STATE OF MINNESOTA
IN COURT OF APPEALS

NO. A09-0178

RIDGE CREEK I, INC.,

APPELLANT,

vs.

CITY OF SHAKOPEE, MINNESOTA,

RESPONDENT.

AMICUS CURIAE BRIEF OF THE BUILDERS ASSOCIATION OF THE TWIN CITIES

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TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICUS 1

STATEMENT OF THE CASE AND FACTS 2

LEGAL ARGUMENT 6

I. MINNESOTA'S LAND USE STATUTE PRESCRIBES THE SCOPE AND LIMITATIONS OF A CITY'S AUTHORITY TO REVIEW AND RULE UPON APPLICATIONS TO SUBDIVIDE PROPERTY. 6

A. A Municipality Must Thoroughly Review A Preliminary Plat Application For Compliance With Local Land Use Regulations. 7

1. Minnesota's subdivision statute requires that municipalities conduct a thorough and comprehensive review to determine if a preliminary plat application complies with local subdivision and zoning regulations. 7

2. Shakopee's own ordinance requires detailed submissions and review of preliminary plat applications. 9

B. Minnesota's Subdivision Statute Ensures That Once Approved, A Preliminary Plat Application Cannot Be Undone. 12

C. A City's Review Of A Final Plat Application Is Limited To Substantial Compliance With The Approved Preliminary Plat. 14

D. Shakopee Exceeded Its Authority By Denying Ridge Creek's Final Plat Application Based On Criteria Other Than Whether It Substantially Complied With The Approved Preliminary Plat. 14

1. Allowing cities to review final plat applications *de novo* would undermine those attributes of the preliminary plat approval process that this Court has recognized as important. 15

2. Allowing *de novo* review of final plat applications would render provisions of Minnesota's subdivision statute moot. 17

3. This Court should not follow the single unpublished decision favoring Shakopee's position because it is factually distinguishable. 18

E. Shakopee Exceeded Its Authority By Imposing Conditions On Ridge Creek's Development That Are Inconsistent With The Approved Preliminary Plat. 20

II. THE DISTRICT COURT'S JUDGMENT AGAINST RIDGE CREEK MUST BE REVERSED BECAUSE IT EXCEEDED THE PROPER SCOPE OF JUDICIAL REVIEW FROM DENIAL OF A FINAL PLAT APPLICATION. 21

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY DISMISSING RIDGE CREEK'S CLAIM TO RECOVER DAMAGES UNDER THE MANDAMUS STATUTE. 22

CONCLUSION 25

TABLE OF AUTHORITIES

Page(s)

STATE CASES

Amaral v. Saint Cloud Hosp., 598 N.W.2d 379 (Minn. 1999) 26, 27

Corrao v. Mortier, 96 N.W.2d 851 (Wis. 1959)...26, 27

Honn v. City of Coon Rapids, 313 N.W.2d 409 (Minn. 1981).......................................22

Jordan Real Estate Services, Inc. v. Gaylord, No. A08-0294, 2009 WL. 982093
(Minn. App. April 14, 2009) 18, 21, 22

Kehr v. City of Roseville, 426 N.W.2d 233 (Minn. Ct. App. 1988)...............................22

Nationwide Corp. v. Northwestern Nat'l Life Insur., 87 N.W.2d 671 (Minn. 1958).....2, 25

Save Lantern Bay v. Cass County Planning Commission, 683 N.W.2d 862 (Minn.
Ct. App. 2004)..1, 19, 24

Semler Construction v. Hanover, 667 N.W.2d 457 (Minn. Ct. App. 2003) ....passim

State v. Kuhlman, 729 N.W.2d 577 (Minn. 2007)...18

Vlahos v. R&I Const., 676 N.W.2d 672 (Minn. 2004)...26

STATE STATUTES

Minn. Stat. § 462.351 ....1, 8, 18

Minn. Stat. § 462.352 ....1, 9, 10, 15

Minn. Stat. § 462.353 8

Minn. Stat. § 462.358 ....passim

Minn. Stat. § 480A.08 21

Minn. Stat. § 586.09 2

OTHER AUTHORITIES

Minn. R. Civ. P. 8.01 27

6 E.C. Yokley, Zoning Law and Practice, §17-5(4th ed. 2002) 11

Shakopee Ord. Ch. 12 .... passim

STATEMENT OF INTEREST OF AMICUS

The Builders Association of Minnesota ("BAM") respectfully submits this brief to urge that the district court's judgment be reversed and the matter remanded to the trial court.[1] BAM is a not-for-profit, voluntary trade association established to represent the interests of building contractors, land developers, manufacturers, suppliers, and related business enterprises. BAM was established in 1974 and now serves over 4,500 home building, remodeling and related professionals in affiliation with 15 local associations across the state of Minnesota. It is dedicated to providing the public with a diverse selection of quality and affordable housing. The efforts of BAM focus on development and infrastructure capacity issues, and on the education of association members, policymakers and the public about housing affordability, construction best practices, and land use best practices. BAM's mission is to increase the professionalism of the residential construction and development industries.

BAM joins this appeal as *amicus curiae* because it presents important questions concerning the scope and applicable limitations on a city's right to deny a property owner's application to develop its land. Minnesota's subdivision statute authorizes cities to enact land use and zoning regulations. Yet, the authority afforded to cities by the subdivision statute is not limitless. Indeed, the statute mandates that cities follow specific procedures when reviewing applications to subdivide and plat property. The statute also provides certainty to property owners involved in the subdivision process by ensuring

[1] In accordance with Minn. R. Civ. App. P. 129.03, BAM certifies that its counsel authored this brief in whole and that no person or entity other than BAM has made a monetary contribution to the preparation or submission of this brief.

that once a preliminary plat application is approved, the items that have been approved cannot be undone. This appeal concerns whether the City of Shakopee can undue Ridge Creek's approved preliminary plat. Minnesota's subdivision statute bars Shakopee from revisiting that approval once it has been given.

This appeal also concerns whether a property owner can seek monetary damages against a city arising out of the city's improper denial of a land use application. Minnesota's mandamus statute plainly provides that, when a plaintiff receives a judgment granting mandamus, it is entitled to recover damages. This Court should uphold the plain language of Minnesota's mandamus statute and allow Ridge Creek to pursue damages against Shakopee.

STATEMENT OF THE CASE AND FACTS

Ridge Creek I, Inc. ("Ridge Creek") is developing an 80-acre property in the city of Shakopee. Ridge Creek submitted requests for approval of a wetland permit and preliminary plat application to Shakopee. (App. 30 & 48). Ridge Creek granted Shakopee an extension to respond to the preliminary plat application, but granted no extension concerning the wetland permit. Almost five months later, Shakopee's City Council issued a two-page resolution denying Ridge Creek's preliminary plat application. (App. 81-82). Shakopee never acted on the wetland permit.

Ridge Creek brought suit for a writ of mandamus granting the wetland permit and preliminary plat application, and for damages. The trial court granted summary judgment to Ridge Creek holding that the wetland permit application was deemed approved under the 60-day Rule. (Add. 15). Because Shakopee's denial of the preliminary plat was

based only on the lack of a wetland permit, the trial court also granted summary judgment ordering approval of the preliminary plat. (Id.)

Ridge Creek then requested final plat approval. (App. 134-140). Shakopee denied Ridge Creek's request for final plat approval, even though the final plat application substantially conformed to the approved preliminary plat. (App. 293 & 304). Ridge Creek again brought suit to compel approval of the final plat and for damages. The trial court granted summary judgment for Shakopee on Ridge Creek's damages claim, relying on case law from other jurisdictions and holding that the mandamus statute was only procedural. (pp. 21) The trial court denied Ridge Creek's summary judgment to compel approval of the final plat, holding that there were fact issues regarding whether the final plat complied with Shakopee's subdivision regulations. (Id.)

Ridge Creek then requested that the trial court certify two issues for immediate appeal to the Court of Appeals: (1) whether damages are available under the mandamus statute; and (2) whether a city may deny approval of a final plat even if it "substantially complied" with the preliminary plat approval. The trial court denied the request to certify the questions for immediate appeal. As to the issue of certifying whether damages are available under the mandamus statute, the trial court noted, "arguably whether the mandamus statute creates cause of action for damages is a question of first impression in Minnesota," but the trial court noted that it could rely upon precedent in other jurisdictions. On the second potential issue for certification, the trial court stated, "as for the denial of the final plat, this court is of the opinion that Minnesota Statutes § 462.358, subdivision 3(b) is clear and not doubtful, and that if the plaintiff is not in compliance

with the defendant's subdivision regulations, it may deny the final plat." Thus, the trial court indicated that the City could deny the final plat application if it violated city ordinances in any respect, even if such violation had already been approved in the preliminary plat or if the final plat substantially conformed to the preliminary plat. As a result, the trial court ordered the parties to trial on whether the preliminary plat complied with Shakopee's subdivision regulations.

Instead of going to trial on the question of whether the final plat application complied with Shakopee's subdivision regulations, Ridge Creek and Shakopee entered into a stipulation to have the trial court enter judgment against Ridge Creek. The portions of the stipulation that are most relevant to the preliminary plat issues are as follows:

> WHEREAS, Ridge Creek maintains that the relevant issue in determining whether City's denials of the Final Plat Application and Grading Permit Application were arbitrary, capricious and unreasonable is whether the applications substantially complied with the preliminary plat, which Ridge Creek asserts was approved by the order that this Court entered on May 17, 2007. Ridge Creek further assets that it would be impossible for it to substantially comply with both the Preliminary Plat and all of City's subdivision requirements. In contrast, City maintains that it was permitted to deny the Final Plat Application if it violated City ordinances in any respect, regardless of whether the Final Plat Application substantially confirmed to the Preliminary Plat;
>
> WHEREAS, City and Ridge Creek agree that the Final Plat Application and the Grading Permit Application do not comply in some respects to City's ordinances and, therefore, agree that a trial on that issue is unnecessary; and
>
> WHEREAS, City and Ridge Creek agree that this Court should enter a final judgment in accordance with this stipulation to allow the parties to file their respective appeals

> before the Court of Appeals rather than holding a trial on the issues identified above.
>
> IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto through their respective counsel, that the above recitals are incorporated herein;
>
> IT IS HEREBY STIPULATED AND AGREED, by and between the parties hereto through their respective counsel, that the Court may enter final judgment on the merits against Ridge Creek in Case No. 70-CV-08-15191 on the grounds that the Final Plat Application does not comply in some respects to City's ordinances....

(Add. 26-31). The intent of the stipulation was to have the trial court enter a judgment so that Ridge Creek could appeal and have this Court instruct the trial court on the proper scope of the City's review of the final plat review, the proper scope of judicial review of the city's denial of a final plat application, and whether damages are available under the mandamus statute. The trial court entered final judgment pursuant to the stipulation and Ridge Creek appealed.[2]

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[2] Ridge Creek's desire to obtain a judgment that could be appealed is understandable. Ridge Creek would be appealing to this Court on the issue of whether damages are available under the mandamus statute even if the trial court ordered approval of the final preliminary plat. Additionally, based upon the trial court's ruling on Ridge Creek's motion for summary judgment to approve the final plat and its ruling on Ridge Creek's motion to certify the standard of review of the final plat, it appeared as though the parties were heading to trial with the trial court using incorrect standards of review for the City's review of the final plat application and the trial court's review of the City's denial of the final plat application.

LEGAL ARGUMENT

I. MINNESOTA'S LAND USE STATUTE PRESCRIBES THE SCOPE AND LIMITATIONS OF A CITY'S AUTHORITY TO REVIEW AND RULE UPON APPLICATIONS TO SUBDIVIDE PROPERTY.

Municipalities derive their authority to regulate land use from state statute. See Minn. Stat. § 462.351; Minn. Stat. § 462.353 (granting municipalities authority to "carry on comprehensive municipal planning. . . ."). "It is the purpose of [Minnesota's land use and subdivision statute] 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. Minnesota Statute §462.358 authorizes municipalities to adopt subdivision regulations "establishing standards, requirements, and procedures for the review and approval or disapproval of subdivisions." Minn. Stat. § 462.358, Subd. 1a. The subdivision process is used by municipalities throughout the state for "residential, commercial, industrial and public activities...." Minn. Stat. § 462.351.

A city's authority, however, is not without limitations. While affording cities broad authority to adopt local ordinances regulating land use, Minnesota's subdivision statute requires that cities follow "uniform procedure[s]" when reviewing applications for subdivisions and plats. Minn. Stat. § 462.351; See also Minn. Stat. § 462.358, Subd. 3b. At issue here is the two-step process prescribed for plat review.

A. A Municipality Must Thoroughly Review A Preliminary Plat Application For Compliance With Local Land Use Regulations.

Minnesota law prescribes a two-step process for plat review: (a) preliminary plat approval and, (b) final plat approval. Platting means the preparation of a map to be filed of record, "containing all elements and requirements set forth in applicable local regulations adopted pursuant to section 462.358 and chapter 505." Minn. Stat. § 462.352, Subd. 13.

1. Minnesota's subdivision statute requires that municipalities conduct a thorough and comprehensive review to determine if a preliminary plat application complies with local subdivision and zoning regulations.

The purpose of the preliminary plat review is to ensure that the proposed development complies with the land use regulations adopted by the municipality pursuant to the authority granted by Minnesota Statute § 462.351 *et. seq*. "A municipality must approve a preliminary plat that meets the applicable standards and criteria contained in the municipality's zoning and subdivision regulations unless the municipality adopts written findings based on a record from the public proceedings why the application shall not be approved." Minn. Stat. § 462.358, Subd. 3b.

The preliminary plat review and approval stage of the process is "*intended to be comprehensive* and, in fact, *is* the most important step in obtaining approval of the subdivision." Semler Construction v Hanover, 667 N.W.2d 457, 461 (Minn. Ct. App. 2003), rev. denied (Oct. 29, 2003) (emphasis in original). A preliminary plat application sets forth "the number, layout, and location of lots, tracts, blocks, and parcels to be created, location of streets, roads, utilities and facilities, park and drainage facilities, and

lands to be dedicated for public use." Minn. Stat. § 462.352, Subd. 16. Upon the filing of a preliminary plat application by a property owner, a municipality is required to conduct a thorough review of the application to determine whether it complies with the municipality's zoning and subdivision regulations. See Minn. Stat. §462.358, Subd. 3b.

In Semler, this Court adopted the Builders Association of the Twin Cities' ("BATC") explanation of the importance of the preliminary plat review process:

> The significance of receiving preliminary plat approval in the real estate development cannot be overstated. The term "preliminary" approval is misleading because preliminary plat approval establishes the nature, design and scope of a development project and triggers significant activity by both developers and cities. Upon receiving preliminary plat approval, development agreements are signed, grading and infrastructure installation begins, and property marking may begin. Those activities are undertaken with the expectation that the entire area encompassed by the preliminary plat will be final platted and developed over time and in accordance with guidelines established in the preliminary plat.

Semler, 67 N.W.2d at 462. As this Court recognized in Semler, preliminary plat approval triggers many activities in reliance on the preliminary plat approval. Obtaining preliminary plat approval is often a contingency in purchase agreements from a land owner to a developer. Preliminary plat approval usually triggers marketing of the future lots or development to end-users, whether those end-users are homeowners or businesses. These end-users will often sign purchase agreements, leases, reservations, or other agreements to lock-in an interest in the property after preliminary plat approval. Banks or other financing institutions will typically require both preliminary plat approval and a

certain number of purchase agreements or other commitments to the project before providing financing for the final construction of the project.

Additionally, physical activity on a new development typically commences upon preliminary plat approval. Site grading usually occurs in reliance on preliminary plat approval. See 6 E.C. Yokley, Zoning Law and Practice, §17-5(4th ed. 2002) ("If the [preliminary] plat is approved, development may proceed and final plat approval sought later."). Site grading involves establishing elevations and infrastructure for roads, building pad sites, parks, and ponds and other drainage facilities. In larger developments that will be built or "phased" over a number of years, this grading and infrastructure installation is often performed on the entire development, and not for just the initial phases for which final plat approval will be obtained shortly after preliminary plat approval. In fact, the City here required that this entire project be graded at one time, and not in phases.

2. Shakopee's own ordinance requires detailed submissions and review of preliminary plat applications.

Shakopee's Ordinance reflects the primary importance of preliminary plat review in the overall development process. The City of Shakopee's "Submittal Requirements for Preliminary Plats" are described in Section 12.21 of the Shakopee City Code (A421-A427). These submittals include the following:

1. A Preliminary Plat Drawing, that includes, among several other items:

   a. "the location and dimensions of any existing or proposed streets;"

b. "the location, exterior dimensions, and area in square feet of all proposed lots;"

c. "the location, description, and dimensions of any existing or proposed easements;" and

d. "the location and dimensions of any existing or proposed sidewalks or trails."

Shakopee Code §12.21, Subd. 4 (A423).

2. An "Existing Conditions Map Drawing," that includes, among several other items, the following:

   a. "the location and dimensions of any previously platted streets;"

   b. "any existing infrastructure, such as sanitary sewer, storm sewer, water mains, culverts or other underground facilities;"

   c. "the location and dimensions of any wetlands;" and

   d. "the location and dimensions of any existing easements and right-of-way."

Id. at Subd. 5 (A423-424).

3. A "Grading and Erosion Control Plan," that includes, among several other items, the following:

   a. "existing floor elevations for all structures;"

   b. "proposed floor elevations;"

   c. "grading and erosion control information…"

   d. "delineation of wetlands on the site;" and

   e. "erosion control features including detailed drawings…."

Id. at Subd. 6 (A424-425).

4. A "Street and Utilities Plan Drawing" that includes, among several other items, the following:

   a. "a sanitary sewer schematic" showing both proposed and existing sanitary sewers, including all elevations, pipe size, grade, and material;

   b. "a storm sewer schematic" showing both proposed and existing storm sewers, including all elevations, pipe size and material;

   c. "typical roadway sections;" and

   d. "drainage and utility easements."

5. A "Stormwater Management Plan Drawing" that includes, among several other items, the following:

   a. a "drainage area map" including "a delineation of existing and proposed drainage sub-areas;"

   b. "drainage calculations" including "total storm water runoff from the site and entering the site" and "pond sizing computations;" and

   c. all existing and proposed contours at two (2) foot intervals.

Id. at Subd. 8 (A426-427).[3]

Depending upon the size of the development, the cost to prepare a preliminary plat application is typically well into the tens of thousands of dollars and may even exceed $100,000.

[3] There are many more requirements than are summarized here. (See App. 421-427).

After an applicant provides these detailed submissions, Shakopee's Ordinance then requires a rigorous preliminary plat review process. See Shakopee Ord. § 12.08. Preliminary plat applications are first submitted to Shakopee's city planner who reviews them for compliance with the city's land use ordinances. See Shakopee Ord. § 12.08, Subd. 2. Shakopee's planner is required to notify the developer if any part of the application fails to comply with the city's land use ordinances. Id., Subd. 2B. Next, twenty copies of the preliminary plat application are submitted for "outside review" to appropriate external government agencies. See Shakopee Ord. § 12.08, Subd. 2. Next, the preliminary plat application is forwarded to the city's Planning Commission for consideration of, among other facts, "whether all applicable provisions of the City Code are met." See Shakopee Ord. § 12.08, Subd. 3.B.2.e. The planning commission conducts a public hearing. Id. Next, the planning commission forwards the application to Shakopee's City Council, along with its recommendation. Id., Subd. 4. Shakopee charges applicants a $2,700 application fee and requires a $13,000 plat review escrow for the preliminary application and a $1,410 fee and $12,700 plat review escrow for the final application. (App. 134).

B. Minnesota's Subdivision Statute Ensures That Once Approved, A Preliminary Plat Application Cannot Be Undone.

In Semler, this Court recognized the importance in the statutory scheme of, "the protection provided to the preliminary plat once it is approved." Semler, 667 N.W.2d at 463. For one year following approval of the preliminary plat, the preliminary plat is automatically exempt from amendments to the municipality's land use ordinances. Id.;

Minn. Stat. § 462.358, Subd. 3c; Minn. Stat. § 462.352, Subd. 15. Thus the property owner automatically gains "vested rights" in the approved preliminary plat for one year after preliminary plat approval. This automatic one-year period of vested rights may be extended for several years by agreement between the municipality and the property owner. Minn. Stat. § 462.358, Subd. 3c; See also Semler, 667 N.W.2d at 464 ("The City authorized preliminary plat approval to last eight years to allow for the staged development it wanted."). Furthermore, even after the expiration of the automatic one-year of vested rights (or longer if extended), the municipality may not require submission of a new application if "substantial physical activity and investment has occurred in reasonable reliance on the approved application and the subdivider will suffer substantial financial damage as a consequence of a requirement to submit a new application." Minn. Stat. § 462.358, Subd. 3c.

As described above, the preliminary platting process involves a significant effort and investment by property owners. After the preliminary plat is granted, significant activity commences, and property owners, developers, builders, financers, and even end-users act in reliance on the approval of the preliminary plat. Changing elements of the development on final plat approval that had previously been approved on the preliminary plat approval would frustrate these parties' expectations and their investment. For example, changing the length of a cul-de-sac or street that had been approved on preliminary plat approval will change lot sizes and layouts and affect purchase agreements. Grading that had been completed to prepare the road bed and building pad

sites would all need to be redone. As a result, preliminary plat approval is of primary importance to landowners, developers, and builders.

C. A City's Review Of A Final Plat Application Is Limited To Substantial Compliance With The Approved Preliminary Plat.

When conducting a final plat review, a city's authority is limited to determining whether the final plat application "substantial[ly] complied" with the approved preliminary plat. See Semler Construction, 667 N.W.2d at 467. "Thus, the statute places *primary emphasis* on the preliminary plat approval; once the conditions and requirements therein are satisfied, the plat mechanically receives final approval." Semler Construction, 667 N.W.2d at 462-3 (emphasis in original). Semler is consistent with Minnesota Statute § 462.358, Subd. 3b, which requires that a final plat application be approved if the applicant has complied with all regulations, conditions, and requirements "upon which the preliminary approval is expressly conditioned."

Shakopee's own ordinance indicates that it understands the narrow scope of final plat review. Shakopee's ordinance provides that a final plat application must be approved if it is in "substantial conformity" with the approved preliminary plat. Shakopee Ord. § 12.09, Subd. 3A.

D. Shakopee Exceeded Its Authority By Denying Ridge Creek's Final Plat Application Based On Criteria Other Than Whether It Substantially Complied With The Approved Preliminary Plat.

Shakopee exceeded its authority by denying Ridge Creek's final plat application based upon criteria outside of whether the proposed final plat substantially complied with the approved preliminary plat application. Semler Construction, 667 N.W.2d at 467.

Shakopee contends that it is entitled to review final plat applications *de novo* to determine whether they comply with city zoning and subdivision ordinances.[4] Furthermore, Shakopee argues that it is entitled to deny a final plat application if it includes items that differ from local regulations, even when those differences were included in the approved preliminary plat application.

Shakopee's argument is unavailing. Shakopee's understanding of the statutory plat review process would render moot the distinctions between preliminary and final plat review recognized in Semler, and would undermine the interests in uniformity, certainty and reliance contained in Minnesota's subdivision statute. See Semler, 667 N.W.2d at 467; See e.g. Minn. Stat. §462.358. Furthermore, Shakopee's interpretation would render key provisions of the subdivision statute meaningless. Finally, any reliance on Jordan Real Estate Services, Inc. v. Gaylord, No. A08-0294, 2009 WL 982093 (Minn. App. April 14, 2009) (App. 505), is misplaced.

1. Allowing cities to review final plat applications *de novo* would undermine those attributes of the preliminary plat approval process that this Court has recognized as important.

If this Court adopts Shakopee's position, it will deprive Ridge Creek, and all property owners, of the uniform review process guaranteed by state statute. The

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[4] The scope of Shakopee's position is not entirely clear. It is unclear whether Shakopee contends that it is always entitled to conduct a *de novo* review of final plat applications for compliance with city ordinances, or whether Shakopee's position is limited to instances where, as here, the preliminary plat application was approved by judicial decision rather than by the city itself. While BAM assumes *arguendo* that Shakopee is making the broader argument, in either case BAM's arguments here would be the same – regardless of how a preliminary plat is approved, the importance of preliminary plat approval and the narrower scope of review of a final plat application is the same.

requirement that cities follow "uniform procedures" for the review and approval of subdivision applications ensures that, from once city to another, property owners can expect to follow the same process. See Minn. Stat. 462.351. Where a state statute calls for uniformity, municipalities cannot diverge from the authority expressly granted by state statute. See State v. Kuhlman, 729 N.W.2d 577, 580 (Minn. 2007). Shakopee has turned the statutory uniform review process on its head by waiting until the review of Ridge Creek's final plat application to conduct a thorough review of the plat's compliance with city land use ordinances. Shakopee's review of Ridge Creek's preliminary plat application was pithy at best, citing only four bases for denial, all of which the district court deemed arbitrary. (App. 81-2; Add. 13-17) Shakopee's review of Ridge Creek's final plat application, however, resulted in a 90-plus-page report detailing reasons that the final plat application should be denied. (See Add. 1-8) Shakopee's City Council resolution denying Ridge Creek's final plat application for the first time listed inconsistencies with the city's land use ordinances as a basis for denial. (App. 160-68). By waiting until Ridge Creek submitted its final plat application to conduct a thorough review, Shakopee deprived Ridge Creek of the uniform review process guaranteed by Minnesota Statute § 462.358.

Shakopee's argument, if adopted, would eliminate property owners' ability to rely on preliminary plat approval. In Semler, this Court recognized that, based on approval, property owners will move forward with physical development activities, secure in the knowledge that the city has at least reviewed the plat for compliance with local ordinances, and found no problems. Semler, 667 N.W.2d at 462-3. This Court has

recognized the importance of property owners' need to rely on preliminary plat approval: "At some point following the grant of preliminary-plat approval . . . a developer must be allowed to safely proceed with the infrastructural improvements necessary to secure final-plat approval." Save Lantern Bay, 683 N.W.2d at 867.

Allowing a city to deny a final plat application based on items that differ with the requirements in local ordinances would undermine the very certainty that an approved preliminary plat application is supposed to afford to property owners. In practice, a city's denial or conditional approval of a preliminary plat application allows a property owner a chance to address items that differ from city requirements before making substantial investments in physical improvements. Many city ordinances are less than crystal clear, and reasonable people often disagree about the meaning of local ordinances. The city's review of the preliminary plat application affords applicants the benefit of the city's interpretation before commencing work. The preliminary plat review process would be undermined if a city could wait until final plat review to advise a property owner that a condition that had been approved in the preliminary plat application violated the city's interpretation of its local ordinance. The statutory process is designed to afford property owners the benefit of a city's interpretation at a time when the situation can be remedied, and not after.

2. Allowing *de novo* review of final plat applications would render provisions of Minnesota's subdivision statute moot.

Shakopee's argument would also render meaningless key provisions of Minnesota Statute § 462.358. For instance, that section provides that, if a municipality fails to act on

a preliminary plat application within 60 days, the application "shall be deemed preliminarily approved." Minn. Stat. § 462.358, Subd. 3b. Notably, approval under the 60-day rule is not conditioned on compliance with city land use ordinances. Shakopee's argument would render the 60-day rule meaningless by allowing a city to reject the very conditions included in a statutorily approved preliminary plat through the final plat review process. If a city can conduct a full *de novo* review of an approved preliminary plat application during final plat review, then the statutory approval has no effect, and cities will have no incentive to complete review of preliminary plat applications in a timely manner.

3. This Court should not follow the single unpublished decision favoring Shakopee's position because it is factually distinguishable.

Jordan is not precedential authority and should not be followed by this Court. See Minn. Stat. § 480A.08, Subd. 3. Furthermore, even if this Court deems Jordan applicable and persuasive here, it is nonetheless distinguishable on the facts.[5] In Jordan, the city had conditioned approval of the preliminary plat application on the property owner's obtaining approval for items that differed from the requirements of the city's land use ordinance. 2009 N.W.2d at *2. The Gaylord city council advised the property owner that it would have to apply for and receive a conditional use permit approving of the items that differed from the city's ordinances before the final plat application would be approved:

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[5] The arguments in Sections D.1 & 2 above apply with equal weight as reasons that Jordan should not be followed.

> Although it appears that the parties understood the subdivision would be a [Planned Unit Development ("PUD")], Jordan never took any formal steps to obtain PUD status as outlined in section 17, subdivision 11, of the city's zoning ordinance. This ordinance requires that the proponent of a PUD go through the conditional use application process.

Id. This Court ruled that the property owner failed to abide by the conditions placed on the preliminary plat application: "Jordan acknowledges that it did not apply for a PUD...." Id.

The Jordan decision is on sound footing to the extent that it rests on the property owner's failure to comply with conditions upon which the preliminary plat application was approved. The granting or denial of a conditional use permit is a quasi-judicial determination for which a municipality has great discretion. See Honn v. City of Coon Rapids, 313 N.W.2d 409, 416-417 (Minn. 1981) (holding that review of a special use permit is a quasi-judicial act reviewed under the arbitrary and capricious standard); Kehr v. City of Roseville, 426 N.W.2d 233, 235 (Minn. Ct. App. 1988) (stating standard of review for city's denial of a of a PUD application). If approval of a preliminary plat application is "expressly conditioned" on compliance with local ordinances, Minnesota Statute § 462.358, Subd. 3b, permits a city to deny a final plat application for failure to satisfy those express conditions.

Here, as part of the preliminary plat approval, Shakopee failed to establish requirements that needed to be met for final plat approval. Unlike in Jordan, Shakopee cannot contend that Ridge Creek failed to satisfy conditions upon which the preliminary plat application was approved. Rather, to the extent that Ridge Creek's preliminary plat

application contained items that differ from Shakopee's ordinances, those differences are deemed approved by the approval of the preliminary plat application.

Analytically, a city's approval of a preliminary plat application that that includes items that differ from the city's ordinances may be considered akin to an exercise of the city's authority to grant variances. See Minn. Stat. § 462.358, Subd. 6 (authorizing municipalities to grant variances from their subdivision regulations); Shakopee Ord. § 12.42. Indeed, the City's own variance ordinance allows requests for variances along with the submission of a preliminary plat application. Id. Subd. 4. Similarly, the City has the authority to permit the development of nonconforming lots or plats. Shakopee Ord. § 12.44.

E. Shakopee Exceeded Its Authority By Imposing Conditions On Ridge Creek's Development That Are Inconsistent With The Approved Preliminary Plat.

Once approved, a preliminary plat application governs the development of property. Shakopee requires that preliminary plat applications include a Grading and Erosion Control Plan, "which necessitates a drawing showing existing and proposed land contours, existing and proposed elevations, and how all streets and property will be graded. (App.424-425). Ridge Creek submitted a grading plan as part of its preliminary plat application. (App. 53) Ridge Creek's grading plan was approved as part of the preliminary plat application.

Here, after the preliminary plat application, which included the preliminary grading plan, had been approved, the Shakopee refused to grant Ridge Creek a grading permit unless Ridge Creek conformed to conditions that directly contradicted the

approved preliminary plat application. (App. 329-337). After a preliminary plat application has been approved, a city may not impose conditions that are inconsistent with the approved application. See Minn. Stat. § 462.358, Subd. 3b (providing that a final plat application must be approved based on conditions upon which the preliminary plat application was approved). Shakopee may not impose new conditions that would vary or alter an approved preliminary plat application. Allowing a city to do so would override the protections and vested rights provided in Minnesota Statute § 462.358, Subd. 3c.

II. THE DISTRICT COURT'S JUDGMENT AGAINST RIDGE CREEK MUST BE REVERSED BECAUSE IT EXCEEDED THE PROPER SCOPE OF JUDICIAL REVIEW FROM DENIAL OF A FINAL PLAT APPLICATION.

When considering an appeal from a municipality's decision on a final plat application, a district court's scope of review is limited to determining whether the final plat application substantially complies with the approved preliminary plat application. See Save Lantern Bay v. Cass County Planning Commission, 683 N.W.2d 862, 867 (Minn. Ct. App. 2004). In Save Lantern Bay, this Court held that, "Because the district court exceeded the scope of review from the appeal of a final-plat approval by reviewing issues that were decided in the preliminary plat approval, we reverse and remand for proper consideration of the appeal of the final-plat approval." Id. Similarly, in Semler, this court remanded the case to the district court as follows:

> Thus, our remand on this issue is limited to instructing the district court to reconsider Semler's application for a final plat approval, and, if it finds substantial compliance with the application conditions, it shall issue a writ compelling the city to certify final approval. The city is instructed that a good –

> faith review of Semler's claim that it has complied with all conditions and requirements is part and parcel of this reversal and remand.

Semler, 667 N.W.2d at 467 (emphasis added).

Here, the district court exceeded the proper scope of judicial review from a denial of a final plat application by reviewing whether Ridge Creek's final plat application complied with city ordinances, rather than whether it substantially complied with the approved preliminary plat application. The district court denied Ridge Creek's motion for summary judgment and set the matter for trial on the issue of whether the final plat application complied with Shakopee's subdivision regulations. (Add. 21). In its memorandum supporting its denial of summary judgment, the district court reasoned that the appropriate scope of judicial review was whether the final plat application complied with Shakopee's subdivision regulations. (Id.) The Court went on to enter judgment against Ridge Creek on the ground that "the Final Plat Application does not comply in some respects to the City's ordinances." (Add. 30).

This Court should reverse the district court's judgment against Ridge Creek, and remand for a determination of whether Ridge Creek's final plat application substantially complied with the approved preliminary plat application.

III. THE DISTRICT COURT ERRED AS A MATTER OF LAW BY DISMISSING RIDGE CREEK'S CLAIM TO RECOVER DAMAGES UNDER THE MANDAMUS STATUTE.

Minnesota Statute § 586.09 expressly authorizes Ridge Creek to recover damages from Shakopee if it prevails on its mandamus claim. That statute provides in relevant part, "A plaintiff who is given judgment, shall recover the damages sustained, together

with costs and disbursements, and a preemptory mandamus shall be awarded without delay." The Minnesota Supreme Court has held that, "Under our statute, damages are recoverable as a matter of right upon the issuance of a preemptory writ of mandamus." Nationwide Corp. v. Northwestern Nat'l Life Insur., 87 N.W.2d 671, 686 (Minn. 1958).

The district court erred by holding that the mandamus statute does not create an independent right to recover damages. In support of its ruling, the district court relied on decisions from foreign jurisdictions holding that statutes permitting the recovery of damages in mandamus actions are "procedural" and afford no "substantive" right to damages. See e.g. Corrao v. Mortier, 96 N.W.2d 851 (Wis. 1959). Accordingly, the district court concluded that the statutory command that a successful plaintiff "shall recover the damages sustained," merely afforded Ridge Creek the right to join another cause of action with its mandamus claim.

The district court's interpretation of Minnesota Statute § 586.09 as providing merely a "procedural" right to join other claims defies common cannons of statutory construction. First, such an interpretation defies the plain meaning of the statute. "When the language of a statute is plain and unambiguous, that plain language must be followed" Vlahos v. R&I Const., 676 N.W.2d 672, 679 (Minn. 2004). "Under basic canons of statutory construction, we are to construe words and phrases according to rules of grammar and according to their most natural and obvious usage unless it would be inconsistent with the manifest intent of the legislature." Amaral v. Saint Cloud Hosp., 598 N.W.2d 379, 384 (Minn. 1999). Had the legislature intended the statute to provide only the right to join other causes of action in a mandamus proceeding, it was capable of

making that intention clear. Yet, the statute speaks not of joinder or "procedure." Rather, it proclaims that a plaintiff "shall recover the damages sustained. . ." When the plain language of a statute is clear, there is no need to look beyond it, and particularly no need to look to the decisions of foreign courts. Id.

Second, the district court's interpretation of the statute as merely affording the right to join other causes of action renders Minnesota Statute § 586.09 superfluous. "Whenever it is possible, no word, phrase, or sentence should be deemed superfluous, void, or insignificant." See Amaral, 598 N.W.2d at 384. Minnesota's Rules of Civil Procedure already provide that litigants may join alternative causes of action in a single proceeding. See Minn. R. Civ. P. 8.01("Relief in the alternative or of several different types may be demanded."). Indeed, because Minnesota's Rules of Civil Procedure allow for joining of multiple claims, the reasoning relied upon by the foreign courts to find their similar statutes "procedural," does not apply here. In Corrao, the Wisconsin Supreme Court reasoned that, "We are satisfied that this statute is procedural and not substantive in character. Without it, the successful plaintiff in a mandamus proceeding would be obliged to institute a separate action for his damages." Carrao, 96 N.W.2d at 496. In Minnesota, however, there would be no need for a separate statute authorizing a plaintiff to assert multiple causes of action, along with mandamus, in a civil action. Interpreting Minnesota Statute § 586.09 as providing mere a right to join other causes of action in a mandamus proceeding entirely deprives that section of independent meaning.

The ability to recover damages in a mandamus action is of particular importance to builders, developers, and property owners who are routinely beholden to municipal

decision-making processes. Indeed, BAM's members' livelihoods depend on the fair and just administration of municipal land regulation throughout the state of Minnesota. In most cases, municipal authorities fairly and competently issue plat approvals and building permits in conformance with state and local law. In the rare instance where a municipality fails to perform its duties, or issues a decision that is arbitrary and capricious, builders, developers, and property owners stand to suffer economic loss.

CONCLUSION

Shakopee's arguments, if adopted by this Court, would deprive property owners with the protections against municipal overreaching provided by the legislature. Among these protections, the legislature has sought to protect property owners against untimely municipal decision-making by requiring that, if a city fails to timely make a decision on an application for preliminary plat approval, the application shall be deemed approved. The legislature has also sought to protect citizens against arbitrary municipal decision-making by permitting the recovery of damages in a mandamus action. Shakopee's arguments seek to undermine both of these protections.

First, Shakopee's argument that it is entitled to review final plat applications *de novo* would undermine the statutory mandate that, if a municipality fails to take action on a preliminary plat application within the statutory review period, it shall be deemed approved. See Minn. Stat. § 462.358, Subd. 3b. If a city can simply revisit the substance of the preliminary plat application when reviewing a final plat application, then the automatic approval required by the statute has no effect. Shakopee's position that it may deny a final plat that substantially complies with an approved preliminary plat is also

contrary to the vested rights that a landowner receives on preliminary plat approval as provided in Minn. Stat. § 462.358 Subd. 3c and recognized by this court in Semler.

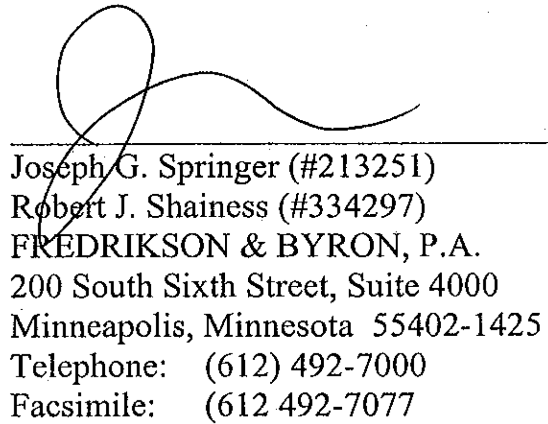
Second, Shakopee seeks to deprive Ridge Creek of its right to damages afforded by the mandamus statute. Shakopee seeks to avoid the plain language of the statute by pointing to decisions of foreign courts—decisions that were made on bases that do not apply here.

Shakopee asks this Court to strip away these important protections against municipal inaction and overreaching that the legislature intended to protect citizens throughout the state. This Court should decline to do so.

This Court should reverse the district court's judgment against Ridge Creek, and remand for a determination of whether Ridge Creek's final plat application substantially complied with the approved preliminary plat application. This Court should also reverse the trial court's determination that the mandamus statute does not afford Ridge Creek the right to recover damages, and remand for a ruling on the appropriate quantum of damages.

Respectfully submitted,

Dated: May 11, 2009



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CERTIFICATE OF COMPLIANCE WITH MINN. R. CIV. APP. P 132.01

The undersigned, Joseph G. Springer, the attorney for *Amicus Curiae* Builders Association of Minnesota, hereby certifies that this brief complies with the form and length requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3. Counsel for Amicus prepared this brief using the word processing software Microsoft Word 2000. The word count of this Amicus Brief, using a 13-point, Times New Roman font, excluding pages containing the Table of Contents and the Table of Authorities, is 6,716 words.

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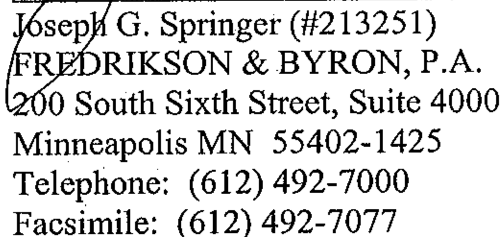

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