Case No. A10-1072

STATE OF MINNESOTA
IN COURT OF APPEALS

Continental Property Group, Inc.,

Respondent,

v.

City of Minneapolis,

Appellant.

BRIEF OF AMICUS CURIAE AMERICAN PLANNING ASSOCIATION

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INTRODUCTION AND STATEMENT OF AMICUS CURIAE

The American Planning Association is a nonprofit public-interest and research organization founded in 1978 to advance the art and science of land-use, economic, and social planning at the local, regional, state, and national levels. APA, and its professional institute, the American Institute of Certified Planners, represent more than 44,000 professional planners, planning commissioners, and citizens involved with urban and rural planning issues. The organization has forty-seven regional chapters. The members of APA work for development interests as well as state and local governments, and they are routinely involved in comprehensive land use planning and its implementation through land use regulation. As an advocate for proper planning, the APA regularly files *amicus* briefs in cases of importance to the planning profession and the public interest that are before the United States Supreme Court, the United States Courts of Appeals, and state supreme and appellate courts.

As this Court decides the legal questions presented by the holdings of the district court, the Hon. Stephen C. Aldrich presiding, its consideration should be informed by the implications for the planning process of various alternative approaches. Many persons involved in the planning process in Minnesota – including professional planners, elected and appointed decision makers, and interested citizens – are potentially affected by the manner in which this Court addresses those questions.

The Minnesota Chapter of the American Planning Association ("MnAPA") is a non-profit statewide organization of over 900 land use planning professionals, educators, local officials, and planning commissioners. MnAPA members engage in policy,

infrastructure, and development planning and zoning on behalf of state and regional agencies, counties, cities, townships, educational institutions, and the private sector. MnAPA members represent the front-line implementers of state and local land use regulations and rules balancing community and individual interests. MnAPA supports the APA's participation in this case as amicus curiae.[1]

STATEMENT OF THE CASE AND FACTS

The APA concurs with the Appellant's statement of the case and the facts.

STANDARD OF REVIEW

The APA concurs with the Appellant's statement of the standard of review.

LEGAL ARGUMENT

An important question presented by this appeal is whether a single city council member caused the City of Minneapolis to violate the U.S. Constitution, because "the timeline of events and communications"[2] show that, before a public hearing, she took a position in opposition to a proposal that was the subject of variance and CUP applications – which the district court viewed as quasi-judicial.

If the Court reaches the question of what process was constitutionally "due" to Respondent Continental Property Group Inc. in this land-use setting, the Court should resist the temptation to hold local elected officials to the same expectations that it sets for members of the judiciary. The Minnesota Supreme Court has held that quasi-judicial

[1] The APA certifies pursuant to Minn. R. Civ. App. P. 129.03 that this brief was not authored in whole or in part by counsel for either party to this appeal and that no other person or entity besides the APA made a monetary contribution to its preparation or submission.

[2] Addendum ("ADD")23.

proceedings on land-use applications "do not invoke the full panoply of procedures required in regular judicial proceedings, civil or criminal, many of which would be plainly inappropriate in these quasi-judicial settings." *Barton Contracting v. City of Afton,* 268 N.W.2d 712, 716 (Minn. 1978). There have been no decisions by the Minnesota Supreme Court in the past 32 years to alter this holding.

The District Court's liability ruling in this case addressed the question of what process is "due" pursuant to the procedural due process component of the Fourteenth Amendment of the U.S. Constitution. The District Court did not derive its conclusions from those rulings of the United States Supreme Court that define what constitutes "notice and an opportunity to be heard," or that establish the point at which a decision maker's bias or prejudgment violates the U.S. Constitution.

When this Court applies the Supreme Court's procedural due process decisions, it should conclude that the council member's actions, including the "timeline of events" related to when the council member made up her mind to oppose the project, do not rise to the level of a constitutional violation. That is particularly true in light of more effective and focused post-deprivation remedies available under state law, and the harmful effect that constitutionalizing this question would have on the planning process.

I. THE CURRENT MEANING OF PROCEDURAL DUE PROCESS – AS REFLECTED IN APPLICABLE U.S. SUPREME COURT DECISIONS – DOES NOT ENTITLE A LAND USE APPLICANT TO A TRIBUNAL OF "BLANK SLATE" DECISION MAKERS.

The district court did not *deduce* its standard and analysis regarding decision maker bias from U.S. Supreme Court rulings.[3] Instead, the district court's standard was based almost entirely on an *inductive* source – an excerpt from a treatise that inventoried decisions of lower courts. ADD18 (quoting *Rathkopf's The Law of Zoning and Planning* §§ 32.14, 32.18 (4th ed. 2009) ("Rathkopf")).[4] The district court's analysis concludes or presumes that procedural due process entitled applicants for conditional use permits or variances to a tribunal full of undecided, ambivalent decision makers. Fortunately, however, the U.S. Supreme Court's procedural due process decisions create no such right. That itself requires reversal of the district court's procedural due process analysis.

Allowing council members to participate in decisions even after they have formed an opinion at an early stage does not run afoul of "[t]he fundamental requirement of due process" – the centerpiece of constitutional procedural due process – "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *See also*

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[3] Indeed, in its October 2008 ruling (when the district court first explained its conclusion that the facts as alleged reflected a violation of procedural due process), the district court cited no procedural due process decisions at all, but instead appeared to equate a conclusion that a land-use decision was unreasonable, arbitrary or capricious under Minn. Stat. § 462.361 with a conclusion that it violated the procedural due process component of the Fourteenth Amendment. See ADD50-55.

[4] On this question of the meaning of the Fourteenth Amendment, neither of the two chapters from which the district court drew its legislative standards cited any U.S. Supreme Court decision. See Rathkopf, §§ 32.14 and 32.18.

Barton Contracting, 268 N.W.2d at 716 ("The basic rights of procedural due process required in that case [when a council is acting in a quasi-judicial capacity] are reasonable notice of hearing and a reasonable opportunity to be heard.") What *kind* of a hearing is constitutionally required "would require a careful balancing of the competing interests – of the [applicant] and the [City] – implicated in the official decision at issue." *Davis v. Scherer,* 468 U.S. 183, 193 n.10 (1984)(citing *Mathews,* 424 U.S. at 335)). *Mathews* captured those "competing interests" in "three distinct factors:"

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews, 424 U.S. at 335. Conspicuously absent from the district court's procedural due process analysis is *any* balancing (careful or otherwise) of the competing interests of the applicant and of the City, let alone any recognition of the importance of the *Mathews v. Eldridge* factors.

Focusing specifically on U.S. Supreme Court due process decisions involving alleged decision maker bias, it is clear that the Court has stopped well short of concluding that procedural due process is violated when local elected officials who have already formed opinions participate in the decision. That is because a supposed bias based on pre-hearing opinions and judgments is not the type of bias that local officials constitutionally are forbidden to possess. On this point, the Supreme Court's analysis in *Hortonville Joint School Dist. No. 1. v. Hortonville Education Ass'n*, 426 U.S. 482

(1976), is the Court's most relevant decision. There, the Supreme Court rejected the claim that procedural due process entitled teachers to an independent and impartial decision maker that was not the local school board before they could be fired for unlawfully striking. The Supreme Court explained its holding by reference to "first, the *nature of the bias* respondents attribute to the Board, and second, the nature of the interests at stake in this case." *Id.* at 491 (emphasis added).

A. Under *Hortonville,* the "Nature of the Bias" Continental Property Group Attributes to the City Council Does Not Rise to the Level of a Procedural Due Process Violation.

In *Hortonville*, the school board fired the teachers after being deeply involved in negotiations that preceded and precipitated the strike. *Id.* at 492. The Court recognized that "mere familiarity with the facts gained by an agency in the performance of its statutory role," and "taking a position, even in public, on a policy issue related to the dispute," do not constitutionally require disqualification absent a showing that the decision maker "is not 'capable of judging a particular controversy fairly on the basis of its own circumstances.'" *Id.* at 492-93.

In this case, by contrast, the district court's analysis of bias turned on "the timeline of events and communications," ADD23, rather than on whether Council member Goodman individually (or the City Council collectively) was incapable "of judging it fairly *on the basis of its own circumstances.*" Under the district court's analysis, it did not matter whether Council member Goodman's judgment was based on the "circumstances" of Respondent's proposal to build a high-rise building in a low-rise neighborhood.

B. The Balancing of the Public and Private Interests under *Hortonville* and *Mathews* Tips Decidedly Against Procedural Due Process Liability.

Regarding the nature of the school district's interests at stake in *Hortonville*, the Supreme Court noted that "state law vests the governmental, or policymaking, function exclusively in the School Board and the State has two interests in keeping it there." *Id.* at 495. "It must cope with the myriad day-to-day problems of a modern public school system," and "by virtue of electing them the constituents have declared the Board members qualified to deal with these problems and they are accountable to the voters for the manner in which they perform." *Id.* at 495-96. The Court further emphasized that the decision of whether to fire the striking teachers had "significant governmental and public policy dimensions." *Id.* at 495. Those interests were not outweighed by the risk of an *erroneous* deprivation, and the degree of the potential deprivation. *Id.*

Here, it is impossible to miss the implications on sound land-use planning policy of a request to put a 21-story tower on 0.85 acres of property south of Loring Park in Minneapolis, through a design that would severely depart from established height limits and setback requirements. As the district court recognized (when rejecting the applicant's substantive due process claim), "[t]he Loring Hill neighborhood consists nearly entirely of low-rise residential and office buildings within the limits of the OR3 Zoning District," and the proposed tower was "objectively different, in both exterior appearance and height, from its surroundings." ADD21. If the Supreme Court considered that a small-town school board faced a "myriad of day-to-day problems," the same could as easily be said about the challenges facing the Minneapolis City Council, particularly as

it struggles to preserve the character of vibrant neighborhoods like Loring Park. And as in *Hortonville,* "by virtue of electing them the constituents have declared the [City Council] members qualified to deal with these problems and they are accountable to the voters for the manner in which they perform." *Id.* at 495-96.

The private interests of Continental Property Group, and any risk of an erroneous deprivation, cannot tip the balance of interests far enough to *constitutionally* entitle it to exclude any council member who formed his or her opinions at an early stage. As the district court recognized in its disposition of Continental's other claims, CUP or variance decisions that are unreasonable, arbitrary or capricious can be set aside in a declaratory judgment action under Minn. Stat. § 462.361. Those proceedings are ordinarily based on the record created in the public hearings, but if those proceedings were not fair and complete, *Swanson v. City of Bloomington,* 421 N.W.2d 307, 313 (Minn. 1988) entitles the aggrieved party to create a new record before the district court, and to essentially obtain a ruling on the merits from the district court judge. For applications that satisfy the legal standards for the issuance of the requested variances or permit – a circumstance that Continental Property Group cannot reasonably claim was present here – but are denied due to decision maker bias or any other inappropriate reason, such remedies provide effective protection of the private interests against the risk of erroneous deprivation. And to the extent that ex parte communications involving one or more council members were an important factor in the district court's constitutional analysis, the opportunity for a subsequent public hearing before the vote was taken has been

viewed by this court as a sufficient curative measure. *See In re Class A License Application of N. Metro Harness, Inc.*, 711 N.W.2d 129, 136 (Minn. Ct. App. 2006).

C. The U.S. Supreme Court's Latest Word on Decision Maker Bias Further Undermines the District Court's Contrary Approach.

Even where the decision maker is a judge, the U.S. Supreme Court recently demonstrated that the type of bias required to establish a procedural due process violation is more extreme than the facts presented here. *Caperton v. A.T. Massey Coal Co., Inc.*, __ U.S. __, 129 S. Ct. 2252 (2009). *Caperton* demonstrates that the district court in the instant case held an elected official to a higher standard of impartiality than even a judge is constitutionally required to satisfy.

In *Caperton,* a 5-4 majority found that procedural due process was violated when a West Virginia Supreme Court justice who cast the decisive vote to overturn a $50 million verdict had received $3 million in campaign contributions from the principal officer of the appellant. In explaining its earlier decisions in which the U.S. Supreme Court found that procedural due process required recusal of a judge, the majority noted that "in each case the Court dealt with extreme facts that created an unconstitutional probability of bias that 'cannot be defined with precision.'" *Caperton,* 129 S. Ct. at 2265. As the majority and minority opinions demonstrate, the type of bias sufficient to constitutionally require a judge's recusal must either be (a) a financial interest in a case's outcome; (2) the commingling of roles in a criminal contempt proceeding arising when the decision maker has charged the defendants with contempt of the same decision maker's ruling; and (3)

(to the majority of five justices)[5] when a third party with a personal stake in the case's outcome has had a significant and disproportionate influence in placing the judge on the case. *Id.* at 2254-55. The instant case does not come close to any of those circumstances, yet the district court relied primarily on decision maker bias to find that the City deprived Continental Property Group of procedural due process.

II. EXISTING STATE-LAW PROCEDURES AND POWERS PROVIDE MORE APPROPRIATE AND EFFECTIVE REMEDIES FOR DECISION MAKER BIAS AND INAPPROPRIATE EX PARTE COMMUNICATIONS.

In its October 2008 ruling, the district court stated without explanation that, if a due process claim were barred because the City had not deprived Continental Property Group of a protected property interest, "Plaintiff would have no recourse whatsoever from alleged arbitrary and capricious behavior on the part of the City." ADD49. When opposing the procedural due process claim, the City emphasized the post-deprivation remedies available under Minnesota law. A89, 114 n.5. Yet the district court brushed off those arguments with little comment. ADD21 n.3.[6] Those remedies are important to this Court's analysis, and not simply as it considers whether the proceedings before the denial

[5] The dissent of Chief Justice Roberts, joined by three other justices, concluded that procedural due process requires a judge's recusal only "when the judge has a financial interest in the outcome of the case, and when the judge is presiding over certain types of criminal contempt proceedings." *Id.* at 2268 (Roberts, C.J., dissenting).

[6] The City had relied upon two cases, including this court's decision in *Winnick v. Chisago County Bd. of Comm'rs,* 389 N.W.2d 546 (Minn. Ct. App. 1986), in which this court affirmed the dismissal of a procedural due process claim because the plaintiff "was given a postdeprivation hearing in which his position was fully vindicated." *Id.* at 548. The district court found this was not a "proper analogue" because it was a situation "where the procedural process was ultimately fair," ADD21 n.3. But *Winnick* was significant *because* this Court considered the post-deprivation process "fair" (and rejected the plaintiff's procedural due process claim on that basis).

of the applications were constitutionally sufficient in light of those post-deprivation remedies, as the City argues. They are important because those state-law post-deprivation remedies are superior to the remedy ultimately imposed by the district court.

A. A Remand For a New Hearing and Council Decision is a Far Better Solution than the District Court's Approach.

When a decision may have been influenced by a biased decision maker's involvement or by improper ex parte communications, courts can send the matter back to the city for full rehearing on the application by an untainted council.[7] It is analogous to ordering a new trial when this court concludes that the trial court judge was biased or influenced by improper considerations, or that important information was wrongfully withheld from a party. It convincingly answers the question of whether the applicant would have succeeded but for the alleged procedural irregularities. Unlike the district court's remedy, it provides a second chance for the application to be granted, and for the applicant to build a tower (and not simply a lawsuit).

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[7] *See, e.g., Hanig v. City of Winner,* 692 N.W.2d 202, 209 (S.D. 2005) (following courts that "have held that if one member has a conflict of interest it taints the entire process *and the applicant is entitled to a new determination without the disqualified member*")(emphasis added); *Prin v. Council of the Monroeville,* 645 A.2d 450, 452 (Pa. Commw. Ct. 1994) (because "it is clear that Councilman Lopicollo was predisposed against Appellants' project. . . the matter is remanded to the trial court with direction to remand the case to Monroeville Council for a vote absent Councilman Lopicollo.") In *Hanig,* the evidence showed that, before the council denied renewal of the plaintiff's liquor license, a council member employed as a waitress at a competing steakhouse was urged by her employer to vote against renewal. *Id.* at 204. Finding that this entitled the plaintiff to "a new hearing, *Id.* at 210, the Supreme Court directed the trial court to "requir[e] the city council to conduct a new hearing and vote without the disqualified member's participation and with full disclosure of any conflicts of the remaining members." *Id.*at 211.

By contrast, the district court's chosen remedy is analogous to holding the State of Minnesota liable for the out-of-pocket expenses and attorneys' fees of appellants who demonstrate that a trial was procedurally deficient, regardless of whether those expenses needed to have been incurred in any event,[8] and regardless of whether those procedural deficiencies affected the outcome. Instead of giving the applicant a second chance to succeed, the district court had surprisingly little concern about whether the applicant would have succeeded after a fair trial.[9] Using the *Mathews v. Eldridge* factors, which place particular importance on the *accuracy* of the proceedings, a post-deprivation remand for a new hearing is more likely to result in an accurate adjudication of the parties' true rights, and to produce a solution that reflects the true effects of the procedural deficiencies.

B. When Proceedings on a Land-Use Application are Procedurally "Unfair," Minnesota Law Provides that an Evidentiary Hearing Can Replace On-The-Record Review.

By operation of state law, *Swanson v. City of Bloomington,* 421 N.W.2d 307, 313 (Minn. 1988) provides a meaningful deterrent and useful remedy when a city's land-use

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[8] The out-of-pocket expenses that make up the Continental Property Groups' damages award, reflecting the fees of architects and other professionals, are unavoidable for anyone who proposes to build a major real-estate project like a 21-foot tower, and who needs variances and a conditional use permit.

[9] Indeed, in its order awarding the Continental Property Group hundreds of thousands of dollars in damages and fees, the district court observed that "Plaintiff could not have reasonably expected that its application would be approved," ADD40, and that "it is impossible to say with any certainty what decision the City Council may have reached in the absence of procedural violations." ADD41 n.3. Under the district court's view of the law, the question of whether any of the applications would have been approved but for those deficiencies was not sufficiently important to warrant a finding on that point.

proceedings are not "fair" (and complete). As the Minnesota Supreme Court noted in that case, which involved an exercise of review under Minn. Stat. § 462.361, a district court "should establish the scope and conduct of its review of a municipality's zoning decision by considering the nature, fairness and adequacy of the proceeding at the local level and the adequacy of the factual and decisional record of the local proceeding. *Where the municipal proceeding was fair and the record clear and complete*, review should be on the record." 421 N.W.2d at 312-313 (emphasis added). Conversely, "[w]here the municipal proceeding has not been fair or the record of that proceeding is not clear and complete, *Honn* [*v. City of Coon Rapids,* 313 N.W.2d 409 (Minn. 1981)] applies and the parties are entitled to a trial or an opportunity to augment the record in district court." *Id.* at 313. That result was described elsewhere in the decision as the ability to "demand that the case be retried in the district court." *Id.* at 312.

This court has found that a similar remedy was available in a certiorari proceeding, after this court concluded that the City of Minneapolis' denial of a license renewal to Hard Times Café was improperly influenced by decision maker bias and extra-record information exchanged by email. *Hard Times Café v. City of Minneapolis,* 625 N.W.2d 165, 174 (Minn. Ct. App. 2001). The court transferred the case to the district court so that it may "take testimony and hear and determine the alleged irregularities in procedure.'" *Id.* (quoting Minn. Stat. § 14.68).[10]

[10] Local decisions are not directly governed by chapter 14 (the Minnesota Administrative Procedure Act, of MAPA), but in *Hard Times Café* this Court "conducted its analysis pursuant to MAPA" because "the city elected to be governed by MAPA," based on

III. UPHOLDING THE DISTRICT COURT'S APPROACH WOULD DAMAGE AND DISTORT THE LAND USE DECISION MAKING PROCESS.

The district court took extraordinary steps in order to constitutionalize its concerns about the timing of Council member Goodman's opposition to the project. The Complaint did *not* include a procedural due process claim, A8-12, ADD10, but the district court allowed Continental Property Group to try such a claim. The district court then used that claim as the hook to find the decision was unconstitutional, ADD6. Weeks before the damages phase of the trial began, Judge Aldrich told Plaintiff's counsel that "I will grant you [a] substantial portion of your fees." Dec. 4, 2009 Tr. at 60. Following the damages phase, the district court found the City liable for $165,369.88 in damages and $357,523.45 attorneys fees, ADD41, 43.[11]

Affirming the district court's constitutional standards and analysis would have a distorting effect on land use decisionmaking, in three different respects.

A. Responding to a Perceived Unfairness in the Land Use Decision Making Process by Expanding Constitutional Protections Would Have a One-Sided Effect.

A claim for damages resulting from a deprivation of property without procedural due process is available only to persons who have a protected property interest at stake – in the land-use context, often permit applicants, but never neighbors or other permit

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communications from an assistant city attorney to the city council and the licenseholder. *Id.* at 173.

[11] Indeed, the primary barrier to the Continental Property Group's ability to succeed before the district court with its claim to over $11 million in lost-profits damages "had its project been approved and built" was the intervening crash of the real estate market for high-rise residential properties, which rendered such profits "speculative" in the eyes of the district court. ADD38-39.

opponents. *See, e.g., Fusco v. Connecticut,* 815 F.2d 201, 205-06 (2d Cir. 1987) (approval of variance for nearby property cannot deprive neighbors of property interest protected by due process clause); *MacNamara v. County Council of Sussex County*, 738 F. Supp. 134, 143 (D. Del. 1990) ("the court is unaware of any cases in which persons who merely own property in the neighborhood of a rezoned parcel have successfully claimed the deprivation of a constitutionally protected interest.")

As a result, if this Court affirms the district court's constitutional analysis, including its invocation of the due process clause to solve a council member's alleged predisposition, it will have a very unbalanced effect. A council member's predisposition *in favor of* an application would be "safe" from a procedural due process suit, because neighborhood opponents of a project will never be able to establish that the grant of a permit or variance deprives *them* of a protected property interest. However, a decision maker's predisposition *against* an application could serve as a powerful tool for an applicant (but only an applicant) to threaten significant financial liability if a denial results. That unbalanced result does not occur if questions of decision maker predisposition are addressed pursuant to Minn. Stat. § 462.361. Under that cause of action, any "aggrieved party" (including both applicants and affected neighbors)[12] can challenge a decision that is unreasonable, arbitrary, capricious, or contrary to law.

[12] See, e.g., *Krummenacher v. City of Minnetonka,* 783 N.W.2d 721, 723 (Minn. 2010) (exercising judicial review of claim that a city unlawfully granted a variance to the plaintiff's neighbor).

B. Affirming the District Court's Constitutional Analysis Would Have a Chilling Effect on Pre-Hearing Discussions that are Important to Both Planners and Developers.

In this case, Council member Goodman did not concede that she had a closed mind during the hearings on the Continental Property Group's applications. Instead, the District Court based that conclusion on "the timeline of events and communications," which reflected that Council member Goodman formed an opinion regarding the Continental Property Group's project at an early stage (and assisted constitutents who shared that opinion in lobbying her colleagues). ADD23. Hundreds of thousands of dollars in municipal liability followed from that syllogism. Affirming the district court's analysis would, as a practical matter, create a chilling effect on pre-hearing communications that are valued by developers, planners, and elected officials.

If this court were to affirm the district court's analysis, among the most disappointed set of stakeholders would be project proposers. Project proposers are often the first to approach city officials (including final decision makers on applications) with ideas about future projects. The testimony of Plaintiff's owner Brad Hoyt and his architects at trial demonstrates how that common practice occurred in this case as well. Seeking out Council member Goodman well before any applications for quasi-judical approvals were submitted, Hoyt and his architects made an early attempt to elicit her reaction to the proposed high-rise project. Trial Testimony of Brad Hoyt, Tr. at 1052 (Supplemental Record ("SR") 364), 1056 (SR368), 1059, 1080, 1095, 1109-10, 1119-20, Trial Testimony of Paul Mellbloom, Tr. at 166-67, 268. These communications occurred

long before any public hearing, and included private phone calls initiated by Continental Property Group and its agents.

The reasons why developers make such early contacts are varied, and legitimate. Here, in many other instances, the developer wanted the council member in whose district the project was proposed to become an early supporter of the project, and for that reason, devoted significant energy to lobbying her at a very early stage. Hoyt Trial Test. at 1052, 1056, (Q: You spent months, countless meetings, not just by you, but by your professional paid staff and architects to try to persuade Council member Goodman to support your project, correct? A: That was the process. Yes.), 1059, 1120 (Q: [D]uring this time of early June, 2004 . . . your representatives were also out there trying to influence, lobby, or whatever word you want to use, Council member Goodman regarding [the] project, correct? A: Yes, that's their job.); Mellbloom Trial Test. at 198-99, 217, 248. Developers also find it useful to understand, at an early stage, what they may need to change about a proposed project in order to win the support of a majority (or, in some cases, supermajority) of the council. Finally, developers also benefit if they learn, before hundreds of hours are spent and thousands of dollars in consultant fees are incurred, that a project has little chance of receiving necessary approvals.

City councils and county boards in Minnesota often convene informal public meetings, known as "work sessions." Those sessions – popular among developers and public officials – serve as occasions for developers to float ideas and describe alternatives, and receive feedback from the ultimate decision makers on any necessary land-use approvals before the more expensive portions of the application process begin.

Work sessions give developers a chance to describe proposed projects to council members at an early stage, in the *hope* that they will provide candid feedback at that session.

If, however, the district court's approach were adopted by this Court, it would simply be too risky for cities and counties to entertain these kinds of efforts. Those kinds of early exchanges serve as the basis for a project proposer to claim a constitutional violation when its lobbying efforts are unsuccessful, because an early *negative* opinion of the project was elicited that could be portrayed as proof of "closemindedness" before the formal hearing. No matter how important it might be to a developer to understand the decision makers' likely reaction to their proposal, the prospect that such a dialogue could later be turned on the city, and used as a basis to make the public pay the developers' consulting and attorneys fees (and, if not speculative, its lost profits), should stop decision makers in most cities from engaging proposers before a formal application and hearing.

Developers sometimes present ideas to cities that are "non-starters." Sometimes that is because they are squarely at odds with an important land-use regulation. Other times, it is because of the likelihood that the decision makers would not make the findings necessary to depart from existing standards.[13] The planning process would suffer if the first "safe" occasion for a city council member to explain that a project is a

[13] This is especially true when a variance is needed, because the statutory criteria for the approval of variances by Minnesota cities, like cities elsewhere, is rigorous. *See, e.g., Krummenacher v. City of Minnetonka*, 783 N.W.2d at 732 (by statute, "a municipality does not have the authority to grant a variance unless the applicant can show that her property cannot be put to a reasonable use without the variance.")

non-starter occurs only after a public hearing on the project has already taken place. That would come at the expense of developers (in the form of wasted time and money, when decision makers withheld criticisms) and at the expense of cities (in liabilities for Section 1983 awards and attorneys' fees, when decision makers did not).

The fact that this risk arises only in situations where a quasi-judicial proceeding later occurs does little to contain the chilling effect. That is because a council member could not predict, with reasonable certainty, that the project would never come before them in a quasi-judicial context. Implicit in every zoning regulation is a potential quasi-judicial proceeding. A developer or property owner might file a variance application *seeking* to avoid the need to comply with that regulation, thus transforming a situation in which a particular use is forbidden by ordinance into the subject of a quasi-judicial proceeding.[14] As a result, if this Court adopts the district court's approach, as a practical matter it would rarely be safe for city council members to participate with developers or project proponents seeking early feedback or support on development ideas.

IV. INSTEAD OF EFFECTIVELY MANDATING RECUSAL, EVEN IN THE ABSENCE OF A TRUE CONFLICT OF INTEREST, THE COURT SHOULD ENCOURAGE CITIES AND COUNTIES TO REQUIRE THE DISCLOSURE ON THE RECORD OF EX PARTE COMMUNICATIONS.

Courts and cities in other states have identified more appropriate ways for communications that occur before or outside of a hearing to be addressed in a manner

[14] Moreover, even when the developer is seeking an application for a legislative change (such as a reguiding or rezoning application), often approval of that legislative request must be followed by an application for a quasi-judicial approval. For example, if a developer wishes to build a convenience store in a residential area, simply rezoning the proposed location to "roadside business" may not suffice, if a convenience store in that type of zoning district is a condition rather than a permitted use.

that is consistent with principles of "on the record" review. The district court's approach – of making those communications part of its conclusion that the proceedings were unconstitutional, without concluding that they prejudiced the applicant or withheld unique information from it – provides no solution at all. It simply penalizes the City as a whole because such communications occurred. It does not cause such communications to be channeled into the record so that – if the information is not already in the record – the participants can consider it and respond to it as needed.

Many stakeholders – including project proponents, concerned neighbors, and other public officials – may be inclined to initiate ex parte contacts regarding a pending application or project. In lieu of the district court's approach, the court should encourage cities and counties to adopt disclosure requirements, under which a decision maker who receives an ex parte contact with significant new information regarding a pending quasi-judicial application is required to describe the source and the substance of the contact during the public hearing. An approach that focuses on whether the information was eventually made a part of the record has been followed by courts in other states. See *Cowan v. Bd. of Comm'rs of Fremont Co.,* 148 P.3d 1247, 1260 (Idaho 2006); *McPherson Landfill Inc. v. Bd. of Shawnee County Comm'rs,* 40 P.3d 522, 534 (Kan. 2002). Such an approach not only allows significant information conveyed to decision makers to be known and responded to at the appropriate time, but should discourage anyone tempted to use ex parte communications to shoot down an application based on refutable misinformation.

CONCLUSION

If the Court reaches the question of what process was constitutionally due to Respondent Continental Property Group Inc., Amicus Curiae American Planning Association respectfully encourages the Court to disregard the district court's misguided and disruptive approach. Consistent with the U.S. Supreme Court's decisions regarding procedural due process, the Court should conclude that procedural due process did not entitle the applicant to have every voting member of the city council refrain from forming any judgment regarding its project or its applications before the public hearing.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the word limitations of Minn. R. Civ. App. P. 132.01, subd. 3(a). The brief was prepared using Microsoft Word 2007, which reports that the brief contains 6,376 words.