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STATE OF MINNESOTA **DISTRICT COURT**

COUNTY OF RAMSEY **SECOND JUDICIAL DISTRICT**

JAMES CHARLES WINTERER, **KATHRYN McGUIRE**, **CATHERINE M. HUNT** and **HOWARD J. MILLER**, **BRUCE J. FARIBAULT**, **BRUCE HOPPE**;

Petitioners,

vs.

THE CITY OF SAINT PAUL, a body corporate and politic under Minnesota law;

Respondent.

Court File No. 62-CV-20-5188
Honorable John H. Guthmann

RESPONDENT CITY OF SAINT PAUL'S REPLY MEMORANDUM SUPPORTING THE MOTION TO DISMISS

REPLY ARGUMENTS

1. To attach jurisdiction on this Court with mandamus, Petitioners needed to follow and exhaust the procedures in the City's code—which they did not.

In its *Opening Memo*, the City argued this Court does not have jurisdiction to hear this case because the Petitioners did not follow and exhaust the City's procedures before bringing this mandamus-case, specifically (i) the City code's 10-day appellate clock, or (ii) Section 462.361's requirement to obtain a final order from the City Council before bringing their case. Petitioners defense is that they do not believe mandamus requires exhaustion of any kind. (*Response* at 5).

Petitioners are incorrect. Section 586.02 in the mandamus statutes reads,

> The 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.*

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Minn. Stat. § 586.02 (emphasis added) (2020). And caselaw interpreting Section 586.02 characterizes this as an exhaustion-requirement. *See NSPEA, Inc. v. State, Dep't of Admin.*, No. C0-02-895, 2003 WL 139717, at *2 (Minn. App. Jan. 21, 2003) ("Generally, a party must exhaust all available administrative and legal remedies [under Section 586.02] before seeking relief in the form of a mandamus action, unless the remedies are not adequate or do not exist."). *See also Chase v. City of Minneapolis*, 401 N.W.2d 408, 411 (Minn. App. 1987) (concluding the petitioner was allowed to bring her mandamus-petition because she had successfully exhausted the procedures in Minneapolis's zoning code); *Zaluckyj v. Rice Creek Watershed Dist.*, 639 N.W.2d 70, 76 (Minn. App. 2002), *review denied* (Apr. 16, 2002) (affirming dismissal of a mandamus-action because petitioners did not exhaust their remedies).

Petitioners also argue any exhaustion-requirement does not apply to their case because exhaustion requires a "legitimate action" from the City before it can kick in. (*Response* at 5-6). What Petitioners are saying is that because the Zoning Administrator's decision was supposedly illegitimate, they did not have to exhaust *any* procedure before bringing their mandamus *Petition*. (*Id.*).

This "legitimate action" requirement is purely imaginary. The only citation in Petitioners' *Response* to justify this requirement is *State ex rel. Sholes v. Univ. of Minn.*, where a taxpayer-plaintiff filed a writ of mandamus against the University of Minnesota to prevent religious activities on campus. 236 Minn. 452, 453, 54 N.W.2d 122, 124 (Minn. 1952). But Petitioners misread *Sholes* in two ways.

First, the words "legitimate action" do not appear *anywhere* in *Sholes*. Petitioners are misquoting a sentence in that case, which actually says, "Furthermore, the doctrine of

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exhaustion of administrative remedies usually presupposes that *some action* has been taken by the administrative agency." *Id.* at 457, 126 (emphasis added). In *Sholes*, there was simply "no action taken by the board at all." *Id.* This is unlike our case where the Zoning Administrator did "some action" by stopping the variance-hearing from taking place.

Second, the court in *Sholes* did impose an exhaustion-requirement, just using an exhaustion-rule from corporate law instead of a admin law. The *Sholes* court wrote the taxpayer-plaintiff was "required to seek relief from the board of regents before proceeding in court." *Id.* at 461-62, 129. A later case summarized this point from *Sholes* nicely, writing,

> [W]hile the court found that the doctrine of exhaustion of administrative remedies was not applicable, the court, in effect, applied the substance of the doctrine—that a party seeking judicial relief from a decision of an administrative body must have first exhausted her right to seek relief within that body.

Stephens v. Bd. of Regents of Univ. of Minn., 614 N.W.2d 764, 772 (Minn. App. 2000), *review denied* (Sept. 26, 2000).

Finally, Petitioners also suggest it's possible they had "no way to know" about the Zoning Administrator's decision, so how could they appeal it within 10 days? (*Response* at 7). But Petitioners admit—and the attachments to their *Petition* verify—they sent two irascible letters to the City complaining about this very decision. The first on July 8, 2020. (*Petition* at ¶ 22); (*Petition* Ex. 5; *Ex. 2-8 pdf* at 109-11). And the second on October 2, 2020. (*Petition* at ¶ 24); (*Petition* Ex. 7; *Ex. 2-8 pdf* at 114-16). Petitioners cannot claim with a straight face they did not know about the Zoning Administrator's decision when they admit to sending *two* letters complaining about this very same decision and demanding the City reverse course.

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So, pick either letter's date and count to ten; Petitioners still did not challenge the Zoning Administrator's decision within the 10-day window required by the City's zoning code, nor did they obtain a final order from the City Council as required by Section 462.361. Both failures prevent this Court from acquiring jurisdiction. *See Saint Paul Leg. Code* § 61.701(c) (2020) (requiring anyone challenging a City zoning-decision to appeal that decision to the Board of Zoning Appeals within 10 days); Minn. Stat. § 462.361, subd. 1 (requiring anyone disputing a municipal land-use decision to first obtain a final "decision or order of a" city's "governing body" before bringing their case in district court).

Nor can Petitioners hide behind their political committee to avoid notice of the Zoning Administrator's decision. In their *Petition* and in public statements, Petitioners insist it was their committee—Neighbors for a Livable Saint Paul—who filed this lawsuit, with the Petitioners acting as the petitioner-representatives of their committee. Their *Petition* admits the Petitioners "are members of the political committee Neighbors for a Livable Saint Paul." (*Petition* at ¶ 6). On their committee website, Petitioners say that "NLSP [Neighbors for a Livable Saint Paul] has decided to pursue legal action against city officials to compel them to enforce their own zoning laws." (*City Exhibit* #1).[1] Petitioners also admit they were the ones who sent the July 8 and October 2 letters to the City complaining about the Zoning Administrator's decision. *Id.* ("NLSP has made official requests to the city's Department of Safety and Inspections asking Zoning Administration to enforce the provisions of their own municipal code and the Master Plan that the city developed. The city has refused."). The

[1] The City has provided a courtesy copy for the Court in *City Exhibit* #1, but a URL to this publicly-available release is available here: https://www.livablesaintpaul.com/truck-stuff (last visited January 20, 2021).

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committee also boasted on its Facebook page that "NLSP [Neighbors for a Livable Saint Paul] filed suit in Ramsey County District Court against the City of Saint Paul compelling the city to enforce their zoning laws that govern the development of Highland Bridge (formerly Ford site)." (*City Exhibit* #2).[2] The most recent post on the committee's website proudly proclaims: "With the generous support of the people of St. Paul, *Neighbors For A Livable Saint Paul is taking the City to Court*. The Hearing will be at 10 a.m. on January 29th. Link to information about the hearing is below." (*City Exhibit* #3) (emphasis added).[3] And two of the Petitioners, Catherine Hunt and Howard Miller, wrote an op-ed in November 2020 where they again admitted their committee filed the lawsuit. Kate M. Hunt and Howard J. Miller, *Neighbors' Lawsuit Aims to Hold City Accountable for Ford Site Master Plan*, VILLAGER (Nov. 25, 2020).[4]

To put even more nails in this coffin, that same editorial written by Petitioners Hunt and Miller implicated fellow Petitioner James Winterer as a member of the committee who used his association with the group to bring this case. *Id.* Also, Petitioner Bruce Hoppe is listed as the committee's founder and chairperson in its initial campaign-finance registration

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[2] The City has provided a courtesy copy of a screenshot of this post for the Court in *City Exhibit* #2, but a URL to this publicly-available post is available here: https://www.facebook.com/NeighborsofStPaulFordSite/posts/1090085284762026 (last visited Jan. 20, 2021).

[3] The City has provided a courtesy copy for the Court in *City Exhibit* #3, but a URL to this publicly-available post is available here: https://www.livablesaintpaul.com/ (last visited January 20, 2021).

[4] A URL to this editorial is available here: https://myvillager.com/2020/11/25/neighbors-lawsuit-aims-to-hold-city-accountable-for-ford-site-master-plan/ (last visited Jan. 20, 2021).

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report. (*City Exhibit* #4).[5] Petitioner Howard Miller is listed as the Treasurer/Secretary of the committee in that same report and in the 8-week and 2-week pre-election reports as well. (*Id.*); (*City Exhibits* ##6, 7).[6] Petitioner Miller continued this role, as seen in the yearly 2018 and 2019 campaign-finance reports for the committee. (*City Exhibits* ##8, 9).[7] Not to mention the large contributions to the committee the Petitioners.[8]

It simply stretches credulity for the Petitioners to claim they were unaware of the Zoning Administrator's decision.

2. Petitioners' *Response* admits they do not have standing and incorrectly claims mandamus is excluded from normal standing requirements.

The City's *Opening Memo* explained why Petitioners lacked both statutory standing under Section 462.361 and taxpayer standing to bring this case. Petitioners counterattack by claiming the City's standing-arguments under Section 462.361 are meaningless since Petitioners brought their case under the mandamus statute—*not* Section 462.361. (*Response* at 8). In other words, Petitioners are saying they have opted out of Section 462.361.

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[5] The City has provided a courtesy copy of this report for the Court in *City Exhibit* #4. But this is a publicly-available document accessible by following the below link, clicking the relevant year (in this case, 2017), clicking "Political committees and funds," then locating the links below "Neighbors for a Livable Saint Paul." https://www.ramseycounty.us/residents/elections-voting/candidates/campaign-finance/campaign-finance-reports (last visited Jan. 20, 2021).

[6] The City has provided courtesy copies of these reports, but they are also publicly-available by following the instructions in note 5, *supra*, for the year 2017.

[7] The City has provided courtesy copies of these reports, but they are also publicly-available by following the instructions in note 5, *supra*, for the years 2018 and 2019.

[8] For example, Petitioners Catherine Hunt (*City Exhibit* #5), Kathryn McGuire (*Id.*), Bruce Hoppe (*Id.*), and Bruce Faribault (*City Exhibit* #8).

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But you cannot simply opt out of Section 462.361. This statute is part of a larger framework called the Municipal Planning Act. *See* Minn. Stat. §§ 462.351-.365 (2020). This Act exists to "provide municipalities, in a single body of law, with the necessary powers and a uniform procedure for adequately conducting and implementing municipal planning." Minn. Stat. § 462.351. It is an extraordinarily powerful set of statutes, giving cities far-reaching abilities to engage in municipal planning and establish zoning laws. *Nordmarken v. City of Richfield*, 641 N.W.2d 343, 347 (Minn. App. 2002). And importantly for this case, it spells out the process for judicial review of a city's planning and zoning decisions, which includes a requirement that anyone challenging a city's zoning-decision *must first* exhaust the city's procedures before bringing their case to court. (Section 462.361).

So, this circles us back to the question: Can the Petitioners choose to opt their mandamus-action out of the Municipal Planning Act and its exhaustion-requirement? According to the Minnesota Supreme Court, the answer is "No," because a city's decision related to a variance is made pursuant to the Municipal Planning Act. *Schulz v. Town of Duluth*, 936 N.W.2d 334, 339 (Minn. 2019) (stating that in cases where a city makes a "variance decision," any person aggrieved by that decision must first "seek review from the *municipality* at the local level" by exhausting procedures under Section 462.361) (emphasis in original).

Even if the Act were not triggered, caselaw is clear that there are three essential "standing requirements" to bring any mandamus-action, they are,

1. The failure of an official duty clearly imposed by law,
2. Public wrong specifically injurious to petitioner, and
3. No other adequate specific legal remedy.

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Coyle v. City of Delano, 526 N.W.2d 205, 207 (Minn. App. 1995).

In our *Opening Memo*, the City pointed out the words "harm," "injury," "suffer," or "damage" do not appear *anywhere* in the *Petition*. (*Opening Memo* at 25). In fact, nowhere in the *Petition* do we see the smallest glimmer of harm to the Petitioners that we could logically and credibly trace to the Zoning Administrator's decision that a variance was unnecessary. (*Id.*).

It's telling the Petitioners' *Response* does not try to justify this oversight. Instead, they only parrot the same argument that standing is automatically gifted to every petitioner who chants the language of the mandamus statute at Section 586.01. (*Response* at 8). By now, the City has put that claim to bed. Both the Municipal Planning Act and the mandamus statutes have a standing requirement—a requirement Petitioners cannot opt out of. And Petitioners' silence on this point may have conceded this argument, requiring dismissal. *See*, *e.g.*, *Peterson v. BASF Corp.*, 711 N.W.2d 470, 482 (Minn. 2006) ("It is well-established that failure to address an issue in brief constitutes waiver of that issue.").

3. Petitioners' *Response* confuses the terms *Amenity Space* and *Lot Coverage by Buildings*.

In our *Opening Memo*, the City explained how Petitioners' entire case is a confusion of the terms *Amenity Space* with *Parks and Open Space*. (*Opening Memo* at 30-38). Petitioners' *Response* repeats the same misstep—just this time, they confuse *Amenity Space* with the term "Building Lot Coverage" (what the City will refer to as *Building Coverage*). The gist of the Petitioners' argument is the Zoning Administrator's interpretation of *Amenity Space* cannibalizes the definition of *Building Coverage*, so the interpretation of *Amenity Space* must be wrong. (*Response* at 10-11.).

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First, let us review what *Amenity Space* means, which the City explained at length in our *Opening Memo*. This term only exists in Chapter 4 of the Ford Site Master Plan, which defines *Amenity Space* as, "areas covered by landscape materials, gardens, walkways, patios, recreation facilities, or play areas." (*Petition*, Ex. 1; *Ex. 1 pdf* at 101). The City's Zoning Administrator—in a decision that sparked and then ignited this entire case—interpreted *Amenity Space*'s definition to mean, "

> All private property areas that meet the [*Amenity Space*] definition – ground level or above grade – apply 100% towards meeting the [25% *Amenity Space*] requirement [on *The Property*].

(*Petition*, Ex. 4; *Ex. 2-8 pdf* at 107).

This new term, *Building Coverage*, appears in both the Ford Site Master Plan and the City's zoning code as "Max. Lot Coverage by Buildings." *Saint Paul Leg. Code* § 66.931 (2020); (*Petition* Ex. 1; *Ex. 1 pdf* at 94-104). *Building Coverage* is defined as, "The part or percent of the lot occupied by the above-grade portion of buildings." *Saint Paul Leg. Code* § 60.213 (2020). Or, in less legalese: How much space does a building take up on the total piece of land it's sitting on? Or, in more visual terms, from a bird's-eye view, imagine each of the four large squares below (made of up 16 little squares) is a piece of property—that is, a lot. Now, imagine the grayed-out parts of these properties are buildings sitting on the properties. The amount of gray is *Building Coverage*.

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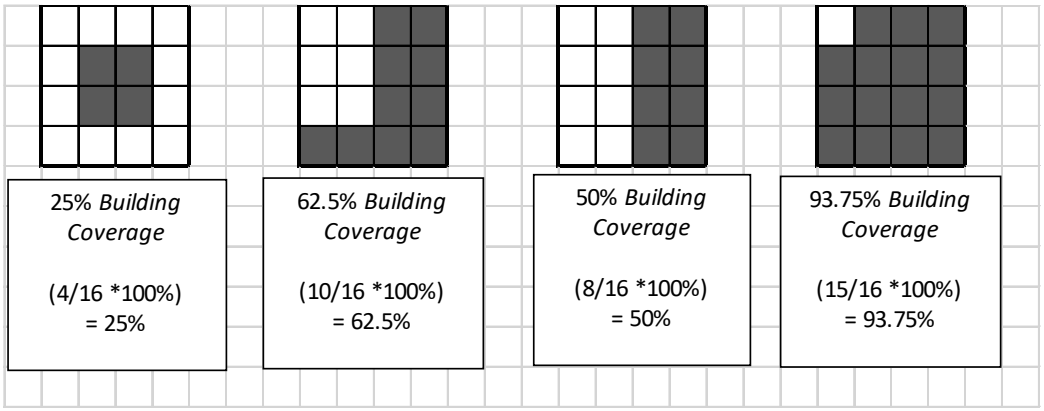

This is completely different from *Amenity Space*, which adds up every area on private property of all spaces exposed to the open—and not just on the ground-level, but on every level of the property. For example, *Amenity Space* includes amenities like gardens, walkways, patios, and decks. (*Petition*, Ex. 1; *Ex. 1 pdf* at 101). So, if there is an open-air patio on the third floor of your apartment building, that would count in the *Amenity Space* calculation. But this same patio is invisible to *Building Coverage* because it does not take up space on the ground-level of the property.[9]

4. Petitioners refuse to address if the Zoning Administrator's decision was reasonable despite providing nearly 300 pages of documentation on that issue.

The City also argued that even if we ignore the jurisdictional-lesions, Petitioners' case still fails to state a legal claim because the Zoning Administrator's decision was clearly reasonable. This is true especially in light of the nearly 300 pages of attachments the Petitioners included with their *Petition* and the plain language of the City's code and Master Plan. (*Opening Memo* at 30-38). Petitioners do not try to dispute this. Instead, they ignore the

[9] And both *Amenity Space* and *Building Coverage* are separate from *Parks and Open Space* because that terms is only for *public* "Land and water areas retained for use as active or passive recreation areas or for resource protection." *Saint Paul Leg. Code* § 60.216 (2020).

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argument entirely, refuse to engage with it, and say it is impossible to discuss on a *Motion to Dismiss*. Full stop. (*Response* at 13-14).

Petitioners seems to misunderstand the City's argument. The City is saying *even if* everything in the *Petition* is true, they still fail to state a legal claim. This is because of, (i) the favorable legal standard that only asks if the Zoning Administrator's variance-decision was reasonable, (ii) the nearly 300 pages of documentation Petitioners provided with their *Petition*, and (iii) the hundreds of pages of documentation available in the public record.

In an ironic twist, the Petitioners' decision to include this avalanche of documentation renders the City's pending *Motion to Dismiss* into a de facto summary-judgment motion—just without the risk of conversion. *Cmty. Fin. Grp., Inc. v. Main St. Otsego, LLC*, No. A19-1805, 2020 WL 5107290, at *2 (Minn. App. Aug. 31, 2020) ("[A] district court may, without converting a motion to dismiss into a motion for summary judgment, consider a document that is attached to the complaint.") (citing *Hardin County Sav. Bank v. Housing & Redevelopment Auth. of Brainerd*, 821 N.W.2d 184, 192 (Minn. 2012)).

Now, instead of taking the Petitioners' word for every vague allegation in their *Petition*, this Court has the documentation to see what exactly occurred. The Court can see the plain language of *Amenity Space* in the Master Plan. (*Petition* Ex. 1; *Ex. 1 pdf* at 101). It can even read the entire Master Plan. (*Id.*; *Id.* at 1-162). It can see Ryan's application for an *Amenity Space* variance. (*Petition* Ex. 3; *Ex. 2-8 pdf* at 75-106). And then the Court can see the Zoning Administrator's thought-process and interpretation about what *Amenity Space* means, and why Ryan's variance-application was unnecessary. (*Petition* Ex. 4; *Ex. 2-8 pdf* at 107-08). Then, the Court can read the June 8 through October 9, 2020 exchanges between the City

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and the Petitioners about the Zoning Administrator's variance-decision. (*Petition* Exs. 5-8; *Ex. 2-8 pdf* at 109-118). And it can see all the planning documents tracing the evolution of the Ford Site—from inception to now. (*Petition* Ex. 2; *Ex. 2-8 pdf* at 1-74); *Ford Site/Highland Bridge – Project Studies*, StPaul.gov.[10]

Ultimately, determining if the Zoning Administrator's interpretation of *Amenity Space* was reasonable in light of its definition in the Master Plan is a straightforward exercise in statutory interpretation. It only requires comparing the City's final interpretation of the term with the plan meaning of its definition. Considering the nearly 300 pages of documentation attached to the *Petition* alone—to say nothing of the reams of pages that are publicly available and cited in these *Memoranda*—this Court may easily deploy the traditional statutory-interpretation toolkit to weigh the reasonableness of the Zoning Administrator's decision.

And Petitioners' refusal to engage only strengthens the City's point that they needed to exhaust the City's procedures first. If the Petitioners had followed the City's procedures, they would have appeared before the Board of Zoning Appeals and then the City Council, where they could have offered testimony and made transcripts for a future court's consideration. Petitioners cannot grumble about the impossibility of addressing the merits when the City's procedures—if correctly followed—would have built any record they wished for this Court to consider right now. The void where this city-built record should be speaks for itself.

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[10] A URL to this website is available here: www.stpaul.gov/departments/planning-economic-development/planning/ford-sitehighland-bridge/ford-site-zoning-and-2#11 (last visited Jan. 21, 2021).

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Dated: January 22, 2021

Respectfully submitted,

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MINN. STAT. § 549.211 ACKNOWLEDGMENT

The party or parties on whose behalf the attached document is served acknowledge through their undersigned counsel that sanctions may be imposed pursuant to Minn. Stat. § 549.211.

s/Kyle Citta
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