

STATE OF MINNESOTA

DISTRICT COURT

COUNTY OF HENNEPIN

FOURTH JUDICIAL DISTRICT

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File No. 27-CV-16-17020

State of Minnesota *ex rel.*,  
Neighbors for East Bank  
Livability, a Minnesota nonprofit  
corporation; and Neighbors for  
East Bank Livability, a Minnesota  
nonprofit corporation,

CASE TYPE: Declaratory  
Judgment/Injunction

The Honorable Daniel C. Moreno

Plaintiffs,

v.

City of Minneapolis, a Minnesota  
municipal corporation; and Alatus,  
LLC, a Minnesota limited liability  
company,

**MEMORANDUM OF LAW IN  
SUPPORT OF MOTION FOR  
SUMMARY JUDGMENT ON  
VERIFIED COMPLAINT COUNTS I  
AND V**

Defendants.

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**INTRODUCTION**

Before the Court are challenges asserted by Plaintiff Neighbors for East Bank Livability (“NEBL”) to two land-use decisions of Defendant City of Minneapolis. The first challenge concerns the City’s grant of a conditional use permit (“CUP”) to Defendant Alatus permitting an increase in the maximum height of a building on the Property from four (4) stories (or fifty-six (56) feet) to forty-two (42) stories (or four-hundred and eighty-three (483) feet, four (4) inches). The second challenge concerns the City’s grant of a variance to Alatus increasing the floor area ratio (“FAR”) of the Property from 2.04 to 14.42 (a seven-hundred percent (700%) increase) (collectively, the CUP Application and the Variance Application are referred to as the “Applications”). NEBL requests summary judgment on its declaratory judgment claim that the City disregarded its own policies, codes, and rules; disregarded state law; and acted arbitrarily,

capriciously, and without a rational basis when it approved the Applications. NEBL further requests summary judgment on its injunction claim seeking a permanent injunction against the City to deny the Applications.

In approving the CUP, the City impermissibly violated its own regulations and codes. By way of example, § 525.340 of the Minneapolis City Code requires that an application for a conditional use permit must be consistent with the Minneapolis Comprehensive Plan (the “Comp Plan”). The City-approved Marcy-Holmes Small Area Plan, which is incorporated within the Comp Plan, states that residential development on the site proposed to be developed cannot exceed fifty (50) to one-hundred and twenty (120) dwelling units per acre (du/acre). Nevertheless, the Alatus Project contemplates a density of 268.2 du/acre, more than double the maximum amount permitted by the Small Area Plan. In addition, while City ordinance and the City’s Comp Plan require that a project necessitating a conditional use permit must be of the same or similar scale and character as the surrounding uses and buildings, the Project would be the tallest structure on the East Bank of Minneapolis by one-hundred and seventy (170) feet. The modern glass tower would contrast starkly with other buildings in the nationally-designated St. Anthony Falls Historic District (the “Historic District”) and would represent an extension of downtown Minneapolis into the East Bank.

The Project also flouts the City’s Historic District Guidelines. The Project seriously threatens the already weakened Historic District. Significantly, the existing taller structures located on the East Bank within the Historic District were constructed more than 25 years *before* the City adopted the Historic District Guidelines, which were designed to protect the Historic District. Furthermore, although City ordinance and the Comp Plan mandates the protection of historic resources, the Project would loom and cast significant shadow over the adjacent, historic

two (2)-story Pillsbury Library and the historic one (1)-story Ard Godfrey House. The Court should declare that the City's grant of the CUP Application was unreasonable and contrary to law.

The City's grant of the Variance Application violates the fundamental rule that there must be practical difficulties rendering the nonconforming property unique before a variance may properly be granted. Property owner-created hardships and economic considerations are not considered practical difficulties that justify granting a variance. *See generally Continental Property Group, LLC v. City of Wayzata*, No. A15-1550, 2016 WL 1551693 (Minn. Ct. App. Apr. 18, 2016). There is nothing truly unique about the proposed development site. Plenty of other properties in the City are subject to restrictive FAR policies similar to those applicable here. That the City and the developer may have economic interests in a massive high-rise tower is not sufficient to satisfy either the municipal ordinance, or the governing state variance statute. The Court should declare that the City acted arbitrarily and capriciously when it granted the Variance Application.

## FACTS

### I. THE HISTORIC DISTRICT AND AREA SURROUNDING THE PROJECT SITE.

The Alatus Project concerns the land situated at 200 Central Avenue SE and 113 2<sup>nd</sup> St. SE, both in Minneapolis, Minnesota (the "Site"). Affidavit of Gary A. Van Cleve ("Van Cleve Aff.") dated March 27, 2017 Ex. A p. 2. The Site is at the intersection of Central Ave. SE and 2<sup>nd</sup> Street SE. *Id.* at p. 2. Significantly, the Site is only a 0.8 acre parcel. *Id.* at p. 1. The Site falls within the C2 zoning district, and thus has a maximum FAR of 2.04. *Id.* at p. 1. The buildings presently situated on the Site include the 1929 Commercial Club, which housed for many decades the Saint Anthony Commercial Club (the "Commercial Club"); a garage addition to the Commercial Club constructed in 1955; and the Saint Anthony Athletic Club building

constructed in 1966 (the “Athletic Club”). *See* Van Cleve Aff. Ex. B p. 1. The Project contemplates demolition of these buildings to make way for Alatus’s tower. *Id.*

The Site is in the St. Anthony Falls Historic District (“the Historic District”). Van Cleve Aff. Ex. A p. 2. The Site is also located in the University Avenue Transition Area (the “Transition Area”) within the Water Power Character Area. Van Cleve Aff. Ex. C p. 9. “The buildings [in the Transition Area] ranged in height from three stories to one and a half stories, which provided a transition from the height of the milling and industrial buildings along Main Street.” Van Cleve Aff. Ex. P p. 126. The primary building materials in the Historic District were brick, stone, and concrete. *Id.* at p. 68.

The historic, two (2)-story Pillsbury Library would be located just sixteen (16) feet from the Project. Van Cleve Aff. Ex. C p. 11. In addition, Chute Square and the historic one (1)-story Ard Godfrey House would be across the street from the Project. *Id.* at p. 3; Van Cleve Aff. Ex. D p. 7.

The tallest building in the immediate vicinity of the Project is the Winslow House, at twelve (12)-stories (one-hundred and eighty (180) feet). Van Cleve Aff. Ex. D p. 2. The tallest building on the East Bank is the LaRive Condos building (approximately 775 feet from the Site), at twenty-nine (29) stories (three-hundred and ten (310) feet). *Id.* Immediately below is a table comparing the Project proposed by Alatus with other buildings in the vicinity.

**TABLE 1**

	<b>Height</b>	<b>Difference from Project Height</b>	<b>Ratio to Project Height</b>	<b>Distance from Site</b>
<b>PROPOSED PROJECT</b>	483 feet			
<b>Historic Pillsbury Library</b>	53 feet	<b>-430 feet</b>	11% of Project height	16 feet
<b>Adjacent Parking Garage</b>	98 feet	<b>-385 feet</b>	20% of Project height	--

<b>Winslow House</b>	180 feet	<b>-303 feet</b>	37% of Project height	Appx. 150 feet
<b>The Falls and the Pinnacle</b>	287 feet	<b>-186 feet</b>	59% of Project height	Appx. 0.3 miles (1,584 feet)
<b>LaRive Condos</b>	310 feet	<b>-170 feet</b>	64% of Project height	775 feet

(Data based on public records and Google Maps searches, as well as staff report.)

*Id.*

## **II. BUILDINGS CURRENTLY SITUATED ON THE PROJECT SITE.**

The Commercial Club was erected in 1929 as the clubhouse of the Saint Anthony Commercial Club, which was active from approximately 1905 to 1973. Van Cleve Aff. Ex. C p. 2. The Commercial Club is a one (1)-story, L plan building with prominent cross gables clad with wood shingles, demonstrating the original Tudor Revival style design. See *id.* at p. 3. The Commercial Club building comprises only a fraction of the Site. Although some alterations to the Commercial Club have been made since its original construction, the Commercial Club retains features reflecting the original intent of the architect and thus retains its historical integrity. *Id.*

The Commercial Club is likely eligible as a historic landmark under both local and National Register criteria. *Id.* at pp. 1-2. The Commercial Club was constructed during the period of significance of the Historic District. *Id.* at p. 2. In addition, “commerce” is an area of significance for the Historic District and the SACC was specifically established to promote commerce on the “East Side” in Minneapolis (i.e., within St. Anthony). Van Cleve Aff. Ex. C p. 2. According to a historical assessment prepared by Hess, Roise and Company in June 2012, the Commercial Club stands as a “physical manifestation of the organization’s significance.” *Id.* (quoting Hess Roise report at 2). Two separate historical studies, the first prepared by Hess Roise and the second prepared by Amy M. Lucas, have concluded that the Commercial Club

likely qualifies as a local landmark under multiple areas of significance. Van Cleve Aff. Ex. S. p. 2; Van Cleve Aff. Ex. T p. 36.

Minneapolis City Staff have acknowledged that the date of construction of the Commercial Club renders it a contributing building to the Historic District. Van Cleve Aff. Ex. C p. 2. This means that demolition of the Commercial Club would undermine the Historic District. As explained by Denis Gardner, a National Register Historian with the State Historic Preservation Office, with historic districts, it is the collection of buildings within the district that is primary; no one building need rely solely on its own historic integrity. *Id.* at pp. 3-4. To a substantial degree, properties within historic districts rely upon the historic integrity of each other. *Id.* Consequently, the loss of the Commercial Club would do substantial and irreparable damage to the Historic District, causing further deterioration to its character and integrity. *Id.* at p. 4.

### **III. ALATUS'S PROPOSED HIGH-RISE DEVELOPMENT.**

The Project proposed by Alatus, LLC is a forty-two (42) story residential tower with two-hundred and fourteen (214) apartment units and an approximate 6,500 square foot retail space on the ground floor. Van Cleve Aff. Ex. A, p. 2. The proposed density of the Project is 268.2 du/acre. *Id.* at 6. The commercial space would occupy most of the Central Avenue frontage. *Id.* The Project construction would utilize primarily glass and steel exterior materials. *Id.* at p. 10; *see also* Van Cleve Aff. Ex. E. The Project would include approximately four-hundred (400) parking spaces. Van Cleve Aff. Ex. A, p. 2. The parking spaces would be located in three (3) levels below-grade in addition to the first four (4) levels of the building. *Id.*

The Project would be four-hundred and eighty-three (483) feet four (4) inches at the tallest part of the building. *Id.* The thirty-seven (37) story tower would sit on a podium that would comprise the first four (4) stories plus an amenity level. *Id.* The footprint of the podium

would occupy most of the Site. *Id.* at p. 3. The Project would be the eleventh tallest building in Minneapolis; the ten (10) tallest buildings are all located downtown. Van Cleve Aff. Ex. C p. 11. It is undisputed that the tower would block views of the Pillsbury Library. Van Cleve Aff. Ex. A p. 7. In addition, the Project would cast shadows on Pillsbury Library and on nearby Chute Square for a significant portion of the year. *See* Van Cleve Aff. Ex. R.

Most vehicle access to the Project would occur from 2nd St. SE. Although Central Ave. SE is a commercial corridor, 2nd St. SE is not a commercial corridor. *See* Van Cleve Aff. Ex. F p. 9. Traffic coming into and out of the Project will result in a substantial intensification of concentrated traffic on 2<sup>nd</sup> St. SE. *Id.*

#### **IV. THE CITY IMPROPERLY DENIES NEBL'S PETITION FOR AN EAW, THEREBY LIMITING THE INFORMATION AVAILABLE ABOUT THE PROJECT'S ADVERSE CONSEQUENCES.**

On or about April 4, 2016, NEBL sent a formal petition to the Minnesota Environmental Quality Board (“EQB”) seeking an environmental assessment worksheet (“EAW”) for the Project (the “EAW Petition”). Van Cleve Aff. Ex. F. An EAW is defined as a “brief document which is designed to set out the basic facts necessary to determine whether an EIS [Environmental Impact Statement] is required for a proposed action.” Minn. Stat. § 116D.04, subd. 1a. In the EAW Petition, NEBL asserted that the Project met the threshold requirements for an EAW under Minnesota Rules Part 4410.4300, subp. 19(C). Van Cleve Aff. Ex. F p. 1. NEBL argued that the Project was inconsistent with numerous elements of the City’s Comp Plan, including portions of Chapter 1 (Land Use), Chapter 8 (Heritage Preservation), and Chapter 10 (Urban Design). Van Cleve Aff. Ex. F pp. 2-7. NEBL similarly contended that the Project was inconsistent with the Historic District Guidelines, including Water Power Character Area massing standards and policies. *Id.* at pp. 7-8. NEBL also asserted that an EAW was appropriate pursuant to Minnesota Rules part 4410.1100, subpart 1, because the Project has the

potential for significant environmental effects. *See id.* at pp. 8-10. NEBL pointed to the damage that may result to adjacent historic structures; the shadowing that would result to nearby historic properties; the concentration of traffic, and the inevitable increase in noise and dust. *Id.* In support of the Petition, NEBL offered material evidence demonstrating that the Project had potential for significant environmental effects. *See Van Cleve Aff. Ex. F* attachments A-K.

The EQB designated the City to review the EAW Petition on April 5, 2016. On the recommendation of the City Zoning and Planning Committee, the City Council denied the EAW Petition on or about April 21, 2016, determining that the Project was exempt from a mandatory EAW. *Van Cleve Aff. Ex. A* p. 2.

**V. THE MINNEAPOLIS HERITAGE PRESERVATION COMMISSION REFUSES TO ISSUE ALATUS A CERTIFICATE OF APPROPRIATENESS TO CONSTRUCT THE PROJECT.**

Because the Project was proposed in the Historic District, Alatus was obliged to seek a Certificate of Appropriateness from the Heritage Preservation Commission (“HPC”) to construct the Project. The HPC has the power and duty to, among other things: interpret and administer the provisions of the Heritage Preservation Regulations, and hear and decide applications for a certificate of appropriateness. Minneapolis Code of Ordinances § 599.120(b). Although City Staff recommended that the HPC grant the Certificate of Appropriateness for construction of the Project, the HPC denied the Certificate. In support of its denial, the HPC made six findings:<sup>1</sup>

1. The building would not be compatible with the adopted guidelines;

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<sup>1</sup> *See* <http://www.minneapolismn.gov/meetings/hpc/WCMSP-179540>. NEBL respectfully requests that the Court take judicial notice of the HPC’s denial of the Certificate of Appropriateness for construction of the building pursuant to Minnesota Rule of Evidence 201(b)(2) (permitting the Court to take judicial notice of facts that are “capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.”). *Cf. Swanson v. City of Bloomington*, 421 N.W.2d 307, 312-13 (Minn. 1988) (stating circumstances when supplementation of record appropriate).

2. The scale and height is not consistent with the guidelines;
3. The building is not compatible with the historic district;
4. The setbacks to the adjacent contributing property are deficient;
5. A taller building detracts from the historic structures; and
6. Impacts to natural environment also needs [sic] to be considered e.g. Mississippi River flyway for birds.

Alatus subsequently appealed the decision denying the Certificate of Appropriateness for construction of the Project. On July 17, 2016, the City Council approved Alatus's appeal and reversed the HPC decision denying the Certificate of Appropriateness to construct the forty-two (42)-story tower. *See Van Cleve Aff. Ex. A p. 3.*

#### **VI. THE CITY GRANTS ALATUS A CONDITIONAL USE PERMIT AND VARIANCE FOR THE PROJECT.**

On or about July 18, 2016, Alatus filed applications for, among other things, (1) a CUP to increase the maximum allowable height of a building on the Property from four (4) stories (56 feet) to forty-two (42) stories (or four-hundred and eighty-three (483) feet, four (4) inches); and (2) a variance to increase the FAR of the Property from 2.04 to 14.42 (a seven-hundred percent (700%) increase from the governing FAR). *See Van Cleve Aff. Ex. G.* The Department of Community Planning and Economic Development (the "CPED") prepared a staff report analyzing the Applications, dated August 29, 2016. *See generally Van Cleve Aff. Ex. A.* CPED recommended that the City Planning Commission (the "Commission") approve the Applications, making various "findings" in support of the issuance of the CUP and variance. The pertinent findings are contained on pages 3-8 of the CPED Report. *Id.*

Numerous comments were submitted by concerned citizens opining that the Project was out of scope with the surrounding neighborhood and with the Historic District. *See Van Cleve Aff. Exs. H-J.* Nevertheless, on August 29, 2016, the Commission approved the Applications.

*See Van Cleve Aff. Ex. K* pp. 1-2. The City Standing Committee on Zoning and Planning considered NEBL's appeal of the Commission's approvals on September 29, 2016. *See Van Cleve Aff. Ex. L*. The Standing Committee made seven "Findings of Fact" in support of its recommendation that the City Council deny NEBL's appeal, specifically:

1. "The proposed findings of fact contained in the staff report prepared and presented by the Community Planning and Economic Development Department are hereby adopted in full and incorporated by reference. The Committee also makes the following additional findings below."
2. "State law states that '[v]ariiances shall only be permitted when they are in harmony with the general purposes and intent of the ordinances and when the variances are consistent with the comprehensive plan.' Minn. Stat. § 362.357, subd. 6(2). Therefore, a variance allows departure from a zoning regulation that, while generally appropriate, is unduly restrictive and inconsistent with the City's development guidance as applied to a specific parcel. The proposed mixed-use project at issue is consistent with the intent of the zoning regulations and the goals of the City's Comprehensive Plan."
3. "The project site is uniquely situated in the City based on the confluence of designated land use features and adopted policy guidance that encourages very high density redevelopment, including the location in the East Hennepin Activity Center, near the Downtown Growth Center, and on a major transportation and transit corridor. The restrictive FAR limits for the C2 zoning district generally considered in conjunction with this expansive land use guidance is unique because it does not apply to the majority of commercially-zoned land or to all land guided for mixed use in the City."
4. "The siting is also contextually unique because there are only two other structures on the entire block. There is the former Pillsbury Library, which is a contributing property to the St. Anthony Falls Historic District, and an adjacent 9-level parking ramp that has recently been upgraded. Both structures, therefore, are likely to be relatively permanent components of this block and the urban landscape going forward. The total block area is 110,089 square feet. When the proposed mixed-use project is considered in this

context, the FAR for this block would be approximately 7.11.”

5. “The variance request is reasonable because the proposed building is similar in density and size to others in the area and is consistent with the expressed goals of the Comprehensive Plan for dense development in Activity Centers, near Growth Centers, and along major transit corridors. The magnitude or percentage increase in FAR allowed by a variance is irrelevant if the result is reasonable.”
6. “It is not the City’s intent to completely prohibit tall tower construction outside of downtown. FAR and height are inherently related. The fact that the Zoning Code authorizes a CUP to consider requests to increase height is a recognition that there is a desire and need for contextual and site-specific flexibility in considering taller buildings outside of downtown that will require an [sic] FAR variance unless it’s proposed on an unusually large parcel of land. The proposed project correspondingly meets the required findings for both a CUP to increase height and an [sic] FAR variance.”
7. “The Marcy Holmes neighborhood in which this project is located officially voted to support the development proposal.”

Van Cleve Aff. Ex. L pp. 2-3 ¶¶ 1-7. Thereafter, the Minneapolis City Council considered NEBL’s appeal on October 7, 2016. *See* Van Cleve Aff. Ex. M p. 1035. The City Council voted to deny NEBL’s appeal. *Id.* The City Council did not adopt the Findings of Fact of the Standing Committee or the findings contained in the City Staff Report when it voted to deny NEBL’s appeal. *Id.* The official action of the City Council denying NEBL’s appeal was published on October 15, 2016. Van Cleve Aff. Ex. N. No findings were made in support of the denial. *See id.*

In this action, NEBL asserts that the City’s grant of the CUP and the variance Applications was not based upon factually or legally sufficient grounds. V. Compl. ¶ 56. NEBL contends that the City improperly disregarded its own policies, codes, and rules, and further

disregarded state law, and acted arbitrarily, capriciously, and without a rational basis. *See* V. Compl. ¶¶ 54-62. NEBL seeks a declaratory judgment invalidating the City’s grant of the CUP and the variance. V. Compl. Prayer for Relief ¶¶ 1-2; V. Compl. Count I. NEBL further prays for permanent injunctive relief directing the City to deny the Applications. V. Compl. Prayer for Relief ¶¶ 5; V. Compl. Count V.

## **VII. REGULATORY CONTEXT.**

Various local zoning criteria guide and constrain the City’s authority to grant the CUP and the variance. The following sets out the multi-layered regulatory context applicable to the City’s decisionmaking here.

### **A. Rules and Standards Governing Approval of a Conditional Use Permit Seeking Increase in Height of Building.**

The City’s consideration of Alatus’s Application for the CUP was constrained by four separate City-enacted codes and ordinances, including: (1) § 525.340 of the Minneapolis Code of Ordinances; (2) § 548.110 of the Minneapolis Code of Ordinances; (3) the Minneapolis Comprehensive Plan; (4) the St. Anthony Falls Historic District Guidelines.

#### **1. *Minneapolis City Code of Ordinances § 525.340.***

§ 525.340 of the City Code states that the “city planning commission shall make” six findings before granting a conditional use permit. The necessary findings are:

- a. The establishment, maintenance or operation of the conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare.
- b. The conditional use will not be injurious to the use and enjoyment of other property in the vicinity and will not impede the normal and orderly development and improvement of surrounding property for uses permitted in the district.
- c. Adequate utilities, access roads, drainage, necessary facilities or other measures, have been or will be provided.

- d. Adequate measures have been or will be taken to minimize traffic congestion in the public streets.
- e. The conditional use is consistent with the applicable policies of the comprehensive plan.
- f. The conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located.

Minneapolis Code of Ordinances § 525.340(1)-(6). City staff determined that the grant of the CUP to Alatus complied with these criteria. Van Cleve Aff. Ex. A pp. 3-6.

**2. *Minneapolis Code of Ordinances § 548.110.***

§ 548.110 of the City Code requires the City to consider four additional criteria when determining the maximum height of principal structures in commercial districts. Those criteria are:

- a. Access to light and air of surrounding properties.
- b. Shadowing of residential properties, significant public spaces, or existing solar energy systems.
- c. The scale and character of surrounding uses.
- d. Preservation of views of landmark buildings, significant open spaces or water bodies.

Minneapolis Code of Ordinances § 548.110(1)-(4). City staff determined that the grant of the CUP to Alatus complied with these criteria. Van Cleve Aff. Ex. A pp. 6-7.

**3. *Minneapolis Comprehensive Plan.***

Several policies of the City's Comp Plan are relevant to the City's grant of a CUP.

Relevant policies in the Comp Plan are:

***Chapter 1: Land Use***

- 1.1.5 Ensure that land use regulations continue to promote development that is compatible with nearby properties, neighborhood character, and natural features; minimizes pedestrian and vehicular

conflict; promotes street life and activity; reinforces public spaces; and visually enhances development.

- 1.2. Ensure appropriate transitions between uses with different size, scale, and intensity.
  - 1.2.1 Promote quality design in new development, as well as building orientation, scale, massing, buffering, and setbacks that are appropriate with the context of the surrounding area.

### ***Chapter 8: Heritage Preservation***

- 8.1 Preserve, maintain, and designate districts, landmarks, and historic resources which serve as reminders of the city's architecture, history, and culture.
  - 8.1.2 Require new construction in historic districts to be compatible with the historic fabric.
- 8.8 Preserve neighborhood character by preserving the quality of the built environment.
- 8.9 Integrate preservation planning in the larger planning process.

### ***Chapter 10: Urban Design***

- 10.1.1 Concentrate the tallest buildings in the Downtown core.
  - 10.1.2 Building placement should preserve and enhance public view corridors that focus attention on natural or built features, such as landmark buildings, significant open spaces or water bodies.
  - 10.1.3 Building placement should allow light and air into the site and surrounding properties.
- 10.4 Support the development of residential dwellings that are of high quality design and compatible with surrounding development.
  - 10.4.1 Maintain and strengthen the architectural character of the city's various residential neighborhoods.

- 10.4.2 Promote the development of new housing that is compatible with existing development in the area and the best of the city's existing housing stock.
- 10.5 Support the development of multi-family residential dwellings of appropriate form and scale.
  - 10.5.2 Medium-scale, multi-family residential development is more appropriate along Commercial Corridors, Activity Centers, Transit Station Areas and Growth Centers outside of Downtown Minneapolis.
  - 10.5.3 Large-scale, high-rise, multi-family residential development is more appropriate in the Downtown Minneapolis Growth Center.
- 10.6.2 Promote the preservation and enhancement of view corridors that focus attention on natural or built features, such as the Downtown skyline, landmark buildings, significant open spaces or bodies of water.

Van Cleve Aff. Ex. O.

**4. *St. Anthony Falls Historic District Guidelines.***

The Project is located within the Historic District and is subject to the Historic District Guidelines, which are an adopted City policy. *See* Van Cleve Aff. Ex. P. The intent of the District Guidelines is to “protect the integrity and character of the district and to ensure that new development occurs in a manner that is sensitive to the historic character of this unique place.” *Id.* (Introduction). The District Guidelines provide general regulation for all development in the Historic District, but also area-specific regulation for each “character area” within the larger Historic District. *See id.* (Chapter 10: Character Areas). With respect to building height, the District Guidelines generally instruct that:

A new building should be compatible in height, mass and scale with its context, including the specific block, the Character Area, and the historic district as a whole. This should be a primary consideration for the design of a new building. Each new building

also should convey a human scale, reflect similar building massing and façade articulation features of the context, and be compatible with the district skyline.

*Id.* at p. 104. The District Guidelines also state a number of “Requirements” with regard to new building height, including, in most relevant part:

- 9.8 Maintain the traditional size of buildings as perceived at the street level.**
  - a. The height of a new building should be within the height range established in the context, especially at the street frontage.
  - ...
- 9.9 The overall height of a new building shall be compatible with the Character Area.**
- 9.10 Position taller portions of a structure away from neighboring buildings of lower scale.**
  - a. Locate the taller portion of a new structure to minimize looming effects and shading of lower scaled neighbors, especially when adjacent to smaller historic structures.

*Id.* at p. 104. The Project is located in the Transition Area, which is a subarea of the Water Power Character Area. *See id.* (Map of Saint Anthony Falls Historic District Character Areas). The District Guidelines state, in the “Intent” portion of the Water Power Character Area subsection, that: “[n]ew buildings should reflect the massing of other historic buildings within the sub-area and not that of the grain elevators.” *Van Cleve Aff. Ex. P* p. 127. In other words, “[t]he grain elevators should . . . continue their visual prominence over the rest of the district.”

*Id.* The District Guidelines unambiguously state on page 129 that:

- 10.9 In University Avenue Transition Area, the maximum building height should not exceed eight stories.**
  - a. Mid-rise, low-rise, and very-low rise building heights are most appropriate[.]

Van Cleve Aff. Ex. P p. 129 (emphasis in original). The District Guidelines define “Low-rise Buildings” as those buildings that range from four (4)-to-six (6)-stories; “Mid-Rise Buildings” range from seven (7)-to-nine (9)-stories; and “High-Rise Buildings” have heights greater than one-hundred and five (105) feet. *Id.* at p. 103.

**B. Rules and Standards Governing Variance Increasing Maximum Floor Area Ratio.**

The City’s consideration of Alatus’s Variance Application was constrained by a City-enacted ordinance, a City-enacted community plan, and by Minnesota Statute.

**1. Minneapolis City Code of Ordinances § 525.500.**

§ 525.500 of the City Code states that “[a] variance may be granted from the regulations of the zoning code only when the applicable board, commission, or council makes each of the following findings based upon the evidence presented to it in each specific case”:

- a. Practical difficulties exist in complying with the ordinance because of circumstances unique to the property. The unique circumstances were not created by persons presently having an interest in the property and are not based on economic considerations alone;
- b. The property owner or authorized applicant proposes to use the property in a reasonable manner that will be in keeping with the spirit and intent of the ordinance and the comprehensive plan; and
- c. The proposed variance will not alter the essential character of the locality or be injurious to the use or enjoyment of other property in the vicinity. If granted, the proposed variance will not be detrimental to the health, safety, or welfare of the general public or of those utilizing the property or nearby properties.

Minneapolis Code of Ordinances § 525.500(1)-(3). City staff determined that the grant of the variance to Alatus complied with these criteria. Van Cleve Aff. Ex. A pp. 8-9.

## 2. *State Law Restrictions on a Municipality's Grant of a Variance.*

The criteria of Minn. Stat. § 394.27 must also be satisfied before a municipality grants a variance. This statute reads, in relevant part, that:

Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control and when the variances are consistent with the comprehensive plan. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the official control. "Practical difficulties," as used in connection with the granting of a variance, means that the property owner proposes to use the property in a reasonable manner not permitted by an official control; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone do not constitute practical difficulties.

Minn. Stat. § 394.27, subd. 7.

## 3. *Marcy-Holmes Neighborhood Master Plan.*

The Project is located in the East Hennepin Activity Center and adjacent to a designated Growth Center. Van Cleve Aff. Ex. A 1 p. 6. A majority of the properties in the East Hennepin Activity Center are zoned C2 residential. *See* Van Cleve Aff. Ex. U; *see also* Van Cleve Aff. Ex. V. The Comp Plan states that densities in Activity Centers range between high density (50-120 du/acre) and very high density (120-200 du/acre), "*dependent on context.*" Van Cleve Aff. Ex. O p. 1-11 (emphasis added). Of critical importance here, the Comp Plan then states that:

Densities up to 800 du/acre **may** be allowed in or near all designated Growth Centers and within Activity Centers adjacent to Growth Centers, **as consistent with adopted small area plans.**

Van Cleve Aff. Ex. O p. 1-11 (emphasis added). *The Marcy-Holmes Neighborhood Master Plan* (Van Cleve Aff. Ex. Q) is one such small area plan. *The Marcy-Holmes Neighborhood Master Plan* provides for high-density residential development of up to 50-120 dwelling units per acre on the Site. Van Cleve Aff. Ex. Q p. 20.

## ARGUMENT

### I. STANDARD OF REVIEW.

Where, as here, the Court reviews a municipality's zoning decision and there is a fair and complete record of decision for review, the Court conducts an on-the-record review. *Swanson*, 421 N.W.2d at 312-313. The Court may properly adjudicate the case based upon the complete administrative record by use of summary judgment. *See id.* at 314.

The standard of review in all zoning matters is whether the local authority's action was reasonable. *Middendorf v. Grove Twp.*, No. CO-89-284, 1989 WL 109331, at \*1 (Minn. Ct. App. 1989) (citing *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983)). "A local [zoning authority] has broad discretion to grant or deny variances, and [the courts] review the exercise of that discretion to determine whether it was reasonable." *Mutsch v. County of Hubbard*, Nos. A11-725, A11-726, 2012 WL 1470152, at \*3 (Minn. Ct. App. April 30, 2012) (citation omitted). Nevertheless, the interpretation of the zoning code is an issue of law, which this Court must review *de novo*. *Monson v. City of Duluth*, No. C8-00-140, 2000 WL 1280641, at \*2 (Minn. Ct. App. Sept. 12, 2000). Zoning ordinances are to be construed: (1) according to their plain and ordinary meaning; (2) strictly against a city and in favor of a landowner; and (3) in light of their underlying policy goals. *Id.* The Court must hold the City "strictly" to its own zoning standards. *Id.*; *see also Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608 (Minn. 1980).

Decisions on special use permits and variances are quasi-judicial in nature, not legislative. *St. Croix Dev., Inc. v. City of Apple Valley*, 446 N.W.2d 392, 399 (Minn. Ct. App. 1989). Hence, the zoning authority is required to "articulate the reasons for its ultimate decision, with specific reference to relevant provisions of its zoning ordinance." *Mutsch*, 2012 WL 1470152, at \*4 (citation omitted); *In re Stadsvold*, 754 N.W.2d 323, 332 (Minn. 2008)

(citation omitted). The Court must “determine whether the zoning authority ‘was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively, or unreasonably, and . . . [must also determine] whether the evidence could reasonably support or justify the determination.’” *In re Stadsvold*, 754 N.W.2d at 332 (citation omitted). “A decision predicated on insufficient evidence or arising from a failure to apply relevant provisions of the ordinance would be arbitrary and capricious.” *Id.* The court analyzes whether there is “substantial evidence” supporting the zoning authority’s determination. *Nesvig v. Crow Wing County*, No. A11-127, 2011 WL 3557871, at \*3 (Minn. Ct. App. Aug. 15, 2011).

## **II. THE COURT SHOULD INVALIDATE THE CITY’S ARBITRARY AND CAPRICIOUS GRANT OF A CONDITIONAL USE PERMIT TO ALATUS PERMITTING CONSTRUCTION OF A FORTY-TWO STORY TOWER.**

The record in this case leads inexorably to the conclusion that the City disregarded its own ordinances, codes, and standards when it granted Alatus a CUP increasing the permissible height of a building on the Site from four (4) stories (fifty-six (56) feet), to approximately forty-two (42) stories (four-hundred and eighty-five (485) feet). Municipalities are required to apply the zoning criteria *as adopted*. The City has no discretion to flout the unambiguous mandates and standards previously adopted when it performs the quasi-judicial task of considering a CUP application.

The role of the City Council in deciding whether to grant a conditional use permit is restricted by the terms of the City’s zoning ordinances. *Monson*, 2000 WL 1280641, at \*2 (“the city council’s discretion is limited by the terms of the zoning ordinance.”). As explained by the Minnesota Court of Appeals:

In granting or denying a special-use permit, a city council is not altering the legislative judgment as to the zoning classification. Rather, it has the function, adjudicative in nature, of applying specific use standards set by the zoning ordinance to a particular individual use **and must be held strictly to those standards**.

*Id.* (emphasis added; citation omitted). A decision that is instructive to the Court's analysis here is *Monson v. City of Duluth*. There, Robert and Mary Monson, residing adjacent to a proposed development site in Duluth, brought suit against the City of Duluth claiming that the city's grant of a conditional use permit to a developer was arbitrary, capricious, and unreasonable. 2000 WL 1280641, at \*\*1-2. The city approved a permit allowing the developer to construct ten (10) townhome units on one (1) parcel of land, and four (4) single-family homes on a second parcel. *Id.* at \*1. A third parcel held by the developer would be designated as open space. *Id.* All three parcels were zoned for single-family residences. *Id.* After the city granted the special use permit, the Monsons brought a declaratory judgment action. The district court agreed that the permit was invalid and entered judgment against the city. The city appealed.

The court of appeals first analyzed whether the city properly applied part of its city code stating that “only tracts of land ten acres or greater in size are eligible for development as a community unit plan.” *Id.* (citation omitted). None of the three (3) noncontiguous parcels was individually larger than ten (10) acres; however, when the acreage of the parcels was added together, the parcels comprised over ten (10) acres of land. *Id.* The city argued that this meant the separate parcels were eligible as part of a community unit plan. The court of appeals rejected this contention, concluding that the plain and ordinary meaning of “tract” of land would not render three (3) noncontiguous parcels part of the same tract. *Id.* The appellate court further analyzed the public policy behind the zoning ordinance and held that the physical separation of the three (3) parcels was contrary to the purposes of the city code. *See Monson*, 2000 WL 1280641, at \*3. Because the property failed to meet the size eligibility requirement for the grant of a conditional use permit, “[i]t was arbitrary, capricious, and unreasonable for the city to issue the SUP to the developer.” *Id.* The appellate court further ruled that there was insufficient

evidence to support several of the necessary findings that must be made under the Duluth zoning code before a CUP may issue. *See id.* at \*\*4-5. This lack of evidence also rendered the grant of the CUP arbitrary, capricious, and unreasonable. *Id.*

Like *Monson*, the City here inappropriately granted a CUP despite a number of unequivocal mandates that prohibit the proposed height of the Project. The City also approved a CUP in contravention of the previously-established public policy of protecting the historical integrity of the Historic District and contrary to the requirement of symmetry between massing of existing buildings and new development. Therefore, the Court should declare that the City's grant of the CUP was arbitrary and capricious and enter a permanent injunction requiring the City to deny Alatus's CUP application.

**A. Grant of the CUP Violates § 525.340 of the Minneapolis City Code.**

The Project wholly fails to meet the required findings of § 525.340 of the City Code. Because there is a complete absence of evidence supporting these findings, the City was required to deny the CUP Application. The most patently-unsupported findings are analyzed below.

**1. *Conditional use will not be detrimental to or endanger the public health, safety, comfort or general welfare.***

The Project does not meet this finding. In April 2016, the City Council denied a petition for an Environmental Assessment Worksheet (EAW) and made an incorrect determination that the Project was exempt from the automatic EAW trigger under Minnesota Rules 4410.4300, subp. 19(c). NEBL demonstrated, among other things, that the Project has the potential for significant environmental effects including, but not limited to, damage to nearby historic structures, increased traffic, and increased noise and dust. *See* Minnesota Rules part 4410.1100, subpart 1. NEBL offered material evidence demonstrating that the Project has potential for significant (adverse) environmental effects. *See* Van Cleve Aff. Ex. F attachments A-K.

Because the City denied the EAW petition contrary to the law, a determination whether the Project will have a detrimental impact on the public health and safety is not fully possible.

The inconsistency of the Project's height and scale with respect to the surrounding area will, however, be detrimental to the comfort and general welfare of the neighborhood and to the Historic District. The Project will be thirty (30)-stories taller than the tallest building in the immediate vicinity (the Winslow House) and more than one-hundred and seventy (170) feet taller than the tallest structure on the East Bank. The height and scale of the Project are extraordinarily out of context for the neighborhood. The Project will loom over the two (2)-story Pillsbury Library (located just sixteen (16) feet away) and the one (1)-story Ard Godfrey House, directly across the street. Van Cleve Aff. Ex. C p. 3; Van Cleve Aff. Ex. D p. 7. In addition, it is undisputed that the Project will cast shadows on nearby historic properties, especially the Pillsbury Library. Van Cleve Aff. Ex. A p. 7. The Project will also be visually disruptive to key views within the neighborhood and surrounding areas. *Id.* (recognizing that the Project will block views of the Pillsbury Library). The foregoing establishes that the Project will be detrimental to the public health, safety, comfort, and general welfare.<sup>2</sup>

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<sup>2</sup> That the Project violates the City's legislatively-adopted CUP criteria also demonstrates that the Project is contrary to public health, safety, and welfare. *Cf. Citizens for a Balanced City v. Plymouth Congregational Church*, 672 N.W.2d 13, 22-23 (Minn. Ct. App. 2003) (determining that city-adopted criteria determined inquiry concerning whether public health, safety, and welfare would be harmed by issuance of conditional use permit).

**2. *The conditional use will not be injurious to the use and enjoyment of other property in the vicinity and will not impede the normal and orderly development and improvement of surrounding property for uses permitted in the district.***

The record demonstrates that the Project will be injurious to the use and enjoyment of other property in the vicinity. As discussed immediately above, the Project will loom and cast shadows over nearby historic properties. Furthermore, approval of the Project would be inconsistent with the character of the surrounding properties and would be disruptive to the orderly development of the neighborhood. At more than four-hundred and eighty-three (483) feet, the Project will be the eleventh tallest structure in the City, far exceeding the height of any structures on the East Bank of downtown Minneapolis. Van Cleve Aff. Ex. D p. 2. Allowing a CUP to permit the excessive height will create a precedent for future incongruous development, resulting in the extension of downtown into the Marcy-Holmes and Nicollet Island East Bank neighborhoods—residential neighborhoods of a far different character. As shown in TABLE 1 (*supra* pp. 4-5), the Project will greatly exceed the height of any structures in the immediate vicinity. There is no factual basis underlying the conclusion that the Project’s height and scale are consistent with the structures in the surrounding area.

**3. *The conditional use is inconsistent with the applicable policies of the Comprehensive Plan.***

The disproportionate height and scale of the Project compared to other buildings in the neighborhood and the Historic District, renders the project inconsistent with the policies of the Comp Plan. The Project is located in an Activity Center, near a designated Growth Center. Van Cleve Aff. Ex. A 1 p. 6. The Comp Plan states that densities in Activity Centers range between high density (50-120 du/acre) and very high density (120-200 du/acre), “*dependent on context.*” O p. 1-11 (emphasis added.) Densities up to 800 du/acre may be allowed in or near all designated Growth Centers and within Activity Centers adjacent to Growth Centers, so long as a

higher density is consistent with adopted small area plans. Van Cleve Aff. Ex. O p. 1-11. The Marcy-Holmes Plan is one such adopted small area plan; that plan limits residential development on the Site to only 50-120 du/acre. Van Cleve Aff. Ex. Q p. 20. Alatus's proposal calls for a density of 268.2 du/acre, *more than double* what is permitted under the Marcy-Holmes Plan. Van Cleve Aff. Ex. A p. 6. Therefore, there is a direct conflict between the density permitted by the City's adopted small area plan and the Alatus Project. The City's grant of a CUP in order to allow a density that exceeds over 120 du/acre is inconsistent with the Comp Plan.

In addition, the Project is inconsistent with various Comp Plan policies, including policies contained in Chapters 1 (land use policies), 8 (heritage preservation), and 10 (urban design elements). The specific policies violated by the Project are as follows:

**a. *The Project violates land use policies of the Comprehensive Plan.***

- 1.1.5 Ensure that land use regulations continue to promote development that is compatible with nearby properties, neighborhood character, and natural features; minimizes pedestrian and vehicular conflict; promotes street life and activity; reinforces public spaces; and visually enhances development.

The Project is grossly out of scale for the surrounding neighborhood. The forty-two (42)-story tower is incompatible with not only the nearby properties, but the massing far exceeds any regulations or policies that exist within the City outside of the downtown core.

**1.2. *Ensure appropriate transitions between uses with different size, scale, and intensity.***

There is no transition aside from a massive reduction in size that could legitimize the incongruous scale of the Project. The surrounding uses include the one (1)-story Ard Godfrey House, three (3)-story condos, the two (2)-story Pillsbury Library, and the nine (9)-story parking ramp immediately to the east. As was observed in the Historic District Guidelines, buildings in the Transition Zone (of which the Site is a part) have ranged in height from one-and-a-half (1.5)

stories to three (3) stories, which provided a transition from the height of the milling and industrial buildings along Main Street. *See Van Cleve Aff. Ex. P p. 126.* At twelve (12)-stories or approximately one-hundred and eighty (180) feet, the tallest building in the immediate vicinity—the Winslow House—is dwarfed by the Project, which is proposed to be thirty (30) stories (or three-hundred and three (303) feet) taller. It cannot reasonably be said that the Project ensures appropriate transitions between uses with different size, scale, and intensity.

- 1.2.1 Promote quality design in new development, as well as building orientation, scale, massing, buffering, and setbacks that are appropriate with the context of the surrounding area.

A forty-two (42) story high rise is patently inappropriate within the context of the scale and massing of other neighboring buildings.

***b. The Project violates heritage preservation provisions of the Comprehensive Plan.***

- 8.1 Preserve, maintain, and designate districts, landmarks, and historic resources which serve as reminders of the city's architecture, history, and culture.

Construction of the Project is inconsistent with preserving and maintaining the Historic District. The Project puts the character of the Historic District itself in jeopardy. *Van Cleve Aff. Ex. C pp. 3-4.* In addition, the Project risks damage to the contributing historical structures. *Van Cleve Aff. Ex. F pp. 8-10.* The Project would entail demolition of the Commercial Club, a building that even the City itself has admitted contributes to the Historic District. *Van Cleve Aff. Ex. C p. 2.* Furthermore, two (2) studies, the first commissioned by Alatus itself, have determined that the Commercial Club likely qualifies as a landmark under local criteria. *Van Cleve Aff. Ex. S. p. 2; Van Cleve Aff. Ex. T p. 36.* Given the circumstances discussed within these historical studies, it is probable that the Commercial Club also qualifies for designation

under the National Register Criteria. *Compare id.* (stating areas of significance satisfied by the Commercial Club) *with State by Archabal v. County of Hennepin*, 495 N.W.2d 416, 421 (Minn. 1993) (listing the criteria applied to determine National Register designation). Nevertheless, rather than attempt to preserve the Commercial Club, the Project calls for its demolition. The Project's looming effect and shadowing on adjacent historical properties further exhibits the detrimental effect the Project will have on historical resources.

8.1.2 Require new construction in historic districts to be compatible with the historic fabric.

The Project would be an abnormality in the Historic District. Not only is the scale of the Project inconsistent with the Historic District, but the materials anticipated to be used for the tower are also not in keeping with materials commonly used in the Historic District. The Project will primarily use glass and steel exterior materials. Van Cleve Aff. Ex. A, p. 10; *see also* Van Cleve Aff. Ex. E. The façade of the Project will be conspicuously out of step with other buildings using masonry appropriate for the Historic District, including brick, stone, and concrete. Van Cleve Aff. Ex. P p. 68. The Project is a contemporary tower that makes no effort to reflect the fabric of the Historic District.

8.8 Preserve neighborhood character by preserving the quality of the built environment.

The Project will pose substantial risks to the nearby historic structures during construction and construction would be detrimental to the preservation and maintenance of the built environment. Van Cleve Aff. Ex. F attachments A-K (material evidence demonstrating Project's potential for significant environmental effects). The dramatically inappropriate height and massing of the Project would also be detrimental to the neighborhood and Historic District character.

8.9 Integrate preservation planning in the larger planning process.

The Project is out of scale and out of character with the District Guidelines, adopted in 2012 and intended to protect the integrity and character of the Historic District. The existing taller structures located on the East Bank within the Historic District were constructed more than 25 years before the adoption of the District Guidelines. Any new development in the Historic District should be consistent with the guidance set forth in the District Guidelines.

c. ***The Project violates urban design elements of the Comprehensive Plan.***

10.1.1 Concentrate the tallest buildings in the Downtown core.

The Project would be the tallest structure in the Nicollet Island-East Bank and Marcy-Holmes neighborhoods and is significantly taller than many of the residential towers recently constructed in the downtown core. A development of this height, scale and massing should be located in the downtown core.

10.1.2 Building placement should preserve and enhance public view corridors that focus attention on natural or built features, such as landmark buildings, significant open spaces or water bodies.

The Project would not preserve or enhance view corridors; instead, it would obstruct several existing view corridors, distract attention from neighboring historic properties, and increase shadow on adjacent properties. *See Van Cleve Aff. Ex. R (Alatus's shadow study).*

10.1.3 Building placement should allow light and air into the site and surrounding properties.

The Pillsbury Library and Ard Godfrey House will be substantially affected by shadowing throughout the year. *Id.* The residential condominiums to the west, as well as the

residential condominiums to the north, will also be severely affected by limited access to sunlight. *Id.*

- 10.4 Support the development of residential dwellings that are of high quality design and compatible with surrounding development.

The scale and height of the Project are unequivocally inconsistent with surrounding development and the Project will tower more than thirty (30) stories or three-hundred and three (303) feet over even the highest building in the immediate vicinity, the Winslow House.

- 10.4.1 Maintain and strengthen the architectural character of the city's various residential neighborhoods.

The character of the Marcy-Holmes and Nicollet Island-East Bank neighborhoods is a mixture of residential, commercial, and industrial uses, heavily influenced by the development patterns around St. Anthony Falls. The existing building heights are largely consistent and the historic building heights are intended to guide development. The Project would materially disrupt the character of these neighborhoods.

- 10.4.2 Promote the development of new housing that is compatible with existing development in the area and the best of the city's existing housing stock.

As was extensively argued above (*see* analysis of policy 8.1.2 at p. 28), the Project is not compatible with existing development or with the Historic District.

- 10.5 Support the development of multi-family residential dwellings of appropriate form and scale.

“[A]ppropriate form and scale” must take into account applicable rules and standards concerning form and scale, which in this case include, but are not limited to, the Historic District Guidelines and *The Marcy-Holmes Neighborhood Master Plan*. Because the Project is not in

keeping with the scale requirements imposed by these and other applicable regulations and standards, it is not appropriate.

10.5.2 Medium-scale, multi-family residential development is more appropriate along Commercial Corridors, Activity Centers, Transit Station Areas and Growth Centers outside of Downtown Minneapolis.

The Project does not qualify as a medium-scale, multi-family residential development. A medium scale development ranges from seven (7) to nine (9) stories. Van Cleve Aff. Ex. P p. 103. The forty-two (42) story tower is wholly inappropriate on the Site.

10.5.3 Large-scale, high-rise, multi-family residential development is more appropriate in the Downtown Minneapolis Growth Center.

The Project is not located in Downtown Minneapolis despite the explicit preference of the Comp Plan for high rises to be situated there.

10.6.2 Promote the preservation and enhancement of view corridors that focus attention on natural or built features, such as the Downtown skyline, landmark buildings, significant open spaces or bodies of water.

The Project would stick out from existing development, and would be visually disruptive to viewsheds of the riverfront and the District. The Project would constitute an extension of downtown into the Marcy-Holmes neighborhood that would be detrimental to not only the character of the immediate vicinity but create a visually scattered skyline.

For all the foregoing reasons, the Project is not consistent with the Comp Plan. Accordingly, the Project fails to meet the threshold showing necessary for a CUP to validly issue. Minneapolis Code of Ordinances § 525.340(6) (“The conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located.”) The Court

should declare that the City failed to properly apply its zoning ordinances when it granted the CUP Application. *See Monson*, 2000 WL 1280641, at \*\*4-5.

**4. *The conditional use shall, in all other respects, conform to the applicable regulations of the district in which it is located.***

The Project plainly does not conform to all applicable regulations, precluding a determination that this finding is appropriate. Specifically, and as is discussed throughout this memoranda, the Project does not conform to: §§ 525.340, 548.110, and 525.500 of the City Code; Comp Plan policies 1.1.5, 1.2, 1.2.1, 8.1, 8.1.2, 8.8, 8.9, 10.1.1, 10.1.2, 10.1.3, 10.4, 10.4.1, 10.4.2, 10.5, 10.5.2, 10.5.3, 10.6.2; the Historic District Guidelines; and the *Marcy-Holmes Neighborhood Master Plan*.

**B. Grant of the CUP Violates § 548.110 of the Minneapolis City Code.**

§ 548.110 of the City Code imposes additional requirements that must be considered when determining the maximum height of structures in commercial districts. There is an absence of evidence in the record that these criteria are satisfied, verifying the illegality of the City's grant of the CUP. The evidence in the record decisively demonstrates that the following factors under § 548.110 weighed in favor of denial of the CUP: (1) shadowing of residential properties, significant public spaces, or existing solar energy systems; (2) the scale and character of surrounding uses; and (3) preservation of views of landmark buildings, significant open spaces, or water bodies.

**1. *Shadowing of residential properties, significant public spaces, or existing solar energy systems.***

Chute Square, a public park located immediately north/northwest of the Project, will receive no sunlight for a significant portion of the year due to the Project's scale and massing, as is demonstrated by the Applicant's shadow study. *See Van Cleve Aff. Ex. R.* The residential

condominiums to the west, as well as the residential condominiums to the north, will also be severely affected by limited access to sunlight. *See id.*

**2. *The scale and character of surrounding uses.***

The indisputable facts concerning the Project demonstrate that the Project is not compatible with the scale and character of development in the surrounding area, or anywhere else on the East Bank. The height and massing of the structure are inconsistent with the surrounding development. Indeed, the Project will rise more than one-hundred and seventy (170) feet over any other structures in the vicinity. *See* Table 1, *supra* p. 4.

**3. *Preservation of views of landmark buildings, significant open spaces or water bodies.***

The Project would obstruct several existing view corridors, increase shadowing on adjacent historical properties, and loom over historic landmarks, including the Pillsbury Library and the Ard Godfrey House, both of which are contributing structures in the Historic District. It cannot be genuinely disputed that the Project would be visually disruptive to viewsheds of the riverfront, adjacent Chute Square, and the skyline of the downtown area.

The foregoing considerations should have compelled the City to deny Alatus's CUP Application. The City's failure to do so was arbitrary, unreasonable, and contrary to law.

**C. *Grant of the CUP Violates the Historic District Guidelines.***

The Project is patently inconsistent with the Historic District Guidelines. The District Guidelines contain various requirements that apply to and limit new building height, including policies 9.8 (maintain the traditional size of buildings as perceived at street level), 9.9 (the overall height of a new building shall be compatible with the Character Area), and 9.10 (position taller portions of a structure away from neighboring buildings of lower scale). *Van Cleve Aff.*

Ex. P p. 106. The palpable purpose of these requirements is to preserve the existing character and integrity of the Historic District.

Furthermore, the express intent of the Water Power Character Area in which the Site is located is to promote the “visual prominence” of the grain elevators “over the rest of the district.” Van Cleve Aff. Ex. P p. 127. New buildings should not be taller than the grain elevators. *See id.* Also, the District Guidelines place a cap of eight (8) stories on the height of new buildings constructed in the University Avenue Transition Area where the Site is located. *Id.* at p. 129 (“**In University Avenue Transition Area, the maximum building height should not exceed eight stories.**”) (emphasis in original). It is not an overstatement to say that the Project simply disregards all of these requirements. The Project will extend many stories over the grain elevators and is thirty-four (34) stories above the maximum height imposed by the District Guidelines. Because the District Guidelines are adopted City policy, and because it is evident that the Project is in violation of the District Guidelines, the Court should declare that the City’s grant of the CUP Application was arbitrary and capricious.

### **III. THE COURT SHOULD INVALIDATE THE CITY’S ARBITRARY AND CAPRICIOUS GRANT OF A VARIANCE TO ALATUS TO INCREASE THE MAXIMUM FLOOR AREA RATIO TO 14.42.**

As it did when it granted the CUP Application, the City also disregarded City-adopted regulations and standards, such as the City Code and the Marcy-Holmes Plan, as well as governing state statute, when it granted the variance to Alatus increasing the maximum FAR (floor area ratio) of the Property from 2.04 to 14.42, a 700% increase. Because there were no special circumstances that would validly permit such an extraordinary divergence from the governing rules and statutes, the City was forced to place exclusive reliance upon impermissible economic motivations. However, the City has no discretion to ignore its own codes and regulations when it performs the quasi-judicial function of considering a variance application.

Nor does the City act lawfully where, as here, it exceeds the limitations placed upon it by Minn. Stat. § 394.27.

There are two layers of regulatory controls governing the City's grant of the variance to Alatus. The first is whether the variance is in keeping with City-adopted regulation. "Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the variances are consistent with the comprehensive plan." Minn. Stat. § 462.357, subd. 6(2). The second is whether the variance otherwise satisfies state law, specifically Minn. Stat. § 462.357. Even if a variance application satisfies municipal criteria, if it does not also satisfy state law criteria, it is inappropriate and should be denied. *In re Appeal from a Decision on September 11, 2014 by St. Louis County, Minnesota, Board of Adjustment Granting Variance*, No. A15-1613, 2016 WL 3129417, at \*2 (Minn. Ct. App. Aug. 23, 2016) ("a board's authority to grant variances under the ordinance may not exceed the power granted by statute."). Although these are separate considerations, both will be analyzed together given the materially similar inquiry under the City zoning ordinance and Minn. Stat. § 462.357.

For the reasons discussed below, the Court should declare that the City acted arbitrarily, capriciously, and contrary to law when it granted the Variance Application.

**A. Grant of the Variance Application Violates Minneapolis Code of Ordinances § 525.500 and Minn. Stat. § 462.357.**

The City Code permits variances to be granted only in certain, narrowly-defined circumstances. Indeed, a variance may only be approved when the City Council's findings are based upon evidence demonstrating that:

- (1) Practical difficulties exist in complying with the ordinance because of circumstances unique to the property. The unique circumstances were not created by persons presently having an interest in the property and are not based on economic considerations alone;

- (2) The property owner or authorized applicant proposes to use the property in a reasonable manner that will be in keeping with the spirit and intent of the ordinance and the comprehensive plan; and
- (3) The proposed variance will not alter the essential character of the locality or be injurious to the use or enjoyment of other property in the vicinity. If granted, the proposed variance will not be detrimental to the health, safety, or welfare of the general public or of those utilizing the property or nearby properties.

Minneapolis Code of Ordinances § 525.500(1)-(3); *see also* Minn. Stat. § 462.357, subd. 7.

None of the above-stated criteria is met here.

The threshold showings necessary to obtain a variance under § 525.500 are very similar to the limitations imposed under governing state statute. An instructive decision applying the variance criteria of major import here is *Continental Property Group, LLC v. City of Wayzata*, No. A15-1550, 2016 WL 1551693 (Minn. Ct. App. Apr. 18, 2016).

The *Continental Property Group* case concerned a developer's appeal of the denial of a height variance by the City of Wayzata. The developer sought approval for a five (5)-story mixed-use building in Wayzata. *Continental Prop. Grp.*, 2016 WL 1551693, at \*1. A five (5)-story building was the only economically viable option to develop the land. *Id.* The applicable zoning ordinance limited the maximum height of structures on the site at two (2) stories (or twenty (20) feet). *Id.* The Wayzata city council denied the variance request because:

. . . The stories and height of the building proposed far exceed the applicable limits for a PUD of this kind. The proposed 5 stories exceed the 3 story limit by 2 stories, and the proposed height of 61 feet 8 inches exceeds the height limit by 26 feet. The PUD ordinance only allows deviation from the height and story limits if a PUD property exceeds 13 acres; the Property for the Proposed PUD is 2.43 acres.

*Id.* at \*4. The city council also concluded that if the variance request were granted, it “would alter the essential character of Wayzata.” *Id.* at \*6 n. 2; *see also* No. 27-CV-15-797, 2015 WL

7429949, at \*6 (Minn. D. Ct. Aug. 13, 2015). The city council concluded that the variance request was “largely based on economic considerations.” *Continental Prop. Grp.*, 2016 WL 1551693, at \*4. Furthermore, the need for the variance was not due to circumstances unique to the property—the site sought to be developed shared characteristics with other similar properties in the immediate area. *Id.* at \*5.

The developer sued asserting entitlement to a variance; the district court granted summary judgment for the city. *Id.* at \*1. The developer appealed, arguing that the city’s action was arbitrary and capricious because the site has ““significant physical (and economic) limitations” and because the height increase request was ““narrowly tailored to minimize those physical limitations and still conform to the City’s comprehensive plan.”” *Id.* at \*4. The appellate court first determined that the developer had not satisfied the unique circumstances variance inquiry, because the developer did not “explain how its property is unique from neighboring properties subject to the same zoning ordinances.” *Id.* at \*5. Considering the developer’s contention that the existence of another five (5)-story structure estopped the city from denying the variance request, the court of appeals recognized that the other five (5)-story complex was across town from the proposed development, on the east end of Wayzata’s downtown area. *Id.* Thus, the appellate court was not persuaded that the presence of another five-story building rendered the development at issue permissible. *Continental Prop. Grp.*, 2016 WL 1551693, at \*5. The court of appeals also relied upon comments submitted by citizens in the neighborhood in the municipal proceedings to determine that the development would alter the essential character of the neighborhood. *Id.* Finally, the court of appeals affirmed the city’s determination that the developer’s economic interest in developing a larger building could not

alone qualify as a practical difficulty meriting a variance. *Id.* at \*6. For all these reasons, the appellate court upheld the denial of the developer's variance application.

*Continental Property Group* demonstrates how the City should have analyzed Alatus's variance application. Alatus has failed to show that a legally-cognizable practical difficulty exists supporting the grant of a variance. Accordingly, the Court should declare that the City's grant of the Variance Application is invalid because it was arbitrary and capricious.

**1. *The City granted a variance in violation of law because there are no legally cognizable circumstances truly unique to the Property justifying grant of a variance.***

In finding that practical difficulties exist with respect to the Site, the City evidently relied upon a purportedly unique “confluence of land use features and adopted policy guidance that encourages very high density redevelopment.” *Van Cleve Aff. Ex. L* pp. 2 ¶ 3. The City Zoning and Planning Committee found significant that the FAR limits applicable to the Site did not apply to a “majority of commercially-zoned land or to all land guided for mixed use in the City.” *Id.* (emphasis added.) The City's findings materially distort the pertinent inquiry, which is whether the property at issue has unique characteristics that distinguish it from *all other properties*. Minneapolis Code of Ordinances § 525.500(1); *see also Continental Prop. Grp.*, 2016 WL 1551693, at \*1 (rejecting developer's practical difficulty argument where other properties were subject to the same zoning ordinances). That inquiry must be answered in the negative.

The City cannot deny that various other properties in the C2 zoning district also are within designated activity centers and near the downtown core. In fact, zoning maps produced by the City suggest that a majority of the properties in the East Hennepin Activity Center are zoned C2 residential. *See Van Cleve Aff. Ex. U; see also Van Cleve Aff. Ex. V.* Many of these properties could be said to be located “near the Downtown Growth Center, and on a major

transportation and transit corridor.” Van Cleve Aff. Ex. L pp. 2 ¶ 3. Furthermore, restrictive FAR limitations apply in other Activity and Growth Centers. Hence, the property is not genuinely unique from other properties so as to merit a variance. *Continental Prop. Grp.*, 2016 WL 1551693, at \*5.

To be sure, neither Alatus’s mere desire to build a high-rise building on the Site, nor the City’s desire to obtain more in tax revenues, are sufficient to demonstrate legally cognizable practical difficulties. Minneapolis Code of Ordinances § 525.500(1) (. . . “unique circumstances . . . are not based on economic considerations alone.”); *cf. Continental Prop. Grp.*, 2016 WL 1551693, at \*6.

For these reasons, the Court should hold that no practical difficulty exists justifying the City’s grant of the Variance Application.

**2. *The City granted a variance in violation of law because Alatus’s proposed use is unreasonable and is not in keeping with the spirit and intent of the ordinance and the Comprehensive Plan.***

The City Standing Committee on Zoning and Planning determined that a variance was reasonable because “the proposed building is similar in density and size to others in the area and is consistent with the expressed goals of the Comprehensive Plan[.]” Van Cleve Aff. Ex. L p. 3 ¶ 5. Both aspects of this finding are without factual support.

First, the Project is grossly inconsistent with the scale of the development in the surrounding area. The Project is more than one-hundred and seventy (170) feet taller than the next highest structure on the East Bank. Van Cleve Aff. Ex. D p. 2. Furthermore, the maximum allowed FAR of 2.04 already takes into account density bonuses—in other words, the baseline FAR guidance for the C2 District has *already* been increased from its norm. In addition, the Applicant is requesting a seven-hundred percent (700%) increase in the FAR. *See* Van Cleve

Aff. Ex. G. These and other circumstances discussed above recommend the conclusion that the Project is unreasonable.

Second, the Project is not in keeping with the spirit and intent of the ordinance/Comp Plan. The *Marcy-Holmes Neighborhood Master Plan*—formally approved by the Minneapolis City Council on August 15, 2015—calls for high-density residential development of only 50-120 dwelling units per acre on the Site. Van Cleve Aff. Ex. Q p. 20. This Small Area Plan demonstrates the intent to preserve small-to-medium floor area ratios in the Marcy-Holmes community. In addition, numerous provisions of the Comp Plan call for high-rise buildings to be constructed in the downtown core. See Van Cleve Aff. Ex. O (Chapter 10), ¶¶ 10.1.1, 10.5.3. The Alatus Project constitutes an expansion of downtown into the East Bank, in contravention of these provisions.

Moreover, the Project flouts the maximum heights contained in the District Guidelines that are applicable to buildings in the Transition Area and the Water Power Character Area. Overall, the Project represents a manifest disregard of the Comp Plan. Accordingly, the Court should hold that City acted unreasonably when it granted the Variance Application.

3. ***The City granted a variance in violation of law because the Alatus Project will alter the essential character of the locality, will be injurious to the use and enjoyment of other property in the vicinity, and will be detrimental to the health, safety, and welfare of the general public as well as to nearby Properties.***

For reasons discussed throughout this memorandum, the Project will forever alter the essential character of the locality and will be detrimental to nearby properties, including, but not limited to, the Pillsbury Library and the Ard Godfrey House. Among other things, the Project will loom and cast shadows over nearby historic properties; will put the Historic District in jeopardy; and will result in the loss of the historically significant and contributing Commercial Club. The City's own HPC refused to grant a Certificate of Appropriateness permitting

construction—over City staff’s recommendation to the contrary—because the Project is not compatible with the Historic District. *See supra* n. 1. Furthermore, numerous comments offered in the municipal proceedings by concerned citizens evidence the Project’s inconsistency with its surroundings. *Van Cleve Aff. Exs. H-J*. The implicit finding of the City Council that the Project would not alter the essential character of the locality is arbitrary, capricious, and without evidentiary support.

The City’s grant of the Variance Application was in derogation of City ordinance, the City Comp Plan, and state law. The Court should declare that the City’s grant of the Variance Application was arbitrary and capricious.

### **CONCLUSION**

The Alatus Tower represents a marked deviation from established City codes and ordinances governing height, massing, and FAR. The approval of a Project so patently inconsistent with the City’s rules and regulations leaves the strong inference that the Project was approved because it heralded a significant economic gain to both the developer, and the City. Yet, the City is not permitted to simply ignore its legislatively-established rules and regulations when considering a CUP or variance application. The proper means for the City to amend its codes and ordinances to permit greater height, massing, and FAR is via legislative enactment, not quasi-judicial decisionmaking. For these and all other reasons stated herein, Plaintiff Neighbors for East Bank Livability respectfully requests that the Court grant plaintiff’s motion for summary judgment on Count I of the Verified Complaint and declare that, when the City granted the Applications, it (a) improperly disregarded its own policies, codes, and rules; (b) disregarded state law; and (c) acted arbitrarily, capriciously, and without a rational basis. Furthermore, the Court should grant plaintiff’s motion for summary judgment on Count V of its

Verified Complaint and enter permanent injunctive relief directing the City to deny the Applications.

Dated: March 30, 2017

s/ Gary A. Van Cleve

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