

ENGINEERING 101: CITY GOVERNMENT AND ENGINEERING TOPICS

I. CITY GOVERNMENT.

- *City Structure:*
 - City Manager/City Council
 - Subcommittees of the City Council
 - Advisory Planning Commission
 - Park Commission
 - Economic Development Authorities

- *Subdivisions/Extractions*

- Road Impact Fee

- *Zoning*

- **Understanding land use law—the Basics**

- What is Zoning

- Definition of a zone: a zone is generally defined as a section of an area established for a specific purpose, as a part of a city restricted to a particular type of building, enterprise or activity.¹

- Cities adopt zoning ordinances to execute policies or goals of a land use plan.² These ordinances or statutes regulate the building development and uses of property.

- **Power to Zone**

- Minn. Stat. § 462.357, subd.1: provides that for the purposes of promoting the public health, safety, morals, and general welfare, a municipality may by ordinance regulate on the earth's surface, in the air space above the surface, and in subsurface areas, the location, height, width, bulk, type of foundation, number of stories, size of buildings, and other structures, the percentage of lot which may be occupied, the size of yards, and other open spaces, the density

¹ 664 N.W.2d 421 (Minn. App. 2003)

² Minn. Stat. 462.357, subd. 1

and distribution of population, the uses of buildings, and structures for trade, industry, residence, recreation, public activities, or other purposes, and the uses of land for trade, industry, residence, recreation, agriculture, forestry, soil conservation, water supply conservation, conservation of shore land, access to direct sunlight for solar energy, flood control or other purposes.

- In general, cities may regulate the use of privately owned land within its borders to guide development of the community. Minn. Stat. §§ 462.351-.365 (2013) (generally called the Zoning enabling Act”)

o Who can zone? Governmental bodies with the power to zone

- Counties: Minn. Stat. 394.21 to 394.37 grant counties authority to enact and enforce planning and zoning regulations
- Cities: Minn. Stat. 462.351 to 462.365 grant municipalities authority to enact and enforce zoning plans
- Towns: Minn. Stat. 366.10 to 366.181 grant town authority to enact and enforce planning and zoning regulations

o How Zoning power is implemented

- Reasonableness: a city must act reasonably; otherwise its ordinances could have the effect of overcoming the property rights of others. Ordinances and actions must be reasonable when applied to individual cases. All ordinances are required to bear some reasonable relation to the purposes they are meant to attain.³
- BUT, a city has a lot of discretion. It is presumed that a city or county acted reasonably when enacting ordinances. It is also presumed that an ordinance is constitutional.
- Minnesota Metropolitan Land Use Planning Act (MLUPA):
 - Minn. Stat. Section 473.859, subd. 1
 - Requires each city in the metropolitan area to produce a comprehensive plan that contains objectives, policies, standards, and programs to guide public and private land use, development, and redevelopment and preservation for all local lands and waters.
- Comprehensive Plan:
 - Cities need to have a plan

³ *Jackel v. Brower*, 668 N.W.2d 685 (Minn. App. 2003).

- Must contain a detailed explanation of how it will actually implement this plan
- Regulatory standards must be sufficiently precise to ensure the application or objective standards to all similarly situated properties, to adequately inform landowners of the requirements they must satisfy to gain subdivision approval, and to allow a reviewing court to evaluate noncompliance.⁴
 - When an ordinance specifies minimum standards to which subdivisions must conform, local officials lack discretionary authority to deny approval of a preliminary plat that meets those standards.⁵
 - Exception: no surprise but a government body is not subject to zoning restrictions where the property is to be used for governmental purposes.⁶

o Seeking Zoning Variances or Rezoning

□ Seeking a variance:

- Get a CUP: Conditional Use Permit
- Cities can permit variances by issuing a CUP.
- Violations of CUP conditions: A CUP usually comes with conditions and the property owner cannot violate those conditions or the city might revoke the CUP,
 - If a city is accusing someone of violating a CUP requirement, they must be proven by substantial evidence.
 - Make them prove their case: *Axelson v. Goodhue County Bd. of Commissioners*, A12-0041 (Minn. App. August 13, 2012).
 - ❖ CUP allowed Axelson to have a campground provided that there were no more than 200 campsites.
 - ❖ The City revoked the CUP claiming there were more than 200 campsites. The problem is that the county admitted they never actually physically counted the number of campsites.
 - ❖ HELD: the County did not have substantial evidence to revoke the CUP.

⁴ *PTL v. Chisago County Bd. Of Commissioners*, 656 N.W.2d 567 (Minn. App. 2003).

⁵ *Id.*

⁶ Minn. Stat. 465.01; *Town of Oronoco v. City of Rochester*, 197 N.W.2d 426 (Minn. 1972).

□ CUP Application:

- These can be denied and a city has a lot of discretion in denying a CUP application.
- City’s decision must not be arbitrary, inconsistent, and unreasonable. A landowner is required to show undue hardship—which means that landowner must show that the property could not be put to reasonable use without a variance. *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn. 2010).
- A conflict of a comprehensive plan typically is a legally sufficient ground for denying a CUP application
- *RDNT, LLC v. City of Bloomington*: (A13-0310)

□ Summary: City can deny conditional use permit based on increased traffic in a residential neighborhood.

□ Facts: RDNT, LLC owns Martin Luther Care, which is a senior living community in southeast Bloomington. The property is zoned as quasi-public land. RDNT wanted to build a new facility with 67 apartments. The neighborhood around Martin Luther Care is mostly residential, and all traffic for Martin Luther Care has to drive through a residential neighborhood. Several homeowners opposed the project because it would aggravate traffic issues.

□ Procedure: RDNT was denied conditional use permit (CUP). Trial court granted RDNT’s motion for summary judgment, reversing the City’s denial of the CUP application. City Appeals.

□ Held: City had proper grounds to deny CUP.

□ Analysis:

- ❖ Cities have broad discretion to grant or deny CUP, only caveat is that the decision cannot be unreasonable arbitrary, or capricious.
- ❖ City’s denial of CUP is legally sufficient if it is based on public health, safety, and general welfare or because of incompatibility between proposed use and a municipality’s comprehensive municipal plan.

- ❖ Expansion conflicts with the City’s comprehensive plan. The expansion would be a “large traffic generator not adjacent to a collector or arterial street” (not a main road). The expansion would aggravate traffic issues, and those traffic issues were demonstrated by neighbors testifying about several near traffic accidents. It would also bring commercial and emergency vehicles into the neighborhood more than what’s usual.
- ❖ Expansion would not preserve the character of the low-density neighborhood around the facility.
- ❖ Dealing with neighborhood opposition: this case shows how neighborhood opposition can impact property development. “Neighborhood opposition alone is not a legally sufficient reason for denying a CUP application, but a city may consider neighborhood opposition if it is based on concrete information.” In this case it was enough in this case that neighbors testified that they would see semi-trucks idling on the streets, observations of several near accidents, and even a delivery truck making a “beep” noise at 8:30 in the evening.
- Take-away: highlights the importance of working with cities or counties when attempting to get a CUP. If a city/county denied permit, it’s going to be an uphill battle.
- Already in Conflict with a comprehensive plan?
 - Grandfathered Nonconformities: One limit on a city’s ability to regulate land is terminating nonconforming use. “A nonconforming use is a use of land that is prohibited under a current zoning ordinance that is prohibited under a current zoning ordinance but nonetheless is permitted to continue because the use lawfully existed before the ordinance took effect.” *Krummenacher v. City of Minnetonka*, 783 N.W.2d 721, 726 (Minn. 2010). Two cases dealt with nonconformity recently.
 - Minn. Stat. § 462.357, subd. 1e(2): “any nonconformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not expansion...”
 - *White v. City of Elk River*, 840 N.W.2d 43 (Minn. 2013):

❖ Facts:

✓ Lorraine White owned Wapiti Park Campgrounds, Inc., in the City of Elk River. When the campground opened up, no zoning ordinance regulated use of the land.

✓ Elk River eventually said that a campground was a nonconformity, but could operate under a conditional use permit. White obtained a CUP. The CUP prevented the campground from having permanent residence.

✓ Elk River did not like this campground at all, mostly because many people were living at the campground and considered it their permanent residence. The campground attracted a lot of suspect characters. Elk River eventually revoked the CUP, and argued that they waived the right to continue using a nonconforming by obtaining a CUP.

□ Held: Landowner maintains right to continue to use nonconforming use even if they obtain a CUP. The CUP application was not a waiver. So the landowner could have people permanently living on the campground it seems.

□ What is a city to do then to terminate a nonconformance? A municipality may terminate a nonconforming use in only four ways: (1) condemn the property/eminent domain (Minn. Stat. § 465.01); (2) showing that the use was discontinued for more than one year (Minn. Stat. § 462.357, subd. 1e(a)(1)); (3) that the use was “destroyed by fire or other peril to the extent of greater than 50 percent of its estimate market value”; or (4) showing that it is a nuisance. Id. at subd. 1e(a)(2) The city did show any of these four.

● *Government Contracts*

○ **Contract Language**

□ Which form to use?

□ AIA Document v. Your own contract

▪ Key: Is there an arbitration clause?

□ Indemnification provisions

- Compensating for damage or loss
- Problems
- Disputes with contractors

o Notice Provision

- Do you follow the notice provision in your contract?
- Do you send the notice by certified mail?
- Which party is making the decision? (owner v. engineer)

o Dispute Resolution

- Need to consider arbitration v. litigation:

▪Arbitration:

- Form of alternative dispute resolution
- Independent 3rd party acts as “judge”
- Parties agree to arbitration and are bound by 3rd party’s decision
- Cost – less than \$10,000 for fees
- Speed – award likely within 3 months
- Use of American Arbitration Association
- Use of Alternate Arbitrators
- Result – difficult to overturn

◆ Mediation requirement:

- Is mediation a prerequisite to filing of any arbitration?
- Benefits to the City for use of arbitration: none
- Benefits to the contractor for use of arbitration: many

- **Litigation**

- Lawsuit brought before a judge
- Party bringing the suit is the Plaintiff
- Party being sued is the Defendant
- Follows traditional legal procedures
- Requirement to pursue claims in state district court.
- Venue for the claims.
- Time frame to pursue the litigation.
- Formal rules of discovery.
- Cost for each side.
- Parties to any dispute?
- Formal trial w/jury – right to appeal.

- ◆ ***Additional Considerations:***

- ✓ Can the consultants be named in an arbitration proceeding?
 - ✓ How do you deal with the professionals, e.g. architects, engineers, and project managers?
 - ✓ Should they all be parties to the same dispute?
 - ✓ Actions against professionals.
 - Requirement of separate affidavit by another professional attesting to negligence.
 - ✓ Consider use of Master Consulting Engineering Contract (You have leverage.)

- o **Insurance Requirements**

Include provision requiring adjacent property owners be named as additional insureds.

Warranties

o **Eminent Domain Law**

Scope of acquisition (can only acquire that which you need)

▪ *Open issue:* Can you acquire portions that are severed?

Definition of Public Use/Public Purpose has been revised substantially to limit the powers of the government.

Fee title vs. easement (again, you can only acquire that which you need)

The new statutes greatly affect the timing for the acquisition of property needed for any project.

Appraisal and negotiation requirements are located in Minnesota Statutes § 117.036.

Minnesota Statute § 117.036:

▪ Subdivision 2, Appraisal:

You MUST obtain an appraisal and provide the owner with a copy of it no later than 60 days before presenting a condemnation petition.

Upon request, you MUST make all appraisals available to the owner

The owner may obtain a qualified appraisal and is entitled to reimbursement for the cost of the appraisal:

❖ Maximum \$1,500 for a single-family residence

❖ Maximum \$5,000 for all other types of property

You MUST reimburse the owner within 30 days after receiving a copy of the appraisal.

▪ Subdivision 3, Negotiation:

- You MUST make a good faith attempt to negotiate *personally* with the property owner to acquire through direct purchase instead of through eminent domain

- Timing:
 - There is at least a six-month process ***before*** you can even commence an eminent domain action.

- Selecting the Appraiser:
 - Use your City Attorney to secure the appraisal to keep it confidential

- Commencement of the Condemnation Proceedings:
 - Use of Quick-Take vs. regular condemnation
 - Public Purpose hearing
 - Come prepared
 - Certified copies of Council Resolutions authorizing eminent domain
 - Have engineer prepare to testify concerning the scope of the project and the need for the project.

- Making the Quick Take Deposit with the District Court:
 - Be careful paying property owners directly
 - Direct purchase: conduct the title search
 - Verify the actual owner of the property
 - Include mortgage company on easement or a consent
 - Obtain multiple originals of the easement document (in case you lose one)

- Pay careful attention to the terms of the easement that you are acquiring (drainage and utility; utility; right-of-way; temporary construction; conservation easement)
- Viewing of the Property:
 - Make sure the property is properly staked and the easement acquisition areas are clearly identified for the commissioners
- Testimony at Commissioners Hearings
 - Be prepared
 - Use all of the resources that the City has available (planners, engineers, city facilities)
- Form of Commissioners' Award:
 - Severance damages can be stated separately
 - Include the number of days that the commissioners spent on the matter.
- Attorney's Fees:
 - 40% above last written offer – mandatory
 - 20% above last written offer – discretionary
- Appeal:
 - Within 40 days any party can appeal and the other party may appeal within 50 days from the report
 - Service of the Report and Affidavit of Mailing
 - Trial *de novo*
 - ❖ Undertake discovery
 - ❖ Find a good mediator and be prepared for the trial

- Special Assessments:
 - Be sure to follow the statutory procedure
 - Consider hiring an appraiser to give a range of benefits (question the appraiser and don't rely on the report as the sole basis)
 - When preparing the assessment, review and follow your special assessment policy
 - Watch for the award of the contract (required to be awarded within one year from the Council Resolution unless a different date is stated.)
- Appeal:
 - Minnesota Statute § 429.081 has strict requirements for service and establishment of subject matter jurisdiction
 - Undertake discovery
 - Consider mediation
 - A court trial only
 - Be prepared for trial (use all your city's resources)

* **Practice Tip:** All contracts must be approved by the City Council and executed by the mayor and clerk. City staff generally have no authority to execute work orders.

o Types of Easements

- Drainage and utility
- Right-of-way
- Trail (trail easements may not be shown on a plat)
- Conservation (credit must be given to the property owner)

A municipality should never grant a property owner an easement. It should be a license for any public property.