

## NEW NOTICE & OPPORTUNITY TO REPAIR STATUTES ADOPTED IN MINNESOTA & WISCONSIN FOR RESIDENTIAL CONSTRUCTION

Minnesota and Wisconsin have joined 28 other states in adopting notice and repair legislation. These new laws require homeowners to notify builders of alleged construction defects. The builders can then perform an inspection and make an offer to repair before the homeowners commence a lawsuit. Minnesota's law will apply to homes built in Minnesota; and Wisconsin's law will apply to homes built in Wisconsin regardless of the state where the builder's business is located.

### MINNESOTA

The Minnesota law became effective on August 1, 2006 and is designed to allow a builder and homeowner to work out their differences in a timely and efficient manner. The legislation (Minn. Stat. §§ 327A.02 and .03) contains the following major provisions:

- If a homeowner makes a valid written complaint (as required by the statute), alleging loss or damage detailing alleged defects, the homeowner must allow an inspection and opportunity to offer to repair the known loss or damage.
- If the builder refuses to conduct an inspection, the homeowner may seek a court order requiring the builder to do so.
- The builder must complete the inspection and any offer to repair must be made in writing to the homeowner within 30 days of the builder's receipt of the initial notice from the homeowner.
- The law tolls the Statute of Limitations (i.e. puts it on hold) for up to 180 days while the homeowner and builder address the defect.
- The law requires builders to respond to homeowners' written complaints about alleged defects within 30 days of the homeowners' written complaint.
- Upon completion of the repairs, the builder must provide the homeowner with a list of repairs made

and a notice that the homeowner may pursue a warranty claim. The law also states that provision of this statement is not an admission of liability; however, we recommend that a builder add a specific statement to this effect when issuing the list of repairs.

- If communication breaks down, the law requires a third party to make an offer to inspect and repair an alleged defect under the warranty statutes.



### WISCONSIN

Wisconsin has also adopted legislation creating a procedure for managing homeowner and builder disputes. The law, effective on October 1, 2006 (Wis. Stat. §§ 101.148 and 895.07), while dealing with the same general concept as Minnesota, is a far more detailed statute. The major provisions of the Wisconsin statute provide:

- Builders must notify homeowners of the dispute resolution process at the time they contract for building services. As a result, Wisconsin contracts with homeowners need to be modified to include the new provisions, and builders will be required to give homeowners a brochure created by the Wisconsin Department of Commerce.
- At least 90 working days before commencing a lawsuit against a builder, the homeowner must deliver to the contractor a written description of the alleged defect.
- Within 15 days after receiving the homeowner's notice of claim, or within 25 days if the builder intends to seek the assistance or contribution of a supplier or subcontractor, the builder must serve the homeowner a written proposal to repair the construction defect at no cost, offering to settle for

**NEW NOTICE AND OPPORTUNITY - continued from page 1**

a monetary payment or some other settlement, or rejecting the claim.

- After receiving a proposal, the homeowner must respond within 15 days. The homeowner must also permit testing and inspection by the builder.
- If the homeowner rejects the builder's settlement proposal, the builder has 5 days after receiving a response to provide a supplemental offer. If at the end of this procedure the issues are still not resolved between the parties, then the homeowner may commence an action.
- Within 5 days of receipt of the initial written homeowner claim, a builder can seek financial or other contributions from subcontractors to the extent the builder believes a subcontractor is responsible for the problem. A builder must send a notice to that contractor along with the reason for seeking contribution. There is then a similar exchange of written notice requirements and efforts to settle their dispute.

places a burden on homeowners and builders to place any disputed issues in writing and requires prompt responses to complaints and responses. If the claims eventually result in litigation, the written dispute process will likely factor into the litigation, suggesting that both homeowners and builders will want to be thoughtful, comprehensive and careful in their written demands and responses.

If you have any questions, please contact Steve Yoch or Brad Hendrikson in our St. Paul office.



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**CONCLUSION**

While there are significant differences between the Minnesota and Wisconsin statutes, both have the same primary advantage. Each law creates an opportunity for the parties to resolve their differences prior to litigation. On the other hand, each law also

**WELCOME OUR NEW ATTORNEY**

The law firm of Felhaber Larson Fenlon & Vogt, P.A. is pleased to announce that Richard R. Voelbel has joined the firm's Minneapolis Office. Mr. Voelbel will practice in the areas of real estate, litigation, and business law.

Mr. Voelbel graduated with a B.A. in Political Science from DePauw University of Greencastle, Indiana in 2001. He received his J. D. from The William Mitchell College of Law, Magna Cum Laude, in 2006. Mr. Voelbel graduated in the Top 10% of his class. He served as an assistant editor for The William Mitchell Law Review while attending law school.



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For access to more in depth articles on legal issues affecting your real estate matters, go to [www.felhaber.com](http://www.felhaber.com). This month's feature article, by Fred Krietzman, outlines the State and Federal Flag Acts and how they impact your Common Interest Community and other homeowner associations' attempted restrictions on flying the State and Federal flag.

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# RECENT COURT CASES REQUIRING ADDITIONAL DUE DILIGENCE IN REAL ESTATE MATTERS

## MINNESOTA SUPREME COURT SIDES WITH CITY AS DEVELOPER IS LEFT WITH LESS THAN PAR FOR THE COURSE!

*The Minnesota Supreme Court's interpretation of the Metropolitan Land Planning Act in the case of Mendota Golf, LLP v. City of Mendota Heights gives metropolitan cities authority to determine use of land within their boundaries. It also requires purchasers of land to consider the city's comprehensive plan to ensure that it is consistent with their proposed use of the land.*

On January 10, 2006, the Minnesota Supreme Court decided in favor of the city of Mendota, in this case brought by landowners to force the city to bring their comprehensive plan into compliance with zoning ordinances and to authorize the development of land currently being used as a golf course.

### I. FACTS

In 1995, Mendota Golf, LLP acquired 17.5 acres of land in the city of Mendota Heights with the intention of eventually using it to develop single family homes. At the time of the purchase, the property was zoned as residential. During this same time, however, the city of Mendota Heights' comprehensive plan designated the property as a "golf course." In 1997, the city's first comprehensive plan created under the new Metropolitan Land Planning Act ("MLPA") continued to designate the property as a "golf course," and the comprehensive plan also encouraged preservation of open space. In 2002, several public hearings were held and another comprehensive plan was adopted by the city in which its designation of the land as a "golf course" remained consistent. Based on this designation under the comprehensive plan, the city blocked Mendota Golf's development of the property as residential property even though the property continued to be zoned as residential property.

### II. LAW

The Metropolitan Land Planning Act (the "MLPA") is the law at issue in this case and applies only to metropolitan counties including Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington. The law requires cities, towns, and municipalities in these counties to reconcile their comprehensive plans and zoning ordinances so that they are in agreement

with each other. Prior to being amended in 1995, the MLPA stated that zoning designations took priority over comprehensive plans. The 1995 amendment to the MLPA reversed that premise and stated that "the zoning ordinance shall be brought on the conformance" with the comprehensive plan. This Minnesota law was amended for purposes of regional planning.



### III. ANALYSIS

The Minnesota Supreme Court in this case reversed the decisions of the lower courts which had twice decided in favor of Mendota Golf to require the City to amend its comprehensive plan and permit construction of a residential development. While the Supreme Court agreed with Mendota Golf that there was a clear conflict between the city's zoning and comprehensive plan that needed to be resolved under the MLPA, they did not require the City to resolve that conflict in favor of Mendota Golf. The Court found that cities have broad discretion in determining use of their land for planning purposes necessary in the MLPA. The comprehensive plan is the controlling document, and zoning ordinances are intended to carry out the policies of the comprehensive plan. So long as the City has a rational basis not to amend its comprehensive plan into conformance with the zoning ordinances, a City has the authority to maintain its position in a comprehensive plan.

### IV. DECISION

The City was not required to amend its comprehensive plan and as a result could prohibit Mendota Golf from developing the property as "residential" despite the fact that the land was zoned as "residential" at the time Mendota Golf purchased it.

### V. NOTES/RECOMMENDATIONS

This case underscores the importance of proper due diligence when acquiring land that is intended for development. It is not only necessary to review zoning ordinances, but a buyer should also review the city's comprehensive plan to make certain both are consistent and that both authorize the intended use of the property. Note that the statutes considered here and the Court's decision applies only to

metropolitan counties because of the importance of the MLPA and regional planning. It is not clear that cities have the same authority in counties that are outside of those listed in the MLPA.

## **A CASE THAT UPS THE ANTE: HIRING ILLEGAL FOREIGN WORKERS MAY RESULT IN JAIL TIME!**

*Recent enforcement activity by the government illustrates that those individuals responsible for “knowingly” hiring illegal workers face a risk of jail time.*

The use of foreign workers in the construction industry is common. What has not been common (until now) is the use of jail time and property forfeiture by the government as tools for enforcement, as illustrated by the recent case of Fisher Homes, Inc. This case suggests that contractors and subcontractors should be reviewing their policies and procedures now to avoid problems down the road.

### **I. FACTS**

On or about May 9, 2006, U.S. Immigration and Customs Enforcement (“ICE”) arrested six supervisors of Fisher Homes, Inc. (“Fisher”) and over 76 illegal alien workers at Fisher construction sites in Kentucky. Fisher is a large builder in Indiana, Kentucky, and Ohio with annual sales of roughly \$200,000,000. The six Fisher managers were charged with criminal aiding and abetting, and harboring illegal aliens for commercial advantage or private financial gain. Several subcontractors were also charged in separate indictments. A major Fisher subcontractor appears to have done the majority of hiring of illegal workers and was indicted separately. The allegations include Fisher’s supervisors coordinating and organizing the work for subcontractors who would perform the work with illegal aliens. These charges are felonies and expose those charged to up to 30 years in jail and fines exceeding \$150,000. Several parties involved have pled guilty to lesser charges and have agreed to cooperate with ICE investigators.

### **II. LAW**

The Fisher Case clarifies that the ICE will not tolerate outward development and pursuit of

hiring illegal aliens, especially when hiring is done “knowingly.” The ICE’s strategy on these cases has become much more aggressive as the ICE is now bringing criminal prosecutions and using asset forfeiture as enforcement tools.

Unfortunately, until recently, the procedures to be followed when hiring foreign workers has not been clear. This is caused in part by the fact that there are three federal departments involved in addressing foreign workers including the ICE, the Department of Homeland Security (“DHS”), and the Social Security Administration (“SSA”). To further complicate matters, the DHS and the SSA have had departing views, until recently, when proposed regulations were drafted to deal with illegal aliens.

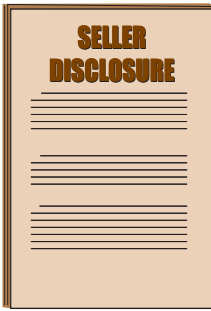
Prior to the recent regulations, The DHS wanted employers to terminate any worker for whom an employer got a “no-match” letter (the social security number given did not match the employee’s name), while the SSA maintained that those employees should not be fired. This created potential exposure for an employer if they terminated an employee wrongfully (possible suit from employee), and exposure for the employer if they employed unauthorized workers through DHS prosecution. The issue centers on whether an employer “knowingly” employs unauthorized workers.

**The term “Knowingly” has been defined as including “constructive knowledge.” The question is whether no-match letters are sufficient to create constructive knowledge.**

The proposed regulations set forth “safe-harbor” procedures an employer may follow in order to avoid problems and expands the definition of “constructive knowledge” for determining whether an employer knowingly employed unauthorized workers. “Constructive knowledge” now includes two new examples:

1. The employer receives notice from the SSA that the combination of name and social security account submitted (through W-2 or other wage reporting forms) to SSA for an employee does not match agency records.

## NEW SELLER DISCLOSURE REQUIREMENTS



All sellers of real property in the State of Minnesota (commercial and residential property) should be aware of the following recent changes to the seller disclosure laws, and should ensure that their purchase agreements are updated to account for these legal modifications.

### METHAMPHETAMINE PRODUCTION ON THE PROPERTY

Effective January 1, 2006, sellers of real property are required to disclose in writing to the buyer if, to the best of seller's knowledge, methamphetamine production has occurred on the property. If methamphetamine production has occurred on the property, the disclosure must include a statement informing the buyer: (1) whether the property is subject to an order issued by the county, local health department or sheriff prohibiting the property from being used or occupied due to a finding that the property has been used as a site for the manufacture of methamphetamine and contaminated by substances, chemicals, or items of any kind used in the production of methamphetamine; (2) whether any orders of the type described above issued against the property have been vacated; or (3) if there was no order issued against the property and the seller is aware that methamphetamine production has occurred on the property, the status of removal and remediation on the property. A

seller who fails to disclose as required is liable to the buyer for costs relating to remediation of the property and reasonable attorney fees for collection of costs from the seller.

### AIRPORT ZONE IMPACTING THE PROPERTY

Effective August 1, 2006, sellers of real property located in certain airport safety zones are required to disclose in writing to the buyer the existence of airport zoning regulations that affect the real property. The safety zones to which the disclosure requirement applies include all A, B and C zones located in general aviation airports located outside the Greater St. Paul/Minneapolis Metropolitan Area as well as the South St. Paul and the Forest Lake Airports. Safety zones associated with airports owned or operated by the Metropolitan Airports Commission (including Minneapolis/St. Paul International Airport, St. Paul Downtown, Anoka County Airport, Flying Cloud, Crystal Airport, Lake Elmo, and Lakeville – Air Lake) are specifically excluded from the disclosure requirement.



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### BUILDER DEVELOPER SEMINAR Thursday, November 2, 2006 Town & Country Club

Please plan to attend the upcoming Builder Developer Seminar, where Felhaber attorneys and guest presenters will discuss today's hottest issues.

Topics include:

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- **Development Trends** - Understanding the New Challenges to Gaining City approval for your Development Proposal
- **Construction Licensing & Regulation Update** - Relating to the State's Regulation of the Construction Industry
- **The Builders' Right to Fix** - The New Notice & Builder's Right to Fix Statutes
- **How the Developer Can Best Utilize the Management Company and Insurance Broker** - A Panel Discussion
- **Piercing the Development Entity Veil** - What happens when the project is done.

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RECENT COURT CASES - continued from page 4

2. The employer receives written notice from DHS that the immigration status or employment authorization documentation presented or referenced by the employee in completing Form I-9 (Employment Eligibility Verification) was not assigned to the employee according to DHS records.

What should you do if you receive one of these notices from SSA or DHS? The regulations contain safe harbor procedures which are beyond the scope of this article but which should be considered in amending and updating your policies and procedures on hiring foreign workers. We recommend that if you obtain a no-match letter, you contact the authors of this article to ensure that you respond appropriately and to avoid any potential claim that you “knowingly” employed an illegal worker. We can also assist you in review of

your updated policies and procedures to ensure that they meet the requirements outlined in the proposed regulations.



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## Real Estate Report

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