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MAKING DEFENSIBLE LAND USE DECISIONS

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by

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I. GENERAL BACKGROUND PRINCIPALS/LIMITATIONS

- A. Statutory basis for power to zone: Minn. Stat. § 462.351 et. seq.
1. The entire basis for zoning is the police power. The police power is inherent in the State, not local government.
 2. Cities only have those powers expressly given them by statute, and those powers that are implied as necessary to exercise the express powers.
- B. The Constitution limits the exercise of local zoning powers.
1. Regulations must be uniformly applied. This is what is referred to as equal protection under the law. This means:
 - Similarly situated landowners must be treated the same.
 - Similarly situated refers to not only circumstances, but time.

NOTE: The purpose of this presentation, and the accompanying materials, is to inform you of interesting and important legal developments. While current as of the date of presentation, the information given today may be superseded by court decisions and legislative amendments. We cannot render legal advice without an awareness and analysis of the facts of a particular situation. If you have questions about the application of concepts discussed in the presentation or addressed in this outline, you should consult your legal counsel. ©2006 Ratwik, Roszak & Maloney, P.A.

- When an equal protection challenge is asserted, the municipality must offer a legitimate reason for distinction.
2. Regulations cannot deny a property owner all economically viable use of property. This stems from the Fifth Amendment to the United States Constitution, which states that private property shall not be taken for public use without just compensation.
- Such a denial equals a “taking.”
 - In Lundstrom v. Hubbard Co., the district court upheld a takings challenge to shoreland substandard contiguous lot combination requirements in the Hubbard County Shoreland Ordinance.
 - In Graham v. Itasca County, the District Court rejected a takings challenge to shoreland contiguous lot combination requirements.
 - In Lovrein v. City of Shorewood, 1989 WL 29549 (Minn. App.) the Minnesota Court of Appeals held that use of land in its natural state constituted a reasonable use of property for purposes of a taking analysis.
3. Governmental action must be “reasonable.”
- This limitation on governmental action is often referred to as “substantive due process.”
 - Substantive due process requires an egregious set of facts to support a claim. It has been said that in order to be so egregious as to call into question substantive due process, there must be something like a decision based on a coin flip. Lemke v. Cass County, 846 F.2d 469 (8th Cir. 1987).
4. The governmental process must be “fair.”
- This is referred to as procedural due process.
 - Fairness does not include a right to cross-examine witnesses opposed to a particular permit application. Nor does it include anything resembling a judicial hearing.

- Fairness instead, in the context of zoning matters, equals notice and an opportunity to be heard.

II. THE HEARING PROCESS & FINDINGS

A. Record Keeping

1. The Data Practices Act

- Minn. Stat. Ch. 13, the Minnesota Government Data Practices Act, classifies virtually all planning and zoning data as public data.
- Under Minn. Stat. § 13.03, subd. 3, the city must respond in a reasonable period of time to a request to review and/or copy public data. No fee can be charged to inspect data, but there may be a charge imposed for the actual costs of searching for and retrieving data, and for making, certifying and compiling copies of documents.

2. Records Destruction

- Minn. Stat. § 138.17 enables cities to adopt records retention schedules, which allow for scheduled destruction of records.

B. Preparation for the Contested Case

1. Review of Plans, Ordinances and Regulations

- Every relevant city ordinance, regulation and plan should be reviewed as part of your application. Obtain copies. Make sure you are familiar with the content of the ordinances. You do not want to be surprised and/or embarrassed by the revelation of provisions you did not think about. Moreover, review allows one to answer questions Board members or other public hearing attendees may have.
- Treat people civilly and follow the rules consistently.

2. Discussion with Appropriate Consultants

- It may be necessary, particularly in the context of technically-oriented applications, to consult outside experts. Think of city consultants as sources.
3. Consultation with Legal Counsel
 - In many circumstances, we all know when an application may lead to litigation. It is very important to consult with legal counsel before the application is considered to assure you are in the best position possible to assert your legal rights.
 4. Analysis and Review of Similar Applications/Actions Taken
 - Oftentimes, applicants will allege that they are being treated differently than the municipality has treated others in the past. A planning and zoning director may be familiar with similar past applications.
 5. Visit of the Site
 - Site visits promote familiarity with site conditions. Board members are encouraged to be familiar with the site. Be present, invite questions and use it to your advantage. Individual Board members that visit the site should share their observations.
 6. Formulation of an Adequate Documentary Record
 - It is critical, prior to the public hearing, to compile a documentary file that can be utilized not only as a reference in the hearing, but to support the decision made by the Board.
 7. Identification of Players
 - It is beneficial to identify proponents of the use, opponents to the use, and others who may play a role in processing of an application. Identification of key individuals and their positions regarding the application, will allow you to strategize as necessary.
 8. Identification of Issues Likely to be Raised

- Identification of all possible issues that may be raised at a hearing, or as part of an application, is critical. This allows you to gather relevant data, and consult with necessary consultants.

C. The Public Hearing

1. Applicability of the Open Meeting Law

- The Open Meeting Law applies to City Council, Planning Commission and Board of Adjustment meetings.
- Presence of a quorum of a body constitutes a “meeting” under the Open Meeting Law.
- Informal site visits, where a quorum of the body is present, can result in Open Meeting Law violations. Give notice of such visits.

2. Pre-hearing Notice Requirements

- Minn. Stat. § 462.357, subd. 3 sets forth the notice requirements for public hearings involving conditional use permits and variances. This includes requirements regarding published notice, notice to neighbors, and notice to affected towns and cities.
- The notice requirement contained in Minn. Stat. Chapter 462, requires notice of the general purpose of the hearing. They do not require that the details of the proposal be disclosed. Kreuz v. St. Louis County Planning and Zoning Commission, 1996 WL 469406 (Minn. App. 1996).
- State law also contains requirements for notice of enactment or amendment of ordinances. This includes publication requirements. Minn. Stat. § 375.51. The best practice is to publish notice that states the municipality’s intent to enact the particular ordinance. However, where a published notice says an ordinance is recommended for adoption by the Board, that has been held to be sufficient. Itasca County v. Radenz, 268 N.W.2d 423 (1978).

3. Procedural Due Process

- As previously stated, under state and federal law the right to due process means the right to notice and an opportunity to be heard.

- The right to procedural due process does not normally include the right to cross examine witnesses.
- The right to procedural due process can be analogized to a right to a fundamentally fair process.

4. Conduct of the Hearing

- Be cognizant that every application considered and denied could become a lawsuit.
- At the hearing allow an applicant to inspect documents, present evidence, and fully present the case. Establish rules of procedure as necessary to maintain control of the hearing, provide for appropriate public input under the circumstances, and keep the length of hearings reasonable.
- Be aware that the applicant has the burden to present evidence to show he or she meets the requirements of the ordinance for the permit required.
- Make a record of the basis for denial.
- Make all pertinent documents part of record of the proceedings.
- Listen to public sentiment and opposition, but do not let it drive your decision. Respond appropriately to facts presented.
- Any exhibits (documents, photographs) people present should be made a part of the record.
- Do not stretch the terms of your ordinance to justify the granting or denial of a permit.

5. Findings/the Decision

- Findings of fact are necessary as part of a permit denial.
- Findings of fact should constitute an exercise of application of the record evidence to the standards set forth in the ordinance.

- Findings of fact should use the applicable decisional standards.
- Findings of fact on specific conditions are necessary when the decision-making authority imposes an unwanted condition on a permit applicant.
- The 60-day rule requires that an applicant be notified in writing of denial within the 60-day period. Formal findings, may however, in certain circumstances, be adopted after the vote of denial.

6. The Need for Contemporaneous Findings of Fact and Record

- Court cases have established the rule that there are to be contemporaneous findings and a contemporaneous record created that support the denial of a permit. Kehr v. City of Roseville, 426 N.W.2d 233 (Minn. App. 1988).
- Requiring the recording of contemporaneously made findings is meant to prevent after-the-fact justifications unrelated to the actual reasons for the decision.
- However, as long as the findings are prepared within a reasonable amount of time from the zoning decision, the contemporaneous requirement has been deemed to have been met. Findings made two weeks after the hearing and 26 days after the hearing have been held to be contemporaneous. BBY Investors v. City of Maplewood, 467 N.W.2d 631 (Minn. App. 1991); R.A. Putnam v. Mendota Heights, 510 N.W.2d 264 (Minn. App. 1994).
- It has been noted that where findings are prepared after a hearing, the absence of a full or verbatim record of the meeting, made either manually or electronically, may result in a decision that the findings are not contemporaneous. Hurrle v. Sherburne County, 594 N.W.2d 246 (Minn. App. 1999).

7. The Record

- The record consists of that evidence considered by the municipal decision-maker. Swanson v. City of Bloomington, 421 N.W.2d 307 (1988).

- The record includes all documents that come before the Board or Council as a part of “the file”, including minutes, reports, letters, applications, other submittals and findings.
- The record may also include documents that were not physically submitted at the hearing on an application if the documents were referred to or testified to at the hearing and had been received by the decision-maker previously. Barton Contracting Co. v. City of Afton, 268 N.W.2d 712 (Minn. 1978).
- In almost all cases, an adequate record precludes the applicant from introducing new data during an appeal of the municipality’s decision.
- During judicial review, a court will review the “record”, and determine whether the decision of the Board or Council was reasonable in light of record evidence.

8. Importance of the Record

- As has long been established by the courts of this State, the standard of judicial review in all zoning matters is whether the zoning authority’s action was reasonable. Honn. v. City of Coon Rapids, 313 N.W.2d 408 (Minn. 1981). What this means in each circumstance differs slightly.
- Great deference is given to the decisions of municipalities in zoning matter, such that the role of the judiciary is limited and sparingly invoked.
- The Minnesota Supreme Court has repeatedly stated that it is not the province of the court to substitute its judgment for that of the municipality, but merely to determine whether the body was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively or unreasonably, and to determine whether the evidence could reasonably support or justify the determination. In Re Appeal of Brine, 460 N.W.2d 53 (1990).