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## Property Law: The Crossroads of Capacity and Livability: A Green Light to Neighborhood Opposition as a Factual Basis for Denying Conditional Use Permits—RDNT, LLC v. City of Bloomington

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**PROPERTY LAW: THE CROSSROADS OF CAPACITY AND  
LIVABILITY: A GREEN LIGHT TO NEIGHBORHOOD  
OPPOSITION AS A FACTUAL BASIS FOR DENYING  
CONDITIONAL USE PERMITS—RDNT, LLC V. CITY OF  
BLOOMINGTON**

Diane B. Galatowitsch<sup>†</sup>

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I. INTRODUCTION

Throughout the history of zoning in America, laws have operated to balance the interests of government, developers, and

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homeowners to develop optimal living environments and maintain property values through a fair process. Zoning laws reflect the socially and culturally constructed “societal consensus” regarding what land uses are “normal and expected, decent, and desirable.”<sup>1</sup> While developers, homeowners, and governments alike encouraged the adoption of zoning ordinances in the early twentieth century, the appropriate degree of local discretion in the zoning process continues to be disputed to this day.<sup>2</sup>

Conditional use permit (CUP) processes were adopted to enable greater discretion in zoning.<sup>3</sup> However, increasing local discretion created controversial issues: How much discretion should a local governing body have in zoning decisions? What is an arbitrary decision? What is the relative authority of a zoning ordinance versus a comprehensive plan? Understanding the evolution of American zoning illuminates the continued efforts of state legislatures and courts to limit the discretion of local governing bodies in order to improve predictability and efficiency in the zoning process for private property owners.

In *RDNT, LLC v. City of Bloomington*, the Minnesota Supreme Court held that it was within a city’s discretion to deny a request for a CUP to expand an assisted living facility because increased traffic volume would “injure the neighborhood or otherwise harm the public health, safety, and welfare.”<sup>4</sup> The court found that evidence of prospective traffic volume would exacerbate existing traffic concerns, as expressed by neighborhood opposition testimony.<sup>5</sup> However, the neighborhood concerns were not substantiated by additional evidence.<sup>6</sup>

This case note begins by tracing the development of CUP processes as a tool for flexibility in zoning law.<sup>7</sup> Then, this note

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1. SONIA A. HIRT, *ZONED IN THE USA* 3 (2014).

2. John R. Nolon, *Historical Overview of the American Land Use System: A Diagnostic Approach to Evaluating Governmental Land Use Control*, 23 PACE ENVTL. L. REV. 821, 829–34 (2006) (discussing the shift of zoning regulations to local municipalities).

3. See RICHARD F. BABCOCK, *THE ZONING GAME: MUNICIPAL PRACTICES AND POLICIES* 7 (1966).

4. *RDNT, LLC v. City of Bloomington (RDNT III)*, 861 N.W.2d 71, 77 (Minn. 2015).

5. *Id.* at 76–77.

6. See *id.* at 73–74, 76–77 (discussing only traffic volume and not issues related to “livability,” such as on-street parking, speeding, disregarding laws, etc.).

7. See *infra* Part II.

discusses the facts and the court's rationale in the *RDNT* decision.<sup>8</sup> Next, it argues that by conflating traffic capacity and livability issues, the court deviated from precedent that prohibits neighborhood opposition testimony from being the sole basis to deny a CUP.<sup>9</sup> Finally, this note concludes that the unfettered use of neighborhood opposition testimony creates barriers to the development of critical services for vulnerable Minnesotans and undermines a process intended to balance property interests.<sup>10</sup>

## II. HISTORY OF THE RELEVANT LAW

### A. *The Emergence of Zoning Laws: Agrarian Idealism, Urbanization, and the Rise of Efficient Municipal Land Use Regulation*

America's revered agrarian past—which idealized low-density, autonomous living—helped establish the single-family residential district as a driving force in modern municipal law. Prior to the American industrial revolution of the nineteenth century, only six percent of Americans lived in cities.<sup>11</sup> American agrarianism was held in such high esteem that it “became a philosophy, a quintessential aspiration that defined what was most virtuous in the American character and what distinguished the new republic from the European autocracies.”<sup>12</sup>

As America urbanized, the detached single-family home emerged as the ideal form of American housing, which maintained a legacy of “individual autonomy, restless mobility, the turning of nature into property, and private spatial conquests.”<sup>13</sup> The industrial revolution upset America's agrarian ideal, forced rural

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8. See *infra* Part III.

9. See *infra* Part IV.

10. See *infra* Part V.

11. See HIRT, *supra* note 1, at 117 (citing JOHN M. LEVY, CONTEMPORARY URBAN PLANNING 9 (10th ed. 2013)).

12. *Id.* at 113. Even more, there was a perception that land was a “limitless natural resource that was physically and culturally vacant” and “could and should be divided and mastered by individuals who were exercising their ‘natural’ rights in order to improve their material situation.” *Id.* at 115.

13. *Id.* In contrast to other countries, American culture uniquely constructed the detached single-family home as the ideal housing form and fervently protects it through preserving the low-density, single-family residential zoning district. *Id.* at 7 (stating that from an international point of view, the “omnipresent” single-family residential district is an “international rarity, historically and today”).

residents into cities, and prompted early suburbanization.<sup>14</sup> Between 1800 and 1900, America's urban population "increased from 6 to 40 percent of the country's total population."<sup>15</sup> In response to growing urban nuisances, affluent city dwellers fled cities for country homes in the suburbs.<sup>16</sup> In effect, suburbanization was a form of private zoning; it spatially separated desirable from undesirable uses for wealthy residents.<sup>17</sup> However, the advent of automobiles and buses helped challenge suburban isolation and increased the use of restrictive covenants<sup>18</sup> to protect the home values and the comfort of wealthy residents.<sup>19</sup>

In addition to restrictive covenants, city codes and nuisance laws helped form the legal "building blocks for municipal proto-zoning regulations" in America.<sup>20</sup> City codes regulated water supply, sanitation, and housing.<sup>21</sup> Nuisance laws "protect[ed] citizens only against indisputable material harm [that] stemm[ed] from excessive pollution and health hazards."<sup>22</sup> Restrictive covenants, city

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14. *Id.* at 116–17.

15. *Id.* at 117 (stating that Chicago, for example, "grew from 30,000 people in 1850 to over a million by 1890").

16. *Id.* at 118. As undesirable neighbors began to crowd affluent urban residents, the wealthy grew intolerant and moved to the suburbs. *Id.* at 117.

17. William A. Fischel, *An Economic History of Zoning and a Cure for its Exclusionary Effects*, 41 URB. STUD. 317, 321 (2004).

18. Restrictive covenants served as a pre-zoning, parcel-specific form of restricting private use of land. An example of this private enforcement of separate land uses is the use of legal racial covenants by homeowners that was in place until *Shelley v. Kraemer*, 334 U.S. 1 (1948). Racial restrictive covenants, for example, segregated cities by restricting the sale of property to minority populations. HIRT, *supra* note 1, at 131.

19. Fischel, *supra* note 17, at 326. As buses connected cities to suburbs, commuters could deviate from streetcar lines and move into suburban neighborhoods. *Id.* at 320 ("[A] crucial precondition for zoning was the spread of a mechanically powered, intra-urban transportation system.").

20. HIRT, *supra* note 1, at 130; accord 1 PATRICIA E. SALKIN, AMERICAN LAW OF ZONING § 1:12, Westlaw (database updated Nov. 2015) (claiming that nuisance law "had developed a broad pattern of restraint, and public control of private land through legislative use of the police power was not uncommon"); see also 1 ARDEN H. RATHKOPF ET AL., RATHKOPF'S THE LAW OF ZONING AND PLANNING § 1:1, Westlaw (database updated Nov. 2015) (discussing the forms in which land use issues could be addressed historically, including nuisance litigation, restrictive covenants, special-purpose regulations, and building codes, and noting that these forms still exist today).

21. HIRT, *supra* note 1, at 118.

22. *Id.* at 119. However, unlike zoning, nuisance laws did not address the

codes, and nuisance laws each served as pre-zoning restrictions on private use. However, unlike zoning regulations, which sought to regulate private use at the community level, each of these restrictions limited private use on a case-by-case basis.

*B. Enabling Statutes: Enabling “American-Style” Zoning*

The emergence of zoning laws in America fulfilled the growing demand to efficiently regulate land use at the community level.<sup>23</sup> American states began to experiment with zoning laws in the 1910s by enabling local and regional governments to regulate land use.<sup>24</sup> In 1915, Minnesota enacted its first “zoning” law, which “allowed cities of the first class to create exclusive residential districts through the use of eminent domain.”<sup>25</sup> However, zoning that was comprehensive, in terms of its inclusion of the whole city, first emerged in New York City in 1916.<sup>26</sup> Following the passage of New

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“more ephemeral aspects of urban life,” such as views, light, beauty, and preservation. *Id.*

23. See Fischel, *supra* note 17, at 320–25.

24. See *id.* at 319. While the rapid spread of zoning laws may be attributed to the broad public appeal of protecting the single-family home, developers also led the zoning movement. For example, developers of large-scale residential subdivisions in southern California led the movement to adopt zoning laws in Los Angeles because “covenants were insufficient to protect their property’s value from incompatible uses on their borders.” *Id.* at 323–24. Even more, “[a]s planning historian Christine Boyer points out, zoning was seen as a way to provide ‘an insurance policy that the single-family homeowner’s investment would be protected in stable neighbourhood communities.’” *Id.* at 324 (quoting M.C. BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 148 (1983)).

25. Jean L. Coleman & Suzanne Sutro Rhees, *Where Land and Water Meet: Opportunities for Integrating Minnesota Water and Land Use Planning Statutes for Water Sustainability*, 39 WM. MITCHELL L. REV. 920, 935 (2013) (citing Act of Apr. 16, 1915, ch. 128, § 1, 1915 Minn. Laws 180, 180). “Property owners in those districts who wanted to use their property for another use, such as a commercial use or an apartment building, had their right to develop for such uses taken by the city through eminent domain, and were paid just compensation for their lost development rights.” *Id.*

26. Fischel, *supra* note 17, at 318–19 (citing S. TOLL, ZONED AMERICAN (1969)). Other cities also formed similar ordinances around the same time. *Id.* The concept of comprehensive zoning arose from German law. See HIRT, *supra* note 1, at 71. At the time, Germany was seen as the “most advanced society in terms of municipal administration.” *Id.* In fact, Germany had “experimented with urban building codes and with rules restricting the location of certain activities to certain areas of town for a very long time.” *Id.*; see also George W. Liebmann, *The*

York's ordinance, eight more cities adopted zoning ordinances in 1916.<sup>27</sup>

States delegate the authority to zone through enabling legislation.<sup>28</sup> In 1924, the United States Department of Commerce created the Standard State Zoning Enabling Act (SZEA).<sup>29</sup> The Act helped states enable local zoning codes by serving as a “blueprint for local municipalities to enact zoning laws” and “showing municipalities how to enact and amend zoning ordinances, as well as how to authorize a zoning commission to propose the proper legislation for zoning.”<sup>30</sup>

In 1928, the United States Department of Commerce published the Standard City Planning Enabling Act (SCPEA).<sup>31</sup> The SCPEA served as a “companion piece to the SZEA” and required a “master plan for the physical development of the municipality.”<sup>32</sup> The SZEA and the SCPEA differed primarily in relation to the role of comprehensive planning. The SZEA required that zoning ordinances “shall be in accordance with a comprehensive plan.”<sup>33</sup>

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*Modernization of Zoning: Enabling Act Revision as a Means to Reform*, 23 URB. LAW. 1, 9 (1991).

27. Fischel, *supra* note 17, at 319.

28. Philip L. Fraietta, *Contract and Conditional Zoning Without Romance: A Public Choice Analysis*, 81 FORDHAM L. REV. 1923, 1928 (2013) (“[M]unicipalities themselves do not have police power. Police power is reserved for the state and not for its political subdivisions. Thus, a municipality can only exercise power ‘when it has specifically or impliedly received a delegation of such power from the state.’” (citations omitted)).

29. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING & DEVELOPMENT REGULATION LAW § 3:6 (1998). The federal government revised the SZEA in 1926. Steven D. Villavaso, *Planning Enabling Legislation in Louisiana: A Retrospective Analysis*, 45 LOY. L. REV. 655, 658 (1999).

30. Patricia E. Salkin, *The Quiet Revolution and Federalism: Into the Future*, 45 J. MARSHALL L. REV. 253, 266–67 (2012). See generally Ruth Knack, Stuart Meck & Israel Stollman, *The Real Story Behind the Standard Planning and Zoning Acts of the 1920s*, LAND USE L. & ZONING DIG., Feb. 1996, at 3–4 (providing insight into President Herbert Hoover’s interest in urban planning and zoning laws).

31. Salkin, *supra* note 30, at 267.

32. *Id.* (quoting AM. PLANNING ASS’N, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE § 7-110 (2002)).

33. Charles M. Haar, *In Accordance with a Comprehensive Plan*, 68 HARV. L. REV. 1154, 1156 (1955). Interestingly, planning consultant Harald Bartholomew, who reviewed a draft of the SZEA created this wording when he recommended the wording be changed from “well-considered plan” to “comprehensive city plan.” Knack, *supra* note 30, at 5. Further, Bartholomew stated that “[z]oning is an

The SCPEA took planning a step further by requiring that a comprehensive plan be followed in order to improve consistency and limit local discretion in the application of local zoning ordinances.<sup>34</sup> Since the 1920s, the development of zoning and planning has been entwined, but the exact relationship between the two is still contested.<sup>35</sup>

By the 1930s, the enabling acts fueled the popular demand for zoning and helped spread zoning legislation to almost all states.<sup>36</sup> In 1926, sixty-eight cities had adopted zoning ordinances.<sup>37</sup> Between 1926 and 1936, 1,246 more municipalities across the country established zoning ordinances.<sup>38</sup> Zoning ordinances spread across American municipalities rapidly; scholars have described them as a “fad”<sup>39</sup> and even a “dance craze[.]”<sup>40</sup> Developers wanted zoning because it “protected the borders of covenanted land,” which helped “induce homeowners to invest their savings in a large, undiversified asset.”<sup>41</sup> Homeowners wanted zoning because it protected the value of what was likely their largest financial

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essential part of the city plan” and “ought never to be considered separately” in discussing the relationship between the Zoning Commission and a city plan commission. *Id.*

34. I RATHKOPF ET AL., *supra* note 20, §§ 14:2–3 (citing U.S. DEP’T OF COMMERCE ADVISORY COMM. ON ZONING AND PLANNING, STANDARD CITY PLANNING ENABLING ACT (1928)) (discussing the SCPEA’s purpose of responding to concerns from the implementation of SZEAs and overreaching discretion of local authorities in the zoning process).

35. *Id.* § 14:2; *see also* *RDNT III*, 861 N.W.2d 71, 87 (Minn. 2015) (Anderson, J., concurring). In questioning the authority of comprehensive plans, Justice Anderson wrote: “Our more recent cases have further confused matters by explicitly authorizing use of comprehensive plans when making decisions on conditional use applications, demonstrating an increased deference to municipalities that is seemingly at odds with our holding in *Zylka*.” *Id.*

36. Salkin, *supra* note 30, at 267 (“By 1930, forty-seven states had adopted zoning enabling legislation. Thirty-five states adopted enabling legislation based on the SZEAs, and ten states used the SCPEA.”) (citations omitted); Christopher Serkin, *Existing Uses and the Limits of Land Use Regulations*, 84 N.Y.U. L. REV. 1222, 1232–33 (2009); *see also* Edward J. Sullivan & Jennifer Bragar, *Recent Developments in Comprehensive Planning*, 46 URB. LAW. 685, 685–86 n.4 (2014) (stating that while seventy-five percent of states adopted the SZEAs model, only fifty percent of states adopted the SCPEA model).

37. Fischel, *supra* note 17, at 319.

38. *Id.*

39. BABCOCK, *supra* note 3, at 5.

40. WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 213 (2001).

41. Fischel, *supra* note 17, at 324–26.

investment.<sup>42</sup> Municipalities wanted zoning because it promoted the tax base by “encouraging commerce while making sure that it did not adversely affect home values and other components of the tax base.”<sup>43</sup>

Minnesota enabled county and township zoning through state legislation in 1929.<sup>44</sup> Today, two enabling acts govern zoning and planning authority in Minnesota: the County Planning Act, passed in 1959,<sup>45</sup> and the Municipal Planning Act, passed in 1965.<sup>46</sup> The 1965 Municipal Planning Act expanded the authority of comprehensive plans to provide a “means of guiding future development of land.”<sup>47</sup> Additionally, the Metropolitan Land Planning Act of 1976 defined the “structure of planning for counties and local governments in the seven-county metropolitan area.”<sup>48</sup> While planning act amendments in 1985 limited the role of comprehensive plans, the 1995 and 1997 amendments expanded

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42. FISCHEL, *supra* note 40, at 30; Fischel, *supra* note 17, at 327–28 (“Having staked their savings in their communities’ character, home-owners became a major force in local politics. They supported zoning, which had originally been proposed by homebuilding developers, and they made their homes the primary object to be protected.”).

43. Fischel, *supra* note 17, at 324.

44. Act of Apr. 12, 1929, ch. 176, § 1, 1929 Minn. Laws 172, 172 (repealed 1965); *see also* Coleman & Rhees, *supra* note 25, at 936 (stating that towns located within counties with populations over 450,000 people could vote to decide whether zoning should be adopted at the municipal level). Following this initial enabling legislation, the “Great Depression and World War II set back real estate development, so the full impact of zoning was not felt until after World War II.” Fischel, *supra* note 17, at 328.

45. Coleman & Rhees, *supra* note 25, at 936 (citing MINN. STAT. § 394.21 (2010 & Supp. 2011)).

46. *Id.* (citing MINN. STAT. § 462.12 (2010)).

47. *RDNT III*, 861 N.W.2d 71, 82 (Minn. 2015) (Anderson, J., concurring) (citing Act of May 22, 1965, ch. 670, § 1, 1965 Minn. Laws 995) (providing the legislative history of comprehensive planning laws in Minnesota).

48. Coleman & Rhees, *supra* note 25, at 936 (citing Act of Apr. 2, 1976, ch. 127, 1976 Minn. Laws 292). As of 2014, the Twin Cities metropolitan area has a population of 2,979,343. *Community Profile for Twin Cities Region (7-county)*, METROPOLITAN COUNCIL, <http://stats.metc.state.mn.us/profile/detail.aspx?c=R11000> (last visited Feb. 6, 2016). The metropolitan area is comprised of seven counties: Anoka County, Carver County, Dakota County, Hennepin County, Ramsey County, Scott County, and Washington County. *Community Profiles*, METROPOLITAN COUNCIL, <http://stats.metc.state.mn.us/profile/Default.aspx> (last visited Feb. 6, 2016). Bloomington, a suburb of Minneapolis, is located in Hennepin County. *Id.*

the role of comprehensive plans.<sup>49</sup> Since 1997, the legislature has trended towards elevating the role of comprehensive planning in the zoning process.<sup>50</sup>

C. *Constitutionalizing Zoning: Rigidity and Frustration with Euclidean Zoning and the Rise of Conditional Use Permit Laws as a Tool for Flexible Zoning*

The first challenge to Minnesota's emerging zoning codes was in the 1925 case of *Beery v. Houghton*.<sup>51</sup> In *Beery*, the Minnesota Supreme Court considered whether a Minneapolis zoning ordinance unconstitutionally restricted development of a four-family apartment building in a district zoned for single-family homes.<sup>52</sup> The court held that the city code was constitutional under the general police powers of the state and determined that the apartment unit contradicted municipal efforts to improve living conditions in the city.<sup>53</sup> Notably, *Beery* helped establish the constitutional source for zoning power as distinct from the power

49. See *RDNT III*, 861 N.W.2d at 83.

50. *Id.*

51. 164 Minn. 146, 147, 204 N.W. 569, 569 (1925).

52. *Id.* at 147–50, 204 N.W. at 569–70 (“By the comprehensive zoning ordinance of Minneapolis, a district is created in which the erection of four-family flat buildings is prohibited . . . . Whether the ordinance is constitutional is the question . . . . With the crowding of population in the cities, there is an active insistence upon the establishment of residential districts from which annoying occupations, and buildings undesirable to the community, are excluded.”).

53. *Id.* at 151, 204 N.W. at 570–71. In *Beery*, the court quotes Justice Holt from a 1919 opinion:

Our elaborate Housing Code of 1917 is an illustration of an effort on the part of the state, through the exercise of the police power, to so regulate the construction of buildings that living conditions shall be better . . . . It must be admitted that owners of land in congested cities have of late, through selfish and unworthy motives, put it to such use that serious inconvenience and loss results to other landowners in the neighborhood . . . . [I]t is readily seen that if a home is built on such a lot and thereafter three-story apartments extending to the lot line are constructed on both sides of the home it becomes almost unlivable and its value utterly destroyed. Not only that, but the construction of such apartments or other like buildings in a territory of individual homes depreciates very much the values in the whole territory.

*Id.* at 149, 204 N.W. at 570 (quoting *State v. Houghton*, 144 Minn. 1, 18–19, 174 N.W. 159, 161–62 (1919)).

of eminent domain.<sup>54</sup> Operating through a state's police powers, zoning regulations may constitute a regulatory taking, but not necessarily.<sup>55</sup>

A year later, in the landmark decision *Euclid v. Ambler Realty Co.*,<sup>56</sup> the United States Supreme Court affirmed the constitutionality of zoning ordinances.<sup>57</sup> In a facial challenge,<sup>58</sup> the Court applied rational basis review<sup>59</sup> and held that zoning ordinances were presumptively constitutional<sup>60</sup> unless the ordinance was “arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”<sup>61</sup> In effect, “Euclidean zoning”<sup>62</sup> provided predictable and efficient

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54. *Id.* at 147, 204 N.W. at 569. (“The public use, which sustains the taking of property under the power of eminent domain upon compensation paid, differs from the public interest or welfare which justifies the restriction of the individual in the use of his property without compensation.”).

55. *See, e.g.*, Mark S. Dennison & Steven M. Silverberg, *Overview of Regulatory Takings Law*, in 31 AM. JUR. PROOF OF FACTS 3D § 2, Westlaw (database updated Dec. 2015).

56. 272 U.S. 365, 395 (1926).

57. *Id.* (“[A]s it must be said before the ordinance can be declared unconstitutional, that such provisions are clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”); *see also* Fischel, *supra* note 17, at 319 (“Euclid’s victory cleared the way for zoning in almost all of the state courts, which had been about evenly split on the constitutionality of zoning up to 1926.”).

58. While *Euclid* determined that zoning ordinances were constitutional in general, the Court held in *Nectow v. City of Cambridge* that zoning ordinances may be unconstitutional as applied. 277 U.S. 183 (1928).

59. In its support for regulation, *Euclid* may be viewed as an anomaly in *Lochner* era substantive due process interpretation, where the Court often struck down regulation of private business. *See* Wayne McCormack, *Lochner, Liberty, Property, and Human Rights*, 1 N.Y.U. J.L. & LIBERTY 432, 459 (2005). *But see* Nadav Shoked, *The Reinvention of Ownership: The Embrace of Residential Zoning and the Modern Populist Reading of Property*, 28 YALE J. ON REG. 91, 112 (2011) (citing ROBERT G. McCLOSKEY, *THE AMERICAN SUPREME COURT 87–90*, 101–05 (4th ed. 2005) (arguing that in the zoning context, the *Lochner* court was more pragmatic than is often credited)).

60. *See* Eric R. Claeys, *Euclid Lives? The Uneasy Legacy of Progressivism in Zoning*, 73 FORDHAM L. REV. 731, 741 (2004) (contending *Euclid* shifted the presumption for noncompliant uses from legitimate to illegitimate).

61. *Euclid*, 272 U.S. at 395.

62. 83 AM. JUR. 2D *Zoning and Planning* § 98, Westlaw (database updated Nov. 2015) (“‘Euclidean zoning’ describes the early zoning concept of separating incompatible land uses through the establishment of fixed legislative rules . . .”).

land use regulations by simply defining uses as conforming and nonconforming to a zoning district's "appropriate" use.<sup>63</sup>

Euclidean zoning's rigid structure of conforming and nonconforming uses provided predictability for developers, but frustrated municipalities. With variances as the only available device to accommodate nonconforming uses,<sup>64</sup> cities were unable to develop important public amenities and services for residents.<sup>65</sup> In response to these problems, by the 1960s, tools for flexibility in the zoning process had expanded, local discretion had grown, and uncertainty in the zoning process had increased.<sup>66</sup>

CUPs, also referred to as special-use permits or special exceptions, were developed to provide more flexibility<sup>67</sup> and discretion for municipalities after World War II.<sup>68</sup> CUP laws enabled

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63. See Shoked, *supra* note 59, at 143 ("Euclid placed the right to security in landholding, to quiet enjoyment of the homestead, at the forefront—at the expense of free exploitation of property and commercial expansion."); see also Claey's, *supra* note 60, at 741 ("Each local owner los[t] substantial freedom to control the use of his own parcel of land, but gain[ed] the opportunity to vote on how his neighbors ought to use their properties.").

64. Variances are a "distinct remedy" from CUPs. 2 PATRICIA E. SALKIN, AM. LAW. ZONING § 13:2 (5th ed.), Westlaw (database updated Nov. 2015). Unlike CUPs, variances relate to nonconforming uses. *Id.* In other words, "[v]ariances are essentially an authorization to deviate from the terms of an applicable zoning ordinance." *Id.*

65. Shelby D. Green, *Development Agreements: Bargained-for Zoning That Is Neither Illegal Contract nor Conditional Zoning*, 33 CAP. U. L. REV. 383, 389 (2004) ("This rigidity of Euclidean zoning came at the expense of flexibility, allowing for little modification or adoption of regulations to particular uses within zones. Moreover, the assumptions underlying Euclidean zoning were incorrect. Euclidean zoning underestimated the effects of the dynamism of a growing economy and rapidly changing technologies in private preferences and municipal needs, and it overestimated the ability of officials to anticipate market demand for new uses.").

66. Fraietta, *supra* note 28, at 1927 ("Although Euclidean zoning provided for changes and variances, it was envisioned that discretionary review of individual proposed use would be the 'exception' rather than the rule and that zoning restrictions would be uniform for each kind of building in each district.").

67. While CUPs are one device that developed to promote flexibility in zoning, other tools that have developed include: "floating zones, cluster zoning, planned unit developments (PUDs), transfer of development rights (TDRs), and 'performance zoning.'" RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 197 (3d ed. 2014). Before these devices existed, the only way to address nonconforming uses were through amendments and variances. *Id.*

68. See BABCOCK, *supra* note 3, at 5; see also 1 RATHKOPF ET AL., *supra* note 20, § 1:14; Green, *supra* note 65, at 388 (arguing that the CUP process was more

localities to permit certain uses in specific areas—typically for hospitals, schools, landfills, or golf courses—but held development for these uses contingent upon approval by a local governing body.<sup>69</sup> Because these uses often raised issues with traffic, noise, odor, property values, and population density, the CUP process allowed local governing bodies to consider each use on a case-by-case basis to balance the interests of the applicant and surrounding property owners.<sup>70</sup> Unlike variances, conditional uses were seen as allowable uses, but only if certain conditions were met to ensure compatibility with surrounding uses, such as the omnipresent low-density, single-family residential district.<sup>71</sup>

When the CUP process started to gain popularity in American zoning, the process was met with “much criticism” because many believed it ran “counter to the principle that zoning is a specific, not discretionary, form of control.”<sup>72</sup> Initial objections to the CUP related to the lack of specific standards for conditional uses.<sup>73</sup> These complaints encouraged legislation to require specifications for how a CUP application determination would be made.<sup>74</sup>

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efficient than rezoning, which was a more “cumbersome legislative process”); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 879 (1983); Patricia E. Salkin, *From Euclid to Growing Smart: The Transformation of the American Local Land Use Ethic into Local Land Use and Environmental Controls*, 20 PACE ENVTL. L. REV. 109, 118 (2002).

69. See 3 RATHKOPF ET AL., *supra* note 20, § 61:4; see also 3 SALKIN, *supra* note 64, § 18:62 (discussing special-use permits for nursing homes and assisted-living facilities).

70. *Zylka v. City of Crystal*, 283 Minn. 192, 195–96, 167 N.W.2d 45, 48–49 (1969); *Amoco Oil Co. v. City of Minneapolis*, 395 N.W.2d 115, 117 (Minn. Ct. App. 1986).

71. BEVERLY J. POOLEY, *PLANNING AND ZONING IN THE UNITED STATES* 65 (1961) (“[W]hereas variances are granted in order to save the constitutionality of the ordinance in cases where its operation would cause special hardship, the exception is intended to further the needs of the community, and not to alleviate the hardship of individual owners.”).

72. JOHN DELAFONS, *LAND-USE CONTROLS IN THE UNITED STATES* 50 (2d ed. 1969). *But see* POOLEY, *supra* note 71, at 66 (arguing that the exceptions actually reduced the “amount of discretion in the hands of the zoning board of appeals, since that body merely has to find whether, as a matter of fact, the application is properly within the scope of the ordinance’s provisions with respect to the granting of special exceptions, and whether the proposed development will accord with the requirements of the master plan”).

73. DELAFONS, *supra* note 72, at 51–52 (attributing the demand for precise specifications to “American distrust for bureaucratic power”).

74. *See id.*

In *Zylka v. City of Crystal*, the Minnesota Supreme Court held that a city only had the authority to deny a CUP that was not in accordance with the city's zoning ordinance or the public's general welfare, and a city had to demonstrate that the decision was not made arbitrarily.<sup>75</sup> According to the court, a "special-use-permit" was "an authorized zoning tool designed not merely for nuisance control but to provide municipalities with broad latitude to meet the changing problems of land-use control . . . ."<sup>76</sup> Although the zoning enabling statute did not "expressly confer upon municipalities the power to provide for special-use permits, such power [was] clearly implicit" in Minnesota Statutes section 462.357, subdivision 1.<sup>77</sup> The statute read: "For the purpose of promoting the public health, safety, morals and general welfare, a municipality may by ordinance regulate . . . the uses of land for trade [and] industry . . . and *may establish standards and procedures regulating such uses.*"<sup>78</sup>

*Zylka* sent the message to developers that municipalities had broad discretion to deny a proposed use through a CUP denial. However, the case was also a reminder to local authorities that a decision must be made on *some* basis in line with the general welfare. Subsequent case law and legislation worked to provide developers with greater predictability and efficiency in obtaining CUPs by defining appropriate municipal discretion.

In 1982, thirteen years after *Zylka*, the Minnesota legislature passed its first CUP legislation, codified in Minnesota Statutes section 462.3595. The statute (1) affirmed municipal power to designate conditional uses,<sup>79</sup> (2) granted municipal discretion to grant or deny a CUP, (3) placed the burden on the CUP applicant to demonstrate that the "standards and criteria stated in the ordinance [would] be satisfied,"<sup>80</sup> and (4) limited municipal discretion by requiring "standards and criteria" for conditional uses

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75. *Zylka*, 283 Minn. at 196, 167 N.W.2d at 49.

76. *Id.* at 196-97, 167 N.W.2d at 49.

77. *Id.* at 196, 167 N.W.2d at 49.

78. MINN. STAT. § 462.357, subdiv. 1 (1968) (emphasis added).

79. MINN. STAT. § 462.3595 (1982). Specifically, the statute emphasized the ability of municipalities to "designate certain types of developments, including planned unit developments, and certain land development activities as conditional uses under zoning regulations." *Id.* at subdiv. 1.

80. *Id.* at subdiv. 1.

and variances.<sup>81</sup> To decrease the discretion of local authorities, the statute required that “standards and criteria *shall* include both general requirements for all conditional uses, and insofar as practicable, requirements specific to each designated conditional use.”<sup>82</sup> The bill passed through the legislature without dispute.<sup>83</sup>

*D. The Role of the Judiciary in the Zoning Process: Standard of Review*

While a city has broad discretionary power to deny a CUP, as determined in *Zylka*,<sup>84</sup> the permit process is considered quasi-judicial and courts may review denials.<sup>85</sup> It is the applicant’s burden to demonstrate that the “standards and criteria stated in the ordinance will be satisfied” by a proposed use.<sup>86</sup> However, the “absence of more express standards makes denial of a special-use permit more, not less, vulnerable to a finding of arbitrariness.”<sup>87</sup> A court may reverse a decision if the governing body acted “unreasonably, arbitrarily, or capriciously.”<sup>88</sup> In deference to the

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81. *Id.*

82. *Id.* (emphasis added).

83. The 1982 Journal of the Senate, in its description of the bill, stated that it was “[a] bill for an act relating to local government . . . requiring notice; authorizing towns to plan; providing for [legal] standards and criteria for conditional uses and variances . . . .” S. JOURNAL, 72d Leg., Reg. Sess., at 4141 (Minn. 1982). This author went to the Minnesota Historical Society’s Gale Family Library in Saint Paul, Minnesota, to conduct a legislative history; the Commerce Committee minutes do not indicate that the CUP section of the bill was ever contested or revised during the 1982 session.

84. See *BECA of Alexandria, L.L.P. v. Cty. of Douglas Bd. of Comm’rs*, 607 N.W.2d 459, 463 (Minn. Ct. App. 2000) (stating that a court “may not substitute its judgment” for a local governing body “if there is a legally sufficient reason for the decision, even if it would have reached a different conclusion”).

85. See *BBY Inv’rs v. City of Maplewood*, 467 N.W.2d 631, 634 (Minn. Ct. App. 1991) (arguing that court may review the CUP denial because the process is “quasi-judicial,” meaning that a local governing body must apply specific standards of a local ordinance to a particular proposed use, which may be evaluated by the court to ensure it was done correctly).

86. See, e.g., *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982); *Minnetonka Congregation of Jehovah’s Witnesses, Inc. v. Svec*, 303 Minn. 79, 84, 226 N.W.2d 306, 309 (1975), *superceded by statute*, MINN. STAT. § 462.3595 (2014), *as recognized in RDNT III*, 861 N.W.2d 71 (Minn. 2015); *Roselawn Cemetery v. City of Roseville*, 689 N.W.2d 254, 259 (Minn. Ct. App. 2004).

87. *Hay v. Twp. of Grow*, 296 Minn. 1, 6, 206 N.W.2d 19, 23 (1973).

88. *Schwardt v. Cty. of Watonwan*, 656 N.W.2d 383, 386 (Minn. 2003); *see also Dead Lake Ass’n v. Otter Tail Cty.*, 695 N.W.2d 129, 134 (Minn. 2005).

legislature,<sup>89</sup> a court's role is only to interpret a zoning ordinance and ensure that a local governing body "was not mistaken as to the applicable law."<sup>90</sup> Zoning ordinances must be interpreted by their "plain and ordinary meaning and in favor of the property owner."<sup>91</sup> A court considers (1) whether a city provides "legally sufficient" reasons to deny a CUP and, if so, (2) whether the reasons have a "factual basis."<sup>92</sup>

Traffic concerns may be considered a "legally sufficient" reason to deny a CUP.<sup>93</sup> However, the Minnesota Supreme Court has emphasized that "traffic, in itself, is not injurious or harmful," and increased traffic is "far from the creation of a traffic hazard."<sup>94</sup> Even more, courts have held that zoning ordinances should not be used "as a primary means of regulating traffic or [an attempt] to reduce traffic congestion."<sup>95</sup> For traffic concerns "to be considered

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89. *But cf.* *Big Lake Ass'n v. Saint Louis Cty. Planning Comm'n*, 761 N.W.2d 487, 491 (Minn. 2009) (finding denials of CUPs receive less deference than approvals).

90. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980); *Vill. of Edina v. Joseph*, 264 Minn. 84, 98, 119 N.W.2d 809, 815 (1962); *see also* *Barton Contracting Co. v. City of Afton*, 268 N.W.2d 712, 718 (Minn. 1978).

91. *Yang v. Cty. of Carver*, 660 N.W.2d 828, 832 (Minn. Ct. App. 2003) (citing *Frank's Nursery Sales*, 295 N.W.2d at 608).

92. *C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981); *Molnar v. Cty. of Carver Bd. of Comm'rs*, 568 N.W.2d 177, 181 (Minn. Ct. App. 1997); *Trisko v. City of Waite Park*, 566 N.W.2d 349, 352 (Minn. Ct. App. 1997) (stating review is limited to the reasons stated by the city).

93. 1 SALKIN, *supra* note 64, § 7:9. While many zoning enabling acts in states borrowed "language from § 3 of the Standard State Zoning Enabling Act," which authorized "the adoption in zoning regulations which tend 'to lessen congestion in the streets,'" neither Minnesota's current enabling statute nor Minnesota's 1965 Municipal Zoning Act referred specifically to controlling traffic as within the police powers of the state. *Id.*; *see* MINN. STAT. § 462.351 (2014); Act of May 22, 1965, ch. 670, 1965 Minn. Laws 995 (codified as amended at MINN. STAT. § 462.351 (1966)). Minnesota's enabling act referred to the police powers broadly by stating that municipalities need to "promote the public health, safety, morals and general welfare." MINN. STAT. § 462.351.

94. *Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Svec*, 303 Minn. 79, 226 N.W.2d 306 (1975), *superseded by statute*, MINN. STAT. § 3595 (2014), *as recognized in RDNT III*, 861 N.W.2d 71, 78 (Minn. 2015) (recognizing the change to the burden of proof standard, but not neighborhood opposition); *see also* 83 AM. JUR. 2D *Zoning and Planning* § 845, Westlaw (database updated Nov. 2015) (stating adverse impact of traffic on neighborhood may be considered, but "should not be given great weight").

95. 1 KENNETH H. YOUNG, *ANDERSON'S AMERICAN LAW OF ZONING* § 7.09, at 749

evidence in favor of a [CUP] denial, [traffic] concerns must be concrete in nature, not vague concerns about future traffic.”<sup>96</sup> The testimony cannot be “general statements about congestion” or “anecdotal comments” regarding traffic.<sup>97</sup> However, testimony is considered “concrete” if it addresses “existing, daily traffic problems”<sup>98</sup> or reflects “actual observations of traffic congestion or potential traffic impact.”<sup>99</sup>

Alone, neighborhood opposition testimony—based on traffic concerns or other potential problems—may not be considered a “sufficient factual basis” to deny a CUP application.<sup>100</sup> It is undisputed that neighbors may express opposition.<sup>101</sup> However, the weight of neighborhood opposition in the decision process is limited. Arguably, Minnesota has a more rigorous standard for neighborhood opposition cases than other states, taking a more “suspicious” view of neighborhood opposition.<sup>102</sup> For instance, in *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, the Minnesota Supreme Court held “non-specific testimony” that a “proposed McDonald’s pose[d] potential traffic hazards” could not “rebut the city engineer’s testimony that the intersection could handle the anticipated traffic.”<sup>103</sup> In this ruling, the court held that a CUP denial “must be based on something more concrete than neighborhood opposition and expressions of concern for public safety and welfare.”<sup>104</sup> Going even further, in *Northpointe Plaza v. City*

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(4th ed. 1996).

96. *RDNT, LLC v. City of Bloomington (RDNT I)*, No. 27-CV-12-791, 2012 WL 12139702, at \*9 (Minn. Dist. Ct. Dec. 18, 2012) (citing *SuperAmerica Grp., Inc., v. City of Little Canada* 539 N.W.2d 264, 268 (Minn. Ct. App. 1995)); *see also Yang*, 660 N.W.2d at 833–34.

97. *RDNT, LLC v. City of Bloomington (RDNT II)*, No. A13-0310, 2014 WL 30382, at \*6 (Minn. Ct. App. Jan. 6, 2014), *aff’d*, 861 N.W.2d 71 (Minn. 2015) (quoting *Yang*, 660 N.W.2d at 834).

98. *SuperAmerica Grp.*, 539 N.W.2d at 267–68.

99. *Bartheld v. Cty. of Koochiching*, 716 N.W.2d 406, 413 (Minn. Ct. App. 2006).

100. *See Yang*, 660 N.W.2d at 833–34.

101. *See SuperAmerica Grp.*, 539 N.W.2d at 268.

102. *See Harold A. Ellis, Neighborhood Opposition and the Permissible Purposes of Zoning*, 7 J. LAND USE & ENVTL. L. 275, 298 (1992).

103. 342 N.W.2d 335, 340 (Minn. 1984).

104. *Id.*; *see also C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981); *Luger v. City of Burnsville*, 295 N.W.2d 609, 612 (Minn. 1980) (“Although neighborhood sentiment may be taken into consideration in any zoning decision, it may not constitute the sole base for granting or denying a given

of *Rochester*, the Minnesota Court of Appeals determined that neighborhood opposition based on traffic concerns was insufficient to deny a CUP to construct a gas station.<sup>105</sup> However, in *SuperAmerica Group, Inc., v. City of Little Canada*, the court of appeals found that expert testimony supporting neighborhood opposition testimony about traffic congestion was a legally sufficient basis to deny a CUP.<sup>106</sup>

The courts' "suspicion" of neighborhood opposition testimony in these cases is highlighted by a comparison to the United States Supreme Court case *City of Cleburne, Texas v. Cleburne Living Center*.<sup>107</sup> Whereas "the Minnesota paradigm . . . seems to trigger presumption shifting, regardless of whether the motives of neighbors and decisionmakers were innocent," *Cleburne* only shifts the burden when there is a "showing" that the denial "was animated by illicit motives or impermissible purposes."<sup>108</sup> Minnesota case law continues to maintain that neighborhood opposition alone cannot be grounds for CUP denial.<sup>109</sup>

Additionally, if a local governing body does not adequately consider proposed mitigating conditions that would bring a CUP application into compliance with a local ordinance, a CUP denial may be considered arbitrary and not based on a sufficient "factual basis."<sup>110</sup> If a city bases a decision on neighborhood opposition testimony more than on the proposed mitigating conditions, a

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a permit." (quoting *Nw. Coll. v. City of Arden Hills*, 281 N.W.2d 865, 869 (Minn. 1979)).

105. 457 N.W.2d 398, 401 (Minn. Ct. App. 1990), *aff'd*, 465 N.W.2d 686 (Minn. 1991).

106. *SuperAmerica Grp.*, 539 N.W.2d at 268.

107. *Ellis*, *supra* note 102, at 297 (citing *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432 (1985)).

108. *Id.* at 297-98.

109. Minnesota case law maintains that neighborhood opposition may be considered as a factual basis if it is concrete and specific. Furthermore, *Chanhassen* and additional cases emphasize that neighborhood opposition *alone* cannot be a factual basis for CUP denial. *See infra* Part IV.A.

110. *Compare* *C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981) (plan to alleviate parking and traffic concerns was adequate), *and* *Trisko v. City of Waite Park*, 566 N.W.2d 349, 355-57 (Minn. Ct. App. 1997) (working with Department of Transportation to address traffic concerns considered adequate), *with In re Application of Stuckmayer*, No. A09-30, 2009 WL 4910053, at \*6 (Minn. Ct. App. Dec. 22, 2009) (local board ignored a proposed condition), *and duCharme v. Otter Tail Cty. Bd. of Comm'rs*, No. A08-0529, 2009 WL 1851445, at \*4-5 (Minn. Ct. App. June 30, 2009) (local board gave no reasons for denial).

court may find a CUP denial arbitrary.<sup>111</sup> In *Tri-City Paving, Inc. v. Cass County Planning Commission/Board of Adjustment*, for example, the Minnesota Court of Appeals held that “[i]f the board’s findings were specific and factually supported in consideration of the conditions, its reasons for denial would survive our deferential review.”<sup>112</sup>

Overall, Minnesota courts demonstrate a cautious approach to neighborhood opposition testimony serving as a “factual basis” for a CUP denial. Courts refuse to accept neighborhood opposition as (1) the sole “factual basis” for a CUP denial, and (2) the primary consideration over proposed mitigating conditions.

### III. THE RDNT DECISION

#### A. *Facts and Procedure*

On September 27, 2011, RDNT, LLC (RDNT) applied to the City of Bloomington (City) for a CUP to add a three-story, sixty-seven unit assisted living facility to its Martin Luther Care Campus (Campus).<sup>113</sup> Located along the Minnesota River, “[t]he [C]ampus is surrounded on its east, south, and west sides by dense woodlands.”<sup>114</sup> Traffic can only access the facility from the north by passing through a residential neighborhood.<sup>115</sup> As a care facility, “the [C]ampus is designated [as a] quasi-public” use.<sup>116</sup> The Campus already includes a 137-unit skilled nursing facility and a 117-unit assisted living facility.<sup>117</sup> According to RDNT, the expansion would enable transitional care residents to “age in

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111. See *Tri-City Paving, Inc. v. Cass Cty. Planning Comm’n/Bd. of Adjustment*, No. A11-2054, 2012 WL 4475742, at \*6 (Minn. Ct. App. Oct. 1, 2012).

112. *Id.*

113. *RDNT III*, 861 N.W.2d 71, 72–73 (Minn. 2015).

114. *RDNT II*, No. A13-0310, 2014 WL 30382, at \*1 (Minn. Ct. App. Jan. 6, 2014), *aff’d*, 861 N.W.2d 71 (Minn. 2015).

115. *Id.* (“Approximately 80 percent of the traffic to and from the campus is carried by 13th Avenue South. The remainder of the traffic to and from the campus is carried by East 100th Street, to the east of its intersection with 13th Avenue South.”). Interestingly, the Campus—built “over 50 years ago” for elder care—preceded the residential neighborhood, which was later built on the Campus’s subdivided excess land. As stated in RDNT’s reply brief, “the residents moved into the Campus’ neighborhood.” Appellant’s Reply Brief & Addendum at 13, *RDNT III*, 861 N.W.2d at 71 (No. A13-0310), 2014 WL 8392639, at \*13.

116. *RDNT II*, 2014 WL 30382, at \*8.

117. *RDNT III*, 861 N.W.2d at 73.

place,” allowing residents to transfer into assisted living without leaving the Campus.<sup>118</sup>

In November 2011, the Bloomington Planning Commission “unanimously voted to recommend denial of the [CUP] application” after neighborhood residents “voic[ed] concerns about increased traffic.”<sup>119</sup> After considering the Planning Commission’s denial, expert traffic studies, and neighborhood opposition testimony, the City denied the CUP application, concluding that the proposed use violated the City’s comprehensive plan and CUP ordinance.<sup>120</sup> The City reasoned that (1) the facility’s size would be “incompatible with the scale and character of the surrounding low density, single family neighborhood;” (2) the traffic volume would be “injurious or otherwise harmful;” and (3) RDNT’s traffic mitigation plan was “insufficient to avoid the injury, given the location and nature of the Campus.”<sup>121</sup>

RDNT appealed to the Hennepin County District Court.<sup>122</sup> The court granted summary judgment to RDNT, ruling that the City “misapplied certain standards, misrepresented the impact of certain studies, and appeared to ignore evidence to the contrary” for each of the reasons asserted by the City.<sup>123</sup> Moreover, the court

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118. *Id.*

119. *Id.*

120. *Id.* at 73–74 (“By a vote of four to three, the City Council passed a resolution to deny RDNT’s application for a conditional use permit.”). The Bloomington City CUP Ordinance reads:

The following findings must be made prior to the approval of a conditional use permit: (1) The proposed use is not in conflict with the Comprehensive Plan; (2) The proposed use is not in conflict with any adopted District Plan for the area; (3) The proposed use is not in conflict with City Code provisions; (4) The proposed use will not create an excessive burden on parks, schools, streets, and other public facilities and utilities which serve or are proposed to serve the planned development; and (5) The proposed use will not be injurious to the surrounding neighborhood or otherwise harm the public health, safety and welfare.

*Id.* (citing BLOOMINGTON, MINN., CODE OF ORDINANCES ch. 21, art. V, div. A, § 21.501.04(e) (2013)).

121. *RDNT III*, 861 N.W.2d at 74–75.

122. *Id.* at 75.

123. *RDNT I*, No. 27-CV-12-791, 2012 WL 12139702, at \*8 (Minn. Dist. Ct. Dec. 18, 2012).

held that City's denial "was based on analysis of inapplicable standards and improper overemphasis of certain statistics."<sup>124</sup>

The City appealed, and the Minnesota Court of Appeals reversed.<sup>125</sup> The court held that the city council acted within its discretion because violation of the City's comprehensive plan and the City's CUP ordinance constituted factually and legally sufficient reasons for a CUP denial.<sup>126</sup> In its reversal, the court relied on two factors. First, the court held that the proposed expansion violated the City's comprehensive plan because it constituted a "larger traffic generator" that was not "located adjacent to an arterial or collector street."<sup>127</sup> Second, the court determined that the increased traffic from the proposed expansion would disturb the "character" of the surrounding "low-density neighborhoods" and injure the general welfare of the surrounding neighborhoods, in violation of the comprehensive plan and CUP ordinance.<sup>128</sup>

RDNT appealed, and the Minnesota Supreme Court granted review.<sup>129</sup> On review, RDNT argued two main points of contention: (1) whether the record supported the conclusion that increased traffic "would injure the surrounding neighborhood or otherwise harm the public health, safety and welfare," and (2) whether the City's denial was arbitrary because the City did not "suggest or impose mitigating conditions" or "adequately consider RDNT's proposed mitigating conditions."<sup>130</sup> After considering the facts and the law, the Minnesota Supreme Court affirmed the court of

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124. *Id.* at \*9.

125. *RDNT II*, No. A13-0310, 2014 WL 30382, at \*10 (Minn. Ct. App. Jan. 6, 2014), *aff'd*, 861 N.W.2d 71 (Minn. 2015).

126. *Id.* at \*5, \*8-9.

127. *Id.* at \*4 ("The comprehensive plan does not define the term 'larger traffic generator.' The plain meaning of the word 'larger' connotes a comparison in terms of size or quantity. Thus, the city is justified in comparing the traffic produced by the campus with the traffic produced by the residential neighborhood directly north of the campus.").

128. *Id.* at \*9 ("The [C]ity cited three specific aspects of RDNT's expansion that would cause injury to the surrounding neighborhood. These three grounds are the same as those cited by the [C]ity with respect to the character of the surrounding low-density neighborhood. For the same reasons . . . stated above, we conclude that the city had both a legally and factually sufficient basis for denying RDNT's CUP application based on concerns for the health and welfare of the surrounding neighborhood.").

129. *RDNT III*, 861 N.W.2d 71, 75 (Minn. 2015).

130. *Id.* at 76, 78.

appeal's decision, holding that the City acted within its discretion by denying RDNT a CUP.<sup>131</sup>

*B. The Rationale of the Minnesota Supreme Court Decision*

The Minnesota Supreme Court<sup>132</sup> limited review to determining whether there were “legally and factually sufficient” grounds to deny RDNT’s CUP based on a violation of the City’s CUP ordinance.<sup>133</sup> First, the court maintained that protecting “the public health or safety or the general welfare of the area affected or the community as a whole” has long been considered a legally sufficient reason to deny a CUP application.<sup>134</sup> Although suggesting that the “absence of more express standards makes denial of a special-use permit more, not less, vulnerable to a finding of arbitrariness,”<sup>135</sup> the court concluded—without analysis—that violation of Bloomington’s CUP ordinance was a legally sufficient reason to deny a CUP.<sup>136</sup>

Second, the court reasoned that there was a “sufficient factual basis” to conclude that the proposed use would harm the neighborhood because increased traffic volume would aggravate existing traffic problems.<sup>137</sup> Distinguishing its decision from *C.R. Investments, Inc. v. Village of Shoreview*,<sup>138</sup> the court found that unlike *C.R. Investments, Inc.*, neighborhood testimony “gave concrete testimony about how the increase in traffic would exacerbate existing traffic conditions.”<sup>139</sup> Specifically, the court emphasized the poor traffic behavior in the neighborhood:

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131. *Id.* at 79.

132. Justice Christopher Dietzen did not partake in the court’s decision. *Id.* Justice G. Barry Anderson’s concurring opinion accepts the majority’s holding, but writes separately to raise concerns about “significant uncertainty in our statutory framework and confusion in our case law concerning the role of comprehensive plans.” *Id.* (Anderson, J., concurring).

133. *Id.* at 75 n.3 (“Not all of the reasons stated need to be legally sufficient and supported by the facts in the record.” (quoting *Hubbard Broad., Inc. v. City of Afton*, 323 N.W.2d 757, 765 n.4 (Minn. 1982))).

134. *Id.* at 76 (quoting *Zylka v. City of Crystal*, 283 Minn. 192, 196, 167 N.W.2d 45, 49 (1969)).

135. *Id.* (quoting *Hay v. Twp. of Grow*, 296 Minn. 1, 6, 206 N.W.2d 19, 22–23 (1973)).

136. *Id.*

137. *Id.* at 77.

138. 304 N.W.2d 320, 325 (Minn. 1981).

139. *RDNT III*, 861 N.W.2d at 77.

For instance, one neighbor wrote about vehicles driving through crosswalks near the school, even though the crossing guards had their flags out. Another neighbor wrote about observing vehicles that sped and made U-turns. Yet another neighbor wrote about the incredible amount of “traffic and noise” due to the large number of delivery trucks, emergency vehicles, shuttle buses, passenger cars, and garbage vehicles.<sup>140</sup>

The court further distinguished its decision from *C.R. Investments, Inc.* based on the source of the neighborhood opposition and the degree of the traffic concern.<sup>141</sup> In *C.R. Investments, Inc.*, the court found that the “only evidence of a traffic control problem” was a “statement of one council member” who had been informed about “a problem existing at one intersection and his opinion that additional housing units might aggravate that problem.”<sup>142</sup> However, in the present case, the court reasoned multiple residents raised traffic concerns at various locations.<sup>143</sup>

Further supporting its argument that the City had a “sufficient factual basis,” the court distinguished its decision from *Chanhassen Estates Residents Ass’n v. City of Chanhassen*.<sup>144</sup> In *Chanhassen*, the Minnesota Supreme Court held that the CUP denial was arbitrary where the city engineer concluded that the “intersection could handle the traffic,” but neighborhood opposition “only offered ‘non-specific testimony that the proposed [use] pose[d] potential traffic hazards at [an] intersection.’”<sup>145</sup> The city engineer in the present case also determined the city’s “streets were not at capacity.”<sup>146</sup> In contrast to the city’s arguments in *Chanhassen*, the City of Bloomington swayed the court through “specific evidence—traffic studies, average street numbers, and neighborhood testimony . . . that the proposed use” would harm the general welfare of the neighborhood.<sup>147</sup> The court’s reasoning linked projected increased traffic to negative impact on the

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140. *Id.*

141. *Id.*; see *C.R. Invs., Inc.*, 304 N.W.2d at 325.

142. *C.R. Invs., Inc.*, 304 N.W.2d at 325.

143. *RDNT III*, 861 N.W.2d at 77.

144. *Id.* (citing *Chanhassen Estates Residents Ass’n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984))

145. *Chanhassen*, 342 N.W.2d at 340.

146. *RDNT III*, 861 N.W.2d at 77.

147. *Id.*

neighborhood's future livability.<sup>148</sup> The court held that although "a street could physically handle more traffic," that did not mean "the neighborhood or the public could handle more traffic."<sup>149</sup>

Finally, the court rejected RDNT's argument that the City arbitrarily found RDNT's proposed mitigating conditions to be insufficient.<sup>150</sup> In its reasoning, the court again distinguished its decision from *C.R. Investments Inc.*, where the Minnesota Supreme Court held a village council's decision arbitrary when it ignored the reasonable condition of adding "turn-around areas in . . . driveways" that would eliminate a traffic hazard.<sup>151</sup> In considering the added condition that eliminated the impact of increased traffic, the *C.R. Investments Inc.* court held that it could no longer find "evidence warranting an inference that the traffic aggravation would be 'substantial.'"<sup>152</sup> In *RDNT*, however, the court concluded that the traffic studies examining increased traffic volume "adequately considered" the proposed conditions by RDNT and showed that even with the conditions, traffic volume would still increase and therefore the conditions would "not alleviate the traffic concerns."<sup>153</sup> The court did not differentiate between mitigating conditions that would decrease the *volume* of traffic and conditions that would minimize the *impact* of increased traffic.

Therefore, the court held that the City acted within its discretion to deny RDNT's CUP application because the City had a "legally and factually sufficient" reason.<sup>154</sup>

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148. *Id.* ("Not unreasonably, the City determined that street capacity alone was not dispositive as to whether an increase in traffic injures the neighborhood or otherwise harms the public health, safety, and welfare.").

149. *Id.* (paraphrasing a city planner, "[T]his is not a capacity issue, it is a livability issue.").

150. *Id.* at 78 (stating that section 462.3595 placed the burden on the applicant to show compliance with the ordinance and the City did not have the burden of proposing mitigating conditions).

151. *C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981) ("The council had been informed, however, that the road could accommodate increased traffic, and appellant can eliminate any hazard from automobile backing onto the road by furnishing turn-around areas in the driveways.").

152. *RDNT III*, 861 N.W.2d at 78 (quoting *C.R. Invs., Inc.*, 304 N.W.2d at 325).

153. *Id.* at 78-79.

154. *Id.* at 72.

## IV. ANALYSIS

In error, the Minnesota Supreme Court (1) solely relied on neighborhood opposition to conclude that the traffic from the proposed use would harm the surrounding neighborhood's livability and (2) ignored material mitigating conditions proposed by RDNT to improve traffic impact. First, despite the court's emphasis that the problem was *not* capacity, but livability, only the neighborhood opposition testimony addressed livability.<sup>155</sup> Second, the court failed to consider RDNT's proposed conditions to minimize the impact of increased traffic by only interpreting conditions that would minimize traffic volume.<sup>156</sup>

Consequently, the court broadly expanded Minnesota law regarding what may be considered a "factually sufficient" basis for denying a CUP based on injurious traffic, lowering the burden of proof for municipalities and disregarding potential public value of a proposed use. The impact of this expanded municipal discretion in development may present undue barriers to the development of important quasi-public uses, such as care facilities for Minnesota's expanding elderly population.<sup>157</sup> The court's holding enforced a process that does not adequately consider the residential needs of the aging versus the needs of the powerful lobby of single-family homeowners. By conflating traffic impact and traffic volume, the court unfettered neighborhood opposition based on traffic concerns and deviated from the state's rigorous standard in considering neighborhood opposition.

A. *Neighborhood Opposition to Traffic Impact*

Even accepting the court's conclusion that the neighborhood opposition evidence was "concrete" and based on existing, daily traffic problems, the court cannot rely on these statements alone to support the claim that traffic would harm the neighborhood.<sup>158</sup> In

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155. *Id.* at 77.

156. *Id.* at 78–79; *see C. R. Invs., Inc.*, 304 N.W.2d at 325.

157. *QuickFacts*, U.S. CENSUS BUREAU, <http://www.census.gov/quickfacts/table/PST045214/27> (last visited Feb. 6, 2016) (showing that from 2010 to 2014, the number of Minnesotans over the age of sixty-five increased from 12.9 to 14.3 percent).

158. *See Chanhassen Estates Residents Ass'n v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn. 1984) (holding a valid denial of a CUP requires more than non-specific testimony, such as mere neighborhood opposition or concern

*RDNT*, the Minnesota Supreme Court held that expert traffic studies adequately considered the increase in traffic and the inability of the proposed mitigating conditions to alleviate the *amount* of traffic.<sup>159</sup> However, the Minnesota Supreme Court did not consider whether the expert traffic studies, or other evidence, confirmed the neighborhood observations regarding the current impact of traffic.<sup>160</sup>

The Minnesota Supreme Court distinguished its decision from *Chanhassen Estates Residents Ass'n v. City of Chanhassen* to demonstrate the authority of the neighborhood opposition testimony.<sup>161</sup> The court distinguished the cases based on the degree of strength of neighborhood opposition testimony and expert testimony.<sup>162</sup> In *Chanhassen*, the neighborhood opposition was weak, based on “non-specific” concerns for the general welfare.<sup>163</sup> The minimal expert testimony regarding the street’s capacity overrode the weaker neighborhood opposition testimony.<sup>164</sup> However, in *RDNT*, the neighborhood opposition was strong, based on multiple accounts of specific concerns about public safety and nuisance.<sup>165</sup> Unlike in *Chanhassen*, the extensive expert testimony regarding traffic volume in *RDNT* did not override the well-asserted neighborhood opposition because, according to the court, *any* increase in volume would exacerbate existing livability concerns.<sup>166</sup> *Chanhassen* established that neighborhood opposition *may* be considered if the testimony is concrete and specific. However, *Chanhassen* did not help clarify the type and degree of expert testimony needed to support or deny a CUP. Subsequent case law

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for public safety).

159. *RDNT III*, 861 N.W.2d at 73–74.

160. *See id.* at 77 (explaining that the City appropriately relied on “traffic studies, average street numbers, and neighborhood testimony—to conclude that the proposed use would nonetheless injure or otherwise harm the neighborhood”).

161. *Id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *Id.*

166. *See id.* at 79 (“Even if URS’s estimates regarding traffic generation and the [Transportation Demand Management Program’s] effectiveness were accurate, the expansion would still add over 100 daily trips. Thus, the City had a reasonable factual basis to determine that the proposal would not alleviate the traffic concerns.”).

helps clarify the relationship between neighborhood opposition and expert testimony; the Minnesota Supreme Court did not analyze this law.<sup>167</sup>

Even if traffic testimony is specific, Minnesota courts maintain a “suspicious” attitude toward neighborhood opposition.<sup>168</sup> Although “municipalities *may* consider bordering residents’ concerns to zoning issues,” the neighborhood opposition needs to be “specific *and* backed by other concrete evidence.”<sup>169</sup> In other words, the law states that if there is neighborhood opposition testimony about a given concern, there needs to be something to substantiate the specific claims. In this respect, *RDNT* departs from precedent. For example, in *SuperAmerica Group, Inc. v. City of Little Canada*, expert testimony directly confirmed residents’ observations about long delays resulting from existing traffic congestion at one intersection.<sup>170</sup> In *SuperAmerica*, the court focused on the expert’s conclusions regarding the impact of the traffic congestion—not traffic volume alone—to conclude the proposed use would harm the public’s general welfare.<sup>171</sup>

However, in *RDNT*, neighborhood opposition was the sole evidence of traffic *harming* the neighborhood in the court’s rationale.<sup>172</sup> This represents a misstep in Minnesota law surrounding CUPs. Although neighborhood opposition may be

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167. *Yang v. Cty. of Carver*, 660 N.W.2d 828, 833 (Minn. Ct. App. 2003) (allowing cities to consider neighborhood opposition if it is based on concrete information).

168. *See Ellis, supra* note 102, at 297–98.

169. *Hanson v. Cty. of Carver Bd. of Comm’rs*, No. A05-2047, 2006 WL 2598283, at \*3 (Minn. Ct. App. Sept. 12, 2006) (emphasis added); *see also Swanson v. City of Bloomington*, 421 N.W.2d 307, 313 (Minn. 1988); *Yang*, 660 N.W.2d at 833 (claiming that the neighborhood opposition testimony was “insufficiently concrete to substantiate a finding that the proposed use would create excess traffic”); *SuperAmerica Grp., Inc. v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. Ct. App. 1995).

170. 539 N.W.2d at 268 (describing expert testimony that supported claims, albeit potentially exaggerated claims, of traffic congestion at the intersection: “(1) making a left turn from the site onto Little Canada Road was extremely difficult, and often impossible, due to traffic congestion; (2) many vehicles had to wait two cycles at the stoplight before completing a turn . . .”).

171. *Id.* It is unclear whether the gas station proposed any mitigating conditions to alleviate the burden of increased traffic; mitigating conditions were not discussed in the opinion. *See id.*

172. *RDNT III*, 861 N.W.2d 71, 77 (Minn. 2015).

considered, it must also be confirmed by other evidence.<sup>173</sup> The Minnesota Supreme Court held that “traffic studies” and “average street numbers” were sufficient evidence to support the neighborhood opposition testimony.<sup>174</sup> However, the court’s analysis of the expert studies focused solely on increased volume of traffic. For example, the court considered only “trip generation rates” and the “daily number of trips.”<sup>175</sup> Thus, the *RDNT* court, unlike the Minnesota Court of Appeals in *SuperAmerica*, relied on specific neighborhood opposition, but no “other concrete evidence” regarding the impact of traffic.<sup>176</sup>

Ultimately, the *RDNT* court’s rationale expands the ability of neighborhood opposition to influence CUP denials. Conflating capacity and livability traffic concerns in considering neighborhood opposition testimony undermines a long history of balancing the interests of homeowners and developers. Predictability comes from limits on discretion, which may strengthen a developer’s ability to plan in accordance with zoning law. Furthermore, predictability enables developers to create mitigating conditions to improve the impact of traffic. Because new development will likely increase the volume of traffic, the real concern should be about the impact of development on traffic and the ability of the developers to mitigate the impact of increased volume and alleviate the burdens of existing traffic concerns.

*B. RDNT’s Proposed Mitigating Conditions to Improve Livability*

The Minnesota Supreme Court erred by only considering *RDNT*’s proposed mitigating conditions that would reduce traffic volume and not considering proposed improvements that sought to manage the impact of traffic. The court considered the Campus’s Transportation Demand Management Program (TDMP) to determine whether the proposed mitigating conditions would exacerbate existing traffic concerns.<sup>177</sup> Similar to the court’s reliance on increased trip volume by the expert studies, the court

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173. See *supra* note 169 and accompanying text.

174. *RDNT III*, 861 N.W.2d at 77.

175. *Id.* at 73–74, 76.

176. The court did consider the city’s engineer’s *opinion* “that the public tends to complain once traffic increases to 1,000 trips per day on such a street. Thus . . . there is a factual basis in the record . . .” *Id.* at 76.

177. *Id.* at 78.

focused specifically on the “measures designed to reduce the number of new and existing trips generated by the Campus” in analyzing the TDMP.<sup>178</sup>

Although the court emphasized that the neighborhood’s concerns about livability were paramount, the court did not analyze RDNT’s attempts to improve livability.<sup>179</sup> Unlike in *C.R. Investments Inc.*, where the court analyzed whether “turn-around areas in . . . driveways” constituted a “reasonable condition” that would eliminate a traffic hazard, the *RDNT* court did not consider conditions that sought to improve the impact of traffic on the surrounding neighborhood.<sup>180</sup> For example, the court did not evaluate the City’s consideration of conditions that sought to improve parking, disperse traffic, slow traffic, and improve driving.<sup>181</sup> Furthermore, distinct from the TDMP, RDNT proposed a “Good-Neighbor Policy” to address the impact of traffic on surrounding streets.<sup>182</sup> The policy involved “constructing speed bumps at the facility entrances, encouraging and requiring all employees to obey traffic laws, working with Google to achieve more accurate and direct online directions, replacing vendors who violate the TDMP policies, and retaining a traffic expert to monitor the success of its policies.”<sup>183</sup> However, there was no analysis suggesting why these proposed conditions would be inadequate to make the traffic less harmful. Thus, the court did not complete its

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178. *Id.* at 74.

179. *Id.* at 77. However, the Minnesota Court of Appeals did address the “Good Neighbor Policy” in its opinion; it held that “RDNT already was required by a pre-existing CUP to accommodate all vehicles at its facility ‘without on-street parking,’ and the record indicates that the campus was unable to comply with this condition.” *RDNT II*, No. A13-0310, 2014 WL 30382, at \*7 (Minn. Ct. App.), *aff’d*, 861 N.W.2d 71 (Minn. 2015). The court of appeals appropriately considered the “Good Neighbor Policy,” which moved beyond traffic volume and relates to the impact of parking in the residential neighborhood. *See id.* It is unclear whether the other asserted mitigating conditions were addressed by the court of appeals. *See id.*

180. *Compare RDNT III*, 861 N.W.2d at 78–79, *with C.R. Invs., Inc. v. Vill. of Shoreview*, 304 N.W.2d 320, 325 (Minn. 1981).

181. To minimize traffic volume, RDNT offered to “expand the scope of its [TDMP] to include, amongst other things, cash incentives for carpooling employees, public-transit incentives for visitors, combined vendor deliveries, and consolidated delivery times.” Brief & Addendum of Amicus Curiae Ebenezer Society at 7, *RDNT III*, 861 N.W.2d 71 (Minn. 2015) (No. A13-0310), 2014 WL 8392645, at \*7 [hereinafter Brief of Ebenezer Society].

182. *Id.*

183. *Id.*

analysis to determine whether the City denied the permit arbitrarily.

Because the court did not consider whether mitigating conditions addressed the neighborhood traffic concerns, this case is similar to *Northpoint Plaza v. City of Rochester* and *Tri-City Paving*.<sup>184</sup> In both of these cases, the courts held that the city's CUP denial was arbitrary when the city's decision was based on neighborhood opposition and not based on the consideration of new mitigating conditions proposed by a developer to meet the city's demands.<sup>185</sup> In *Northpoint Plaza*, the city denied a CUP based on neighborhood opposition, even after the developer "altered its plans so as to comply with all respondent's requirements."<sup>186</sup> In a somewhat different case, *Tri-City Paving*, the city imposed conditions on a developer to "mitigate the negative effects of the noise, dust, and trucks, included a 40 mile-per-hour speed limit, road management for damage and dust, and operation within limited hours."<sup>187</sup> The court held in *Tri-City Paving* that the city's decision was arbitrary when it denied the CUP despite the developer's alteration of its development plan to accommodate the imposed conditions.<sup>188</sup>

In *RDNT*, although the City did not impose the mitigating conditions at issue, RDNT took it upon itself to adapt its development plan to address neighborhood traffic concerns.<sup>189</sup> Nonetheless, the neighborhood opposition in *RDNT* trumped consideration of mitigating conditions, just as in the CUP decisions

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184. See *Tri-City Paving, Inc. v. Cass Cty. Planning Comm'n/Bd. of Adjustment*, No. A11-2054, 2012 WL 4475742 (Minn. Ct. App. Oct. 1, 2012); *Northpointe Plaza v. City of Rochester*, 457 N.W.2d 398 (Minn. Ct. App. 1990), *aff'd*, 465 N.W.2d 686 (Minn. 1991).

185. *Tri-City Paving*, 2012 WL 4475742, at \*5; *Northpointe Plaza*, 457 N.W.2d at 404.

186. *Northpointe*, 457 N.W.2d at 401 ("The minutes of the common council meeting for January 21, 1986, reflect that Superamerica had altered its plans so as to comply with all respondent's requirements, but that there was still considerable opposition to the CUP.").

187. *Tri-City Paving*, 2012 WL 4475742, at \*4.

188. See *id.* ("Because the board's first finding does not address how the proposed CUP conditions would not satisfy the stated concerns in the finding and because the finding is otherwise not supported by the record, we must deem the finding arbitrary.").

189. Brief of Ebenezer Society, *supra* note 181, at \*7. To mitigate traffic concerns, RDNT offered to decrease the total number of units in expansion, reduce the building story levels, and increase the set-back, and provided photo simulation to show sightlines would not be affected. *Id.*

that brought about *Tri-City Paving* and *Northpoint Plaza*, where CUP denials were found to be arbitrary.<sup>190</sup> Thus, the Minnesota Supreme Court failed to consider the proposed mitigating conditions as a whole.

C. *Impact on Future Decisions and Care Services*

RDNT's proposed expansion served a quasi-public function by providing services to a growing, vulnerable population, which illuminates the importance of substantiating neighborhood opposition testimony in CUP cases. For instance, *RDNT* is similar to *Hanson v. County of Carver Board of Commissioners* where the court held that a proposed expansion of a current use could exacerbate existing traffic concerns resulting from increased volume of traffic, which could suffice as a legitimate basis for denial.<sup>191</sup> However, equating *RDNT* to *Hanson* risks equating the nuisances of a mining facility to the inconveniences of an elder care facility. While the legal standard is the same for both cases, the context of a care facility helps illuminate the consequences of an unfair process.

Assisted living facilities, such as Martin Luther Care Center, provide essential care services to residents who can no longer live independently—residents who can no longer be independent homeowners.<sup>192</sup> Broadening the reach of neighborhood opposition caters to the “Not in My Backyard” (NIMBY)<sup>193</sup> mindset and leaves developers of care facilities vulnerable to unsubstantiated traffic

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190. See *RDNT III*, 861 N.W.2d 71, 78 (Minn. 2015) (considering only the proposed mitigating conditions that targeted the “minimization of the trip volume by the proposed Traffic Demand Management Plan”).

191. See *Hanson v. Cty. of Carver Bd. of Comm'rs*, No. A05-2047, 2006 WL 2598283, at \*4 (Minn. Ct. App. Sept. 12, 2006). In *Hanson*, the CUP applicant proposed to expand a mining operation, which would increase the number of trucks where trucks were already causing considerable nuisance to the surrounding neighborhood, namely from “[t]ruck noise and ‘jake braking’ . . . dust and noise generated by current traffic . . . the lack of turn lanes and traffic controls of nearby intersections have already caused delays . . .” *Id.* at \*3.

192. See *RDNT III*, 861 N.W.2d at 72–73.

193. See Michael Kling, *Zoned Out: Assisted-Living Facilities and Zoning*, 10 ELDER L.J. 187, 196 (2002) (discussing the “NIMBY Phenomenon”); see also FISCHER, *supra* note 40, at 9–10 (“NIMBYism is weird only if you think solely about the rationally expected outcome from development. NIMBYism makes perfectly good sense if you think about the variance in expected outcomes, and the fact that there is no way to insure against neighborhood or community-wide decline.”).

impact allegations.<sup>194</sup> The effects of *RDNT* have already been seen in Minnesota.

LifeSpan of Minnesota, a Youth Transition Program that provides day treatment services to school age children ranging from five to eighteen years of age, applied for a CUP to build a mental health facility for children, but the city denied the permit due to neighborhood opposition.<sup>195</sup> LifeSpan worries that the process of building and expanding facilities for essential services will “become political” if cities can “rely on anecdotal statements of prospective neighbors.”<sup>196</sup> As demonstrated by LifeSpan’s experience, *RDNT* has already impacted CUP permit decisions in Minnesota.<sup>197</sup>

The experiences of *RDNT* and LifeSpan represent an emerging trend of CUP denials for care facilities. The *RDNT* decision may make it more difficult for care services to meet the needs of vulnerable Minnesotans.<sup>198</sup> As the elderly population increases and the market shifts,<sup>199</sup> the need for assisted living facilities will increase.<sup>200</sup> The aging population is demanding the

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194. See, e.g., HERBERT INHABER, *SLAYING THE NIMBY DRAGON* 5–9 (1998) (discussing the NIMBY concept and how neighborhood opposition has prevented the development of daycare facilities, AIDS treatment facilities, small group homes for mentally ill patients, affordable housing, and homeless shelters).

195. Brief of Amicus Curiae Lifespan of Minnesota, Inc., *RDNT III*, 861 N.W.2d 71 (Minn. 2015) (No. A13-0310), 2014 WL 8392640, at \*1–3.

196. *Id.* at \*3.

197. See *id.* at \*1.

198. Kling argues that an unfortunate “pattern” has formed because assisted-living facilities “tend to arouse much local opposition and typically end with a permit denial by the local zoning board.” Kling, *supra* note 193, at 203. According to Kling, this pattern has forced courts to “step in to counteract the local government.” *Id.*

199. See Brief of Amicus Curiae Aging Services of Minnesota, *RDNT III*, 861 N.W.2d 71 (Minn. 2015) (No. 0310), 2014 WL 8392644, at \*10 [hereinafter Brief of Aging Services] (“Minnesotans ‘are expecting and demanding more choice over their long-term care. This trend is expected to accelerate as baby boomers, the first real “consumer” generation, grow old and need care.” (quoting MINN. DEPT. OF HUMAN SERVS., *STATUS OF LONG-TERM CARE IN MINNESOTA 2005: A REPORT TO THE MINNESOTA LEGISLATURE* 4 (June 2006), <http://archive.leg.state.mn.us/docs/2006/Mandated/060432.pdf>)).

200. Brief of Aging Services, *supra* note 199, at \*2–3. (“In 2011, the first wave of baby boomers (those born between 1946 and 1964) began to turn 65, and for the next 30 years this cohort will profoundly affect the business of senior care.”); see, e.g., Bayan Raji, *Rise of Baby Boomers is Changing the Assisted Living Landscape*, HOUS. BUS. J. (Aug. 30, 2013), <http://www.bizjournals.com/houston/print-edition>

ability to “age in place,”<sup>201</sup> and the court’s decision may impair the ability of facilities to meet this demand.

## V. CONCLUSION

The history of American zoning demonstrates how changing American ideals have demanded protection of the single-family home, greater flexibility in zoning, and limits to municipal discretion through more express standards. Tools of flexibility emerged to adapt to changing urban demands that were frustrated by the rigidities of the original model of Euclidean zoning. However, these devices, including CUPs, opened a debate about the appropriate degree of municipal discretion.

Closer judicial analysis is due when weighing public concerns in CUP denials.<sup>202</sup> Rather than always deferring to local governing bodies about decisions based on traffic and allegedly injurious uses, courts have helped interpret (1) what constitutes traffic that is “injurious” to the general welfare, (2) whether neighborhood traffic concerns alone can be grounds for denial, and (3) whether ignoring mitigating conditions to improve traffic impact constitutes an arbitrary denial.<sup>203</sup> These are all issues that restrict the discretion of municipal decision makers and limit deference to legislature.

The *RDNT* decision increased the ability of local governing bodies to (1) deny CUP applications on the basis of neighborhood opposition alone and (2) disregard proposed mitigating conditions that may improve traffic conditions in a neighborhood.<sup>204</sup> While neighborhood opposition testimony often seeks to protect the important financial interest of the single-family homeowner, allowing this testimony to go unsubstantiated risks restricting otherwise permissible uses too broadly. Furthermore, enabling municipalities to ignore proposed mitigating conditions that may

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/2013/08/30/the-rise-of-baby-boomers-is-changing.html (discussing growing demand to age in place).

201. “Aging in place” refers to a growing industry trend where “[m]any seniors choose campuses where a full continuum of care is offered to individuals to meet their variety of needs.” Brief of Aging Services, *supra* note 199, at \*9; *see also* Rebecca C. Morgan, *What the Future of Aging Means to All of Us: An Era of Possibilities*, 48 IND. L. REV. 125, 131 (2014) (discussing the changing paradigms and demands for elder housing and care).

202. *See supra* Part IV.

203. *See supra* Parts II.D, IV.

204. *See supra* Part IV.

improve traffic livability and alleviate concerns undermines the ability of developers to address concerns from neighbors in development proposals.

The policy considerations regarding decreased access to elder care are not the *reason* that the court should have held in RDNT's favor, but rather are an indicator of the importance of balancing property interests. When essential residential and nursing care services are at stake, it is more readily apparent that while deference to legislature is important, so is a fair process.