




TO: Council President Amy Brendmoen  
Council Members  
Mayor Melvin Carter

FROM: Lyndsey Olson, City Attorney 

DATE: 5-13-2021

RE: City Attorney Opinion regarding Mayoral Veto of RES 21-632

I am submitting this opinion in response to Council Member Prince's May 6, 2021 request and Council Member Thao's May 10, 2021 request for a published City Attorney Opinion which provides a consolidated public record of previously issued legal advice to Saint Paul City officials in the matter of the Alatus site plan application process, its appeal and the corresponding mayoral veto.

Background:

On December 18, 2020, Alatus filed a site plan application for a 6-story mixed-use building on Lexington Pkwy N. at Fuller Ave. As proposed, the site plan includes: 288 residential units, 3,000 square feet of ground level commercial space, and 254 structured parking spaces. To approve a site plan, the Planning Commission must find that a site plan application "is consistent with" eleven standards set forth under Leg. Code § 61.402(c). Planning staff reviewed Alatus's site plan application and concluded that the application met Leg. Code § 61.402(c) standards and recommended approval subject to certain conditions as forth in the staff report. On January 14, 2021, the Planning Commission Zoning Committee held a public hearing where all parties were afforded an opportunity to be heard. The Zoning Committee recommended approval with conditions by a vote of 5 in favor, 2 against. On February 5, 2021, the Planning Commission disagreed with the staff recommendation and the zoning committee and adopted a resolution by a vote of 8 in favor 7 against to deny the application.

The Planning Commission's denial was based upon two reasons: [1] Leg. Code 61.402(c)(1) requiring consistency with "the city's adopted comprehensive plan and development or project plans for sub-areas of the city; and [2] Leg. Code 61.402(c)(2) requiring consistency with "applicable ordinances of the city."

With respect to Leg. Code 61.402(c)(1), the Planning Commission found that “While the site plan is generally consistent with the applicable policies of the 2040 Saint Paul Comprehensive Plan (2020), the Lexington Station Area Plan (2008), and 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.”

With respect to Leg. Code 61.402(c)(2), the Planning Commission found that the site plan did not meet two design standards for “Traditional Neighborhood” districts set forth under Leg. Code §66.343. In particular, Leg. Code § 66.343(b)(2), entitled “Transitions to lower density neighborhoods” states that “transitions in density or intensity shall be managed through careful attention to building height, scale, massing and solar exposure” and Leg. Code § 66.343(b)(16), entitled “Interconnected street and alley network,” states that “the existing street and alley network shall be preserved and extended as part of any new development. If the street network has been interrupted, it shall be restored whenever possible.”

The Council first heard the appeal (CF APC 21-1) on March 17, 2021. The appeal hearing was then laid over to April 7, 2021. The March 17, 2021 Council file reflects that the Council was advised that the time requirements of Minn. Stat. § 15.99 applied to this case, that the original 60 day deadline had been extended, and that the final date for a determination from the City was April 17, 2021.

On April 7, 2021, the Council adopted a motion of intent to deny the Alatus appeal. On April 14, 2021, a resolution memorializing the Council’s motion of intent was adopted as RES 21-632. The Council’s memorialization resolution outlined the following basis for denying the appeal:

- The Planning Commission did not err when it found the Applicant’s site plan did not meet the 2040 Plan’s core values of equity, affordability, and sustainability. Based upon testimony, the Planning Commission did not err when it found that the site plan did not meet Leg. Code § 61.402(c)(1)’s requirement to consider “the city's adopted comprehensive plan and development or project plans for sub-areas of the city”.
- The Planning Commission did not err when it found that the Alatus site plan did not meet Leg. Code § 66.343(b)(2)’s standard for a “careful transition” in building massing, height, scale, and design transition to those permitted in adjoining zoning districts and that this standard actuated Land Use Policy-29 of the 2040 Comprehensive Plan.
- The Planning Commission did not err when it found that the Alatus site plan did not meet Leg. Code § 66.343(b)(16)’s standard to preserve or extend existing streets as part of any new development.

Subsequently, on April 14, 2021, Mayor Carter vetoed RES 21-632 pursuant to Saint Paul Charter § 6.08 and, as required by § 6.08, included a communication to the Council stating the reasons for the veto. In his letter, Mayor Carter provided several reasons for the veto including:

- The need for significantly more opportunities for families and workers at all income levels to live with dignity in our city.
- The Mayor and Council's shared goal of shared prosperity and affordable housing,
- Site Plan denial stands to create significant challenges to future housing and economic development in our city.
- The project "site plan ... conforms to the underlying zoning of the parcel and requires no variances or conditional use permits from the city".
- The project requires no public funding subsidy.

### **Mayor Carter's Veto of RES 21-632 Is Valid.**

#### 1. The Mayor has veto power over quasi-judicial decisions.

The Mayor exercised his authority under the Charter to veto RES 21-632. The language of the Charter does not limit the Mayor's veto authority. It states "[e]very ordinance or resolution adopted by the council shall be presented to the mayor ...[who] shall either approve the measure or veto it." Charter § 6.08.

A resolution that has not been approved by the mayor (either by signature or failing to sign or veto the measure within five business days) does not take effect. "Any ordinance or resolution ...which has been vetoed may be reconsidered by the council and shall become law if passed by an affirmative vote of at least five (5) members within thirty (30) days of the veto. Any such ordinance or resolution ... which has been reconsidered by the council and repassed shall be deemed approved." Charter § 6.10.

Because of the veto, RES 21-632 was not "approved" by the Mayor and did not take effect. Under the Charter, then, the Council could have reconsidered the matter and overrode the veto by a 5-2 majority.

There is no case law in Minnesota to support a claim that the Mayor's veto is invalid. The Minnesota Supreme Court has, in fact, upheld a mayoral veto of a quasi-judicial action. Although the quasi-judicial nature of the council action was not an issue raised in *Green's Bar Inc. v. Johnson*, 275 Minn. 471, 147 N.W.2d 686 (1967), the issue decided in that case was whether the veto power of the Mayor of the City of Duluth applied to a resolution of the Duluth City Council purporting to grant an application for an on-sale liquor license which is a quasi-judicial decision. The Court held that the governing body of the City of Duluth, within the meaning of Minn. Stat. § 340.11, Subd. 4 (providing that on-sale liquor licenses shall be granted 'by the respective local governing bodies of the various municipalities of the state'), is the City Council exercising delegated authority in the manner fixed by the charter of the City of Duluth. That authority is, by

ordinance or resolution, approved by the Mayor or, in the event of a veto, made effective by an overriding vote of not less than six of the nine members of the City Council. Quasi-judicial decisions are not exempt from a mayoral veto. Further, there is case law from outside of Minnesota addressing mayoral vetoes of quasi-judicial decisions. With one exception<sup>1</sup>, those cases address specific statutory preemption, or jurisdiction-specific charter language. No specific language exists in statute or Saint Paul Charter that would invalidate mayoral veto of a quasi-judicial decision of the Council in St Paul. See *Miami-Dade Cty. v. City of Miami*, No. 3D20-1195, 2020 WL 7636006, at \*6 (Fla. Dist. Ct. App. Dec. 23, 2020); *Detroit City Council v. Detroit Mayor*, 283 Mich. App. 442, 453, 770 N.W.2d 117, 123 (2009); *D.R. Horton, Inc.--Jacksonville v. Peyton*, 959 So. 2d 390, 397 (Fla. Dist. Ct. App. 2007).

## 2. The Municipal Planning Act does not preempt a mayoral veto.

The Alatus appeal came to the Council from the Planning Commission. The statute cited in RES 21-673 (titled: *Clarifying the City Council's sole authority to review appeals from the Zoning Code*), regulates the "board of appeals and adjustment." Creation of a board of appeals and adjustment is required Minn. Stat. § 462.354, Subd. 2. That subdivision is not applicable to the Planning Commission or to appeals from Planning Commission decisions. The Planning Commission, rather, is established under Minn. Stat. 462.354, Subd. 1, which enables municipalities to establish a "planning agency." The City of Saint Paul's planning agency is created pursuant to Minn. Stat. 462.354, Subd.1 (2), which states that the planning agency "may consist of a planning department with a Planning Commission advisory to it and shall function as a department advisory to the governing body and the municipal administration." The Planning Commission was then established by Chapter 107 of the Administrative Code as required by the Saint Paul City Charter.

The statutory language enabling the creation of the Planning Commission does not preempt the Mayor's veto, which is exercised pursuant to Saint Paul City Charter § 6.08. Specifically, Minn. Stat. § 462.354, Subd. 1 states a municipality may create a Planning Commission which shall be advisory, except as other powers and duties are imposed on it by sections 462.351 to 462.364, by statute, by charter, or by ordinance consistent with the municipal charter. Therefore, even if the legislative code could be viewed as in conflict with and supersede provisions the Charter (which it cannot), the Municipal Planning Act does not allow the ordinance regulating the Planning Commission to be inconsistent with the City's Charter.

Furthermore, even if the Council were sitting as a "board of appeals and adjustment" when it made its determination on the Alatus appeal, the argument in RES 21-673 fails because it ignores that part of Minn. Stat. § 462.354, Subd. 2 which states that a governing body "may, except as otherwise provided by charter, provide that the decisions of the board on matters within its jurisdiction are final subject to judicial review or are final subject to appeal to the council and the right of later judicial review or are advisory to the council."

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<sup>1</sup> *Tombs v. King County Wash.* 741 P.2d 1047 (1987), holding that county executive lacked authority to veto ordinance rezoning property. This case has not been cited by any court, including in the State of Washington.

There is one instructive Minnesota case on the interpretation of veto authority under a home rule charter and whether that authority is preempted by statute. In *A. C. E. Equip. Co. v. Erickson*, 277 Minn. 457, 458, 152 N.W.2d 739, 740 (1967), a developer challenged a rezoning denial where the Mayor of Minneapolis vetoed the Council's grant of rezoning and the Council was unable to override the veto. The Plaintiff in that case argued that Minn. Stat. § 462.18 (Minn. 1961)<sup>2</sup> which empowered cities to regulate "by and through its governing body," meant that the Mayor could not veto a decision by the Council pursuant to an ordinance adopted by the governing body. The Minnesota Supreme Court rejected that argument explaining that the legislature had issued an explicit grant of power but had not dictated the method that the local body should utilize while exercising that power. The Court further explained that the Minneapolis charter specifies how Minneapolis must operate in order to pass an ordinance, and the general statute must give way to the specific legislation. *Id.* at 740. A mayoral veto is consistent with the Saint Paul Charter and the Municipal Planning Act.

3. APC 21-1 was not a final decision on a Planning Commission appeal, and not a final action of the Council subject to mayoral veto.

On April 7, 2021, the Council considered Council file APC 21-1 and adopted a "motion of intent" to deny Alatus's appeal of the Planning Commission's decision denying its site plan application. This motion of intent was not a final action of the Council. Pursuant to § 6.01 of the City Charter, the Council can act only by resolution or ordinance. Further, consistent with the Charter and specifically regarding zoning appeals, the City's zoning code requires that the final decision be by resolution: "All final decisions, orders, requirements or determinations by the board of zoning appeals, Planning Commission, and/or city council shall be in the form of a written resolution." Leg. Code § 61.704. Therefore, following any motion of intent, the Council must (and did) adopt a resolution in order to memorialize the motion of intent. Only an ordinance or a resolution is an official action of the Council, and all ordinances and resolutions are subject to mayoral veto. Consistent with the Charter, the Mayor exercised his ability to veto that resolution.

4. The Mayor's veto simply nullified the Council's action.

Under Minn. Stat. § 15.99, the City has at most 120 days to make a final decision on a request related to zoning. In the Alatus site plan application, that deadline was April 17. Interpreting a similar charter provision, the court in *Green's Bar* explained regarding a liquor license application:

There is no way under that charter by which the city council can grant an on-sale liquor license except by ordinance or resolution. There is no way by which such ordinance or resolution can be made effective without first being submitted to the mayor for his approval or disapproval. And, if the mayor, by the terms of this same charter, expresses disapproval of the ordinance or resolution granting a liquor license by the exercise of his charter-granted veto power, there is no way by which

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<sup>2</sup> 462.18 to 462.23. Repealed by Laws 1965, c. 670, § 14, eff. Jan. 1, 1966, renumbered and replaced by the Municipal Planning Act.

the ordinance or resolution granting the license can be made effective 'unless the Council \* \* \* shall by a vote of not less than six (6) of the members thereof resolve to override the Mayor's veto.'

*Green's Bar Inc. v. Johnson*, 275 Minn. 471, 473–74, 147 N.W.2d 686, 688 (1967).

In the case at hand, the veto nullified the action of the Council. "The executive's veto power is a power to nullify legislation, not the power to enact new laws or to recall or modify old laws." 82 C.J.S. Statutes § 66 (citations omitted). Such is the case here. The Mayor's action did not enact a resolution. He lacks that authority to enact a resolution or an ordinance. Rather, the Mayor exercised his authority to require five, rather than four, votes to adopt RES 21-673. The intervening deadline created by the timeline requirement in Minn. Stat. § 15.99 prevented, by operation of law, any opportunity the Council could have otherwise had to exercise its authority under the Charter to override that veto. Therefore, the Alatus application is granted – not by mayoral veto - but by the operation of Minn. Stat. § 15.99 which declares that "failure of an agency to deny a request within 60 days is approval of the request." For that reason, the "arbitrary and capricious" standard is inapplicable to the Mayor's decision because he did not grant or deny a zoning request.

The veto does not resurrect the Planning Commission's decision. City ordinances give applicants the right to appeal decisions of the Planning Commission to the City Council. See, Leg. Code § 61.702. All "final" decisions must be by resolution. A resolution cannot be a final decision if it does not take effect. "Resolutions shall become effective upon passage by the council and approval by the mayor or council override of a mayoral veto. Charter § 6.07. Much like a contract is construed against its drafter, a zoning ordinance "should be construed strictly against the city and in favor of the property owner. *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980). A property owner who appeals a decision is entitled to a decision on that appeal. There is no provision in ordinance or Charter that takes away Alatus's right to appeal. If a veto resulted in a reversion to the Planning Commission's decision, it would effectively deny Alatus the due process provided by the City zoning code.

In light of the foregoing, the Mayor's veto of the Council resolution in this matter is a valid exercise of his authority under the City Charter. By operation of law under Minn. Stat. § 15.99, the Alatus request is approved.