PART IV
REGULATORY AND DEVELOPMENT FUNCTIONS OF CITIES

CHAPTER 14: COMPREHENSIVE PLANNING, LAND USE AND CITY-OWNED LAND

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Chapter 14

Comprehensive planning, land use, and city-owned land

This chapter discusses the two basic methods of city land use control—land use ordinances and city ownership of land. Topics discussed in this chapter include:

I. State municipal planning policy

Minn. Stat. § 462.351.

State policy-makers recognize municipalities face mounting problems with respect to their ability to guide future land development that ensures pleasant and economical residential communities and profitable commercial and industrial enterprises, while preserving agricultural lands and open space.

Minn. Stat. §§ 462.351 to 462.365.

The Municipal Planning Act provides the authority and uniform procedures for conducting and implementing municipal planning. This approach to land use was designed to allow for planning, consistency, efficiency, and a more secure tax base.

A. Resources for planning

Zoning and other land use controls help ensure a well-planned community where one person's property rights do not detrimentally affect another person's rights to enjoy their property or the community as a whole. A variety of resources are available to cities to assist them in land use planning.

American Planning Association Minnesota Chapter.

Government Training Services

Sensible Land Use Coalition

- The Minnesota Chapter, American Planning Association
- Government Training Services offers a variety of training programs on zoning and land use.
- The Sensible Land Use Coalition.

B. LMCIT land use defense coverage

See LMCIT Risk Management memos *LMCIT Land Use Defense Coverage* and *Ten Tips for Avoiding Land Use Claims*.

The League of Minnesota Cities Insurance Trust provides coverage for litigation relating to land use regulation, development, and franchising. Cities involved in pending or actual litigation on these issues should contact LMCIT.

II. Municipal authority to plan

Minn. Stat. §§ 462.351 to 462.365.

Minn. Stat. §§ 473.851 to 473.871.

Nordmarken v. City of Richfield, 641 N.W.2d 343 (Minn. Ct. App. 2002).

Minnesota law gives cities the authority to regulate how land may be used. The Municipal Planning Act creates a single, uniform procedure that applies to all cities. Ordinances must comply with both the substantive and procedural requirements contained in the Act. Metropolitan area cities are also empowered and governed by the Metropolitan Land Planning Act. These acts occupy the field of the process by which municipal land use laws are finally approved or disapproved.

A. Organization for planning

Cities may exercise a wide range of discretion in developing internal planning. In fact, cities need not undertake formal planning activities at all. Planning organization may take several different forms: the council may assume total responsibility, it may delegate this duty to administrative officers, or it may appoint a planning commission .

Minn. Stat. § 462.354, subd. 1.

Councils create these planning agencies or commissions by ordinance. (State law uses the term “planning agency” most often but this chapter uses the term planning commission to mean a either a planning agency or a commission.) The role of the planning commission is to advise the council. City officials may serve as members, and the organization is left to the discretion of the council.

Minn. Stat. § 462.354, subd. 2.

Cities are also authorized to create a planning department with an advisory planning commission. In that situation, the agency advises the department, which then advises the council.

Usually, it is a good idea to create a planning commission. City officials are often so consumed with daily demands that they don’t have time to survey and evaluate the long-range objectives and implications necessary to create and implement a comprehensive land use plan. Planning agencies, on the other hand, are usually composed of people who focus on preparing and implementing plans and, thus, can devote their full attention.

B. Preparation, adoption, and amendment of comprehensive plans

Comprehensive planning recognizes the complex interaction between social, economic, and environmental systems. A comprehensive plan is an expression of the community’s vision and a strategic map to reach that vision. Comprehensive plans analyze existing economic, social, and environmental conditions, lay out the goals and policies that will guide future development, and provide the legal basis for land use controls. Economic vitality, a healthy environment for children and families, protection of the natural resources, and the active participation and leadership of local citizens, are all components of a comprehensive plan that will provide for the sustainable development of the city. Land use and zoning regulations are just one aspect of implementing the vision for the city contained in the comprehensive plan.

Minn. Stat. § 462.355, subds. 2, 3.

Gold Nugget Dev., Inc. v. City of Monticello, 2001 WL 683488, C3-01-7 (Minn. Ct. App. Jun. 19, 2001).

A comprehensive plan is not required outside the seven-county metropolitan area. A comprehensive plan is adopted and amended by resolution by a two-thirds vote of all of the members of the council. A hearing must be held on the comprehensive plan. A notice of the time, place, and purpose of the hearing must be published once in the official newspaper of the city at least 10 days before the day of the hearing. Failure to follow the statutory procedures for the adoption of the plan invalidates the plan.

Minn. Stat. § 462.355.

One of the primary responsibilities of the planning commission is to prepare, review, and periodically amend the comprehensive plan, in consultation and coordination with other municipal agencies and departments. Preparing a comprehensive plan is a large undertaking. While a planning commission can and should do most of the job, many communities have found they also need professional assistance. A comprehensive plan often requires the assistance of a professional planning consultant or a competent person on the staff of the city, county, regional development commission, or neighboring city.

Minn. Stat. § 473.858.

Minn. Stat. § 473.175.

City of Lake Elmo v. Metropolitan Council, 685 N.W.2d 1 (Minn. 2004).

If a comprehensive municipal plan in the metropolitan area conflicts with the zoning ordinance, the zoning ordinance must be brought into conformance with the plan. Comprehensive plans in the metropolitan area must be submitted to the Metropolitan Council for review as to compatibility and conformity with Metropolitan Council's regional system plans. When the Metropolitan Council determines that a city's comprehensive land use plan may have a substantial impact on or contain a substantial departure from the Metropolitan Council's regional system plans, the Council has the statutory authority to require the city to conform to the Council's system plans.

C. Planning commission duties

Minn. Stat. § 462.355.

The Municipal Planning Act imposes several duties on the planning commission especially where a city is developing or has a comprehensive plan, including:

Minn. Stat. § 462.355, subd. 1.

- Preparation and review of comprehensive plan. The agency must create the comprehensive plan and coordinate planning activities with other city departments.

Minn. Stat. § 462.355, subd. 1.

- Coordination with other units of government. The agency must consider the planning activities of adjacent units of government and other affected public agencies.

Minn. Stat. § 462.355, subds. 2, 3.

- Adoption of the plan. The agency recommends the comprehensive plan or amendments, after a hearing date following a notice of 10 days publication in the official newspaper. The agency must submit the plan or proposed amendment of the council prior to publishing the notice. The council must formally adopt the plan as the official comprehensive plan; otherwise it remains only as a recommendation to the council.

Minn. Stat. § 462.356, subd. 1.

- Recommendation for plan execution. The agency must study and propose ways to put the plan into effect, including zoning, subdivision regulations, official maps, a program of public improvements and services, city renewal and redevelopment, and a capital improvements program.

Minn. Stat. § 462.355, subd. 1.

- Periodic review. The agency must periodically review the plan and recommend amendments when necessary.

Minn. Stat. § 462.356, subd. 2.

- Review of land acquisitions and capital improvements. Once an agency adopts a comprehensive plan or part of a plan, all proposed land acquisitions and capital improvements of the city, or any other governmental unit with jurisdiction in the city, must go to the commission for review. The agency will then submit a written report describing its findings. (The council may, by two-thirds vote, dispense with this requirement if it feels no planning implications are involved.) Failure to report in 45 days is deemed approval.

- Even in a city with no comprehensive plan, the planning commission is responsible for reviewing land use control measures. State law requires the planning commission to review zoning ordinance amendments, subdivision plats, and official maps. Public hearings may be held before the planning commission, but the council makes the final determination. Under most city ordinances, all council determinations having planning implications first go to the planning commission.

Minn. Stat. § 462.354, subd. 2.

See Section VII. *Official Map*

- Finally, the planning commission may get the assignment from the council to act as a board of adjustments and appeals. As discussed subsequently, every city that has an official map in effect, must establish a board of adjustment and appeals. However, because the board has the authority to review the decisions and recommendations of the planning commission, it is usually better (if possible) to have a board of adjustment and appeals whose members are somewhat different from those of the planning commission.

D. Community-based planning

Minn. Stat. § 473.858, subd. 2.

Pursuant to state law, cities must submit their proposed comprehensive plans to adjacent governmental units and affected school districts for review and comment.

Minn. Stat. § 462.3535.

Nordmarken v. City of Richfield, 641 N.W.2d 343 (Minn. Ct. App. 2002).

Cities and counties are authorized to develop community-based plans to facilitate cooperative agreements among adjacent communities, and to coordinate planning to ensure compatibility of one community's development with development of neighboring communities. A city or county that chooses to develop a community-based plan must cooperate with neighboring governmental units.

III. The 60-day rule

Minn. Stat. § 15.99.

Manco of Fairmont v. Town Bd. of Rock Dell Township, 583 N.W.2d 293 (Minn. Ct. App. 1998).

Moreno v. City of Minneapolis, 676 N.W.2d 1 (Minn. Ct. App. 2004).

The 60-day rule is a state law that provides that a city must approve or deny a written request relating to zoning within 60 days or it is deemed approved. Note: The 2005 legislature adds that a request, subject to the 60-day rule, includes a watershed district review or a soil conservation district review. The underlying purpose of the rule is to keep governmental agencies from taking too long in deciding land use issues. Minnesota courts have generally demanded strict compliance with the rule. For the purposes of the 60-day rule, a zoning application is not considered approved or denied until the city has completes all appeals challenging city decisions on that zoning application.

Minn. Stat. § 15.99, subd. 2(a).

Minn. Stat. § 15.99, subd. 3(c).

The general rule provides that the failure of a city to deny a written request within 60 days is approval of the request. The statute also provides that a city's response meets the 60-day time limit if the city can document that the response was sent within 60 days of receipt of the written request.

A. Scope of the rule

Minn. Stat. § 15.99, subd. 1(c).

Minn. Stat. § 15.99, subd. 2(a).

Minn. Stat. § 462.358, subd. 3b.

Advantage Capital Mgmt, v. City of Northfield, 664 N.W.2d 421 (Minn. Ct. App. 2003).

A request is a written application related to zoning, septic systems watershed district review, soil and water conservation district review, or the expansion of the metropolitan urban service area for a permit, license or other government approval. The courts have been rather expansive in their interpretation of the phrase "related to zoning," and almost all requests affecting the use of land have been treated as subject to the law. The statute does not apply to subdivision and plat approvals, since those processes are subject to their own timeframes. The Minnesota Court of Appeals has ruled that Minn. Stat. § 15.99 does not apply to building permits.

B. Applications

Minn. Stat. § 15.99, subd. 1(c).

A request must be submitted in writing on the city's application form, if one exists. A request not on a city's form must clearly identify on the first page the approval sought. The city may reject as incomplete a request not on the city's form, if the request does not include information required by the city. The request is incomplete if it does not include the application fee.

Minn. Stat. § 15.99, subd. 3(a).

The 60-day time period does not begin to run if the city notifies the landowner in writing within 15 business days that the application is incomplete. The city must also state what information is missing. A city may want to consider developing a checklist and reviewing its zoning ordinances to make explicit what items it requires in an application.

Tollefson Dev., Inc. v. City of Elk River, 665 N.W.2d 554 (Minn. Ct. App. 2003) .

When a zoning applicant materially amends a request to rezone property, the 60-day period runs from the date of the written amendment, not from the date of the original application. But minor changes to a zoning request should not affect the running of the 60-day period.

C. Denials

Demolition Landfill Servs. v. City of Duluth, 609 N.W.2d 278 (Minn. Ct. App. 2000).

Minn. Stat. § 15.99, subd. 2(b).

The Minnesota Court of Appeals had ruled that failure of a motion to approve is not a denial. But the 2003 Legislature amended the statute to provide that the failure of a motion to approve an application shall constitute a denial provided those voting against the motion state on the record the reasons why they oppose the request.

Minn. Stat. § 15.99, subd. 2(a).

Minn. Stat. § 15.99, subd. 2(c).

Generally if an agency or a city denies a request, it must give written reasons for its denial at the time it denies the request. When a multimember governing body such as a city council denies a request, it must state the reasons for denial on the record and provide the applicant with a written statement of the reasons for denial. If the written statement of the reasons for denial is not adopted at the same time as the denial, it must be adopted at the next meeting following the denial of the request but before the expiration of the 60-day period. The written statement of the reasons for denial must be consistent with reasons stated in the record at the time of denial. The written statement of reasons for denial must be provided to the applicant upon adoption.

D. Extensions

Minn. Stat. § 15.99, subd. 3(f).

The law allows a city the opportunity to give itself an additional 60 days (up to a total of 120 days) to consider an application, if the city follows specific statutory requirements. In order to avail itself of an additional 60 days, the city must give:

- Written notification to landowner before the end of the initial 60-day period;
- The reasons for extension; and
- The anticipated length of the extension.

Northern States Power Co. v. City of Mendota Heights, 646 N.W.2d 919 (Minn. Ct. App. 2002).

The courts have been particularly demanding on local governments with regard to this requirement and have required local governments to meet each element of the statute. An oral notice or an oral agreement to extend is insufficient. The reasons stated should be specific in order to inform the applicant exactly why the process is being delayed. Needing more time to fully consider the application may be an adequate reason.

Minn. Stat. § 15.99, subd. 3(g).

An applicant may by written notice request an extension of the time limit. A city can only go beyond 120 days if it gets the approval of the applicant. The city must initiate the request in writing and have the applicant agree to an extension in writing, or the applicant may ask for an extension by written request.

Minn. Stat. § 15.99, subd. 3(d), (e).

Minn. Stat. ch. 116D.

Minn. R. ch. 4410.

The 60-day time period is also extended if a state statute requires a process to occur before the city acts on the application if the process will make it impossible for the city to act within 60 days. The environmental review process is an example. If the city or state law requires the preparation of an environmental assessment worksheet (EAW) or an environmental impact statement (EIS) under the state Environmental Policy Act, the deadline is extended until 60 days after the environmental review process is completed. Likewise, if a proposed development requires state or federal approval in addition to city action, the 60-day period for city action is extended until 60 days after the required prior approval is granted.

Minn. Stat. § 15.99, subd. 2(a).

Minn. Stat. § 462.358, subd. 3b.

There are other time limits and requirements contained in the Municipal Planning Act, and there may be similar time provisions in a particular city's local zoning ordinance. The 60-day rule generally supersedes those time limits and requirements. One notable exception is that the 60-day rule does not apply to subdivision and plat approvals.

Cities should adopt a procedure or set of procedures to ensure planning staff, the planning commission, and the city council follow the 60-day rule. City staff should develop a timetable and guidelines to ensure no application or request for a watershed district review, soil and water conservation district review, is deemed approved because the city could not act fast enough to complete the review process. In many situations, it may be necessary to extend the 60-day period. Written and legally sufficient notice to the applicant of the extension should be given early in the first 60-day period if a delay appears possible.

IV. Fees and escrow

Minn. Stat. § 462.353, subd. 4(a).

Minn. Stat. § 462.353, subd. 4(b).

A city may prescribe land use fees under the Municipal Planning Act sufficient to defray the costs incurred by the city in reviewing, investigating, and administering an application for an amendment to an official control, or an application for a permit or other approval required under an official control. Fees are required by law to be fair, reasonable, and proportionate and have a nexus to the actual cost of the service for which the fee is imposed. All cities are required to adopt management and accounting procedures to ensure fees are maintained and used only for the purpose for which they are collected. Upon request, a city must explain the basis of its fees.

Minn. Stat. § 462.353, subd. 4(d).

Minn. Stat. § 462.361.

If a dispute arises over a specific fee imposed by a city related to a specific application, the person aggrieved by the fee may appeal to district court provided the appeal is brought within 60 days after approval of application and deposit of the fee into escrow. An approved application may proceed as if the fee had been paid, pending a decision on the appeal.

Minn. Stat. § 462.353, subd. 4(a).

Generally, cities must adopt fees by ordinance. However, there is a statutory exception to this general requirement. The exception authorizes cities that collect an annual cumulative total of $5,000 or less of land use fees to simply refer to a fee schedule in the ordinance that governs the official control or permit. These cities are authorized to adopt a fee schedule by ordinance or by resolution, either annually or more frequently, after providing notice and holding a public hearing. Notice must be published at least 10 days before the public hearing. The exception also authorizes cities that collect an annual cumulative total in excess of $5,000 of land use fees to adopt a fee schedule if they wish, but they may only do so by ordinance, after following the same notice and hearing procedures.

Minn. Stat. § 462.353, subd. 4(c).

January 1 is set by statute as the standard effective date for changes to fee ordinances, but a city may set a different effective date as long as the new fee ordinance does not apply to a project for which application for final approval was submitted before the ordinance was adopted.

Minn. Stat. § 462.358, subd. 2b.

Minn. Stat. § 462.358, subd. 2c.

See Sec. VI. *Subdivision Regulation.*

As discussed subsequently, fees paid in lieu of dedication of land under a subdivision regulation must not be used for ongoing operation or maintenance. The basis for calculating the amount of land to be dedicated or preserved must be established by ordinance or pursuant to the statutory procedures for adopting a land use fee schedule. There must be an essential nexus between fees or dedication and the municipal purpose to be achieved by the fee or dedication. The fee or dedication must bear rough proportionality to the need created by the proposed subdivision.

Minn. Stat. § 16B.685.

Cities must report annually to the Department of Administration all construction and development-related fees collected, information on the number and valuation of the units for which fees were paid, the amount of permit fees, plan review fees, administrative fees, engineering fees, infrastructure fees, other related fees, and the expenses associated with the municipal activities for which the fees were collected. Although this requirement applies primarily to building permit fees, it also includes certain land use fees. Cities that collect $5,000 or less in fees are exempt from this filing requirement.

V. Zoning

Zoning establishes a land use pattern and the orderly development of various types of districts according to the best use of particular areas of a community.

Minn. Stat. § 462.357.

Zoning ordinances may be enacted for many reasons including the general purposes of preserving and protecting the public health, safety, morals, and general welfare. Specifically, these ordinances may regulate the uses of property, the height, width and size of buildings, and the amount of vacant space on lots in each district. The regulations must be uniform within each district, but may vary across different districts.

State, by Rochester Ass'n of Neighborhoods v. City of Rochester, 268 N.W.2d 885 (Minn. 1978).

Honn v. City of Coon Rapids, 313 N.W.2d 409 (Minn. 1981).

Standards in zoning ordinances must have a rational basis, related to public health, safety, and welfare. Therefore, the reasons for the adoption of the standards should be supported by evidence, reports, or other information.

A. Limitations on zoning

42 U.S.C. § 2000cc.

The Religious Land Use and Institutionalized Persons Act (RLUIPA) of 2000 provides that no government shall impose or implement a land use regulation in a manner that puts a substantial burden on the religious exercise of a person, unless the government can show the burden is in furtherance of a compelling government interest and is the least restrictive means of furthering that interest. The Act also provides that no government may impose or implement a land use regulation in a manner that treats a religious assembly or institution on less than equal terms with a nonreligious assembly or institution; that discriminates against any assembly or institution on the basis of religion or religious denomination - and that totally excludes religious assemblies from their jurisdiction or unreasonably limits religious assemblies, institutions, or structures within a jurisdiction. Local ordinances could be challenged under the Act, allowing religious institutions and organizations to ignore requirements concerning parking restrictions, drainage requirements, setback requirements, noise limits or tree ordinances. Activities beyond worship services for religious institutions can be protected by the Act, including schools, childcare, senior centers, theaters, coffeehouses, and fitness facilities.

Civil Liberties for Urban Believers v. City of Chicago, 342 F.3d 752 (7th Cir. 2003).

Many cases are making their way through the courts interpreting this Act. In one case, a federal appellate court held that a city's imposition of special use and other approval processes on the location of churches in nonresidential zoning areas did not impose a "substantial burden" on religious exercise in violation of the Act, as the restrictions did not render impracticable the use of real property in the city for religious exercise, much less discourage churches from locating in the city.

B. Procedures to adopt or amend zoning

For many reasons, including RLUIPA, it is advisable for the council to obtain the best technical help available to ensure that the legal requirements to adopt or amend a zoning ordinance are met (and that the zoning ordinance is consistent with the comprehensive plan, if any.) an experienced land use attorney, while not required, is certainly desirable.

Minn. Stat. § 462.357.

Assuming a planning commission exists, state law sets forth the following procedural steps to guide cities through the zoning ordinance adoption or amendment process:

1. Proposals or amendments

Minn. Stat. § 462.357, subd. 2.

Typically, the planning commission submits proposed zoning ordinances or amendments to the council after conducting studies to ascertain that official controls or regulations are necessary (and will implement the comprehensive plan, if any). This stage is also the appropriate time for the planning commission to prepare a tentative official map, proposed subdivision regulations, a capital improvement program, and any other necessary official controls. (These topics will be discussed in more detail in subsequent sections of this chapter.)

Minn. Stat. § 462.357, subd. 4.

An *amendment* to a zoning ordinance may come from:

- the council,
- the planning commission,
- or by petition of affected property owners as defined in the city's zoning ordinance.

If an amendment not initiated by the planning commission must be sent to the planning commission, if there is one, for study and report. The council must not act on the proposed amendment until it receives a recommendation from the planning commission - if the planning commission does not respond in 60 days, the council may act on the proposed amendment to the zoning ordinance, after notice and public hearing.

2. Public hearing

Minn. Stat. § 462.357, subd. 3.

A public hearing must be held by the council or the planning commission before the city adopts or amends a zoning ordinance.

3. Notice of public hearing

a. Published notice

Minn. Stat. § 462.357, subd. 3.

A notice of the time, place and purpose of the hearing must be published in the official newspaper of the municipality at least ten days prior to the day of the hearing.

b. Mailed notice

Minn. Stat. § 462.357, subd. 3.

If an amendment to a zoning ordinance involves changes in district boundaries affecting an area of five acres or less, a similar notice must be mailed at least ten days before the day of the hearing to each owner of affected property and property situated completely or partly within 350 feet of the property to which the amendment applies. Note: When a city provides mailed notice, the clerk or person responsible for mailing the notice may use any appropriate records to determine the names and addresses of affected property owners. A copy of the notice and a list of the owners and addresses to which the notice was sent must be attested to by that responsible person and must be made a part of the records of the proceedings. However, failure to give mailed notice to individual property owners, or defects in the notice shall not invalidate the proceedings, provided that a genuine attempt to comply with this subdivision has been made.

4. Adoption

Following the public hearing, the planning commission reviews the proposed zoning ordinances or amendments and comments from the public hearing, and makes any appropriate and reasonable revisions.

Minn. Stat. § 462.357, subd. 4.

The planning commission then presents the zoning ordinances or amendments in final draft form along with a report to the council.

Minn. Stat. § 462.357, subds. 2, 5.

A.G. Op. 59-A-32 (Jan. 25, 2002).

Zoning ordinances and amendments must be adopted by a majority vote of all of the members of the council unless an amendment to zoning changes all or part of an existing classification from residential to commercial or industrial. In that specific situation the law requires a two-thirds majority of all of the members of the council. An attorney general opinion finds that a council may adopt or amend a municipal zoning ordinance by a majority vote of the council even if a charter provision or ordinance requires a different vote.

5. Publication

Minn. Stat. §§ 412.191, subd. 4; 331A.02; 331A.04.

After adopting new zoning ordinances or amending existing ones, the council must publish or summarize them in the official newspaper and, in some cases, file them with the county recorder and law library.

C. Extra-territorial zoning powers

Minn. Stat. § 462.357, subd. 1.

A.G. Op. 59-A-32 (Aug. 18, 1995).

A city's zoning authority may be extended to unincorporated territories within two miles of its boundary, unless that area falls within another city, county or township that has adopted zoning regulations. Where zoning is extended, ordinances may be enforced in the same manner and to the same extent as within the city's corporate limits.

D. Particular zoning: floodplains, shorelands, soils, wetlands and feedlots

Some land is subject to special protection under Minnesota law. Floodplains, wetlands, and shorelands must be addressed separately from other types of lands.

Minn. Stat. ch. 103F (water protection).

Minn. Stat. §§ 103F.101 to 103F.161 (floodplain management).

Minn. Stat. §§ 103F.201 to 103F.221 (shoreland management).

Minnesota Shoreland Management Resource Guide.

See Handbook, Chapter 17, Part V, for more information.

Local units of government are required to adopt floodplain management ordinances that regulate the use of floodplains. Cities must ensure that water management ordinances are consistent with the county's comprehensive water plan.

The *Minnesota Shoreland Management Resource Guide* and other river and lake management information is available online at: www.shorelandmanagement.org.

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Soil loss ordinances are encouraged, but not required. Many cities ask their soil and water conservation district to review any proposed subdivision or other proposed land use change to evaluate the soil characteristics of the land area. Without this review, a city council might approve a subdivision that has potential problems on particular lots.

While city approval does not mean the council guarantees every lot to be suitable for building, the homeowner will come to the city with problems such as an improperly working onsite sewage system due to soil problems or a wet basement. To discourage people from platting unsuitable or questionable lots, soil and water conservation district review will give the city the information necessary to challenge portions of a proposed subdivision, and to encourage the person who is subdividing to make the necessary revisions.

The soil and water conservation district's information on soil types in specific locations is also useful when making other land use decisions.

2005 Minn. Laws 1st Spec. Sess. ch.1, § 146.

The 2005 legislature added specific procedural requirements to feedlot zoning, some of which are mandatory and some discretionary. Follow these procedures, in addition to the general zoning ordinance procedures, for feedlot ordinances.

Minn. Stat. § 462.357, subd. 1g.

- If a city or a planning commission considers adopting a new or amended feedlot ordinance, it must notify the Pollution Control Agency and commissioner of Agriculture at the beginning of the process, no later than the date notice is given of the first hearing proposing to adopt or amend an ordinance purporting to address feedlots.
- A local zoning ordinance that requires a setback for new feedlots from existing residential areas must also require that new residential areas have the same setbacks from existing feedlots in agricultural districts. This requirement does not pertain to a new residence built to replace an existing residence. A city may grant a variance from this requirement.
- At the request of the city council, the city must prepare a report on the economic effects from specific provisions in the feedlot ordinance. Assistance with the report, in the form of a template, is available from the commissioner of Agriculture, in cooperation with the Department of Employment and Economic Development. Upon completion, the report must be submitted to the commissioners of employment and economic development and agriculture along with the proposed ordinance.

A city council also has the option to request that the Pollution Control Agency and the commissioner of Agriculture review, comment, and make recommendations on the environmental and agricultural effects from a proposed feedlot ordinance.

E. Rezoning

Minn. Stat. § 462.357.

Minn. Stat. § 462.358, subd. 2a.

Minn. Stat. § 15.99.

Minn. Stat. §462.357, subd. 4.

Cities have the authority to rezone or grant changes in the zoning designation of a particular portion of property. The planning commission, council, or a petition by an individual landowner may initiate a rezoning

If a request for rezoning does not come from planning commission, the matter must go to the planning commission for study and report. Care should be taken so that the 60-day rule discussed above in Part III is not violated, resulting in an automatic granting of the rezoning.

Sun Oil Co. v. Village of New Hope, 300 Minn. 326, 220 N.W.2d 256 (Minn. 1974).

Honn v. City of Coon Rapids, 313 N.W.2d 409 (Minn. 1981).

Rezoning is a legislative act and needs only to be reasonable and have some rational basis relating to public health, safety, morals, or general welfare. However, a rezoning decision must be supported by evidence that indicates it has a rational basis. A citizen cannot obtain a vested right in the zoning of their property.

Iowa Coal Mining Co. v. Monroe County, Iowa, 257 F. 3rd 846 (8th Cir. 2001).

Interstate Power Co v. Nobles County, 617 N.W.2d 566 (Minn. 2000).

Tollefson Dev., Inc. v. City of Elk River, 665 N.W.2d 554 (Minn. Ct. App. 2003).

Courts may allow a city rezoning even after an application for a permit has been made. For example, a business applies for mining permit but the city rezones the area and mining is no longer a permitted use in that district. If the party applying for the mining permit has taken no steps to begin mining, before the rezoning occurs a court may uphold the city's decision to rezone the district. However, this is not always the case – in this complicated area of law; cities should seek legal advice prior to rezoning especially where there are pending requests for a land use-related permit.

Minn. Stat. § 462.357, subd. 2.

A.G. Op. 59-A-32 (Jan. 25, 2002).

When property is rezoned from residential to commercial or industrial, a two-thirds majority of *all members of the city council* is required. (This means there must be four affirmative votes on a five-member council, in most, but not all cases.) For other rezoning, a simple majority is all that is required. The attorney general is of the opinion that neither a city's charter nor an ordinance may increase this voting requirement.

F. Variances from the zoning ordinance

1. Board of adjustments and appeals

Minn. Stat. §§ 462.354, subd. 2 and 462.357, subd. 6.

When a city has a zoning ordinance, it must, by ordinance, create a Board of Appeals and Adjustments which may be: a separate board; the planning commission; or the council. The board hears appeals where an error is alleged in the administration of the zoning ordinance, and hears requests for variances from the literal provisions of the ordinance. Variances can only be granted by the Board of Appeals and Adjustments,

Minn. Stat. § 462.354, subd. 2.

Minn. Stat. § 15.99.

See Part III of this chapter concerning the 60-day rule.

The ordinance establishing the board must provide notice and time requirements for hearings before the board. All orders by the board are due within a reasonable time. Requests before the board are subject to the 60-day rule.

Minn. Stat. § 462.354, subd. 2.

The board is also required to take minutes including any findings, actions taken on all matters, and final orders. If the board is a separate body, the council can provide that board decisions are: final and subject only to judicial review; are final subject to appeal to the council and judicial review; or that decisions are only advisory to the council.

2. Variances

Myron v. City of Plymouth, 562 N.W.2d 21 (Minn. Ct. App. Apr. 15, 1997), *aff'd*, 581 N.W.2d 815 (Minn. 1998).

Variances are to be granted only if strict enforcement of a zoning ordinance causes undue hardship. A landowner who purchased land knowing a variance would be necessary in order to make the property buildable is not barred from requesting a variance on the grounds the hardship was self-imposed.

City of Maplewood v. Valiukas, 1997 WL 53031, CO-96-1468 (Minn. Ct. App. Feb 11, 1997).

In granting a variance, the city may attach conditions, but the conditions must be reasonable and bear some relationship to the purpose of the variance.

Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002).

Nolan v. City of Eden Prairie, 610 N.W.2d 697 (Minn. Ct. App. 2000).

Graham v. Itasca County Planning Comm'n, 601 N.W.2d 461 (Minn. Ct. App. 1999).

Broad discretion is permitted when denying a request for a variance, but there must be legally sufficient reasons for the denial. The Board must make findings concerning the reasons for the denial or approval and the facts upon which the decision was based. The findings must adequately address the statutory requirements. Best practice suggests seeking specific legal advice from the city attorney before making decisions on requests for variances.

Stotts v. Wright County, 478 N.W.2d 802 (Minn. Ct. App. 1992).

An applicant for a variance is not entitled to a variance merely because similar variances were granted in the past.

Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002).

Error by city staff in approving plans does not constitute undue hardship entitling a person to a variance. While the result might be harsh, a municipality cannot be estopped from correctly enforcing a zoning ordinance even if the property owner relies to his or her detriment on prior city action.

Minn. Stat. § 462.357, subd. 6.

Kismet Investors v. County of Benton, 617 N.W.2d 85 (Minn. 2000).

No use variance may be granted if the use is prohibited in a zoning district. A city may grant use variances when a use is not prohibited in the zoning district, but the use is limited by another portion of the zoning ordinance. The requirements of unusual hardship and other statutory requirements still apply to use variances.

G. Specific uses

1. Permitted uses

Chase v. City of Minneapolis, 401 N.W.2d 408 (Minn. 1981).

Rose Cliff Landscape Nursery v. City of Rosemount, 467 N.W.2d 641 (Minn. Ct. App. 1991).

Permitted uses are those that the zoning ordinance allows. It is generally arbitrary and unlawful to deny a building permit for a permitted use unless the zoning of the property is subsequently changed to prohibit that use.

2. Accessory uses

Stodola v. City of Orono, 1994 WL 272900, C2-93-2445, (Minn. Ct. App. 1994).

Accessory uses are those uses that cannot stand alone and must be accompanied by a principal, permitted use. For example, a garage may be an accessory use in a residential area.

3. Conditional uses

Minn. Stat. § 462.3595.

Minn. Stat. § 462.3595, subd. 2.

Conditional uses are those activities that the zoning ordinance permits if certain conditions (that the council determines or the zoning ordinance specifies) are met. The city must grant the conditional use permit (CUP) if the applicant satisfies all the conditions. Conditional uses remain in effect indefinitely as long as the use complies with the conditions. Note: Before a CUP is granted, a city must provide notice and a public hearing. A notice of the time, place and purpose of the hearing must be published in the official newspaper of the municipality at least ten days prior to the day of the hearing. A certified copy of the CUP must be recorded with the county recorder or the registrar of titles, and must include a legal description of the land.

Trisko v. City of Waite Park, 566 N.W.2d 349 (Minn. Ct. App. 1997).

An applicant for a CUP is entitled to one when the controlling land use ordinances authorize the use, and there is evidence of the need for the permit. Neighborhood opposition, alone, does not authorize the rejection of an application for a CUP.

In re Livingood, 594 N.W.2d 889 (Minn. 1999).

When a local government denies a landowner a CUP without sufficient evidence to support its decision, a court can order the issuance of the permit subject to reasonable conditions.

State ex rel. Howard v. Village of Roseville, 70 N.W.2d 404 (Minn. 1955).

Mohler v. City of St. Louis Park, 643 N.W.2d 623 (Minn. Ct. App. 2002).

Issuance of a CUP by mistake does not prevent the city from enforcing the ordinance once it is aware of the violation. The city can enforce the zoning ordinance and require the landowner to follow the ordinance and in most situations, will not incur liability for costs that occur as a result of the mistake.

Northpointe Plaza v. City of Rochester, 465 N.W.2d 686 (Minn. 1991).

There is a constitutionally protected property interest in a CUP and that interest runs with the land.

Minn. Stat. § 462.3597.

See Part 5. *Interim Uses* below

CUPs issued for only a limited time and subject to renewal may not be valid. Consider using an interim use permit or a licensing ordinance in these situations, instead of issuing a limited time CUP.

SuperAmerica Group, Inc. v. City of Little Canada, 539 N.W.2d 264 (Minn. Ct. App. 1995).

A governing body may deny a CUP for reasons relating to public health, safety, and general welfare, or for incompatibility with a city's land use plan--even if the zoning ordinance does not specify these reasons.

Schwardt v. County of Watonwan, 656 N.W.2d 383 (Minn. 2003).

Yang v. County of Carver, 660 N.W.2d 828 (Minn. Ct. App. 2003).

Citizens for a Balanced City v. Plymouth Congregational Church, 672 N.W.2d 13 (Minn. Ct. App. 2003).

A court reviews a decision on a CUP independently to see whether a reasonable basis exists for the decision, or whether the decision is unreasonable or arbitrary. A denial of a CUP is arbitrary where the proposed use meets the requirements specified by the relevant zoning ordinance and the reasons for the denial have no factual basis in the record. Again, once an applicant meets the requirements for granting a CUP, approval of a permitted use follows as a matter of right.

Sunrise Lake Ass'n v. Chisago County Bd. of Comm'rs, 633 N.W.2d 59 (Minn. Ct. App. 2001).

A CUP may not be granted for a use prohibited in the zoning district.

Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, 624 N.W.2d 796 (Minn. Ct. App. 2001).

Citizens may bring a lawsuit to prevent a use when a governmental unit fails to enforce the conditions, as described in the local ordinance, for a CUP.

4. "Special uses"

Some zoning ordinances use the term "special use." The Municipal Land Use Planning Act does not recognize special use permits, and the courts would likely apply the same requirements for their issuance as those for conditional uses specified above.

5. Interim uses

Minn. Stat. § 462.3597.

An interim use is a temporary use of property until a certain date or until the use is no longer permitted. Authority for an interim use permit, and the conditions for one, is found in the local zoning ordinance. Typically, the conditions require the use to conform to the zoning code, a termination date is certain and there will be no additional costs to the public.

H. Non-conforming uses

SLS P'ship v. City of Apple Valley, 511 N.W.2d 738 (Minn. 1994).

Upon the creation of a zoning district, certain uses will be allowed and others will be prohibited. Non-conforming uses are those that legally existed prior to the creation of the zoning district and, in recognition of the landowner's property rights, are allowed to continue even though such uses are now illegal. One reason for identifying non-conforming uses in a zoning ordinance is to secure the gradual or eventual elimination of non-conforming uses. Besides being allowed to remain in effect, non-conforming uses also escape requirements subsequently enacted, such as setback requirements. A zoning ordinance may be amended to identify new non-conforming uses thus making what was once a permitted use into a non-conforming use if there is a reasonable basis for this decision.

Minn. Stat. § 462.357, subd. 1c.

Jake's, Ltd., Inc. v. City of Coates, 284 F.3d 884 (8th Cir. 2002).

Minn. Stat. § 462.357, subd. 1d.

Non-conforming uses cannot be amortized or phased-out. A municipality must not enact, amend or enforce an ordinance that eliminates a use which use was lawful at the time of its inception. This prohibition does not apply to adults-only bookstores, adults-only theaters or similar adults-only businesses, as defined by ordinance. Nor does it prohibit a municipality from enforcing an ordinance providing for the prevention or abatement of nuisances, or eliminating a use determined to be a public nuisance.

County of Freeborn v. Claussen, 295 Minn. 96, 203 N.W.2d 323 (1972).

While nonconformities must be allowed to continue, a zoning ordinance may prohibit them from being expanded, extended or rebuilt in certain situations. Restrictions on nonconformities are specifically addressed in state statute.

Minn. Stat. § 462.357, subd. 1e.

Any nonconformities, including the lawful use or occupation of land or premises existing at the time of an amendment to the zoning ordinance, may be continued through repair, replacement, restoration, maintenance, improvement, but not including expansion, unless:

- The nonconformity or occupancy is not used for a period of more than one year; or
- Any nonconforming use is destroyed by fire or other peril to the extent of greater than 50 percent of its market value, and no building permit has been applied for within 180 days of when the property is damaged. In this case a municipality may impose reasonable conditions upon a building permit in order to mitigate any newly created impact on adjacent property.

Minn. Stat. § 462.357, subd. 1e (c)

Cities can regulate nonconforming uses and structures to maintain eligibility in the National Flood Insurance Program. State law specifically authorizes city regulation of nonconforming uses to mitigate potential flood damage or flood flow.

Minn. Stat. § 462.357, subd. 1e.

Any subsequent use or occupancy of the land or premises shall be a conforming use or occupancy

Minn. Stat. § 462.357, subd. 1f.

Minn. R. pts. 6105.0351 to 6105.0550.

Notwithstanding statutory restrictions on nonconformities, Minnesota Rules may allow for the continuation and improvement of substandard structures in the Lower Saint Croix National Scenic Riverway.

The state statute on nonconformities supersedes any conflicting language in a zoning ordinance.

I. Interim ordinances (moratoria)

Cities may use an interim ordinance, also commonly known as a moratorium, to protect the planning process. Such ordinances are appropriate if city councils need time to more carefully consider local land use issues before certain developments occur.

Minn. Stat. § 462.355, subd. 4.

Note: The law states that a city council may adopt an interim ordinance (or moratorium) if a study is being conducted or has been authorized, if a hearing has been held or is scheduled for the purpose of considering adoption or amendment of a comprehensive plan or zoning amendment, or if an annexation has occurred. In these situations, the council may adopt an interim ordinance that regulates, restricts or prohibits any use, development or subdivision for a period not to exceed one year from the date it is effective. No notice is generally necessary before an interim ordinance is enacted, although cities may be well-advised to provide notice and hearing procedures as used for other land use matters – Except, the law does require a public hearing on a proposed interim ordinance only if it regulates, restricts or prohibits livestock production, or feedlots. In addition, notice of the public hearing on a proposed feedlot interim ordinance must be published at least ten days ahead of time in a newspaper of general circulation in the city.

Duncanson v. Board of Supervisors, 551 N.W.2d 248 (Minn. Ct. App. 1996)

Semler Constr., Inc. v. City of Hanover, 667 N.W.2d 457 (Minn. Ct. App. 2003).

An interim ordinance or moratorium may not delay or prohibit a subdivision that has been given preliminary approval, nor extend the time for action under the 60-day rule with respect to any application filed prior to the effective date of the interim ordinance. An interim ordinance applicable to an area affected by a city's master plan for a municipal airport may be extended for additional periods of time as the city council determines but must not exceed a total additional period of 18 months.

Minn. Stat. § 462.355, subd. 4.

Minn. Stat. § 462.355, subd. 4(1), (2).

In other cases, after a public hearing and written findings, an interim ordinance may be extended for up to an additional 120 days following the receipt of a required agency approval or review required by law, or the completion of any other process required law, when not received or completed at least 30 days before expiration of the interim ordinance. The ordinance may not be so extended more than an additional 18 months.

Minn. Stat. § 462.355, subd. 4(3).

After a public hearing and written findings, an interim ordinance may be extended up to an additional year if the city has not adopted a comprehensive plan at the time the interim ordinance is enacted.

Minn. Stat. § 462.355, subd. 4.

A public hearing on the extension of an interim ordinance must be held at least 15 days, but not more than 30 days before the expiration of the interim ordinance; notice of the hearing must be published at least 10 days before the hearing.

Woodbury Place Partners v. Woodbury, 492 N.W.2d 258 (Minn. Ct. App. 1993).

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002).

According to the Minnesota Court of Appeals, the use of an interim ordinance prohibiting or limiting use of land is generally not compensable if there is a valid purpose for the interim regulation. In evaluating whether an interim ordinance is a temporary taking in the nature of a regulatory taking, courts will look to the parcel as whole. There is no bright-line rule for regulatory takings; rather, they must be evaluated on a case-by-case basis.

VI. Subdivision regulation

A. Subdivision ordinances, plats and fees

Minn. Stat. § 462.358.

Municipalities have the authority to regulate subdivisions of land for many reasons including but not limited to encouraging orderly development and planning for all the related necessities such as streets, parks and open spaces.

Each city has the authority to adopt an ordinance setting out the standards, requirements and procedures to review, approve or disapprove an application to subdivide a large tract of land in the city. (Typically, the large tract is under single ownership until it is subdivided or separated into smaller lots.)

Minn. Stat. § 462.358, subd. 2a.

A municipality may require that an applicant establish an escrow account or financial security for the purpose of reimbursing the municipality for direct costs relating to professional services a city provides during the review, approval and inspection of the project. A municipality may only charge the applicant a rate equal to the value of the service to the municipality. Services provided by municipal staff or contract professionals must be billed at an established rate. (Cities have 30 days to release any financial securities after the applicant notifies the city, by certified letter, that all the city's requirements for approval are met; if a city fails to release and return letters of credit, the applicant receives any interest accrued. Consult the city attorney for additional requirements applicable to financial securities.).

Minn. Stat. § 462.353, subd. 4(d).

A city cannot condition the approval of a proposed subdivision or development on an agreement to waive the right to challenge the validity of a fee. However, a city may condition the approval of any proposed subdivision or development on a waiver agreement regarding costs associated with municipally-installed improvements.

Minn. Stat. § 462.358, subd. 3a.

Minn. Stat. ch. 505.

In conjunction with the authority to adopt subdivisions regulations, cities may, and sometimes must, require plats of the newly subdivided lots. (Plats are maps of small sections of land that show the location of individual lots as well as roads and other landmarks.) State law describes the platting process, but city subdivision regulations may also require plats where any subdivision creates parcels, tracts, or lots. Cities *must* require plats if any subdivision creates five or more lots or parcels which are 2-1/2 acres or less in size. City subdivision regulations must not conflict with state platting laws but may address the same or additional subjects.

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Minn. Stat. § 505.03.

All plats must receive approval prior to recording them with the county recorder or registrar of titles. Prior to approval, the council may employ qualified people to check and verify the plat to determine its suitability from a community-planning standpoint. The council may require that the applicant pay for the costs associated with this verification process.

Crystal Green v. City of Crystal, 421 N.W.2d 393 (Minn. Ct. App. 1988).

Minn. Stat. § 462.358, subd. 3a.

Cities may choose to adopt additional regulations necessary to ensure a harmonious process in the development of subdivisions. Once a plat has been recorded, a developer cannot challenge the conditions that have been attached.

Minn. Stat. § 462.358, subd. 2b.

Ruzic v. City of Eden Prairie, 479 N.W.2d 417 (Minn. Ct. App. 1991).

On a somewhat related note, cities should require that the applicant install all improvements subject to the council's approval to avoid the legal difficulties inherent in making special assessments. The city may also enter into a development agreement with a developer, requiring that the developer pay the special assessments if the city puts in the improvements.

B. Dedication of public lands

Minn. Stat. § 462.358, subd. 2b.

Minn. Stat. §462.353, subd. 4.

Cities have the authority to require, as part of the subdivision regulations, that a reasonable portion of buildable land in any proposed subdivision be dedicated to the public or preserved for public use as streets, roads, sewers, electric, gas, and water facilities, storm water drainage and holding areas or ponds and similar utilities and improvements, parks, recreational facilities, playgrounds, trails, wetlands, or open space. In the alternative, cities may require money instead of land; state law refers to this as "cash fees." If cities require cash fees (discussed subsequently) in the subdivision regulations it must be done by ordinance or, depending on the amount of fees collected, by a fee schedule.

The 2006 legislative changes to subdivision law include the following provisions:

- That the portion of land to be dedicated be based solely upon the "buildable" land, as defined by municipal ordinance.
- The municipality must reasonably determine that it will need to acquire that portion of land for the recreational and environmental purposes as a result of approval of the subdivision.

Minn. Stat. § 462.358, 2b(h).

- In establishing what portion of land must be dedicated or preserved, or the cash fee, city regulations must also give due consideration to the public open space and recreational areas and facilities that the developer proposes for the subdivision.
- A city cannot deny subdivision approval based solely on an inadequate supply of parks, playgrounds, trails, wetlands or open space within the municipality.

1. Cash fees in lieu of dedicated land

Minn. Stat. § 462.358, subd. 2b(c)

A city may choose to accept a cash fee - as set by ordinance - from the applicant for some or all of the new lots created in the subdivision, based on fair market value of the land, no later than at the time of final approval. If a city adopts an ordinance requiring payment of fees in lieu of dedicated lands, the city must also:

Minn. Stat. § 462.358, subd. 2b

- adopt a capital improvement budget and
- have a parks and open space plan or a parks and open space component in its comprehensive plan.
- Cash payments received must be placed by the municipality in a special fund to be used only for the purposes for which the money was obtained.
- Cash payments received must be used only for the acquisition and development or improvement of parks, recreational facilities, playgrounds, trails, wetlands, or open space based on the approved park systems plan.
- Cash payments must not be used for ongoing operation or maintenance of parks, recreational facilities, playgrounds, trails, wetlands, or open space.

C. Review of proposed subdivisions

Subdivision regulations must address procedural matters, such as what is required in an application, the preliminary and final review process, the approval/disapproval process, and coordination with other affected political subdivisions and state agencies.

Some flexibility is allowed in the administration of the preliminary and final review process, and in the approval/disapproval process. For example, the subdivision regulations may consolidate the procedures. The review process may be delegated to the planning commission, but the council is responsible for final approval or disapproval.

Prior to any subdivision, a public hearing is required. Notice of the hearing must be published in the official newspaper at least 10 days prior to the hearing date.

- **Preliminary plat.** Following the pre-application meeting, the applicant typically prepares a preliminary map or plat of the proposed subdivision. The map should include the location and approximate dimensions of the lots, easements, streets, public utilities, and other public lands on and adjacent to the tract. This preliminary plat should go to the planning commission with all the specific information about the proposal. Before making a decision, the agency should solicit comments and recommendations from other interested groups and individuals, and hold a public hearing on the matter. The 2006 legislature added language to the effect that a municipality must approve a preliminary plat that meets the applicable standards and criteria contained in the municipality's zoning and subdivision regulations unless the municipality adopts written findings based on a record from the public proceedings why the application shall not be approved. The council should review the agency's findings and actions. The time restrictions in the statute should be followed.

Minn. Stat. § 505.03, subd. 2.

- **Referral to county engineer or state department of transportation.** At least 30 days prior to taking final action on a preliminary plat, the proposed preliminary plat must be presented to the commissioner of Transportation, if the plat includes or borders on a trunk highway. Within five days after receiving the preliminary plat, the city must submit it to the county engineer, if the plat includes or borders on an existing or proposed county road. The commissioner of Transportation and the county engineer must report any comments and recommendations to the city within 30 days. Counties are required to adopt guidelines for review by the county engineer. No preliminary plat may be approved until these comments and recommendations are received and considered. This requirement does not extend the timelines under the planning act or the 60-day rule, if it applies to preliminary plat approval. Within 10 days after approval of the preliminary plat, notice explaining how the comments and recommendations have been met must be sent to the commissioner or the county board.

- **Final plat.** The planning commission reviews the final proposed plat to determine its conformance with the approved preliminary plat. Following a public hearing, the council should review the entire project, including plans and specifications. The city may require a contract with the applicant to ensure compliance with all necessary arrangements. The council accepts the final plat by resolution, and files it with the county recorder or registrar of titles. The city must file resolutions approving plats that border another city with the governing body of the other city.

Minn. Stat. § 462.358, subd. 3b.

A subdivision application must receive preliminary approval or disapproval within 120 days of its delivery, unless the applicant agrees to an extension. If no action is taken, the application will be deemed approved after this time period.

PTL, LCC v. Chisago County Bd. of Comm'rs, 656 N.W.2d 567 (Minn. 2003).

A county board of commissioners could not deny a developer's application for preliminary plat approval based solely on the comprehensive plan where the ordinance deemed the use a permitted one.

Semler Constr., Inc. v. City of Hanover, 667 N.W.2d 457 (Minn. Ct. App. 2003).

Minn. Stat. § 462.355, subd. 4.

After a plat is preliminarily approved, the city cannot require further significant changes. An interim ordinance or moratorium cannot prevent final approval of a subdivision application that has been given preliminary approval.

Minn. Stat. § 462.358, subd. 3b.

Upon receiving preliminary approval, the applicant may request final approval, which the city must certify within 60 days as long as the applicant has met all necessary requirements and complies with any conditions. An applicant may demand the execution of a certificate of final approval where the requirement and conditions have been satisfied. After final approval has been received, a subdivision may be filed or recorded.

West Circle Properties LLC v. Hall, 634 N.W.2d 238 (Minn. Ct. App. 2001).

The county recorder may refuse to file the plat if it has not been approved by the city council.

Minn. Stat. § 462.358, subd. 3c.

After a subdivision has been approved, for one year after preliminary approval and two years after final approval, an amendment to the comprehensive plan or to the zoning ordinances will not apply to or affect the subdivision with regard to use, density, lot size, lot layout, or dedication or platting--unless the municipality and the applicant agree otherwise.

Minn. Stat. § 462.358, subd. 6.

Nolan v. City of Eden Prairie, 610 N.W.2d 697 (Minn. Ct. App. 2000).

Variances to subdivision regulations may be allowed, but only on the grounds specifically identified in the subdivision regulations.

D. Extra-territorial subdivision regulation

Minn. Stat. § 462.358, subd. 1a.

See A.G. Op. 59-A-32 (Aug. 18, 1995).

As discussed with regard to zoning, cities may, by resolution, extend their subdivision regulations to unincorporated territory located within two miles of its boundaries in any direction, except for a town that has adopted subdivision regulations. If two or more non-contiguous cities have boundaries less than four miles apart, each may control the subdivision of land at equal distance from its boundaries within this area. Enforcement procedures are the same as if the regulation occurs inside the city's boundaries. The enforcement authority continues until the county or town board adopts comprehensive regulations that encompass the unincorporated territory.

Minn. Stat. § 462.358.

Another option is available with regard to regulation in these unincorporated areas. Upon the request of a city, county or the adjacent town, the involved parties must set up a board to exercise planning and land use control authority in those areas within two miles of the corporate limits of the city. The board must have an equal number of members from the city, county, and town appointed by their respective governing bodies.

Minn. Stat. §§ 462.351 to 462.364.

This board serves as a governing body, having all of the authority provided in the Planning Act and a board of adjustments and appeals with respect to land use issues in the unincorporated areas. Additionally, the board has the authority to adopt and enforce the state fire code within its jurisdiction.

Unless the parties agree to an alternative arrangement, the city is required to provide staff for the preparation and administration of land use controls.

VII. The official map

Minn. Stat. § 462.359.

As a planning tool, official maps ensure that land the city needs for street widening, street extensions, future streets, local airports and other public purposes will be available at basic land prices. To accomplish this, cities have authority to adopt official maps. While the planning commission can prepare the map, the council must approve the map before it has any legal effect.

The city's land use ordinance should require prospective builders to furnish a plan showing the location of their property with reference to the nearest existing streets and property lines in order to meet set-back requirements. If any proposed building would encroach on land the city reserves for public purposes, the council should deny the land use permit. If the council denies the permit, the applicant must have an opportunity to appeal the board of adjustments and appeals.

After the appeal and a public hearing, the board must grant a land use permit only if it finds that the entire property cannot yield a reasonable return to the owner, unless the city allows the building.

Minn. Stat. § 462.359, subd. 4.

If the board grants the land use permit, it must specify the exact location, ground area, height, and all other details of the building in question. If the board grants the permit, the council has six months to acquire the affected property by use of eminent domain proceedings. If the council does not act within six months, the permit shall be issues provided the application complies with all other ordinances.

Minn. Stat. § 462.359, subd. 3.

Official maps do not give a city any right to acquire the areas reserved on the map without payment. When the city is ready to proceed with the opening of a mapped street, the widening and extension of existing mapped streets, or for aviation purposes, it still must acquire the property by gift, purchase, or condemnation. It need not, however, pay for any building or other improvement erected on the land without a permit or in violation of the conditions of the permit.

Minn. Stat. § 462.359, subd. 2.

A. Procedural steps in adopting an official map

- The planning commission prepares and adopts a major thoroughfare plan and community facilities plan as part of the comprehensive plan, if the city has one.
- The agency prepares an official map and recommendations to the council.
- The council holds a public hearing after 10 days published notice in the official newspaper.
- The council adopts the map by ordinance.
- The city files the ordinance and the official map with the county recorder.

The purpose of the map is to permit both private and public property owners to adjust building plans equitably and conveniently before investments are made.

After a major thoroughfare plan and facilities are prepared by the planning commission and recommended to the council, the agency may prepare and recommend the official map.

Following the adoption and filing of an official map, the issuance of building permits are subject to its provisions. If any building is built without a building permit or in violation of permit conditions, a municipality need not compensate a landowner whose building may be destroyed if a street is widened. In other words, while the official map does not give any interest in land, it does authorize the municipality to acquire such interests in the future without having to pay compensation for buildings that are erected in violation of the official map

The board of adjustments and appeals may authorize the grant of a building permit upon finding that the entire property cannot otherwise yield a reasonable return to the landowner and that a balancing of interests requires granting the permit.

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VIII. File certified land use documents with county recorder

Minn. Stat. § 462.3595.

Minn. Stat. § 462.36.

Cities must record certified copies of all zoning ordinances, subdivision regulations, amendments, official maps, conditional use permits, and variances with the county recorder or register of titles. All of the documents must include the legal description of the property to which they apply.

The filing requirement is intended to provide prospective buyers with notice of existing land use restrictions on a particular parcel of property.

IX. Enforcement

SLS P'ship v. City of Apple Valley, 511 N.W.2d 738 (Minn. 1994).

Itasca County v. Rodent, 268 N.W.2d 423 (Minn. 1978).

City of Hibbing v. Baratto, 620 N.W.2d 58 (Minn. Ct. App. 2000).

Citizens for a Safe Grant v. Lone Oak Sportsmen's Club, 624 N.W.2d 796 (Minn. Ct. App. 2001).

Bateman v. City of La Crescent, 2000 WL 979105, C5-99-1979 (Minn. Ct. App. Jul. 18, 2000).

State v. Dorn, 1999 WL 153792, C6-98-2001 (Minn. Ct. App. Mar, 23, 1999).

Courts construe zoning ordinances according to their plain meaning and in favor of the property owner.

Violation of a zoning ordinance may be stopped. Violation of a land use ordinance is a misdemeanor or petty misdemeanor, as specified in the ordinance. A city may also seek an injunction from a court to enforce an ordinance. Citizens may also go to court to enforce a city's land use ordinances. Or, a citizen could bring a timely lawsuit to force the city to enforce its zoning ordinance.

A zoning ordinance may provide that each day the violation exists constitutes a separate offense. Multiple citations are consistent with public policy because it would be unjust to allow individuals to pay the fine for the original charge and finish a building project without abiding by the appropriate codes and ordinances.

Care should be taken when gathering evidence of an ordinance violation. The zoning administrator or other city official should not go onto private property without permission of the owner or occupant or, if permission is denied, without a search warrant.

Planning & Zoning Comm'n of Bemidji Township v. Schneider, C0-99-2067 (Minn. Ct. App. Jun, 13, 2000).

Village of Willowbrook v. Olech, 582 U.S. 562, 120 S Ct. 1073 (2000).

A claim that a city is selectively enforcing a land use ordinance must be based upon impermissible considerations as race, religion or the desire to prevent the exercise of a constitutional right. An individual may make a claim for selective enforcement.

X. Making a record and judicial review

Swanson v. City of Bloomington, 421 N.W.2d 307 (Minn. 1988).

To avoid or minimize the costly expenses of litigation, cities should always keep an accurate record of meetings, including any evidence presented, make findings contemporaneously with any actions taken, and provide an opportunity for interested parties to speak. Base findings of fact on the record and discuss the legal standards from the city's ordinances. The findings of fact show the council fulfilled its role as judge, and justifies the decision in regard to the law and facts. The council must not base its decision solely on neighborhood support or opposition. If these steps are followed, the city has a clear and complete record that generally limits the court's review of the city's record and eliminates the need for additional evidence at trial.

Pelican Lake Prop. Owners Ass'n v. County of Crow Wing, 1999 WL 618232, C5-98-1549 (Minn. Ct. App. Aug. 17, 1999).

A city that does not follow the procedures in its own land use ordinances risks having its decisions reversed by a court.

Minn. Stat. ch. 554.

While anyone can speak at the public hearing on a land use issue, there is a new cause of action that discourages public testimony, called tortious interference with economic relations or strategic lawsuits against public participation (SLAPs). While Minnesota law seems to protect those who testify at public hearings on land use matters from these type of lawsuits (unless their conduct or speech constitutes a separate violation of law or constitutional rights), threats of being sued may discourage persons who wish to oppose a land use from testifying.

SuperAmerica Group, Inc. v. City of Little Canada, 539 N.W.2d 264 (Minn. Ct. App. 1995).

Trisko v. City of Waite Park, 566 N.W.2d 349 (Minn. Ct. App. 1997).

Councils should avoid making a decision on a land use issue based on citizen opposition alone. A decision-making body cannot use vague and speculative opinions and unsubstantiated concerns from citizens as the basis for a decision. However, expert testimony supporting the citizens' point of view may not be necessary if there is a factual basis for the opposition.

Minn. Stat. § 462.361.

Stansell v. City of Northfield, 618 N.W.2d 814 (Minn. Ct. App. 2000).

District court review is available, but an exhaustion of the remedies provided by ordinance is first required. A person suing to challenge a city's land use decisions, must allege specific injuries as to how the action adversely affects the person's property rights or personal interests.

Sunrise Lake Ass'n v. Chisago County Bd. of Comm'rs, 633 N.W.2d 59 (Minn. Ct. App. 2001).

BECA of Alexandria LLP v. County of Douglas ex rel Bd. of Comm'rs, 607 N.W.2d 459 (Minn. Ct. App. 2000).

In re Livingood, 594 N.W.2d 889 (Minn. 1999).

Hurrle v. County of Sherburne, 594 N.W.2d 246, (Minn. Ct. App. 1999).

R.A. Putnam & Assocs. v. City of Mendota Heights, 510 N.W.2d 264 (Minn. Ct. App. 1994).

C.R. Invs., Inc. v. Village of Shoreview, 304 N.W.2d 320 (Minn. 1981).

Honn v. City of Coon Rapids, 313 N.W.2d 409 (Minn. 1981) (holding limited by *Swanson v. City of Bloomington*, 421 N.W.2d 307 (Minn. 1988).

Zylka v. City of Crystal, 283 Minn. 192, 167 N.W.2d 45 (1969).

The general standard for review in all land use decisions is whether the council's action was reasonable and rationally based. If the city neglects to state reasons for an action taken on the record, the city's action is presumed arbitrary and unreasonable. Similarly, if the record contains no findings by the council, the burden of proof shifts to the city to show its actions were reasonable.

Denials and findings of fact made within a reasonable time are sufficient. For example, in complex matters a council may ask the city attorney to draft findings of for the council to adopt at a subsequent council meeting when a council denies a land use application. Findings must be legally sufficient and factually supported.

Note: It is of the utmost importance that the city issue denials and adopt findings within the 60-day time limit as required by state law.

Minn. Stat. § 15.99.

Kreuz v. St. Louis County Planning & Zoning Comm'n, 1996 WL 469486, C8-96-150 (Minn. Ct. App. Aug. 20, 1996).

When explicit written findings are made -as to the basis and reasons for a decision - the courts respect the broad discretion cities have to make routine municipal decisions and will likely determine the decision is not arbitrary and capricious.

XI. Real estate acquisitions, sales, and other dispositions

Minn. Stat. § 412.211.

See League research memo *Purchase and Sale of Real Property* (470a).

Statutory cities are authorized to acquire real property within or outside their corporate limits by purchase, gift, devise, condemnation, lease, or otherwise. The law permitting the conveyance of tax-forfeited land to a city may also be used to acquire land for community development programs.

Minn. Stat. § 412.211.

Statutory cities are free to hold, manage, control, sell, convey, lease, or otherwise dispose of real and personal property as required by the city's interest.

Minn. Stat. § 465.035.

With the council's authorization, no consideration is required when a city conveys land for the public use to another public corporation, any governmental subdivision, or the Minnesota Armory Building Commission.

Minn. Stat. § 412.211.

Special problems arise in conveying lands held in trust for some specified public purpose. Usually a statute or charter is necessary to enable a city to sell or otherwise dispose of lands it holds in trust and uses for a specific purpose.

Headley v. City of Northfield, 227 Minn. 458, 35 N.W.2d 606 (1949).

Kronshnabel v. City of St. Paul, 272 Minn. 256, 137 N.W.2d 200 (1965).

City of Zumbrota v. Stafford Western Emigration Co., 290 N.W.2d 621 (Minn. 1980).

10 McQuillin, *Municipal Corporations* § 28.38 (3rd ed. Revised 1999)..

For example, if a city dedicates land for a public purpose, such as a park or square, the city corporation holds the property in trust for the public and has no power to divert the lands from the uses and purposes of its original dedication. The land can be used only for the purposes for which it is dedicated and cannot be sold.

A.G. Op. 469-A-15 (Nov. 20, 1969).

Thus, it is important for cities to examine the language of a deed that restricts the use of the land to determine if it creates a trust.

Minn. Stat. § 541.023.

Minn. Stat. § 500.20.

Witchelman v. Messner, 250 Minn. 88, 83 N.W.2d 800 (1957).

Witzig v. Phillips, 274 Minn. 406, 144 N.W.2d 266 (1966).

A city's power to convey land that is limited to a particular use or purpose is a complicated legal consideration. The council should seek the advice of its city attorney prior to authorizing any sale or disposition of the property.

A.G. Op. 469-A-15 (May 15, 1967).

Minn. Stat. § 462.356, subd. 2.

Minn. Stat. § 412.221, subd. 2.

Generally, a city council can decide to buy or sell property without seeking permission. The statutes do not require the council to submit the question to voters unless bonds are issued to purchase property. If a city has a comprehensive plan however, it must usually notify the planning commission of the intent to purchase or sell land, and allow 45 days for comment from the planning commission. Cities may use contracts for deed for both buying and selling real property but in some situations, the city must publish a resolution indicating the intent to purchase land. If voters submit a petition, the city must hold a special election to get permission to buy the land.

A. Vacating easements, streets and roads

1. Vacation by cities

Minn. Stat. § 412.851.

When it is in the public interest to do so, cities may abandon ownership or control over all or any part of land set aside, dedicated, or used as streets or alleys; however, the only way for a city to abandon a street, road, alley or public way is to follow state law. See the Research memo, *Procedure for Vacation of Streets in Cities* for in-depth information and forms for vacating streets.

Minn. Stat. § 412.851

In statutory cities, the resolution ordering the vacation must pass by a four-fifths vote of all the members of the council. (This means there must be four affirmative votes on a five member council.)

Minn. Stat. § 462.358, subd. 7.

A statutory city may also vacate any publicly-owned utility easement or boulevard reserve in the same way streets or alleys are vacated by the type of city involved.

The steps for a statutory city to vacate a street or alley are as follows:

- The council may initiate the action by resolution or a majority of property owners who abut the land to be vacated may petition for this action. Such petitions probably need signatures from a majority of landowners and from the owners of at least 50 percent of the land area.
- The council must hold a public hearing on the proposal, following two weeks published and posted notice. The city must provide written notice to each affected property owner at least 10 days before the hearing.

Minn. Stat. § 164.07, subd.2.

If the road to be vacated abuts or terminates on, or is adjacent to any public water, the city must send written notice of the petition or resolution to vacate to the commissioner of Natural Resources, by certified mail, 60 days before the date of the public hearing. In addition, the council or its designee must meet with the commissioner of Natural Resources at least 15 days before the public hearing. The commissioner will evaluate the proposed vacation according to state law, and will advise the council as to that evaluation.

A.G. Op. 59-A-53 (Jan. 13, 1977).

Minn. Stat. § 160.29.

When a city lawfully vacates a street, the owner of the abutting property holds title to the land in the former street (presumably to the centerline) free of easements either in favor of the public or owners of other property abutting on the street. Cities may specify the extent to which a proposed vacation affects existing utility easements, including the right to maintain and continue utility easements.

If the city actually owns the dedicated street, the resolution vacating the street does not divest the city of its rights to the property. It still may dispose of the property on which the street was located. It is unusual that a city would own a street; a city does not gain ownership by plat dedication.

In re Hull, 163 Minn. 439, 204 N.W. 534 (1925).

An abutting property owner who suffers "peculiar damages" (lack of access) from the vacation of the street may be entitled to compensation. However, a property owner probably will not prevail on a claim for money against a city if the only complaint is that the person must travel further or over a poorer road due to a street vacation.

2. Vacation by courts

Minn. Stat. § 505.14.

In re Verbick, 607 N.W.2d 148 (Minn. Ct. App. 2000).

For streets in private and in certain platted territories, there is also a district court procedure for vacation. The street may be vacated only if it is useless for its original purpose. The courts broadly construe the terms "useless" and "purpose." Merely showing the street is not presently used is insufficient to show uselessness. Before a court may grant an application, the mayor of the city must receive personal notification of the application at least 10 days before the court intends to hear the application. If the road to be vacated abuts or terminates on, or is adjacent to any public water, the commissioner of Natural Resources must be notified well in advance and has a right to intervene in the court proceedings.

B. Establishing streets, roads and cartways

In re Lafayette Dev. Corp., 567 N.W.2d 743 (Minn. Ct. App. 1997), *aff'd*, 567 N.W.2d 740 (Minn. 1988).

When a city accepts dedication of a roadway designated in its official map, and the roadway is used before and after the dedication, the city forgoes the discretion to refuse use or maintenance of the roadway. No resolution or ceremony is necessary to signify the road is open.

Minn. Stat. § 435.37

A new law passed in 2006 may require that cities establish a road in certain situations. A property owner who has limited access to their land may petition the city council to connect the land to a public road. If the petition fits the following criteria, the city council *must* establish a cartway (a road or driveway) connecting the petitioner's land to a public road:

- The tract of land is five acres or more
- The owner has no access except over a navigable waterway, or
- Over the land of some else's land, or
- The current access is less than two rods in width

The city council may select an alternative route in some situations. The petitioner must pay all costs associated with establishing and maintaining the road - unless the council, by resolution, determines that such expenditures are in the public interest. In addition, the council may require the petitioner to post a bond or other security before the council acts on the petition.

C. Eminent domain

1. Background

Minn. Stat. § 465.01.

Minn. Stat. § 117.012.

Minn. Stat. ch. 117.

All cities have the authority to take (or condemn) private property for public use as long as they pay the landowner reasonable compensation. Essentially, this is a way to require that an owner sell his or her land to a city. This procedure requires a formal court action, and a city must pay an owner for the value of the land or the damages to the land - if the city is taking only part of the private property, such as for an easement.

Kelo et al v. City of New London, et al. 545 U.S. 469, 125 S. Ct. 2655 (2005).

In the 2005 case, Kelo v. City of New London, Conn., the United States Supreme Court held that taking property for economic development is a valid public purpose and that if a city seeks to exercise its power of eminent domain for economic development purposes, it should do so in conjunction with a well thought out economic development plan.

2. 2006 changes in state law

a. Public use and public purpose

2006 Minn. Laws ch. 214.

In response to the Kelo decision, the 2006 Minnesota Legislature passed extensive legislation restricting a city's power of eminent domain and increasing compensation to owners.

See also, *Regents of the Univ. of Minn. v. Chicago & N.W. Transp. Co.*, 552 N.W.2d 578 (Minn. Ct. App. 1996).

The new law preempts all other condemnation procedures for charter and statutory cities (except for drainage, town roads and watershed districts). It narrows the definition of "pubic use" and "public purpose" to:

the possession, occupation, ownership, and enjoyment of the land by the general public, or by public agencies;

the creation or functioning of a public service corporation (for example, a municipal or private utility); or

the mitigation of a blighted area, remediation of an environmentally contaminated area, reduction of abandoned property, or removal of public nuisances.

In contrast, the public benefits of economic development, including an increase in tax base, tax revenues, employment, or general economic health, do not by themselves constitute a public use or public purpose.

Minn. Stat. § 117.025, subd. 6.

Cities may still use condemnation to alleviate a blighted area; however "blighted area" is now more narrowly defined as an area in urban use where half of the buildings are structurally substandard.

Minn. Stat. § 117.025, subd. 7.

"Structurally substandard building" means

- The building has been inspected and cited for enforceable housing, maintenance, or building code violations; and
- The building code violations involve specific structural aspects of the building (i.e. roof, support walls and beams, foundation, internal utilities, etc.); and
- The cited violations have not been remedied after two notices to cure noncompliance; and
- The cost to cure the violations is more than 50 percent of the assessor's taxable market value for the building (excluding land value).

The law gives local government the authority to seek an administrative search warrant to enter and inspect a building if there is a reasonable suspicion that the property

- violates a specific section of a housing maintenance or building code
- that the violation is ongoing, and
- that the owner denies the local government access to the property.

Cities may use recent fire or police inspections, housing inspections, and exterior indications of deterioration as evidence to support their suspicions that a building is structurally substandard.

Minn. Stat. § 117.027, subds. 1 and 2.

The new law prohibits taking non-structurally substandard buildings and uncontaminated parcels unless there is no other reasonable way to remedy blight or contamination in the area - and all possible steps are taken to minimize the taking of such buildings or lands.

Minn. Stat. § 117.027.

Minnesota's New Eminent Domain Law

The law also specifically defines other terms (owner, environmentally contaminated areas, abandoned property and public nuisance). Additional resources are available on these legal terms as well as the legal standards a city must meet when condemning private property.

b. Procedural changes

2006 Minn. Laws, ch 214.

The 2006 changes in state law include changes to the eminent domain process. All land acquisitions must now follow the process the state uses to take land for transportation purposes – and the law also modifies those processes including but not limited to:

- Requiring exchange of appraisals
- Requiring timely exchange of specific documents between the parties

Minn. Stat. § 117.0412.

The law includes a new requirement for a public hearing before a city can condemn property to mitigate a blighted area, remediate an environmentally contaminated area, reduce abandoned property, or remove a public nuisance. In concert with the new hearing requirements are new notice requirements. The law also now requires that cities make specific findings as to public costs, if any, and public purposes during the process.

Minn. Stat. § 117.226.

If a city determines that property acquired through eminent domain is no longer needed for a public purpose, the city must offer to sell the property back to the person it was acquired from at the original price or the current fair market value, whichever is lowest. (The Minnesota Department of Transportation is exempt from this "right of first refusal" requirement.)

c. Relocation costs

Both state and federal law protect property owners and tenants who are required to move because of eminent domain proceedings; cities, or condemning authorities, must pay relocation costs for the people who must move. In some limited circumstances, owner-occupants may waive relocation benefits.

In re Wren, 699 N.W.2d 758 (Minn. 2005)

42 U.S.C.A. §§ 4601-4655

If a city receives federal funding for a project the involves the use of eminent domain, federal law requires that the city pay certain benefits to people who must move from their homes, farms, or businesses as a result of the project.

Minn. Stat . §117.52, subd. 1a.

Minnesota law also requires payment of relocation benefits when eminent domain is used, even if no federal funding is involved. The nature and amount of these benefits is the same as if federal funds were involved. The maximum that a city must pay to a relocated business is $50,000, if actually incurred.

Minn. Stat . § 117.52, subd. 4.

If a person must relocate but does not accept the city's relocation offer, the state law now requires that a city must seek resolution using state contested case procedures and an administrative law judge.

d. Court and compensation costs

Minn. Stat. § 117.031.

If a person challenges a city's condemnation proceeding or amount in court, and prevails, the court may – and in some situations must – pay the person's court costs and attorney's fees.

Minn. Stat. § 117.186.

The new state law contains numerous provisions relating to compensation for losses, including but not limited to:

- Going concern compensation
- Minimum compensation
- Acceptance of replacement properties
- Loss of a non-conforming use
- Loss of driveway access

As you can see, the use of eminent domain is controversial and complex. A city council considering the use of eminent domain should consult with the city attorney well before using this tool for land acquisition.

XII. The "takings" issue

A. The general law

U. S. Const. Amend. V.

Minn. Const. art. I § 3.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

Both the U.S. Constitution and the Minnesota Constitution forbid the taking of private property for public use without just compensation. Zoning and land use regulations on property may be considered takings if the regulation goes too far.

In determining whether a regulation goes too far, the United States Supreme Court has recognized two distinct classes of regulatory takings:

Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

- Categorical takings, in which the regulation denies all economically beneficial or productive use of land.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646 (1978).

- Case-specific regulatory takings, which involve consideration of the economic impact of the regulation, the interference with reasonable investment-backed expectations, and the character of the regulation.

McShane v. City of Fairbault, 292 N.W.2d 253 (Minn. 1980).

Olsen v. City of Ironton, 2001 WL 379010, CX-00-1371 (Minn. Ct. App. Apr. 17, 2001).

- The Minnesota Supreme Court has recognized a third class of takings that may occur when the government adopts a land use regulation designed to benefit a specific public or governmental enterprise. If the regulation is enacted for the benefit of a government enterprise (airport zoning, for example), the government must compensate the landowners whose property has suffered a substantial and measurable decline in market value as a result of the regulations.

Alevizos v. Metropolitan Airports Comm'n, 298 Minn. 471, 216 N.W.2d 651 (1974).

Grossman Invs. v. State by Humphrey, 571 N.W.2d 47 (Minn. Ct. App. 1997).

Minn. Stat. ch. 117.

When the government has taken property without formally using its eminent domain powers, the property owner has a cause of action for inverse condemnation under the eminent domain laws.

Northern States Power Co. v. Minnesota Metro. Council, 684 N.W.2d 485 (Minn. 2004).

Johnson v. City of Minneapolis, 667 N.W.2d 109 (Minn. 2003).

See Part XIX-B of this chapter for more on eminent domain.

Inverse condemnation is an action against a governmental defendant to recover the value of property that has been taken in fact by the government defendant, even though no formal exercise of the statutory power of eminent domain has been attempted by the taking agency.

42 U.S.C. § 1983.

Money damages may also be available under a claim that the taking violates a person's constitutional rights.

Kottschade v. City of Rochester, 319 F.3d 1038 (319 F.3d 1038).

Before bringing a takings clause claim in federal court, a property owner must first attempt to obtain just compensation through inverse condemnation procedures available in state courts.

City of Monterey v. Del Monte Dunes at Monterey, 526 U.S. 687, 119 S. Ct. 1624 (1999).

The U.S. Supreme Court found that the city of Monterey, Calif., by imposing more and more rigorous demands each of the five times it rejected applications to develop a parcel of land, committed a regulatory taking of the land without paying just compensation or providing an adequate post-deprivation remedy for the loss. The Court also determined it was appropriate for a jury to find that the city's denial of the final development plan was not reasonably related to legitimate public interests. The issue of when a jury is required in a takings case was raised in this case. Because of the extreme circumstances, the Supreme Court held that a jury was required. But it is clear that a jury is required only in cases where the facts and procedural posture are extreme. If the actions of the city in dealing with an applicant for a land use permit are so extreme that due process requires a jury to be appointed, the city should not expect the jury to be sympathetic to arguments that it acted reasonably.

1. Zoning ordinances and takings

Los Angeles City Council v. Taxpayers for Vincent, 466 U.S. 789, 104 S. Ct. 2118 (1984).

Cities enact zoning ordinances based on their police powers that allow them to reasonably promote the public health, safety, morals, and welfare, which may also include protecting the appearance of their community.

Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 98 S. Ct. 2646 (1978).

Generally, no taking occurs where the city's land use regulation is reasonably necessary to accomplish a legitimate government purpose.

Palazzolo v. Rhode Island, 533 U.S. 606, 121 S. Ct. 2448 (2001).

A taking might occur even when a purchaser buys property and is aware of a zoning ordinance that may restrict the intended use. However, background principles derived from state law may limit a claimant's property interest.

First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304, 107 S. Ct. 2378 (1987).

If a zoning or land use regulation is so restrictive as to deny property owners reasonable use of their property, they may recover monetary damages for the period the restriction was in effect, regardless of the length of time. This action is referred to as a temporary taking.

Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302, 122 S. Ct. 1465 (2002).

A temporary taking is in the nature of a regulatory taking in which courts will look to the parcel as whole. There is no bright-line rule for regulatory takings; rather, they must be evaluated on a case-by-case basis.

Parranto Bros., Inc. v. City of New Brighton, 425 N.W.2d 585 (Minn. App. 1985).

Minnesota courts have ruled that in order for a taking to occur, the application of a land use ordinance must deprive the owner of all reasonable use of the land. Where a legitimate governmental purpose exists and some economically viable use of the property exists, a taking will not be found. The court will look at the regulation's economic impact, the extent to which the landowner's investment-backed expectations have been diminished by the regulation, and the general character of the regulation.

2. Conditional use permits and takings

Hubbard Broad. v. City of Afton, 323 N.W.2d 757 (Minn. 1982).

According to the courts, denial of conditional or special use permits and building permits do not constitute an unconstitutional taking of property where reasonable uses remain.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987).

No taking occurs where an "essential nexus" exists between a condition that is imposed on a development proposal and the burden on the local unit of government caused by such development.

Dolan v. City of Tigard, 512 U.S. 374, 114 S. Ct. 2309 (1994).

Cities considering land use permit applications must prove that any conditions or requirements in the form of land dedications or easements are in "rough proportionality" to the impact of the proposed development in both nature and extent.

The determination that conditions imposed or extractions required are roughly proportional to the impact of the proposal must be made in each individual case. At the very least, cities should give serious consideration to generically applied conditions or extractions, such as using a flat percentage fee or dollar amount for park dedication fees for each type of permissible use subject to variances for special circumstances for particular property. The generic condition, however, should be based on a study of the rough proportional impact of each type of use.

Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S. Ct. 3141 (1987).

Requiring a property owner to grant a public easement across the beachfront of a lot, before the owner could receive a building permit, was a taking of a property interest for which the owner was constitutionally entitled to just compensation.

3. Rezoning and failure to rezone and takings

DeCook v. City of Rochester, 1998 WL 73050, C8-97-1518 (Minn. Ct. App. Feb. 24, 1998).

Rezoning of property does not constitute a taking since a land use regulation constitutes a compensable taking only if it deprives the landowner of all reasonable use of the property. If an economically viable use of the land remains after the rezoning, there is no taking.

DeCook v. City of Rochester, 1998 WL 73050, C8-97-1518 (Minn. Ct. App. Feb. 24, 1998).

A rezoning of land from residential to industrial, if in conformity with the comprehensive plan and if a substantial value remains in the use of the land as industrial space, is not a taking that must be compensated.

4. Nuisances and takings

Lucas v. South Carolina Coastal Comm'n, 505 U.S. 1003, 112 S. Ct. 2886 (1992).

See *City of Minneapolis v. Meldahl*, 607 N.W.2d 168 (Minn. Ct. App. 2000) (hazardous building).

A narrow exception has been carved out with respect to regulations prohibiting something that would have been prohibited by the state's property or nuisance laws. For example, appropriate demolition of a hazardous building is not taking private property without just compensation because hazardous buildings are dangerous to the public.

5. Access and takings

Grossman Invs. v. State by Humphrey, 571 N.W.2d 47 (Minn. Ct. App. 1997).

Kick's Liquor Store v. City of Minneapolis, 587 N.W.2d. 57 (1998).

Property owners have a right of reasonably convenient and suitable access to their property. Depriving a property owner of reasonably convenient and suitable access from a street or highway may be an inverse condemnation.

Dale Properties, LLC v. State, 638 N.W.2d 763 (Minn. 2002).

A property owner who retained direct access to traffic in one direction, but lost it in the other direction due to closure of a median crossover, retained reasonable access as a matter of law; thus, the closure of median crossover, which allegedly reduced value of property, was a noncompensable exercise of state's police power.

XIII. How this chapter applies to home rule charter cities

Handbook, Chapter 4

Land use control ordinances apply to charter cities as well as to statutory cities. If a charter contains conflicting provisions, refer to the Chapter 4, The Home Rule Charter City. For the most part, Minnesota land use law governs home rule charter cities just as it does statutory cities. In the metropolitan area, both the Municipal Planning Act and the Metropolitan Land Planning Act apply to home rule charter cities.

Nordmarken v. City of Richfield, 641 N.W.2d 343 (Minn. Ct. App. 2002).

The Municipal Planning Act and the Metropolitan Land Planning Act occupy the field of the process by which municipal land use laws are finally approved or disapproved, and pre-empt the power of referendum reserved in a city's home rule charter.

Some charters contain provisions for the acquisition and disposition of real property. The statutes do not give directions for charter cities to follow, absent charter provisions. Best practice suggests charter cities seek legal advice as to real property transactions prior to making an agreement.