



**League of Minnesota Cities  
Insurance Trust**

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May 15, 2007

David Hebert, Esq.  
Hebert & Welch  
20 Lake Street North  
Suite 301  
Forest Lake, MN 55025

Dear Mr. Hebert:

I write in response to your inquiry regarding city authority to mandate affordable housing.

The question presented is whether the city has authority to mandate affordable housing requirements as part of the development approval process. This arises in the context of the city's efforts to update its comprehensive plan, especially with regard to affordable housing. My understanding is that the prototypical application of such authority would be a requirement that a certain percentage of a given development be dedicated to affordable housing.

A number of interested groups have participated in the planning process. Housing advocacy groups have urged the city to adopt land use controls mandating affordable housing. You have previously advised the city that you believed the city did not have authority for such a mandatory provision. You have requested that I provide a second legal opinion on this issue. I agree with your assessment for the reasons set forth below.

It is arguable that the city formerly had broad authority to mandate affordable housing, but recent statutory amendments have made clear that any affordable housing requirements must be a result of a voluntary agreement with a developer.

Housing advocates, including the Metropolitan Interfaith Council on Affordable Housing ("MICAH"), have pointed to a 2001 letter from AAG Ken Raschke to the City of St. Cloud opining that cities probably had authority to institute mandatory affordable housing ordinances. Mr. Raschke's letter<sup>1</sup> relies on the general provisions of Minn. Stat. 462.358, subd. 1a, which

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<sup>1</sup>This letter is often referred to, incorrectly, as an Attorney General's Opinion. Formal legal opinions of the Attorney General are authorized by Minn. Stat. §8.07 and are published under a formal citation system. Formal opinions are entitled to significant deference but are not dispositive and are not binding on the courts. *Village of Blaine v. Independent School Dist. No. 12, Anoka County*, 272 Minn. 343, 138 N.W.2d 32 (Minn. 1965).

include:

Subd. 1a. Authority. To protect and promote the public health, safety, and general welfare, to provide for the orderly, economic, and safe development of land, to preserve agricultural lands, to promote the availability of housing affordable to persons and families of all income levels,

However, the discussion of these issues in St. Cloud triggered activity in the state legislature. The legislature subsequently passed 2002 Session Law Ch. 315, codified at Minn. Stat. 462.3358, subd. 11. That statute provides:

Subd. 11. Affordable housing. For the purposes of this subdivision, a "development application" means subdivision, planned unit development, site plan, or other similar type action. If a municipality, in approving a development application that provides all or a portion of the units for persons and families of low and moderate income, so proposes, the applicant may request that provisions authorized by clauses (1) to (4) will apply to housing for persons of low and moderate income, subject to agreement between the municipality and the applicant:

- (1) establishing sales prices or rents for housing affordable to low- and moderate-income households;
- (2) establishing maximum income limits for initial and subsequent purchasers or renters of the affordable units;
- (3) establishing means, including, but not limited to, equity sharing, or similar activities, to maintain the long-term affordability of the affordable units; and
- (4) establishing a land trust agreement to maintain the long-term affordability of the affordable units.

Clauses (1) to (3) shall not apply for more than 20 years from the date of initial occupancy except where public financing or subsidy requires longer terms.

While the addition of Subdivision 11 does provide explicit authority to address housing issues, it also narrows the previously open-ended general authority provided by Subd. 1a. The statute stresses that local housing requirements may apply only upon the applicant's request and subject to agreement.

Furthermore, mandating affordable housing seems to present the potential for a regulatory taking under the Supreme Court's *Nollan/Dolan* line of cases. In *Nollan v. California Coastal Commission*, the Court held that while the government did have the power to attach conditions to a land use approval, the conditions must be related to a remedying a circumstance that would

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As a former Assistant Attorney General, I can tell you that formal opinions are quite rare. The vast majority of inquiries receive an informal response, often in the form of a letter. While these usually provide excellent legal analysis, they carry no further legal weight. Mr. Raschke's 2001 letter is one such informal response; it has not been published as a formal opinion.

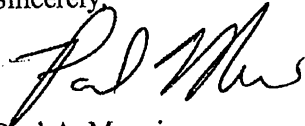
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provide a valid a government purpose to prohibit the use. The proposed affordable housing dedication would have to bear a rough proportionality to some harm or burden created by the development.

My opinion only addresses the interpretation of Minn. Stat. §462.358 on mandating affordable housing, and does not address other legal requirements or tools. The city still has considerable influence to encourage affordable housing through voluntary agreements. The development process is quite negotiable and the city may offer a number of incentives such as waiver of fees, tax increment financing, and applications for grants or other funding.

I hope this is useful to you. If you have any other questions, do not hesitate to ask.

Sincerely,

A handwritten signature in black ink, appearing to read "Paul Merwin". The signature is written in a cursive, flowing style.

Paul A. Merwin  
Attorney at Law

PAM/smk

cc: Mr. Doug Borglund