NO. A05-1074

State of Minnesota
In Supreme Court

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

v.

City of Eagan, a Minnesota municipal corporation,
Respondent.

BRIEF OF AMICI CURIAE LEAGUE OF MINNESOTA CITIES, AMERICAN PLANNING ASSOCIATION, MINNESOTA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND COMMUNITY RIGHTS COUNSEL

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 5

I. The Takings Clause Is Not A Taxpayer-Subsidized Insurance Policy For Business Risks or Bad Investments 7

II. The Lack of Interference With Reasonable Expectations Undermines Plaintiffs' Takings Claim 10

III. Plaintiffs' Failure to Show that the City's Action Had a Severe Economic Impact Undermines Their Takings Claim 16

IV. The Character of the Government Action Cuts Strongly Against Takings Liability in View of the City's Desire to Protect the Integrity of Its Comprehensive Plan 24

CONCLUSION 28

TABLE OF AUTHORITIES

Agins v. City of Tiburon,
447 U.S. 255 (1980) 20, 21, 24

American Pelagic Fishing Co. v. United States,
379 F.3d 1363 (Fed. Cir. 2004) 18

Andrus v. Allard,
444 U.S. 51 (1979) 18

Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs,
38 P.3d 59 (Colo. 2001) 20, 21

Board of Supervisors v. Omni Homes, Inc.,
481 S.E.2d 460 (Va. 1997) 12

Brown v. Legal Found. of Washington,
538 U.S. 216 (2003) 15

Cane Tennessee, Inc. v. United States,
57 Fed. Cl. 115 (2003) 9-10, 17-18

Claridge v. N.H. Wetlands Bd.,
485 A.2d 287 (N.H. 1984) 8

Creppel v. United States,
41 F.3d 627 (Fed. Cir. 1994) 11

Czech v. City of Blaine,
253 N.W.2d 272 (Minn. 1977) 15

District Intown Properties Ltd. P'ship v. District of Columbia,
198 F.3d 874 (D.C. Cir. 1999) 21

Dolan v. City of Tigard,
512 U.S. 374 (1994) 2, 25

Elias v. Town of Brookhaven,
738 F. Supp. 758 (E.D.N.Y. 1992) 9

Florida Rock Indus., Inc. v. Bystrom,
485 So.2d 442 (Fla. Ct. App. 1986) 23

Florida Rock Indus., Inc. v. United States,
791 F.2d 893 (Fed. Cir. 1986).....23

Forest Props. v. United States,
39 Fed. Cl. 56 (1997), *aff'd*, 177 F.3d 1360 (Fed. Cir. 1999) 9

Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal,
135 F.3d 275 (4th Cir. 1998) 21-22

Good v. United States,
189 F.3d 1355 (Fed. Cir. 1999).....10, 11, 12

Gove v. Zoning Board of Appeals of Chatham,
831 N.E.2d 865 (Mass. 2005) 17

Hadacheck v. Sebastian,
239 U.S. 394 (1915).....20, 21

Jengten v. United States,
657 F.2d 1210 (Ct. Cl. 1981) 22

Keystone Bituminous Coal Ass'n v. DeBenedictis,
480 U.S. 470 (1987).....4, 16, 18, 24

Lingle v. Chevron U.S.A., Inc.,
544 U.S. 528 (2005).....4, 14-15, 18-19

Lucas v. South Carolina Coastal Council,
505 U.S. 1003 (1992).....5, 6, 19, 20, 21

Palazzolo v. Rhode Island,
C.A. No. WM 88-0297, 2005 R.I. Super. LEXIS 108 (July 5, 2005) 14

Palazzolo v. Rhode Island,
533 U.S. 606 (2001).....13, 14

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

Reahard v. Lee County,
968 F.2d 1131 (11th Cir. 1992) 22

Ruckelshaus v. Monsanto Co.,
467 U.S. 986 (1984).....3, 10, 12

Sanderson v. Town of Candia,
787 A.2d 167 (N.H. 2001) 8

State of Florida v. Burgess,
772 So.2d 540 (Fl. 2000) 9

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency,
535 U.S. 302 (2002)..... *passim*

Texas Manufactured Hous. Ass'n, Inc. v. Nederland,
101 F.3d 1095 (5th Cir. 1995) 22

767 Third Avenue Associates v. United States,
48 F.3d 1575 (Fed. Cir. 1995).....10

United States v. Riverside Bayview Homes, Inc.,
474 U.S. 121 (1985).....20

Valley Sand & Gravel, Inc. v. Board of County Comm'rs,
38 P.3d 59 (Colo. 2001).....20

Village of Euclid v. Ambler Realty Co.,
272 U.S. 365 (1926).....20, 21

Wensmann Realty, Inc. v. City of Eagan, 2006 Minn. App. Unpub. LEXIS 529
(2006) 16

Williamson County Reg'l Planning Comm'n v. Hamilton Bank,
473 U.S. 172 (1985).....19

Zealy v. City of Waukesha,
548 N.W.2d 528 (Wisc. 1996).....22

Zeman v. City of Minneapolis,
552 N.W.2d 548 (Minn. 1996).....5, 10

Other Authorities

J. David Breemer & R.S. Radford,
The (Less?) Murky Doctrine of Investment-Backed Expectations After Palazzolo, and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-Palazzolo Muck, 34 Sw.U.L.Rev. 351 (2005) 15

Lynda L. Butler,
State Environmental Programs: A Study in Political Influence and Regulatory Failure, 31 Wm. & Mary L. Rev. 823 (1990) 26, 27

Susan A. Macmanus,
The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms, 44 Syracuse L. Rev. 833 (1993).....26

David S. Mendel,
Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments, 95 Mich. L. Rev. 492 (1996).....26

Lynda J. Oswald,
Cornering the Quark: Investment-Backed Expectations and Economically Viable Uses in Takings Analysis, 70 Wash. L. Rev. 91 (1995)..... 17-18

INTEREST OF AMICI CURIAE[1]

The League of Minnesota Cities represents more than 800 Minnesota cities, 11 townships, and 41 special districts. Founded in 1913 by a special law passed by the Minnesota Legislature, the League is committed to serving Minnesota's cities through effective advocacy, expert analysis, trusted guidance, and collective action. The League works in the interest of cities and the communities they serve through policy development, advocacy, education and training, information-sharing, and other services.

The American Planning Association (APA) is a public interest organization founded in 1978 to advance the art and science of planning at the local, regional, state, and national levels. It represents more than 38,000 planners, officials, and citizens involved in formulating and implementing planning policies and land use regulations. The organization has 46 regional chapters, as well as 19 divisions devoted to specialized planning interests. The APA's members work for development interests as well as state and local governments, and its mission is to encourage planning that will contribute to public well-being by developing communities and environments that meet the needs of people and society more effectively.

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[1] Pursuant to Minn. R. Civ. App. P. 129.03, amici affirm that this brief was not authored in whole or in part by counsel for a party, and no person or entity other than the amici, their members, and their counsel made a monetary contribution to the preparation or submission of the brief.

The Minnesota Chapter of the American Planning Association is a non-profit statewide organization of over 750 planning professionals, educators, local officials, and planning commissioners involved in planning-related activities on behalf of state and regional agencies, counties, cities, towns, educational institutions and the private sector.

Community Rights Counsel (CRC) is a nonprofit, public interest law firm in Washington, D.C., that assists local officials in defending against constitutional challenges to land use laws, environmental safeguards, and other community protections. Since its founding in 1997, CRC has filed amicus briefs with the U.S. Supreme Court in many regulatory takings cases, and has represented scores of governmental amici in state and federal appellate courts across the country.

As noted in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), local officials "have long engaged in the commendable task of land use planning." *Id.* at 396. Amici bring a vital perspective to regulatory takings issues and have a compelling interest in the proper development of takings law as applied to comprehensive planning and other land use controls.

SUMMARY OF ARGUMENT

Investments sometimes go bad due to changes in market conditions or imprudent business decisions. Plaintiffs are, in effect, asking this Court to use the Takings Clause to require Minnesota taxpayers to provide businesses with insurance against the risk of new competition and other

marketplace developments that can transform seemingly sound investments into unprofitable ventures, or alternatively to compel local officials to abandon longstanding community protections in their comprehensive land-use plans. The takings jurisprudence of this Court and the U.S. Supreme Court compel rejection of this extraordinary request.

Under established precedent, a proper analysis of Plaintiffs' takings claim requires consideration of three factors: 1) the extent to which the City's denial of Plaintiffs' request to amend the Comprehensive Plan interfered with Plaintiffs' reasonable expectations; 2) the severity of the denial's economic impact; and 3) the character of the government action. As the Court of Appeals unanimously concluded, each of these factors, individually and collectively, cuts strongly against Plaintiffs' claim.

First, Plaintiffs had no objectively reasonable expectation of using the land at issue for residential development. There could be no such expectation given the longstanding zoning and Comprehensive Plan provisions that prohibit such use, as well as the City's refusal to amend its Plan in 1996 just shortly before Rahn Family LP purchased the land, and Rahn's use of the land as a golf course for many years. As the U.S. Supreme Court has recognized, the absence of interference with reasonable expectations may, in some cases, be "so overwhelming * * * that it disposes of the taking question." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984). That is the case here.

Second, as reaffirmed in the recent ruling in *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), government regulation works a taking only where the economic impact is so severe as to constitute the "functional equivalent" of an actual appropriation of the land. The proper inquiry does not compare the current value of the land with its value if intense residential development were allowed, but instead the land's value before and after the City's rejection of Plaintiffs' request to amend the Comprehensive Plan. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (in analyzing a regulatory taking claim, a court should "compare the value that has been taken from the property with the value that remains in the property").

The trial court made no findings on this crucial aspect of Plaintiffs' claim, and the Court of Appeals correctly concluded that the record fails to establish that the 2004 denial of Plaintiffs' application diminished the property's value at all. It is reasonable to presume that any change in value was, at most, de minimis because the land's market value already would have been discounted to reflect the longstanding restrictions on residential development. The facts of this case are a far cry from the kind of severe economic impact required to show a taking.

Finally, the character of the government action cuts against takings liability. The City did nothing more than preserve the integrity of its longstanding Comprehensive Plan and the quality of life protected by that

Plan. Takings jurisprudence expressly recognizes the legitimacy and importance of careful land use planning. A finding of takings liability based on a municipal decision to adhere to its Comprehensive Plan would severely undercut the usefulness of careful, comprehensive land use planning and the ability of local officials to protect their communities through land use controls.

ARGUMENT

This brief focuses on Plaintiffs' claim under the Takings Clause of the Minnesota Constitution, Art. I, §13, which provides: "Private property shall not be taken, destroyed or damaged for public use without just compensation." While we agree with the analysis of the other issues set forth in the City of Eagan's opening brief, we give the takings issue our exclusive attention due to its overriding importance to local officials. In particular, this brief concentrates on the multifactor takings inquiry articulated in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978), *Zeman v. City of Minneapolis*, 552 N.W.2d 548, 552 (Minn. 1996), and other controlling precedents.[2]

[2] No serious contention can be made that the City's denial of Plaintiffs' application to amend the Comprehensive Plan worked a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). The *Lucas* per se rule applies only where government regulation renders the claimant's land valueless. *E.g.*, *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 330 (2002) ("Anything less than a 'complete elimination of value,' or a 'total loss,' the [*Lucas*] Court acknowledged, would require the kind of analysis applied in *Penn*

At the outset, it is important to emphasize the extraordinary nature of Plaintiffs' claim. In the typical regulatory takings case, a landowner challenges a *new* regulation or government action that restricts previously permissible uses of the land. This was the scenario confronted by the U.S. Supreme Court in: (1) *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), where the court considered the takings implications of a 32-month moratorium on previously allowed development, (2) *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), where the court considered the takings implications of new regulations that limited previously permissible beachfront development, and (3) *Penn Central*, *supra*, where new restrictions impaired previously permitted development above Grand Central Terminal. In some cases, such as *Lucas*, new restrictions can result in takings liability; in others, such as *Tahoe-Sierra* and *Penn Central*, the new restrictions do not give rise to takings liability.

This case is remarkably different. It is virtually unprecedented for a court to find takings liability where local officials simply refuse to amend Comprehensive Plan requirements rooted in a longstanding zoning

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Central."). Any contention that *Lucas* applies here is defeated by Plaintiffs' own consultant, who agreed that the land retains substantial value (*see* the McMurchie Report, App. 523), and by Plaintiff Wennsman's October 2004 non-contingent offer to purchase the land. App. 50, transcript pp. 127-128; Conf. App. 1, "H"; Conf. App. 7.

designation. These settled land use measures prevented Plaintiffs from ever having a reasonable expectation to use the land in a manner inconsistent with those requirements. We show below why this remarkable claim should be rejected.

I. The Takings Clause Is Not A Taxpayer-Subsidized Insurance Policy For Business Risks or Bad Investments.

Rahn bought the land at issue in 1996 for use as a golf course, fully aware that the City's Comprehensive Plan and applicable zoning prohibited use of the land for residential development. App. 42, pp. 69-70. Indeed, during that same year the City had denied a request from Pulte Homes of Minnesota to amend the Comprehensive Plan to allow for residential development of the land. App. 525-531; Resp. 43-61. Over the years, Rahn rebuilt tee boxes, refurbished the clubhouse, and made other improvements to the property to further its use as a golf course. App. 44-45, pp.79-84.

In purchasing the property, Rahn knowingly took an informed business risk, believing that he "could go in there and turn this thing around and get it back to a really viable golf course." App. 33, p. 33; *see also* App. 39, pp. 58-59 ("I had every hope[] of that place just booming just because of our reputation."). And, indeed, the property was financially viable as a golf course from the time of Rahn's purchase through 2000. App. 46, pp. 93-95. Thereafter, the investment soured due to a general economic decline

and an overbuilding of golf courses in the area, which led to stiffer competition. App. 39, p. 59 (describing the new competition); App. 46, pp. 93-96 (discussing economic downturn and golf course glut). In other words, the vicissitudes of the marketplace devalued the property as a golf course and transformed Rahn's investment into a bad deal.

The Takings Clause is not designed to be a taxpayer-subsidized insurance policy against bad investments, or good investments that turn bad due to changes in the marketplace. This theme is a mainstay of takings jurisprudence. For example, in *Sanderson v. Town of Candia*, 787 A.2d 167 (N.H. 2001), the Supreme Court of New Hampshire affirmed the lower court's rejection of a takings challenge to the town's refusal to approve a cluster subdivision on the claimant's land due to inadequate street frontage. Because the claimant knew that the property lacked the requisite frontage when she bought the property, the court rejected the claim, insisting that the Takings Clause is not an insurance policy against business risk:

> [The claimant] purchased the hardship of which she now complains. Under these circumstances, the plaintiff had "few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights," and applying the ordinance to her land did not constitute a taking. As we explained in *Claridge [v. N.H. Wetlands Bd.*, 485 A.2d 287 (1984)], "The [government] cannot be guarantor, via inverse and condemnation proceedings, of the investment risks which people choose to take in the face of statutory or regulatory impediments."

Id. at 169 (citations omitted); *accord, State of Florida v. Burgess*, 772 So.2d 540, 544 (2000) (rejecting a takings challenge to the state's denial of a permit to fill and develop wetlands because a landowner "does not have a right to gain a profit from an investment in land," and "the frustration of speculative economic gain is not protected by the Takings Clause.")

Federal courts, too, recognize that the Takings Clause does not serve as an insurance policy against business risk and investment loss. In *Elias v. Town of Brookhaven*, 783 F. Supp. 758 (E.D.N.Y. 1992), the court rejected a takings challenge to a change in zoning from commercial to residential, ruling that the Takings Clause "does not guarantee to an investor in land that the existing zoning regulation will remain unchanged." *Id.* at 761. "To hold otherwise," the court observed, "would be to draw into question the effective power of a locality to plan for the future needs of its residents." *Id. A fortiori,* the Takings Clause does not guarantee a landowner that local officials will amend Comprehensive Plan requirements where marketplace changes subsequently render the owner's investment in the land a dubious one. *Accord*, *Forest Props. v. United States*, 39 Fed. Cl. 56 (1997) (The Takings Clause does not "turn the Government into an involuntary guarantor of the property owner's gamble that he could develop the land as he wished despite the existing regulatory structure"), *aff'd*, 177 F.3d 1360 (Fed. Cir. 1999); *Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003) (The Takings Clause should not reward bad investments; "If a

party overpaid for a piece of property, it could reap an economic windfall if the economic impact of later governmental action is measured as the party's inability to recoup its investment or earn a positive return.").

II. The Lack of Interference With Reasonable Expectations Undermines Plaintiffs' Takings Claim.

The legal explanation for why the Takings Clause does not serve as a taxpayer-subsidized insurance policy against business risk derives from judicial insistence that government action must severely interfere with a claimant's objectively reasonable expectations before takings liability attaches. *See Penn Central*, 438 U.S. at 124; *Zeman*, 552 N.W.2d at 552. As the U.S. Supreme Court observed in *Ruckelshaus v. Monsanto*, 467 U.S. 986 (1984), a lack of interference with reasonable expectations can be "so overwhelming * * * that it disposes of the taking question." *Id.* at 1005; *accord Good v. United States*, 189 F.3d 1355, 1360 (Fed. Cir. 1999); *767 Third Avenue Associates v. United States*, 48 F.3d 1575, 1581 (Fed. Cir. 1995). The case at bar is such a case.

It is difficult to imagine another takings case in which the claimants' expectations cut so strongly against takings liability. At the time this suit was filed, the property had been zoned for recreational use, to the exclusion of residential development, since 1962, and it was so zoned at the request of the property's owner at that time. Resp. 34-35. Since 1965, the land had been used as a golf course. Resp. 38-40. In 1974, the City adopted a

Comprehensive Plan that incorporated the recreational zoning designation by designating the land as "Golf." App. 179. Rahn purchased the land in 1996 with actual knowledge of the applicable zoning, and with no subjective intention (much less an objectively reasonable expectation) of using the land for residential development. App. 42, pp. 69-70. Just a few months prior to Rahn's purchase, the City had unanimously refused to amend its Comprehensive Plan to allow for residential development in response to a request from Pulte Homes. App. 525-531; Resp. 43-61. Rahn operated the golf course successfully from 1996 through 2000, and he made investments to improve the golf course. App. 44-45, pp.79-84; App. 46, pp. 94-95. Only after the overbuilding of regional golf courses led to greater competition, and only after being approached by a developer, did Rahn consider selling the land for residential use. App. 39, p.59; App. 46, pp. 93-96; App. 48, p. 107.

The expectations inquiry "limits recovery to owners who can demonstrate that they bought their property in reliance on the non-existence of the challenged regulation." *Good*, 189 F.3d at 1361 (quoting *Creppel v. United States*, 41 F.3d 627, 632 (Fed. Cir. 1994)). Consideration of expectations is rooted in simple fairness. Taxpayers should not be compelled to compensate an owner for a land-use restriction where the owner had no reasonable expectation of pursuing the prohibited use.

There are both legal and economic justifications for the expectations inquiry: "'In legal terms, the owner who bought with knowledge of the restraint could be said to have no reliance interest, or to have assumed the risk of any economic loss. In economic terms, it could be said that the market had already discounted for the risk, so that a purchaser could not show a loss in his investment attributable to it.'" *Good*, 189 F.3d at 1361 (citation omitted); *see also Creppel*, 41 F.3d at 632 ("One who buys with knowledge of a restraint assumes the risk of economic loss"); *Board of Supervisors v. Omni Homes, Inc.*, 481 S.E.2d 460, 465 (Va. 1997) ("One who buys with knowledge of a restraint must assume the risk of economic loss.")

Ruckelshaus demonstrates that a takings claimant can suffer a fatal lack of reasonable expectations where the claimant purchases with actual knowledge of the challenged restriction. In that case, a pesticide manufacturer brought a takings challenge to 1978 statutory amendments that provided for public disclosure and other use of trade secret information submitted to the U.S. Environmental Protection Agency in connection with pesticide registration applications. For data submitted to EPA after 1978, the Court rejected the takings claim because Monsanto knew that the amendments permitted the use and disclosure of the proprietary data. *Ruckelshaus*, 467 U.S. at 1006. The claimant thus could not have had a

reasonable expectation that EPA would keep the data confidential beyond the limits set forth in the 1978 amendments:

> If, despite the data-consideration and data-disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment-backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submission.

Id. at 1006-07. Because the claimant was aware of the conditions under which it submitted its data, its voluntarily submission of the data in return for the economic advantages of a pesticide registration did not result in a taking. *Id*. at 1007.

Plaintiffs rely on *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), but this case is not to the contrary. Nothing in *Palazzolo* purports to cut back on *Penn Central*, *Ruckelshaus*, or any other U.S. Supreme Court precedent, or to diminish the critical role of expectations in takings analysis. Rather, *Palazzolo* rejected what it called a "single, sweeping rule" previously used by some courts under which the *timing* of the claimant's purchase was viewed as exclusively controlling on the expectations issue. *Id.* at 626. The court viewed this rigid, absolute rule as potentially unfair on the facts before it because Palazzolo's corporation owned the land prior to the challenged wetland regulations, the regulations were subsequently enacted, and then title to the land automatically passed to Palazzolo by

operation of law when his corporation dissolved. *Id.* On these unusual facts, the court held that a formulistic flat ban on liability could be unfair.

Although it rejected rigid ruling on the *timing* of purchase, the *Palazzolo* court nowhere reduced the role of expectations. Indeed, Justice Sandra Day O'Connor wrote separately to emphasize that a takings claimant's reasonable expectations remain a central component of takings analysis. *Id.* at 632-36. And last year, the Rhode Island Superior Court rejected Palazzolo's takings claim on remand largely due to the absence of reasonable expectations. *Palazzolo v. Rhode Island*, C.A. No. WM 88-0297, 2005 R.I. Super. LEXIS 108 (July 5, 2005). The court observed that longstanding Rhode Island law reserved public ownership of all parts of the land at issue below the mean high water mark, and that after the upland portion was developed, the prior owner sold the rump portion of the land to Palazzolo: "Bluntly put, it would appear that [the prior owner] simply wanted out of a bad investment concerning which the primary beneficial use (the six lots on upland) had already been realized. Constitutional takings law does not compensate bad business decisions." *Id.* at *52. There was no appeal of this final ruling.

Not surprisingly, several rulings after *Palazzolo* reaffirm the critical role that expectations continue to play in takings analysis. *See Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 538-39 (2005) (confirming that interference with "distinct, investment-backed expectations" remains of

"primary" importance in takings analysis); *Brown v. Legal Found. of Washington*, 538 U.S. 216, 234 (2003) (same); *Tahoe-Sierra*, 535 U.S. at 326 n.23 (same).

To our knowledge, it appears virtually unprecedented for a court to find takings liability where local officials refuse to amend a Comprehensive Plan based on a longstanding zoning designation that precluded the claimant from having a reasonable expectation to use the land in a manner inconsistent with those requirements.[3] The absence of any reasonable expectation to use the property at issue for residential development strongly counsels against Plaintiffs' takings claim.[4]

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[3] *Czech v. City of Blaine*, 253 N.W.2d 272 (Minn. 1977), which was cited by the trial court, is not to the contrary. In that case -- which pre-dated *Penn Central* and thus has little bearing on how to apply *Penn Central* -- the claimant purchased property with the same zoning designation that applied to other land he operated as a mobile home park, and indeed the same designation that applied to *every* mobile home park in the city. *Id.* at 273. Although various amendments to the zoning code required the claimant to acquire a special use permit to operate a mobile home park on the land at issue, the claimant plainly had some reasonable expectation of obtaining the permit, given that "every mobile home park in the city * * * operated by virtue of a special-use permit." *Id.* In contrast, Plaintiffs here did not have a reasonable expectation that the City would grant their application to amend the Comprehensive Plan.

[4] Plaintiffs' reliance on articles by J. David Breemer and R.S. Radford (Br. 35-36) should be viewed with appropriate caution, given that both authors work for Pacific Legal Foundation, an avowedly libertarian, pro-claimant organization. *See* J. David Breemer & R. S. Radford, 34 S.W.U.L. Rev. 351, 351 fn* (2005).

III. Plaintiffs' Failure to Show that the City's Action Had a Severe Economic Impact Undermines Their Takings Claim.

Plaintiffs' takings claim suffers for a second, independent reason. The challenged government action had little, if any, economic impact on the property at issue.

In considering economic impact under *Penn Central*, a court must "compare the value that has been taken from the property with the value that remains in the property." *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987). In other words, the relevant calculation compares the value of Plaintiffs' property immediately before the City denied the request to amend the Comprehensive Plan with the value immediately after the denial.

The trial court made no findings on this critical calculation, and understandably so, given that the denial most likely had no impact whatsoever because the land's market value already would have been discounted to reflect its longstanding zoning. The Court of Appeals correctly concluded that "[t]he record does not establish that the denial of the application in 2004, which maintained the existing long-term use of the property, diminished the property's value." *Wensmann Realty, Inc. v. City of Eagan*, 2006 Minn. App. Unpub. LEXIS 529, at *9.

Plaintiffs (Br. 39-40) urge this court to measure economic impact by focusing on the value of the land if the City were to grant Plaintiffs'

application for intense residential development. But this is precisely the wrong inquiry. In *Gove v. Zoning Board of Appeals of Chatham*, 831 N.E.2d 865 (Mass. 2005), a landowner filed a takings challenge to restrictions on her ability to build houses on 1.8 acres of land that were designated as part of a conservancy district. In denying the claim, the Supreme Judicial Court of Massachusetts expressly rejected the relevance of an offer to purchase the land for $192,000 contingent on the issuance of variances to build a home on the site. *Id.* at 766. The court observed that purported values based on a hypothetical ability to build were "wholly speculative" and "highly dubious at best because the regulations did not permit such variances," and the offer's relevance was undercut by evidence showing that the claimant had no reasonable expectation of selling the land for residential development. *Id.* The court concluded it was "similarly fallacious" to consider appraisal evidence suggesting that the land would be worth $346,000 if it were suitable for home construction. *Id.*; *accord*, *Cane Tennessee, Inc. v. United States*, 57 Fed. Cl. 115, 123 (2003) ("the proper measure of economic impact is a comparison of the market value of the property immediately before the governmental action with the market value of that same property immediately after the action," citing *Keystone*, 480 U.S. at 497). Even Plaintiffs' own authorities recognize that "it is ludicrous to argue that the developer has suffered a compensable taking as a result of [a] municipality's refusal to change the existing zoning on the property."

Lynda J. Oswald, *Cornering the Quark*: *Investment-Backed Expectations and Economically Viable Uses in Takings Analysis*, 70 Wash. L. Rev. 91, 115 (1995).

Under Plaintiffs' approach a claimant could gin up the economic impact by submitting an outlandish development proposal, one wildly inconsistent with all applicable controls and restrictions, and then contend that denial of the proposal caused an astronomical economic impact. Nothing in the case law supports this approach.

Moreover, to show a regulatory taking under *Penn Central*, the economic impact must be extremely severe. As noted in *Andrus v. Allard*, 444 U.S. 51 (1979), loss of future profits "provides a slender reed upon which to rest a takings claim." *Id.* at 66. Because Plaintiffs never acquired the right to build houses on the land under the Comprehensive Plan, they cannot assert a takings claim based on any such right. *E.g.*, *American Pelagic Fishing Co. v. United States*, 379 F.3d 1363, 1382-83 (Fed. Cir. 2004) (reviewing failed takings challenges to restrictions on the right to fish and the right to import firearms "because what allegedly was taken was not one of the sticks in the bundle of rights that inhered in ownership of the underlying res").

The U.S. Supreme Court's unanimous ruling in *Lingle v. Chevron U.S.A., Inc.* also is illuminating on this point. In its comprehensive review of regulatory takings jurisprudence, the *Lingle* court acknowledged that

"[e]arly constitutional theorists did not believe the Takings Clause embraced regulations of property at all." *Lingle*, 544 U.S. at 537 (quoting *Lucas*, 505 U.S. at 1028 n.15). Thus, a regulatory taking occurs only in the extraordinary circumstance that regulation is "so onerous that its effect is tantamount to a direct appropriation or ouster." *Id.* The court went on to explain that *all* measures of regulatory takings liability "share a common touchstone" because each seeks "to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Id.* at 539. The *Lucas* per se rule, for example, properly identifies a regulatory taking because the complete elimination of a property's value is the functional equivalent of a physical appropriation. *Id.* (citing *Lucas*). The multifactor *Penn Central* test, too, often turns on economic impact and seeks to identify those extreme regulations that act as the functional equivalent of an expropriation. *Id.* at 540; *accord Tahoe-Sierra*, 535 U.S. at 322 (a regulatory taking occurs when "a law or regulation imposes restrictions so severe that they are tantamount to a condemnation or appropriation"); *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 199 (1985) (In regulatory takings cases, a court's task is "to distinguish the point at which regulation becomes so onerous that it has the same effect as an appropriation of the property through eminent domain or physical possession.").

Because *Lucas* instructs that a complete value loss is the functional equivalent of an expropriation, it would be odd indeed if the *Penn Central* test applied far more broadly. In fact, the history of takings jurisprudence shows that *Penn Central* also requires an extremely severe, near-complete value loss before a regulation is deemed to be the functional equivalent of an expropriation. The *Penn Central* court cited cases in which no taking was found despite value losses exceeding 75 percent. *See Penn Central*, 438 U.S. at 131 (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (no taking despite a 75 percent value loss) and *Hadacheck v. Sebastian*, 239 U.S. 394 (1915) (no taking despite a value loss exceeding 85 percent)); *Agins v. City of Tiburon*, 447 U.S. 255 (1980) (no facial taking where new zoning allowed only 1 to 5 homes on a 5-acre tract). In other words, even under the *Penn Central* multi-factor inquiry, land-use controls constitute a taking only in the most "extreme circumstances." *United States v. Riverside Bayview Homes, Inc*., 474 U.S. 121, 126 (1985).

The Supreme Court of Colorado recently provided an excellent analysis of the extent of economic impact required under *Penn Central*. *See Animas Valley Sand & Gravel, Inc. v. Board of County Comm'rs*, 38 P.3d 59 (Colo. 2001) (en banc). The *Animas* court concluded that "it is apparent that the level of interference must be very high" for a takings claim under *Penn Central* to succeed. *Id*. at 65. It ruled that to prevail under *Penn Central*, a claimant "must show that it falls into the rare

category of a landowner whose land has a value slightly greater than de minimis but, nonetheless, given the totality of the circumstances, has had its land taken by a government regulation." *Id*. at 67.

The *Animas* court drew this "slightly-greater-than-de-minimis" standard from several sources. It observed that "the likely purpose of the fact-specific test [under *Penn Central*] is to provide an avenue of redress for a landowner whose property retains value that is slightly greater than de minimis," citing *Lucas*'s discussion of the *Penn Central* factors in response to concerns that its per se rule does not cover a landowner whose property is diminished in value by 95 percent. *Id*. at 65. The *Animas* court also relied on *Euclid*, *Hadacheck*, and *Agins* as examples of cases finding no taking notwithstanding significant value losses and interference with investment-backed expectations. *Id*. at 66. The *Animas* court concluded that the *Penn Central* test provides "a safety valve to protect the landowner in the truly unusual case," *id*. at 67, in other words, the case where new regulation destroys all but a slight amount of value.

Many other courts have reached the same conclusion. *See, e.g.*, *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 883 (D.C. Cir. 1999) ("[A] claimant must put forth striking evidence of economic effects to prevail even under the [*Penn Central*] ad hoc inquiry."); *Front Royal & Warren County Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 286 (4th Cir. 1998) (rejecting a takings

challenge where regulation caused a fifty percent value loss); *Texas Manufactured Hous. Ass'n v. City of Nederland*, 101 F.3d 1095 (5th Cir. 1996) (no taking where the claimant failed to show a deprivation of all beneficial use); *Reahard v. Lee County*, 968 F.2d 1131, 1136 (11th Cir. 1992) ("[T]he only issue in just compensation claims is whether an owner has been denied all or substantially all economically viable use of his property."); *Jengten v. United States*, 657 F.2d 1210 (Ct. Cl. 1981) (rejecting a takings challenge where regulation prohibited development on 75% of the claimant's land); *Zealy v. City of Waukesha*, 548 N.W.2d 528, 531 (Wisc. 1996) (rule emerging from state courts requires very substantial loss of use and value to show a regulatory taking).

In the instant case, the record shows that Plaintiffs' land retains substantial value. As noted above, the report provided by Plaintiffs' own consultant shows that the land has a "Supportable Purchase Price" of $967,000 for use as a golf course (*see* the McMurchie Report, App. 523).

Wennsman's October 2004 non-contingent offer to purchase the land (App. 50, pp. 127-128; Conf. App. 1, "H"; Conf. App. 7) also reflects the land's remaining value and viable use. Indeed, a non-contingent offer in an arms-length transaction is the very definition of market value. Where an investor is ready, willing, and able to purchase land for a designated price, that price sets the floor for market value, even if the investor hopes to use the land in a manner that is currently prohibited. For example, in a

takings challenge to federal wetlands protections, the U.S. Court of Appeals for the Federal Circuit credited inquiries about possible sale and one offer to purchase as an adequate measure of market value:

> The trial court also invoked the rule that damages must not be speculative by analogy as he was not ascertaining damages at that point. This rule, however, means that the court must not, itself, speculate, *i.e.*, guess, about potential end uses or markets when the speculation is so remote or improbable that one would not invest his money in it. It does not exclude consideration of a relevant market made up of investors who are real but are speculating in whole or major part.

Florida Rock Indus., Inc. v. United States, 791 F.2d 893, 903 (Fed. Cir. 1986) (citation omitted); *accord Florida Rock Industries, Inc. v. Bystrom*, 485 So.2d 442, 447-48 (Fla. Ct. App. 1986) ("Present market sales of unimproved land which may be based on the buyer's expectations of 'future potential use' are evidence of present market value. The future uses to which the property may be put is a matter of conjecture. The presence of an active sales market and of resulting market value are matters of fact, not speculation.")

In short, Plaintiffs 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. On these facts, Plaintiffs cannot plausibly argue that the City's decision constituted the functional equivalent of an expropriation of land.

IV. The Character of the Government Action Cuts Strongly Against Takings Liability in View of the City's Desire to Protect the Integrity of Its Comprehensive Plan.

In considering the character of the challenged government action, *Penn Central* instructs that a court should inquire whether the action is a physical invasion or, on the other hand, one that "arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Penn Central*, 438 U.S. at 124. The City's decision not to amend its Comprehensive Plan plainly falls into the latter category, and thus raises far less concern under the Takings Clause.

Moreover, because zoning affords all landowners a "reciprocity of advantage," courts should be especially reluctant to conclude that adherence to a particular zoning restriction works a taking. *E.g.*, *Tahoe-Sierra*, 535 U.S. at 325 (reciprocity of advantage exists where temporary land use controls prevent development "that might be inconsistent with the provisions of the plan that is ultimately adopted"); *Keystone*, 480 U.S. at 491 ("While each of us is burdened somewhat by such restrictions, we, in turn, benefit greatly from the restrictions that are placed on others."); *Agins*, 447 U.S. at 262 ("The zoning ordinances benefit the Plaintiffs as well as the public by serving the city's interest in assuring careful and orderly development of residential property with provision of open-space areas.").

The City's desire to protect the integrity of its Comprehensive Plan also cuts strongly against takings liability. The U.S. Supreme Court has

recognized that local officials "have long engaged in the commendable task of land use planning." *Dolan*, 512 U.S. at 396. Indeed, the landmark ruling in *Tahoe-Sierra* is a paean to comprehensive planning. In rejecting a per se takings challenge to a temporary planning moratorium, the court hailed the importance of comprehensive plans and thoughtful planning to avoid ill-conceived growth. *Tahoe-Sierra*, 535 U.S. at 339. The court also deferred to "the consensus in the planning community" regarding the usefulness of development moratoria for effective planning. *Id.* at 337-38. And in evaluating the overall fairness of the case, the court highlighted the need to "protect[] the decisional process" in developing regional plans. *Id.* at 340.

Plaintiffs' taking claim strikes at the heart of comprehensive land-use planning. If successful, Plaintiffs' claim would have far-reaching implications for Comprehensive Plans throughout Minnesota. Planners could no longer depend on the legal viability of existing plan requirements or confidently predict whether future land-use controls would survive judicial scrutiny. Every plan requirement would be put at risk by changes in market conditions beyond the control of planners and local officials.

Even apart from actual liability, the fear of litigation costs already has a chilling effect on planning, especially in smaller municipalities. Most communities simply do not have the time, money, or staff to defend every land-use regulation through the process of discovery, pretrial motions, trial

and appeal. Even when local governments regulate appropriately, litigation costs can soar as the need to defend against meritless suits increases.

If local governments cannot count on the courts to dispose of meritless constitutional claims swiftly, many municipalities may choose to settle winnable cases or allow development to proceed despite the public interest against it. *See* Susan A. Macmanus, *The Impact of Litigation on Municipalities: Total Cost, Driving Factors, and Cost Containment Mechanisms*, 44 Syracuse L. Rev. 833, 838-39 (1993). Indeed, one survey shows that 81.4 percent of municipalities "acknowledge they settle at least some of their 'winnable' cases just to save money." *Id*. at 842.[5]

A survey by Professor Lynda Butler turned up similar findings. The proliferation of constitutional land use litigation and continued debate over compensation principles, she writes,

> have made legislators and administrators * * * hesitant to adopt new regulatory programs. * * * As one official explained, lawmakers who foresaw an increased risk of litigation would be more likely to weaken the regulatory programs that they adopted by, for example, including broader grandfather clauses; yet the weaker the program, the less effective it becomes.

[5] Other commentators also have noted the pressure on local governments to settle even frivolous claims in order to avoid legal fees and litigation. *See, e.g.*, David S. Mendel, *Determining Ripeness of Substantive Due Process Claims Brought by Landowners Against Local Governments*, 95 Mich. L. Rev. 492, 494 & n.9 (1996).

Lynda L. Butler, *State Environmental Programs: A Study in Political Influence and Regulatory Failure*, 31 Wm. & Mary L. Rev. 823, 830-38 (1990).

In reviewing takings claims, courts must take care not to create an environment in which municipalities might be compelled to set aside the fruits of their comprehensive planning efforts to avoid costly litigation. We urge this Court to spare Minnesota municipalities from costly, needless litigation and send a strong message that Minnesota courts will not tolerate meritless challenges to comprehensive plans.

CONCLUSION

For all of these reasons, amici respectfully request that the court of appeals decision be affirmed.

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