

**CASE NOTE: PROPERTY—HOLE-IN-ONE FOR LAND-USE
CONTROL: ENDORSING THE DOMINANCE OF
COMPREHENSIVE PLANS—*MENDOTA GOLF, LLP V. CITY
OF MENDOTA HEIGHTS***

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I.	INTRODUCTION.....	627
II.	HISTORY.....	630
	A. <i>Planning and Zoning: Early Missteps</i>	630
	B. <i>Comprehensive Planning and Sprawl</i>	633
	C. <i>Regional Planning in the Twin Cities</i>	635
III.	THE <i>MENDOTA GOLF</i> DECISION.....	638
	A. <i>Facts and Procedural History</i>	638
	B. <i>The Minnesota Supreme Court’s Decision</i>	641
IV.	ANALYSIS OF <i>MENDOTA GOLF</i>	642
	A. <i>Legislature Embraces Regionalism, For Now</i>	643
	1. <i>Legislative Intent</i>	643
	2. <i>Statutory Construction</i>	643
	B. <i>Municipal Planning and Zoning Power</i>	644
	C. <i>The Unresolved Question of Regulatory Taking</i>	645
	1. Penn Central.....	646
	a. <i>Public Purpose Justified City’s Action</i>	647
	b. <i>Owner’s Expectations</i>	647
	2. Lucas.....	648
	3. Lingle.....	649
	4. McShane.....	650
	D. <i>Impact: Regional Planning v. Property Rights</i>	651
V.	CONCLUSION.....	652

I. INTRODUCTION

Eighty years after the U.S. Supreme Court said that zoning

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does not violate property owners' constitutional due process rights,¹ municipal land-use planning is still a thicket that can trap the unwitting property owner, city council member, or judge. On one side of that thicket, planning devices are a legitimate exercise of government police power because they serve the public welfare.² On the other side, planners and officials sometimes "go too far"³ and impermissibly interfere with private property rights. A recent Minnesota Supreme Court case required justices to wade in and decide on which side of the hedge a comprehensive plan falls.⁴

The case, *Mendota Golf LLP v. City of Mendota Heights*,⁵ involved the owners of a private golf course itching to sell to a developer, who would replace the links with a low-density housing development. The City of Mendota Heights refused to change its comprehensive plan to allow the development.⁶ There was a twist: the comprehensive plan did not allow housing on the site, but the city's zoning ordinance did.⁷ The immediate issue that confronted the Minnesota Supreme Court was whether the city was obligated to change the comprehensive plan so that it matched the zoning ordinance—and thus allow the housing development.⁸ The court decided that the city could not be forced to change the comprehensive plan.⁹

While the golf course was tiny, the stakes were huge—the entire Twin Cities regional planning scheme was at issue, some claimed.¹⁰ Yet for a case with such weighty implications, its path to

1. See *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (holding that the zoning ordinance was a reasonable extension of the village's police power and did not have the character of arbitrary fiat, and thus was not unconstitutional).

2. See AM. PLANNING ASS'N, POLICY GUIDE ON TAKINGS 3–4 (1995), <http://www.planning.org/policyguides/pdf/Takings.pdf>.

3. David L. Callies, *Takings: An Introduction and Overview*, 24 U. HAW. L. REV. 441, 443 (2002).

4. See *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162 (Minn. 2006).

5. 708 N.W.2d 162 (Minn. 2006).

6. *Id.* at 170.

7. *Id.* at 167–68.

8. *Id.* at 166.

9. *Id.*

10. David Peterson, *Land-Use Ruling May Have Wider Effect Across Metro*, STAR TRIB. (Minneapolis), Jan. 23, 2006, at 3B (quoting city attorney calling the ruling a "major opinion reinforcing the legitimacy of a community's desire to preserve open and recreational spaces as part of an overall land-use plan"); *Community Rights Report*, CRC'S MONTHLY NEWSLETTER (Community Rts. Couns., Wash. D.C.), Jan. 2006, at 1, <http://www.communityrights.org/PDFs/Newsletters/Jan2006.pdf> (last visited Jan. 9, 2007) (hailing decision as "clear reaffirmation of

the courthouse was surprisingly marred by mistakes and confusion. Nearly every entity in the case stumbled. The city failed to reconcile its comprehensive plan and zoning ordinance despite a state mandate,¹¹ left puzzling language in its comprehensive plan,¹² and passed a vaguely worded resolution in turning away the developers.¹³ The landowner overpaid for its property, operated a money-losing business there for eight years, and nodded off while its ox was gored by the legislature and the city.¹⁴ The legislature, meanwhile, kept things interesting by flip-flopping—twice—the legal hierarchy of planning and zoning.¹⁵

This note first traces the development of land-use law in the United States generally and Minnesota specifically, with an emphasis on smart-growth controls that—especially since 1995—enhanced the status of the comprehensive plan.¹⁶ Then the note examines the supreme court’s decision in *Mendota Golf*,¹⁷ followed by an analysis of the ruling.¹⁸ The note observes that the supreme court opted to protect the comprehensive plan because of its importance in the Twin Cities’ regional land-use planning system, while leaving the door open for the landowners to return with a federal or state constitutional takings claim.¹⁹ The note concludes that if the landowners do mount a takings challenge, they likely would not succeed.²⁰ Because comprehensive planning is a legitimate use of the state’s police powers, because it plays a key role in the Twin Cities’ regional planning structure, and because Mendota Heights went about its planning in a rational way, the city’s actions did not “go too far.”²¹

comprehensive planning for the promotion of the health, safety, and quality of life of our communities”).

11. *Mendota Golf*, 708 N.W.2d at 170–71.

12. *Id.* at 171.

13. *See id.* at 180.

14. Brief of Appellant City of Mendota Heights at 8–9, *Mendota Golf*, 708 N.W.2d 162 (Minn. 2006) (No. A04-0206), 2005 WL 3816935.

15. *Mendota Golf*, 708 N.W.2d 166–67; *see infra* Part II.C.

16. *See infra* Part II.

17. *See infra* Part III.

18. *See infra* Part IV.

19. U.S. CONST. amend. V (providing that “private property [shall not] be taken for public use without just compensation”); MINN. CONST. art. I, § 13 (“[p]rivate property shall not be taken, destroyed or damaged for public use without just compensation”).

20. *See infra* Part IV.

21. *See Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415 (setting out Justice Oliver Wendell Holmes’s now-famous exposition that “while property may be regulated

II. HISTORY

Like Jacob and Esau in the Bible,²² planning and zoning have had a long and complicated sibling rivalry. In both cases, the birth order was controversial; in both cases, troubles were not far behind.

A. *Planning and Zoning: Early Missteps*

The roots of the conflict trace to the dawn of zoning in the late 19th century.²³ The factories of the industrial revolution belched out air and noise pollution, and cities grew congested with workers.²⁴ But neighbors trying to protect their interests against these modern plagues had only the inadequate tools of common-law nuisance and servitude doctrines.²⁵ Reform-minded thinkers—who would become the first city planners—stepped forward in England and America with proposals they argued would prevent the harmful effects wrought by industrial society.²⁶ Their answer was zoning.

American social reformers, adapting their ideas from the earlier proposal of an English author,²⁷ seized on four underlying principles that would animate modern city planning: separation of uses, protection of the single-family home, low-rise development, and medium-density of population.²⁸ Proponents believed these principles would protect the public health, safety, welfare, and morals.²⁹ “[Z]oning means better homes and an increase of health, comfort and happiness for all the people,” said planner Robert H.

to a certain extent, if regulation goes too far it will be recognized as a taking”).

22. *Genesis* 25:24–26. Esau came out of Rebecca’s womb first, followed by Jacob, holding onto his brother’s heel. *Id.* at 25:26.

23. See JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 951–52 (5th ed. 2002).

24. *Id.*; JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND CONTROL LAW* 16–22 (1998).

25. DUKEMINIER & KRIER, *supra* note 23, at 951.

26. *Id.* at 952–955.

27. Ebenezer Howard, appalled by the sprawling chaos of London, proposed a new type of town known as a Garden City, which would be built in the countryside to give people ample space for healthy lives, and would separate the “wholesome” suburban-style homes from commerce, industry, and homes that would shelter “waifs,” “inebriates,” and the insane. DUKEMINIER & KRIER, *supra* note 23, at 952, referencing Ebenezer Howard, *TOMORROW: A PEACEFUL PATH TO REAL REFORM* (1898) (reprinted as Ebenezer Howard, *GARDEN CITIES OF TOMORROW* (1902)).

28. DUKEMINIER & KRIER, *supra* note 23, at 953.

29. *Id.* at 971.

Whitten.³⁰

The first municipal comprehensive zoning plan was enacted in 1916.³¹ The United States Supreme Court upheld zoning's constitutionality in 1926, ruling that government could use its police power to keep differing uses apart.³² Hundreds of other cities and towns quickly embraced zoning.³³ Zoning arrived in the Twin Cities of Minneapolis and St. Paul in 1922.³⁴

But there was a problem. Logically, city planning should have been invented first, and then zoning.³⁵ After all, first you plan, and then you act. At least in theory, the comprehensive plan is the vision of what a town wants to look like—a “statement of the local government's objectives and standards for development.”³⁶ The zoning ordinance then gives effect to the comprehensive plan's vision.³⁷

Scholars have described zoning's early dominance over planning as a historical error.³⁸ Zoning and planning developed on separate tracks, spawned by two different model acts proposed by

30. William M. Randle, *Professors, Reformers, Bureaucrats and Cronies: The Players in Euclid v. Ambler*, in *ZONING AND THE AMERICAN DREAM* 31, 39 (Charles M. Haar & Jerold S. Kayden eds., 1989) (quoting Robert H. Whitten, *Zoning and Living Conditions*, 13 *PROC. NAT'L CONF. CITY PLAN.* 22–23 (1921)).

31. JUERGENSMEYER & ROBERTS, *supra* note 24, at 22.

32. *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926).

33. JUERGENSMEYER & ROBERTS, *supra* note 24, at 23.

34. Larry Millett, *The Deep Roots of Urban Sprawl*, ST. PAUL PIONEER PRESS (Minn.), Nov. 19, 1996, at 1A (arguing that by eliminating mixed-use neighborhoods, zoning forced automobile use and made sprawl inevitable).

35. DANIEL R. MANDELKER, *LAND USE LAW* § 3.01 (5th ed. 2003).

36. DUKEMINIER & KRIER, *supra* note 23, at 972 (discussing the Standard State Enabling Act, an advisory document issued in 1922 that continues to influence states). Minnesota land use law defines the comprehensive plan as:

a compilation of policy statements, goals, standards, and maps for guiding the physical, social and economic development, both private and public, of the municipality and its environs, and may include, but is not limited to, the following: statements of policies, goals, standards, a land use plan, including proposed densities for development, a community facilities plan, a transportation plan, and recommendations for plan execution. A comprehensive plan represents the planning agency's recommendations for the future development of the community.

MINN. STAT. § 462.352, subdiv. 5 (2004).

37. DUKEMINIER & KRIER, *supra* note 23, at 972 (citing Charles M. Haar, *In Accordance With a Comprehensive Plan*, 68 *HARV. L. REV.* 1154, 1155 (1955)). *See also* 101A C.J.S. *Zoning and Land Planning* § 4 (2005).

38. Edward J. Sullivan & Matthew J. Michel, *Ramapo Plus Thirty: The Changing Role of the Plan in Land Use Regulation*, 35 *URB. LAW.* 75, 83 (2003).

the United States Department of Commerce.³⁹ First, in 1926, came the Standard State Zoning Enabling Act (SZEa), setting out statutory authority for zoning.⁴⁰ Two years later, the Standard City Planning Enabling Act was released, containing statutory authority for planning and subdivision control.⁴¹ The uneasy relationship between planning and zoning that continues to this day has its roots in the model acts. Not only was their timing arguably out of sequence, but the documents had internal problems as well. For example, the language of the two acts, and their timing, left unclear whether zoning had to be consistent with, or dependent on, a comprehensive plan.⁴² The zoning model act stated, enigmatically,⁴³ that zoning “shall be in accordance with a comprehensive plan.”⁴⁴ A footnote in the SZEa declared, “No zoning should be done without such a comprehensive study.”⁴⁵ But the planning enabling act made local planning optional.⁴⁶ Moreover, it appears the authors of the zoning act did not envision enactment of a comprehensive plan in the form of an independent document.⁴⁷ In their first decades, then, zoning ordinances were traditionally enacted without any reference to a prior or underlying comprehensive municipal plan.⁴⁸ Land-use law scholars maintain that these early missteps laid the groundwork for an approach based on short-term thinking.⁴⁹

39. Daniel R. Mandelker, *The Role of the Local Comprehensive Plan in Land Use Regulations*, 74 MICH. L. REV. 899, 901 (1976).

40. Standard State Zoning Enabling Act (U.S. Dep’t. of Commerce rev. ed. 1926); DUKEMINIER & KRIER, *supra* note 23, at 959; MANDELKER, *supra* note 35, at § 3.13.

41. Standard City Planning Enabling Act (U.S. Dep’t of Commerce 1928); MANDELKER, *supra* note 35, at § 3.05; Edward J. Sullivan, *Comprehensive Planning and Smart Growth*, in TRENDS IN LAND USE LAW FROM A TO Z 177, 189 n.7 (Patricia E. Salkin ed., 2001).

42. Mandelker, *supra* note 39, at 901–02.

43. HOUSING FOR ALL UNDER LAW: NEW DIRECTIONS IN HOUSING, LAND USE AND PLANNING LAW 328 (Richard P. Fishman ed., 1978) [hereinafter HOUSING FOR ALL].

44. Mandelker, *supra* note 39, at 902; Standard State Zoning Enabling Act § 3 (U.S. Dep’t of Commerce rev. ed. 1926).

45. Sullivan & Michel, *supra* note 38, at 75.

46. Standard City Planning Enabling Act § 2 (U.S. Dep’t of Commerce 1928); Mandelker, *Role*, *supra* note 39, at 902; MANDELKER, *supra* note 35, at § 3.5.

47. MANDELKER, *supra* note 35, at § 3.13.

48. JUERGENSMEYER & ROBERTS, *supra* note 24, at 26.

49. See Sullivan & Michel, *supra* note 38, at 81. “[T]he history of planning and land use regulation put zoning ahead of planning. With no driving vision for land use, land use regulation was incoherent and unprincipled in its development,

Even once the comprehensive plan came into vogue, aided by redevelopment needs after World War II,⁵⁰ it was still primarily considered only an advisory document.⁵¹ Courts and legislatures often failed to see the necessary interrelationship between zoning and planning.⁵² States have varied as to how much legal weight should be given to plans and whether a plan is even required.⁵³

B. *Comprehensive Planning and Sprawl*

Gradually, the comprehensive plan gained more than advisory status, especially after a landmark article by Charles M. Haar.⁵⁴ A distinguished land-use scholar, Professor Haar argued that a city should be required to have a master plan before it could exercise its regulatory powers through a zoning ordinance.⁵⁵

More recently, states have increasingly been making the comprehensive plan a legally binding document.⁵⁶ Comprehensive planning has become a lifeline for reformers anxious to control suburban sprawl.⁵⁷ The movement, which came to be known as “smart growth,”⁵⁸ is shorthand for a “comprehensive planning process that preserves open space and encourages the concentration of development.”⁵⁹ To accomplish those goals, “[e]ach comprehensive plan must be consistent with an overall, connected system or state and regional land use policies,” a veteran

leaving communities without the power to direct their own urbanization activities.”
Id.

50. HOUSING FOR ALL, *supra* note 43, at 331.

51. JUERGENSMEYER & ROBERTS, *supra* note 24, at 26.

52. MANDELKER, *supra* note 35, at § 3.1; Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1154 (1955).

53. Edward J. Sullivan, *Recent Developments in Comprehensive Planning Law*, 37 URB. LAW. 595, 595 (2005).

54. Haar, *supra* note 52, at 1155. *See also* HOUSING FOR ALL, *supra* note 43, at 332 (reporting a “demonstrable shift” toward Haar’s view by 1978).

55. Haar, *supra* note 52, at 1156.

56. *Id.* *See also* DUKEMINIER & KRIER, *supra* note 23, at 972 (observing that only about half the states require comprehensive plans, “judicial attitudes [toward them] vary greatly,” and the trend toward enforcing them “seems not to be substantial”). The Montana Supreme Court endorsed a flexible but definite standard in *Ash Grove Cement Co. v. Jefferson County*, 283 Mont. 486, 495 (1997): “[T]o require no compliance at all would defeat the whole idea of planning. Why have a plan if the local government units are free to ignore it at any time?”

57. *See* Mandelker, *supra* note 39, at 911.

58. Sullivan, *supra* note 41, at 178.

59. James A. Kushner, *Smart Growth: Urban Growth Management and Land-Use Regulation Law in America*, 32 URB. LAW. 211, 229 (2000).

scholar of planning maintains.⁶⁰ “Comprehensive planning is a comprehensive response to the systemic problems of sprawl.”⁶¹

Comprehensive plans have played a central role in Minnesota’s response to sprawl.⁶² The Twin Cities has long been one of America’s least-dense metropolitan areas.⁶³ Concerns about sprawl began during the 1950s amid waves of migration from Minnesota cities to the suburbs.⁶⁴ The growth overwhelmed sewage treatment systems, leading to widespread polluted wells and a public health crisis.⁶⁵ Into the 1960s, the Twin Cities region was suffering the growth pains familiar across the country—leapfrogging, scattered development, urban sprawl, and deteriorating central cities.⁶⁶ Sprawl not only threatened loss of open space but also meant more costly public and private facilities and ultimately “vastly” higher taxes.⁶⁷ Eventually it would mean “wellwater problems in Olmsted County, farmland [loss] in Winona, failing septic systems in Stearns County, rising poverty in Minneapolis and St. Paul, [and] exclusionary zoning in developing suburbs.”⁶⁸ Sprawl posed the “[number one] threat to community livability in America today,” an author observed in 1996.⁶⁹

In 1967, the Minnesota Legislature created the Metropolitan Council to oversee “a comprehensive development guide” for the Minneapolis-St. Paul region.⁷⁰ The agency’s creation reflected a desire to guard vital open space, and indeed, the region’s quality of

60. Sullivan, *supra* note 41, at 179.

61. *Id.*

62. Janice C. Griffith, *Regional Governance Reconsidered*, 21 J.L. & POL. 505, 532 (2005).

63. Millett, *supra* note 34. See also Dan Wascoe Jr., *Road to Sprawl Was Paved with Good Intentions*, STAR TRIB. (Minneapolis), Jan. 22, 2000, at 1A.

64. Lynda McDonnell, *The Invisible Crisis*, ST. PAUL PIONEER PRESS (Minn.), Nov. 18, 1996, at 1A.

65. *Id.*

66. ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH 109 (American Bar Association 1999). Freilich was the lead consultant for preparing the Metropolitan Council’s development framework in 1973. *Id.* at 108–09.

67. *Id.* at 109.

68. Lynda McDonnell, *Can We Live with the Limits?*, ST. PAUL PIONEER PRESS (Minn.), Nov. 23, 1996, at 1A.

69. Bill Salisbury, *In Fight Against Urban Sprawl, Maryland Tries ‘Smart Growth,’* ST. PAUL PIONEER PRESS (Minn.), Feb. 24, 1999, at 1A (quoting Richard Moe, former chief of staff to Vice President Walter Mondale and later president of the National Trust for Historic Preservation).

70. James Poradek, *Putting the Use Back in Metropolitan Land-Use Planning: Private Enforcement of Urban Sprawl Control Laws*, 81 MINN. L. REV. 1343, 1355–56 (1997).

life, against urban sprawl.⁷¹ Gov. Harold LeVander, making the first appointments to the council, said the council was needed to attack “more and more problems that will pay no heed to the boundary lines which mark the end of one community in this metropolitan area and the beginning of another.”⁷² The council was widely heralded as a model solution to sprawl.⁷³

C. Regional Planning in the Twin Cities

In 1976, lawmakers empowered the Council to control urban sprawl by enacting the Metropolitan Land Use Planning Act (MLPA).⁷⁴ The enactment followed several years of conflict and uncertainty,⁷⁵ but once in place, the MLPA was a strong endorsement of regional planning, declaring that local governmental units were interdependent and that their urbanization put pressure on the others, increasing the spillover effects of pollution, congestion, and water shortages.⁷⁶ Suddenly, more than 300 separate but overlapping governmental units over an area of 3,000 square miles and seven counties would have their

71. See *City of Lake Elmo v. Metro. Council*, 685 N.W.2d 1, 4 (Minn. 2004); see also “*History of the Metropolitan Council*,” e-mail and attached document from Steven Dornfeld, Director of Public Affairs, Metropolitan Council, to Eric Linsk (Sept. 5, 2006) (on file with author) [hereinafter *Met Council History*].

72. “Metropolitan Council Milestones,” e-mail and attached document from Steven Dornfeld, Director of Public Affairs, Metropolitan Council, to Eric Linsk (Sept. 5, 2006) (on file with author) [hereinafter *Milestones*].

73. *Land Use: The Rage for Reform*, TIME, Oct. 1, 1973, available at <http://www.time.com/time/magazine/article/0,9171,942725,00.html> [hereinafter *Rage for Reform*].

Regional-planning authorities should be encouraged wherever possible. These can treat whole watersheds or air basins and thus cope with environmental questions too large for local governments. They also are needed around cities, where growth is often the concern of several counties. One model: the Twin Cities Metropolitan Council in Minnesota, which plans development for nine counties and has veto power over growth-inducing facilities—including projects like airports and sewers.

Id.

74. See MINN. STAT. § 473.851 (2004) (declaring that urbanization and development transcended municipal boundaries and required “comprehensive local planning with land use controls consistent with planned, orderly and staged development”); see also Poradek, *supra* note 70, at 1357.

75. ARTHUR NAFTALIN & JOHN BRANDL, THE TWIN CITIES REGIONAL STRATEGY 10 (Metropolitan Council of the Twin Cities Area 1980).

76. See MINN. STAT. § 473.851; *City of Lake Elmo*, 685 N.W.2d at 5.

plans coordinated.⁷⁷ The governing bodies had to adopt comprehensive plans consistent with the Metropolitan Council's Regional Development Framework and system plans for transportation, aviation, water resources (including wastewater collection and treatment), and regional parks and open space.⁷⁸ The Council was given authority to ensure that the plans conform with regional goals.⁷⁹ Opinions are mixed as to whether the council has been a success or a disappointment. The council has received national acclaim,⁸⁰ but critics charge that its promise remains unfulfilled.⁸¹ The council won a major victory in 2004 when the Minnesota Supreme Court ruled that the council could order Lake Elmo to change its comprehensive plan.⁸²

The Twin Cities regional structure requires municipalities to enact zoning controls to implement the comprehensive plan.⁸³ But that goal has been undermined by the uneasy relationship between comprehensive plans and zoning ordinances, where it has not always been clear whether the comprehensive plan is binding and which document prevails in a conflict. The Minnesota legislature has see-sawed back and forth as to whether comprehensive plans or zoning ordinances should be preeminent.⁸⁴ First, lawmakers favored comprehensive plans.⁸⁵ In 1985, they made zoning

77. FREILICH, *supra* note 66, at 109–10.

78. *Milestones*, *supra* note 72.

79. See MINN. STAT. § 473.175, subdiv. 1 (2004); *City of Lake Elmo*, 685 N.W.2d at 5; Griffith, *supra* note 62, at 532; NAFTALIN & BRANDL, *supra* note 75, at 8–10; *Met Council History*, *supra* note 71.

80. TIME, *Rage for Reform*, *supra* note 73; Poradek, *supra* note 70, at 1345.

81. See Poradek, *supra* note 70, at 1344 (arguing that suburban cities' resistance to provide affordable housing has been "more than embarrassing"); NAFTALIN & BRANDL, *supra* note 75, at 59 (finding a consensus in 1980 that the council had become less aggressive, less innovative, and more bureaucratic); MYRON ORFIELD, METROPOLITICS 102 (1997) (contending that the council, with its weak derivative power, "has avoided confrontation"); Mike Kaszuba, *A 'Delicate Balance' for Met Council Members*, STAR TRIB. (Minneapolis), June 30, 1996, at 1A (remarking that the council "has in many eyes grown into an ineffective bureaucracy").

82. *City of Lake Elmo*, 685 N.W.2d at 11–12.

83. MINN. STAT. § 473.858, subdiv. 1 (2004).

84. See *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 166–67 (Minn. 2006); Poradek, *supra* note 70, at 1356–58.

85. Poradek, *supra* note 70, at 1357. Requiring local zoning controls to conform to comprehensive plans reflected the planning act's original intent, "that local governments use zoning to carry out the policies of their comprehensive plans." *Id.*

ordinances predominant.⁸⁶ With that change, “the whole comprehensive planning process in the Twin Cities became null and void,” recalled Ted Mondale, a state senator from 1990 to 1996 and chairman of the Metropolitan Council from 1999 to 2003.⁸⁷ In August 1995, at Mondale’s behest, the legislature enacted changes to the MLPA that had been requested by the Metropolitan Council, including a provision restoring the primacy of comprehensive plans.⁸⁸ One senator who spoke against the bill argued that it took away local zoning control.⁸⁹ But the adherents of regional planning had regained the upper hand.⁹⁰ A later attempt by some legislators to change the law back again failed.⁹¹

86. *Mendota Golf*, 708 N.W.2d at 166; Act of May 6, 1985, ch. 62, sec. 4, subdiv. 1, 1985 Minn. Laws 162 (stating that “[i]f the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance supersedes the plan” (formerly codified as amended at MINN. STAT. § 473.858, subdiv. 1)). The measure apparently was introduced to help a suburban community fend off a development proposal. See Cindy Carlsson, *How Bad Ideas Become Law*, Minnesota Chapter of the American Planning Association (June 1997), available at <http://www.mnapa.com/previousnews/june97.html>.

87. Telephone interview with Ted Mondale, CEO, Nazca Solutions, Inc. in St. Paul, Minn. (Sept. 20, 2006).

88. See Act of May 17, 1995, ch. 176, sec. 5, 1995 Minn. Laws 593, 594–95 (codified as amended at MINN. STAT. § 473.858, subdiv. 1 (2005), striking out language saying the zoning ordinance “supersedes” the comprehensive plan); BRIEFLY: THE MINNESOTA SENATE WEEK IN REVIEW (May 12, 1995), available at <http://www.senate.mn/briefly/1995/bri512.txt> [hereinafter SENATE BRIEFLY] (reporting legislative debate comments by Sen. Ted Mondale about his proposed amendment to § 473.858); Brief of Appellant at 29–30, *Mendota Golf, LLP v. City of Mendota Heights* 708 N.W.2d 162 (Minn. 2006) (No. A04-206) (quoting Sen. Mondale saying in floor debate that “the comprehensive plan has to be more important than the zoning documents”).

89. SENATE BRIEFLY, *supra* note 88 (reporting comments of Sen. Roy Terwilliger, R–Edina).

90. The planning statute now reads:

If the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance shall be brought into conformance with the plan by local government units in conjunction with the review and, if necessary, amendment of its comprehensive plan. . . . After August 1, 1995, a local government unit shall not adopt any fiscal device or official control which is in conflict with its comprehensive plan

MINN. STAT. § 473.858, subdiv. 1 (2004).

91. Carlsson, *supra* note 86. Rep. Tim Pawlenty, later to become Minnesota’s governor, was a co-sponsor of the bill. Journal of the House of Representatives, 80th Leg., Reg. Sess., 3974 (Minn. May 12, 1997). The bill died in committee. H.F. 2205 Status in House for Legislative Session 80, at http://ros.leg.mn/visitor/pages/search_status/status_detail.php?b=House&f=HF2205&ssn=0&y=1997 (last visited Jan. 9, 2007).

III. THE *MENDOTA GOLF* DECISIONA. *Facts and Procedural History*

The 17.5-acre property at Dodd Road and Bachelor Avenue in suburban Mendota Heights has been a nine-hole, par-three golf course since the early 1960s.⁹² One city council member called the tract “a treasure to the neighborhood.”⁹³ Neighbors considered the course and other green spaces part of what made Mendota Heights different from other suburbs.⁹⁴ Homeowners on the course’s southern side enjoyed a scenic view of the Mississippi River.⁹⁵ “Par 3,” as people called it, was also the only remaining public golf course in Mendota Heights.⁹⁶

Mendota Golf, LLP, purchased the property in January 1995.⁹⁷ At the time of its acquisition, the land was zoned Residential (R-1 One-Family Residential), while the city’s comprehensive plan labeled the property as “Golf Course” (GC).⁹⁸ Mendota Golf paid \$1.289 million for the property,⁹⁹ which was an “inflated price” for a golf course.¹⁰⁰ Because of the zoning designation, the owners believed they had a “safety net” to develop the property someday if the golf course became unprofitable.¹⁰¹ That day came in 2003, when the landowners sold to a developer that proposed to do away with the golf course and build homes on the property.¹⁰² But the

92. *Mendota Golf*, 708 N.W.2d at 166.

93. Mendota Heights City Council Minutes 9 (July 1, 2003), *available at* <http://www.mendota-heights.com/pdf/03july1.pdf> [hereinafter *July 2003 Minutes*] (reporting the remarks of Councilmember Mary Jeanne Schneeman).

94. *Id.* at 15 (reporting the statement of Dr. Jim Smith, a neighbor of the property).

95. Peterson, *supra* note 10, at 3B (quoting lawyer for Mendota Heights). Others, including attorney Clifford M. Greene, argued that “[p]eople who have bought land based on those views are entitled to some rights as well.” *Id.*

96. Mendota Heights Parks and Recreation Committee Minutes 2 (Oct. 12, 2004) (reporting comments of Commissioner Morris) [hereinafter *Parks and Rec Minutes*].

97. *Mendota Golf*, 708 N.W.2d at 166.

98. *Id.*

99. *July 2003 Minutes*, *supra* note 93, at 9 (reporting the statement of Mendota Golf partner Alan Spaulding).

100. *Id.* at 12.

101. *See Mendota Golf*, 708 N.W.2d at 166. At the time of the purchase, Minnesota law made zoning designations preeminent over comprehensive plan designations. *Id.* About five months after the purchase, the legislature restored comprehensive plans’ prominence. *Id.*

102. *Id.* at 169.

land sale was contingent on persuading Mendota Heights to change the comprehensive plan's designation of the property from golf course to low-density residential.¹⁰³

In the years leading up to Mendota Golf's request, the city had gone through an extensive review of its land-use goals.¹⁰⁴ Mendota Heights officials in 2002 reaffirmed planning goals they had first enacted in 1979 in accordance with the Metropolitan Land Planning Act.¹⁰⁵ Back in 1979, the comprehensive plan put the golf course property in the land use category "GC" for golf course, and "guided" the adjacent land as low-density residential.¹⁰⁶ The GC designation was retained in 2002.¹⁰⁷ The 1979 plan's goals—including preservation of green spaces, open spaces, and recreational facilities—were also renewed in 2002.¹⁰⁸ The adoption of the comprehensive plan in 2002 followed a three-year review process in which several public hearings were held.¹⁰⁹ Mendota Golf did not come before the city at that time to request changes in the property's designation.¹¹⁰ A partner in Mendota Golf later said he and his partner were not aware of the hearings.¹¹¹

But the city's policy choice was still tinged with ambiguity. While officials maintained the golf course designation in the comprehensive plan, they failed to resolve the apparent conflict between the plan and the zoning ordinance, keeping the property's residential zoning in place.¹¹² The city's officials also left open the possibility that the golf course might someday be developed.¹¹³

Against this uncertain backdrop, Mendota Golf in 2003 requested that the city change the comprehensive plan's designation for the property from "Golf Course" to "Low Density

103. *Id.* Specifically, the sale was contingent on "the buyer's obtaining necessary governmental approvals for proposed residential development." *Id.*

104. *Id.* at 167–68.

105. *Id.* at 167.

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.*

110. *Id.* at 168.

111. *Id.* at 170.

112. *Id.* at 168. The city's Technical Plan, though, expressed "concern" about the conflict, given the city's obligations under the MLPA, and legal uncertainty over how to move forward. *Id.* at 168 n.4.

113. *Id.* at 168. The city's Technical Plan stated that if "future redevelopment of this site is contemplated, careful consideration would need to be given to develop the site in a manner consistent with and sensitive to the existing low-density residential neighborhood." *Id.* (citation omitted in original).

Residential.”¹¹⁴ A Mendota Golf partner said the golf course was no longer profitable.¹¹⁵ The city’s consulting planner recommended that “an alternate land use designation for the site is appropriate,” depending on review of the landowner’s claim that a golf course was no longer viable.¹¹⁶ But sentiment for its preservation remained strong and after a public hearing, the city planning commission recommended rejecting the request.¹¹⁷ The city council then turned it down by a 5–0 vote after a tense public meeting.¹¹⁸ Officials and residents began floating the idea that the city purchase the property to keep it a golf course.¹¹⁹

Mendota Golf brought an action for mandamus¹²⁰ in district court asking that the city be ordered to change the comprehensive plan as requested.¹²¹ The district court granted the order, finding the city’s denial had been arbitrary, capricious, and without a rational basis.¹²² The court of appeals affirmed.¹²³ The court of appeals emphasized the city’s failure for nearly eight years to carry out its statutory duty to reconcile the two plans.¹²⁴ The court of

114. *Id.* at 169.

115. *Id.* In 2003, Alan Spaulding said Mendota Golf lost money on the golf course in every year since it was acquired. Brian Bonner, *Key Ruling Undercuts Golf Course Backers*, ST. PAUL PIONEER PRESS (Minn.), Dec. 12, 2003, at B2 [hereinafter Bonner, *Key Ruling*]. Spaulding asked the city to “restore the rights” that the landowners first had when they purchased the property, back when the zoning ordinance prevailed over the comprehensive plan and allowed residential development on the parcel. 708 N.W.2d at 169 (citation omitted in original). *But see* Brian Bonner, *Par 3 Opponent Raises His Voice*, ST. PAUL PIONEER PRESS (Minn.), Feb. 8, 2007 (discussing newly released financial statements showing “what city officials have contended all along: [that] [m]inus debt service for the purchase, the course is profitable”).

116. 708 N.W.2d at 169 (citation omitted in original).

117. *See id.*

118. *See id.* at 169–70. Mendota Golf partner Alan Spaulding told the council that his firm had a contract to sell to a development company for more than double the price that a golfing group had offered. *See July 2003 Minutes, supra* note 93, at 8. The conditional offer was for \$2.35 million. Bonner, *Key Ruling, supra* note 115. Council Member Jack Vitelli responded that the Council had no obligation to help the landowners double their money over the original purchase price. *July 2003 Minutes, supra* note 93, at 10.

119. *Parks and Rec Minutes, supra* note 96, at 2–3.

120. BLACK’S LAW DICTIONARY 980 (8th ed. 2004) (defining mandamus as “[a] writ issued by a superior court to compel a lower court or governmental officer to perform mandatory or purely ministerial duties correctly”).

121. *Mendota Golf*, 708 N.W.2d at 170.

122. *Id.*

123. *Mendota Golf, LLP v. City of Mendota Heights*, No. A04-206, 2004 WL 2161422, at *1 (Minn. Ct. App. 2004), *rev’d*, 708 N.W.2d 162 (Minn. 2006).

124. *Mendota Golf*, 2004 WL 2161422, at *2.

appeals also seized on a “peculiar provision” in Mendota Heights’ comprehensive plan “stating that the primary authority for development decisions is the zoning ordinance.”¹²⁵ The court of appeals interpreted the statement to mean that in a conflict between the comprehensive plan and the zoning ordinance, the zoning ordinance shall prevail.¹²⁶

B. The Minnesota Supreme Court’s Decision

The Minnesota Supreme Court reversed the court of appeals.¹²⁷ The court found that the zoning and comprehensive plan conflicted,¹²⁸ and that under state law¹²⁹ the landowner was indeed entitled to a writ of mandamus directing the city to resolve the conflict.¹³⁰ But the supreme court found that the district court exceeded its authority by ordering the city to resolve the conflict in a *specific way*.¹³¹

The court found that the Minnesota Land Planning Act¹³² was clear¹³³ about the dominance of comprehensive municipal plans and their place in a regional planning scheme.¹³⁴ Therefore, the mandamus order would force the city to violate the statute.¹³⁵

The court noted that previous case law considered a legislative body’s enactment of zoning regulations an act of legislative discretion.¹³⁶ Courts upheld zoning decisions unless challengers could show the classification lacked any relationship to public health, safety, morals, or general welfare—the “rational basis”

125. *Id.*

126. *Id.*

127. *Mendota Golf*, 708 N.W.2d at 182.

128. *Id.* at 173.

129. MINN. STAT. § 473.858, subdiv. 1 (2004).

130. *Mendota Golf*, 708 N.W.2d at 183.

131. *Id.* at 174 (emphasis added).

132. MINN. STAT. § 473.858, subdiv. 1 (2004).

133. “When the words of a statute . . . are clear and free from ambiguity, judicial construction is inappropriate.” *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, 342 N.W.2d 335, 339 (Minn. 1984).

134. *See Mendota Golf*, 708 N.W.2d at 175.

135. *Id.* As a threshold issue, the supreme court discussed whether mandamus was appropriate to compel Mendota Heights to amend its comprehensive plan. *Id.* at 171–79. The court concluded mandamus was *not* appropriate because it would have invaded the city’s exercise of legislative discretion in zoning matters, but the court went on to consider the substantive issues anyway. *Id.* at 179.

136. *Mendota Golf*, 708 N.W.2d at 174 (citing *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 414 (Minn. 1981)). *See also* *State, by Rochester Ass’n of Neighborhoods v. City of Rochester*, 268 N.W.2d 885, 888 (Minn. 1978).

test.¹³⁷ In this case, Mendota Heights acted rationally¹³⁸ based on the property's historical designation, regulation, and character,¹³⁹ and in light of the city's extensive planning process.¹⁴⁰

The dissent, for its part, expressed concern about the decision's impact on private-property rights.¹⁴¹ The ruling effectively ordered the landowner to forever keep the property as a golf course due to its value to the community as open space.¹⁴² Indeed, the dissent asserted that "there might be regulatory taking implications in the actions taken by the City."¹⁴³ Mendota Golf had not argued a takings claim,¹⁴⁴ despite one of its partners earlier hinting at it before the city council.¹⁴⁵ The majority said the landowners, after remand, could return with a regulatory takings claim if unable to reach a settlement with the city.¹⁴⁶

IV. ANALYSIS OF *MENDOTA GOLF*

Mendota Golf is the latest case to seriously test Minnesota's commitment to the system of regional planning laid out by the

137. *Mendota Golf*, 708 N.W.2d at 179–80 (quoting *Honn*, 313 N.W.2d at 414–15).

138. *Id.* at 182. "[W]e conclude that legitimate objectives supported the city's denial of Mendota Golf's application for an amendment to the city's comprehensive plan, and Mendota Golf has failed to establish that the city lacked a rational basis for the decision." *Id.* The court of appeals had not even applied the rationality test. *Mendota Golf, LLP v. City of Mendota Heights*, No. A04-206, 2004 WL 2161422, at *3 (Minn. Ct. App. Sept. 28, 2004), *rev'd*, 708 N.W.2d 162. The appellate court said the city lacked entitlement to rational basis review because it had not put all its stated reasons for rejection into its resolution. *See id.*

139. *Mendota Golf*, 708 N.W.2d at 181 n.13.

140. *Id.* at 181. Nevertheless, the supreme court decided the "peculiar phrase" did *not* confer primary power on the zoning ordinance, because of additional language in the provision, which said that the comprehensive plan provides the city's land-use goals, "while the zoning ordinance provides the legislative means of carrying out those goals." *Mendota Golf*, 708 N.W.2d at 175 n.8.

141. *Mendota Golf*, 708 N.W.2d at 162, 184 (Anderson, J., dissenting).

142. *Id.* The dissent also said it was "not at all clear" that the city had acted rationally. *Id.*

143. *Id.* (citing *McShane v. City of Faribault*, 292 N.W.2d 253 (Minn. 1980) (holding that landowners deprived of economic benefit by zoning regulations were entitled to compensation under some circumstances)).

144. *Id.*

145. *July 2003 Minutes*, *supra* note 93, at 8–9.

146. *Mendota Golf*, 708 N.W.2d at 182. The city is now moving toward bringing its plans into conformance. E-mail from John Huber, Mayor of Mendota Heights, to Eric Linsk (Oct. 2, 2006, 07:59 CDT) (on file with author). The city has verbally told the landowners that Mendota Heights would comply with the court's direction by Dec. 31, 2006. *Id.*

legislature—albeit in fits and starts—over the last thirty years. The Court refrained from making bold pronouncements about that planning scheme, instead hewing closely to the legislative authority and producing a careful, functional decision.

A. *Legislature Embraces Regionalism, For Now*

Since the inception of the regional planning statute, lawmakers in Minnesota have demonstrated ambivalence about how much power to invest in the comprehensive plan.¹⁴⁷ Nonetheless, the statute has remained constant now for more than a decade, suggesting that the legislature has settled the issue.¹⁴⁸

1. *Legislative Intent*

Records of the 1995 debate indicate that legislators intended to restore the primacy of comprehensive plans.¹⁴⁹ The sponsor of the change was open about its purpose.¹⁵⁰ But the change was not without opponents. One senator criticized the 1995 measure and tried in vain to delete the pertinent provisions.¹⁵¹ A bill proposed in 1997 to reverse course again went nowhere.¹⁵² Comprehensive plans are a key facet of the Met Council's regional strategy,¹⁵³ a strategy that was reaffirmed in the *Lake Elmo* decision.¹⁵⁴ As a policy matter, it is reasonable to read the Metropolitan Land Planning Act¹⁵⁵ as requiring that zoning conform to comprehensive plans.

2. *Statutory Construction*

The city argued and the Minnesota Supreme Court accepted that zoning ordinances must be brought in line with

147. Compare MINN. STAT. § 473.858, subdiv. 1 (1994) (providing that a city's zoning designations take priority over conflicting comprehensive plans), with MINN. STAT. § 473.858, subdiv. 1 (2004) (providing that comprehensive plans take priority).

148. MINN. STAT. § 473.858, subdiv. 1 (2004); *Mendota Golf*, 708 N.W.2d at 166.

149. Brief of Appellant City of Mendota Heights at 29–30, *Mendota Golf*, 708 N.W.2d 162 (Minn. 2006) (No. A04-0206) (quoting Sen. Ted Mondale, sponsor of the amendment favoring comprehensive plans).

150. Brief of Appellant City of Mendota Heights, *supra* note 149, at 29–30.

151. SENATE BRIEFLY, *supra* note 88 (reporting debate comments of Sen. Roy Terwilliger).

152. H.R. 2205, 80th Leg., Reg. Sess. (Minn. 1997).

153. *Mendota Golf*, 708 N.W.2d at 182.

154. City of Lake Elmo v. Metro. Council, 685 N.W.2d 1, 11 (Minn. 2004).

155. MINN. STAT. § 473.858, subdiv. 1 (2004).

comprehensive plans.¹⁵⁶ But as the landowners argued, the statute does allow for conflicts to be resolved by amendment of the comprehensive plan.¹⁵⁷ Though this is a reasonable reading, the text does not *require* a city to choose that route,¹⁵⁸ and for the court to order such an action would undermine the legislature's choice to invest authority in the comprehensive plan.¹⁵⁹

In the end, by upholding Mendota Heights' refusal to change its comprehensive plan, the Minnesota Supreme Court respected the legislature's clear policy choice in 1995 elevating the comprehensive plan in order to control and guide growth.

B. *Municipal Planning and Zoning Power*

Mendota Golf posed the question: who gets to decide what a city looks like—its citizen-residents or its property owners?¹⁶⁰ The Minnesota Supreme Court answered that the city had the right to stand by its vision, sand traps and all.¹⁶¹

The case's outcome arguably caused an injustice to the Mendota Golf partners, who purchased land only to see the regulatory ground shift under their feet six months later.¹⁶² But as the court said, "the power to zone has been delegated to the city council and not to the courts."¹⁶³ The supreme court has consistently recognized in the past that municipalities making zoning decisions are acting in their legislative capacities under their delegated police powers.¹⁶⁴ Those decisions are upheld unless

156. *Mendota Golf*, 708 N.W.2d at 175; Brief of Appellant City of Mendota Heights, *supra* note 149, at 35.

157. MINN. STAT. § 473.858, subd. 1 (2004); Brief of Respondent Mendota Golf, LLP at 12, *Mendota Golf*, 708 N.W.2d 162 (Minn. 2006) (No. A04-0206).

158. *Mendota Golf*, 708 N.W.2d at 175.

159. *Id.*

160. *See id.* at 175.

161. *Id.* at 183 (stating that the City Council is permitted to exercise its discretion in resolving the conflict between the comprehensive plan and the zoning ordinance).

162. Several events combined to shift the regulatory ground on which Mendota Golf partners stood. The landowners purchased the property in 1995 in reliance on the law at that time. *See id.* at 169. The city failed to reconcile its comprehensive plan and zoning ordinance for eight years despite state law requiring it. *Id.* at 182. The city wrote the "peculiar provision" in the comprehensive plan, which appeared to delegate power back to the zoning ordinance. *Id.* at 175 n.8. The golf course was entirely surrounded by single-family residential development. *Id.* at 166.

163. *Id.*, 708 N.W.2d at 182.

164. *State, by Rochester Ass'n of Neighborhoods v. City of Rochester*, 268

opponents prove the decisions lack any rational basis related to public health, safety, morals, or the general welfare.¹⁶⁵ In Mendota Heights' case, the city decided after an extensive planning process, that keeping the property a "Par 3" golf course was related to public health and the general welfare.¹⁶⁶ The city likewise was making a rational legislative decision when it considered the property owners' proposed change in the comprehensive plan and turned it down.¹⁶⁷

C. The Unresolved Question of Regulatory Taking

A looming question is whether the landowners were subjected to a "regulatory taking."¹⁶⁸ The landowners did not bring a takings claim, so the supreme court majority did not analyze the question.¹⁶⁹ A traditional physical taking occurs when the government seizes property through its powers of eminent domain.¹⁷⁰ A regulatory taking occurs when government regulates property so substantially that the property has arguably been "taken" by the government.¹⁷¹

Distinguishing a regulatory taking from a permissible planning regulation (which does not require compensation) can be difficult.¹⁷² The U.S. Supreme Court's takings jurisprudence has zigged and zagged over the past eighty years and left hazy and shifting guidance.¹⁷³ In 1922, in the Court's first major modern

N.W.2d 885, 888 (Minn. 1978).

165. *Id.*

166. *Mendota Golf*, 708 N.W.2d at 167, 169.

167. *Id.* at 169–70.

168. U.S. CONST., amend. V; Callies, *supra* note 3; *see also* Arthur G. Boylan, Note, *Property—Losing Clarity in Loss of Access Cases: The Minnesota Supreme Court's Muddled Analysis in Dale Properties, LLC v. State*, 29 WM. MITCHELL L. REV. 695, 706 (2002) (observing that Minnesota largely follows the U.S. Supreme Court's takings jurisprudence and likewise "lacks clarity").

169. *Mendota Golf*, 708 N.W.2d at 182 n.14. The court did not address "whether Mendota Golf might ultimately have a valid takings claim based on the proposition that the restrictions on the use of its land to a golf course constitutes a regulatory taking." *Id.*

170. Joseph William Singer, *The Ownership Society and Takings of Property: Castles, Investments, and Just Obligations*, 30 HARV. ENVTL. L. REV. 309, 314 (2006).

171. *Id.*

172. *See* McShane v. City of Faribault, 292 N.W.2d 253, 257 (Minn. 1980) (remarking on the "great deal of confusion over the standards used to determine whether there has been a taking of private property as a result of governmental regulation of land use").

173. The Supreme Court has twice quoted planning scholar Charles Haar in

takings case, it found a state effort to regulate subsistence coal mining so onerous as to be a taking.¹⁷⁴ Four decades later, the Court declared that “[t]here is no set formula to determine where regulation ends and taking begins.”¹⁷⁵ It is essentially a question of “reasonableness.”¹⁷⁶ In more recent decades, a nascent property rights movement has reignited the Court’s search for discernible takings standards.¹⁷⁷ *Mendota Heights*’ decision meets the modern tests established by the U.S. Supreme Court and followed by Minnesota.¹⁷⁸

I. Penn Central

In 1978, the Supreme Court in *Penn Central Transportation Co. v. New York City* decided the city had not committed a regulatory taking when it refused a developer’s plan to build a fifty-story office building atop the stately Grand Central Station.¹⁷⁹ The decision established a new approach to takings.¹⁸⁰ Where there is neither a physical invasion nor a total loss of economic value, the court said,

regulatory cases, remarking that “the attempt to distinguish ‘regulation’ from ‘taking’ as the most haunting jurisprudential problem in the field of contemporary land-use law . . . one that may be the lawyer’s equivalent of the physicist’s hunt for the quark.” See *Williamson County Reg’l Planning Comm’n v. Hamilton Bank*, 473 U.S. 172, 200 n.17 (1985) (quoting CHARLES M. HAAR, *LAND USE PLANNING* 766 (3d ed. 1976)); *San Diego Gas & Elec. v. City of San Diego*, 450 U.S. 621, 650 n.15 (1981) (Brennen, J., dissenting) (quoting CHARLES M. HAAR, *LAND USE PLANNING* (3d ed. 1976)).

174. In *Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court held that a “diminution in value” from a government regulation would constitute a taking. *Id.* at 415. The case is remembered for Justice Holmes’ pronouncement that “while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.” *Id.*

175. *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962).

176. *Id.* at 594–95.

177. See, e.g., *Hawaii Hous. Auth. v. Midkiff*, 467 U.S. 229, 241 (holding a taking should be upheld as consistent with the Public Use Clause, U.S. Const., amend. 5, as long as it is “rationally related to a conceivable public purpose”); *Kelo v. City of New London*, 545 U.S. 469 (holding that city’s exercise of economic development plan satisfied constitutional “public use” requirement).

178. *Boylan*, *supra* note 168, at 706.

179. 438 U.S. 104, 138 (1978).

180. Prior to *Penn Central*, the most influential takings case had been *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), which held that government regulation becomes a compensable taking when it causes a diminution in value of “a certain magnitude.” 260 U.S. at 413. *Penn Central*, to the contrary, held that mere diminution in value from land use regulations did *not*, standing alone, constitute a taking. 438 U.S. at 130–31.

a balancing test is applied.¹⁸¹ Factors to be balanced include the extent of the economic impact on the property owner, the owner's distinct investment-backed expectations, and the law's benefit to the public.¹⁸² Based on the application of these factors, the comprehensive plan in *Mendota Golf* would likely survive the *Penn Central* balancing test.

a. Public Purpose Justified City's Action

Penn Central observed that a taking is less likely to be found when interference with property arises from a "public program adjusting the benefits and burdens of economic life to promote the common good."¹⁸³ The Mendota Heights City Council stated a public purpose—maintenance of green space and recreational options for the residents—in retaining the comprehensive plan's golf course designation.¹⁸⁴ The city conducted a democratic process with notice and hearings¹⁸⁵ and maintained a designation that had been on the books since 1979.¹⁸⁶ The landowner, however, failed to show up during the review of the plan.¹⁸⁷

b. Owner's Expectations

Applying the *Penn Central* framework, a crucial point is whether the partners' investment-backed expectations in 1995—which amounted to the belief that development could be a "safety net" if the golf course did not work out¹⁸⁸—were distinct. Evaluating the "distinct" question in hindsight is difficult, and the case brought out little hard evidence on the point. An owner's expectations are based on the facts at the time of purchase.¹⁸⁹

181. *Penn Central*, 438 U.S. at 124.

182. *Id.*

183. *Id.*

184. *See Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 167 (Minn. 2006).

185. *Id.* at 168.

186. *Id.* at 167.

187. *See id.* at 168. "Despite published notice of the city's plans to revise its comprehensive plan, Mendota Golf did not appear before the city to request alternate 'guiding' of the property." *Id.*

188. *See July 2003 Minutes, supra* note 93, at 12 (stating that the owner claimed to have paid an inflated market price—about double—for the golf course with the expectation that should the business fail, development of the property was a viable alternative).

189. *See, e.g., Wensmann Realty, Inc. v. City of Eagan*, No. A05-1074, 2006 WL 1390278, *3 (Minn. Ct. App. May 23, 2006), *rev. granted* (Aug. 15, 2006) (citing

Mendota Golf bought the property as a golf course and operated it as a golf course for eight years.¹⁹⁰ Had the landowner's plans been distinct, the firm would have sought an amendment to the comprehensive plan right away to resolve the conflict between the plan and the zoning ordinance, rather than waiting eight years. It would have paid attention to—and perhaps intervened to prevent—the important change in land-use law enacted by the legislature, which flip-flopped the authority of comprehensive plans and zoning ordinances.¹⁹¹ It would have come forward when Mendota Heights reviewed the comprehensive plan and reenacted the golf course designation in 2002.¹⁹² Through the lens of hindsight, it looks as much like a bad business decision as an investment.¹⁹³

A recent decision of the Minnesota Court of Appeals, influenced by the *Mendota Golf* ruling,¹⁹⁴ employed a similar analysis in rejecting a takings claim involving another golf course in the Twin Cities.¹⁹⁵ In both cases, it was not the cities' actions that caused the golf courses' economic troubles.

2. Lucas

Fourteen years after *Penn Central*, the Supreme Court tackled another regulatory takings case, *Lucas v. South Carolina Coastal Council*.¹⁹⁶ David Lucas purchased beachfront lots on a barrier island east of Charleston with the intention of building single-family homes.¹⁹⁷ A regulatory change in South Carolina's coastal-

Zeman v. City of Minneapolis, 552 N.W.2d 548, 553 (Minn. 1996)). In *Wensmann*, the court noted that a buyer of a golf course "had no reasonable investment-backed expectation to develop its land as residential property because [the buyer] purchased the land as an established golf course with the intention of continuing to operate it as a golf course . . . [t]he applicant for rezoning 'knew at the time of purchase that the property was subject to a zoning restriction.'" *Id.* at *3 (citing *Myron v. City of Plymouth*, 562 N.W.2d 21, 23–24 (Minn. Ct. App. 1997), *aff'd without opinion*, 581 N.W.2d 815 (Minn. 1998)).

190. See *Mendota Golf*, 708 N.W.2d at 169.

191. *Id.* at 166.

192. *Id.* at 167.

193. See *July 2003 Minutes*, *supra* note 93, at 8 (stating that after eight years of operation, the golf course was not profitable and that the owner just wanted to be rid of the property and to recoup some or all of his investment).

194. *Wensmann Realty*, 2006 WL 1390278.

195. *Id.* at *2–4.

196. 505 U.S. 1003 (1992).

197. *Id.* at 1006–07.

zone permit requirements foiled his plans, and he was prohibited from building on the lots.¹⁹⁸ The Supreme Court was asked to decide whether the regulation's dramatic effect on the economic value of the lots amounted to a regulatory taking.¹⁹⁹

The majority opinion in *Lucas* attempted to establish a more objective standard for regulatory takings than *Penn Central* had.²⁰⁰ The *Lucas* Court declared that a total wipeout of a property's value is a *per se* taking unless the government regulation is addressing a traditional common-law nuisance.²⁰¹

The *Mendota Golf* facts are far different from those in *Lucas*. In *Lucas*, the property owner was stuck with unimprovable lots.²⁰² Under the Mendota Heights comprehensive plan, by contrast, the developers' property still had value as a golf course, albeit perhaps an unprofitable one.²⁰³ One person had expressed interest in buying the property, but the price was not high enough for the Mendota Golf partners.²⁰⁴

3. Lingle

The Supreme Court's latest word on takings came in *Lingle v. Chevron U.S.A., Inc.*²⁰⁵ There are two circumstances that will be held as *per se* takings: physical occupations²⁰⁶ and total economic

198. *Id.* at 1007.

199. *Id.*

200. Kushner, *supra* note 59, at 216.

201. 505 U.S. at 1019, 1030–32. Debate has raged ever since over the impact of *Lucas*. See RUTHERFORD H. PLATT, LAND USE & SOCIETY 267 (1996). Professor James Kushner has called *Lucas* a “powerful precedent” that validates virtually all mainstream zoning and land development regulation, and most growth management strategies as well. Kushner, *supra* note 59, at 218. Kushner argues that, despite the rise of the property rights movement, courts are more deferential than ever to local planning autonomy, including smart growth strategies. *Id.* at 237.

202. 505 U.S. at 1009. Some observers continue to dispute the underlying facts of *Lucas*. See Singer, *supra* note 170, at 317.

203. *July 2003 Minutes*, *supra* note 93, at 9.

204. *Id.* at 8 (reporting remarks of partner Alan Spaulding that the offered price “was no where [sic] near where it had to be”).

205. 544 U.S. 528 (2005). In *Lingle*, responding to concerns about the effects of market concentration on gasoline prices, the State of Hawaii had limited the rent that oil companies could charge service station operators. *Id.* at 533. Chevron persuaded the federal district court that the cap was an uncompensated taking because it did not “substantially advance” Hawaii's asserted interest in controlling gas prices. *Id.* at 533–34.

206. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

wipeout.²⁰⁷ Otherwise, takings claims are judged by the balancing factors of *Penn Central*,²⁰⁸ with the inquiry reduced to whether the impact of the regulatory action was “functionally equivalent” to a classic taking in which government took property from a private owner or ousted the owner.²⁰⁹ In the *Mendota Golf* case, the city’s action was not equivalent to a physical taking or ouster, rather it involved the city’s classic use of traditional land-use regulation in the public interest.²¹⁰

4. McShane

The *Mendota Golf* dissent, in raising the possibility that Mendota Heights had engaged in a regulatory taking, observed that Minnesota entitles property owners deprived of economic benefit by zoning regulations to compensation “under some circumstances.”²¹¹ But the cited case’s application to the *Mendota Golf* facts is questionable. *McShane v. City of Faribault* involved a municipal airport zoning regulation that affected nearby private property.²¹² In *McShane*, the Minnesota Supreme Court held that if the land-use regulation is enacted for the benefit of a “government enterprise,” the government must compensate the affected landowners.²¹³ Mendota Heights, in contrast, was not burdening a property owner to benefit a government enterprise.²¹⁴ Moreover, *McShane* held that if an ordinance has a “legitimate comprehensive planning objective, there is no taking unless all reasonable uses of

207. *Lucas*, 505 U.S. at 1003.

208. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978).

209. *Lingle*, 544 U.S. at 538–39 (quoting *Penn Cent. Transp.*, 438 U.S. at 124). See also Daphne Vlcek, *Consumers Union Of United States, Inc. v. New York*, 22 TOURO L. REV. 319, 331 (2006).

210. *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 181–82 (Minn. 2006).

211. *Id.* at 184 (citing *McShane v. City of Faribault*, 292 N.W.2d 253 (1980)).

212. 292 N.W.2d at 255–56.

213. *Id.* at 258–59. *McShane* embraced Professor Joseph Sax’s argument that a regulatory taking occurs when government acts as entrepreneur, but not where the government acts in its traditional role as arbiter. See Joseph L. Sax, *Takings and the Police Power*, 74 YALE L.J. 36 (1964). In *McShane*, the City of Faribault was acting as an entrepreneur by operating an airport. 292 N.W.2d at 258–59.

214. *But see* Mendota Heights City Council Minutes 24 (May 6, 2003), available at <http://www.mendota-heights.com/pdf/03May06.pdf> (reporting statement of developer’s representative Jim Johnston that property owners should not be asked to provide the public with open space in perpetuity).

the property have been proscribed.”²¹⁵ The Mendota Heights comprehensive plan had the legitimate objective of keeping the parcel a golf course, and continued use as a golf course was reasonable.²¹⁶ Lastly, *McShane* required compensation to landowners whose property has suffered a “substantial and measurable decline in market value as a result of the regulations.”²¹⁷ Mendota Golf’s property, under the comprehensive plan designation in place since 1979, maintains the same value it has had all along—the value of a golf course.

D. Impact: Regional Planning v. Property Rights

The majority in *Mendota Golf* said its decision was narrow.²¹⁸ But some outside observers predicted a broad impact.²¹⁹ In fact, the ruling’s influence was demonstrated almost immediately, as officials in neighboring Eagan were encouraged by the *Mendota Golf* ruling to resist development plans on the Carriage Hills golf course.²²⁰ The gamble succeeded, as the Minnesota Court of Appeals reversed a district court’s order that Eagan amend its comprehensive plan to allow the development.²²¹ The court of appeals relied squarely on *Mendota Golf*.²²² “The ‘legitimate interests’ recognized in *Mendota Golf* are nearly identical to the reasons stated here,” the court of appeals said.²²³ The Minnesota Supreme Court granted review and expects to hear the case in 2007.²²⁴

Chances are that *Mendota Golf* will have the same effect on other local governments, providing them with newfound

215. 292 N.W.2d at 257 n.2 (citing *Holaway v. City of Pipestone*, 269 N.W.2d 28 (Minn. 1978)).

216. See *supra* note 115 and accompanying text.

217. *Id.* at 258–59.

218. *Mendota Golf*, 708 N.W.2d at 182. The court said it did not intend to force a permanent comprehensive plan designation on the golf course property. Rather, *Mendota Golf* and the city were free to discuss and negotiate the use of the property. *Id.*

219. Peterson, *supra* note 10, at 3B.

220. Meggen Lindsay, *City Will Fight Subdivision Plan: Council Drops Settlement With Golf Course*, ST. PAUL PIONEER PRESS (Minn.), Jan. 18, 2006, at B1.

221. *Wensmann Realty, Inc. v. City of Eagan*, No. A05-1074, 2006 WL 1390278, at *4 (Minn. Ct. App. May 23, 2006), *rev. granted* (Aug. 15, 2006).

222. *Id.* at *2.

223. *Id.*

224. Meggen Lindsay, *Carriage Hills Battle Is on Again: State Supreme Court Will Review Lawsuit*, ST. PAUL PIONEER PRESS (Minn.), Aug. 23, 2006, at B1.

confidence that their planning decisions have sweeping protection from judicial review. That in turn could lead to either of two divergent scenarios. In one, golf course owners—bowing to the municipalities' solid legal authority—would negotiate with towns to find mutually acceptable alternatives to unprofitable uses. Or, municipalities may get carried away, act sloppily or “irrationally” and provoke developers to press regulatory takings claims. Courts would be in the unenviable position of discerning when the cities have, in the takings parlance, “gone too far.”

V. CONCLUSION

Mendota Golf could have been the beginning of the end for regional planning in the Twin Cities, not to mention a couple of golf courses in Dakota County. Upholding the mandamus order against the city would have let the tail (zoning) wag the dog (planning). The modest²²⁵ progress toward comprehensive planning and regionalism could have begun to unravel. Instead, the supreme court reaffirmed that cities can work within the regional scheme and craft a vision of their future without fear of legal attack by developers. Upholding the legislature's commitment to regional planning provides stability to municipalities and developers alike.

Mendota Golf was not a case where a city ran roughshod over a developer's rights. For those occasions, Minnesota still needs a law that keeps cities from crossing the line from planning to regulatory taking. Presented with an opportunity to settle precisely where that line is, *Mendota Golf* instead deferred the question. The people of Mendota Heights get to decide that their city will stay green.²²⁶ But this developer and others could soon return for another swing.

225. Poradek, *supra* note 70, at 1363.

226. As the time of publication, Mendota Heights took the first steps toward buying the Par 3 course from Mendota Golf, approving a general letter of intent to preserve the course. Frederick Melo, *Voters Will Decide Whether City Should Buy Golf Course*, ST. PAUL PIONEER PRESS (Minn.), Jan. 19, 2006, at B1. Voters were to be asked to approve the land's purchase for \$2.79 million in a referendum. *Id.* A rejection of the deal, the city's mayor said, “would mean allowing the current owners . . . to sell the 17-acre site to a housing developer, or develop it themselves.” *Id.*