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HOUSING MATTERS: WHY OUR COMMUNITIES MUST HAVE AFFORDABLE HOUSING

Justin D. Cummins[†]

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"The legislature finds and determines that . . . an increasingly large majority of the residents of the metropolitan area are unable to afford housing. . . ."

— Minnesota Legislature¹

I. INTRODUCTION

This article analyzes the nature and contributing causes of the deepening affordable housing crisis. It also outlines the basis for legal action that could address the violations of law that have helped to create and aggravate this situation.

In describing the far-reaching effects of the affordable housing crisis, the discussion highlights the link between housing and access to opportunity, such as good jobs, schools, health care, and capital. Moreover, while analyzing the main causes of the crisis, this article shows the connection between the affordable housing shortage and discrimination.

The discussion then reviews the actual impact of affordable housing on neighborhoods and the affordable housing efforts in several parts of the country, demonstrating that such housing can be created on a large scale to the benefit of communities. In closing, this article focuses on two laws that could be a basis for legal action in Minnesota: the Minnesota Land Use Planning Act ("LUPA")² and the federal Fair Housing Act ("FHA").³

A lawsuit based on the LUPA could be filed against both the Metropolitan Council ("Met Council")⁴ and individual cities in the Twin Cities metropolitan area ("metro area"). Legal claims against the Met Council would concern the Met Council's failure to fulfill its legal obligation to provide adequate guidance to, and oversight of, cities regarding affordable housing planning and creation. Legal claims against cities in the metro area would address these cities' failure to plan for and provide enough of the housing needed.

1. MINN. STAT. § 473.868, subd. 1 (2001).

2. MINN. STAT. §§ 473.851–854, .856–871 (2001).

3. 42 U.S.C. §§ 3601–3619 (2001).

4. The Met Council consists of 16 members and one chairperson, all of whom are appointed by the governor of Minnesota. The Met Council makes and implements policies and distributes money and resources to advance regional planning and development objectives. *See* MINN. STAT. § 473.123 (2001).

Legal action based on the FHA could be brought against cities in the metro area because their failure to plan for and create an adequate supply of affordable housing has a discriminatory impact on people of color. In other words, because these cities have not fulfilled their duties under the LUPA, people of color are disproportionately denied adequate housing and the opportunities connected with such housing. Cities are also violating the FHA because their failure to provide enough affordable housing allows racial segregation in the metro area to continue.

II. THE CRISIS FACING OUR COMMUNITIES

Across the United States, the lack of affordable housing⁵ has reached epidemic proportions.⁶ The affordable housing crisis is worse in the metro area, and in Minnesota at large, than anywhere else.⁷ The metro area now has “the most minuscule percentage of

5. “Affordable housing” means housing (including rent or mortgage payments, utilities, taxes, and insurance) that consumes 30% or less of the income of a household earning 80% or less of the metro area median income. *See, e.g.,* METRO. COUNCIL, REPORT TO THE MINNESOTA LEGISLATURE ON AFFORDABLE AND LIFE-CYCLE HOUSING, at 4 (Dec. 2000). In the metro area, a house is “affordable” at \$140,000.00 or less, and an apartment is “affordable” at \$738.00 or less in monthly rent. OFFICE OF THE LEGISLATIVE AUDITOR, STATE OF MINNESOTA, PROGRAM EVALUATION REPORT: AFFORDABLE HOUSING, at 4 (Jan. 2001). In order to assess the full scope of the affordable housing need, it is imperative to consider the need of people with very low incomes (0-30% of metro area median income) and low incomes (30%-50% of metro area median income) in addition to people with moderate incomes (50%-80% of metro area median income).

6. *See, e.g.,* METRO. COUNCIL, *supra* note 5, at 10-11 (discussing the findings of a recent national study commissioned by the United States Department of Housing and Urban Development).

7. Between 1990 and 1999, rents in the metro area increased by 34% while incomes increased by only 9%; in the last year alone, rents increased by 11%. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 14; *see also* BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 121-91 (2001) (describing the housing crisis in Minnesota and noting that it is worse here than elsewhere); *infra* notes 8-9, 14-19 and accompanying text. While a “healthy market” has a vacancy rate of 5%, the metro area vacancy rate is “unusually low” and appears to be near 1%. *See* OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 15; HOME LINE, VOUCHERS TO NOWHERE 3 (Oct. 2000); REGINA WAGNER & MAUREEN O’CONNELL, REGIONAL ANALYSIS OF IMPEDIMENTS TO FAIR HOUSING, at 21 (May 2001); *see also* MAYORS’ REGIONAL HOUSING TASK FORCE, AFFORDABLE HOUSING FOR THE REGION: STRATEGIES FOR BUILDING STRONG COMMUNITIES 5 (Nov. 2000) (observing that \$14 million in Section 8 vouchers are going unused in the Twin Cities metro area due largely to resistance from landlords); Rob Hotakainen, *Housing Crisis Hurting Kids, Study Says: The Health of Children in the Twin Cities and Nationwide is Endangered by a Lack of Affordable Shelter*, STAR-TRIBUNE (Minneapolis), Apr. 8, 1999, at 1A (discussing a national study that found there to be nearly

idle units of any metro area in the nation.”⁸ In fact, the vacancy rate for housing that is more affordable may now be 0%.⁹ This is disturbing, especially in light of Minnesota’s tradition of cutting-edge leadership on critical economic and social issues.¹⁰

A. The Impact of the Affordable Housing Shortage

In response to the government’s failure to resolve the affordable housing crisis, a coalition has formed. This coalition consists of people from central city, suburban, and out-state communities and from a variety of religious, racial, cultural, and economic backgrounds.¹¹ Members of this coalition have repeatedly testified before city councils, county commissions, the Met Council, and the Minnesota Legislature about the need for more affordable housing.¹² They have also held large rallies at the State Capitol and organized numerous forums to educate the public about what public officials have known for some time—the housing crisis is spinning out of control.¹³

80,000 low-income renters but less than 40,000 low-income units in the metro area); David Peterson & Steve Brandt, *Housing Fails to Keep Pace: As State Population Soars, Metro Area Scrambles for Living Space*, STAR-TRIBUNE (Minneapolis), May 23, 2001, at 1A (“Even as Minnesota’s population was taking its biggest jump ever in the 1990s, its housing supply increased at the lowest rate since at least the Great Depression, according to the latest data from the 2000 census.”).

8. Peterson & Brandt, *supra* note 7, at 1A (using 2000 census data).

9. WAGNER & O’CONNELL, *supra* note 7, at 21 (analyzing housing patterns in the metro area).

10. See, e.g., Myron Orfield, *Conflict or Consensus? Forty Years of Minnesota Metropolitan Politics*, BROOKINGS REV., Fall 1998, at 31 (discussing the creation of regional transit, land-use planning, and tax-revenue sharing systems in Minnesota).

11. *HousingMinnesota, Initiates Statewide Media Campaign for Affordable Housing: More than 50 Organizations are Supporting the Campaign*, COMMON GROUND (Alliance for Metro. Stability, Minneapolis, Minn.), Summer 2000, at 15; *Housing Works, a New Coalition, Brings New Voices to Call for Housing*, DWELLINGS (Metropolitan Interfaith Council on Affordable Housing, Minneapolis, Minn.), July 2001, at 6-7; Telephone Interview with Russ Adams, Director of the Alliance for Metropolitan Stability (July 9, 2001); Telephone Interview with Chip Halbach, Executive Director of the Minnesota Housing Partnership (July 9, 2001); Interview with Jodi Nelson, Lead Congregational Organizer of the Metropolitan Interfaith Council on Affordable Housing, in Eagan, Minn. (July 16, 2001); Interview with Caty Royce, Executive Director of the Community Stabilization Project, in Minneapolis, Minn. (June 28, 2001).

12. See *supra* note 11.

13. MINN. STAT. § 473.868, subd. 1 (2001); WILDER RESEARCH CENTER, MINNESOTA STATEWIDE SURVEY OF PEOPLE WITHOUT PERMANENT SHELTER: PRELIMINARY FINDINGS 2 (Feb. 2000) (finding the homeless population has

There is good reason for the growing public concern. The affordable housing shortage is causing widespread hardship for families and children. Nearly 12,000 children, and more than 21,000 people in total, are estimated to be homeless in Minnesota on any given night.¹⁴ Homeless shelters are overflowing with families and people who work full-time jobs.¹⁵ Moreover, in the last ten years the number of people living in group housing, such as homeless shelters, has increased in Minnesota at "nearly three times the national average, and [Minnesota has] led all states."¹⁶

Among those in the metro area who have housing, many must choose between their housing and feeding their families adequately because they pay more than 50%¹⁷ of their income for housing.¹⁸ Others must choose between doubling-up, putting their friends' and relatives' housing at risk, and living on the street.¹⁹

Communities without an adequate supply of affordable

increased 149% in the last ten years); *see also supra* notes 7-9 and accompanying text; *infra* notes 14-19 and accompanying text.

14. WILDER RESEARCH CENTER, FACTS ABOUT HOMELESS CHILDREN AND YOUTH: SUMMARY 1 (Oct. 2000); WILDER RESEARCH CENTER, *supra* note 13, at 1-2.

15. WILDER RESEARCH CENTER, *supra* note 13, at 2, 4 (finding that shelters turn away families who seek temporary housing at twice the rate as that of ten years ago and documenting that a significant percentage of those staying in shelters work full-time jobs); *see also* JOBS NOW COALITION, THE COST OF LIVING IN MINNESOTA 16 (May 2001) (showing that typical wages in Minnesota are not high enough to meet basic needs, such as housing); *Who Needs Affordable Housing?* (Minn. Housing Partnership, St. Paul, Minn.), 1999, at 1 (showing that lower-level jobs do not pay enough to cover the cost of housing and other living expenses).

16. Peterson & Brandt, *supra* note 7, at 1A (using 2000 census data).

17. To be able to provide for food, clothing, health care, and other necessities, no more than 30% of a household's income should be used for housing. *See* FAMILY HOUS. FUND, 20TH ANNIVERSARY REPORT, 1980-2000, at 10 (2000); OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 5-8.

18. MAYORS' REGIONAL HOUSING TASK FORCE, *supra* note 7, at 4 (estimating that over 160,000 households in the metro area pay more than 50% of their income, live in substandard housing, or both); WAGNER & O'CONNELL, *supra* note 7, at 7 ("[A]bout three-fourths of low-income households and one-half of moderate income households [have] a housing-cost burden . . ."); Hotakainen, *supra* note 7, at 1A (describing the choice between food and housing that many families must make); *see also* OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 5 (finding that over 20% of Minnesotans pay more than 30% of their income on housing).

19. *The Need for Affordable Housing in the Twin Cities*, PUBLIC EDUCATION INITIATIVE (Family Hous. Fund, Minneapolis, Minn.), July 1998, at 2 (describing the choice between doubling-up and living on the streets that many families face); Interview with Ken Gilchrist, Director of Project HOPE, in St. Paul, Minn. (July 6, 2001) (explaining that doubling-up to avoid living on the street makes evictions more likely); WILDER RESEARCH CENTER, *supra* note 13, at 2 (estimating that nearly 13,000 people are doubling-up in Minnesota).

housing are also feeling the effects of the housing crisis.²⁰ For example, businesses in these areas struggle to fill vacant job positions, and a growing number of teachers, police officers, and home health aides, among others, cannot live in the communities they serve.²¹ Ultimately, the affordable housing shortage has harmed the metro area as a whole. The metro area continues to be one of the most segregated regions in the United States.²²

20. Affordable housing is located mainly in central city neighborhoods. WAGNER & O'CONNELL, *supra* note 7, at App. F: Report Maps ("Twin Cities: Housing Types 1998") (illustrating the location of affordable housing); EDWARD GOETZ & LORI MARDOCK, *LOSING GROUND: THE TWIN CITIES LIVABLE COMMUNITIES ACT AND AFFORDABLE HOUSING 5* (Center for Urban and Regional Affairs 1998) (describing the housing situation in the metro area).

21. Many new jobs in the metro area do not pay enough to enable employees to afford housing near new job opportunities; this makes it difficult for businesses and agencies to recruit and retain workers. *See, e.g.,* MYRON ORFIELD, *METROPOLITICS: A REGIONAL AGENDA FOR COMMUNITY AND STABILITY* 7, 67-68 (1997); *see also* DAKOTA COUNTY, *DAKOTA COUNTY INDICATORS 2001: MEASURING PROGRESS, DRAFT EXECUTIVE SUMMARY* 7 (May 2001) (finding that many service-industry employees cannot afford housing near their work); JIM KIELKOPF, ET AL., *UNIVERSITY OF MINNESOTA DEPARTMENT OF APPLIED ECONOMICS, EAGAN BUSINESS SURVEY: SUMMARY REPORT 7* (June 2001) (reporting the widespread labor shortage in suburban communities); G.R. Anderson Jr., *Ted's Excellent Adventure*, CITY PAGES, May 23, 2001, at 17; Editorial, *Affordable Housing: Workers Should be Able to Live Nearby*, PIONEER PRESS (St. Paul), May 11, 2001, at 16A (discussing the inability of many to live in the area in which they work); Sally Thompson, *A Living Wage — But Will It Buy Housing?*, SUN NEWSPAPERS, Apr. 4th, 2001, (Special Addition: An Affordable Place to Call Home), at 10 (same); Neal St. Anthony, *Housing, Education Top List of Business Concerns*, STAR-TRIBUNE (Minneapolis), Apr. 3, 2001, at 1D (same); BUILDERS ASS'N OF THE TWIN CITIES & CENTER FOR ENERGY AND ENV'T, *FEES, INFRASTRUCTURE COSTS, AND DENSITY . . . THEIR IMPACT UPON THE TWIN CITIES REGIONAL GROWTH STRATEGY: EXECUTIVE SUMMARY 1* (May 2000) [hereinafter *BATC & CEE*] (same).

22. 2000 United States Census; ERIC MYOTT, *INST. ON RACE AND POVERTY, TWIN CITIES SEVEN COUNTY MAPS OF 1990 AND 2000 CENSUS TRACTS: RACIAL/ETHNIC GROUPS* ("Twin Cities 2000 Percent People of Color;" "Twin Cities 1990 to 2000 Change in Non-Hispanic White Population;" "Twin Cities 1990 to 2000 Change in People of Color Population") (June 2001) (mapping the extent of racial segregation in the metro area with 2000 census data); David Peterson, *Many Children Racially Isolated: A New Analysis is Comparing the Interaction of Pairs of Races Separately*, STAR-TRIBUNE (Minneapolis), May 8, 2001, at 1B (using 2000 census data).

This segregation flows from cities' failure to provide enough affordable housing. In the metro area, people of color disproportionately have low or moderate incomes, so cities' failure to provide housing that is affordable to people with low and moderate incomes tends to exclude people of color. *See* 2000 United States Census; WAGNER & O'CONNELL, *supra* note 7, at 9-10, App. F: Report Maps ("Twin Cities: 1998 Percent People of Color within Housing Subsidized Population"). That this relationship between race and income comes from the effects of past and present discrimination underscores the fact that the failure to provide affordable

Significantly, segregation is associated with metropolitan decline.²³ In addition, as cities insist on more expensive, low-density housing development, the metro area faces more suburban sprawl and environmental degradation.²⁴

Although all of our communities are negatively affected by the affordable housing shortage, certain residents of the metro area are harmed disproportionately.²⁵ For example, people of color are homeless or on waiting lists for housing in greater proportions than white Minnesotans. While approximately 10% of Minnesotans are people of color, about 70% of homeless Minnesotans are people of color.²⁶ Also by way of example, nearly 90% of people on the

housing is a civil rights issue. For a discussion of why racial discrimination explains racial disparities regarding income, among other things, see RANDALL ROBINSON, *THE DEBT: WHAT AMERICA OWES TO BLACKS* 61-80 (2000); see also generally CHALLENGES TO EQUALITY: POVERTY AND RACE IN AMERICA (Chester Hartman ed., 2001).

23.: See, e.g., INSTITUTE ON RACE AND POVERTY, *EXAMINING THE RELATIONSHIP BETWEEN HOUSING, EDUCATION, AND PERSISTENT SEGREGATION: A REPORT TO THE MCKNIGHT FOUNDATION* 37 (Feb. 1998) (noting the connection between segregation and decline); ORFIELD, *supra* note 21, at 2-10 (same); see also Jack Conrad, Editorial, *Welcome Home*, PIONEER PRESS (St. Paul), June 25, 2001, at 9A ("If Eagan clings to an isolationist position, the social and economic base of the community will ultimately be damaged."); Peter Dreier, *Sprawl's Invisible Hand*, THE NATION, at 6, 6 (Feb. 21, 2001) ("[T]here's a growing recognition among environmentalists, community organizations, labor activists, academic researchers and even some business leaders that cities and suburbs are in the same metropolitan boat . . ."); RICHARD VOITH, FEDERAL RESERVE BANK OF PHILADELPHIA, *DO SUBURBS NEED CITIES?* 20-21 (1994) (identifying a strong link between city and suburban growth in income, population, and property values); *infra* notes 79-82 and accompanying text.

24. See Editorial, *Metro Sprawl: Adding Land Far Faster than People*, STAR-TRIBUNE (Minneapolis), July 15, 2001, at A24 ("Minneapolis-St. Paul added 270,000 acres of urbanized land. . . . That's an additional acre of urbanized land for every two new residents."); Charles Pope, *Suburban Sprawl and Government Turf: 'Smart Growth,' Long Regarded as a Local Issue, Is Now a Hot Topic at the Federal Level*, CQ WEEKLY, Mar. 13, 1999, at 586, 590 (describing the metro area as having one of the greatest problems of sprawl in the United States); see also Dreier, *supra* note 23, at 6 (observing that sprawl causes "traffic congestion, pollution and loss of green spaces . . .").

25. See, e.g., Hannah Allam, *Area Thriving Despite Affordable Housing Efforts; Labor Shortages, Transportation Also Problems*, PIONEER PRESS (St. Paul), June 6, 2001, at B2 ("[Dakota County Board Chairman Mike] Turner said many people of color are employed in the county's service industry, leaving them most affected by the housing shortage."); WAGNER & O'CONNELL, *supra* note 7, at 8 (observing that people of color are disproportionately harmed); see also *infra* notes 113-39 and accompanying text.

26. 2000 United States Census; WILDER RESEARCH CENTER, *supra* note 13, at 3 (estimating the racial impact of homelessness).

waiting list for public housing in Minneapolis are people of color.²⁷ This housing instability has even more of an impact because children without housing suffer health and developmental problems at much greater rates.²⁸ Minnesota children without housing are disproportionately youth of color.²⁹

Even when people of color secure housing, it may not offer the same access to opportunity as housing does for whites in the metro area.³⁰ The vast majority of new jobs in the metro area are far from such housing.³¹ In addition, residents of this housing can be some distance from schools with better educational opportunities.³²

27. Press Release, Minneapolis Public Housing Authority, MPHA Demographics—Race/Ethnicity: by heads of households (July 5, 2001) (on file with author) (setting forth data regarding waiting lists); *see also* METRO. COUNCIL, HRA APPLICANT CHARACTERISTIC REPORT 1 (May 2001) (showing that over 50% of people on the waiting list for the metropolitan Section 8 program are people of color); Telephone Interview with Carol Schultz, Director of Property Management for Dakota County CDA, by Southern Minnesota Regional Legal Services (May 31, 2001) (indicating that over 50% of people on the waiting list for public housing in Dakota County are people of color); E-mail with attached spreadsheet from Al Hester, Assistant to the Executive Director of the St. Paul Public Housing Authority, to Southern Minnesota Regional Legal Services (May 29, 2001) (on file with author) (reporting that nearly 80% of people on the waiting list for public housing in St. Paul are people of color); WAGNER & O'CONNELL, *supra* note 7, at 77 (reporting that nearly 60% of people in the metro area seeking housing with rental assistance vouchers, and who are denied the housing they seek, are people of color).

28. WILDER RESEARCH CENTER, *supra* note 14, at 2 (concluding that large numbers of children without housing in the metro area have chronic or severe health and learning difficulties); *Homelessness and its Effects on Children*, PUBLIC EDUCATION INITIATIVE (Family Hous. Fund, Minneapolis, Minn.), Dec. 1999, at 4-9 (same).

29. 2000 United States Census; WILDER RESEARCH CENTER, *supra* note 14, at 4 (estimating that about 45% of youth without housing in Minnesota are children of color).

30. *See infra* notes 31-34 and accompanying text. For a general discussion of this reality, *see* John Calmore, *A Call to Context: The Professional Challenges of Cause Lawyering at the Intersection of Race, Space, and Poverty*, 67 *FORDHAM L. REV.* 1927, 1943, 1947 (1999) (noting that people of color often do not have access to adequate schools, city services, employment opportunities, and physical safety).

31. WAGNER & O'CONNELL, *supra* note 7, at App. F: Report Maps ("Twin Cities: Total Number of Jobs 1999;" "Twin Cities: Change in Jobs 1994 to 1999") (illustrating the mismatch between the location of jobs and affordable housing in the metro area); BATC & CEE, *supra* note 21, at 1; FAMILY HOUS. FUND, *supra* note 19, at 3 (noting that most job growth in the metro area occurs in certain suburban areas).

32. WAGNER & O'CONNELL, *supra* note 7, at App. F: Report Maps ("Twin Cities: Race and Ethnicity of School District Students 1999-2000") (reporting the segregation of schools in the metro area); INSTITUTE ON RACE AND POVERTY, *supra* note 23, at 28-32, 53-67 (illustrating the segregation and educational inequality in

Moreover, such housing frequently provides inferior access to health care facilities and greater exposure to health risks.³³ Furthermore, residents of this housing typically have less access to bank loans and other forms of economic opportunity.³⁴

In short, the lack of affordable housing harms all of our communities, but it affects people of color to a much greater extent. The housing crisis disproportionately denies them adequate housing opportunities and a fair chance to succeed in life.

B. A Substantial Cause of the Housing Crisis

The affordable housing shortage results from, to a large extent, the Met Council's and metro cities' failure to follow the state law, the LUPA, which requires affordable housing planning and creation.³⁵ For clarity, violations of the LUPA by the Met Council will be outlined first and violations by cities will be

certain schools in the metro area); ORFIELD, *supra* note 21, at 43-47 (same). For a powerful analysis of the inequality of educational opportunity experienced by many students of color across the United States, see generally JONATHAN KOZOL, *SAVAGE INEQUALITIES* (HarperPerennial 1992) (1991).

33. FAMILY HOUS. FUND, *supra* note 28, at 12 (noting the greater health risks in the metro area faced by children in these settings); INSTITUTE ON RACE AND POVERTY, *supra* note 23, at 69 (finding that crime rates increase in economically distressed neighborhoods in the metro area); see also MICHAEL TONRY, *MALIGN NEGLECT: RACE, CRIME, AND PUNISHMENT IN AMERICA* 186-87 (1995) (finding that police and other law enforcement agencies unfairly target people of color in urban areas); George Galster, *Polarization, Place, and Race*, 71 N.C. L. REV. 1421, 1436 (1993) (describing the violence that has occurred in some economically distressed areas); Sidney Watson, *Health Care in the Inner City: Asking the Right Question*, 71 N.C. L. REV. 1647, 1650-54 (1993) (explaining that many primary-care clinics and private hospitals in communities of color have closed); Sylvia Drew Ivie, *Ending Discrimination in Health Care: A Dream Deferred*, in UNITED STATES COMM'N ON CIVIL RIGHTS, *CIVIL RIGHTS ISSUES IN HEALTH CARE DELIVERY* 282, 295 (1980) (describing environmental hazards imposed on communities of color).

34. INSTITUTE ON RACE AND POVERTY, *supra* note 23, at 33-34 (describing the inequality of opportunity in some central city neighborhoods in the metro area); see also Galster, *supra* note 33, at 1434 (explaining that many central city residents become isolated from social and political contacts that would enable them to mobilize community and economic resources for advancement); Timothy Bates, *Small Business Viability in the Urban Ghetto*, 29 J. REG'L SCI. 625, 635-37 (1989) (describing lending discrimination against communities of color).

35. Although Minnesota's historically high tax rate on rental property and the 1986 changes to the federal tax code have made it more difficult to provide affordable housing, the affordable housing shortage would nonetheless be greatly reduced, if not eliminated, if the Met Council and cities had taken appropriate steps, as required by the LUPA. See *infra* notes 83-103 and accompanying text.

discussed second.

1. *Violations of State Law by the Met Council*

The Met Council has two main duties under the LUPA: (1) to help each city meet its obligations under the law and (2) to review each city's efforts to provide enough affordable housing. Unfortunately, the Met Council falls short in both respects.

a. *The Met Council's Failure to Provide Adequate Guidance and Support for Affordable Housing Planning and Creation*

The LUPA requires the Met Council to provide adequate direction and assistance to cities in the metro area so that all housing needs are met.³⁶ Toward this end, the Met Council originally used a comprehensive formula to calculate the amount of affordable housing needed in every city.³⁷ By 1983, however, the Met Council had abandoned this mandatory housing formula, giving cities little guidance regarding the amount of affordable housing that each city must create.³⁸ Moreover, starting in 1995, the Met Council began encouraging cities to use voluntary housing goals negotiated under the Metropolitan Livable Communities Act ("LCA")³⁹ as the calculation of the official "need" for affordable

36. MINN. STAT. § 473.854 (2001) ("The council *shall* prepare and adopt guidelines and procedures relating to the requirements and provisions of sections . . . 473.851 to 473.871 [LUPA] which will provide assistance to local governmental units . . . in accomplishing the provisions of . . . 473.851 to 473.871 [LUPA].") (emphasis added)).

37. BARBARA LUKERMANN & MICHAEL KANE, CENTER FOR URBAN AND REGIONAL AFFAIRS, LAND USE PRACTICES: EXCLUSIONARY ZONING, DE FACTO OR DE JURE? AN EXAMINATION OF THE PRACTICES OF TEN SUBURBAN COMMUNITIES IN THE TWIN CITIES METROPOLITAN AREA (1994) (documenting the nature and results of city policies and practices concerning affordable housing).

38. Telephone Interview with Edward Goetz, Associate Professor at the Hubert H. Humphrey Institute of Public Affairs (August 15, 2001).

39. MINN. STAT. §§ 473.25 – .255 (2001). Under the LCA, which does not supersede or replace the LUPA, cities negotiate with the Met Council to agree on affordable housing goals in light of benchmarks established by the Met Council. GOETZ & MARDOCK, *supra* note 20, at 9. These benchmarks are based on past performance in creating affordable housing, so cities that have created the least affordable housing in the past have the lowest benchmarks. Goetz, *supra* note 38. Thus, a city's housing goals have little to do with actual, let alone future, affordable housing need. *Id.* Moreover, unlike the LUPA, the LCA involves a voluntary program. MINN. STAT. § 473.2541(a) (2001) ("[A] municipality may elect to participate in the local housing incentive account program."). Cities can choose, and have chosen, not to participate, further limiting the creation of

housing.⁴⁰

By the Met Council's own admission, the voluntary LCA goals are not based on need, and they fall far short of the affordable housing obligations under the LUPA—that is far short of the current and future need.⁴¹ In fact, LCA goals, even if met, would satisfy only about 10% of the demand for affordable housing.⁴² Moreover, cities appear to be creating even less affordable housing now than before the Met Council allowed them to use the voluntary LCA goals as the measure of need.⁴³ Yet cities in the metro can now claim that they are providing enough affordable housing if they meet these entirely inadequate goals.

b. The Met Council's Failure to Exercise its Authority Properly in Overseeing the Comprehensive Plan⁴⁴ Process

The LUPA also requires the Met Council to review the comprehensive plan of each city in the metro area.⁴⁵ Every city's comprehensive plan must include a determination and discussion of the criteria and strategies⁴⁶ it will use and the concrete steps it will take to provide an adequate amount of affordable housing.⁴⁷

affordable housing.

40. Goetz, *supra* note 38.

41. *Alliance Urges Met Council to Follow State Law, Set Stronger Housing Affordability Goals*, COMMON GROUND (Alliance for Metro. Stability, Minneapolis, Minn.), Winter 2001, at 7 (describing the inadequacy of the LCA goals); GOETZ & MARDOCK, *supra* note 20, at 2 (same); *see also supra* note 39.

42. Alliance for Metro. Stability, *supra* note 41, at 7.

43. GOETZ & MARDOCK, *supra* note 20 at 29-32 (documenting current, and projecting future, affordable housing shortfalls).

44. A comprehensive plan is a city document that describes the goals, standards, rules, and actions that a city will take regarding the use of its land and natural resources. *See* MINN. STAT. § 473.859 (2001).

45. MINN. STAT. § 473.175 (2001) ("The council *shall* review the comprehensive plans of local governmental units . . . to determine their compatibility with each other and conformity with metropolitan system plans. The council *shall* review and comment on the apparent consistency of the comprehensive plans . . . with adopted plans of the council." (emphasis added)).

46. MINN. STAT. § 473.859, subd. 2 (2001) ("A land use plan [of a city's comprehensive plan] *shall* also include a housing element containing standards, plans and programs for providing adequate housing opportunities to meet *existing and projected local and regional housing needs*, including but not limited to the use of official controls and land use planning to promote the availability of land for the development of low and moderate income housing." (emphasis added)).

47. MINN. STAT. § 473.859, subd. 4(3) ("An implementation program [of a city's comprehensive plan] *shall* contain at least the following parts: . . . a housing implementation program, including official controls to implement the housing element of the land use plan, *which will provide* sufficient existing and new housing

Nonetheless, the Met Council consistently approves city comprehensive plans that do not include an identification, much less a discussion, of the required criteria, strategies, and actions concerning affordable housing.⁴⁸ Neither the LUPA nor any other law authorizes the approval of these clearly inadequate plans.

2. *Violations of State Law by Cities*

Under the LUPA, every city in the metro area must prepare a comprehensive plan and submit it to the Met Council.⁴⁹ In this way, each city must plan for and implement development, including affordable housing, appropriate to meet the needs of the city and the metro area.⁵⁰ The legal duties of cities under the LUPA can be put into three categories: (1) planning for enough affordable housing, (2) providing an adequate supply of affordable housing, and (3) eliminating all exclusionary policies and practices.⁵¹ On all three counts, many cities in the metro area fail.

a. *The Cities' Failure to Plan for Enough Affordable Housing*

Each city has an absolute duty under the LUPA to plan adequately for affordable housing.⁵² According to the law, the city planning process for affordable housing must not be an academic

to meet the local unit's share of the metropolitan area need for low and moderate income housing." (emphasis added)).

48. See generally EDWARD GOETZ, ET AL., CENTER FOR URBAN AND REGIONAL AFFAIRS, *THE AFFORDABLE HOUSING LEGACY OF THE 1976 LAND USE PLANNING ACT* (forthcoming Oct. 2001) (finding widespread non-compliance with the LUPA).

49. Cities submit their comprehensive plans for review to the Met Council pursuant to section 473.175 subd. 1. See MINN. STAT. § 473.858, subd. 1 (2001) ("[E]very local governmental unit *shall* have prepared a comprehensive plan, in accordance with sections 462.355, subdivision 4, 473.175, and 473.851 to 473.871 [LUPA] and the applicable planning statute and shall have submitted the plan to the metropolitan council for review pursuant to section 473.175." (emphasis added)).

50. MINN. STAT. § 473.859, subd. 2, subd. 4(3); MINN. STAT. § 473.858, subd. 1.

51. Exclusionary policies and practices are city laws and actions, such as the requirement of large setbacks and lot sizes, that make it more difficult to locate affordable housing in that city and, therefore, that exclude people of color in greater proportions. For a discussion of exclusionary policies and practices, see LUKERMANN & KANE, *supra* note 37, at 5; DAVID R. MANDELKER & ROGER A. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 330-35 (Michie Co. ed. 1990) (1979); see also *infra* notes 63-70 and accompanying text.

52. MINN. STAT. § 473.859, subd. 2.

exercise. The LUPA requires every city in the metro area to identify and adopt “standards, plans, and programs”⁵³ so that each city can provide enough affordable housing “to meet *existing and projected local and regional housing needs*.”⁵⁴

Although the law is clear on planning for affordable housing, cities routinely submit comprehensive plans that are inadequate in this respect. For example, almost all cities in the metro area do not specify the amount of local, let alone regional, need for affordable housing.⁵⁵ In addition, many comprehensive plans make no numerical commitments for housing creation, let alone describe steps actually to be taken to meet the need for housing.⁵⁶ Some cities refuse even to make land available for the possibility of developing affordable housing. Eagan, for example, has set aside only 7 of more than 3,500 available acres for higher-density, and thus possibly affordable, housing in its proposed plan.⁵⁷ According to Eagan officials, the problem is the lack of \$400,000.00 homes, not a shortage of affordable housing: “[Eagan has chosen] to *prioritize building homes for corporate CEOs and a championship golf course*.”⁵⁸

b. The Cities' Failure to Provide an Adequate Amount of Affordable Housing

The LUPA also requires every city to create enough affordable housing to meet the need.⁵⁹ It clearly establishes every city's duty to adopt an implementation program that “*will provide* sufficient existing and new housing to meet [a city's] share of the metropolitan area need for low and moderate income housing.”⁶⁰

53. *Id.*

54. *Id.* (emphasis added).

55. See generally GOETZ, ET AL., *supra* note 48 (documenting the failure to fulfill obligations under the LUPA).

56. *Id.*

57. METRO. COUNCIL, REVIEW AND COMMENTS ON THE MET COUNCIL RECOMMENDATION FOR DENIAL OF EAGAN COMPREHENSIVE PLAN UPDATE, at 2 (Sept. 2000); see also generally Anderson, *supra* note 21, at 11, 16; GOETZ, ET AL., *supra* note 48.

58. Amy Sherman, *Survey Suggests Homes Should be Built for CEOs: Eagan Plan Mapped to Court Business*, PIONEER PRESS (St. Paul), June 13, 2001, at 1B, 4B (emphasis added); see also KIELKOPF, ET. AL. *supra* note 21, at 9.

59. MINN. STAT. § 473.859, subd. 4(3) (2001).

60. *Id.* (emphasis added). Other states also have laws that impose this duty to address the affordable housing need, commonly referred to as a city's “fair share” obligation. See, e.g., N.H. REV. STAT. § 674:2(III) (2000) (“[The master plan shall include] [a] housing section which . . . addresses current and future housing

Even if cities' comprehensive plans were adequate—which most are not—cities frequently do not implement the plans fully or effectively. Consequently, almost no city in the metro area provides enough of the affordable housing needed.⁶¹ The city of Minneapolis illustrates the nature of this problem. According to housing officials, Minneapolis may need nearly 15,000 additional units to satisfy the local demand for affordable housing.⁶²

c. The Cities' Exclusionary Policies and Practices

Every city also has an absolute duty to ensure that its actions do not hamper the creation of an adequate amount of affordable housing.⁶³ In other words, in addition to requiring the adoption of the inclusionary⁶⁴ housing approach described above, the LUPA mandates the elimination of exclusionary laws and conduct. For example, each city must change any zoning⁶⁵ policy that interferes with the development of enough affordable housing.⁶⁶

needs of residents of all levels of income and of municipality and of the region . . ."); N.J. STAT. ANN. § 52:27D-310 (2001) ("A municipality's housing element shall be designed to achieve the goal of access to affordable housing to meet present and prospective housing needs . . .").

61. See GOETZ ET AL., *supra* note 48; Goetz, *supra* note 38; LUKERMANN & KANE, *supra* note 37, at 14, 31; see also *infra* note 62 and accompanying text.

62. MINNEAPOLIS AFFORDABLE HOUSING TASK FORCE REPORT 12 (July 15th, 1999) (finding the unmet demand among people in Minneapolis with very-low incomes, 0-30% of the metro area median income, to be 14,776 households).

63. MINN. STAT. § 473.858, subd. 1 (2001).

If the comprehensive municipal plan is in conflict with the zoning ordinance, the zoning ordinance *shall* be brought into conformance with the plan by local government units in conjunction with the review [by the Met Council] and, if necessary, amendment of its comprehensive plan required under Section 473.864, subdivision 2. After August 1, 1995, a local government unit *shall not* adopt any fiscal device or official control which is in conflict with its comprehensive plan . . .

Id. (emphasis added)); see also MINN. STAT. § 473.865, subd. 2 ("A local governmental unit *shall not* adopt any official control or fiscal device which is in conflict with its comprehensive plan or which permits activity in conflict with metropolitan system plans." (emphasis added)).

64. This term generally refers to laws that require the creation and use of mandates and incentives that provide more economically and racially integrated housing. For an analysis of inclusionary approaches, see *infra* notes 85-92 and accompanying text.

65. Zoning means city laws that control how land is used within city boundaries. For a more detailed description of zoning laws, see MANDELKER & CUNNINGHAM, *supra* note 51, at 165-81, 199-330.

66. MINN. STAT. § 473.858, subd. 1 (2001); MINN. STAT. § 473.865, subd. 2 (2001).

Nonetheless, many cities have exclusionary zoning laws that make it more difficult, if not impossible, to create affordable housing within city limits.⁶⁷ For example, Woodbury requires a costly brick or stone facade for housing that is taller than three floors—in other words, for multi-family housing that could otherwise be more affordable.⁶⁸ Other cities have imposed, among other things, expensive low-density, large-lot, and multiple-car-garage requirements.⁶⁹ By driving up the cost of housing development, cities in the metro area unnecessarily increase the cost of housing.⁷⁰

In sum, the Met Council continues to fail to provide adequate guidance and review concerning city comprehensive plans. Moreover, cities in the metro area not only continue to fail to implement inclusionary measures, many also actually have exclusionary policies and practices.

III. THE MYTHS AND FACTS ABOUT AFFORDABLE HOUSING

Given the impact of the affordable housing crisis on our communities and the government's duty under the LUPA to ensure that all housing needs are met, it is perplexing that the housing crisis continues. Despite the urgency of the situation, some people still overlook the devastating effect of the housing shortage and choose, instead, to focus on the perceived disadvantages of providing more affordable housing.⁷¹ To assess the actual impact of affordable housing on our communities, each of the most common fears will be evaluated.

67. WAGNER & O'CONNELL, *supra* note 7, at 45-49 (noting that cities in the metro area have exclusionary policies and practices); *see also* OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 29-31 (same); INSTITUTE ON RACE & POVERTY, *supra* note 23, at 48-50 (same); LUKERMANN & KANE, *supra* note 37, at 9-10, 20 (same).

68. WOODBURY CITY CODE § 24-9(h)(i)(1) (1995).

69. LUKERMANN & KANE, *supra* note 37, at 17-18 (outlining examples of exclusionary zoning).

70. *See* Merrily Heleson & Todd Messelt, *City Zoning Ordinances Affect Housing*, SUN NEWSPAPERS, Apr. 4, 2001, (Special Addition: An Affordable Place to Call Home), at 6 (describing the impact of exclusionary policies and practices); LUKERMANN & KANE, *supra* note 37, at 20, 25 (same); *see also* Michael Schill & Susan Wachter, *The Spatial Basis of Federal Housing Law and Policy: Concentrated Poverty in Urban America*, 143 U. PA. L. REV. 1285, 1333-35 (1995) (discussing how cities use zoning laws to inflate housing costs).

71. *See generally* Anderson, *supra* note 21 (discussing the mayor of Eagan's position on affordable housing).

A. *Affordable Housing and Neighborhood Property Values*

Perhaps the greatest worry is that affordable housing will drive down the value of nearby homes, apartments, and other real estate. Data collected over the past four decades from across the country, and in the metro area, shows affordable housing has little, if any, negative impact on surrounding property values.⁷² In fact, local studies of both urban and suburban housing markets demonstrate that affordable housing can increase the value of nearby real estate.⁷³ In any event, courts dismiss, as discriminatory, the idea that affordable housing will reduce the property values in a community.⁷⁴

B. *Affordable Housing and Neighborhood Crime Rates*

Some opponents of affordable housing express the related fear that such housing will cause a sharp increase in criminal activity. The research also shows that this belief is unfounded.⁷⁵ In addition, that the value of properties near affordable housing does not drop, and may even increase, further confirms that there is no

72. EDWARD G. GOETZ ET AL., CENTER FOR URBAN AND REGIONAL AFFAIRS, THERE GOES THE NEIGHBORHOOD? THE IMPACT OF SUBSIDIZED MULTI-FAMILY HOUSING ON URBAN NEIGHBORHOODS 12-15 (1996) (outlining local research findings, reviewing over one dozen similar studies, and concluding that housing does not reduce nearby property values); ROBERT LYONS & SCOTT LOVERIDGE, UNIV. OF MINN. DEP'T OF AGRIC. & APPLIED ECON., AN HEDONIC ESTIMATION OF THE EFFECT OF FEDERALLY SUBSIDIZED HOUSING ON NEARBY RESIDENTIAL PROPERTY VALUES i (1993) (finding that affordable housing has little, if any, negative effect); *Affordable Housing Does Not Reduce Property Values: The Evidence from the Twin Cities*, PUBLIC EDUCATION INITIATIVE (Family Hous. Fund, Minneapolis, Minn.), Apr. 2001, at 1-2 (studying eleven suburbs between 1993 and 1997 and concluding that affordable housing does not harm the value of neighboring homes); see also DAVID RUSK, HUMPHREY POLICY FORUM, INCLUSIONARY ZONING: KEY STEP TOWARD BECOMING A WORLD CLASS REGION 8 (May 2001) (same); Hugh Nourse, *The Effect of Public Housing on Property Values in St. Louis*, 39 LAND ECON. 433, 440-41 (1963) (same); William Rabiega et al., *The Property Value Impacts of Public Housing Projects in Low and Moderate Density Residential Neighborhoods*, 60 LAND ECON. 174, 178 (1984) (same).

73. Family Hous. Fund, *supra* note 72, at 1-2; GOETZ, ET. AL, *supra* note 72, at 1; see also Joshua Nichols, *Many Affordable Housing Myths Prove to be Nothing But*, SUN NEWSPAPERS, Apr. 4, 2001, (Special Addition: An Affordable Place to Call Home), at 7; MAYORS' REGIONAL HOUSING TASK FORCE, *supra* note 7, at 7.

74. See, e.g., *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1187-88 (8th Cir. 1974), cert. denied 422 U.S. 1042 (1975) (rejecting the city's asserted reasons for not wanting affordable housing).

75. GOETZ, ET. AL, *supra* note 72, at 2, 13-14 (determining that affordable housing does not cause an increase in crime); see also FAMILY HOUSING FUND, *supra* note 17, at 9; Nichols, *supra* note 73, at 7.

actual link between affordable housing and crime.⁷⁶

C. *Affordable Housing and Neighborhood Stability*

In connection with the fears about property values and crime rates, some residents worry about the impact of affordable housing on the quality of communities. In other words, some people fear that the presence of affordable housing will mean a substantial increase in traffic and neighborhood turnover. Again, the data demonstrates that affordable housing does not make a community more transient or unstable.⁷⁷ Courts also reject this third basis for opposing affordable housing.⁷⁸

D. *Affordable Housing and Neighborhood Resources*

The final major worry regarding the impact of affordable housing is that such housing will cause businesses to leave and put overwhelming demands on city services. In reality, it is the failure to provide—not the provision of—enough affordable housing that can help to cause a major drain of resources.⁷⁹ Moreover, when businesses leave neighborhoods as part of this drain, they frequently leave the region altogether.⁸⁰ Consequently, the

76. Generally speaking, an increased crime rate would cause residents to move and property values to drop. Thus, when property values do not drop, it is reasonable to infer that crime rates have not increased significantly.

77. GOETZ, ET. AL, *supra* note 72, at 2-3 (concluding that the presence of affordable housing does not destabilize the surrounding neighborhoods).

78. *See, e.g., Black Jack*, 508 F.2d at 1187 (dismissing the city's rationales for opposing affordable housing).

79. This becomes more apparent when one analyzes, through a metropolitan lens, the consequences of an affordable housing shortage and the resulting segregation. *See* ORFIELD, *supra* note 21, at 9-10, 18-19, 27-28 (discussing the exodus of resources from economically distressed areas and the resulting strain on communities); CITIZENS LEAGUE, THE CASE FOR A REGIONAL HOUSING POLICY IN THE TWIN CITIES METROPOLITAN AREA 2-3 (May 1994) (same); *see also* John Powell, *Race and Space: What Really Drives Metropolitan Growth*, BROOKINGS REV., Fall 1998, at 20, 22.

80. For example, 40% of the businesses that left the highly segregated city of Philadelphia during the 1980s also left the metropolitan area entirely. ANTHONY DOWNS, LINCOLN INST. OF LAND POLICY, NEW VISIONS FOR METROPOLITAN AMERICA 56-59 (1994); *see also* Bob von Sternberg, *State Has Stake in Inner Cities*, STAR-TRIBUNE (Minneapolis), Aug. 5, 2001, at 1B ("[W]hat happens in St. Paul and Minneapolis sets the tone for the whole region."). Generally speaking, the bad conditions often found in economically distressed areas eventually have an impact on the metropolitan area as a whole. DOWNS, *supra* note 80, at 55-57; *see also* Douglas Massey, *Getting Away with Murder: Segregation and Violent Crime in Urban America*, 143 U. PA. L. REV. 1203, 1231-32 (1995) (finding that the problems

affordable housing shortage and the accompanying segregation are associated with the decline of entire regions.⁸¹ By contrast, greater economic integration, which can happen when communities provide an adequate amount of affordable housing, is associated with healthier metropolitan areas.⁸²

In short, each of the main fears about the perceived negative impact of affordable housing has little basis in fact. In truth, affordable housing benefits metropolitan areas by injecting additional resources and by bringing needed workers and energy into communities.

IV. THE ABILITY TO PROVIDE MORE AFFORDABLE HOUSING WITHOUT PUBLIC MONEY

Because fears about affordable housing are unfounded, the significant remaining objection is that there are insufficient resources to create more housing. According to this view, land and development costs have become so high that affordable housing cannot be created without substantial government funding. Moreover, this position asserts, the federal government has severely reduced the money available for developing affordable housing.

This final argument against affordable housing is irrelevant because cities in the metro area have an absolute duty to plan for and provide enough housing.⁸³ In any event, a glance at the

confronting economically distressed areas eventually appear in other communities).

81. See *supra* notes 21-24, 79-80 and accompanying text; see also BATC & CEE, *supra* note 21, at 1 (noting that the lack of affordable housing and other barriers to attracting and keeping entry-level workers will limit economic growth). The Milwaukee, Detroit, and St. Louis metropolitan areas illustrate this reality.

82. See ORFIELD, *supra* note 21, at 10-11 (describing the benefits of balanced living patterns); see also LARRY LEDEBUR & WILLIAM BARNES, NATIONAL LEAGUE OF CITIES, CITY DISTRESS, METROPOLITAN DISPARITIES AND ECONOMIC GROWTH 13-15 (Sept. 1992) (showing that income inequality between cities and their surrounding suburbs results in less job growth in those metropolitan areas); Donald DeMarco & George Galster, *Prointegrative Policy: Theory and Practice*, 15 J. URB. AFF. 141, 155-57 (1993) (identifying the benefits of economic integration); James Rosenbaum, *Changing the Geography of Opportunity by Expanding Residential Choice: Lessons from the Gautreaux Program*, 6 HOUS. POL'Y DEBATE 231, 263-66 (1995) (explaining why a balanced distribution of affordable housing reduces poverty in metropolitan areas).

83. See MINN. STAT. § 473.859, subd. 2, subd. 4(3) (2001). Other states with laws similar to the LUPA recognize that there is an overriding duty to meet the affordable housing need. See, e.g., *Britton v. Town of Chester*, 595 A.2d 492, 496 (N.H. 1991) ("[Each municipality has an] obligation to provide low [-] and moderate [-] income families in the community and a proportionate share of same

experience around the United States confirms that affordable housing can be created with little public money.⁸⁴ Successful methods for creating more affordable housing in this way fit into the three categories outlined below.

A. *Meaningful Inclusionary Zoning*

Generally speaking, inclusionary zoning refers to the requirement that all housing developments include a certain amount of affordable housing.⁸⁵ This approach has been used across the United States at the city, county, metropolitan, and state levels. Inclusionary zoning involves two main devices: density bonuses⁸⁶ and set-asides.⁸⁷

Inclusionary zoning has been highly successful in creating a substantial amount of affordable housing. Under a state law that is

within its region a realistic opportunity to obtain affordable housing.” (citation omitted)); *So. Burlington Cty. NAACP v. Tp. of Mt. Laurel*, 336 A.2d 713, 727-28 (N.J. 1975) (“It is plain beyond dispute that proper *provision for adequate housing of all categories of people is certainly an absolute essential* in promotion of the general welfare required in *all local land use regulation . . .*” (emphasis added)). At any rate, the lack-of-money argument rings a bit hollow in light of Minnesota’s budget surplus, which is approximately \$2.4 billion to date. Patricia Lopez Baden & Dane Smith, *State Surplus Forecast Slides 20% to \$2.4 Billion*, STAR-TRIBUNE (Minneapolis), Mar. 1, 2001, at 1A.

84. Simply because affordable housing can be created without public money does not mean, however, that all such housing can be provided without spending anything. To meet fully the housing need, as required by the LUPA, cities will have to allocate some money for the creation of additional housing that is affordable, in particular, to people with very low and low incomes.

85. For a discussion of inclusionary zoning, see MANDELKER & CUNNINGHAM, *supra* note 51, at 346-350.

86. Density bonuses take various forms, all of which encourage the production of housing at less cost because more housing can be located in a given place. For example, some cities allow developers to build housing at increasing densities as the amount of affordable housing they build increases; other cities allow for “tandem houses” and “accessory apartments” to transform single-family homes to multi-family housing that retains the single-family home appearance. See TOWN OF CARY AFFORDABLE HOUSING KIT, TOWN OF CARY DEPARTMENT OF DEVELOPMENT SERVICES, PLANNING AND ZONING DIVISION 12-15 (1999) [hereinafter TOWN OF CARY], available at <http://www.townofcary.org/agenda/ds00113C2.htm>; MANDELKER & CUNNINGHAM, *supra* note 51, at 328, 348.

87. Set-asides refer to the requirement that developers price a percentage of the housing they create, usually between 15% and 20%, for people with low or moderate incomes. For a discussion of set-asides, see CALIFORNIA COALITION FOR RURAL HOUSING PROJECT, CREATING AFFORDABLE COMMUNITIES: INCLUSIONARY HOUSING PROGRAMS IN CALIFORNIA 11 (1994) [hereinafter CALIFORNIA COALITION]; MANDELKER & CUNNINGHAM, *supra* note 51, at 348-50.

strikingly similar to the LUPA,⁸⁸ cities in California have adopted inclusionary zoning and created approximately 20,000 affordable housing units within ten years.⁸⁹ Similarly, a suburban Washington, D.C. community⁹⁰ has produced approximately 10,000 affordable housing units over a twenty-year period.⁹¹ If cities in the metro area were to adopt this approach, up to \$15,000.00 per housing unit could be saved and nearly 40,000 affordable units could be built within twenty-five years.⁹²

B. Responsible Administrative Reform

The second method addresses the web of financial and procedural hurdles that can prevent affordable housing developments from going forward. To create more affordable housing, communities across the country remove many of these barriers by adjusting the process for development proposals.

In concrete terms, many communities waive the impact⁹³ and administrative⁹⁴ fees normally applied to housing proposals. These fees are large and, therefore, can prevent the creation of affordable housing.⁹⁵ Thus, the Mayors' Regional Housing Task Force in

88. Compare CAL. GOV'T CODE § 65583 (West 2000) with MINN. STAT. § 473.859, subd. 2 (2001).

89. See Marc T. Smith et al., *Inclusionary Housing Programs: Issues and Outcomes*, 25 REAL ESTATE L.J. 155, 167 (1996) (describing affordable housing production in California).

90. Montgomery County, Maryland.

91. See DIVISION OF HOUSING AND CODE ENFORCEMENT, MODERATELY PRICED DWELLING UNIT PROGRAM: MONTGOMERY COUNTY, MARYLAND'S INCLUSIONARY ZONING ORDINANCE 6 (2001), available at <http://hca.emontgomery.org/Housing/MPDU/summary.htm>.

92. RUSK, *supra* note 72, at 9 (projecting the amount of affordable housing that could be built in the metro area); see also Kim Johnson & Mike Werner, *Developers Face Stumbling Blocks When it Comes to Affordable Housing*, SUN NEWSPAPERS, Apr. 4, 2001 (Special Addition: An Affordable Place to Call Home), at 8 (discussing the savings that could be realized by using inclusionary zoning); MAYORS' REGIONAL HOUSING TASK FORCE, *supra* note 7, at 7, 18 (same).

93. In theory, these fees are compensation for the burden of additional housing on water, sewer, transportation, park, and other community systems and resources. For a description of impact fees, see TOWN OF CARY, *supra* note 86, at 10-12; Seymour Schwartz & Robert Johnston, *Inclusionary Housing Programs*, 49 J. AM. PLAN. ASS'N 3, 17 (1983).

94. Cities charge developers these fees when developers seek an exception to city zoning laws; examples include zoning variance and conditional-use permit fees. See MANDELKER & CUNNINGHAM, *supra* note 51, at 331.

95. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 30 ("Fees charged by municipalities are substantial."); BATC & CEE, *supra* note 21, at 9-11; see also CALIFORNIA COALITION, *supra* note 87, at 28 (referring to the waiver of fees).

Minnesota has recommended the waiver of some fees in the metro area.⁹⁶ Communities around the country also simplify and accelerate the application and appeal processes for affordable housing proposals; these changes reduce the steps, time, and, money needed to obtain approval of a development proposal.⁹⁷

Administrative reform has been an effective supplement to inclusionary zoning because it can significantly cut the cost of housing development. For example, a suburban Tampa Bay community⁹⁸ reduced the cost of a recent affordable housing development by nearly \$500,000.00 when it waived impact fees.⁹⁹

C. Innovative For-Profit and Non-Profit Enterprise

An initiative by the for-profit and non-profit sectors can also provide important resources for the creation of affordable housing. Minnesota is fortunate to have forward-thinking business and community leadership, so examples can be found in the metro area. These initiatives often include partnerships between business, community, and foundation leaders, 0% or low-interest loans to developers, and forgivable loans to people who need housing.¹⁰⁰ Creative design and construction by for-profit and non-profit developers can also result in more affordable housing.¹⁰¹

Significantly, the Minnesota Attorney General states that these fees are not to be a source of general revenue. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 40.

96. MAYORS' REGIONAL HOUSING TASK FORCE, *supra* note 7, at 18-19 (suggesting that waiving development fees could be a way to encourage the creation of more affordable housing).

97. See OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 74-75 (discussing the savings that could be achieved through procedural reform); see also TOWN OF CARY, *supra* note 86, at 7-12 (same); CALIFORNIA COALITION, *supra* note 87, at 28-29 (same).

98. Hillsborough County, Florida.

99. TOWN OF CARY, *supra* note 86, at 10-12.

100. OFFICE OF THE LEGISLATIVE AUDITOR, *supra* note 5, at 66-73 (outlining strategies for creating affordable housing); GREATER MINNESOTA HOUS. FUND, EMPLOYER ASSISTED HOUSING: MINNESOTA EXAMPLES 1-3 (2001), available at <http://www.gmhf.com/pages/eahmnexamples.htm> (same); ANNE REIKE, DAYTON'S BLUFF NEIGHBORHOOD HOUSING SERVICES, EMPLOYER ASSISTED HOME OWNERSHIP 6-7 (1999), available at <http://www.npcr.org/copc/reports/copc3/copc3.html> (same). For a general discussion of various ways to reduce development costs and, therefore, to make housing more affordable in Minnesota, see GREATER MINNESOTA HOUS. FUND, BUILDING BETTER NEIGHBORHOODS: CREATING AFFORDABLE HOMES AND LIVABLE COMMUNITIES 7-11, 17-21, 25-29, 39-46, 57-61 (2001).

101. For example, by reducing lot size from 100 to 50 feet, reducing street

Much like administrative reform, this approach has been a helpful addition to inclusionary zoning. For example, Abbot-Northwestern Hospital, in partnership with a Minneapolis neighborhood agency, ensured the purchase of 125 homes in the past ten years by low- or moderate-income employees of the hospital.¹⁰² Within about the same time period, Central Community Housing Trust ("CCHT"), a non-profit housing developer in Minneapolis, created or preserved approximately 1,000 units of affordable housing.¹⁰³

In sum, there can be no doubt that affordable housing can be created without a great deal of public money. It has been done across the United States for years. The three methods described above could similarly be an important part of addressing the affordable housing shortage in the metro area.

V. HOW WE MEET OUR HOUSING NEED

There is an obvious remedy for the lack of affordable housing: fulfillment of the obligations established by the LUPA and the FHA. Thus, if the Met Council and cities in the metro area continue to violate the LUPA and the FHA, legal action is likely. Such a lawsuit would work in tandem with vigorous community educating, organizing, and advocacy before city councils, county commissions, the Met Council, and the Minnesota Legislature. A lawsuit could have two related parts: (1) claims regarding violations of the LUPA and (2) claims concerning violations of the FHA.

A. *Minnesota Land Use Planning Act*

The claims against the Met Council under the LUPA would address the Met Council's failure to provide adequate direction and oversight regarding the comprehensive plan process.¹⁰⁴ In addition, the claims could relate to the Met Council's actions that exceed its authority, such as the approval of obviously inadequate

width from 44 to 34 feet, building in volume, and using other design innovations, nearly \$40,000.00 per unit could be saved in the construction of housing valued at \$151,000.00 in out-state Minnesota. GREATER MINNESOTA HOUS. FUND (BUILDING BETTER NEIGHBORHOODS), *supra* note 100, at 70.

102. REIKE, *supra* note 100, at 6 (analyzing efforts to create more affordable housing).

103. Telephone Interview with Alan Arthur, President of the Central Community Housing Trust (June 21, 2001).

104. See *supra* notes 36-48 and accompanying text.

comprehensive plans.¹⁰⁵

Legal claims against a city, or cities, in the metro area would probably challenge their failure to plan for and provide enough affordable housing.¹⁰⁶ Claims against a city or cities could also address their failure to remove obstacles prohibiting the creation of affordable housing.¹⁰⁷

Under the LUPA, the duties to plan for and provide enough affordable housing are absolute, so cities cannot avoid legal responsibility by simply identifying other possible causes for the lack of affordable housing.¹⁰⁸ In any event, as California, Maryland, and other parts of the country demonstrate, affordable housing can be created on a large scale if communities take appropriate steps.¹⁰⁹ The failure to take these steps can clearly be addressed by a court order requiring the Met Council and cities to obey the LUPA.

Legal action that includes these types of claims could be brought by organizations or individuals that have been harmed by the Met Council's and cities' failure to fulfill their duties under the LUPA.¹¹⁰ Prime candidates for filing this lawsuit would include community organizations that have diverted significant resources¹¹¹ or whose goals have been frustrated¹¹² because of the affordable housing crisis. Individuals who lack housing or who have been unable to live in a particular community because of the lack of affordable housing could also bring claims under the LUPA.

105. See *supra* notes 36-48 and accompanying text; see also *Grannis v. Bd. of Comm'rs of Blue Earth County*, 83 N.W. 495, 496 (Minn. 1900) ("[I]t is elementary that [political subdivisions of the State] can exercise only such powers as are expressly granted them by the legislature, or such as are fairly implied as necessary to the exercise of powers expressly granted.") (citation omitted).

106. See *supra* notes 52-62 and accompanying text.

107. See *supra* notes 63-70 and accompanying text.

108. See *supra* notes 52-54, 59-60, 63, 83 and accompanying text.

109. See *supra* notes 88-103 and accompanying text.

110. A group or person that has been harmed by the failure to follow the LUPA has standing to file a lawsuit in Minnesota. *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharm.*, 221 N.W.2d 162, 165 (Minn. 1974) ("We . . . adopt 'injury in fact' as the test for standing in this jurisdiction, absent a discernible legislative intent to the contrary in a given case.") (citing *DAVIS, ADMINISTRATIVE LAW TREATISE*, § 22.01, at 210 (Supp. 1970)).

111. A group would have standing, for example, if it had to shift significant staff time and resources from other organization projects or activities to address the affordable housing crisis.

112. For instance, a group that exists to promote more affordable housing or to obtain housing for people with low or moderate incomes would have grounds to sue.

B. Federal Fair Housing Act

Two types of legal claims could be brought under the FHA against cities in the metro area. The first kind is known as a "disparate impact" claim and would concern the comparatively larger negative impact of the affordable housing crisis on people of color. The second type, referred to as a "perpetuation of segregation" claim, would address the ongoing racial segregation of our communities that results from the affordable housing shortage.

Courts faced with these types of claims carefully examine¹¹³ the conduct of cities in light of the twin goals of the FHA: (1) the elimination of all housing discrimination and (2) the promotion of racial integration.¹¹⁴ Significantly, the FHA "implements a policy to which Congress has accorded *the highest national priority*, and [the FHA] is to be construed liberally in accordance with that purpose."¹¹⁵ Therefore, "governmental bodies are bound to uphold and obey the provisions of the Fair Housing Act . . . and cannot seek refuge in broad generalizations regarding the absence of a constitutional guarantee of adequate housing."¹¹⁶

In order to prove these two civil rights claims, it would not be necessary to show that a city intended to discriminate or segregate. Instead, the issue for a court would be the ultimate effect of the cities' actions.¹¹⁷ In this case, a court would focus on whether

113. See, e.g., *Metro. Hous. Dev. Corp. v. Vill. of Arlington Heights*, 558 F.2d 1283, 1290 (7th Cir. 1977), cert. denied 434 U.S. 1025 (1978) ("We cannot agree that Congress in enacting the Fair Housing Act intended to permit municipalities to systematically deprive minorities of housing opportunities simply because those municipalities act discreetly.").

114. *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1542 (11th Cir. 1994) ("The Fair Housing Act is concerned with both the furtherance of equal housing opportunity and the elimination of segregated housing."); *Garcia v. Condarco*, 114 F.Supp.2d 1158, 1162 (D. N.M. 2000) ("Beyond the integration of residential housing patterns, Congress also 'intended to promote freedom of choice in housing. . . . [The FHA] 'removes the opportunity to insult and discriminate against a fellow American because of his color' . . . and gives blacks freedom to move where they will.' The element of *freedom of choice* is, then, *paramount*." (citations omitted) (emphasis added)).

115. *United States v. Hughes Mem'l Home*, 396 F.Supp. 544, 548 (W.D. Va. 1975) (citations omitted) (emphasis added); see also *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 212 (1972) ("We can give vitality to . . . [the FHA] only by a generous construction . . .").

116. *Jackson*, 21 F.3d at 1540 (citation omitted).

117. See, e.g., *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1185 (8th Cir. 1974).

The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. Effect, and not motivation, is the

people of color have been harmed disproportionately and whether racial segregation has been allowed to continue. Significantly, it would not be necessary to show that a city's actions were the only, or even the primary, cause of the disparate impact or perpetuation of segregation.¹¹⁸

In the metro area, people of color continue to be deprived disproportionately of equal housing opportunities, including housing outright.¹¹⁹ In addition, the metro area remains racially segregated,¹²⁰ despite the preferences of both people of color and whites.¹²¹ These problems flow from cities' failure to comply with the LUPA, and they can be addressed by a court order requiring cities to do what the LUPA and the FHA require.¹²²

Organizations or individuals that have been harmed by cities' failure to follow the LUPA could bring a lawsuit with these FHA claims.¹²³ Possible plaintiffs would include community

touchstone, in part because clever men may easily conceal their motivations, but more importantly, because . . . '[w]hatever our law was once, . . . we now firmly recognize that the arbitrary quality of *thoughtlessness can be as disastrous and unfair to private rights and the public interest as the perversity of a willful scheme.*'

Id. (citations omitted) (emphasis added)).

118. *Black Jack*, 508 F.2d at 1186 ("[Defendant's] action is but *one more factor* confining blacks to low-income housing in the center city" (citations omitted) (emphasis added)); *see also Jackson*, 21 F.3d at 1540, n. 13 ("Simply because there may have been other factors than the Policy that contributed to . . . [the challenged effect] does not erase the fact that the County's policy was also a substantial *contributing factor*. The County is not so readily relieved from its obligations to follow the law of fair housing." (emphasis added)).

119. *See supra* notes 25-34 and accompanying text.

120. Although the metro area has become much more diverse in the past ten years, the central cities remain disproportionately of color and the suburbs continue to be disproportionately white. *See supra* notes 25-34 and accompanying text.

121. *See, e.g.,* INSTITUTE ON RACE AND POVERTY, *supra* note 23, at 74 (showing that the vast majority of people want to live in integrated neighborhoods); *supra* note 22 and accompanying text; *see also* GARY ORFIELD, THE HARVARD CIVIL RIGHTS PROJECT, HOUSING SEGREGATION: CAUSES, EFFECTS, POSSIBLE CURES 8 (Apr. 2001) (discussing several recent national studies that found widespread preference for racially integrated neighborhoods).

122. *See supra* notes 22, 35, 52-70 and accompanying text.

123. It is noteworthy that Congress expanded standing to sue under the FHA to the greatest extent possible under the federal Constitution. *See, e.g.,* *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. at 205, 209 (1972) ("[T]he words used showed a 'congressional intention to define standing as broadly as permitted by Article III of the Constitution.'" (citation omitted)). Minnesota courts use a standard that makes it even easier to bring a lawsuit. *See, e.g.,* *Snyder's Drug Stores, Inc. v. Minnesota State Bd. of Pharm.*, 221 N.W.2d 162, 165 (Minn. 1974) (stating the legal standard for standing in Minnesota).

organizations that have diverted resources or whose goals have been undermined because of the impact of the affordable housing crisis on people of color. People of color who do not have housing or who have been unable to live in a particular area because of the affordable housing shortage could also bring claims under the FHA. In addition, both whites and people of color living in the metro area could be plaintiffs because the actions of cities in the metro area deny everyone the benefits that come from the racial integration of neighborhoods.¹²⁴

1. *Disparate Impact*

To bring a disparate impact claim under the FHA, one would only need to demonstrate that a city's action "actually or predictably results in discrimination."¹²⁵ A plaintiff would not have to show anything else to go to trial.¹²⁶

If a plaintiff were to demonstrate this discriminatory effect, a city could lose the case under the law of Minnesota federal courts and the Eighth Circuit—even before a trial—unless that city's action could withstand "strict scrutiny."¹²⁷ This means that a city

124. *Trafficante*, 409 U.S. at 209-10 (observing that segregation deprives all members of a community "important benefits from interracial association."); *Otero v. N.Y. City Hous. Auth.*, 484 F.2d 1122, 1134 (2d Cir. 1973) ("The purpose of racial integration is to benefit the community as a whole . . ."); see also *Jackson v. Okaloosa County, Fla.*, 21 F.3d 1531, 1539 (11th Cir. 1994) ("[A] plaintiff may have 'neighborhood' standing to challenge violations of the Fair Housing Act even if the discriminatory acts are not directed at that person. In order to establish neighborhood standing, the plaintiff must show that the racially discriminatory practice at issue affected the neighborhood where the plaintiff resides." (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 377 (1982))).

For a more detailed analysis of the true meaning and value of racial integration, see Justin Cummins, *Recasting Fair Share: Toward Effective Housing Law and Principled Social Policy*, 14 LAW & INEQ. 339, 342-47, 368-70, 372 (1996).

125. *Familystyle of St. Paul v. City of St. Paul*, 728 F.Supp. 1396, 1403 (D. Minn. 1990), *aff'd*, 923 F.2d 91 (8th Cir. 1991) (quoting *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1184 (8th Cir. 1974), *cert. denied* 422 U.S. 1042 (1975)); see also *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 936 (2d Cir. 1988) ("The legislative history of the Fair Housing Act . . . argues persuasively against [a higher] *prima facie* standard."), *aff'd*, 488 U.S. 15 (1988).

126. *Huntington*, 844 F.2d at 939 ("The *McDonnell Douglas* test . . . is an intent-based standard for disparate treatment cases inapposite to the disparate impact claim asserted here. No circuit, in an impact case, has required plaintiffs to prove that defendants' justifications were pretextual." (citations omitted)); *Black Jack*, 508 F.2d at 1185.

127. This is the most stringent standard by which courts evaluate government action. In practical terms, this means that a court will be most likely to rule that a city action is illegal. For an in-depth discussion of the different standards of

would need to prove its action is *necessary* to advance a vital government objective.¹²⁸ To do this, a city would have to show the following: (1) the city's action actually advances the important government purpose identified, (2) the government purpose is constitutional and critical enough to outweigh the harm caused, and (3) no less harmful way exists for advancing the vital government purpose.¹²⁹

Cities in the metro area would have difficulty surviving "strict scrutiny" because the expected rationales for not providing enough affordable housing would have little basis in fact.¹³⁰ Moreover, a court would review city actions with more skepticism in this case because the very conduct a city would seek to justify, the failure to plan for and provide enough affordable housing, violates state law—the LUPA.¹³¹

As the Eighth Circuit makes clear, courts consider the overall context in which a city's action occurs in deciding if a plaintiff wins

judicial review, *see* LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW*, § 16-6, at 1000 (1978) ("Strict scrutiny is . . . 'strict' in theory and usually 'fatal' in fact." (citation omitted)). Although courts typically apply "strict scrutiny" in race discrimination cases brought under the Fourteenth Amendment to the United States Constitution, a court's analysis of a case brought under the FHA is equally strict. *See, e.g., Familystyle of St. Paul*, 728 F.Supp. at 1403-04, *aff'd*, 923 F.2d 91 (8th Cir. 1991); *Black Jack*, 508 F.2d at 1185.

128. *Black Jack*, 508 F.2d at 1186 ("It having been established that the ordinance had a discriminatory effect, it follows that the [plaintiff] had made out a *prima facie* case under Title VIII, and the burden shifted to the City to demonstrate that a compelling governmental interest was furthered by that ordinance."); *Familystyle of St. Paul*, 728 F.Supp. at 1403-04, *aff'd*, 923 F.2d 91 (8th Cir. 1991) ("Once a plaintiff has made out a *prima facie* case, the burden of proof shifts to the government to demonstrate that its *conduct was necessary to promote a compelling governmental interest*." (citation omitted) (emphasis added)); *see also* *Dews v. Town of Sunnyvale, Tex.*, 109 F.Supp.2d 526, 532 (N.D. Tex. 2000) ("Once the plaintiff has made out a *prima facie* case of discriminatory effect, by demonstrating adverse impact on a particular minority group[,] . . . the burden shifts to the defendant to prove a compelling government interest.").

129. *See, e.g., Black Jack*, 508 F.2d at 1186 (setting forth a defendant's burden under the FHA). Even if a Minnesota court were to ignore the law of Minnesota federal courts and the Eighth Circuit, cities in the metro area would still have to overcome a heavy burden to avoid losing before or at trial. In order to mount a successful defense under the lower standard used by some courts, a city still "*must prove* that its actions furthered, in theory and in practice, a legitimate, bona fide governmental interest and that no alternative would serve that interest with less discriminatory effect." *Huntington*, 844 F.2d at 936 (citing *Resident Advisory Bd. v. Rizzo*, 564 F.2d 126, 148-49 (3d Cir. 1977) (emphasis added)).

130. *See supra* notes 71-103 and accompanying text.

131. *See supra* notes 49-70 and accompanying text.

at trial.¹³² In a case that is strikingly similar to one which could be brought against cities in the metro area, the United States Supreme Court upheld the ruling in favor of the plaintiffs:

*[T]he Town has a shortage of rental housing affordable for low- and moderate-income households, . . . a disproportionately large percentage of the households using subsidized rental units are minority citizens, and . . . a disproportionately large number of minorities are on the waiting lists for subsidized housing and existing Section 8 certificates.*¹³³

More recently, a court ruled that a city's "stubborn insistence on low density"¹³⁴ has a disparate impact because African Americans are more likely to be renters, use subsidized housing, or both:¹³⁵ "by raising the cost of entry into [the city], the Town has imposed a barrier that cannot be overcome except by a token number of black households."¹³⁶ Therefore, it appears that it would not be difficult to bring a disparate impact claim in Minnesota.¹³⁷

A plaintiff in the metro area could even prove that a city intentionally discriminated by showing the city acted in response to

132. *United States v. Badgett*, 976 F.2d 1176, 1179 (8th Cir. 1992) (affirming that the FHA "requires the court to examine the totality of the circumstances" (citing *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977) (emphasis added))); *Black Jack*, 508 F.2d at 1186 (reversing the district court's finding of no disparate impact because the lower court "failed to take into account either the 'ultimate effect' or the 'historical context' of the City's action." (citations omitted)); see also *United Farmworkers of Fla. Hous. Project, Inc. v. City of Delray Beach*, 493 F.2d 799, 810 (5th Cir. 1974) ("[H]istorical context' and the 'ultimate effect' of the City's actions . . . are highly relevant considerations . . ."); *Kennedy Park Homes Ass'n v. City of Lakawanna, N.Y.*, 436 F.2d 108, 112 (2nd Cir. 1970) ("[The city's] action must be assessed not only in its immediate objective but its historical context and ultimate effect."), *cert. denied* 410 U.S. 1010 (1971).

133. *Huntington*, 844 F.2d at 937, *aff'd*, 488 U.S. 15 (1988) (emphasis added); see also *United Farmworkers*, 493 F.2d at 810.

134. *Dews v. Town of Sunnyvale, Tex.*, 109 F. Supp. 2d 526, 566 (N.D. Tex. 2000).

135. *Id.* at 565-67.

136. *Id.* at 566.

137. If courts were to recognize the reality that discrimination causes not just subordination (of people of color, for example), but also privilege (of whites, for example), then the fair housing laws would be even more effective at addressing discrimination. Using this analysis, called "disproportionate impact"—to reflect the fact that the harm is not simply subordination—courts could then consider both the subordination of people of color and white privilege as evidence of a violation of the FHA. For an explanation of the "disproportionate impact" doctrine and its application in civil rights cases, see Justin Cummins, *Refashioning the Disparate Treatment and Disparate Impact Doctrines in Theory and in Practice*, 41 *How. L.J.* 455, 472-76 (1998).

political pressure that flowed from discriminatory attitudes.¹³⁸ A recent letter to the editor of the St. Paul *Pioneer Press* might be considered suggestive of such an attitude. In that letter, an Eagan resident defended his city's opposition to affordable housing and criticized an article that called for more affordable housing: "I don't know anyone who shares Jack Conrad's views. . . . [H]e really needs to return to Africa."¹³⁹

2. Perpetuation of Segregation

Courts also closely examine city actions that allow for racial segregation because cities have an affirmative duty to promote integrated neighborhoods.¹⁴⁰ To take a perpetuation of segregation claim to trial, a plaintiff would only need to demonstrate that a city is racially segregated and that the city's actions contributed in some way to the segregation.¹⁴¹

A plaintiff would not need to show a disparate impact because racial segregation, by definition, has such an impact.¹⁴² A plaintiff

138. *Bryant Woods Inn, Inc. v. Howard County Md.*, 911 F.Supp. 918, 930 (D. Md. 1996) ("If . . . a zoning board's response to political pressure amounts to the implementation of local residents' discriminatory impulses, the board's actions may give rise to a cause of action for intentional discrimination." (citation omitted), *aff'd*, 124 F.3d 597 (4th Cir. 1997); *Dailey v. City of Lawton, Okla.*, 425 F.2d 1037, 1039 (10th Cir. 1970) ("[I]t is enough for the complaining parties to show that the local officials are effectuating the discriminatory designs of private individuals." (citations omitted)); *Jackson v. City of Auburn, Ala.*, 41 F.Supp.2d 1300, 1301 (M.D.Ala. 1999) ("In order to demonstrate a city's racially discriminatory intent, it is sufficient to show that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of private citizen[s]." (citation omitted)).

139. Rick Johnson, Letters to the Editor, *Eagan Mayor's Vision for City Draws Mixed Reactions*, PIONEER PRESS (St. Paul), June 28, 2001, at 16A (emphasis added).

140. See, e.g., *Trafficante v. Metro. Life Ins. Co.*, 409 U.S. 205, 211 (1972) ("[A]s Senator [Walter] Mondale [from Minnesota] who drafted [the FHA] said, the reach of the proposed law was to replace ghettos 'by truly integrated and balanced living patterns.'" (citing 114 CONG. REC. 3422)).

141. See, e.g., *United States v. City of Black Jack, Mo.*, 508 F.2d 1179, 1185 (8th Cir. 1975) (describing a plaintiff's burden under the FHA), *cert. denied* 422 U.S. 1042 (1975). Courts decide what is "segregated" under the FHA based on the facts and expert witness testimony in each case. Generally speaking, however, courts compare the proportion of people of color in the community at issue to that of surrounding areas. See, e.g., *Huntington Branch, NAACP v. Town of Huntington Beach*, 844 F.2d 926, 938 (2d Cir. 1988); *Dews v. Town of Sunnyvale, Tex.*, 109 F.Supp.2d 526, 565 (N.D. Tex. 2000).

142. See, e.g., *Black Jack*, 508 F.2d at 1184 ("[W]hen racial discrimination herds

also would not have to prove that a city acted with a hidden intent to segregate because the focus would be on the effect of, not the motive behind, a city's actions.¹⁴³

To avoid losing a case before trial, under the law of Minnesota federal courts and the Eighth Circuit, a city must be able to withstand "strict scrutiny"¹⁴⁴ by a court.¹⁴⁵ As with a disparate impact claim, cities in the metro area would have difficulty surviving "strict scrutiny" because their actions regarding affordable housing are not necessary to advance the government purpose they would probably assert.¹⁴⁶ In any event, cities' failure to plan for and provide affordable housing—standing alone—is illegal,¹⁴⁷ so there is certainly a less harmful way to advance any asserted government objectives.

Even if a city's action could withstand "strict scrutiny," a court would consider the circumstances surrounding a city's action in determining if a plaintiff wins at trial.¹⁴⁸ A landmark case decided by the Eighth Circuit shows how a court would analyze a case similar to one that could be brought against cities in the metro area:

[Defendant's] action is but one more factor confining

men into ghettos and makes their ability to buy property turn on the color of their skin, then it too is a relic of slavery." (quoting *Jones v. Mayer*, 392 U.S. 409, 442-43 (1968)); see also *Booker v. Special School Dist. No. 1, Minneapolis*, Minn., 351 F.Supp. 799, 807 (Minn. 1972) ("This Court agrees . . . that racial segregation is, in principle, a denial of equality . . ." (citations omitted)).

143. *Black Jack*, 508 F.2d at 1185 (outlining a plaintiff's burden under the FHA); see also *Huntington*, 844 F.2d at 938; *United States v. Yonkers Bd. of Educ.*, 624 F.Supp. 1276, 1293 (S.D.N.Y. 1985), *aff'd*, 837 F.2d 1181 (2d Cir. 1987).

144. See *supra* notes 127-29 and accompanying text. Even if a Minnesota court were to disregard the law of Minnesota federal courts and the Eighth Circuit, a city would nonetheless have a substantial burden to overcome even under the lower standard used by some courts in other circuits. See, e.g., *Huntington*, 844 F.2d at 936.

145. *Black Jack*, 508 F.2d at 1184 ("The discretion of local zoning officials . . . must be curbed where 'the clear result of such discretion is the segregation of low-income Blacks from all White neighborhoods.'" (citation omitted) (emphasis added)); see also *Crow v. Brown*, 332 F.Supp. 382, 392 (N.D. Ga. 1971) ("[I]t is abundantly clear that, in the absence of supervening necessity, any [governmental] action or inaction intended to perpetuate or which in effect perpetuates [segregation] cannot stand. Nor can [governmental] action or inaction which would thwart their correction be permitted to continue."), *aff'd*, 457 F.2d 788 (5th Cir. 1972).

146. See *supra* notes 71-103 and accompanying text.

147. Such conduct violates the LUPA. See *supra* notes 49-70 and accompanying text.

148. See, e.g., *Black Jack*, 508 F.2d at 1186 (highlighting the importance of context in the analysis of fair housing claims).

blacks to low-income housing in the center city, confirming the inexorable process whereby the[metropolitan] area becomes one that "has the racial shape of a donut, with the [African Americans] in the hole and with mostly Whites occupying the ring."¹⁴⁹

Given these facts, which closely resemble what is happening in the metro area, the Eighth Circuit ruled in favor of the plaintiffs.¹⁵⁰

Courts continue to decide cases in favor of plaintiffs when a city plans and zones like many cities in the metro area. For example, a court recently ruled against a city that required low-density development: "[i]nstead of sharing its obligation to provide fair housing, [the city], by hiding behind its exclusive zoning practices, is compelling neighboring communities to assume its obligation."¹⁵¹ In light of such court rulings and the importance given by Congress to duties under the FHA, it would be wise for cities in the metro area to fulfill their legal obligations at once.

VI. CONCLUSION

Minnesota is at a critical point in its history. It faces an affordable housing situation in the metro area for which "crisis" is probably not sufficient to describe the damage being done. If the Met Council and cities take the legally and morally correct action, the affordable housing shortage and the civil rights violations in the metro area can be addressed. If, however, the Met Council and cities continue to refuse to follow the law, residents of the metro area will have no choice but to broaden and intensify the organizing campaign already underway and to seek relief from the courts.

149. *Id.* (citations omitted) (emphasis added).

150. *Id.* at 1188.

151. *Dews v. Town of Sunnyvale, Tex.*, 109 F.Supp.2d 526, 567 (N.D. Tex. 2000).
