**STATE OF MINNESOTA**
**IN COURT OF APPEALS**
**A09-2042**

Beverly Goerisch, Donald Goerisch,
Bernadine Simons, Sandra Simons, and Kevin Thurs,
jointly d/b/a Elm Creek Business Park,
Appellants,

vs.

City of Brooklyn Park,
Respondent.

**Filed July 27, 2010**
**Affirmed**
**Johnson, Judge**

Hennepin County District Court
File No. 27-CV-08-31732

Dan Biersdorf, E. Kelly Keady, Biersdorf & Associates, P.A., Minneapolis, Minnesota (for appellants)

George C. Hoff, Shelley M. Ryan, Hoff, Barry & Kozar, P.A., Eden Prairie, Minnesota (for respondent)

Considered and decided by Johnson, Presiding Judge; Stauber, Judge; and Willis, Judge.[*]

[*]Retired judge of the Minnesota Court of Appeals, serving by appointment pursuant to Minn. Const. art. VI, § 10.

## U N P U B L I S H E D  O P I N I O N

**JOHNSON**, Judge

Property owners in the city of Brooklyn Park sought to develop 14 acres of land as a mixed-use development. The city denied approval of their concept plan. The property owners challenged the city's denial in district court, seeking a declaratory judgment and a writ of mandamus on the ground that the city's actions violated their right to equal protection and constituted an unconstitutional taking. The district court granted summary judgment to the city. We affirm.

## FACTS

Each of the five individual plaintiffs in this case owns a parcel of land at the northwest corner of 101st Avenue North and Highway 169 in the city of Brooklyn Park. The five parcels constitute a contiguous 14-acre property. The five individuals (appellants) have formed a partnership, Elm Creek Business Park, for the purpose of developing their property.

On July 31, 2008, appellants applied for approval of the concept plan for their proposed development, which would include several office buildings and a restaurant. Concept-plan approval is the initial stage of development approval in the city of Brooklyn Park. The property is currently zoned R-1 under the city's zoning ordinance, and the proposed uses are not permitted in an R-1 district. In addition, the city's comprehensive plan, which includes a master plan providing for staged growth, provides that the property is in the city's fifth growth stage. As a result of its location in the fifth

growth stage, the final growth stage in the city's master plan, the property is not scheduled to receive roadway improvements or installation of utilities for several years.

On November 12, 2008, the city planning commission voted to recommend approval of the concept plan with certain conditions. At a city council meeting two weeks later, appellants attempted to address some of the planning commission's concerns by offering to pay for or finance the extension of utilities and roads to the proposed development. After discussion of the proposal, the city council ultimately adopted a resolution denying appellants' application. The city council found that the application is premature for a number of reasons, including the lack of utilities, the lack of roadway improvements, current market conditions, the availability of other land in the city, and the concept plan's noncompliance with the city's comprehensive plan and zoning code.

After the city's denial of the concept-plan application, appellants commenced this action seeking a declaratory judgment that the city acted arbitrarily and capriciously and a writ of mandamus ordering the city to approve the concept plan. Appellants also alleged that the city's actions constituted an unconstitutional taking of its property and violated its right to equal protection under the Minnesota Constitution.

During the discovery period, appellants sought to depose a number of city officials. In response to the notices of deposition, the city moved for a protective order in July 2009. The city filed a motion for summary judgment that same month. After a hearing, the district court issued an order on September 30, 2009, granting the city's motion for summary judgment. The property owners appeal.

## D E C I S I O N

A district court must grant a motion for summary judgment "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); *see also* Minn. R. Civ. P. 56.03. "On an appeal from summary judgment, we ask two questions: (1) whether there are any genuine issues of material fact and (2) whether the [district] court[] erred in [its] application of the law." *State by Cooper v. French*, 460 N.W.2d 2, 4 (Minn. 1990). We apply a *de novo* standard of review to the district court's decision, viewing the evidence in the light most favorable to the non-moving party. *See Osborne v. Twin Town Bowl, Inc.*, 749 N.W.2d 367, 371 (Minn. 2008).

### I. Denial of Concept Plan

Appellants first argue that the district court erred by concluding that the city had a rational basis for denying their concept plan.

#### A. Standard of Review

We first must determine our standard of review. The parties disagree on this issue. Appellants argue that the city's denial of their concept plan was a quasi-judicial act. The city argues that the concept-plan application "is a precursor to requesting a Comprehensive Plan amendment and rezoning -- both of which are quintessential legislative decisions."

As a general rule, rezoning is legislative in nature, but the grant or denial of a variance or special-use permit is a quasi-judicial action. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983); *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416-17 (Minn. 1981). Legislative action affects the general public, whereas judicial action affects only a few individuals. *See Interstate Power Co., Inc. v. Nobles County Bd. of Comm'rs*, 617 N.W.2d 566, 574 (Minn. 2000). The city's action in this matter does not fall neatly into either category. The concept plan, if approved, would be a precursor to an amendment to the city's comprehensive plan and zoning ordinance. The denial of the concept plan, however, affects only appellants.

The city asserts that it is unnecessary to characterize the city's action as either quasi-judicial or legislative. A review of the caselaw reveals that this assertion is correct. The supreme court has stated, "Regardless of whether the zoning matter is legislative (rezoning) or quasi-judicial (variances and special-use permits), we determine whether the municipality's action in the particular case was reasonable." *VanLandschoot*, 336 N.W.2d at 508. The supreme court has repeatedly stated that "the standard of review is the same for all zoning matters, namely, whether the zoning authority's action was reasonable. . . . 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 416-17; *see also Mendota Golf, LLP v. City of Mendota Heights*, 708 N.W.2d 162, 179 (Minn. 2006) (applying *Honn* to city's denial of application for amendment to comprehensive plan); *Swanson v. City of Bloomington*, 421 N.W.2d 307, 311 (Minn. 1988) (applying *Honn* standard of review to city's denial of plat application);

*White Bear Docking & Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982) (applying *Honn* standard of review to city's denial of special-use permit). "Our scope of review is narrow. We uphold a city's land use decision unless the party challenging that decision establishes that the decision is unsupported by any rational basis related to promoting the public health, safety, morals, or general welfare." *Mendota Golf*, 708 N.W.2d at 180 (quotation and citation omitted). Furthermore, a reviewing court does "not give any special deference to the conclusions of the lower courts, but rather engage[s] in an independent examination of the record and arrive[s] at [its] own conclusions as to the propriety of the city's decision." *Id*.

**B. Completeness of Record**

As a threshold matter, appellants argue that the district court erred by concluding that the record of the city's proceedings is clear and complete. This court reviews the record made before a city "without according any special deference to the same review conducted by the trial court." *Swanson*, 421 N.W.2d at 311 (quotation omitted). "Where the municipal proceeding was fair and the record clear and complete, review should be on the record." *Id*. at 313. However, "where a city has failed to make a complete and adequate record of its proceedings in zoning matters [the court may] require that city to prove the basis of its decision." *Id*. at 312. "Where the municipal body has proposed formal findings contemporaneously with its decision and there is an accurate verbatim transcript of the proceedings, the record is likely to be clear and complete." *Id*. at 313.

Appellants contend that they were not given notice that the question whether the record was complete was before the district court. But a review of the district court

record indicates that the issue was briefed by appellants in their memorandum in opposition to the city's motion for summary judgment. Thus, appellants were on notice of the issue.

Appellants also contend that the administrative record is not clear and complete because it does not include a November 2, 2007, letter; portions of the city's records for several other Brooklyn Park developments; and an unsigned affidavit of Alan Kretman, a former planner with the city. In addition, appellants contend that they should be entitled to depose city officials, such as city council members, the city manager, the city planner, and other city staff. In *Swanson*, the supreme court explained that a "district court should establish the scope and conduct of its review of a municipality's zoning decision by considering the nature, fairness and adequacy of the proceeding at the local level and the adequacy of the factual and decisional record of the local proceeding." 421 N.W.2d at 312-13. If the proceeding was fair and the administrative record is clear and complete, "the district court should receive additional evidence only on substantive issues raised and considered by the municipal body and then only on determining that the additional evidence is material and that there were good reasons for failure to present it at the municipal proceedings." *Id*. at 313. "Where the municipal body has proposed formal findings contemporaneously with its decision and there is an accurate verbatim transcript of the proceedings, the record is likely to be clear and complete." *Id*.

Here, the record of the proceedings before the city includes appellants' application and plans; verbatim transcripts of the meetings before the planning commission and the city council; the staff reports for the planning commission and city council; and the city

council's resolution, containing factual findings, which was adopted the same night as its consideration of the concept plan. Like the record in *Swanson*, which contained "verbatim transcripts of the public hearings on the matter, including statements by experts on both sides; written reports by the city director of planning and city forester; and contemporaneous written findings by the city council on which the council based its decision," the record here is complete and clear. *Id.*; *see also R.L. Hexum & Assocs., Inc. v. Rochester Twp.*, 609 N.W.2d 271, 278 (Minn. App. 2000) (holding that record was clear and complete when proceedings were recorded and transcribed and when township board made contemporaneous findings that included a staff report and recommendation with letters from government agencies). Appellants had an opportunity to submit to the city the documents that they now want to add to the appellate record, but they did not do so. The city did not consider those documents in making its decision, and it is unclear how those documents would augment the voluminous information that was before the city council.

Appellants further contend that the city's proceedings were unfair. *See Swanson*, 421 N.W.2d at 313 (holding that where city proceedings are fair and administrative record is clear and complete, review should be on the record). The city contends that this issue was not raised in the district court. The record reveals that appellants did not make this argument in the district court. Thus, appellants have forfeited the argument. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988).

Thus, the district court did not err by concluding that the record of the city's proceedings was clear and complete.

## C. Reasonableness of City's Decision

Appellants argue that the city's reasons for denying the concept-plan application are not reasonable and are not supported by the record. A reviewing court looks at the city's resolution and "can look beyond the city's resolution and review the minutes of relevant meetings and documents considered therein to determine whether the city had a rational basis for its decision." *Mendota Golf*, 708 N.W.2d at 180.

The city's resolution denying appellants' concept-plan application contains several factual findings. The city found that the property is zoned R-1, Urban Reserve district; that the property is not scheduled to receive public utilities within "at least the next 5 years"; that appellants' plan would require development "outside of the city's staging plan"; and that the city "may consider modifying the staging of utilities if there is a compelling reason." The city then denied the application because it "is premature for the following reasons:"

> a. Roadway improvements are not in place or planned to serve the type of development proposed.
>
> b. Brooklyn Park Public Utilities are not readily available to serve the site.
>
> c. There are currently approximately 400 acres of vacant land with city services available for office development.
>
> d. The current market does not warrant deviating from the staging plan without a specific user identified.
>
> e. The Comprehensive Plan does not call for utilities to be staged into this area at this time.

> f. The Zoning of the property does not allow for a development as proposed.
>
> g. The civil plans have not been designed by an engineer licensed in the State of Minnesota.

Appellants argue that all the reasons except the fifth reason have "no supporting factual basis" in the record. The fifth reason also is improper, appellants contend, because it is unsupported by facts and ignores appellants' intention to pay for the installation of utilities and for obtaining utilities from a neighboring municipality.

**1. Staging**

We first consider the city's reliance on its staged-growth plan. The master plan, a part of the city's comprehensive plan, explains the plan:

> Staged growth has been a growth policy in Brooklyn Park since the early 1960's. It was adopted in order to: Extend utilities in a controlled manner and not on a piece-meal basis; Establish staging to meet development needs; Require that all new subdivisions must have full utilities; and Ensure development is consistent with the City's Capital Improvement Plan.

The city's policies state that staged growth "[p]rovide[s] for the orderly and logical extension of infrastructure to support growth by: Planning and coordinating roadway and utility extensions in accordance with the staged growth plan and economic conditions. Allowing flexibility in the staged growth plan by a Comprehensive Plan amendment when development proposal meets the City's intentions."

The supreme court has explained that "[a] municipality has legitimate interests in . . . reaffirming historical land use designations." *Mendota Golf*, 708 N.W.2d at 181. In *Mendota Golf*, the supreme court examined a property owner's challenge to the city's

denial of a request to amend the city's comprehensive plan. *Id.* at 179. The supreme court held that the city's denial had a rational basis because of a municipality's legitimate interests in "protecting open and recreational space" such as the land in question, a golf course, and in "reaffirming historical land use designations." *Id.* at 181. Similarly, in *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007), the supreme court held that the property owner had failed to show that the city's reasons for denying an amendment to the city's comprehensive plan, including "preservation of open and recreational space and reaffirmation of historical land use designations" as well as traffic concerns, lacked a rational basis. *Id.* at 630-31. As the supreme court noted, review of a city's refusal to amend a comprehensive plan is "highly deferential." *Id.* at 631.

Appellants do not dispute that the property is in the fifth growth stage and is scheduled, under that plan, to receive municipal services last. The proposed development conflicts with the city's comprehensive plan and "historical land use designations." *Id.* Development of the land now would require the city to take an action that is contrary to the comprehensive plan and to allow development contrary to the order established by the city in its staged-growth plan. The city's own zoning code provides that in examining a proposed development, the city must consider conformance of the proposed plan with the city's comprehensive plan. Brooklyn Park, Minn., City Code § 152.563 (2001).

The city's comprehensive plan and its concept of staged growth also relate to the city's finding that 400 acres of vacant land with city services are available for development. The city's master plan, which is part of its comprehensive plan, provides that the city must consider economic conditions in its staged-growth plan. Appellants'

proposed development is outside the staged-growth plan. The availability of land elsewhere in the city for development, which already is serviced by utilities, is a relevant consideration for the city in determining whether it should approve appellants' concept plan. *See Concept Props., LLP v. City of Minnetrista*, 694 N.W.2d 804, 815 (Minn. App. 2005) (affirming city's denial of rezoning based in part on city's desire to avoid urban sprawl), *review denied* (Minn. July 19, 2005).

Appellants do not dispute that other land is available. Rather, they contend that the city acted arbitrarily because the city has, on other occasions, allowed other property owners to develop property located outside the relevant staged-growth area. That argument is better addressed in appellants' claim that the city's actions violated their right to equal protection, which will be discussed below. Because appellants' proposed development conflicts with the city's comprehensive plan, the city's decision is supported by a rational basis and is reasonable. *See Mendota Golf*, 708 N.W.2d at 179-82; *Honn*, 313 N.W.2d at 417.

**2. Zoning**

We next consider the city's reliance on its zoning code. Appellants argue that there is no requirement that a concept plan comply with the zoning code. The city argues in response that appellants have not yet requested rezoning, which would be necessary and, thus, that the city had a rational basis for denying the concept plan. The city asserts that appellants are free to request rezoning, which the city then would consider.

In *Sun Oil Co. v. Village of New Hope*, 300 Minn. 326, 220 N.W.2d 256 (1974), the supreme court examined a village's denial of a property owner's request to rezone a

parcel of land. *Id*. at 327, 220 N.W.2d at 257. In affirming the village's decision, the court explained that a municipal authority's "desire to perpetuate an area of land for certain permitted uses as established by a comprehensive plan does not, without evidence to the contrary, constitute arbitrary or capricious action on the part of the [municipal authority]." *Id*. at 337, 220 N.W.2d at 263.

Appellants do not dispute that the proposed development does not comply with the property's current zoning, which does not permit office building or restaurants, both of which are a part of the proposed mixed-use development. Because appellants' proposed development does not comply with the existing zoning of the property, the city's decision is supported by a rational basis and is reasonable. *See Mendota Golf*, 708 N.W.2d at 179-82; *Honn*, 313 N.W.2d at 417.

**3. Roadways**

We next consider the city's reliance on the lack of necessary roadway improvements. Appellants argue that the record does not support the city's reasoning that roadway improvements are not planned or in place because the city acknowledged that a traffic study is unnecessary at the concept-plan stage. But appellants cannot dispute that the city's comprehensive plan does not provide for roadway improvements near the property for several years. As noted above, conflict with a city's comprehensive plan provides a city with a rational basis to deny a development request. *See Wensmann Realty*, 734 N.W.2d at 631; *Mendota Golf*, 708 N.W.2d at 181. In *Wensmann Realty*, the supreme court affirmed the denial of a comprehensive-plan amendment that was based in part on the necessity of roadway improvements. 734 N.W.2d at 629, 631 & n.3. Because

appellants' proposed development requires roadway improvements, the city's decision is supported by a rational basis and is reasonable. *See Mendota Golf*, 708 N.W.2d at 179-82; *Honn*, 313 N.W.2d at 417.

**4. Utilities**

Finally, we consider the city's reliance on the proposed development's lack of utilities. Appellants argue that the city's decision is unreasonable because appellants offered to pay for the installation of utilities.

Appellants did not propose to provide full payment of the expenses necessary to extend utilities to the proposed development. Rather, appellants proposed to finance the installation of utilities and to recoup their money later, after the property is developed, when the city could impose a special assessment on all properties in the development, which could be credited to appellants. As the city points out, appellants would essentially lend money to the city for the installation of utilities. The proposal conceivably would make it unnecessary for the city to devote financial resources to the installation of utilities before the time specified in its staged-growth plan. But the record indicates that the only city specifically identified by appellants from which they proposed to obtain utilities, Maple Grove, indicated to the city that it was "not interested in providing" utilities to the development because it does not have the necessary capacity to provide water to a development the size of the one proposed. Appellants did not propose an alternative source of utilities.

The availability of utilities for a proposed development is a relevant consideration for a city. In *Freundshuh v. City of Blaine*, 385 N.W.2d 6 (Minn. App. 1986), this court

examined a city's denial of a request to rezone a parcel of property. *Id*. at 8. The city's denial was supported in part by its reasoning that the property did not contain the water and sewer services necessary to support the rezoning. *Id*. at 9. This court noted that the city's comprehensive plan encouraged development where "urban services such as major highways and sewer services are already available or can be easily extended." *Id*. Because the record showed the "substantial costs to both the city and adjoining property owners" as well as showed the inadequacy of the water and sewer service, this court held that the city's denial of the rezoning request was not arbitrary and capricious. *Id*. at 9-11. This court also has stated, in reviewing another denial of a rezoning request, "A land-use decision based on the scarcity of resources to support the proposed land use is not unreasonable." *Concept Props.*, 694 N.W.2d at 819. Because appellants' proposed development requires utilities that are not in place, the city's decision is supported by a rational basis and is reasonable to the extent that it is based on the present unavailability of utilities. *See Mendota Golf*, 708 N.W.2d at 179-82; *Honn*, 313 N.W.2d at 417.

The city has at least four valid, rational reasons for denying appellants' concept plan. Appellants' proposed development does not comply with Brooklyn Park's comprehensive plan. It does not comply with the city's zoning ordinances. It is not serviced by utilities or adequate roadways. And the city has more than 400 acres of other land ready for development. For these reasons, the city's decision to deny approval of appellants' concept plan is reasonable, and the district court did not err by granting summary judgment to the city on this claim. *See Mendota Golf*, 708 N.W.2d at 179-82; *Honn*, 313 N.W.2d at 417.

## II. Writ of Mandamus

Appellants next argue that the district court erred by concluding that a writ of mandamus is not an available remedy. More specifically, appellants contend that, although mandamus may not control a city council's exercise of discretion, mandamus may be available to compel action by city officials if they act in an arbitrary and capricious manner in exercising their discretion.

The supreme court recently discussed "the proper use of mandamus in municipal zoning cases." *Mendota Golf*, 708 N.W.2d at 176. The court acknowledged that its prior caselaw had "not always been clear or consistent in defining the proper reach of mandamus." *Id*. at 177. The court then "reiterate[d] [its] guidance that the proper procedure for reviewing a city's decision in a zoning matter generally will be a declaratory judgment action, possibly including a request for injunctive relief." *Id*. at 178 (footnote omitted). The court clarified that in using the word "zoning," it meant to "encompass a municipality's land use decisions under its zoning ordinances and rules, as well as its comprehensive plan." *Id*. at 178 n.9 (citation omitted). The court acknowledged that mandamus may be appropriate if a claim concerns a city's failure "to perform a clearly defined duty that is required by a statute or zoning ordinance." *Id*. at 178. "In contrast to cases involving a city's failure to perform a clearly defined duty, mandamus is not appropriate to review the exercise of legislative discretion in municipal zoning matters." *Id*. at 179.

Despite appellants' argument that the city's action may be reviewed in a mandamus action, the supreme court's opinion in *Mendota Golf* states otherwise: "a

mandamus action generally is not appropriate to review claims that a city acted arbitrarily and capriciously in denying a proposed amendment to a comprehensive plan." *Id.* Here, the concept-plan application would require the city to amend its zoning ordinance or its comprehensive plan, even though there is no formal request for an amendment. Thus, the district court did not err by concluding that a writ of mandamus is not a remedy that is available to appellants.

## III. Equal Protection Claim

Appellants next argue that the district court erred by concluding that the city was entitled to summary judgment on its equal protection claim under the Minnesota Constitution. The right to equal protection is embodied in a provision that states: "No member of this state shall be disenfranchised or deprived of any of the rights or privileges secured to any citizen thereof, unless by the law of the land . . . ." Minn. Const. art. I, § 2; *see also Northwestern Coll. v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979). To avoid a violation of the right to equal protection, "[a] zoning ordinance must operate uniformly on those similarly situated," and "one applicant [must] not be preferred over another for reasons unexpressed or unrelated to the health, welfare, or safety of the community or any other particular and permissible standards or conditions imposed by the relevant zoning ordinances." *Northwestern Coll.*, 281 N.W.2d at 869 (quotation omitted).

The district court concluded that appellants' concept plan is not similarly situated to other concept plans approved by the city, including the Gateway concept plan. The district court noted that Gateway and appellants' property are in different growth-plan

stages. Furthermore, the district court found that the Gateway plan is much larger, at 91 acres, than appellants' property of 14 acres. The Gateway property also is zoned differently from appellants' property. Thus, the district court concluded, there was no evidence in the record to support appellants' equal protection claim.

In *Northwestern College*, the supreme court examined whether a city had violated Northwestern College's equal protection rights when it approved another college's building permit on the same night that it concluded that Northwestern College's application required further review. *Id.* The supreme court held that the only justification for the disparate treatment -- objection by a neighborhood association -- was insufficient to provide a rational basis for differing treatment. *Id.* Similarly, in *Hay v. Township of Grow*, 296 Minn. 1, 206 N.W.2d 19 (1973), the supreme court held that denying a special-use permit to one mobile-home park while granting a special-use permit to another mobile-home park violated the first park's equal protection rights. *Id.* at 7-8, 206 N.W.2d at 23-24. The court noted that the "almost simultaneous filing" of the applications mandated similar treatment when no other differences between the parties were apparent. *Id.* Conversely, in *Kottschade v. City of Rochester*, 537 N.W.2d 301 (Minn. App. 1995), *review denied* (Minn. Nov. 15, 1995), this court held that a city did not violate a property owner's equal protection rights when it denied that owner's development application and granted another owner's application. *Id.* at 306-07. This court noted that the applications were not filed close in time, that the applications required consideration of different regulations, and that the quality of the properties were different based on their locations. *Id.*

Appellants compare themselves to the two other developments approved by the city: the Target development and the Gateway development. The Target development was initially brought to the city's attention in 1999, when Target applied for review of its preliminary development plan. Several years later, in 2006, the city and Target agreed on the scope of the development. The city argues that the Target development is not similarly situated to appellants' development because the size of that development -- at least 95 acres and as much as 334 acres -- is substantially different from appellants' 14 acres. Furthermore, the city argues, the two properties are zoned differently. In addition, the Target development is not in the fifth growth stage.

Based on the significant separation in time -- Target's initial application was filed in 1999 and appellants' in 2008 -- Target is not similarly situated to appellants. Furthermore, the size of the development and the fact that Target and appellants are in different growth stages may also support the conclusion that the two applicants are not similarly situated.

Whether Gateway and appellants are similarly situated is a somewhat closer issue. The city first discussed Gateway's concept-plan application in October 2007. The next year, on the same day that the city denied appellants' concept-plan application, the city considered and approved Gateway's preliminary and final plats. The city contends that the two requests are different and require different approval and procedures, but the city never voted to approve or deny Gateway's concept plan. Rather, the city allowed Gateway to proceed to the next stage, at which point it approved the plats. And, as discussed above in part II.B., the city's ordinances refer to preliminary plans as "concept

plans" and seem to require consideration of the same factors in the approval process. Brooklyn Park, Minn., City Code §§ 152.562, .563 (2001).

Nonetheless, it is significant that Gateway and appellants are in different growth stages. The city relied heavily on the fact that the city's comprehensive plan does not contemplate development in stage five at this time, before other areas of the city are developed. Appellants argue that because the city has deviated from the staged-growth plan before, it cannot justify its disparate treatment on that factor now. But a city's previous deviation from its comprehensive plan does not require it to continue to deviate. *See Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 607 (Minn. 1980) ("The law in Minnesota is clear that administration of zoning ordinances is a governmental not a proprietary function, and the municipality cannot be estopped from correctly enforcing the ordinance even if the property owner relied to his detriment on prior city action."). Gateway and appellants are in different growth stages, and the city's comprehensive plan provides for their development at different times. This difference is sufficient for the district court to have concluded that Gateway and appellants are not similarly situated and that their disparate treatment by the city does not violate appellants' equal protection rights. *See Northwestern Coll.*, 281 N.W.2d at 869.

## IV. Takings Claim

Appellants last argue that the district court erred by granting summary judgment to the city on appellants' takings claim. Specifically, appellants argue that the district court erred by concluding that their takings claim is not ripe. "Whether a governmental

entity's action constitutes a taking is a question of law that [this court] review[s] de novo." *Wensmann Realty*, 734 N.W.2d at 631.

Appellants rely solely on the Minnesota Constitution for their takings claim. "Private property shall not be taken, destroyed or damaged for public use without just compensation." Minn. Const. art. I, § 13. Because the language of the Minnesota Constitution is similar to the Takings Clause in the United States Constitution, Minnesota courts may rely on federal caselaw in interpreting the takings clause of the Minnesota Constitution. *Wensmann Realty*, 734 N.W.2d at 631-32.

Before a court can examine a property owner's takings claim, the municipality must reach a "final, definitive position regarding how it will apply the regulations at issue to the particular land in question." *Kottschade v. City of Rochester*, 760 N.W.2d 342, 348 (Minn. App. 2009) (quotation omitted), *review denied* (Minn. Apr. 29, 2009); *see also Palazzolo v. Rhode Island*, 533 U.S. 606, 620, 121 S. Ct. 2448, 2459 (2001). In *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 105 S. Ct. 3108 (1985), the Supreme Court stated that it is impossible to determine whether a taking has occurred before a municipality has come to a final decision. 473 U.S. at 191, 105 S. Ct. at 3119. The Court examined a developer's claim that county zoning ordinances amounted to a taking of the developer's property. *Id*. at 175, 105 S. Ct. at 3110-11. The developer submitted a plat, which the county planning commission rejected for several reasons, including density problems, lack of fire protection, and disrepair of roads. *Id*. at 181-82, 105 S. Ct. at 3114. The plat did not, for these reasons, comply with county zoning ordinances and subdivision regulations. *Id*. at 187-88, 105. S. Ct. at 3117. The

Court held that the developer's takings claim was not ripe because the developer did not seek variances from the zoning ordinances and subdivision regulations. *Id*. at 188-94, 105 S. Ct. at 3117-20. As the Supreme Court explained, a planning commission's "refusal to approve the preliminary plat does not determine that issue; it prevents [the developer] from developing its subdivision without obtaining the necessary variances." *Id*. at 193, 105 S. Ct. at 3120. But if the developer had sought variances, the Court reasoned, there would have been a "conclusive determination by the [county] whether it would allow [the developer] to develop the subdivision in the manner . . . proposed." *Id*.

The same is true here. The city denied appellants' initial concept plan, in part because the plan does not comply with the city's zoning ordinances and comprehensive plan. Appellants have not sought variances from those regulations. Thus, the city has not "reached a final decision regarding the application of the regulations to the property at issue." *Id*. at 186, 105 S. Ct. at 3116.

In addition, this court has stated, "A takings claim . . . is not ripe where only one plan is rejected and no other plan is proposed." *Thompson v. City of Red Wing*, 455 N.W.2d 512, 516 (Minn. App. 1990) (citing *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 136-37, 98 S. Ct. 2646, 2665-66 (1978)), *review denied* (Minn. June 26, 1990). Here, appellants have submitted a single concept plan to the city. A concept plan is the initial stage in the development of a piece of property in Brooklyn Park. It is unclear what types of development the city would allow because appellants have not presented any other proposals to the city.

Appellants argue that they do not need to exhaust their administrative remedies "where those steps would be futile." But as the city points out, the futility doctrine "does not . . . permit a party to rely on its personal belief that it would not have been successful if it had followed the procedures." *Kells v. City of Rochester*, 597 N.W.2d 332, 339 (Minn. App. 1999). The city contends that the facts that appellants allege support their futility argument are "vague, lack foundation, and are offered without any indication that they are based on personal knowledge." Indeed, the only evidence that appellants cite in support of their futility argument is the affidavit of one property owner in which he states that all informal development proposals made to the city have been rejected. The city argues that its denial of the concept plan "does not establish that the City would not allow development of [appellants'] Property under the zoning ordinance in all instances." Thus, appellants have failed to establish that pursuing further administrative procedures would be futile.

In sum, the district court did not err by concluding that the city was entitled to summary judgment on appellants' takings claim on the ground that the claim is not ripe.

**Affirmed.**