Planning and Zoning Basics

Information for
Planning Commissioners
and others interested
in the regulation of land use
in Minnesota

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Introduction

This material has been assembled as a “primer” on planning and zoning for Planning Commission members and City Council members, as well as interested City staff and members of the public. Our intent is to provide a usable background for typical planning and zoning issues faced by the City’s Planning Commission.

Public Health, Safety , and Welfare. Planning and zoning activities are conducted as a part of the “police powers” – protection of public health, safety, and general welfare. Because the way land is used by private property owners can affect other property owners and the public, courts have interpreted the “police power” to include the regulation of land use.

The City’s authority to regulate land use is a power granted by the State government. The Legislature determines what powers the City has, and does not have. All of this power exists within the context of the U.S. Constitution which defines and restricts governmental authority.

Some of the most evident ways that land uses affect the public is through the need for clean water supply, sanitary waste systems, stormwater drainage, and the need for public street systems. In addition, private land use creates the need for fire protection and law enforcement. In short, private land development creates a significant demand on the public for services. As a result, the public has a significant interest in ensuring that land is used in a responsible and efficient manner.

Land use regulation is part planning theory and part property rights law. To help both public officials and citizens in understanding the complexities of land use regulation, we have compiled this material covering some of the most common planning issues that are faced by growing communities. This material does not cover everything, nor does it cover all aspects of each issue. Moreover, each community has its own set of specific regulations and requirements. Nonetheless, we hope that it provides a solid underpinning so City officials will feel comfortable addressing the situations faced on a monthly basis.

Meeting Conduct and "Robert's Rules of Order"

Public meetings are conducted generally under "Robert's Rules of Order", usually modified somewhat for convenience to allow a less formal meeting environment. The purpose of these rules are to create an orderly process for information gathering, public participation, and ultimately, decision-making. In most communities, the chair assumes a significant amount of latitude in modifying the strict rules, but should be ready to submit to a more formal process when preferred by the group, or at any time when better information will possibly result. A simple rule of thumb is to err on the side of better information, or more information, in determining the amount of formal process to apply to a given situation.

A typical meeting agenda will consist of some or all of the following elements:

A. Chair's announcement that the meeting is open – a "Call to Order"
B. Approval of Minutes of previous meeting(s)
C. Announcements, if any
D. Adoption of the Agenda (members have the opportunity to recommend the addition of items to the published agenda)
E. Consideration of Agenda Items
    a. Chair announces the agenda item
    b. Chair asks for a presentation of the Staff Report
    c. Chair asks for a presentation from the Applicant
    d. Chair opens the public hearing (this may be done on the initiative of the Chair (some jurisdictions hold a formal vote to open the hearing, but this is not required)
    e. Chair announces the format for public comment, including the following:
        i. Public comments must germane to the issue.
        ii. Speakers must address their comments and questions to the Chair and Commission, not to the applicant or other individuals at the meeting.
        iii. Speakers are directed to focus on new information relevant to the issue and avoid repetitive comments.
        iv. Audience must not interrupt the speaker with comments, applause, or other disruptions.
        v. Speakers must identify themselves by name and address, including representation of any interested party.
        vi. Speakers must speak from the microphone/podium to ensure that they are heard by Commission members, recording equipment, and those observing the meeting electronically.
        vii. Planning Commission members may ask questions of speakers while they are at the podium.
        viii. Answers to speakers' questions are typically held until all speakers have been heard. This rule is often modified to avoid many speakers asking identical questions.
    f. Speaker testimony is taken as called on by the Chair – the City may require speakers to have signed in to speak, although this is often waived in smaller hearings.
    g. Chair closes the public hearing at the end of public testimony (see item d. above). In the alternative, the Chair may ask for a motion to continue the

hearing to a future specific time and date when additional information is required prior to Planning Commission action.

h. Discussion. Once the hearing is closed, the Chair invites members to discuss the issue. The purpose of discussion is to ensure that adequate information has been gathered to formulate a motion. The Commission may ask staff, applicant, or members of the public for clarification of specific points.

F. Following discussion, a motion for action on the item should be made. Motion may be to recommend approval, recommend denial, or to table action. If the hearing was continued (see g. above), a motion to table action would be in order. The Planning Commission should be aware of any "60-Day Rule" issues relating to the amount of time for a decision.
   a. A motion for action must be seconded. Occasionally, a member may request that a specific motion be amended to include additional language, such as a new condition or to refer to certain findings. For most circumstances, this is done by requesting that the motion-maker and the second accept a "friendly amendment", without separate votes on the amendment.
   b. If the motion-maker and/or second do not accept the "friendly amendment", a member may make a motion to have a formal vote to amend the original motion – this is a rare occurrence in informal meeting settings such as a Planning Commission.
   c. Once the language of the motion is agreed to, the Chair calls for a vote. For most zoning-related items, a simple majority of members present carries the item.
   d. Special situations:
      i. If a motion to ***deny*** or ***approve*** fails to receive a simple majority (either gains only a minority or ends in a tie vote), the Chair should declare that the motion fails, and ask those who voted against the motion to state their reasons on the record. Under this scenario, the item goes to the City Council without a recommendation from Planning Commission, with the stated reasons servings as the "findings".
      ii. In the alternative, a member may make a substitute motion and the Commission may consider it separately.

G. After all items on the adopted agenda have been disposed of, the Chair may entertain a motion to adjourn. This is considered a non-debatable motion, and should proceed directly to a vote after it has been seconded.

Comprehensive Plan

The City's Comprehensive Plan is a document that describes the community's vision of itself in the future. The enabling planning statutes (found in Minn. Stat. §462.351 through §462.364) give a community the authority to plan and manage land use and related facilities (such as transportation, utilities, and other functions) to accomplish specific objectives. These objectives are quoted as follows:

> *The legislature finds that municipalities are face with mounting problems in providing means of guiding future development of land so as to insure a safer,*

more pleasant and more economical environment for residential, commercial, industrial and public activities, to preserve agricultural and open lands, and to promote the public health, safety, and general welfare.

This statute recognizes that the development of land is not merely a private venture. Instead, private landowners create a partnership with the public to develop the land - the landowner provides the private land (as well as the capital to develop it) and public agrees to provide access to properly maintained roads, highways, sanitary sewer treatment, water supply, stormwater management systems, parks and recreation, police and fire protection, and other public functions. Because the public has such a great stake in the ongoing cost of serving private land uses, the legislature has granted communities the ability to plan for development and make sure that the public's costs will be manageable in the future.

In the seven county Twin Cities Metropolitan Area, the legislature has established an overarching set of requirements for local Comprehensive Plans. The purpose of these additional requirements, found in Minn. Stat. Minn. Stat. §473, especially §473.175, is to help ensure that development in the various metropolitan communities is consistent with abutting municipalities, and to ensure that local plans are consistent with metro-wide systems and goals, such as regional highways, transit, parks, wastewater systems, water supply, and housing. A municipality's Comprehensive Plan, and requests for its amendment, are routinely reviewed by the Metropolitan Council in this regard.

Metro or Non-Metro ? The primary difference between metro and non-metro counties in Comprehensive Plan impact relates to priority of Plan or Zoning. In the seven county area, the Comprehensive Plan is considered primary in the event there is a conflict between the Plan and the Zoning Ordinance. For instance, if the Comprehensive Plan calls for an area to be guided commercial in the land use plan, but the City has designated the area as a residential zoning district, courts will give deference to the Comprehensive Plan land use designation over the zoning.

In contrast, in the communities not in the Twin Cities seven county area have the reverse condition – Zoning regulations (and map) are prioritized over the Comprehensive Plan. In these localities, the Comprehensive Plan serves more as a guide plan, but land use disputes rely on the zoning to determine the actual effective regulations. However, most zoning actions include reference to consistency with the Comprehensive Plan, so there is some force in the Plan that filters down into individual planning and zoning decisions.

Land Use Plan. The most recognizable component of the Comprehensive Plan is the Land Use Plan. This plan identifies various areas of the community as being guided for various types of land use, including land needed for public uses. However, the Comprehensive Plan is usually made up of many other important sections, including transportation and community facilities plans, housing plans, and natural resources plans, to name just a few.

Goals and Policies . Perhaps the most important (although often overlooked) chapter of the Comprehensive Plan is the statements of Goals and Policies of the community. This section really defines what is meant by all of the rest of the text and maps that comprise the Plan document. The Comprehensive Plan, at its essence, is a policy document relating to land use and community development, although the maps and pictures usually get the most attention.

In considering various development proposals, the Planning Commission and City Council should be able to identify specific goal or policy statements that they believe are accomplished by the project being presented. If a project cannot meet the goals and policies, it is a clear indication that the project is not consistent with the community's Comprehensive Plan (even if the land use is proper). At this point, the City needs to decide how the project should be changed to be consistent, or sometimes, whether the Comprehensive Plan needs to be considered for an amendment.

Rezoning and Zoning Amendments

Zoning Amendment - A change to *either* the text or the map of the Zoning Ordinance.

Zoning is the most commonly used technique in implementing the goals and policies of the Comprehensive Plan. The Zoning Ordinance is not a goal in itself - it should be thought of as the legal means of ensuring that the goals of the Comprehensive Plan are carried out by private landowners. Together with the Subdivision Ordinance, the Zoning Ordinance works to regulate almost all forms of land use and development. Whereas the Subdivision Ordinance regulates the conversion of raw land to a condition in which it is ready to be built upon, the Zoning Ordinance regulates the physical occupation of the land by a building or use.

Types of Amendments. Zoning Amendments are made in one of two categories: (1) Amendments to the text of the City's Zoning Ordinance, which apply generally; and (2) Amendments to the map, which apply to specific property. The City's Zoning Ordinance includes a section which establishes the process for adopting a zoning amendment, including the process and the standard for evaluating the merits of the proposed change.

The standards for considering the rezoning are generalized, and do not include details of a particular development scheme. It is not permissible to approve rezonings with conditions. Common rezoning criteria are as follows:

i. Traffic levels capable of being handled on existing roadways.
ii. Utility demands capable of being served with existing utility capacity.
iii. Land Use compatibility with adjoining property.
iv. Consistency with Land Use guide plan.
v. Environmental concerns (air, soil, water) and potential hazards to the public.
vi. Impacts on Schools, Parks or Open Space.

Rezoning land from commercial or industrial to residential requires a simple majority of the City Council. On the other hand, rezoning land from residential to commercial or industrial requires the "super-majority" - technically two-thirds of the eligible voters. In most communities, a super-majority consists of a 4/5 vote of the City Council.

Voting on an Amendment. Where a member is absent, but otherwise eligible to vote, the super-majority requirements would remain 2/3 of the full council. Where the City Council has been reduced to four members by a vacancy on the Council, or a member who is considered ineligible due to a conflict of interest, the requirement is 2/3 of the remaining eligible members. The rules relating to "super-majority" can be complicated when members are

missing, or are ineligible due to conflict of interest. The City's Attorney should be consulted in these cases to ensure that the proper voting requirements have been met.

It should be noted that for the Planning Commission, no super-majority vote comes into play. As an advisory board, the Commission passes on its recommendation by simple majority vote.

It is important to remember that zoning amendments are adopted by enactment of a new ordinance. This includes both text amendments and rezonings of property. The City needs to put the proposed amendment in the form of an ordinance, adopt it by the required vote, then publish it as with any other ordinance before it becomes effective.

Challenges. Zoning amendments are occasionally litigated. The standard of review is "rational basis", and the basis Cities should rely on is direction from the Comprehensive Plan. The factors listed above, and the quality of the record documenting the proposal's consistency with those factors, will often be determinative in legal disputes involving rezoning requests. As a rule, the City has broad discretion to consider zoning patterns, and their relationship to the Comprehensive Plan.

Conditional Use Permits

Conditional Use - A type of land use in a particular district which is presumed to be allowed, but requires special, additional standards and review due to the existence of some aspect of the use which may create a nuisance or place an extraordinary burden on public services. Conditional Use Permits, once granted, are considered to be permanent, without need for renewal, so long as the conditions applied to the permit are maintained. A Conditional Use Permit may be transferred to other persons, again as long as they continue to meet the original conditions. The exception to this "permanence" is when the use lapses for more than one year. In that case, the property must apply for a new CUP if they wish to reinstate the use.

Disputes. Conditional Use Permits are, by far, the most commonly litigated zoning matter. Whereas the development of Comprehensive Plans allows the City to exercise the most discretion, Conditional Use Permits allow, typically, the least. The general standard for the City is that if the conditions are met by the permittee, the City has very little discretion to deny the CUP request. Moreover, conditions must be rationally related to the impacts created by the proposed use.

Basis of Review. The Zoning Ordinance applies two sets of conditions in the review of any Conditional Use Permit application - general conditions applying to all CUPs which serve as the basis for findings of approval or denial, and specific conditions listed with each individual use in the Zoning Ordinance district section.

The first set of conditions is as follows:

i. *The proposed action has been considered in relation to the specific policies and provisions of and has been found to be consistent with the official Comprehensive Land Use Plan.*
ii. *The proposed use is or will be compatible with present and future land uses of the area.*
iii. *The proposed use conforms with all performance standards contained herein.*
iv. *The proposed use will not tend to or actually depreciate the area in which it is proposed.*
v. *The proposed use can be accommodated with existing public services and will not overburden the City's service capacity.*
vi. *Traffic generation by the proposed use is within the capabilities of streets serving the property.*

The second set of conditions is listed with the use in each district. The typical review will be whether the specific standards are met, then whether the general conditions are met. It is with this set of general conditions where the City may exercise some discretion, but only in the context of the neighborhood and the Comprehensive Plan.

In addition to the stated conditions listed in the Zoning Ordinance, the City can impose other conditions on the use, so long as those conditions are intended to correct a specific deficiency of the project that is within the City's regulatory authority. For instance, the City might choose to require specific landscaping requirements on a proposed use that creates an identified visual conflict with a neighboring use. However, the City could not arbitrarily decide to require a new business to restrict its hours of operation, unless the restriction was directly related to a specific public health, safety, or welfare issue.

In summary, Conditional Uses need to be addressed carefully, and the City uses most of its discretion in establishing the use in the ordinance. Additional conditions placed on such uses must be specific, and tied to a quantifiable issue. Vague Conditional Use Permits create confusion for users, as well as for future City Councils in trying to fairly apply the regulations.

Interim Use Permits

Whereas Conditional Use Permits are considered to "run with the land" when all of the conditions are complied with, Interim Use Permits may be granted for a specified period of time. The municipality must be able to ascertain a specific date or event that will result in the termination of the IUP. The statutes require that the applicant must agree to any conditions deemed necessary by the municipality. As such, it is good practice to have a signed development agreement that specifies those conditions, including the termination date and/or event that memorializes the applicant's required consent.

Variances

Variance - An approved departure from the standard imposed by a (usually) dimensional zoning regulation, such as size, area, length, or bulk.

Variances are somewhat less likely than Conditional Use Permits to be the subject of litigation, because the City has more latitude to determine the meaning of the standard for variance approval, namely, the existence of "special conditions", and "reasonable use". It is important to keep in mind that the City's standard zoning regulations are presumed to allow reasonable use of property. Only special, unique conditions that interfere with reasonable use can impel the City to depart from its standard regulations.

The most common concern related to variance decisions is based on "precedent" - whether the applicant is being treated similarly to like properties in like situations. To ensure that people are being treated similarly, variance approval just because something seems like a nice idea should be avoided.

Uniqueness. Variances are intentionally made to be difficult to obtain, based on the premise that the City establishes zoning standards for the protection of public health, safety, and welfare. Therefore, a departure from the regulations should be considered rarely, only where unique, special conditions are apparent which would deny the applicant reasonable use of the land in question.

Amendment Rather Than Variance. If the circumstances that generate a variance request are common, the City should enact a regulation which applies to all properties rather than regulate by variance. If the regulations allow a reasonable use, the purposes of the ordinance are realized without the need for a variance.

Practical Difficulties and Reasonable Use. Probably the most routine aspect of variance consideration is the focus on a non-economic basis for the request. The ordinance states that a variance may be considered where application of the regulations creates *practical difficulties* in putting the property to *reasonable use*. This standard is typically applied by considering whether a fully conforming use can be made of the property without the variance.

For instance, can a conforming house with a two car garage be located on a residential property without the need for a variance? If it can, then a variance request from something outside the typical requirements might be viewed as a matter of convenience rather than reasonable use. The practical difficulties that interfere with the proposed use must be "non-economic". This requirement is made since virtually everyone may make an economic claim - the application of the standards regulations are too costly to comply with.

Standards of Review. The primary considerations for variance review are as follows:

(a) The practical difficulties in complying with the ordinance are due to the existence of special conditions and circumstances which are peculiar to the land, structure or building involved.

(1) Special conditions may include exceptional topographic or water conditions or, in the case of an existing lot or parcel of record, narrowness, shallowness, insufficient area or shape of the property.

(2) Practical difficulties caused by the special conditions and circumstances may not be solely economic in nature, if a reasonable use of the property exists under the terms of this Chapter.

(3) *Special conditions and circumstances causing practical difficulties shall not be a result of lot size or building location when the lot qualifies as a buildable parcel.*

(b) *Literal interpretation of the provisions of this Chapter would deprive the applicant of rights commonly enjoyed by other properties in the same district under the terms of this Chapter, or deny the applicant of the ability to put the property in question to a reasonable use.*

(c) *The special conditions and circumstances do not result from the actions of the applicant.*

(d) *Granting the variance requested will not confer on the applicant any special privilege that is denied by this Chapter to other lands, structures or buildings in the same district.*

(e) *The request is not a use variance.*

(f) *Variance requested is the minimum variance necessary to accomplish the intended purpose of the applicant.*

It is important to notice that each of these standards must be met in order to qualify for variance consideration. Variances should be put to this test rigorously in order that the City applies its ordinances equitably. Finally, the City may still deny a variance if despite these conditions, the result would be contrary to the Comprehensive Plan. However, where the refusal to grant a variance results in a situation which makes it *impossible* to use the land under the ordinance, the City may be found liable for a "regulatory taking", effectively requiring the City to compensate the property owner for the fair market value of the property.

Findings of Fact

Findings of Fact - The legal, written substantiation for a land use decision.

One of the most critical factors in making land use decisions, whether rezonings, variances, conditional use permits, or subdivisions, is that the decision meets the legal standard for local government land use regulation. This is often called the "rational basis" standard of review. In short, a local government may regulate land use so long as there is a rational basis for the regulation, and the regulation bears a reasonable relationship to the attainment of a legitimate governmental interest. Violations of this test are often called "arbitrary and capricious".

For many land use decisions, there are numerous reasons the decision was made. Each of these reasons may be completely legitimate, and based on evidence available to the Planning Commission or City Council. However, if a decision is challenged, and the City has not made its decision accompanied by written findings of fact, the Court may throw out the City's decision, and put itself in the City's place. There are a number of standards to apply when making the findings:

1. Findings need to be made "contemporaneously" with the decision. The City does not have the latitude to decide an issue one month, then adopt formal findings the next. Recent court decisions have made it clear that the City needs to support its

decision with findings at the time of the decision. This can make things difficult if the 60-day calendar is running out.

2. Findings need to be based on evidence submitted as a part of the City's hearing process. This means that if the City is going to decide a permit request based on a particular reason, that reason must have been a part of the debate or submissions made to the City. It does not necessarily have to have been brought up by the applicant. Planning Commissioners or Councilmembers may raise an issue during the debate, and having arrived at a conclusion based on that issue, may include it in the findings.

3. Findings need to be written. This means that the City should rely on a written record documenting the debate and the decision, and the record should include the findings. This may be in the form of a separate resolution, or it may be imbedded into the meeting minutes.

4. Findings should be as specific as possible. They should include references to specific policies or components of the City's Comprehensive Plan or a specific ordinance standard. Vague findings may be better than none, but only a little better.

If a City makes clear, written, contemporaneous findings of fact with their land use decisions, a court will most often rely on the City's record in reviewing a challenged City decision. And, if the findings meet the rational basis test, the City's decision will most likely withstand challenge.

"60 Day Rule"

This rule is a statute (Minn. Stat. §15.99) which requires local governments and state agencies to respond to zoning applications within (usually) 60 days of application. There are a number of complications to this law.

1. The City has 15 days from the time that an application is made to determine whether or not the application is *complete.* The City must notify the applicant within this time period of any incompleteness. The 60 day period does not begin until the application is complete. However, if the City does not notify an applicant as to incompleteness within the first 15 days, the application is deemed complete as a matter of law, and the calendar starts running as of the original date of submission.

   It is important to note that completeness does not mean acceptability. The application just has to have addressed the required items – the subsequent review process will determine whether the project is acceptable under the City's regulations.

2. If the City cannot come to a final decision prior to the end of the first 60 days, for almost any reason, it may extend the review period by an additional 60 days, if the applicant is notified in writing prior to the expiration of the first 60 day period. There appears to be little constraint on the "quality" of the reason - a simple explanation

that the City's review schedule does not permit adequate time for the City Council to act properly on the item is sufficient.

3. The City cannot "automatically" notify the applicant of a 60 day extension. The City is required to review the application enough to make a reasonable determination that the first 60 days will be inadequate. Therefore, a separate letter should be sent after the material is received.

4. If the City reaches the end of the 120 day review period, including a noticed extension, it must make a final decision, or the application will be considered approved *as submitted*. For complex projects, negotiations often occur between the City and the applicant, and can take several weeks. Most Cities will ask the applicant to sign a form letter waiving the 60-day rule if a decision can not be made. The City can be quite persuasive with this request as the alternative to further consideration is usually to deny the proposal.

5. Subdivisions have their own 120 review calendar listed in the Statutes. However, most Cities apply the 60-day rule to subdivisions just to be on the safe side.

6. Cities are required to notify an applicant in writing of a denial of a permit, including the reasons for denial. This notice is required to be provided within the statutory period. It is a safe assumption that approvals with conditions must also be notified in this manner.

   This notification can have consequences that cities need to be careful of. Imagine that a City Council is meeting on the final day of the timeline. They would essentially have to present the written notice of denial, along with the reasons, to the applicant at the meeting to meet the deadline.

The 60-day rule is not necessarily difficult to comply with, but it requires attention to avoid a trap of automatic approval. The safest option is to be careful with the application package and notify the applicant of deficiencies in the application to delay the start of the calendar.

For multi-part applications, it is best to require that each part is a separate application. For instance, with Planned Unit Developments, the ordinance provides for a Concept Stage review, Development Stage review, and Final Stage PUD. For complex projects, there is no way that the project can be submitted, reviewed, revised, and reviewed again within the full 120 day period. As such, most Cities separate the stages into distinct applications.

Subdivisions and Plats

Subdivisions are any division or combination of land parcels. A "Plat" is a specific type of subdivision that involves the filing of new title information with the County Recorder that results in all future legal descriptions referring to the mapped Plat, rather than historical description information.

There are generally three types of subdivision actions that a City will consider. The simplest is sometimes referred to as a “Minor Subdivision”. These actions usually involve no more than two parcels, and may include lot combinations, lot line adjustments, and occasionally, the splitting of one *platted* lot into two new parcels. This type of approval is typically not applied to *unplatted* land due to the complicated legal descriptions that can result. The County Recorder may reject subdivisions when the legal description is too long or complex.

In certain circumstances, where the subdivision is clear and simple, Minor Subdivisions are eligible to be approved by the City staff, relieving the applicant of the procedural requirements of Planning Commission and City Council review.

Minor Subdivisions are commonly permitted by what is referred to as a “Metes and Bounds” certificate of survey. These surveys are prepared by registered surveyors, and include a map of the property and a legal description that provides an exact description of the parcel or parcels in question. The survey will usually show lot dimensions, existing buildings, and existing easements that may exist on the property.

The second type of subdivision action is a “Registered Land Survey”. This is a legal method of subdivision for registered property, also known as “Torrens” property. Torrens parcels are registered with the County, and have had new registered title certificates prepared. These are in contrast to the more common “Abstract” property, in which an abstract of the title to the property exists that lists the chain of title back to its original conveyance (often from the original United States government land grant).

The third type of subdivision is the Plat. Platting re-titles the subject property into new lots and blocks, and eliminates previous underlying lot lines (it should be noted that easements and streets need to be separately vacated). The platting process typically consists of a Preliminary Plat and a Final Plat. In many instances, a City will ask for a sketch plan for preliminary concept review, prior to a formal Preliminary Plat application.

An approved Preliminary Plat conveys specific rights to a property owner, and as such, should be reviewed carefully. This stage of review will usually include a plat drawing showing the layout of the subdivision; a grading and drainage plan that identifies the changes to the existing grade and stormwater management impacts; a utility plan that provides for preliminary sanitary sewer and water designs; a street plan that identifies the street profile; and a landscaping plan that identifies new landscaping and erosion control planting in the subdivision.

Minnesota courts have determined that the approval of a Preliminary Plat gives the developer a reasonable expectation that he or she will be able to develop the property as proposed. It is common for small adjustments to be made between the Preliminary Plat and the Final Plat, but the City needs to make sure that it has addressed all of its major issues in its review and approval of the Preliminary Plat. Because many Preliminary Plats get approved with a number of technical conditions, it is usually a good idea to require that a revised and corrected Preliminary Plat is submitted for City records and reference.

There are several issues to look for when reviewing new subdivision proposals:

1. Does the street system provide for an adequate number of new and future street connections to surrounding land? Most planning recommendations look for residential neighborhoods that limit traffic to less than 500 vehicle trips per day – 250 trips per day is considered the more optimal threshold. If the street design creates a high number of trips past some lots, additional street connections should be considered. As a general rule, more connections result in better and more even traffic distribution. Cities often hear people argue for fewer connections over fear of increased traffic. The opposite is actually the case.

2. Does the regional street system support the number of lots in the subdivision, or should a new collector route be considered in the area?

3. Does the design of the individual lots allow for comfortable building placement? Occasionally, lot designs may meet the City's technical regulations, but due to unique considerations, result in difficult building sites. Most cities consider newly platted lots to be "variance-proof", that is, there should be no need to consider variances to make reasonable use of a new lot – it is presumed to be buildable as approved.

4. Does the subdivision make reasonable consideration for the existing character of the land? Heavily graded projects, woodland areas that are being eliminated for additional lots, elimination of significant views of surrounding countryside or water features, or other similar characteristics indicate a subdivision that is not making the best use of the property. The City has a stake in managing these issues.

5. Does the subdivision minimize the impact on the City's utility and maintenance system? Some subdivision designs can make it difficult for the City to serve the project once constructed. Issues such as snow-plowing, maintenance access to stormwater ponding areas, fire-fighting capability, access for emergency vehicles, and other issues need to be considered to ensure the protection of the City's future residents. It is tempting to think of the subdivision's defects as the problem of the developer in selling the lots. But these problems will become the City's when the future new residents raise concerns over poor design.

6. What kinds of public use might be necessary in the subdivision, or in the area? Should the City require a dedication of park land or trail right of way? Is there a need for the construction of sidewalks or other improvements not commonly found in other areas?

7. What kinds of ideas might improve the livability of the subdivision? How can the existing landscape be capitalized upon to ensure the best neighborhood? Or, what additional amenities might be considered to improve the area?

8. What dedication requirements should be considered? The authorizing statutes permit the City to exact certain amounts of land for streets, utilities, and parks from subdivisions. In the case of parkland, the city may exchange the land requirement for an equivalent amount of cash, which is to be used for acquisition or development of parks in other locations in the community.

Planned Unit Development

Planned Unit Development is a zoning technique that permits a developer and City to negotiate the applicable zoning standards for a project. PUD can affect a number of elements in any project design – those below are a generalized outline of common elements:

a. The City will allow flexibility from some of its zoning standards, in exchange for a higher standard in other areas.

b. The flexibility is intended to result in a project of superior design and amenity than would otherwise be possible if basic zoning regulations were to be applied. Superior design is often considered to be a better method of achieving the City's land use objectives that would result from a common zoning approach.

c. PUD is not intended as a method of merely skirting around inconvenient regulations.

d. The process is designed to allow for the integration of several disparate project elements, resulting in better coordination of public facilities, and hopefully, more efficient use of land and public resources.

e. The process ends with a development contract that accompanies an associated Zoning Ordinance amendment for the construction of the project.

In many zoning ordinances, there are two types of Planned Unit Development projects. Both follow the processing section of the Zoning Ordinance, but they differ in the nature of the regulation. The first is a rezoning of the property to a PUD zoning district. In this type of PUD, The City is essentially writing a new zoning ordinance that applies only to this district. The ordinance will list which uses are allowed, what development standards apply, and any other requirements of the district. While this sounds complex, most PUD District ordinances refer to some other existing zoning district and the master development plans, and then list only additions or deletions.

The second type of PUD is actually a Conditional Use Permit allowing the use of PUD flexibility on a development parcel, keeping the underlying zoning district in place. In this type of PUD, the base zoning district regulates the allowable uses in the district, and sets out the general conditions. The site plan and other documents are then used to identify the areas where flexibility is being approved. This type of PUD used to be quite common, but is becoming less common in favor of the zoning district approach.

For many PUD projects (especially residential projects), one of the most common areas of flexibility requested is for the use of private streets. With private street design, an association is formed of the owners in the project, and the association becomes responsible for street maintenance, and many other aspects of project operation. For a developer, the advantage of using a private street design is a marked increase in potential density. Setbacks from the edge of a private street need not be a strict as might be typical with public streets, and the street itself will typically require less than half of the area of a public street right of way. The

City should feel confident in requiring significant upgrades to the design and amenity package of such a PUD, given the increased density that usually accompanies this type of project.

The key for the successful use of Planned Unit Development is to be able to identify the specific, tangible benefits from the use of PUD design. These benefits may include upgraded architecture (both building design and materials), significantly increased landscaping, or additional open space offsetting greater building density. In many cases, the developer may be adding specific amenities to the project, including recreational facilities, or similar elements. When these types of "upgrades" can not be easily identified, the City should reconsider the flexibility being requested by the applicant.

Nonconformities

A common issue that faces Planning Commissions in the application of zoning regulations is how to treat existing buildings or land uses that are no longer allowed by newer zoning requirements. Such buildings and uses are called "nonconformities", and have specific rights under State law.

Until recently, the municipality applied a "50% Rule" to all nonconformities. Under this rule, a community was permitted to require that any existing nonconformity be removed and replaced only by a fully conforming use if it was destroyed by more than 50% of its value. Thus, a property owner who lost most of a building through damage by storm, accident, or even one's own demolition, was required from that point on to comply with the current zoning requirements.

The newer rule expands the rights of the owners of nonconformities. The Statute explicitly provides that nonconformities may be replaced or improved, but not expanded, so long as the owner has applied for a building permit within 6 months, and completed the work within 12 months. After this timeframe, the 50% Rule comes back into play. This is true even for the removal of nonconformities that are removed by the owner intentionally - natural or accidental damage is no longer a factor.

One aspect of this issue relates to the "legality" or illegality" of the use or building. The nonconforming rights accrue only to those uses that are "legal nonconforming", that is, they must have been legally established at the time of their construction or occupancy, according to the rules in place at that time. If they were never legal, such as someone who built a building outside of the regulations that would have applied, then no nonconforming rights accrue to that use or building.

There are specific exclusions for Floodplain nonconformities that should be checked out when applying this relatively new language.

Annexation

Not technically a “planning and zoning” issue, annexation is nonetheless an important factor for communities managing growth and development. Annexation is a discretionary decision on the part of the City. While the interests of the Township government and subject property owners can affect the process, a City can not be forced by either to accept an annexation (the State theoretically could, but this would be extremely unusual).

For cities in the Metro area counties of Hennepin, Ramsey, Anoka, and Washington, annexations are extremely rare – particularly because there is very little unincorporated land, and the annexation request would imply a “detachment” of the subject land from the adjoining city. Cases of concurrent detachment and annexation almost always will require the willingness of both cities to participate. Otherwise, there would have to be an extremely unusual set of compelling circumstances present before the State would impose this type of remedy on an unwilling city.

In Carver, Scott, and Dakota counties, where there are still several township governments, annexation requests by growing incorporated cities are not uncommon.

The State of Minnesota sets out annexation rules in Chapter 414 of the State Statutes. There are essentially three types of annexation:

1. Orderly Annexation
2. Annexation by Ordinance
3. Contested Case Annexations

With Orderly Annexation, the City and Township work together to establish a set of conditions under which annexations can occur. These conditions usually include rules about contiguity and the ability to serve the site with public utilities. Other common conditions include specific geographic areas that are eligible or off-limits, and whether the City will provide a fee to the Township to mitigate the Township’s loss of tax base.

Orderly Annexations can occur one at a time, with an agreement reached between City and Township as each property comes up, or, more comprehensively – subject to a larger Orderly Annexation plan. In either case, the City and Township will create an agreement and a joint resolution effecting the annexation. The resolution is forwarded to the State of Minnesota Department of Administration’s Office of Municipal Boundary Adjustments for certification.

The second type, Annexation by Ordinance, is an annexation decision between the City and the property owner. There are a few specific conditions to Annexation by Ordinance, in which case no direct Township involvement occurs. These conditions include:

a. The subject parcel is no more than 120 acres in size;*
b. 100% of the property owners of the parcel(s) in question petition for the annexation; and
c. The subject parcel is contiguous to the current City limits.

*There are now some additional limitations affecting “serial” annexations.

When these conditions are met, the City can call for a public hearing to annex the parcel through the adoption of an Ordinance. While the Township may object to the annexation during the hearing process, it does not have the authority to "veto" or otherwise interfere with the decision. If the City adopts the ordinance in compliance with the statutory requirements, the State's Office of Municipal Boundary Adjustments then certifies the annexation.

The third type of annexation is sometimes referred to as a "contested case" annexation. In these situations, the City is considering an annexation that does not comply with the Annexation by Ordinance rules, and the Township will not agree to a joint resolution or "Orderly Annexation". Contested Cases are treated like trials, held before an Administrative Law Judge. Prior to trial, however, the City and Township must conduct a series of negotiation sessions to attempt to come to an agreement.

If no agreement is reached, the judge reviews the evidence presented, and rules based on specific criteria laid out in the statutes. These criteria are centered around whether or not the area "is or is about to become urban or suburban in character". This phrase is somewhat ambiguous, however. As a result, Cities most often support their contested case annexations with studies demonstrating growth demand and shortage of available land area, and the cost of providing services to unincorporated areas. These trials have become rarer, and are very expensive and time consuming.

One additional point about annexation policy relates to the City's ability to recover the costs of growth. Once a property has been annexed, the fees charged for development services (such as sewer and water extensions, road improvements, etc.) must meet specific and strict statutory requirements for "proportionality" to the impacts created by the development. However, property owners do not have any implicit right to annex into a City. As such, the City can negotiate a development fee agreement with the owner/developer of annexing land to cover extraordinary costs that would otherwise be spread to the general City taxpayer. This is an important factor to remember when considering annexation agreements and requests.