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STATEMENT OF ISSUES WITH RELEVANT AUTHORITIES

1. Did the district court abuse its discretion by dismissing, the action with prejudice under Minn. R. Civ. P. 41.01 (b) without entering judgment on its May 31, 2002 partial summary judgment order so that that order could be appealed?

ANSWER: No.

a. Could the district court have granted Intervenor's request to simultaneously. approve Respondents' settlement (which automatically granted the zoning requests at issue) and enter judgment on the district court's May 31, 2002 partial summary judgment order (which addressed City's initial denial of the zoning requests), so that Intervenor could appeal the May 31 order?

ANSWER: No.

- *In re Silicone Implant Ins. Coverage Litig.*, _____ *N.W.2d* _____ 2002 WL 31109708, at *13 (Minn. Ct. App. Sept. 24, 2002) (court will not review moot issues) (Xcel App. 243-44).
- *Wills v. Red Lake Municipal Liquor Store*, 389 N.W.2d 769, 770: (Minn. Ct. App. 1986) (following stipulated settlements, court may not issue judgments unless they are "in accordance with" the settlement or "otherwise necessary to close the litigation properly").
- Would Intervenor be unduly prejudiced by having to bring a separate challenge to the automatic zoning approvals under the settlement agreement?
-

ANSWER: No.

Altimus. v. Hyundai. Motor Co., 578 N.W.2d 409;. 411. (Minn.. Ct. App. 1998) (standards for challenging Rule 41.01 (b) dismissal).

Pierce v. Honan, No. C8-00-2065, 2001 WL 682885, at *3 (Minn. Ct. App. June 19, 2001) (remaining party challenging the Rule 41.01(b) dismissal has burden of showing undue prejudice from the dismissal) (Xcel App. 259).

Thompson v. Northern Realty, Inc., No. C6-96-2267, 1997 WL 161854 (Minn. Ct. App. Apr. 8, 1997). (no undue prejudice because the settlement amongst two of the parties to accounting claim mooted the existing claim and required the remaining non-settling party to bring a separate action) (Xcel App. 262-64).

c. For purposes of this appeal, is there any relevance to whether the May 31; 2002 partial summary judgment order was properly decided?

ANSWER: No.

Johnson v. St. Paul Ins. Cos., 305 N.W.2d 571, 573-75 (Minn. 1981) "as the parties had equal means of ascertaining what their respective rights were, the courts must uphold any compromise of such rights; although a judicial decision should afterwards be made showing that these rights

were different from what they supposed them to be, or showing that one of them had no rights at all, and so nothing to forego").

Forcier v. State Farm Mitt. Auto. Ins. Co., 310 N.W.2d 124, 128-29 (Minn. 1981) (settlement will be upheld if "the parties made a goodfaith settlement on the basis of what they then understood the law to be"):



STATEMENT OF THE CASE AND FACTS

A. XCEL ENERGY'S ZONING APPLICATION TO CITY

In March 1999, Respondent Northern States Power Company d/b/a Xcel Energy (Xcel Energy) began formally pursuing the necessary governmental, approvals for an upgrade to a portion of its existing 14.7 mile southeast metro single circuit 115kV transmission line. The line runs from Newport, Minnesota to Bloomington, Minnesota. The -local governments with zoning authority over the proposed. line upgrade are Newport; Inver Grove Heights, South St. Paul, Mendota Heights and Respondent City of Sunfish Lake (City). The upgrade consists of adding a second circuit transmission line to the existing 75-year-old single circuit line and replacing the wooden H-frame poles for the line with steel monopoles that are on average approximately 25 feet higher. May 31 Order at 5-10. (PLTF App. 103-08); Xcel App. 1, 30-33.

Xcel urged that the line upgrade was needed because: the existing line failed to satisfy its double contingency planning requirements. Indeed Xcel Energy projected that by the summer 2002 the existing line would not even satisfy single contingency requirements. A single contingency system is one designed such that the failure of any single line, transformer or generator will not result in system overloading or blackouts:

With respect to the proposed line upgrade, the critical load level is 511 megawatts; "this is the load level at which overloading can first occur due to a single contingency." Xcel App. 16; 195-98 & 350. "[I]n the summer of .2001, Xcel Energy's peak load '(summer months) along the existing southeast metro line was 506 megawatts." Id. at 16 & 195-98 Thus "[o]nly a one-year growth rate of 1.010% is required to increase the peak from 506 megawatts to 511 megawatts (i.e., the point at which a double contingency design is needed). That point may occur in the summer, of 2002; if not, then it is expected that the critical point will occur in the summer of 2003 or 2004." Id. "[T]his is because in the 10-year period (1992 to 2001, inclusive), the compound load growth rate has been 3.6%

per year." Id.

In April 2000, Xcel Energy agreed with City, Mendota Heights and South St. Paul to cooperate in and pay for a \$130,000 "environmental impact review" (EIR) of the line upgrade. The EIR was equivalent to an environmental impact statement (EIS). Xcel Energy agreed to the EIR even though the Minnesota Environmental Quality Board (EQB)'s negative declaration on the need for an EIS had already been judicially upheld. The EIR was coordinated and compiled by an independent outside consultant selected by the three cities; the independent consultant was Commonwealth Associates, Inc. (CAI) of Jackson, Michigan.. The EIR report was reviewed by the cities and issued in early 2001.

May 31 Order at 13-14 (PLTF App, 111-12).

The EIR report included, a study conducted by Colliers Towle Real Estate of Minneapolis (Colliers Towle) to determine the effect of the line upgrade on neighboring property values. It was a paired sales analysis that compared the sale price of Twin Cities metropolitan area properties located along two different transmission lines to the sale price of comparable properties not located near a line. One of the transmission lines was a single-circuit 115kV line on wooden H-frame poles (like the existing line), while the other was a double-circuit 115kV line on steel monopoles (like the proposed upgraded line). Over 400 sales transactions during the last eight years were analyzed, of which 49 involved sales of property along the two transmission lines. Xcel App. 59. Colliers

Towle's study demonstrated that houses selling along an existing line took only 5 1/2 days longer to sell and sold for only about .5% less than houses located away from a line. It also demonstrated that the conversion of a 115kV transmission line from a single circuit line on wooden- H-frame poles to a double-circuit line on steel monopoles would have a

nominal negative impact on property value of only about 1%. *Id.* at 66; PLTF App. 11:8 19; see also Xcel App: 6.

The EIR report also included CAI's analysis of the electric and magnetic force (EMF) impacts. CAI calculated the EMF levels, resulting from double-circuiting the current line and concluded that, because of the magnetic cancellation caused by the vertical positioning of the lines, EMF would be dramatically "reduced." May 31 Order at 22 (PLTF App. 120); Xcel App. 40. Using, an assumption of 800 amps for the existing circuit and 400 amps, for each of the proposed double circuits, the magnetic field strengths with the double-circuit line would drop from 86.7 milliGauss (mG) to 21.0 mG, or 76%. *Id.* All of CAI's modeling of EMF levels using different load, amperage and distance figures showed significant declines in the EMF levels of the double-circuit line over the single-circuit line: Xcel App. 49 & 55-57; see, also PLTF App. 20-22 ¶¶ 26-34.

The EIR report included; as well, CAI's analysis of the need *for* the line upgrade. *Using* computer modeling, CAI examined in detail Xcel Energy's proposed line upgrade *along* with five other alternatives to the proposal. CAI concluded that the line upgrade was needed, with Xcel Energy's proposed upgrade being the best method of curing the various reliability and contingency deficiencies of the current line. Xcel App. 37-39, 195-98, 215; see also *id.* 15-16 ¶¶ 55-59.

After City had received and reviewed the EIR, *Xcel* Energy formally applied to City on November 13, 2002 for a conditional use permit and a major site and building plan review (collectively, CUP) to upgrade the 1.268-mile portion of the existing single circuit 115kV transmission line which runs through City. In addition, Xcel Energy .

applied *for* a minor variance from City's transmission line setback requirements.. City held several *public* hearings and meetings on Xcel Energy's CUP and minor variance requests. Appellant Power Line Task Force (Task Force) played an active role opposing Xcel Energy's zoning requests. The exhaustive nature of the hearings *on* the zoning requests is reflected in the administrative record, which *consists* of "109 documents totaling more than 2,000 pages." May 31 Order at 3 (PLTF App. 101).

CITY'S :FEBRUARY 5, 2002 DENIAL OF XCEL ENERGY'S ZONING REQUESTS

On February 5, 2002,. City denied Xcel Energy's: zoning requests. PLTF App. 15 44. City supported its denial with 89 findings of fact. *Id.* These findings conclude that the line upgrade would (1) adversely impact property values (*id.* 19-22), (2) pose unwarranted health hazards from EMF (*id* para 23 -71), and (3) had neither been shown to be needed nor: procured the alleged statutorily required "certificate of need" from the Minnesota Public Utilities Commission (PUC) (*id.* 1172-89).

C. XCEL ENERGY'S WRIT OF MANDAMUS ACTION AGAINST CITY

On February 26, 2002, Xcel Energy petitioned the district court for a writ of mandamus seeking to compel City to grant the zoning requests because City's denial of the zoning requests was in violation of the law and arbitrary and capricious. In addition, Xcel Energy sought an order compelling City to (1) pay Xcel Energy's damages, costs and disbursements pursuant to- Minn. Stat. § 586.09; (2) reimburse Xcel Energy its remaining unused escrow deposit held by City; and (3) require City to pay its own fees and costs incurred in reviewing Xcel Energy's zoning requests May 3 1Order at 3-4 (PLTF App. 101-02).

Xcel Energy subsequently moved for partial summary judgment on its claim that City be compelled to grant the zoning requests. City cross-moved for the dismissal of the mandamus action. The cross motions were vigorously contested, as reflected in the thorough briefing and the nearly three hours of oral argument before the district court. Prior to the summary judgment hearing, Task Force and two City residents moved to intervene. At the summary judgment hearing, the district court, the Honorable Rex D. Stacey presiding, allowed the intervention over Xcel Energy's objection. May 31 Order at 4. (PLTF App. 102). As a part of the grant of intervention, Task Force and the two individual interveners expressly agreed to the record that had been submitted and agreed to be bound by the arguments made by City.

On May 31, 2002, the district court issued its 28-page order and memorandum (May 31 Order) denying City's motion for summary judgment and granting Xcel Energy's partial summary judgment motion for an order compelling City to grant the zoning requests. In granting partial summary judgment in favor of Xcel Energy, the district court rejected the factual and legal bases for each of City's three reasons for denying the zoning requests. May 31 Order at 16-28 (PLTF App. 114-26).

The district court concluded that City's denial based on diminution of property values was "arbitrary, and capricious." May 31 Order at 21-22 (PLTF App. 119-20). The district court found that City erroneously rejected the only relevant and credible expert opinion on this issue in the record - that is, the uncontroverted opinion of the real estate appraisal expert - Colliers Towle. Colliers Towle found through a detailed study of house sales near transmission lines that the type of line upgrade Xcel Energy was proposing would have a negligible impact on property values of only 1%. City, instead, relied on three last minute letter "testimonials" from real estate agents that generally and conclusory stated that the proximity of transmission lines to a property presented a health risk and had an adverse impact on property values. City's reliance on these testimonials was found by the

court` to be inappropriate because there was no record proof that these testimonials were reliable or that the real estate agents were qualified to give such opinions. In any event, the court concluded that, because the 75-year-old line predates the adjacent homes, "the only property value impact at issue is the incremental impact, if any, caused by adding the second circuit to the, existing line." (which was addressed by Colliers Towle), not whether transmission lines adversely impact neighboring property values (which was addressed by the. three real estate agents). Id:

The district court also concluded that City's denial based on the health risks of EMF was "arbitrary and capricious" because the upgrade. met City's requirement that "reasonable and prudent measures" be taken to mitigate EMF. May 31 Order at 22-25 (PLTF App. 120-23). Indeed "City . . . identified no other measures that Xcel [Energy] might take to reduce EMFs.except for undergrounding the line, and City rejected this alternative due to its costs." Id at 24-25 (PLTF App. 122-23). The court found that the upgrade not only met all state and national safety standards but, even according to City, it may reduce exposure to EMF "by as much as 80°/a' over the current line. The Task Force had, moreover, already unsuccessfully challenged in front of three state agencies= EQB, PUC and the Minnesota Department of Health (MDH). = the line upgrade on the grounds that it was a health hazard. Id. at 10-13 (PLTF App. 108-11). The decisions by these state agencies not to take action against the line because of purported health risks had been upheld in both the Ramsey County District Court and this Court. Id. at 5-6 (PLTF APP. 103-04)."

Finally, the district court concluded that City's determination that the zoning request should be denied` because there was no need: for the upgrade violated City's own zoning procedures and

regulations. May 31 Order at 16-19 (PLTF App. 114-17). It further found 'the denial based on lack of need to be" "arbitrary and capricious" because (1)

"[v]irtually no one testified before any responsible governmental body to a lack of need for the Project," and (2) "Xcel [Energy] has already established need for the 'second circuit and .[w]hen the record adequately supplies the reasons underlying a business decision, neither a municipal body nor a court should override that business judgment."

Id. at 19-20 (PLTF App. 117-18) (quoting *Trisko v. City of Waite Park*, 566 N.W.2d 349, 355 (Minn. Ct. App.), *review denied* (Minn. Sept. 25, 1997)).

The district court likewise rejected City's related contention that it had to deny the

zoning requests because Xcel Energy had yet to procure a Minn. Stat. §§ 216B.2421,

subd. 2(3)' & 216B.243, subd. 4 "certificate of need" from PUC. Id. at 25-27 (PLTF App.

.123:-25). "Certificates of need" are only "required for construction of 100+ kV lines of

over ten miles in length," and Xcel Energy's proposed upgrade is for only 6:36 miles. Id.

at 14 (PLTF App. 112). The court, nevertheless, found three additional bases for

rejecting City's denial based on this certificate of need requirement. It held that

"[b]ecause Xcel [Energy] had an application for approval of this project before various .

cities before August 1, 2001[J [which is the effective date of the certificate of need

requirement,] it does not need PUC review at. all." Id. at 26 (PLTF App. 124). The court

added that, pursuant to § 216B.243, subd. 4, Xcel Energy is, in any event; "free to obtain

siting review and approval before it obtains a certificate of need so 'long as: it does not

begin 'construction of the facility.'" Id. And the court concluded that, because "it is

arbitrary to deny a use where conditions can be imposed that make the use acceptable,"

"[t]he most City could do was to condition its approval on Xcel [Energy] obtaining any

and all authorizations required by law." Id. at 26-27 (PLTF App. 124-25) (citing. *Trisko*;

566 N.W.2d at 357).

There was no entry of judgment of the May 31 Order and; as. such, the order was not appealable. Instead of litigating Xcel Energy's remaining claims, City and Xcel Energy entered into settlement discussions.

D. XCEL ENERGY AND CITY'S SETTLEMENT OF THE CASE AND ITS
DISMISSAL

On July 10, 2002, City and Xcel Energy executed a Settlement Agreement and Release, with an accompanying Stipulation and Order for Approval of Settlement and Dismissal with Prejudice of All Claims, and submitted it to the district court for approval under Minn. R. Civ. P. 41.01(b). PLTF App. 131-45. The settlement provided that City would grant Xcel Energy's zoning requests; but with certain additional conditions not required under the district court's May 31 Order. Specifically, the settlement provided that (1) City would not be liable for any of Xcel Energy's damages arising from the improper denial, (2) City would be allowed to keep the Xcel Energy escrow deposit that it held, and (3) Xcel Energy would pay City an additional \$6,500 for the costs City had incurred in reviewing Xcel Energy's zoning requests. Id. City had already adopted the settlement and dismissal agreement at a prior meeting of the City Council, and its terms were to be automatically executed upon the district court accepting it. PLTF App. 130. In submitting the settlement to the district court for its appeal, Xcel Energy and City informed the district court that Task Force opposed the settlement. Xcel App. 216-17. Two days later, Task Force formally objected to the dismissal. Task Force's objection was stated in its July 12 letter to the district court. Task Force's letter reinforced that it had not agreed to the proposed dismissal, and it asked for a hearing on the matter, which the district court readily granted. PLTF App. 146-48.

On July 15, 2002, apparently before receiving Task Force's July 12 letter, the district court executed the dismissal order. PLTF App. 199. The next day, Task Force formally served and filed its answer to Xcel Energy's writ of mandamus. PLTF App. 149-61 .: The answer was months too late.

At the July 22, 2002 hearing on the dismissal, Task Force repeatedly and unequivocally represented to the district court that it was: not trying to prevent the settlement nor challenge the reasonableness of the settlement. PLTF App: 172-74.

Rather Task Force simply requested that the district court, in addition to allowing City and Xcel Energy to settle and dismiss: the case,, also enter judgment on its May 31 Order so that Task Force could appeal it. Task Force's counsel stated;

[T]he Question is not really whether this case should be settled- If Xcel and the city wish to settle this case and reach a settlement the court can enter an' order. The question is,, what should the court do in order to preserve and protect the rights of the intervenors to appeal your decision of May 31? * * * And it can be done by an. order under Rule 54, which. would make that decision final, and, then we can take that up as a final decision, and the parties can still enter into any settlement they want. The City can, if it wishes to, issue the conditional use permit, but that reserves our right to respectfully challenge or appeal your [May 31] decision and have the Appellate Court pass upon the merits of that determination. * * * And that would be, could be consistent, your Honor; with Rule 41.01, which requires a court to condition any disposition when there is an intervenor on terms. * * * We're not trying to prevent that settlement and we're not challenging the reasonableness of the settlement. What we are saying is our right [] to appeal your decision of May 31 should be preserved. You can do. that by entering [] a Rule 54 finalization of your decision of May 31:

PLTF App. 172-74 (emphasis, ellipses and emendation of wording and punctuation added):

In response, Xcel Energy argued that Task Force's request was non-sensical; once the: settlement was approved, the zoning requests were automatically ranted, thereby mooting any relevance to the correctness of City's prior zoning denial, including the

May 31 Order regarding the same. PLTF App. 174-76 & 177-78. When the district court asked if there was any objection to this, Xcel Energy's counsel pointed out this obvious problem:

It doesn't make sense, your Honor: What he's asking to do is []' take up an issue that is mooted by th[e] granted permit.

Id 174 (emendation of wording added). *See also* Xcel App..216-17 (Xcel Energy's cover letter to court on proposed settlement and dismissal, noting that adoption *of* settlement would mean that only issue left for further litigation would be City's ant of the zoning requests, not its past denial of the same).

At the close of the arguments of counsel, the district court not only rejected Task

Force's objection to the dismissal but it also concluded that City could have adequately represented the public's concerns without Task Force's intervention. PLTF *App.* 178-79.

The district court stated:

You. know, if I had to do . it over again I probably wouldn't have granted intervenor status given the way the case was ultimately decided. It was a close call. I think I said somewhere in the- opinion, or in the decision I wrote that I really had great doubts about whether the city could adequately protect homeowners along: *the* lines. Their rights. And given the prodigious talents of Mr. Greene and his law firm, I mean, the did. everything they could. And I recognized that the task force was involved in the dispute from the start. Really, ignited the whole dispute I think, here and elsewhere.' And. of course I ^didn't know how I was going to decide the case. when, when I heard:, their motion to intervene. And hindsight's 20/20. It was probably a bad call. So I'm going to sign the reposed order and allow you to settle the case and get on with it.

.Id. (emphasis added).

On July 26, 2002, the district court filed its Settlement and Release and Judgment, which included the Stipulation and Order for Approval of Settlement and Dismissal of All Claims. PLTF App. 184=99.

On August 2, 2002, the district court denied *Task* Force's July 25 request to file *a*

motion *for* reconsideration of the court's dismissal. PLTF App. 1.83. In its request for reconsideration, 'Task Force' did not challenge the settlement itself; rather it again

narrowly asked the district court "that any dismissal of the litigation under *Rule* 41.01(b). be accompanied by an entry of final judgment of the Order of May 31, 2002, pursuant to Rule 54.02." PLTF App. 182.

On August 7, 2002, the clerk of court entered judgment on the Settlement and Release and Judgment.¹

'Task Force consistently misstates that the district court "entered" its order adopting the parties' settlement and dismissing the case on July 15, 2002 before Task Force could object; thereby denying *Task Force* due process. *See* PLTF Br. at 17=18 & 26... This is not true. While the district court signed- the *order* upon initially receiving it on July 15, 2002 (*see* PLTF App. 199), the district court did not file it before considering. Task Force's objections to the settlement and dismissal at the hearing on July 22, 2002. As Judge Stacey stated at the hearing, "I wanted- to give everybody a chance ... to say what they wanted." PLTF App. 179. And only after having done *so*, did Judge Stacey conclude: "I am *going* to *sign* the proposed order and allow [Xcel Energy and City] to settle the 'case and get *on*. with it." *Id.* It was on July 26, 2002, *four* days after the hearing, that the district court first filed its order dismissing the case. Moreover,, judgment. was not entered *until* nearly two weeks later, on August 7, 2002, after the district court considered and rejected Task Force's Minn. Gen. R. Prac. 115.11 request to file a motion for reconsideration.

E. TASK FORCE'S APPEALS

Task Force filed two appeals. First, it filed a notice of appeal of the May 31

Order. But, by Order filed September 3, 2002, this Court dismissed the appeal. This Court stated:

It is clear that the May 31, 2002, order is not appealable. It did not finally determine the action and no judgment was entered thereon. This appeal must be dismissed.

PLTF App. 207:

Task Force also filed this second appeal, which" challenges the district court's dismissal order.

Despite. this. Court's dismissal of the first appeal; Task Force's second appeal is premised entirely upon the first appeal = i.e., the correctness of the May 31 Order. Task Force's sole argument is that the dismissal was unreasonable because it did not also enter judgment on the May 31 Order so that Task Force could challenge it.

ARGUMENT

THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DISMISSING THE ACTION WITH PREJUDICE UNDER RULE 41.01(b)

A. Standards for reviewing Rule 41.01.0 dismissal

Minn. R. Civ. P: 41.01(b) provides:

[A]n action shall not be dismissed at the plaintiffs instance except upon order of the court and upon such terms and conditions as the court deems proper. If a counterclaim has been pleaded by a defendant prior to the service upon the defendant of the plaintiffs motion to dismiss, the action shall not be dismissed-against the defendant's objection unless the counterclaim may remain pending for independent adjudication by the court. Unless otherwise specified in the order,, a dismissal herein is without prejudice.

(Emphasis added). In other words, the district court may dismiss an action over the objection of a remaining party to the action upon "terms and conditions as the Court deems proper" for the dismissal.

Whether or not to grant a Rule 41 motion to dismiss rests in the discretion of the district court, and this Court will not reverse unless the district court has abused its discretion. *Altitnus v. Hyundai Motor Co.*, 578 N.W.2d 409, 411 (Minn. Ct. App. 1-998) (citing as guiding precedent the federal cases interpreting the federal rule counterpart to Rule 41, including *Metropolitan Fed.. Bank of Iowa, FSB v: W.R. Grace & Co.*, 999 F.2d 1257, 1262 (8th Cir. 1993), and *Paulucci v. City of Duluth*, 826 F.2d 780, 782-783 (8th Cir: 1987)).

The purpose of the rule is to prevent a voluntary dismissal which unfairly affects a remaining party to the action. *Paulucci*, 826 F.2d at 782. A remaining party that challenges a Rule 41.01(b) dismissal has the burden of showing undue prejudice from the dismissal. *Pierce v. Honan*; No. C8-00-2065, 2001 WL 682885, at *3 (Minn. Ct. App: June 19, 2001) (Xcel App. 259). "And the mere prospect of a second lawsuit is not sufficiently, prejudicial: to Justify" the denial of a Rule 41.01(b) motion to dismiss.

Altimus, 578 N.W.2d at 411. Moreover, unless it is "a voluntary dismissal that strips a defendant of a defense that would otherwise be available" (id. (citing *Ikospentakis v. Thalassic Steamship Agency*, 915 F.2d 176, 178 (5th. Cir. 1990)), "[t]hat plaintiff may obtain some tactical advantage over the defendant in future litigation is not ordinarily a bar to dismissal." *Ikospentakis*, 915 F.2d at 178.

In addition to the general issue of prejudice, this Court in Altimus, also identified the following factors for reviewing a district court's decision on a Rule 41.01(b) motion:

(1) the defendant's effort and the expense of trial preparation; (2) the plaintiffs excessive delay and lack of diligence; (3) insufficient explanation of plaintiffs' need for dismissal; and (4) whether defendant moved for summary judgment. Altimus, 578 N.W.2d at 411. Review of the issue of undue prejudice and the above four factors plainly supports affirming the district court's decision to dismiss:

Mootness bars Task Force's requested appellate review of City's February 5, 2002 denial of the zoning requests and May 31 Order regarding the same

Upon the presentation of the proposed settlement and dismissal to the district court, Task Force specifically and repeatedly stated that it was not objecting to the settlement City had reached with Xcel Energy (notably, the automatic grant of the zoning requests). Rather it was only asking that the district court also enter judgment on its May 31 Order, so that it could appeal that decision. PLTF App. 172-74, Task Force's counsel could not have been more clear to the district court [w]e're not trying to prevent that settlement and we're not challenging the reasonableness of the settlement." Id. 174. Likewise, Task Force's request for reconsideration only narrowly asked the district court "that any dismissal of litigation under Rule 41.01(b) be accompanied by an entry of final judgment of the Order of May 31, 2002." PLTF App. 182. And Task Force's notice of appeal and its opening brief reiterate the same requested relief. To be clear, Task Force nowhere before the district court or this Court has challenged the reasonableness of the settlement, notably the reasonableness of City's automatic grant of the zoning requests.² The fatal problem with Task Force's

requested relief is thus that it would lead to the appeal of a moot issue:- that is, whether City's February 5, 2002 denial of Xcel Energy's zoning requests was arbitrary and capricious.

As all the parties and the district court below plainly contemplated at the time; the approval of the settlement would: result in City's immediate grant of Xcel Energy's zoning requests. The inevitable consequence of this is that City's grant of the zoning requests not only. moots any relevance to its initial denial of the zoning requests but also any past court order regarding the denial, notably the May 31 Order. As a result, entering judgment on the May 31 Order to provide for appellate review truly made no sense. Though clearly not before this Court, it is noteworthy that Task Force's decision not to challenge, below or on appeal the reasonableness of City's grant of the zoning requests may well preclude it from later bringing a separate district court challenge to the grant of the zoning requests. City and Xcel Energy expressly reserve their right to later raise this defense in any subsequently filed district court action.

because, as very recently reiterated,, "[t]his [C]ourt addresses only actual controversies and will not decide moot questions." *In re Silicone Implant Ins. Coverage Litig.*, NN.2d _____ 2002 WL 31109708, at *13, (Minn. Ct. App. Sept. 24, 2002) (*Xcel App: 243-244*); *see also In re Glendale Tp., Scott County*, 288 Minn. 340, 180 N.W.2d 925, 927 (1970); *State ex rel. Klemer v. City of Faribault*, 129 Minn. 535, 152 N.W. 654 (1915).

Task Force nevertheless insists that the May 31 Order is reviewable because it was what prompted City to settle the case: It asserts that if it can show that the order was somehow wrong, then it will have shown that the settlement was unreasonable and, therefore, invalid. Task Force has no basis for this claim. . City's grant of the zoning requests cannot be affected. by any subsequent appellate review of City's prior denial of the same zoning requests. Otherwise stated, City's grant of the zoning requests is final even if this Court was inclined to disagree with the district court's May 31 Order and uphold City's initial denial of the zoning requests. That's because in Minnesota parties have a. right to settle their disputes regardless of the actual strengths or weaknesses of their respective claims and counterclaims under the law. *See Johnson v: St. Paul Ins. Cos.*, 305 N.W.2d 571; 573-75 (Minn 1981) ("as the parties had equal means of ascertaining what their respective rights were, the courts must uphold any compromise of such rights, 'although a judicial decision should afterwards be made showing that these rights were different from what they supposed them to be, or showing that one of them had no rights at all, and so nothing to forego") (quoting *hall v. Wheeler*, 35 N.W. 377, 377 (1887)): Indeed, whether a settlement is based on what proves to be "good law" or a

avoidable legal decision is irrelevant if the *parties'* settlement is one made in good faith based on what they understand the law to be. *Forcier v. State Farm Mut. Auto. Ins. Co.*, 310 N. W.2d 124, 128-29 (Minn. 1981) (settlement must be upheld *where* "the parties made a good-faith settlement on the basis of what they then understood the law to be").

To hold otherwise would virtually *preclude* municipalities from settling zoning disputes:

Hence, entering judgment on the May 31 Order was not a condition or term that

could be deemed- proper for the district court's dismissal order. Rather, "[o]nce the

[settlement]. stipulation was filed, the trial court had no jurisdiction, thereafter to enter a

judgment, in the case, except *in* accordance with the stipulation: or as otherwise necessary

to close the litigation properly." *Wills v. Red Lake Municipal Liquor Store*; 38.9 N.W.2d 769, 770

(Minn. Ct. App. 1986) (citing *Muellenberg v. Joblinski*, 188 Minn. 398, 400, 247 N.W. 570, 571

(1933)). And the entry of judgment on the May 31 Order *was* neither

a condition "in accordance with" the stipulated settlement nor "otherwise necessary to

close the litigation properly." *Id.*

Even setting aside the mootness bar to its challenge to the dismissal, Task Force can show no undue Prejudice from the dismissal

The only claim of undue prejudice Task Force raises is that, without entry of

judgment of the May 31 Order, Xcel Energy is not required *to* show 'his Court on appeal that City's initial

denial of the zoning requests was unreasonable, arbitrary and capricious. Instead, Task Force complains

that it could be "forced" *to* start a separate action against *City* challenging the grant in of the CUP, and

thus itself have to show that City's granting

of the CUP was unreasonable, arbitrary and capricious, a standard that it finds

"extraordinarily difficult to achieve" and "a burden that belongs to Xcel [Energy], not Intervenor." PLTF Br. at 25-26. Task Force *is* thus complaining about the undue prejudice arising from its required compliance with the standard of review and forum that applies to all challenges to municipal CUP decisions. brought under Minn. Stat. - § 462.361. Trisko, 566 N.W.2d at 352:

There is nothing unduly prejudicial about Task Force having to. start a separate district court. action in which it has the burden of proving that City's rant of the zoning requests was arbitrary and capricious. : This is the precise burden that would have applied if City had granted = instead of denied - Xcel Energy's *zoning* requests in the first place. Task Force fails to explain how it would be prejudiced by having to meet the standards that. are applicable to every other neighborhood challenge to such zoning approvals, including *any* such challenge to City's zoning approval by one of Task Force's own members.. Significantly, Task Force points to no case that supports its claim. of prejudice. ³ Nor can it. There is nothing. about its intervenor status that grants Task Force a

³The cases Task Force cites are *all* inapposite to its claim of prejudice. They either involve the courts (1) vacating a judgment upon insufficient legal notice to an affected *party* (*Erickson v Bennett* 409 N.W.2d 884 (Minn. Ct. App. 1987)); (2) not allowing a settlement and dismissal to prevent a non-settling party from pursuing an independent action or outstanding cross-claim (*Lang v William, Bros. Boiler & Mfg, Co.*, 250 Minn. 521, 85 N.W.2d 412 (1957); *Muirhead v. Johnson*, 232 Minn. 408, 46 N.W.2d 502 (1951)); or (3) granting party status to non-named members of a class- for purposes of appealing a settlement approval (*Devlin v Scardelletti*, *U.S.* , 122 S. Ct. 2005 (2002)). Suffice it to say that Task Force had notice of the settlement, is free (subject to City and Xcel Energy's defenses) to pursue an independent zoning challenge if it so chooses, had no outstanding cross-claim *in* this action; and is not a non-named class member seeking party status in a class action suit..

preferential standard of review. Indeed the fact that it may be forced to try to file a separate challenge has already been determined to be insufficient grounds for finding that the district court abused its discretion by ordering dismissal. . *Thompson v. Northern Realty, Inc.*, No. C6-96-2267, 1997 WL 161854 (Minn. Ct. App. Apr. 8, 1997) (*Xcel App. 262-64*). .

Thompson is on all fours with this case. *Thompson* involved a real estate partner, Thompson, suing her other two partners, Perovich and Rathman, for an accounting of the partnership and a buyout. While Perovich and Rathman were initially united in opposition to Thompson, Rathman eventually reached a settlement with Thompson that resulted in Perovich being stripped of all partnership offices and reduced to a minority shareholder. *Id.* at *1-2: Thompson then moved to dismiss her original action under Rule 41.01(b), which the trial court granted over Perovich's objections. Upon appeal, this Court upheld the dismissal. It noted that once Rathman allied himself with Thompson, the basis for the original buyout action by Thompson ^aagainst Rathman and Perovich was mooted. *Id.* at *3. In addition, any claim Perovich may have had because Thompson and Rathman's settlement reduced him to a minority shareholder was properly pursued in an independent statutory action. *Id.*

The same situation exists here. Once Xcel Energy and City settled their zoning dispute, there was no basis for maintaining the mandamus action. And, having not challenged the reasonableness of the grant here, Task Force's only conceivable challenge to City's grant of the zoning requests is in a separate district court action under Minn. Stag: § 462.361. *Altimus*; 578 N.W.2d at 411.

D. Each of the four Altimus factors supports the Dismissal

Consideration of the four Altimus factors further compels the conclusion that the district court did not abuse its discretion in granting the dismissal as it did.

First, Task Force's effort and expense in preparation of its case before the district court was minimal. Its participation in this suit involved nothing more than moving for intervention and then specifically agreeing that, because *its* interests were aligned with City's initial zoning denials, it would rely on City's arguments to the court. It submitted no brief, except with regard to City and Xcel Energy's motion for dismissal. It, in fact, did *not* even submit its answer until after Xcel Energy had its partial *summary* judgment motions heard and decided, and City and Xcel Energy had settled the case. And, as the district court noted at the July 22, 2002 hearing, it *was* City's counsel not Task Force's counsel that did "everything they could" to protect the interests of homeowners along the lines. PLTF App. 178-79.

Second, there was no excessive delay or lack of diligence by Xcel Energy that would warrant not granting the dismissal. Within *five* months of City's zoning denial, Xcel Energy not only filed its mandamus action, but it also procured the May 31 Order, the settlement with City, and the dismissal.

Third, and most importantly, there is a more than sufficient explanation for Xcel Energy's need of dismissal: it had settled its mandamus action with the only party against whom it could maintain the action. As a matter of law, a mandamus action to obtain zoning approval can *only* be maintained against the zoning authority with jurisdiction over the approval. *See* Minn. Stat. § 586.01 (mandamus *is* issued to compel an entity or

person to perform an act which the law specially enjoins as a duty resulting *from* their office, trust, or station). Once City agreed to grant Xcel Energy's zoning requests and City and Xcel Energy resolved the remaining money issues, the *legal* foundation for maintaining the mandamus action vanished. Indeed the *only* possible action *left* upon acceptance of the settlement did *not* involve Xcel Energy against Task Force, but rather an action by Task Force against City *for* granting the zoning requests.

Fourth and finally, there was *no* pending summary judgment motion that would militate against dismissal. Rather the parties' cross *motions* for summary judgment had already been decided *in* favor of Xcel Energy and against City and Task Force.

The district court's May 31 Order is neither before the Court nor relevant to the correctness of the dismissal. Task Force spent 26 pages of *its* 30-page legal argument on the merits of City's February 5, 2002 denial of the zoning requests, notably the May 31 Order regarding the *same*. But, *as* this Court has already found, the May 31 Order is an unappealable partial summary judgment order. PLTF App. 207-08. Accordingly, Task Force's appeal *of* the May 31 Order *was* dismissed and is not before this Court.

Moreover, the merits *of* the May 31 Order have no bearing on the sole issue in this appeal – i.e., whether the district court abused its discretion in declining to condition its adoption of the dismissal on entry of judgment of the May 31 Order. In other words, City and Xcel Energy were free to resolve their disputes even *if* the May 31 Order was *wrong*..

Johnson, 305 N.W.2d at 573-75; *see also Foreier*, 310 N.W.2d at 128-29.

Regardless, the record clearly, shows. that the May 31` Order was correct in all

respects. None of City's three bases for initially denying the zoning requests is substantiated in the record: See Xcel App. 265-348. And, even though City's automatic grant of the zoning requests is not being challenged, it intuitively follows that if City's denial of the zoning requests was arbitrary and capricious, then its grant of the same must be reasonable, particularly given the deferential review given to municipal zoning decisions. Trisko, 566 N.W.2d at 352:

CONCLUSION

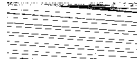
Task Force desperately pleads for this Court's review of City's February 5, 2002 denial of Xcel Energy's zoning requests and, in particular, the district court's May 31 Order reversal of the zoning denial. But, even if the correctness of the May 31 Order was in doubt (though City's grant of the zoning requests reinforces that it is not!), Task Force has given this Court no grounds for reviewing that decision. By virtue of the settlement portion of the dismissal which Task Force does not challenge' City has automatically granted Xcel Energy's zoning requests, thereby mooted any "significance to its prior denial of these requests and the May 31 Order which reversed the denial." And: Task Force can show no undue prejudice from having to challenge City's grant of the zoning requests in the manner and forum dictated by the Legislature - that is, in a separate district court action. Task Force's latest appeal on this line upgrade project must, therefore, be rejected as with each of its prior three *appeals*. *PLTF v. MEQB, No. 62-C3 99=010952* (Minn. 2nd Jud. Dist. Order & Memo. dated Jan. 16, 2001)- (Xcel App. 218 25); *PLTF v. MPUC, 2001 WL 481949* (Minn. Ct. App: May 8, 2001) (Xcel App. 226

28) *NSP v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App.), review denied (Minn.

Sept. 25, 2002) (petition filed by Task Force).

DATED: October 21, 2002

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