements in anticipation of and preparation for development of the Property. Again, statements made by Planning Commission and City Council members underscore the fact that the only question is when such development will be approved. Thus, as in *Good*, Rahn's expectations justifiably changed between when he purchased the Property and when Wensmann submitted its application. In fact, Rahn's expectations fell in line with City's own expectations about future use of the Property.

With respect to the severity of the economic impact prong of the *Penn Central* test, Amici Curiae create two traps for Respondents. First, they cite to a traditional line of takings cases in which property with value prior to the imposition of an affirmative regulation has that value reduced after the regulation is imposed. The case before this Court presents the opposite scenario: the Property cannot be operated as a golf course or any of the other conditional or permitted uses under the current zoning ordinance and only has value if development is allowed. To say that "Respondents have failed to show that the value of the land immediately prior to the City's refusal to amend its Comprehensive Plan was dramatically higher than the value after the refusal" is, if

nothing else, obvious.[130] How could the value go up when the City would not allow development? To use that as proof that there has been no severe economic impact misses the point. The severity of the impact has to be measured by what has been taken, in this case the right to develop the Property.

The other trap is found in Amici Curiae's claim that, although Rahn had no reasonable expectation at the time he purchased the Property that the Property would ever be developed, Wensmann's offer to buy the Property is "based on the buyer's expectations of future potential use" which they claim is evidence that the Property has value.[131] To insure that Rahn cannot escape this trap, Amici Curiae also cite to cases in which an offer to purchase land for a use not permitted by current regulations is "wholly speculative" and "highly dubious".[132] Thus, when it is convenient to Amici Curiae's argument, Wensmann's offer is variously either speculative or else evidence that the Property has value and has not been severely impacted by the City's denial of the amendment to the Guide Plan.[133]

If the City's denial of Wensmann's application is a taking, the severity of the economic impact must be measured by the difference in value between the Property as currently guided and zoned and the Property as guided and zoned low

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[130] Brief of Amici Curiae, 22.
[131] Brief of Amici Curiae, pp. 21-22.
[132] Brief of Amici Curiae, 16.
[133] Contrary to the City's argument, the Court cannot take into consideration an oral offer by Wensmann to purchase the Property as such agreements are unenforceable under the Statute of Frauds. Minn. Stat. § 513.05. See, *Goss v. City of Little Rock*, 151 F.3d 861, 864 (8th Cir. 1998) (Goss not permitted to submit oral purchase agreement as measure of damages because such agreements are unenforceable under the Statute of Frauds).

density residential. Even using the McMurchie report to value the Property as currently guided and zoned, though the report is based on the golf course being in operation, the economic impact of the City's denial is very severe as it prevented the sale of the Property to Wensmann for [Conf. App. 1, "G"].

Finally, with respect to the character of the governmental action prong of the *Penn Central* test, the City's and Amici Curiaes' argument is essentially that the City's denial of Wensmann's application was standard city planning designed to protect the integrity of the Comprehensive Guide Plan. *Penn Central* and *Lucas* both made very clear that regulations which abate a nuisance or which are necessary to protect against an environmental risk to water, air, endangered species, etc. are afforded far greater protection than other types of government action. In the cases cited below, government action which simply preserves open space or recreational uses are not afforded heightened protection.[134] See also, *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 554 (Minn. 1996): "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."

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[134] See, Rathkopf, *The Law of Zoning and Planning*, Section 6:21: "Also, cases where characterization of the nature of the government action is likely to prove to be of importance in taking analysis are those discussed later herein where courts rule that a regulation has gone 'too far' in situations where particular owners are burdened with the loss resulting from a regulation that clearly is designed to secure public resources or extract some public benefit, that in all justice and fairness, should be paid for by the public as a whole."

In *Sheerr v. Evesham Township*, 184 N.J. Super. 11 (1982), the court reviewed a long line of cases holding that a taking had occurred where the government action had the effect of restricting use of property for open space or recreational activities.[135]

In *Morris County Land v. Parsipanny-Troy Hills Township*, 40 N.J. 539, 557 (1963) the court held that a regulation constituted a taking when the purpose and practical effect was to appropriate private property for open space. The court said this result followed when land could not be utilized for any reasonable purpose or when permitted uses are economically infeasible.

In *Steel v. Cape Corp.*, 111 Maryland App. 1 (1996), a case in which property was rezoned from residential to open space, the court found:

> The instant property is neither public nor community property. It is purely private property, irrespective of the wishes of neighboring property owners. *** Moreover, the area sought to be rezoned...is virtually surrounded by the development that itself apparently contains thousands of lots and units zoned [residential] – the classification sought by Appellee. *** We hold that none of the uses permitted in the open space classification afford to Appellee any viable economic use of the subject property that would avoid the impermissible taking of Appellee's property without just compensation.[136]

In an illuminating footnote, the court found there was no doubt that government could not "compel a private property owner to use that property for community recreational purposes without compensating the property owner.... It would,

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[135] *Id.* at pp. 28-34.
[136] *Id.* at pp. 32-33.

therefore, be unreasonable to require the property to maintain open space zoning under the circumstances here presented."[137]

In *Rippley v. City of Lincoln*, 330 N.W.2d 505 (N.D. 1983), the court considered a City's denial of a request to rezone the property from public use to commercial. The court found, "the public use zoning of the Rippleys' property is a classic example of the type of land use regulation which other jurisdictions have found to constitute a taking of private property for public use without just compensation."[138] The court then reviewed numerous cases finding a taking and then concluded: "Accordingly, we hold that by zoning the Rippleys' property public use Lincoln has deprived the Rippleys of all reasonable use of their property and has thereby accomplished a taking of the property for which just compensation is constitutionally required."[139]

In *Burrows v. City of Keene*, 121 N.H. 590 (1981), the court held:

> It is plain that the City and its officials were attempting to obtain for the public the benefit of having this land remain undeveloped as open space without paying for that benefit in the constitutional manner. The City sought to enjoy that public benefit by forcing the plaintiffs to devote their land to a particular purpose and prohibiting all other economically feasible uses of the land, thus placing the entire burden of preserving the land as open space upon the plaintiffs. The trial court found, in a well considered opinion, that the uses permitted were "so restrictive as to be economically impracticable, resulting in a substantial reduction in the value of the land" and that they prevented a private owner from enjoying "any worthwhile rights or benefits in the land." *** The purpose of the regulation is clearly to give the public the benefit of preserving the

[137] *Id.* at n. 17.
[138] *Id.* at p. 507.
[139] *Id.* at p. 509.

plaintiff's land as open space. Its purpose is not to restrain an injurious use of the property."[140]

In *Corrigan v. City of Scottsdale*, 149 Az. 553 (App. 1985), the court phrased the issue as follows: "Although the preservation of open space in the McDowell Mountains is a legitimate state interest, we must determine whether it can be done through the exercise of police power or whether it must be done through eminent domain with the required payment of just compensation."[141] Since the regulation had the effect of setting aside the property solely for the conservation of permanent natural open space, the court held that the ordinance was "void as an unconstitutional taking of appellant's property without just compensation."[142]

Nichols, Eminent Domain, § 14D.03 states: "Eminent domain may be the most expensive method for acquiring land for open space, but it may be the most dependable method for assuring that the property owner receives the compensation guaranteed by the Constitution. The other methods can leave the owner with something less than just compensation."

Respondents' expert, Philip Carlson, whose affidavit was unrebutted by Appellant, addressed the customary methods for a governmental entity achieving open space. Mr. Carlson has been a planning consultant for 28 years and has assisted in the preparation of dozens of comprehensive plans and zoning

[140] *Id.* at pp. 600-01.
[141] *Id.* at p. 562.
[142] *Id.* at p. 565.

ordinances on behalf of cities and has taught seminars to city staff, planning commissioners and city councilmembers on comprehensive planning, zoning and the proper and legal use of these tools. He has also assisted in the design of numerous residential subdivisions, shopping centers, industrial parks and mixed use areas.

Based on his experience, Mr. Carlson affied that the language in the Comprehensive Plan and in the P Park District is typical of language used in comprehensive plans and zoning ordinances to describe public parks and publicly owned uses, not private business uses. In his opinion, it is appropriate for the City to set aside areas for the use and enjoyment of the public as open space and recreational areas, but typically these areas are purchased by the City or dedicated as part of the process of subdivision. In his experience, although the land use designation of Park, Open Space and Recreation is typical and reasonable in a comprehensive plan, the P Park zoning district created by the City is extremely unusual and represents an approach he strongly urges cities to avoid. Park areas designated on a comprehensive land use plan are often zoned residential, so that some reasonable use of the land is allowed as a matter of right. 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.[143]

B. *McShane* and *Lucas*.

Respondents concur with the District Court's analysis of *McShane* found at App. 20-21, ¶ 25. Respondent sought from the District Court a declaratory and summary judgment on the issue of whether a specific governmental enterprise is involved and whether Rahn has had to bear a grossly disproportionate burden while the City has avoided having to pay compensation. Respondents took the position that, if the court granted declaratory and summary judgment on this issue, a genuine issue of material fact would still remain as to the amount of diminution in value and would require appraisal testimony. Similarly, Respondents suggested to the District Court that appraisal testimony may be necessary to determine whether the City's denial of Wensmann's application had denied Respondents all economically viable use of the Property resulting in a categorical taking under *Lucas*. If appraisal testimony is necessary as to these issues, Respondents would seek a remand to the District Court only if this Court were to reverse the District Court in all respects.

III. Wensmann Had A Protected Property Interest But, In Any Event, Courts Do Not Require The Submission Of Futile Applications.

The City argues that, because Wensmann entered into an Option Agreement for the purchase of the Property, it did not have a property interest that

[143] Resp. 11-14, ¶¶ 1, 7 and 8.

formed a viable basis for a takings claim.[144] However, at the time of the City Council hearing on August 2, 2004, there was a purchase agreement between Rahn and Wensmann.[145] The fact that there were contingencies in the purchase agreement makes it no different from any other purchase agreement. In any event, Rahn is the owner of the Property and a party to this lawsuit so, given the City's very clear position regarding guiding and zoning of the Property, courts do not "require the submission of further and futile applications."[146]

IV. Relief Sought.

Respondents seek an order from this Court affirming in all respects the District Court's Order. If the District Court's Order is reversed in all respects, Respondents seek a remand to the District Court on the following issues:

1. A determination as to the amount of diminution in value of the Property under *McShane*.

2. A determination whether the City's denial of Wensmann's application has denied Respondents' all economically viable use of the Property resulting in a categorical taking under *Lucas*.

3. Respondents' equal protection claim after discovery has been completed as described in the Rule 56.06 Affidavit at Resp. 305-06.

4. Whether the change in the City's Comprehensive Guide Plan in 2001, redesignating the golf course from PF – Public Facilities to P – Parks, Recreation and Open Space, constitutes a taking.

These issues were raised by Respondents before the District Court at p. 4 of their initial Memorandum in Support of Plaintiff's Motion For Declaratory Judgment,

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[144] Brief of Appellant, p. 23, citing *Superior-FCR Landfill*.
[145] App. 287-316.
[146] *Palazzolo v. Rhode Island*, 533 U.S. 606, 626 (2001).

Summary Judgment, Mandatory Injunction, or, in the Alternative, a Writ of Mandamus.

Dated: October 3, 2005.

By: _____

Wm Christopher Penwell (#164847)
Siegel, Brill, Greupner,
Duffy & Foster, P.A.
100 Washington Avenue South
Suite 1300
Minneapolis, MN 55401
(612) 337-6100

Attorneys for Wensmann Realty, Inc. and Rahn Family LP

State Of Minnesota
In Court of Appeals
NO. A05-1074

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

Respondents,

v.

City of Eagan, a Minnesota municipal corporation,

Appellant.

CERTIFICATE OF BRIEF LENGTH

I herby certify that Respondents' Brief conforms to the requirements of R.Civ.App.P. 132.01, subd. 3(a)(1) for a principal brief. The length of this brief is 12,664 words. This brief was prepared using Microsoft Word 2003.

Dated: October 3, 2005. By: _____

Wm Christopher Penwell (#164847)
Siegel, Brill, Greupner,
Duffy & Foster, P.A.
100 Washington Avenue South
Suite 1300
Minneapolis, MN 55401
(612) 337-6100

Attorneys for Respondents
Wensmann Realty, Inc.
and Rahn Family LP