STATE OF MINNESOTA
COUNTY OF RAMSEY

DISTRICT COURT
SECOND JUDICIAL DISTRICT

File No.: 27-CV-21-10098

MCDC Penn LLC,

Plaintiff,

v.

City of Bloomington, a Minnesota municipal corporation,

Defendant.

**ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT**

The above-entitled matter came before the Honorable John H. Guthmann, Judge of District Court, on April 5, 2022, via Zoom, on cross Motions for Summary Judgment. Jevon C. Bindman, Esq., and Jeremy D.F. Krahn, Esq., appeared on behalf of the plaintiff. Michelle E. Weinberg, Esq., appeared on behalf of the defendant. Based upon all the files, records, submissions and arguments of counsel herein, the Court issues the following:

**ORDER**

1. Plaintiff's motion for summary judgment is **GRANTED**.

2. Defendant's motion for summary judgment is **GRANTED in part and DENIED in part**. The motion to dismiss the Count II mandamus cause of action is **GRANTED**. All other aspects of defendant's summary judgment motion are **DENIED**.

3. Defendant's denial of plaintiff's change-in-condition application is hereby reversed and remanded. On remand, defendant is directed to approve plaintiff's application for a change in condition, without further fact finding, per the staff-recommended resolution with conditions that was moved and defeated at the May 3, 2021 Bloomington City Council meeting. (AR 69 at BL 01526-01528; AR 75 at BL 01767-01768; AR 77 at BL 01791-01792.[1])

[1] The parties stipulated to the administrative record of proceedings before the Bloomington Planning Commission and the Bloomington City Council. The administrative record is contained in the court file along with a separate index to

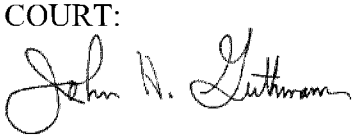
4. Plaintiff is awarded its reasonable taxable costs and disbursements from defendant.

5. The following Memorandum is made part of this Order.

**THERE BEING NO JUST REASON FOR DELAY, LET JUDGMENT BE ENTERED ACCORDINGLY.**

Dated: July 5, 2022

BY THE COURT:



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John H. Guthmann
Judge of District Court

## M E M O R A N D U M

### I. STATEMENT OF THE CASE

A dispute over a change-in-condition application in connection with Penn Avenue South access to a proposed townhome development is the sole focus of the instant litigation. It all began when plaintiff MCDC Penn LLC ("plaintiff") proposed the construction of a 15-unit townhome development on property it owns at 8525 and 8545 Penn Avenue South (the "Property") in Bloomington, MN.[2] (Compl. & Pet. for Writ of Mandamus ¶¶ 4, 8-9; *see* AR 1 at BL 00001.) The Property is on the northeast corner of the intersection of West 86th Street and Penn Avenue South. (AR 5 at BL 00019.)

The development was proposed through the submission of a Development Application to the City of Bloomington ("defendant") on August 3, 2020. (AR 2-3.) In its application, plaintiff

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the administrative record filed by defendant on February 22, 2022. In their briefs, both parties cited the administrative record using consecutive Bates numbering with the prefix "BL" before each page number. In its briefs, defendant used the prefix "AR" (standing for Administrative Record) when referencing entire documents listed in the index to the administrative record. Accordingly, the Court's citation to the administrative record uses the same citation conventions.

[2] Due to the long series of events leading to the instant litigation and the voluminous administrative record, an understandable Statement of the Case requires some recitation of the undisputed facts.

sought an amendment to defendant's 2040 Comprehensive Plan to reguide the Property from Low-Density Residential to Medium-Density Residential, rezone the Property from Single-Family Residential (R-1) to Townhouse Residential (R-3), gain city approval of plaintiff's preliminary and final development plans, and gain approval of plaintiff's preliminary and final plat. (*Id.*) As submitted, plaintiff's proposed site plan calls for two access points for public ingress and egress to the Property. (AR 5 at BL 21.) There is full public access to West 86th Street and limited public access on a right-in and right-out basis ("RIRO") to Penn Avenue South, which is a Hennepin County road. (*Id.*) Thus, [w]ith ingress and egress at each end of the central drive, a two-way accessibility is proposed." (AR 3 at BL 00009.) According to the project description, plaintiff reviewed the proposed public access points on the site plan with Hennepin County traffic control and received "preliminary approval" before submitting the Development Application. (*Id.*)

The Development Application next went to the city Planning Commission, which did not advance a recommendation to the City Council due to a tie vote. (AR 27 at BL 00363-00364.) The City Council unanimously approved the Comprehensive Plan amendment and the proposed rezoning at its October 5, 2020 meeting but tabled consideration of the development plan, including the issue of Penn Avenue South access to the Property. (AR 41 at BL 01081.)

The development plan returned to the City Council on October 19, 2020. Following debate, the City Council approved the following secondary access condition on a 5-2 vote: "the development must include access to Penn Avenue South available for public use as approved by the City Engineer and fire Marshal. Approval for the access must be obtained from Hennepin County prior to site disturbance or development activity." (AR 50 at BL 01447.) However, when plaintiff applied to Hennepin County for approval of the RIRO public access to Penn Avenue South, the request and all appeals were denied. (*See* AR 55 at 01462-01466.)

Unable to gain Hennepin County approval for the RIRO public access condition, plaintiff applied to defendant for a change in condition to allow emergency-use-only access to Penn Avenue South rather than public access. (AR 56, 58, 60.) After another tie vote and no recommendation by the Planning Commission, the City Council voted against a motion to approve the request on May 3, 2010 and adopted a resolution denying plaintiff's change-in-condition application on May 10, 2021. (AR 72, 77, 84.)

In response to the denial, plaintiff filed the instant lawsuit. In its Complaint and Petition for Writ of Mandamus, plaintiff contends that defendant's denial of the change-in-condition application is unsupported by the record and was unreasonable, arbitrary, and capricious. (Compl. & Pet. for Writ of Mandamus ¶ 36.) Accordingly, plaintiff seeks a declaratory judgment that denial of its change-in-condition application is null and void and that denial of the preliminary and final development plans was unreasonable, arbitrary, and capricious. (*Id.* ¶ 38, Prayer for Relief ¶ A.) Finally, plaintiff seeks a Writ of Mandamus compelling defendant to grant and approve plaintiff's change-in-condition application. (*Id.* ¶ 41, Prayer for Relief ¶ B.)

Defendant entered an Answer denying the allegations of the Complaint and Petition for Writ of Mandamus. Subsequently, the parties filed cross motions for summary judgment.

## II. STATEMENT OF UNDISPUTED FACTS

### A. Public Meetings Leading to Defendant's Conditional Approval of a Secondary Public Access to the Property.

#### *1. City Planning Commission's Meeting*

The approval process for plaintiff's August 3, 2020 Development Application required several public meetings. The first meeting was held by the Bloomington Planning Commission on September 10, 2020. Planning commission meetings are typically preceded by the preparation of a report by the Bloomington City Planner for consideration by the body conducting the hearing,

whether it be the Planning Commission or the City Council. For example, according to the September 10, 2020, report by City Planner Nick Johnson to the Mayor and City Council, plaintiff's Development Application was consistent with the Comprehensive Plan's Housing Element which "encourages the development of life cycle housing to increase housing supply and variety. Medium density housing is encouraged in locations that benefit from frequent transit service." (AR 27 at BL 00165.) The same report indicates that the rezoning request for the Property conforms to R-3 zoning and "would be consistent with the Medium Density Residential land use category". (*Id.* at BL 000167.)

> Regarding access to the Property via Penn Avenue South, Mr. Johnson stated that:
>
> once a development crosses a certain threshold number of units, secondary access becomes an essential component for a safe and well-functioning development. Multiple points of ingress and egress allow for improved traffic distribution and ensure emergency vehicles can always access the site from multiple directions. City staff would not recommend a development of this size be constructed without some form of secondary access.

(*Id.* at BL 00169-70.) Thus, staff recommended approval of the Project only if certain conditions were met, including some form of access to Penn Avenue South:

> The development must include access to Penn Avenue South as approved by the City Engineer and Fire Marshal. Approval for the access must be obtained from Hennepin County prior to site disturbance or development activity.

(*Id.* at BL 00184.) The Fire Marshal also "expressed the importance of two full access points," which would have to be accepted by Hennepin County before being constructed. (*Id.* at BL 00173.)

On September 1, 2020, Hennepin County supplied a letter to City staff in which it reversed its previous support for a public RIRO access at Penn Avenue South, stating that "the proposed access does not comply with typical County access spacing guidelines." (AR 27 at BL 00257-00258.) Instead, Hennepin County recommended that "the secondary access be designed for emergency traffic only, and the driveway be designed as such." (*Id.*)

During the September 10, 2020 Planning Commission meeting, City Planner Johnson went over the staff report and the recommendation for approval of the Development Application, including the recommendation that the development plan include a condition requiring secondary access from Penn Avenue South. (AR 29 at BL 00335-00336.) City staff recommended that "a second access must be provided for this development and it must meet the approval of fire prevention, engineering, traffic, and Hennepin County." (*Id.* at BL 00340-41.) During the hearing, Steve Furlong, principal developer for the project, spoke on behalf of plaintiff. (*Id.* at BL 00343.) Addressing secondary access, he stated that his team and City staff worked extensively for more than one year to come up with the proposed plan. (*Id.*) Further, he indicated that he "had some conversation with the County" and they "did get in writing from the county plat review committee last year that they supported a right-in/right-out onto Penn Avenue." (*Id.* at BL 00344.) He did not directly address the September 1, 2020 letter from Hennepin County. After questions by the Commissioners were answered, members of the public were able to express their views and opinions on the proposed development. However, the Planning Commission vote split 2-2 so no recommendation was made to the City Council. (*Id.* at BL 00363-00364.)

*2. City Council Public Hearing*

The City Council conducted a hearing on plaintiff's application on October 5, 2020. (AR 37.) City staff continued to recommend approval subject to the same conditions submitted to the Planning Commission. (AR 38-39.) Regarding secondary access to Penn Avenue South, City staff expressed its opinion that "secondary access is essential for public safety, traffic distribution, and circulation." (*Id.* at BL 00959.) Although the Fire Marshal expressed the importance of two full access points, he ultimately agreed to a RIRO access. (*Id.*) Accordingly, City staff provided the following advice to the City Council:

> Prior to the application, the Fire Marshal agreed to a right-in, right-out only access and the applicant secured acceptance from Hennepin County for the proposed access. However, Hennepin County has submitted a comment letter noting that the proposed access does not comply with typical County access spacing guidelines. As of this report date, Hennepin County staff have recommended that the secondary access be designed for emergency traffic only, and the driveway be designed as such.
>
> For the reasons mentioned prior, City staff recommends that the secondary access be open to all vehicles at minimum for right-in and right-out movements to provide alternative means in and out of the site. Prior to any development activity on the property, the applicant must secure the approval of the secondary access from Hennepin County.

(AR 38 at BL 00959-00960.)

During the hearing, plaintiff's representative Steve Furlong reminded the City Council that that "we have written communication from Hennepin County at the onset of planning during the summer of 2019 supporting the right-in right-out design." (AR 40 at BL 01019.) In an apparent oblique reference to the more recent September 1, 2020 letter from Hennepin County, Mr. Furlong expressed confidence that "we will find compromise and a viable solution for all parties." (*Id.*) At the conclusion of the public hearing, the City Council unanimously approved the amendment to the Comprehensive Plan and the proposed rezoning. (AR 41 at BL 01081.) However, consideration of the development plan was tabled to permit staff to provide, among other things, more information on the secondary access issue. (*Id.* at BL 01080-01081.)

*3. Continued City Council Public Hearing*

Plaintiff's development plan returned to the City Council on October 19, 2020. Prior to the meeting, City Staff submitted a memorandum addressing the City Council's requested follow-up items. (AR 48.) During the meeting, City Planner Johnson reviewed the memorandum and staff's recommendations. He emphasized the following points:

> The [city] traffic engineer . . . confirm[ed] that the proposed development would not present a problem for Penn Avenue or 86th Street from either a capacity or safety standpoint.
>
> . . . .
>
> [Secondary access via Penn Avenue South is necessary] from a fire and emergency vehicle safety standpoint. . . . so whenever you have a longer dead-end, that is not an acceptable condition per the fire code and from a fire safety standpoint.
>
> . . . .
>
> [Absent secondary access,] the development would have to be significantly redesigned to provide some type of adequate turnaround that could accommodate a ladder truck, and so that would effectively completely change the course of design for this development in its entirety.
>
> . . . .
>
> If the City Council determines that in order to move these final development plans for the public use access is absolutely critical for it to go forward, we would recommend that you add or revise this condition to include the language available for public use behind the Penn Avenue South language as you see on your screen. So that's -- that is a -- a point of discussion on the part of the Council. *Again, I think both pathways are available.* This is a standard that is founded or -- founded in good planning practice as well as good traffic engineering practice in terms of trip distribution as well as how to get larger vehicles in and out of the site more effectively. The city's traffic engineer has stated that the development can function with a single access. *It is just preferred to have a public use secondary access.*

(AR 50 at BL 01413-01416 (emphasis added).)

In its meeting presentation slides, City Staff offered the City Council two alternatives; either require public access to Penn Avenue South or emergency-use only access to Penn Avenue South. (AR 49 at BL 01402.) Following debate, the City Council approved the following secondary access condition on a 5-2 vote: "the development must include access to Penn Avenue South available for *public use* as approved by the City Engineer and fire Marshal. Approval for the access must be obtained from Hennepin County prior to site disturbance or development activity." (*Id.* at BL 01447 (emphasis added).) The final resolution adopted by defendant did not include any

findings of fact specific to the condition requiring public use access to Penn Avenue South. (AR 52 at BL 01449-01450.) Similarly, neither the transcript of the City Council meeting nor the meeting minutes indicate that any such findings were adopted. (*Id.* at BL 01412-01448.)

### B. Hennepin County Denies Plaintiff's Request for Approval of Public Access to Penn Avenue.

As anticipated in plaintiff's original Development Application and development plan, and consistent with defendant's approval of that plan, plaintiff applied to Hennepin County for a RIRO public right-of-way access permit to Penn Avenue South on December 30, 2020. (*See* AR 55 at BL 01463.) However, the request was denied due to safety and operational concerns on January 4, 2021. (*See id.*) Accordingly, plaintiff appealed the decision to the Hennepin County Engineer, who issued a denial on February 5, 2021, citing the county's preference for emergency-only access from Penn Avenue South. (*Id.* at BL 01462-01465) The Hennepin County Engineer's letter of denial includes the following language:

> The County shares [plaintiff's] opinion that secondary access is not essential to the Development; rather, public access from 86th Street together with secondary emergency access to and from Penn Avenue would reasonably serve the property based on the proposed use. The Penn Avenue secondary access condition that has been imposed . . . is supported by the City alone.

(*Id.* at BL 01463.) The Hennepin County Board of Commissioners affirmed the appeal denial on March 9, 2021. (*Id.* at BL 01466.)

### C. Public Meetings Leading to City Council Rejection of Plaintiff's Change in Condition Application.

Following Hennepin County's denial, plaintiff submitted to defendant a change-in-condition application seeking modification of the development plan's condition for approval from RIRO public access to RIRO emergency-use-only access to Penn Avenue South. (AR 56, 58, 60.) As part of plaintiff's change-in-condition application, plaintiff submitted a modified site plan that

provided space for oversized vehicles to maneuver and turn around within the site using an enhanced hammerhead design. (AR 58.)

1. *Planning Commission Consideration of the Change-in-Condition Application*

The Planning Commission met to consider plaintiff's change-in-condition application on April 15, 2021. (AR 71.) At the public hearing, City Planner Johnson indicated that the City Engineer, Fire Marshal, and Hennepin County gave a "strong indication" that the proposed change in condition was acceptable. (*Id.* at BL 01608.) He also expressed concern that large vehicles might not be able to turn around using the revised design, that the revised design assumed experienced drivers, and that the plan would not work unless plaintiff enforced snow removal and parking-clear-area requirements. (*Id.*) Notwithstanding these concerns, City staff recommended approval of the change-in-condition application. (*Id.*) Conditions were also recommended to address the concerns mentioned in the report. (AR 69 at BL 01526-01528.) Once again, no recommendation was made by the Planning Commission due to a tie vote. (*See* AR 72.)

2. *City Council Hearing on Change in Condition Application*

The City Council conducted a public hearing on the change-in-condition application on May 3, 2021. Once again, a staff report was prepared and submitted prior to the hearing. (AR 75.) City Planner Johnson's report contained the following key points:

> While the city code does not require secondary access to townhome developments, it does require any dead-end public street to have a full turnaround when the street exceeds 300 feet in length.
>
> The City "Traffic and Transportation Engineer concluded that a single public access to West 86th Street would provide adequate, although not ideal, access and circulation for the typical traffic generated by a 15-unit townhome development."
>
> While the proposed turnaround design permitted larger vehicles to maneuver, less experienced drivers may encounter "some difficulty while executing turnaround movements."

> A review of seven other similar townhome developments in Bloomington revealed that only one had a secondary public access but five of the other six had full turnaround capability or plans to expand and potentially include secondary access in the future.
>
> Plaintiff's auto-turn exhibit did not model the South-bound ingress movements desired by the Fire Department. If the change-in-condition application is approved, plaintiff would need to demonstrate the feasibility of this movement.
>
> Large non-emergency vehicles, such as delivery, garbage, snowplow, contractor, moving, and other trucks would be unable to use the emergency-only Penn Avenue South access point so they must be able to turn around. Plaintiff's proposed plan is adequate only if cleared of snow, "unencumbered at all times", and if plaintiff enforces parking-clear-area requirements and polices the access barriers.

(AR 75 at BL 01763-01766.) Approval was recommended with the same conditions recommended to the Planning Commission. (*Id.* at BL 01767-01768.)

> At the hearing, City Planner Johnson reviewed staff's recommendations and concerns:
>
> Staff has been consistent throughout this process that ideally any development, you know, particularly over a certain quantity of units, would benefit from having a public use secondary access, just from a standpoint of traffic dispersion, and, you know, having multiple ways to -- to egress and ingress the site is certainly something valuable.

(AR 77 at BL 01782.) To prevent vehicles from entering the emergency-only Penn Avenue access, it was noted that the design included a surmountable curb and signage. (*Id.* at BL 01783.) Mr. Johnson also reviewed potential issues with the design, such as persons ignoring the restriction, the slowing of emergency vehicles, and snow-plow drivers being "less motivated or less willing to-to handle that snow removal and keep that access clear, which is critical again for fire and other emergency responders." (*Id.*) Mr. Johnson noted that conditions of approval were recommended to address these concerns. (*Id.* at BL 01784.)

In the discussion session, a council member asked what findings are necessary when reviewing change-in-condition applications. (*Id.* at 01785.) Mr. Johnson said the city code is silent on the issue and that the city's template change-in-condition resolution makes "some type of

inference or references to, you know, that there is not some further violation of public health, safety, or welfare, or those types of general type findings." (*Id.*) When asked to weigh in, the City Attorney noted that the City Council had "very limited discretion in this case", later adding:

> It's my understanding that there is no evidence that the city staff has that would support a finding of this being not in support of public health, safety, and welfare. We don't have evidence that it would create traffic problems, and we don't have a code requirement for a secondary access. The other evidentiary fact that I'm aware of is that this access is supported by traffic—the traffic folks at the City. So unless there are other evidentiary matters that you all are aware of or that have been raised and brought to your attention that we could put into the record, I'm not aware of any evidence that the staff has that would support not—not moving forward with this change in condition.

(*Id.* at BL 01785-01786.) Thus, according to the City Attorney, to decline the change-in-condition application, the City Council "would need to be able to articulate the reasons in support, the evidence that you have learned in order to put it into the record to explain why you wouldn't be moving forward with the recommendation." (*Id.* at BL 01787.) Further clarifying, counsel said:

> what I was trying to simply explain is that the . . . staff report and the staff proposal contains the evidence that it has in it. You all have received potentially other information from the public, or you have heard other sorts of testimony along the way from the community. You're certainly able to incorporate and reflect the totality of your knowledge. We just need you to explain that into the record and then, you know, move forward however you want.

(*Id.* at BL 01789.)

During the council's discussion, some questioned the extent of the city's discretion, others repeated concerns about the project raised before its original approval, one council member noted that a change-in-condition application was made when "nothing has changed in terms of the reasons that we articulated the first time", while another said:

> we have a code-complying site plan and condition here [and for] my colleagues who don't agree with putting this through, . . . [h]ow would another future developer utilize this property [] to get the full density out of this? Should we have not approved what we did back with R-1 to R-3? We talk about density being a priority in our city and, you know, here's one way to do it.

(*Id.* at BL 01790-01791) Following discussion, a motion to approve the staff-recommended change-in-condition resolution with conditions was made and failed on a 2-4 vote. (*Id.* at BL 01792.) A formal resolution of denial was approved on May 10, 2021. (*See* AR 84 at BL 01827.) This time, the resolution included specific findings in support of the city's denial. Specifically, the resolution cited the city's October 19, 2020 action adopting the public access condition and the purported reasons for that decision. (*Id.* at BL 01829.) In addition, the resolution found that:

> Applicant is seeking to move forward with the development as proposed, providing emergency-use-only access to Penn Avenue contrary to the specific findings made by the City Council at its October 19, 2020 public meeting without providing any site design changes to mitigate impacts to the surrounding neighborhood or address the concerns highlighted by the City Council at the October 19, 2020 meeting.

(*Id.* at BL 01830.) Based on its review of all information, including staff and public input, the City Council found that the proposed emergency-use-access was:

> inadequate to address the movement of resident vehicles, delivery vehicle, trucks, trailers, garbage haulers, and internal circulation through the proposed development and that the proposed amended condition failed to address the Council's concerns about safety and site functionality first articulated in the Council approval of October 19, 2020.

(*Id.*) The City Council concluded that, "without public use access . . . the proposed development on the Property will be injurious to the surrounding neighborhood and otherwise harm health, safety or welfare." (*Id.*) As set forth in the Statement of the Case, the instant litigation followed.

## III. STANDARDS OF REVIEW

### A. Summary Judgment Standard.

The parties each move for summary judgment and they agree that the cross-motions present no genuine issues of material fact. Summary judgment is appropriate when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. "A motion for summary judgment shall be granted when the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue of material fact and that either party is entitled to a judgment as a matter of law." *Fabio v. Bellomo*, 504 N.W.2d 758, 761 (Minn. 1993) (citing Minn. R. Civ. P. 56.03). Summary judgment is not appropriate when reasonable minds could differ and draw different conclusions from the evidence presented. *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citing *Illinois Farmers Ins. Co. v. Tapemark Co.*, 273 N.W.2d 630, 634 (Minn. 1978)).

A party opposing summary judgment may not rely merely on its pleadings but must present specific facts demonstrating there is a genuine issue of material fact for trial. *W.J.L. v. Bugge,* 573 N.W.2d 677, 680 (Minn. 1998); Minn. R. Civ. P. 56.05. The court must view the facts in the light most favorable to the nonmoving party. *Bugge,* 573 N.W.2d at 680. "Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." *DLH,* 566 N.W.2d at 69 (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986)).

Once the moving party has established a *prima facie* case that entitles it to summary judgment, the burden shifts to the nonmoving party to present specific facts that raise a genuine issue for trial. *Bebo v. Delander*, 632 N.W.2d 732, 737 (Minn. Ct. App. 2001). A genuine issue of material fact exists when a fact may be reasonably resolved in favor of either party. *DLH*, 566 N.W.2d at 69. However, there is no genuine issue of material fact for trial when the nonmoving party presents evidence which merely creates a metaphysical doubt as to a factual issue. *Id.* at 71. If any legitimate doubt exists as to the existence of a genuine issue of material fact, the doubt must be resolved in favor of finding that the fact issue exists. *Poplinski v. Gislason*, 397 N.W.2d 412, 414 (Minn. Ct. App. 1986), *rev. denied* (Minn. Feb. 18, 1987).

In the instant case, the parties submitted a stipulated record. The parties also agree that there is no genuine issue of material fact preventing entry of judgment as a matter of law.

**B. Standard Applicable to Judicial Review of Municipal Land-Use Decisions.**

The legislature expressly authorizes district-court review of municipal land-use decisions. Minn. Stat. § 361.361, subd. 1 (2020). However, review is limited to the record before the city. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988). In addition, municipal land use decisions are given great deference and are disturbed on judicial review only in "those rare instances in which the City's decision has no rational basis." *White Bear Docking v. City of Mound*, 324 N.W.2d 174, 176 (Minn. 1982) (courts should ordinarily defer to city's judgment when there is conflicting evidence); *accord Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 179-80 (Minn. 2006) (citing *Honn v. City of Coon Rapids,* 313 N.W.2d 409, 414-15 (Minn. 1981)). In *Honn*, the Supreme Court recognized that "[o]ur cases express this standard in various ways: Is there a 'reasonable basis' for the decision? Or is the decision 'unreasonable, arbitrary or capricious'? or is the decision 'reasonably debatable'?" *Honn*, 313 N.W.2d at 417; *see Schwardt v. County of Watonwan*, 66 N.W.2d 383, 386 (Minn. 2003) ("whether there was a reasonable basis for the decision, or whether the county acted unreasonably, arbitrarily, or capriciously").

If the municipality provides reasons for its decision, the reviewing court examines the record and determines if the stated reasons are legally sufficient and have a rational basis. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983); *see RDNT, LLC v. City of Bloomington*, 861 N.W.2d 71, 75-76 (Minn. 2015). "A decision lacks a rational basis if it is unsupported by substantial evidence in the record, premised on a legally insufficient reason, or based on subjective or unreasonably vague standards." *PTL, L.L.C. v. Chisago County Board of Commissioners*, 656 N.W.2d 567, 571 (Minn. Ct. App. 2003).

The reasons given by a city to support a land-use decision need not meet a 100% test. A city's decision "is not arbitrary when at least one of the reasons given . . . satisfies the rational basis test." *St. Croix Dev., Inc. v. City of Apple Valley*, 446 N.W.2d 392, 398 (Minn. Ct. App.), *rev. denied* (Dec. 1, 1989); *see Hubbard Broadcasting, Inc. v. City of Afton*, 323 N.W.2d 757, 765 n.4 (Minn. 1982) ("Not all of the reasons stated need be legally sufficient and supported by facts in the record.") (citation omitted).

The same rational basis/reasonableness standard applies whether the city's decision was "legislative in nature (rezoning)" or "quasi-judicial (variances and special use permits)." *Honn*, 313 N.W.2d at 416-17. The *Honn* court elaborated:

> [I]n legislative zoning, the municipal body is formulating public policy, so the inquiry focuses on whether the proposed use promotes the public welfare. In quasi-judicial zoning, public policy has already been established and the inquiry focuses on whether the proposed use is contrary to the general welfare as already established in the zoning ordinance. Consequently, the reviewing courts, in determining what is reasonable, should keep in mind that the zoning authority is less circumscribed by judicial oversight when it considers zoning or rezoning than when it considers a special use permit or a variance.

*Id.* at 417; *see Odell v. City of Eagan,* 348 N.W.2d 792, 796 (Minn. Ct. App. 1984) (citing *Honn*, 313 N.W.2d at 417; *Frank's Nursery Sales, Inc.*, 295 N.W.2d at 608). "The fact that a court reviewing the action of a municipal body may have arrived at a different conclusion, had it been a member of the body, does not invalidate the judgment of the city officials if they acted in good faith and within the broad discretion accorded them by statutes and the relevant ordinances." *VanLandschoot*, 336 N.W.2d at 509 (citation omitted). Plaintiff bears the burden of proving that the reasons stated by the City are either without factual support in the record or are legally insufficient. *Hubbard Broad, Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982); *Larson v. Washington County*, 387 N.W.2d 902, 906 (Minn. Ct. App. 1986).

## IV. ANALYSIS

### A. A Writ of Mandamus is Not Available to Plaintiff.

Plaintiff's Complaint is a two-count pleading seeking declaratory judgment and the issuance of a Writ of Mandamus. (Compl. & Pet. for Writ of Mandamus.) Defendant asks that the Court deny plaintiff's request for a writ of mandamus without offering a reason beyond its argument for summary judgment generally.

Although it has common-law origins, mandamus is now statutory. *State v. Wilson*, 632 N.W.2d 225, 227 (Minn. 2001). Minnesota's district courts have "exclusive original jurisdiction in all cases of mandamus." Minn. Stat. § 586.01 (2020).[3] According to the legislature:

> The writ of mandamus may be issued to any inferior tribunal, corporation, board, or person to compel the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station. It may require an inferior tribunal to exercise its judgment or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

*Id.* § 586.01. "Mandamus is an extraordinary legal remedy awarded, not as a matter of right, but in the exercise of sound judicial discretion and upon equitable principles." *County of Swift v. Boyle,* 481 N.W.2d 74, 77 (Minn. 1992) (quoting *State ex rel. Hennepin County Welfare Bd. v. Fitzsimmons*, 239 Minn. 407, 422, 58 N.W.2d 882, 891 (1953)).

To prevail in a mandamus action, the petitioner must prove that the respondent: (1) "failed to perform an official duty clearly imposed by law . . .; (2) as a result, the petitioner suffered a public wrong specifically injurious to the petitioner . . .; and (3) that there is no other adequate legal remedy." *N. States Power Co. v. Minn. Metro. Council,* 684 N.W.2d 485, 491 (Minn. 2004) (citations omitted); *accord Madison Equities, Inc. v. Crockarell*, 889 N.W.2d 568, 571 (Minn. 2017); *Breza v. City of Minnetrista*, 725 N.W.2d 106, 110 (Minn. 2006); *Coyle v. City of Delano*,

[3] The statutory exceptions to the district court's original jurisdiction are inapplicable in this case. *See* Minn. Stat. § 586.11 (2020).

526 N.W.2d 205, 207 (Minn. Ct. App. 1995). As to the third element, the statute is clear. A writ of mandamus "shall issue on the information of the party beneficially interested, but it shall not issue in any case where there is a plain, speedy, and adequate remedy in the ordinary course of law." Minn. Stat. § 586.02 (2020).

Mandamus is primarily used "(1) to compel the performance of an official duty clearly imposed by law and (2) to compel the exercise of discretion when that exercise is required by law." *Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 171 (Minn. 2006) (citing Minn. Stat. § 586.01) "However, a writ of mandamus does not control the particular manner in which a duty is to be performed and does not dictate how discretion is to be exercised." *Id.* (citations omitted).

Plaintiff asserts that a Writ of Mandamus is appropriate in this case because defendant had a duty to approve the change-in-condition application it submitted. (Compl. & Pet. for Writ of Mandamus ¶¶ 40-42.) The problem with plaintiff's argument is the existence of a statute that specifically provides a means by which zoning-related grievances may be aired in district court. The parties agree that the municipal decision at issue was made by defendant pursuant to Minnesota's Municipal Land Use Act. Minn. Stat. § 462.351-.364 (2020). (Compl. & Pet. for Writ of Mandamus ¶ 1.) The statute contains a provision that provides for district court review of grievances related to zoning matters. Minn. Stat. § 462.361, subd. 1 (2020). The proper process for seeking judicial review of a city's decision in a zoning matter is usually through a declaratory judgment action brought under section 462.361. *Mendota Golf, LLP*, 708 N.W.2d at 177 (citing *Honn*, 313 N.W.2d at 416).

Based on the applicable statutes and cases, the court concludes that plaintiff cannot proceed by mandamus because section 462.361 provides a remedy in the ordinary course of law. The Count

II mandamus claim is subject to dismissal for this reason alone. However, plaintiff also seeks declaratory relief and its asserted basis for both causes of action is the same. Moreover, defendant does not seek dismissal of Count II on the grounds that only declaratory relief is the only available remedy. For these reasons, and because the outcome of the case does not turn on the distinction between plaintiff's counts I and II, the Court proceeds to consider the merits of Count I.

### B. Defendant's Rejection of the Change-in-Condition Application was Legally Sufficient.

"There are two steps in determining whether a city's denial [of a conditional use permit application] was unreasonable, arbitrary, or capricious. First, [the court] must determine if the reasons given by the city were legally sufficient." *RDNT, LLC*, 861 N.W.2d at 75-76 (citations omitted).[4] Under Minnesota law, municipalities may condition their approval of a development "on compliance with other requirements reasonably related to the provisions of the regulations." Minn. Stat. § 462.358, subd. 2a (2020); *see Pebble Creek Rochester, LLC v. City of Rochester*, No. A05-1493, 206 WL 1321262, slip op. at *3 (Minn. Ct. App. May 16, 2006) (defining a condition as "'[a] provision making the effect of a legal instrument contingent on the occurrence of an uncertain future event.'") (quoting THE AMERICAN HERITAGE COLLEGE DICTIONARY 290 (3d ed. 2000)).

Here, the development plan plaintiff submitted with its Development Application called for RIRO public access from Penn Avenue South. Thereafter, defendant's October 19, 2020 approval of plaintiff's development plan was conditioned upon construction of the proposed public access and on plaintiff gaining the Hennepin County approval necessary to build that public access.

[4] Plaintiff never really argued that the reasons defendant gave for denying the change-in-condition application were legally deficient. Instead, it argued that the reasons given to support the legal basis for denial were unreasonable, arbitrary, and without a factual basis in the record. (MCDC Penn LLC's Mem of Law in Supp. of Mot. for SJ at 17-34.) Nevertheless, the Court considers the issue using the most recent Minnesota Supreme Court guidance—*RDNT, LLC*.

Plaintiff did not seek district court review of defendant's inclusion of a public access condition, presumably because it got what it asked for. Instead, plaintiff went to Hennepin County to request approval of a public RIRO access. However, when Hennepin County denied the request, plaintiff returned to the Bloomington City Council and applied for a change in condition consistent with the emergency-vehicle-only access that Hennepin County said it would approve.

Defendant's resolution denying the change-in-condition application expressly found that that "without public use access . . . the proposed development on the Property will be injurious to the surrounding neighborhood and otherwise harm health, safety or welfare." (AR 84 at 1830.) However, the resolution failed to cite an ordinance establishing the legal standard by which defendant considers change-in-condition applications. Similarly, neither of the parties cited a Bloomington ordinance establishing such a standard. According to Minnesota appellate cases, absent a standard-defining ordinance, a default standard applies. Thus, a city's denial of a requested land use is not arbitrary or unreasonable if accompanied by a finding, supported in the record, that the proposed use "endangers 'the public health or safety or the general welfare of the area affected or the community as a whole.'" *RDNT, LLC*, 861 N.W.2d at 76 (special use permit) (quoting *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969)).

Although defendant's May 10, 2021 resolution did not cite an ordinance governing consideration of plaintiff's change-in-condition application, it is undisputed that defendant's zoning ordinance permits the city to include conditions of approval in the final development plan. Bloomington, Minn., Code of Ordinances, ch. 21, art. V, div. A, § 21.501.03(c) (2020). Moreover, defendant's zoning ordinance requires the following finding before a development plan is finally approved or the revision to a previously approved development plan is approved: "The proposed development will not be injurious to the surrounding neighborhood or otherwise harm the public

health, safety and welfare." *Id.* § 21.501.03(e)(7). The standard in section 21.501.03(e)(7) is virtually identical to the default standard recognized in cases such as *RDNT, LLC* and *Zylka* and it is virtually identical to the language defendant used in the final resolution denying the change-in-condition application. *Compare id.* § 21.501.03(e)(7) *with RDNT, LLC*, 861 N.W.2d at 76 (quoting *Zylka* and Bloomington, Minn., Code of Ordinances, ch. 21, art. V, div. A, § 21.501.04(e)(5) (2020)) *with* AR 84 at 01830. As such, regardless of whether the ordinance's standard for setting a condition applies to change-in-condition applications or the default standard applies, the language is the same. Accordingly, as in *RDNT, LLC*, the reason given by defendant for denying the change-in-condition application was legally sufficient. 861 N.W.2d at 76. However, like the identically worded Bloomington ordinance considered in *RDNT, LLC*, defendant's failure to establish "more express standards make[s] denial . . . more, not less, vulnerable to a finding of arbitrariness." *RDNT, LLC*, 861 N.W.2d at 76 (quoting *Hay v. Twp. of Grow*, 296 Minn. 1, 6, 206 N.W.2d 19, 22-23 (1973)).[5]

### C. Defendant did not have a Rational or Reasonable Factual Basis for Denying the Change-of-Condition Application.

The Court's second step is to "address whether the City had a reasonable factual basis to determine that the proposed use would injure the surrounding neighborhood or otherwise harm the public health, safety, and welfare." *RDNT, LLC*, 861 N.W.2d at 76. This task requires examination of the facts supporting defendant's ultimate finding that the proposed change in condition "will be injurious to the surrounding neighborhood and otherwise harm health, safety or welfare." (AR 84 at BL 01830.) Examining "the factual basis for the City's findings more closely than . . . under a

[5] At every approval stage of a development in Bloomington, the building code requires a finding by the city that "[t]he proposed development will not be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare." Bloomington, Minn., Code of Ordinances, ch. 21, art. V, div. A, §§ 21.501.02(d)(6) (preliminary development plans) & .03(e)(7) (final development plans). The same standard also applies to applications for conditional use permits. *Id.* § 21.501.04(e)(5).

less subjective standard", *id.*, the court finds that the required reasonable factual basis is not present and that defendant's decision was arbitrary.

The factual basis for defendant's denial is best analyzed by going straight to the source of defendant's action—the findings of fact listed in the May 10, 2021 resolution denying plaintiff's change-in-condition application. Defendant's findings of fact are set forth in the various "whereas" paragraphs of the resolution. The first five "whereas" paragraphs describe the history of the Project and its stages of approval. (AR 84 at BL 01828-01829.) Paragraphs seven through eleven, thirteen through fifteen, and seventeen through nineteen are also historical in nature. (*Id.*) The Court focuses on the paragraphs containing specific factual findings purporting to support defendant's decision to deny the change-in-condition application—the sixth, twelfth, sixteenth, twenty-first, and twenty-second, although the eleventh paragraph helps to understand the twelfth paragraph.

The sixth paragraph notes city staff's testimony in October 2020 and its "preference" for a "public use" secondary point of access to the Project for reasons related to traffic circulation, supporting large vehicles without the need for a turnaround, and accommodating emergency vehicles. (*Id.* at BL 01829.) It should go without saying that a preference is not the equivalent to a finding or even a recommendation that public access is necessary to prevent injury or harm to a neighborhood or to the public. City staff never advised the City Council that a public use secondary access was necessary to prevent injury or harm to a neighborhood or to the public. In fact, both public and emergency-use only options were presented as suitable alternatives.

The eleventh paragraph references the decision by city staff to present both a public access and emergency-only access proposal to the City Council on October 19, 2020, specifically asking the City Council to determine if public access was "absolutely necessary" following Hennepin County's indication that it would only approve the latter. (AR 84 at BL 01829.)

The twelfth paragraph contains a broad factual finding that ties defendant's action to approve the public access condition to the decision to deny the change-in-condition application and uses the term "absolutely critical" instead of "absolutely necessary":

> At the public meeting on October 19, 2020, Council found that public-use access to Penn Avenue was absolutely critical for Applicant's development to move forward in order to facilitate ingress and egress from the Property, that emergency-use only access was inadequate to meet concerns regarding cite circulation, distribution of vehicles through the Property, prevent queuing on adjacent roadways, and to facilitate use of the internal roadway by delivery vehicles, large trucks, garbage haulers as well as emergency vehicles, and, specifically, that Condition of Approval #7 was designed to address public health, safety, and welfare impacts to the surrounding properties.

(*Id.*) The problem with the twelfth paragraph is that there is no support for it in the administrative record in the context of *public use* secondary access. The administrative record at most supports a conclusion that some form of secondary access was needed. Moreover, the administrative record contains no documentation that the City Council made any findings on October 19, 2020. The meeting transcript, meeting minutes, and resolution approving plaintiff's plat contain no factual findings of any kind related to Penn Avenue South secondary access. (AR 50-53.) The words "critical", "inadequate", "absolutely", and "queuing" were not used by any council member in connection with the secondary access issue on October 19, 2020. (AR 50.) The word "queuing" was used only in the City Planner's report when explaining that "no queuing or delay" was expected even in the absence of any kind of secondary access to Penn Avenue South. (AR 50-53; *see* AR 48 at BL 01389.) The report added that "[t]he proposal is not expected to create observable traffic impacts for the surrounding neighborhoods." (*Id.* at BL 01389.) The city traffic engineer also found that the Project would generate a low number of trips and are not "expected to exacerbate any existing safety, capacity, or delay issues." (*Id.* at BL 01387-01388.)

The next relevant factual finding is in the fifteenth "whereas" paragraph:

> Applicant is seeking to move forward with the development as proposed, providing emergency-use-only access to Penn Avenue contrary to the specific findings made by the City Council at its October 19, 2020 public meeting without providing any site design changes to mitigate impacts to the surrounding neighborhood or address the concerns highlighted by the City Council at the October 19, 2020 meeting.

(AR 84 at BL 01830.) The findings in paragraph fifteen are arbitrary and have no rational basis because they have no support in the record, contradict the record, and assume facts that are not in the record. The City Council made no findings on October 19, 2020. As already noted, there was no evidence submitted to the City Council on October 19, 2020, or at any other time, that a lack of public access to Penn Avenue South would have any negative neighborhood impact. The only concerns about emergency-only access expressly discussed at the October 19, 2020 hearing came from City Planner Johnson regarding turnaround capability. (AR 77 at BL 1784.) The statement that plaintiff did not provide "any design changes to mitigate impacts" is simply untrue and is contradicted by the enhanced hammerhead design change that plaintiff included in its change-in-condition application. (AR 58.)

In its twentieth "whereas" paragraph, the City Council itemized the sources of information it reviewed and stated its conclusion that the proposed emergency-use-access was:

> inadequate to address the movement of resident vehicles, delivery vehicle, trucks, trailers, garbage haulers, and internal circulation through the proposed development and that the proposed amended condition failed to address the Council's concerns about safety and site functionality first articulated in the Council approval of October 19, 2020.

(AR 84 at BL 01830.) Once again, the City Council's findings are neither reasonable nor rational because they lack factual support in the record. The City Council never expressed concern about safety and site functionality specific to emergency-only access to Penn Avenue South on October 19, 2020. In addition, the word "functionality" appears nowhere in either a staff report or during a City Council meeting.

From the twentieth paragraph, the May 10, 2021 resolution moves on to the ultimate conclusion. Defendant found that without public-use access to Penn Avenue South, the Project would "be injurious to the surrounding neighborhood and otherwise harm health, safety, or welfare." (*Id.*) In briefing its motion for summary judgment defendant, suggests that since it was reasonable to impose the original condition, the proposed change-in-condition was unreasonable. (Def. City of Bloomington's Mem. of Law in Supp. of its Mot. for Judgment in its Favor at 18-21.) However, the two questions are not mutually exclusive. Defendant was advised by its staff that both forms of secondary access met city standards, they both met the necessary health and safety requirements, and it was simply a matter of "preference." There is no evidence in the administrative record that defendant chose the public access option on October 19, 2020 because the emergency-only option would be harmful to the health and safety of the public or to neighborhoods. Thus, defendant's argument only begs the question.[6]

Next, in arguing that its decision to deny the change-in-condition application was reasonable, defendant's brief contradicted its own May 10, 2021 resolution. Recognizing that its May 10, 2021 finding stated that plaintiff failed to offer "any" mitigating design changes is flat-out wrong, defendant re-characterizes the change-in-condition application as containing "almost no additional design changes." (*Id.* at 21.) Defendant's moving brief failed to reference a single piece of evidence in the administrative record supporting the resolution. (*Id.* at 21-24.)

Defendant's opposition brief is no different. Ironically, while arguing that "[s]taff is not the decision maker", the only facts it cited as supporting the City Council's decision came from

[6] To approve the original public access condition, defendant only needed to find that it would not "be injurious to the surrounding neighborhood and otherwise harm health, safety, or welfare." On October 19, 2020, no one claimed that it was. But on that same day, defendant was also informed by City Planner Johnson that if Hennepin County followed through with its newly stated intent to deny approval of a public access, plaintiff would have to come back with an alternative plan. (AR 50 at BL 1423.)

the May 3, 2021 staff report recommending approval of the change-in-condition application. (Def. City of Bloomington's Response Mem. in Opp. to Plf.'s Mot. for SJ and in Further Supp. of its Mot. for Judgment in its Favor at 4-6 (citing AR 75).) The listed facts relate to the need for secondary access generally, adequate turnaround space, and staff's unsubstantiated and speculative concerns about inexperienced drivers and parking restrictions that plaintiff said it would address through townhome by-law provisions and enforcement. (*Id.* (citing AR 75 at BL 01763-01765.) When recommending passage of the change-in-condition application, city staff recommended resolving these issues by adding plaintiff's proposed mitigating solutions as conditions in the recommended draft resolution. (AR 74 at BL 01754, 01757.)

During the May 3, 2021 hearing, the City Attorney advised the City Council that there was no evidence from city staff supporting denial of the change-in-condition application and that denial required support from another source. (AR 77 at BL 01785-01787, 01789.) Yet, the May 10, 2021 resolution and defendant's briefing fails to cite such a source. Although a city is not "bound by the recommendations of its own experts", it must "have some basis" for its findings. *Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svee*, 303 Minn. 79, 85, 226 N.W.2d 306, 309 (1975); *see SuperAmerica Group, Inc., v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. Ct. App. 1995) ("a city may not reject expert testimony without adequate supporting reasons"), *rev. denied* (Minn. Jan. 5, 1996). The actual evidence presented to the City Council may be summarized as follows:

- An emergency-only access on Penn Avenue South is consistent with the change in zoning and change in density approved for the Project in October 2020.
- Neither the proposed development nor the proposed emergency-only access for Penn Avenue or 86th Street creates traffic capacity or safety issues.
- Some form of secondary access from Penn Avenue South was recommended by city staff but it is not necessary.

- Hennepin County agrees that secondary emergency access to and from Penn Avenue would reasonably serve the property based on the proposed use.
- The proposed enhanced hammerhead turnaround design permits large vehicles to maneuver, although inexperienced drivers may find it difficult.
- Bloomington has experienced no significant traffic access or circulation issues at other developments that have no secondary access.
- Approval of the change-in-condition application will cause no appreciable impact on the city's neighborhoods.
- In addition to the enhanced hammerhead design, defendant's design called for a surmountable curb and signage to enforce emergency-only access and provisions in the homeowner association by-laws to enforce parking restrictions, vehicle restrictions, and emergency-only access.
- City staff recommended passage of the change-in-condition application subject to the conditions in the staff report.

The words of the Minnesota Supreme Court are particularly applicable in this case. Defendant's failure to establish "more express standards make[s defendant's] denial of [plaintiff's change-in-condition application] more, not less, vulnerable to a finding of arbitrariness." *RDNT, LLC*, 861 N.W.2d at 76 (citation omitted). In *RDNT, LLC*, the court upheld the City of Bloomington's special-use permit decision because the city had the sole discretion to weigh the conflicting expert opinions it reviewed, the City had actual evidence in the record supporting its conclusion that there would be a substantial and harmful traffic increase, and there was "concrete testimony" from the public documenting traffic problems that already existed. *Id.* at 76-77. The court therefore distinguished the evidence before it from the insufficient evidence in *C.R. Investments, Inc. v. Village of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981). *Id.*

Here, the opposite is true and the opposite result is warranted. In the instant case, there was no conflicting expert evidence submitted to the City Council. The only expert evidence submitted to the City Council came from city staff, which recommended approval with added conditions as

proposed by plaintiff. Moreover, actual experience with similar developments and projected traffic at the Project with emergency-only access revealed no traffic capacity or safety issues. Finally, the only citizen complaints were both unsupported by fact and unrelated to the issue before the City Council. Rather, they consisted of general opposition to an already approved Project. (AR 66 at BL 01510-01512; AR 69 at BL 01523; AR 71 at BL at 01612-01618.) Thus, this case most resembles *C.R. Investments, Inc.* Vague reservations without factual support, conclusions about traffic impact that contradicted available evidence, and reliance on speculative conclusions unsupported by evidence were among the reasons the *C.R. Investments, Inc.*, court found that denying a special use permit resulted from arbitrary and capricious action by the village. 304 N.W.2d at 326-28. Here, defendant's denial of the change-in-condition application suffers from the same infirmities found in *C.R. Investments, Inc.* A legally sufficient reason still requires factual support in the administrative record. *See id.* at 325 ("the reasons relating to traffic do not justify denial of the permit even though they would have been legally sufficient had the record demonstrated a factual basis for them").

Finally, as noted by the court in *C.R. Investments, Inc.*, a municipality acts arbitrarily when it disregards proposed mitigating measures and denies the use as if the mitigating measures are unavailable. *Id.* at 325. The solution is to adopt reasonable use conditions and not to reject the proposed use. *Id.* Here, defendant not only disregarded the proposed mitigating measures recommended by city staff, it adopted a finding that falsely stated that no mitigating measures were proposed at all.

The Court finds that defendant's denial of plaintiff's change-in-condition application was arbitrary and unreasonable. Summary judgment is granted in favor of plaintiff and defendant's motion is denied. Just as the court ordered in *C.R. Investments, Inc.*, the Court remands the matter

to the Bloomington City Council with directions to approve the change-in-condition application.[7] *Id.* at 328. In *C.R. Investments, Inc.*, the court's remand left open the city's discretion to add a condition to the approval. *Id.* Here, the defeated motion to approve plaintiff's change-in-condition application already had reasonable conditions attached. Accordingly, the Court's remand order requires defendant to approve the defeated resolution and conditions as moved at the May 3, 2021 City Council meeting. (*See* AR 69 at BL 01526-01528; AR 75 at BL 01767-01768; AR 77 at BL 01791-01792.)

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[7] Plaintiff also argues that defendant acted arbitrarily because other similarly situated townhome developments exist in the city without a secondary access condition. The argument is without merit for three reasons. First while it is true that a city's failure to treat similarly situated properties equally may form a basis for concluding that the city acted unreasonably or arbitrarily, *Billy Graham Evangelistic Ass'n v. City of Minneapolis*, 667 N.W.2d 117, 126 (Minn. 2003), properties are not similarly situated if their development applications are too remote in time. *Compare Northwestern College v. City of Arden Hills*, 281 N.W.2d 865, 867 (Minn. 1979) (approving a permit for one college and denying a permit for another only a month later violates equal protection), *with Stotts v. Wright County,* 478 N.W.2d 803, 806 (Minn. Ct. App. 1991), *rev. denied* (Minn. Feb. 11, 1992) (properties not similarly situated because variance applications too remote in time) *and Hagstrom v. City of Shoreview*, No. A04-1812, 2005 WL 1620117, at *7 (Minn. Ct. App. July 5, 2005) ("similarly situated requirement" not met because applications too separated in time) (citing *Stotts*), *rev. denied* (Minn. Sept. 28, 2005) *and Castle Design & Dev. Co. v. City of Lake Elmo*, 396 N.W.2d 578, 582 (Minn. Ct. App. 1986) (variance applications considered four years earlier and related to larger lots cannot support non-uniform treatment argument), *overruled on other grounds, Myron v. City of Plymouth*, 562 N.W.2d 21 (Minn. Ct. App. 1997). Here, there is no evidence that any of the seven properties plaintiff contends are similarly situated submitted their development applications for approval within even a decade of plaintiff's. Second, plaintiff offered no evidence that the so-called comparable properties had a location or traffic patterns substantially similar to the subject Property. Thus, even without considering time, plaintiff failed to demonstrate substantial similarity in fact. Finally, all but one of the properties is internally dissimilar from the subject Property because they have full turn arounds, which is not part of plaintiff's proposed design. *See* Statement of Undisputed Facts, *supra* at 10.