

**IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

Clear Channel Outdoor Inc.,
a Delaware corporation,

Appellee,

v.

City of St. Paul,

Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA
District Court Civil No. 06-CV-3304 DWF/AJB
District Court Judge Donovan W. Frank

BRIEF OF PROPOSED AMICI BUILDERS ASSOCIATION
OF MINNESOTA, MINNESOTA AUTOMOBILE DEALERS
ASSOCIATION, NAIOP MINNESOTA, AND OUTDOOR
ADVERTISING ASSOCIATION OF MINNESOTA IN
SUPPORT OF AFFIRMANCE

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae Builders Association of Minnesota (“BAM”) is a non-profit organization. It has no parent corporation and no publicly held company owns ten percent or more of its stock.

Amicus curiae Minnesota Automobile Dealers Association (“MADA”) is a non-profit organization. It has no parent corporation and no publicly held company owns ten percent or more of its stock.

Amicus curiae NAIOP Minnesota (“NAIOP”) is a chapter of NAIOP, the Commercial Real Estate Development Association, which is a non-profit organization. NAIOP has no parent corporation and no publicly held company owns ten percent or more of its stock.

Amicus curiae Outdoor Advertising Association of Minnesota (“OAAM”) is a non-profit organization. It has no parent corporation and no publicly held company owns ten percent or more of its stock.

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STATEMENT OF INTEREST

BAM is a voluntary membership organization representing more than 3,000 builders and developers, both individuals and businesses, throughout the State of Minnesota (the “State”). BAM provides information, education, and guidance to the State’s builders and developers. BAM also advocates the legal, political, and regulatory interests of its members. BAM also serves the interests of its members by seeking to protect long-cherished property rights against arbitrary activities of local government.

MADA is a voluntary membership organization representing the interests of approximately 375 franchised new car and truck dealers throughout the State. MADA provides information, education, and guidance to the State’s retail motor vehicle industry. MADA also advocates the legal, political, and regulatory interests of its members. MADA also serves the interests of its members by seeking to protect long-cherished property rights against arbitrary local government actions.

NAIOP is a voluntary membership organization representing the interests of approximately 850 developers, owners, and related professionals in office, industrial, and mixed-use real estate throughout the State, with 18,000 members in North America. NAIOP provides information, education, and guidance to the State’s commercial real estate development industry. NAIOP also advocates the legal, political, and regulatory interests of its members. NAIOP also serves the interests of its members by seeking to protect long-cherished property rights against arbitrary local government actions.

OAAM represents outdoor advertising companies with over 5,000 outdoor advertising signs throughout the State. OAAM is a voluntary membership organization that provides information and guidance to entities involved in the outdoor advertising industry. The outdoor advertising industry is heavily regulated at the federal, state, and local levels of government. OAAM devotes significant efforts to educating its members and promoting compliance with state and federal statutes and various local government ordinances. OAAM also serves the interests of its members by seeking to ensure that the heavily-regulated rights of outdoor advertisers are not unlawfully eroded by the acts of local government that are arbitrary or otherwise illegal.

BAM, MADA, NAIOP, and OAAM have a particular interest in this case because of their concern about the effort by Appellant City of St. Paul (the “City”) and supportive amici to remove certain due process protections for private landowners and businesses involved with zoning decisions throughout the State.¹

The primary issue on appeal is the legality of a local zoning ordinance that purports to ban a use of land, billboard extensions, without any stated reason, and in the face of pre-adoption arguments raised to the governing body regarding the constitutional and statutory rights of property owners, particularly billboard owners and advertisers. The secondary issue is whether the City is entitled to a trial on the claims of Appellee Clear Channel Outdoor, Inc. (“Clear Channel”) when the City had a full opportunity to present the complete record to the district court regarding its amendment of the zoning

¹ Additionally, the members of amici in support of affirmance own or advertise on billboards throughout the State and in the City.

code that banned all billboard extensions in the City (the “Extension Ordinance”). Amici support and adopt the arguments of Clear Channel that Minnesota law does not require a trial in every zoning case. Amici will not separately address this secondary issue in this brief.

Amici will address the primary issue – whether the district court correctly applied Minnesota law in concluding that the Extension Ordinance is arbitrary and unenforceable as adopted. This issue must be considered in the context of the constitutional and statutory rights and interests of property owners of all sorts, including billboard owners and advertisers, builders and developers, and automobile dealers, all of whom encounter local governments actions to amend zoning ordinances in the regular course of business. These rights and freedoms underscore why a local zoning ordinance regulating property rights, and indeed banning a particular form of land use, without any articulation of a reason supporting the ordinance, is contrary to Minnesota law.

SUMMARY OF LEGAL ARGUMENT

The district court correctly applied Minnesota law when it determined that the Extension Ordinance is unenforceable as a matter of law because the City failed to articulate any reason for it within the record and granted summary judgment to Clear Channel on its state law claim. The City and its amici supporters misstate Minnesota law by arguing that hypothetical ex post facto reasons are legally sufficient to withstand judicial review of a zoning ordinance. The Minnesota Supreme Court has long required that cities record a contemporaneous, legally-sufficient reason for zoning enactments to survive rational basis review.

The Minnesota Supreme Court's requirement that cities identify legally-sufficient reasons on the record for zoning ordinances and amendments has remained unchanged for nearly 30 years, evidencing that it is not burdensome, contrary to the arguments of the City and its amicus supporters. Given the potential impact on property rights and freedoms implicated by a given zoning ordinance, requiring a city to identify a legally-sufficient reason for its ordinance is minimal, unremarkable and fundamentally consistent with the property interests being regulated.

The City failed to comply with Minnesota law when it enacted a zoning ordinance without articulating any reason for it within the record; accordingly, the adoption of the Extension Ordinance was arbitrary and capricious. Furthermore, the post-enactment reasons proffered by the City for the Extension Ordinance do not provide a basis for the ordinance because it is not rationally related to any of these hypothetical reasons. In a diversity case, the duty of the federal courts is to determine and apply state law. *Stratioti v. Bick*, 704 F.2d 1052, 1054 (8th Cir. 1983) (citations omitted). The district court correctly determined and applied Minnesota law and its decision should be affirmed.

LEGAL ARGUMENT

I. THE MINNESOTA SUPREME COURT'S REQUIREMENT THAT CITIES IDENTIFY REASONS FOR ZONING MATTERS IS NEITHER SURPRISING NOR BURDENSOME.

The City and its amici supporters argue that the holding of *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 416 (Minn. 1981), requiring a city to provide reasons for its legislative zoning matters, cannot apply to legislative zoning matters. They argue that this would result in excessive judicial oversight of cities and would establish too high a

bar for cities to overcome when passing legislation. This argument disregards the fundamental protections offered to property owners and property rights under Minnesota law. Any burden this additional scrutiny imposes is justified considering the rights and interests at stake. The City and amici arguments also fail to recognize that the Minnesota Supreme Court has established and engaged in more searching judicial review of legislative reasons in a number of other contexts. Moreover, the ramifications of rational basis review based on a written record are not onerous.

A. Rational Basis Review Requiring On-the-Record, Legally-Sufficient Reasons for Legislative Decisions is Entirely Appropriate Given the Interests at Stake in a Zoning Decision and is Not Unique to Minnesota Cities.

The City and amici rely on decisions from other contexts and from courts other than Minnesota's highest court to argue that the Minnesota Supreme Court did not mean what it held in *Honn*. An analysis of the rights in property and interests in freedom of expression at issue here and of Minnesota case law reveals that Minnesota applies a higher level of review under a rational basis standard when courts of other jurisdictions have declined to do so, and that *Honn* meant what it said when it held that zoning ordinances are arbitrary when they are not supported on the record by an articulated rational basis.

1. The rational basis review dictated by *Honn* is entirely appropriate here because property interests and freedom of commercial expression are at stake.

Billboard owners have a “very real property interest” in their billboards, as the district court correctly observed. (Appellee’s Addendum 013). Property rights are

important, valuable and vested. The requirement pursuant to *Honn* that a city articulate a reason for an ordinance that detrimentally operates on property rights is consistent with Minnesota's protection of its citizens' rights.

In the landmark zoning case of *Village of Euclid v. Ambler Realty Co.*, the United States Supreme Court held that land use regulations and zoning ordinances may be enacted pursuant to states' police powers, but because these controls may restrict private property rights, such ordinances must not be unreasonable or arbitrary. 272 U.S. 365, 395, 47 S.Ct. 114, 121 (1926). Given that a zoning ordinance imposes restrictions on land uses that attach to and run with the land, *Orme v. Atlas Gas & Oil Co.*, 217 Minn. 27, 13 N.W.2d 757 (1944), the constitutional requirement that these ordinances not be arbitrary and capricious provides minimal protection for property rights, but it is protection nonetheless.

Similarly, a fundamental principle of local land use regulation under Minnesota law is that a city's arbitrary and unreasonable zoning ordinance is unenforceable. *Village of St. Louis Park v. Casey*, 218 Minn. 394, 399, 16 N.W.2d 459, 461 (1944) (reversing injunction granted by district court against property owner because of arbitrary zoning ordinance). When a city adopts an ordinance amending its zoning code, the city cannot act arbitrarily. *Olsen v. City of Hopkins*, 276 Minn. 163, 172, 149 N.W.2d 394, 400 (1967). In other words, a city's land use decisions may not, under Minnesota law, be unreasonable, arbitrary, or capricious. *Swanson v. City of Bloomington*, 421 N.W.2d 307, 311 (Minn. 1988) (quoting *White Bear Docking and Storage, Inc. v. City of White Bear Lake*, 324 N.W.2d 174, 176 (Minn. 1982)). A city's power to regulate land uses does not

extend to arbitrary or unreasonable “intermeddling with the private ownership of property.” *Olsen v. City of Minneapolis*, 263 Minn. 1, 13, 115 N.W.2d 734, 742 (1962) (citation omitted).

Recognizing the rights and values of property ownership, Minnesota law requires that zoning ordinances, when ambiguous, be construed in favor of property owners. *Olsen*, 276 Minn. at 170, 149 N.W.2d at 399. Accordingly, Minnesota courts give weight to the reasonable interpretation that “is least restrictive upon the rights of the property owner to use his land as he wishes.” *Frank’s Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-9 (Minn. 1980).

The Minnesota Supreme Court in *Honn* set forth the procedure that cities must follow in “any zoning matter, whether legislative or quasi-judicial.” *Honn*, 313 N.W.2d at 416. *Honn* acknowledged municipal concerns regarding hearings conducted “in informal fashion,” without complete and formal records of proceedings, and “relatively few remarks in its minutes to suffice as its findings of fact and conclusions.” *Id.* Thus, it did not require cities to prepare “formal findings of fact.” *Id.* Rather, a city “must, at a minimum, have the reasons for its decision recorded or reduced to writing² and in more than just a conclusory fashion.” *Id.* *Honn* imposed this requirement because an “after-

² Further, a city’s zoning ordinance amendment that legislates a legal non-conforming use out of existence without recording sufficient reasons for doing so is void and unenforceable. *Apple Valley Red-E-Mix v. City of St. Louis Park*, 359 N.W.2d 313, 314 (Minn. Ct. App. 1984).

the fact record”³ “runs the risk inherent in any opportunity to rationalize or justify what one has done before.”⁴ *Id.* (citing *Zylka v. City of Crystal*, 283 Minn. 192, 198, 167 N.W.2d 45,50 (1969)). If a city elects not to follow these procedures, “it runs the risk of not having its decision sustained” as a party detrimentally impacted by a city’s legislative or quasi-judicial matter may establish a prima facie case of arbitrariness. *Id.*

The Minnesota Supreme Court understands that property rights are important and valuable to the State’s land owners. Indeed, the plethora of property-owner interests represented by the many amicus parties joining in this brief surely reflects concern for the preservation of Minnesota’s longstanding protections afforded in judicial review of

³ Similarly, when interpreting and construing the legislative activities of the legislature, courts are to consider the “**contemporaneous** legislative history,” but only when the statute is ambiguous. Minn. Stat. § 645.16 (emphasis added). Because a legislator’s post-enactment statements regarding legislative motivation cannot “adequately represent the varying viewpoints that are expressed in the legislative process,” *Reserve Min. Co. v. State*, 310 N.W.2d 487, 491 (Minn. 1981), a court must refuse to consider affidavits submitted to courts by legislators in determining the intentions of the legislature. *In re Welfare of D.L.*, 486 N.W.2d 375, 381 (Minn. 1992). Moreover, “the reason or motive for passing a resolution might be shown by the discussion had at the board, but certainly not by the secret operation of the mind of individual members” of the legislative body. *Queen City Constr., Inc. v. City of Rochester*, 604 N.W.2d 368, 377 (Minn. Ct. App. 1999) (quoting *Cannon River Mfrs. Ass’n v. Rogers*, 51 Minn. 388, 396, 53 N.W. 759, 761 (1892)).

⁴ If a city does not “record the basis for a zoning determination” within a “reasonably timely fashion,” then “the zoning action is presumed to be arbitrary.” *R.A. Putnam & Assoc., Inc. v. City of Mendota Heights*, 510 N.W.2d 264, 267 (Minn. Ct. App. 1994), *pet. for review denied*, (Minn., Mar. 15, 1994). While *Putnam* allowed legislative findings “within a reasonable time,” here, the City failed to avail itself even of this opportunity offered under Minnesota law. The City offered no findings in support of the Extension Ordinance at any time until it was called to answer in this litigation.

zoning decisions. Although the protection afforded by rational basis review may be minimal, the courts do not permit cities to enact zoning ordinances in an arbitrary or unreasonable manner. Requiring a city to identify an interest it is allegedly pursuing when it is enacting a zoning ordinance protects the State's citizens from arbitrary governmental interference with vested property rights. Without this requirement, arbitrary zoning ordinances would be the norm rather than the exception and property owners' ability to discern whether a zoning ordinance is reasonable would be severely hindered.

2. When sufficient interests are at stake, the Minnesota Supreme Court has not hesitated to scrutinize regulations more closely under a rational basis review.

The arguments of the City and amici that the district court did not review the Extension Ordinance under “the” rational basis test ignore that more than one rational basis test exists. As support for their argument that the district court erroneously applied *Honn*, amici in support of reversal irrelevantly discuss numerous other standards of review applied by a variety of other courts. See Brief of Amici in Support of Reversal, pp. 18-22 (explaining the standard of review applied by federal courts examining First Amendment claims). The relevant and operative standard of review is that of the Minnesota Supreme Court in *Honn*, which adopted one of several rational basis tests that have developed for reviewing governmental interferences claimed to be arbitrary or unreasonable.

Honn did not apply “the” rational basis test; it applied “a ‘rational basis’ test.” 313 N.W.2d at 415 (emphasis added). Specifically, it held that a city “must, at a

minimum, have the reasons for its decisions recorded or reduced to writing” for “zoning matters which are legislative in nature.” *Id.* at 416, 417. Cities in Minnesota receive power to regulate land uses only by legislative grant. *Costley v. Caromin House, Inc.*, 313 N.W.2d 21, 27 (Minn. 1981). Pursuant to statute, a city may regulate land uses for the limited and specified purposes “of promoting the public health, safety, morals, and general welfare.” Minn. Stat. § 462.357, subd. 1. A city’s exercise of its land use regulatory authority that exceeds the statutory limitations on its powers is invalid. *Reilly Tar & Chemical Corp. v. City of St. Louis Park*, 265 Minn. 295, 300, 121 N.W.2d 393, 396 (1963). *Honn* adopted a particular standard for rational basis review of legislative zoning enactments promulgated under the authority of Minnesota statute. There is no requirement that Minnesota adopt and apply a rational basis standard that is applicable in other jurisdictions or in other contexts. The arguments of amici in support of reversal on the basis of the level of scrutiny employed by federal courts in other contexts, accordingly, do not (indeed, cannot) controvert the Minnesota Supreme Court holding in *Honn*.

Similar to its requirements concerning legislative zoning ordinances, Minnesota has adopted a more stringent standard than otherwise exists for rational basis review in other contexts. In *State v. Russell*, the Minnesota Supreme Court, in analyzing a claim under the Minnesota equal protection clause, noted that “[w]hat has been consistent, however, is that in the cases where we have applied what may be characterized as the Minnesota rational basis analysis, **we have been unwilling to hypothesize a rational basis** to justify a classification, as the more deferential federal standard requires.” 477

N.W.2d 886, 889 (Minn. 1991) (emphasis added). The court decided that it was “particularly appropriate that we apply our stricter standard of rational basis review” because of the underlying important interests at stake. *Id.* The court then analyzed plaintiff’s claim that the contested statute lacked a rational basis by evaluating the testimony offered at the relevant legislative hearings. *Id.* at 889-90. The court held that the justifications for the statute put forth in front of the legislature failed to provide a rational basis for the legislation. *Id.*

Minnesota courts have repeatedly noted that the “key distinction” of Minnesota rational basis review is the courts’ unwillingness to hypothesize a rational basis that might justify a statute that is claimed to violate the equal protection clause. *Greene v. Comm’r, Minn. Dep’t. of Human Servs.*, 755 N.W.2d 713, 729 (Minn. 2008); *State v. Garcia*, 683 N.W.2d 294, 299 (Minn. 2004). When a state court is reviewing a Minnesota law, it may adopt and require a more searching level of rational basis review than that applied for other laws or in other jurisdictions. The Minnesota Supreme Court requires that the Minnesota legislature, which generally has more authority than municipalities to act and whose powers are less circumscribed by particular statutes, identify a rational basis for its activities bearing on citizens’ rights; accordingly, the level of judicial scrutiny required by *Honn* is not unique and should not be surprising.

The Minnesota Supreme Court adopted a different and somewhat more demanding standard of judicial review of zoning ordinances in *Honn* than exists in other jurisdictions scrutinizing other laws. The *Honn* rational basis standard governs the Extension Ordinance and pursuant to *Stratioti*, 704 F.2d at 1054, must be applied in these

proceedings. For these reasons, this Court should conclude that the district court decision correctly applied *Honn* and correctly decided that the Extension Ordinance is arbitrary.

B. The Burden that *Honn* Imposes on Cities is Justified and Is Not Insurmountable.

Contrary to the arguments of the City and amici in support of reversal, the *Honn* requirement that a legislative zoning matter be supported by a recorded legally-sufficient basis has not and will not sound the death knell for cities' zoning-related enactments. Far from being onerous, *Honn* specifically does not require cities to prepare "formal findings of fact." 313 N.W.2d at 416. Rather, a city "must, at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion." *Id.* This holding does not require cities to identify each and every interest affected by its activities, but instead requires a minimal effort by a city reflecting some reason for its action, when it seeks to impact property owners' rights and interests.

Unlike other ordinances that do not directly impinge on private property interests, a zoning ordinance regulates well-established and long-cherished rights to own and use property. In particular, the Extension Ordinance here completely eliminates⁵ a portion of the vested property rights of billboard owners and advertisers, and restricts creative expression protected by the constitution. *Honn* limited its holding only to legislative and quasi-judicial zoning matters. When a city acts pursuant to its limited authorities in these

⁵ Indeed, one of Clear Channel's claims below, not reached by the district court, was that the Extension Ordinance constitutes a regulatory taking. (Appellee's Addendum 012-013).

arenas, a minimal requirement that a city identify reasons for its activities infringing on protected rights and interests is justified.

The City and amici argue in contradictory fashion that on the one hand, the Extension Ordinance is easily supportable, and on the other hand, application of *Honn* would impose an onerous burden on cities. These assertions ignore *Honn*'s express limitation to zoning matters, where cities are exercising limited, state-granted powers on property rights. 313 N.W.2d at 416. Additionally, these arguments ignore that Minnesota courts require the Minnesota legislature to articulate reasons for laws challenged for lack of a rational basis under the equal protection clause. This requirement has not caused a government shut-down, and has still allowed legislation supported by a rational basis to survive judicial review. *See, e.g., Greene*, 755 N.W.2d at 730 (upholding statute in light of legislative goal identified in relevant act). Furthermore, if the City is correct that zoning ordinances are easily supportable post-enactment, then it must also be true that they are just as easily supportable pre-enactment.

Finally, as amici in support of reversal acknowledge, cities have long been encouraged, by among others, Amicus League of Minnesota Cities, to state the reasons for the adoption of any zoning ordinance or amendment and warned that “inadequate findings may result in a reversal of the council’s decision.” *See Risk Management Information: Public Hearings*, p. 3 (Addendum of Amici in Support of Affirmance 003); *see also*, *Handbook for Minnesota Cities, Part IV Regulatory and Development Functions of Cities, Chapter 14: Comprehensive Planning, Land Use and City-Owned Land*, p. 14:33 (Addendum of Amici in Support of Affirmance 036) (stating “[i]f the city neglects

to state reasons for an action taken on the record, the city’s action is presumed arbitrary and unreasonable”). Cities have been also encouraged by other municipal resources to, at a minimum, include statements of purpose within their zoning ordinances. *See* Brief of Amici in Support of Reversal, p. 10, n. 1 (stating the American Planning Association and several of the attorneys for the amici in support of reversal “have encouraged local governments to formally include statements of purpose in their sign laws”).

Consistent with the recommendations of the amici in support of reversal, many Minnesota cities have passed zoning ordinances regulating billboards that contain express findings which purport to establish a rational basis for the legislative enactment. *See, e.g.,* Addendum of Amici in Support of Affirmance 036 (City of Minnetonka Ordinance 2007-). These authoritative sources from the amicus parties all indicate that the holding of the Minnesota Supreme Court in *Honn* – which has been the law in Minnesota for nearly 30 years – does not create an unworkable requirement for legislative zoning decisions.

II. THE DISTRICT COURT CORRECTLY DETERMINED AND APPLIED MINNESOTA LAW TO HOLD THAT THE CITY LACKED A RATIONAL BASIS FOR THE EXTENSION ORDINANCE.

The City arbitrarily enacted the Extension Ordinance without discussing, suggesting, positively identifying, or even hinting at any reason for doing so. Nothing in the record before the City Council supports its action; in fact, the record directly opposes the amendment. This Court should affirm the district court because it correctly held that the Extension Ordinance violates Minnesota law as arbitrary and unreasonable. The City concedes that the Extension Ordinance must have a rational basis, but then engages in a

results-oriented attack by arguing that because the district court did not find a rational basis, the district court erred. The City’s arguments ignore the well-established principles of Minnesota law that a city, to satisfy a rational basis review, must articulate a legally-sufficient reason for its zoning ordinances.

A. The Extension Ordinance is Arbitrary Because the City Did Not Articulate or Record Any Reason For It.

The decisions by the highest court of Minnesota⁶ hold that a city must record legally-sufficient reasons for its actions when it is enacting legislative zoning changes. The Extension Ordinance is arbitrary and unenforceable because the City failed to articulate on the record *any* reason for its change – let alone a legally-sufficient reason.

The Extension Ordinance is a legislative zoning ordinance over which the holding of *Honn* controls. The adoption of an ordinance is a legislative matter. *See, e.g., Honn*, 313 N.W.2d at 417 (explaining that “[i]n enacting a zoning ordinance or in amending an ordinance to rezone, the approach is legislative”). A zoning ordinance is one that regulates the uses of property. *Orme v. Atlas Gas & Oil Co.*, 217 Minn. 27, 32, 13 N.W.2d 757, 761 (1944). Local regulations of billboards constitute zoning matters. *See, e.g., State by Spannaus v. Hopf*, 323 N.W.2d 746, 756 (Minn. 1982). The City does not appear to dispute that the Extension Ordinance is a legislative zoning matter. With the

⁶ The City improperly relies on decisions of the Minnesota Court of Appeals given that (a) it is not the highest state court in Minnesota, (b) it is merely an error-correcting court, *State v. Adkins*, 706 N.W.2d 59, 63 (Minn. App. 2005), and (c) numerous of the City’s citations are to unpublished Court of Appeals decision which are expressly “not precedential” as a matter of law. Minn. Stat. § 480A.08(3).

Extension Ordinance, the City purports to regulate all land and airspace within the City by banning billboard extensions throughout the City. Thus, the Extension Ordinance is a legislative zoning ordinance. Accordingly, the decision in this matter must comport with the *Honn* holding.

The City failed to articulate any interest, legitimate or otherwise, when it enacted the Extension Ordinance. The City does not appear to dispute these facts. *See* City's Brief, pp. 25-27, 31 (identifying potential reasons for the ordinance not indicated within the record and stating that those purported reasons are "known and reasonably assumed facts"). The City considered the Extension Ordinance at multiple levels, including the staff, the Planning Commission's Zoning Committee, the Planning Commission itself, and the City Council, at multiple public hearings and meetings, between March 3, 2005, and March 8, 2006. Despite all of these opportunities, the City never once discussed or identified any reason for a ban of billboard extensions. Particularly when Clear Channel, through counsel, raised legal concerns regarding the Extension Ordinance, the City had numerous opportunities to state its reasons on the record. To enact an ordinance destroying vested and valuable property rights without ever indicating any interest served by the ordinance, smacks of arbitrary and unreasonable governmental regulation. The district court correctly applied Minnesota law and decided that the City's enactment of the Extension Ordinance was arbitrary and capricious. For these reasons, this Court should affirm the district court.

B. The Extension Ordinance is Arbitrary Because it is Not Rationally Related to Any Legally-Sufficient Reason.

The City suggests potential post-enactment reasons for the Extension Ordinance; even if the Minnesota Supreme Court holding in *Honn* is disregarded, none of these post-enactment, hypothesized reasons provides a rational basis for the City's action. The City's attempt during litigation to recite the purpose section of its zoning code for signs fails to support the Extension Ordinance. First, a general purpose section alone does not provide any fact-based support in the record for the proposition that a proposed zoning ordinance operating directly on property rights achieves a purpose identified by a former governing body of a municipality. Where important property rights are at stake, a city must do more than just point to or include a boilerplate 'purpose' section as an after-the-fact rationale for its action. *Honn*, 313 N.W.2d at 416. Here, there is no evidence to support the notion that billboard extensions are harmful to public health, welfare, and safety; if the City's goal is to promote safety or reduce hazards, there is a disconnect between the means and the ends. Second, if the purpose section indeed served as a basis for the Extension Ordinance, then the City could have, would have, and should have, indicated somewhere during any one of the numerous meetings comprising the record that it was acting out of concerns for public health and safety or any one of the other purposes cited in that provision. Third, the City routinely uses the same purpose section, post-enactment or otherwise, for a host of contradictory billboard regulations, including most notably that the City now bans billboard extensions while allowing dynamic display

billboards.⁷ No legally sufficient reason for this zoning ordinance exists and the district court therefore correctly decided that it is arbitrary and void.

CONCLUSION

Based on the foregoing reasons and further based on the arguments set forth in the brief of Clear Channel, proposed amici BAM, MADA, NAIOP, and OAAM respectfully request the Court to affirm the district court's order and judgment in this matter.

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⁷ Ironically, the City argues that billboards can be regulated for public safety purposes, citing several cases that uphold ordinances banning billboards using dynamic displays, while the City here allows dynamic displays and claims that public safety interests force it to totally prohibit billboard extensions.

CERTIFICATION OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C) and 8th Cir. L.R. 28A(c), the undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7). The brief was prepared using Microsoft Word 2007, which reports that the brief contains _____ words, excluding items listed in Fed. R. App. P. 32(a)(7)(B)(iii). The diskette containing the brief has been scanned for viruses and is virus free.

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