



February 26, 2021

City of St. Paul
1400 City Hall Annex
25 W. 4th St.
St. Paul, MN 55102

VIA EMAIL

RE: THE CITY COUNCIL SHOULD REJECT THE SITE PLAN APPLICATION FOR LEXINGTON STATION APARTMENTS SUBMITTED BY ALATUS DEVELOPMENT LLC.

Dear City Clerk and Councilmembers:

We represent the Frogtown Neighborhood Association (FNA) in this matter. The Planning Commission voted on February 5, 2021, to reject the site plan application for this project, primarily pursuant to zoning ordinance § 61.402(c)(1) for its inconsistency with affordable housing provisions of the Comprehensive Plan. The developer, Alatus, has appealed. This memorandum demonstrates that rejection of the application by the Council on the same grounds relied on by the Planning Commission is both legally proper and dictated by the City zoning code.

As described in Section 1 below, Alatus is appealing a finding never made by the Planning Commission. Section 2 rebuts both Alatus's arguments that its site plan application should be approved because it demonstrates compliance with the Comprehensive Plan's affordability provisions and the planning staff position that it complies with the Comprehensive Plan simply because it is a dense project near a transit stop.

Throughout the Commission's discussions, the staff and City Attorney consistently asserted that it would be inappropriate to deny a site plan application based on inconsistency with the Comprehensive Plan and that consideration of affordability was inappropriate in determining whether to approve a site plan. The Alatus appeal does not take either of these positions and instead asserts consistency with the Comprehensive Plan's affordability provisions. Nevertheless, the planning staff and the City Attorney will likely assert the same positions to the City Council. For that reason, and to avoid future disputes over these issues, we rebut the assertions regarding the propriety of Planning Commission considerations of affordability in section 3 and comprehensive plan consistency in section 4 below.

1. Alatus is appealing actions never taken by the Planning Commission.

Preliminary, Alatus's attorney's appeal letter dated 2/11/21 is appealing a purported Planning Commission finding which the Planning Commission never made. The appeal cites and

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addresses a purported written finding #1 of the Planning Commission: *“While the site plan is generally consistent with the applicable policies of the 2040 St. Paul Comprehensive Plan (2020), the Lexington Station Area Plan (200), and the Union Park Community Plan (2016), on balance the site plan is inconsistent with the 2040 Saint Paul Comprehensive Plan (2020) core values of equity, affordability, and sustainability.”* (Italics in appeal letter).

The Planning Commission never made any such finding, nor did it adopt Resolution 21-05, as alleged in the Appeal letter. The Planning Commission Action Minutes describe the only action taken by the Commission: “Commissioner Perryman moved under the authority of the City’s Legislative Code, based on findings 1 and 2, that the application of Alatus Development LLC for a site plan for a 6-story, mixed-use building at 411 and 417 Lexington Pkwy N is DENIED. The motion carried 8-7 (Baker, Edgerton, Hood, Lindeke, Risberg, Underwood with 2 abstentions (Reilly, Yang) on a roll call vote.” Nor is the purported resolution #1 remotely consistent with the comments, at the January 22 and February 5 meetings, of commissioners voting for the motion to deny. It is doubtful that they believe the site plan “generally consistent with the applicable policies” of the Comprehensive Plan. On the contrary, the reference to “finding 1” in the actual resolution is a reference to a required finding in Zoning Code § 61.402(c)(1) that the site plan is consistent with the comprehensive plan and area sub-plans. A vote to deny the application based on that required finding quite obviously represents a finding that the application is **not** consistent with the Comprehensive Plan and sub-area plans. It’s not clear where Alatus got its information about the purported Planning Commission actions.

The Alatus appeal is based in substantial part on the assertion that the purported finding #1 “acknowledges that the Site Plan is consistent with all applicable policies and reaches an unsupported conclusion of inconsistency with the City’s core values.” This memorandum will ignore all references in the appeal to the non-existent finding #1. In section 2 below, it will instead address the argument in the Appeal that the project described in the Site Plan is consistent with the affordability and equity provisions of the Comprehensive Plan because the project will provide 144 units affordable at 60% of AMI.

2. The Site Plan Application does not permit a finding of consistency with the Comprehensive Plan and area plans, and the application must be denied pursuant to Code Section 61.402(c)(1).

Alatus has not provided, and the Planning Commission has not considered facts regarding project affordability sufficient to permit a finding of consistency with the Comprehensive Plan. The appeal rests on Alatus’s argument that the project is consistent with Comprehensive Plan affordability provisions, based on an assertion that the project will provide 144 units affordable at 60% of Area Median Income (AMI) for ten years using Section 4(d) real estate tax break for affordable housing.

The appeal letter is the first time since the filing of the application that Alatus has mentioned 144 units affordable at 60% of AMI, use of 4(d), or a ten-year limit on affordability. There is nothing in the record supporting any of these assertions.

Alatus's application for site plan approval was submitted on December 1, 2020. The Project Narrative includes the following:

The Project creatively supports the desire of area stakeholders to see a wider range in rents within new privately-financed developments, including more units at deeper levels of affordability. Specifically, the Project seeks to reduce construction costs and use new, efficient unit configurations (including affordable co-living suites) in an effort to achieve overall rent levels that will be appealing and attainable to both existing and new community members.

Despite having featured "a wider range of rent" in the supporting narrative, the site plan application has no information about proposed rents or rents by unit size.

At the January 14, 2021, Zoning Committee hearing, the Alatus representative asserted that 155 of the proposed 288 units would be affordable at or below 60% of AMI. However, he declined to provide any specific details on rent levels or unit sizes. The 155 affordable unit assertion at the public hearing differs from the 144 asserted in the appeal, with no explanation. Nor was there any mention of the use of 4(d) or a ten-year limit on any affordability provisions.

A 7/11/19 application for Metropolitan Council funding, which was later withdrawn, and multiple Alatus presentations to community groups and the media call into question Alatus's assertions regarding deeper levels of affordability and rent levels appealing to existing community members. The Metro Council application form specifically said: "We will not accept public housing vouchers as our market rents will not be within the anticipated allowable voucher payment thresholds." The application further asserts that only 12 of the projected 226 units (5%) will have rents "affordable" at 51%-60% AMI. In other forums, Alatus repeated the 12 "affordable" unit proposal while indicating that in exchange, all of the commercial spaces would then be required to pay market rents. Alatus has not explained how the use of Section 4(d) alone would be sufficient to transform 12 affordable units into 144, or 155, or whatever number Alatus comes up with next. The developer's unsupported assertions at the hearing and in the appeal are even more suspect given that the written site plan application submitted only in mid-December discussed affordability without making a claim about 155 or 144 "affordable" units or even providing any data on rents by unit size, despite recognition of the importance placed on this issue by community groups. The Director of Planning has not replied to a January 28, 2021, Data Practices Act request for any communications from Alatus discussing affordability levels in the project.

Housing at 60% of Metro AMI is not "attainable to ...existing...community members" or to St. Paul renters generally. Even if Alatus is proposing 144 units with rents at 60% of AMI, the project would still not be consistent with Comprehensive Plan goals and policies regarding equity and affordable housing. First, units priced above 50% of AMI serve only a tiny portion of renter households in need. The most recent HUD CHAS (Comprehensive Housing Affordability Strategy) data show that 99% of the 13,845 St. Paul renter households currently paying more

than half their income for rent have incomes less than 50% of AMI, and the vast majority have far lower incomes.

These households will not even be able to access the proposed housing with vouchers because, as noted, the Alatus stated position is that the project will not accept vouchers. Nor could voucher holders afford this rent. Many of the “affordable” units will be efficiencies. The St. Paul HRA’s voucher payment standard (the maximum rent it will cover with subsidies) for such apartments is \$915. The current metro area rent at 60% of AMI for one person is \$1086, \$171 more than the payment standard. Voucher holders may not initially pay more than 40% of their income for rent, so a voucher holder would have to be making at least \$ 32,580 to be eligible to use a voucher for an Alatus efficiency apartment.

The City’s severe shortage of truly affordable housing, forcing thousands of households to pay far more than they can afford, has obvious implications for the equity concerns that are a foundation of the Comprehensive Plan. The HUD CHAS data indicate that households of color are three times as likely as white, non-Hispanic households to have severe housing problems. Public decisions that ignore this situation thus have a serious disparate adverse impact on households of color. For the housing to be truly affordable, rent levels at or below 50% and 30% of AMI need to be in place for an extended period. A 10-year agreement is not sufficient to make these affordable units. Finally, the Alatus discussion hinted that the “affordable” units would tiny “micro” units. There is a question if achieving affordability exclusively with such units is consistent with Comprehensive Plan goals and policies.

The staff report was wholly inadequate in its discussion of consistency with the Comprehensive Plan. Planning staff may well insist that, regardless of what Alatus’s appeal says, the project is consistent with the comprehensive plan simply because it is a relatively high-density project adjacent to a transit stop. The 1/7/21 Zoning Committee staff report summarizes the staff argument for consistency with the Comprehensive Plan and sub-area plans as follows:

The site plan meets this finding. The proposed mixed-use project is consistent with the 2040 Saint Paul Comprehensive Plan (2020), the Lexington Station Area Plan (2008), and Union Park Community Plan (2016). Generally, the comprehensive plan encourages transit supportive density and supports growth and development of new housing, particularly in areas identified as Mixed Use, Urban Neighborhoods and/or in areas with the highest existing or planned transit capacity, to meet market demand for living in walkable, transit-accessible, urban neighborhoods. The plan also supports increases in density on valuable urban land and calls for high-quality urban design that supports pedestrian friendliness and a healthy environment, and enhances the public realm.

This summary of the project’s purported consistency with the Comprehensive Plan is based entirely on Comprehensive Plan support for new density in transit-accessible areas. Unfortunately, this approach to finding consistency with the Comprehensive Plan is routinely

employed by city staff and city officials. It involves finding some policy somewhere in the plan which is consistent with the project while ignoring any policies with which the proposed project is inconsistent. Most importantly, the approach ignores the guidance built into the Comprehensive Plan itself as to how the Plan must be interpreted. The guidance in the Plan focuses overwhelmingly on equity.

The very first two sentences of the Plan read as follows:

The 2040 Comprehensive Plan is divided into seven main chapters, each focusing on a specific topic area. The chapters are informed by Saint Paul's **core values**, the **community's priorities**, and the city's **current focus areas**. (emphasis in the original).

The policies set out in the seven chapters are, in other words, to be interpreted in light of the City's core values, community priorities, and focus areas, each of which is directly incorporated into the plan through the links in that first sentence. The very first statement in each of those areas involves equity:

- In Core Values: "**Equity and opportunity**. We are a city where opportunities in education, employment, housing, health and safety are equitably distributed and not pre-determined by race, gender identity, sexual orientation or age; we are a city that creates opportunities for all residents to achieve their highest potential."
- In community priorities: "**Livability, equity and sustainability**. When we asked about regional themes established by the Metropolitan Council, you said livability, equity and sustainability are the most important for Saint Paul." A further community priority: "**Quality affordable housing**. You said we need more affordable housing, and that existing housing must be well-maintained."
- In focus areas: "**Equitable cities** create opportunities for all residents to achieve their highest potential. How Saint Paul grows, develops and invests over the next 20 years must be done in a way that reduces racial disparities in jobs, income, education and homeownership."

Each chapter of the Comprehensive Plan is organized around a few critical goals. The following are the goals most closely related to the fundamental considerations of equity as applied to a rental housing development which is highly accessible to transit options – one-half block from the Lexington Green Line station:

- Land Use chapter: Equitably-distributed community amenities, access to employment, and housing choice.
- Transportation Chapter: A transportation system that supports access to employment, and economic opportunity.

- Housing Chapter: Fair and equitable access to housing for all city residents; and improved access to affordable housing. A large number of specific policies related to goals 3 and 6 are relevant to this project.

The people who most need transit-oriented development to access employment and economic opportunity are lower-income people without reliable cars. The first paragraph in the introduction to the transit-oriented development study quoted at length in The Land Use Chapter of the Comprehensive Plan says: “A primary approach to eTOD [equitable transit-oriented development] is the preservation and creation of dedicated affordable housing, which can ensure that high-opportunity neighborhoods are open to people from all walks of life.”¹ Housing Policy H-37 is to “encourage the development of affordable housing in areas well served by transit.” The Union Park Community Plan, Policy H1.2 is: “Support efforts to develop a wide range of housing affordability levels, promoting more affordable housing along major transit routes including...the Green Line Light Rail Line.”

In relying on comprehensive plan goals supporting higher residential densities near transit to find that the project plans are consistent with the comprehensive plan, the staff ignored all of the Comprehensive Plan goals and policies with which the project conflicts, especially those regarding the city’s desperate need for more affordable housing and the priority of affordability near transit. But the Comprehensive plan’s explicit requirement that the City’s core values, community priorities, and focus areas inform the entire Comprehensive Plan dictates that, in balancing such a conflict, the most weight must be given to Comprehensive Plan goals and policies relating to equity. The staff report has disregarded the most fundamental provisions of the Comprehensive Plan. The City Council must not repeat those errors in determining consistency with the Comprehensive Plan.

3. The City Council may deny a site plan application based on affordability considerations.

Commissioners were repeatedly told by staff that the rent levels and affordability were not relevant to site plan approval during consideration of this project. But Minnesota Statutes Section 462.358 Subd. 11 provides that in approving a “development application,” specifically including one for site plan approval, a city may require developer agreement on affordability requirements. A 2007 letter opinion by the Minnesota Attorney General issued to the City of Forest Lake found that, while the language of the statute could be more straightforward, “it seems clear that municipalities are authorized [by the statute] to require the developer’s agreement” to affordability requirements and that the Legislature intended that cities be able to disapprove a development application for failure to reach an affordability agreement.² As discussed above, the Comprehensive Plan provides a substantial basis for the provision of affordable housing as a requirement of site plan approval.

¹ “Promoting Opportunity Through Equitable Transit-Oriented Development,” by Enterprise Community Partners, cited at length at page 37 of the Transportation Chapter of the Comprehensive Plan. See: <https://www.enterprisecommunity.org/download?fid=7022&nid=3489>

² 10/25/2007 AG letter to Forest Lake City Attorney available from: Library.AG@ag.state.mn.us

Further, the zoning ordinance itself is broad enough to require review as to affordability. Section 61.401(3) requires a review of the “intended use of the zoning lot and all structures upon it.” It’s hard to imagine a broader mandate than review of the intended use. Finally, as described above, affordability concerns are central to the determination of consistency with the comprehensive plan.

4. Inconsistency with the Comprehensive Plan provides legally sufficient grounds for denial of a site plan application.

The Planning Director indicated at the February 5 meeting that staff had reviewed the issue of rejection based solely on inconsistency with the comprehensive plan and concluded that such an inconsistency could legally provide no basis for denial. Alatus does not base its appeal on that principle and does not dispute that consistency with the Comprehensive Plan is required and instead argues that the application is consistent with the Comprehensive Plan. Alatus similarly based its argument for land use permits on the Minneapolis Comprehensive plan in a 2018 case discussed below.

However, the planning staff and City Attorney are likely to again raise the argument in the appeal to the City Council. Therefore it is necessary to demonstrate that the assertions of the staff and City attorney at the Planning Commission are unambiguously contradicted by Minnesota Court decisions dating at least to 1978. Hopefully, this demonstration will prevent future misrepresentations regarding consistency with the comprehensive plan, as required by the zoning code, in reviewing future land use applications.

After opining at the Feb. 5 meeting that inconsistency with the Comprehensive Plan was not required for site plan approval, the Planning Director asked the City Attorney to comment. Mr. Warner responded that comprehensive plans are visionary, not regulatory, tools, that the Comprehensive Plan vision must be put into effect through the adoption of such official controls, and that the City had not yet adopted such controls concerning affordability. He said that denial of the application based on a Comprehensive Plan goal for which no official control has been adopted presents a legal risk.

However, that position is contradicted by multiple Minnesota court decisions, which, since 1978, have routinely upheld city rejections of application for land use permits based on inconsistency with comprehensive plans. The relevant cases have involved the denial of applications for conditional use permits (CUPs) as inconsistent with the comprehensive plan, and the courts have consistently upheld such denials. While the grounds for approval of a site plan and a CUP differ, Mr. Warner’s assertion that comprehensive plans are merely visionary rather than regulatory tools apply to both.

In *Barton Contracting Co. v. City of Afton*, the state Supreme Court upheld the denial of a CUP for gravel mining as inconsistent with a comprehensive plan “permeated with evidence of a strong desire to preserve the rural character and unique scenic beauty of Afton.” 268 N.W. 2d

712,717 Minn. 1978). Note that similarly, as described above, the St. Paul Comprehensive Plan is “permeated” with a strong desire that its public actions advance equity. See also, *Hubbard Broadcasting Co. v. City of Afton*, 323 N.W.2d 757, 763 (Minn. 1982) (special use permits may be denied for reasons related to incompatibility with a comprehensive plan); *C.R. Investments v. Village of Shoreview*, 304 N.W.2d 320,326-2 (Minn. 1981)(municipality may rely on comprehensive plan to deny permit, although in this case the provisions were too vague to provide such a basis). These Supreme Court decisions are routinely cited to support the rejection of land use permit requests. See, *SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264, 267 (Minn. App. 1995), *Rev. den. 1996*; *Anderson v. Winona County Bd. of Commissioners*, 2000 Minn. App. LEXIS 1206 at 4-5; *Kimmel v. Twp. of Ravenna*, 2005 Minn. App. Unpub. LEXIS 581, at 9, 14 (comprehensive plan purpose statements, such as preserving rural quality, are sufficient for denial); *RDNT, LLC v. City of Bloomington*, 2014 Minn. App. Unpub. LEXIS 7, upholding CUP denial on other grounds, 61 N.W.2d 71 (Minn. 2015). See also, *Amoco Oil Co. v. Minneapolis*, 395 N.W.2d 115, 117-11 (Minn. App. 1986)(Citing *Hubbard* for the proposition that an application may be rejected for inconsistency with the comprehensive plan but distinguishing it because, at that time, the City ordinance did not require comprehensive plan consistency for approval of a permit).

As recently as 2018, in *State ex rel. Neighbors for East Bank Diversity v. City of Minneapolis*, 915 N.W.2d 505 (Minn. App. 2018), *rev. den. 2018*, the Court of Appeals analyzed CUP approval on the basis of consistency with the comprehensive plan. A neighborhood group had challenged the City grant of a CUP for an Alatus project. The City ordinance required a finding of consistency with the comprehensive plan, and the issue considered by the Court was whether the City’s finding of consistency was unreasonable or arbitrary. *Id.* at 510 and fn 12.

As in many of the above cases, the St. Paul Ordinance at § 61.402(c) conditions approval of a site plan application on 11 Planning Commission findings, including consistency with the comprehensive plan and related small area plans. The ordinance directs this finding as a condition of site plan approval, and the Minnesota courts have long recognized that a finding of inconsistency is a legally permissible basis for rejection of a land-use application.

The argument of the Planning Commission staff and attorney is further undercut by the fact that Minnesota statutes require a finding of comprehensive plan consistency for approval of variances. § 462.357 subd. 6(2). It is difficult to see how the Legislature could impose such a requirement if comprehensive plans are too “visionary” to act as a legitimate basis for land use decisions.

In fact, in a decision filed on February 10, 2021, the Minnesota Supreme Court rejected contentions raised by the City of Minneapolis similar to those of the Planning staff. Minneapolis argued that the comprehensive plan was simply a statement of policies and goals which could not have actual practical effects on the environment and that subsequent implementing actions would be necessary for such effects to occur. *State of Minnesota by Smart Growth Minneapolis v. City of Minneapolis*, at 19. The Court rejected that argument noting that pursuant to Minn. Stat. 473.858, the comprehensive plan controls a city’s land use

development and that the “comprehensive plan constitutes the primary land use control for cities and supersedes all other municipal regulations.” Id. at 21, Citing *Mendota Golf, LLP v. City of Mendota Heights*, 70 N.W. 2d, 162,175 (Minn. 2006).

In conclusion, the Alatus application has no support in the record for its assertions. It has failed to demonstrate the required consistency with the City’s comprehensive plan and, pursuant to the requirements of the zoning ordinance, the City Council must reject it.

Yours truly,

Jack Cann,
Attorney for FNA