

Chapter Sixteen

Planning & Zoning

§ 16-1. What is Planning & Zoning?

The concept of planning the development of a community and regulating what owners may do on their land has a rich and colorful history. In recent years, zoning decisions and the scope of zoning authority versus personal property rights has received a great deal of attention in local government meeting rooms, the media, the legislature, and the courts.

The process of land use regulation can be summarized as balancing the property rights of an individual against the rights of the many in determining how the community will develop. The point at which that balance is achieved differs in each community and can change over time.

A. Brief History of Zoning

Depending on how one views zoning, its American origins can be traced to some of the initial efforts to place restrictions on how people used their property. In fact, there is reference to an ordinance adopted by the Town of Cambridge, Massachusetts in 1632, requiring the consent of the mayor before a building could be erected. Even the Congressional ordinance of 1785 providing for the survey of the Northwest Territory has been included in the historical chronology of zoning. Many of these early efforts were an attempt to avoid or reduce the impact of nuisances. Interestingly, even though planning and zoning has evolved into a sophisticated interplay of regulations, standards, and codes, the goal of avoiding conflicting land uses is still a centerpiece of zoning today.

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While earlier examples can be found, nearly every discussion of the history of zoning begins at or near the United States Supreme Court case of *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), primarily because it was the first United States Supreme Court case recognizing the validity of local government ordinances creating zones that permitted some uses and excluded others. The case arose out of a person's claims that the value of his vacant property was substantially reduced when the Village limited use of the property to residential purposes. The court upheld the validity of the ordinances, concluding that a zoning ordinance would not be found unconstitutional unless it was "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

While the *Euclid* case was the first to acknowledge local government authority to regulate the use of property, it was not the first United States Supreme Court ruling on the issue of permissible local regulation of property. In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922) the court reviewed a state law enacted to protect homes from coal mining activities. The case arose when a coal company sold the rights to use the surface of certain property while retaining mining rights. Some years later the state enacted the Kohler Act, which prohibited mining within a certain distance of homes. The owner of the surface rights claimed the Pennsylvania Coal Company was therefore prohibited from mining the property.

The Supreme Court acknowledged the government's police powers, but also recognized that when the exercise of that power "reaches a certain magnitude, in most if not in all cases there must be an exercise of eminent domain and compensation to sustain the act." *Id.* at 413. "The general rule at least is that while property may be regulated to a

certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415. In other words, government is required compensate property owners when it physically "takes" their property. In *Pennsylvania Coal Co.*, the Supreme Court held that at some point the Constitution also requires the government to compensate owners whose property has been subjected to a certain magnitude of governmental regulation.

So, what do these cases mean? In many ways, they illustrate the nature of the debates that still occur to this day regarding zoning. There is no question that local governments have the right to regulate land use. At the same time, regulations cannot go too far or the government must compensate the property owner for having "taken" his or her property. The difficulty for town officers is determining the point at which compensation is required, especially given the changing nature of the law as state and federal courts further interpret the law through their decisions.

B. Purpose of Planning and Zoning

Planning and zoning has two primary purposes: (1) protecting the health, safety, and general welfare of a community, including protecting property values; and (2) providing for the orderly growth and development of communities. How a community uses planning and zoning to achieve those purposes can vary greatly, as can the opinions regarding the value of zoning itself.

While some view planning and zoning as a necessary part of any community, others see it as an unwarranted intrusion into their private lives and their right to use their property as they see fit. Planning and zoning, *if done properly*, can yield many beneficial results; however, if done poorly it can create inefficiencies and costs without much benefit in return. Like most things in life, "you get out of it what you put into it."

C. Planning & Zoning Process Overview

For those not familiar with planning and zoning it may be helpful to have a general overview of the basic process and structure of planning and zoning before launching into the rest of the chapter. This overview, in fact this entire chapter, is general in nature and is only intended to provide town officers a basic introduction to the topic. A full discussion of planning and zoning would take hundreds of pages and would likely still be incomplete. This section summarizes one path a town might take in the development and adoption of a comprehensive plan and zoning ordinances. By no means is the following description of the process the only available approach to planning and zoning.

All planning and zoning start with the town board identifying a need that can best be addressed by developing planning and zoning. After the board does some homework to better understand the issues, its authority, and available resources, it hires a planner and/or an attorney with planning experience to assist the town throughout the process. If deemed appropriate, the board can choose to adopt an interim ordinance to place temporary regulations or a moratorium on certain land uses while the town studies planning and zoning. To assist in the study, the board appoints either a study commission or adopts an ordinance to create a planning commission.

Once a planning commission is established and the initial phase of the study is complete, the commission, with guidance from the board, develops a proposed comprehensive plan. At the same time, the commission often starts work on developing a zoning ordinance to implement the plan.

The commission must publish notice and hold at least one hearing on the proposed plan. The commission then gives its recommendations concerning the plan to the board. The board may then, by a two-thirds vote of all its members, pass a resolution to adopt the plan.

The commission then undertakes or completes the process of developing the proposed zoning ordinance. An important part of developing proposed regulations is to consider and plan for the administration and enforcement of the regulations. The needed staff, forms, and procedures must be finalized and in place before ordinances are adopted. The commission provides notice and holds a hearing on the ordinances or passes them along to the board to hold the hearing. After the hearing is held, the board can adopt the ordinances by a majority vote of all the supervisors. Once adopted, a town must be sure to comply with all the formalities associated with adopting zoning ordinances including, but not limited to, publishing the regulations, recording the ordinance with the county recorder, placing the ordinance in a public library and the county law library, and placing the ordinance in a town ordinance book. Towns with websites often post the ordinance on the site together with its fee schedule and application forms. Refer to Document Number **TP6000** for additional information on ordinance formalities.

If it had not already done so, the town board needs to create the board of appeals and adjustments. Having adopted the ordinances, it is the responsibility of the town's zoning administrator to manage and enforce the regulations according to the procedures established by the town. The board of appeals and adjustments receives requests for variances from the literal provisions of the ordinances and hears appeals from administrative and enforcement decisions. The commission often receives requests for conditional use permits, rezone requests, subdivision approval requests, and other zoning requests requiring consideration by the town. Both the board and the commission monitor the plan and regulations, proposing changes as needed to stay consistent with the long-term goals of the community.

The remainder of this chapter will be spent discussing various aspects of Minnesota's planning and zoning law.

§ 16-2. Authority to Plan & Zone

Towns have had the authority to plan and zone for decades. The basis for town zoning authority can be found in two locations in the statutes. Initially, the statutes made a distinction in zoning authorities based on whether a town had adopted urban town powers under Minn. Stat. Chap. 368. Urban towns were authorized to exercise the zoning powers given cities under Minn. Stat. Chap. 462. Rural towns had a separate source of authority for zoning located in Minn. Stat. §§ 366.10 to 366.181. The primary distinction between the two authorities is that Chapter 462 is much more comprehensive and Chapter 366 requires elector authorization before a town may engage in zoning or make changes to an existing zoning code. A vote of the electors is not required for towns relying on Chapter 462 for their zoning authority.

In 1982, the importance of the distinction was essentially eliminated when the legislature amended the definition of municipality in Minn. Stat. § 462.352, subd. 2 to include all towns. Since that time, all towns have had authority to adopt planning and zoning under the more comprehensive scheme of Chapter 462. While the Chapter 366 zoning authority remains in statute, nearly all towns exercising zoning authority today do so using the Chapter 462 authority. Towns who originally relied on the Chapter 366 authority should consider revising their zoning ordinances as part of its next scheduled update to reflect they are based on the Chapter 462 authority. Towns just starting the zoning process should refer exclusively to the Chapter 462 authority.

§ 16-3. Limitations of Planning and Zoning

Local governments are given broad powers to plan and zone, but those powers have limits. Zoning authority is constrained by the

United States Constitution, federal laws, federal court decisions, the state constitution, state laws, and state court decisions. Identifying and tracking these limitations as they change over time is not an easy task and that is why most local governments turn to their state and national associations to keep them informed on changes in the law. The fluid nature of the limitations placed on zoning is also why it is extremely important for towns to have an attorney involved in reviewing all zoning ordinances before they are adopted and to assist in periodically reviewing and amending the ordinances as needed.

The following section on interactions with other governmental entities will touch on how those interactions impact a town's zoning authority. However, for a discussion on specific limitations on zoning refer to Document Number **PZ2000**.

§ 16-4. Interaction with other Governmental Entities

Zoning regulations can have a broad reach and impact on a wide range of activities. Given this broad nature, questions occasionally arise over the scope of the authority in relation to regulations imposed by other governmental entities. These interactions are very important because they often define the permissible scope of local zoning authority. The following will briefly discuss examples of how laws and rules enacted at different levels of government may impact a town's zoning authority.

A. Preemption and Conflict

One of the most fundamental concepts affecting how local government regulations interact with federal and state authority is that of preemption and conflict. In short, local governments have broad authority to enact zoning ordinances, but those ordinances are not permitted to intrude upon issues (fields) exclusively reserved for federal or state regulation (siting a nuclear power plant for example). Preemption of an issue can ei-

ther be expressed in law or implied by the courts. When local regulation of an issue is preempted, any attempt to regulate the issue through local ordinances is invalid and will be struck down by the courts if challenged.

Local zoning ordinances are also not allowed to conflict with federal or state regulations. For instance, a local zoning ordinance may not allow something prohibited by state law. It is possible for an issue to be subject to local regulation (i.e., not preempted), but still have a court strike down a particular local regulation as being in conflict with federal or state law.

B. Federal Laws and Rules

Zoning is primarily controlled by the state, but federal laws and rules can have a direct or indirect impact on local zoning. An example of a federal act having a great deal of impact on local government zoning of cell towers is the Federal Telecommunications Act. Administered by the FCC, part of the Act addresses the interaction between the rights of telecommunication companies in the placement of cell towers and the rights of local governments to control such placements through zoning.

Despite a broadly worded recognition of local zoning authority in the Act, there have been many lawsuits challenging zoning ordinances as having impermissibly overreached and infringed on the rights of the cell phone companies. The question comes down to where the line should be between the authority of local governments to impose zoning regulations and the rights of telecommunication companies under the Act.

Unfortunately, the federal district court hearing Minnesota cases has drawn the line very much in favor of the telecommunications companies. Because of these rulings, local governments are severely limited in their ability to regulate cell towers and their location. Attempts to temporarily limit the placement of towers through a moratorium are even more limited. While the state statute allows a moratorium to initially remain in place for up to 12 months, the federal courts have struck down ordinances imposing

much shorter moratoriums on the basis they have the effect of prohibiting the provision of personal wireless services. Furthermore, the court has also found such ordinances can constitute a violation of a company's federally established rights entitling the company to seek reimbursement of its attorney's fees under a section 1983 claim. *See APT Minneapolis, Inc. v. Stillwater Township*, 44-25000 Fed. Dist. Ct. (Minn. 2000). More recently, federal law was enacted to limit a local government's authority to deny an expansion or the replacement of equipment on a tower.

The Religious Land Use and Institutionalized Persons Act of 2000 is a federal act for which the limits are still being determined by the courts. 42 U.S.C. § 2000cc. The purpose of the Act is to protect religious institutions and religious practices from governmental interference. The Act provides:

No government shall impose or implement a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution, unless the government demonstrates that imposition of the burden on that person, assembly, or institution –

- (A) is in furtherance of a compelling governmental interest; and
- (B) is the least restrictive means of furthering that compelling governmental interest.

42 U.S.C. 2000cc(a)(1)

An earlier attempt by Congress to impose these stricter standards on governmental regulations of religious institutions was struck down by the United States Supreme Court. As the present version of the Act is being tested in the courts, local governments are left struggling to understand and comply with the limitations imposed by the Act.

There are a variety of other federal laws that may have an impact on local zoning ranging from the Fair Housing Act to laws protecting trademarks. No local government will be able

to have a handle on all potential limiting factors, but all towns engaging in zoning must remain aware of these factors and seek assistance, primarily through their local attorney, to remain within the scope of their authority.

C. Counties

County regulations have the most direct impact on the permissible scope of town zoning regulations. Because counties and towns potentially regulate the same territory, the state legislature needed to come up with a way for county and town regulations to co-exist. The answer it devised is found in Minn. Stat. § 394.33, subd. 1 and indicates a town's zoning regulations must be as strict as or stricter than, and be consistent with, the county's regulations.

Similar to the legal concept of conflict discussed above, a town may not have a zoning regulation that allows uses prohibited by the county. This is a critical factor for towns and one that requires towns to regularly communicate with the county so they remain aware of potential changes to the county's regulations. It is important to remember that while counties and towns may zone the same territory, they do so under different statutory authority.

Town land use authority is primarily located in Minnesota Statutes, Chapter 462, while county land use authority is in Chapter 394. While the authority is similar in most aspects, there are occasionally differences.

In some counties, the issue of interacting with town zoning regulations is a point of contention. Under current law, a town can choose to enact zoning ordinances that only address certain aspects of land use and rely on the county zoning ordinance to address other issues. Some counties disagree with this approach and believe zoning should be an all-or-nothing proposition for towns. However, a town is authorized to adopt general zoning regulations regardless of whether a

county gives its support and there is no statute or court decision in support of the all-or-nothing approach.

There are at least three types of regulations on which the interaction between counties and towns is of particular importance. Those regulations are septic regulations, shoreland regulations, and park dedications. Turn to § 16-13 for a discussion of these regulations.

D. Cities

Cities have authority to extend the application and enforcement of certain regulations up to two miles outside of their boundaries. A city choosing to unilaterally extend its regulations can cause significant concern in the surrounding towns. That is why it is important for towns to understand this possibility exists, but also the limitations on a city's ability to extend their regulations.

There are three types of regulations a city may extend into a town. The first are the city's general zoning ordinances. Under Minn. Stat. § 462.357, subd. 1, a city may adopt an ordinance to extend its zoning regulations up to two miles into the surrounding towns. However, a city may only extend its zoning regulations if neither the county nor the town has adopted zoning regulations.

Under Minn. Stat. § 462.358, subd. 1, a city may adopt a resolution to extend the application of its subdivision regulations up to two miles into the surrounding towns. However, a city may not extend its subdivision regulations into a town that has adopted subdivision regulations.

Under Minn. Stat. § 326B.121, subd. 2(d), a city may adopt an ordinance to extend its enforcement of the building code up to two miles outside of its boundaries. A city may not extend its enforcement of the code if the building code is already in effect for the area or if the town board does not give the city permission to extend the code.

E. Joint Zoning Efforts

Local governments have several opportunities to engage in cooperative zoning efforts. Cooperation can come in the form of contracting with each other for service, working together to jointly develop mechanisms for administering zoning, or jointly zoning an identified area. Contracting for services can be as simple as a town contracting with a neighboring city to obtain the services of the city's zoning administrator. The next step in cooperation is for two or more local governments to enter a joint powers agreement to jointly provide for the administration of their ordinances.

An example of this type of cooperation is found in Olmsted County. Rather than attempt to administer their individual sets of zoning ordinances separately, 12 towns came together to develop a joint planning office. Two additional towns joined as associate members of the group. Through the cooperative efforts of these towns they have the benefit of full-time planning staff to assist in the administration of their ordinances.

Not only can local governments share staff, but they can also agree to zone jointly. One of the most common examples of joint planning comes about as part of an orderly annexation agreement. A city and town can develop an orderly annexation agreement for all or a part of the territory in a town and provide for a joint planning board. Minn. Stat. § 414.0325, subd. 5. The board is established under a joint powers agreement that can indicate the joint planning and land use controls apply to part or all of the designated territory, and can even be extended into other areas of the town or city. Minn. Stat. § 414.0325, subd. 5(c). There are a variety of other options for regulating zoning within an orderly annexation area, including the establishment of a three-member committee (one member from the county, town, and city) to control planning and zoning. Minn. Stat. § 414.0325, subd. 5(d).

An even more direct, though largely unused, method for joint planning is provided for in Minn. Stat. § 462.3585. Upon a request of county, town, or city a joint board must be formed to control planning and land use within two miles of the city limits. The board is comprised of an equal number of members from each local government and staff must be provided by city.

F. Metropolitan Area Planning

Planning within the seven-county metropolitan area in and around the Twin Cities is subject to an additional set of requirements. Because towns in those areas are typically aware of these requirements, this discussion will be brief.

Citing the interdependence of local governments in the metropolitan area and a finding that "problems of urbanization and development transcend local government boundaries," the legislature imposed several planning mandates on local governments in the metropolitan area. Minn. Stat. § 473.851. Under the mandate, all local governments (including towns) must prepare a comprehensive plan that contains certain information. Minn. Stat. §§ 473.858; 473.859. The original mandate required towns to decide whether they would adopt a comprehensive plan by December 31, 1976. Each local government must review its comprehensive plan at least once every ten years. Minn. Stat. § 473.864, subd. 2.

To promote consistency with the overall metropolitan plan, all local governments must submit their proposed official controls to the metropolitan council for review and are prohibited from adopting controls that are inconsistent with the area plan. Minn. Stat. § 473.865. The council makes materials, such as model plans and ordinances, available to local governments. Technical and legal assistance as well as financial assistance may also be available. Minn. Stat. § 473.867.

§ 16-5. Considerations and Myths about Adopting Planning and Zoning

Becoming a zoning authority is a significant step for a town that must be taken very seriously. A town should take into consideration several factors before choosing to adopt zoning ordinances including:

- What exactly are the concerns leading the town to consider adopting zoning?
- Can those concerns be effectively addressed through zoning? If not, it makes little sense to adopt zoning.
- Can the concerns be addressed through the exercise of some other town power? Towns have other regulatory authority outside of its zoning authority which may be “easier” to exercise and have greater effect than the zoning authority in a given situation.
- What are the existing federal, state, and local laws that address the identified concerns? Is it a matter of seeking the enforcement of existing laws or is there truly a gap in existing regulations?
- Can the town successfully encourage the county to amend or expand its zoning regulations to address the concerns, thus allowing the town to avoid the work and expense of adopting zoning?
- Are there opportunities to enter cooperative agreements with nearby towns, cities, or the county to share the costs of administering zoning?
- Is the town board committed to hiring the professionals necessary to assist in developing the comprehensive plan, ordinances, administrative procedures, enforcement actions, and to regularly review and update the plan and ordinances as needed?
- If the town adopts zoning will the town electors likely be supportive enough to annually levy sufficient funds to support continued administration and enforcement activities?
- Is the town board able and committed to enforcing its ordinances if adopted?

Several myths exist concerning towns engaging in planning and zoning:

Myth: If a town adopts zoning, it must adopt the full spectrum of ordinances that exist at the county level.

Except for certain sets of regulations such as shoreland regulations, towns are not required to take an all-or-nothing approach to zoning. Ordinances a town chooses to enact must fall within its authority and comply with the applicable limitations, but there is no general requirement that a town’s ordinances be as comprehensive as the county’s. Despite the fact a legal analysis of this question conducted at the request of counties came to the same conclusion, this myth continues to be promoted by some counties.

Myth: If a town adopts zoning ordinances, the county is no longer required to enforce any county zoning ordinances in the town.

This myth is often coupled with the first and seems to be motivated by a desire to scare towns out of adopting zoning ordinances. A county remains responsible for enforcing its ordinances unless it chooses to forgo the enforcement of certain issues that are already fully regulated by the town. Even then, the county may be subject to a mandamus action to require it to enforce its ordinances. An exception is the shoreland regulations. If a town adopts shoreland regulations, an applicant is only required to obtain the town’s permit and does not need to also obtain the county’s permit since the town’s regulations are necessarily as comprehensive and restrictive as the county’s ordinances. However, if a town adopts a setback ordinance, for example, the county cannot refuse to administer and enforce its septic system regulations in the town if the town does not have such regulations.

Myth: A town must obtain the permission from the county to adopt an interim ordinance or zoning ordinances.

A town should consult with the county before adopting zoning ordinances, but it is not required to obtain its permission to adopt the ordinances. A town's ordinances must remain as strict or stricter than, and consistent with, the county's regulations, but permission is not required.

Myth: If a town adopts a zoning ordinance the county is required to enforce the town's ordinance.

If a town adopts a zoning ordinance the town is solely responsible for administering and enforcing the ordinance. A county can agree to administer and enforce a town's ordinances by contract, but is not required to do so.

Myth: A county cannot approve an application for a use prohibited by the town's ordinances.

If a town has fewer ordinances in effect than the county, a person may need to seek permits from both the county and the town. If the person chooses to seek the county permit first, the county is obligated to review and decide the issuance of the permit on its ordinances. This is true even if the county believes the applicant will not receive permission from the town, the state, or the federal government. If the person obtains a county permit and fails to apply for a required town permit, it is up to the town to take enforcement action against the person for the violation.

§ 16-6. Interim Ordinances (Moratoria)

Towns are authorized to adopt interim ordinances to "regulate, restrict or prohibit any use, development, or subdivision within the jurisdiction or a portion thereof for a period not to exceed one year from the date it is effective." Minn. Stat. § 462.355, subd. 4. If an interim ordinance prohibits one or more uses, the regulation is referred to as a moratorium. The purpose behind this authority is to protect the planning process while a town studies the adoption or amendment to planning and zoning. That is why the authority to adopt an interim ordinance is conditioned on the town being in the process of authorizing or conducting a study, or of holding hearings, to consider the adoption or amendment of a comprehensive plan or official controls.

An interim ordinance can be in effect for an initial period of up to one year. There are three limited circumstances in which an interim ordinance may be extended beyond the first year. The condition most applicable to towns allows an extension of up to an additional year if the town had not adopted a comprehensive plan at the time the interim ordinance was enacted.

A. Interim Ordinances Have Different Procedural Requirements

There have been many challenges to interim ordinances over the last several years which have produced several court decisions discussing the validity and effect of interim ordinances. One such decision found that interim ordinances are not zoning ordinances under Chapter 462 and therefore do not need to be adopted following the same procedural requirements applicable to adopting zoning ordinances. *Duncanson v. Board of Supervisors of Danville Tp.*, 551 N.W.2d 248 (Minn. App. 1996). The decision upheld a town board's adoption of an interim ordinance without following the otherwise required notice and hearing procedures. Despite this holding, towns are encouraged to give notice of the fact the board is considering adopting an interim ordinance so the public has an opportunity to give the board input on whether such an ordinance should be adopted. Furthermore, in 2005 the legislature amended the interim ordinance authority to require a 10-day published notice and a hearing before adopting an interim ordinance that "purports

to regulate, restrict, or prohibit activities relating to livestock production” Minn. Stat. § 462.355, subd. 4(b). It is important to keep this requirement in mind if a town intends to adopt a sweeping moratorium.

B. Adopting Ordinances in Response to a Proposed Project

Other decisions have made it clear interim ordinances may not be arbitrarily adopted to discriminate against particular projects. *City of Crystal v. Fantasy House, Inc.*, 569 N.W.2d 225 (Minn. Ct. App. 1997); *Medical Services, Inc. v. City of Savage*, 487 N.W.2d 263 (Minn. Ct. App. 1992). However, the courts have recognized the legitimacy of a local government adopting an interim ordinance after having learned of a proposed project. It is often only when a project that is in some way unique to the community is proposed that the local government recognizes the need to consider adopting planning or amending their ordinances. If the local government acts in good faith to put the interim ordinance in place to address the concerns and uncertainties associated with a proposed project the ordinance should be upheld even if it has the effect of stopping the proposed project.

If the adoption of an interim ordinance does have an impact on a proposed project, the town may face a challenge from the proposer alleging the ordinance does not apply to their project. The application of an interim ordinance to specific projects in various stages of development is not always clear. The statute specifically states an interim ordinance may not “halt, delay, or impede a subdivision which has been given preliminary approval, nor may an interim ordinance extend the time deadline for agency action set forth in section 15.99 with respect to any application filed prior to the effective date of the interim ordinance.” Minn. Stat. § 462.355, subd. 4(c). However, can a town adopt an interim ordinance after an application has been submitted and deny the application based on the restrictions contained in the interim ordinance? The language prohibiting the exten-

sion of the deadline for making decisions does not exclude such a possibility.

§ 16-7. Planning Commission

The planning commission is the primary planning body for a town engaged in planning and zoning. Even though the planning commission is only advisory to the town board, it often does the ground work for both establishing and maintaining a town’s planning and zoning efforts. Its work is critical and can make the difference between effective and ineffective zoning.

A. Establishment and Makeup of the Commission

Planning agencies can take one of two forms, either a planning commission or a planning department with a planning commission advisory to it. Minn. Stat. § 462.354, subd. 1. For practical reasons, towns typically do not establish planning departments and instead opt for a planning commission. A town board creates a planning commission by adopting an ordinance. Once created, the board should also develop bylaws that set out the details for how the commission will operate. The task of creating bylaws can be left to the commission itself, but if a board takes that approach it will need to make sure the ordinance contains sufficient oversight features built into it to help ensure the two bodies remain on harmonious paths.

Who is selected to serve on the planning commission is one of the most important contributing factors to the commission’s success. Town officers can be appointed to the planning commission, but towns that rely solely on town supervisors to serve as commission members miss the opportunity to create partnerships and hear the valuable ideas of others. The value of having a planning commission is essentially eliminated if the town supervisors are left advising themselves. Tapping the human resources of the town for appointment to the commission can greatly strengthen the planning process and result in greater support from the community.

B. Duties

Planning commissions have those duties as prescribed by law and by ordinance. Minn. Stat. § 462.354, subd. 1. Planning commissions are charged by statute with the following duties:

- Prepare the comprehensive municipal plan. Minn. Stat. § 462.355, subd. 1. In preparing the plan, the commission is to consult with and coordinate the planning activities of other town departments and agencies as well as take due cognizance of the planning activities of adjacent units of government and other affected public agencies. Recommend the adoption or amendment of the plan to the town board. Minn. Stat. § 462.355, subd. 2. The commission must hold at least one hearing before the plan, any section of the plan, or an amendment to the plan is adopted.
- After recommending a comprehensive plan to the board, the commission shall study and propose to the board reasonable and practicable means for putting the plan into effect. Minn. Stat. § 462.356, subd. 1. These recommendations can include zoning regulations, subdivision regulations, an official map, public improvement and service coordination plans, urban renewal, capital improvement programs, and others.
- Once a comprehensive plan is adopted, the commission must review any proposed acquisition or disposal of publicly owned interests in real estate in the town or capital improvement project and submit a written report of its findings regarding the compliance of the proposed acquisition, disposal or improvement with the town plan. Minn. Stat. § 462.356, subd. 2. The town board can pass a resolution by a two-thirds vote to dispense with this requirement.
- After the adoption of a plan, the commission may prepare a proposed zoning ordinance and submit it to the board with its recommendations for adoption. Minn. Stat. § 462.357, subd. 2. The commission may hold the hearing required before the board can adopt or amend a zoning ordinance. Minn. Stat. § 462.357, subd. 3.

- Commission may propose an amendment to zoning ordinances. Minn. Stat. § 462.357, subd. 4. Proposed amendments not initiated by the commission, must be referred to the commission for study and report, if a commission exists.
- May adopt a major thoroughfare plan, a community facilities plan, and prepare and recommend to the board a proposed official map to carry out the policies of the thoroughfare plan and community facilities plan. Minn. Stat. § 462.359, subd. 2.

An important side effect of creating a planning commission is the triggering of plat approval requirement. Counties have the primary responsibility for reviewing and approving plats located in towns. If a town does not have its own planning commission or subdivision regulations, the degree to which the county may involve the town in the process can differ greatly around the state. Because the public roads and other lands dedicated to the public become dedicated to the town and often become the town's responsibility, town boards have a legitimate interest in regulations associated with those dedications.

Short of adopting their own subdivision regulations, a town can make itself part of the plat approval process by creating a planning commission. Under Minn. Stat. § 505.09, subd. 1a., a county is prohibited from approving a plat in a town that has a planning commission until the town board approves the plat and the laying of the roads and other public ways shown on the plat. Some town boards condition their approval of a plat on the developer entering a development agreement to ensure the roads and other public improvements are properly constructed and the town's costs are reimbursed. This requirement to obtain town board approval of the plat is not dependent on whether the town has zoning or subdivision regulations. Some counties attempt to resist towns inserting themselves in the plat approval process absent their own subdivision regulations, but the language of the statute is unavoidable and provides towns a valuable option to make sure its concerns are addressed in the platting process.

§ 16-8. Board of Appeals and Adjustment

Towns with a comprehensive plan or zoning ordinance must provide by ordinance for a board of appeals and adjustment. Minn. Stat. § 462.354, subd. 2. The board of appeals and adjustment can be created as a separate body, or its duties can be assumed by the town board or the planning commission. If the town board does not serve as the board of appeals and adjustment, the ordinance establishing the board of appeals and adjustment can provide that its decisions are either:

- (1) final subject to judicial review;
- (2) final subject to appeal to the town board and right of later judicial review; or
- (3) are advisory to the town board.

The ordinance should also establish timelines and notice requirements for the hearings held by the board of appeals and adjustment. If the planning commission is not the board of appeals and adjustment, the board of appeals and adjustment may not make a final decision on an appeal or petition until the commission, if there is one, has had up to 60 days to review and report to the board of appeals and adjustment on the appeal or petition.

§ 16-9. Developing a Comprehensive Plan

The comprehensive planning process can yield many outcomes. Towns can develop a comprehensive plan for many reasons, including:

1. to provide input to the county planning process with no intention of the town adopting its own zoning ordinances;
2. to gain a better understanding of the community and guide future town projects without enacting ordinances to impose the plan on others;
3. as the basis to develop zoning ordinances on one or more specific issues of concern to the town; or
4. as the basis for adopting wide-range zoning ordinances.

The point is that planning can have many goals and outcomes. Not all plans need to lead to the adoption of zoning ordinances. The process of

The board of appeals and adjustment is empowered to adopt rules for the conduct of proceedings before it, which may include provisions for giving oaths to witnesses and the filing of written briefs by the parties. Minn. Stat. § 462.354, subd. 2.

The board of appeals and adjustment has the following duties:

- Hear appeals alleging that there was an error in an order, requirement, decision, or determination made by an administrative officer in the enforcement of a zoning ordinance. Minn. Stat. § 462.357, subd. 6(1).
- Hear requests for variances from the literal provisions of an ordinance. Refer to § 16-16 for a discussion on the limitations on when variances may be granted.
- Hear appeals from denials of a land use, zoning permit, or building approval for an area identified on an official map adopted by the town as needed for road or other public purposes. Minn. Stat. § 462.359, subd. 4.
- Such other duties as the board may direct. Minn. Stat. § 462.354, subd. 2.

planning has inherent value that is not dependent on adopting ordinances. However, if the plan envisions a certain future for the community, ordinances will typically be required to bring the particular future about.

It is the duty of the planning commission to prepare the comprehensive plan. Minn. Stat. § 462.355, subd. 1. The commission must consult with and coordinate planning activities with the other departments and agencies of the town. However, since most towns do not have several other departments or agencies, the commission coordinates primarily with the town board and perhaps citizen working groups established to assist the commission in its work. By statute, the commission is also required to “take due cognizance of the planning activities of adjacent units of government.” Minn. Stat. § 462.355, subd. 1.

To be effective, any comprehensive planning process must involve those who represent a broad range of interests. This is particularly true if the community is dealing with one or more issues that tend to polarize the community. Involving different interest groups will both strengthen the plan and reduce (though likely not eliminate) complaints about the process.

There are more planning tools available to communities than ever before. Through resources like the internet and enhanced mapping capabilities, towns now have access to aerial photographs, demographic information, mapping software, environmental information, and the ability to easily review the plans and ordinances of many other communities. A great deal of

§ 16-10. Developing Zoning Districts

A comprehensive plan not only describes the community as it currently exists, but it also contains several judgments about what types of development are appropriate for the community and where they will be allowed to develop in the future. A plan does this by generally describing the types of uses allowed and not allowed within the town. Within the general group of allowed uses a town may recognize a need to separate those uses that may be incompatible with other allowed uses. This sort of separation of uses is a primary function of zoning and is accomplished by creating zoning districts as part of the zoning ordinance. The ordinance identifies the zoning districts, describes their purposes, and identifies the uses allowed within each. Three of the most common districts in towns are agricultural, residential, and commercial. While it is possible to have multiple land use districts, towns typically deal with some combination of those three types of land uses. How many zoning districts a town has, where they are located, and which uses are allowed in each are among the most important policy decisions made as part of developing planning and zoning.

Even when all the hard work is done to develop and adopt planning and zoning, towns must realize the work does not stop there. Administering zoning is a continual learning process and one involving a bit of trial and error. One

information can now be gathered from the internet and serve as a starting point for a town's plan. If a town does not use a professional to assist in developing its plan, it should have a professional review the draft plan before it goes to a public hearing.

Because a community's zoning ordinances must be consistent with its comprehensive plan, it could be said developing a proper plan is the most important aspect of having a successful planning and zoning effort. This need to remain consistent with the county's plan and adjust to changes in the community over time makes it critical for communities to revisit their plan on a regular basis to make sure it is still pointing the community in the correct direction.

lesson learned over the years is that failing to break general uses into smaller categories can result in the same types of land use disputes as if the community failed to plan in the first place. For towns, this fact became vividly clear with the feedlot issue. The past planning practice of deciding where homes and businesses should be built and then designating the remainder of the town as an agricultural zone simply does not work any longer. Animal agriculture has diversified over the years with some choosing to intensify and expand their farming practices.

Regardless of where one stands on the large farm vs. small farm debate (even how the dispute is cast is often disputed), it must be recognized that not all agricultural practices are the same. It is the nature of these practices and their resulting impacts on surrounding properties (including other agricultural properties) that needs to be considered to further the goal of reducing conflicts. This suggested sorting out of the different types of agricultural uses is critical and is already commonly done with commercial and residential uses. Once the different types of agricultural zones are established, appropriate setbacks and exclusions of certain uses (such as residential developments) can be determined. Separating potentially conflicting uses is one of the most fundamental purposes of zoning controls.

§ 16-11. Adopting a Comprehensive Plan

Developing a comprehensive plan involves the work of the planning commission, town board, and the public. Adopting a comprehensive plan involves the same groups of people, but is more closely controlled by statute.

The planning commission must conduct at least one public hearing, preceded by at least 10 days' published notice, before a plan may be adopted. Minn. Stat. § 462.355, subd. 2. After the hearing, the planning commission makes

any necessary changes and forwards the plan to the town board with its recommendations. If the town board chooses, it may then adopt the plan by passing a resolution by a two-thirds vote of its members. Minn. Stat. § 462.355, subd. 3. A copy of the plan must be filed with the governing body of each bordering city and town as well as with the regional planning agency if one exists. Minn. Stat. § 462.36, subd. 2.

§ 16-12. Types of Land Uses

Once the different zoning districts are identified, the next task is to classify the uses within each of the districts. The three classifications typically used are permitted uses, conditional uses, and interim uses. As will be explained below, uses already existing within a district that do not fall within one of the allowed use classifications for the district are considered nonconforming uses.

A. Permitted Uses

Permitted uses are simply those uses that can occur in the district without the need to obtain specific permission for that use. Such uses are compatible with the purpose of the district and need the least amount of government oversight. An owner can often build, for example, a single-family home in a residential district without separate permission for the use. However, even though the use is permitted in the districts there are still several other permits that may be required and regulations that need to be followed. For example, a building or land use permit may be required, the construction may need to comply with building codes, and the well and septic system must be permitted and installed in accordance with applicable regulations.

B. Conditional Uses

Certain types of uses, including planned unit developments, and certain land development activities may be designated by ordinance as a conditional use. Minn. Stat. § 462.3595. Conditional uses are permitted uses within a district to which the town has reserved the right to place conditions to reduce potential negative impacts of the particular

use as located on a particular site. Classifying a use as a conditional use recognizes its appropriateness within the district, but also acknowledges a need to review proposed uses on a case-by-case basis and place conditions as needed.

As a type of permitted use, towns must pay close attention to what they classify as conditional uses. Once permitted, a conditional use may exist for decades without an opportunity to adjust the conditions placed on the use. Also, being specific about the scope of the uses allowed as a conditional use is important. Designating broad categories of uses, such as "agricultural" or "commercial", as conditional uses in a district can result in unintended negative consequences. While allowing flexibility may appear desirable, doing so could result in having to allow certain unwanted uses since there may be no legitimate way to distinguish the unwanted commercial uses from other commercial uses if the ordinance simply allows "commercial" uses. Keep in mind that conditional uses should be viewed as permitted uses subject to conditions. As a type of use classified as being appropriate in a particular district, a local government's ability to deny such permits to a qualifying applicant is limited.

Hearings on the question of issuing a conditional use permit must be held according to the same standards applicable to adopting or amending a zoning ordinance. If granted, the conditional use permit must be recorded against the property and remains in effect if the conditions are observed. Minn. Stat. § 462.3595, subd. 3 & 4. However, through a later adoption or amendment to an ordinance a town can change the status of a preexisting conditional use.

C. Interim Uses

A town's zoning regulations may allow for interim uses. An interim use is defined as "a temporary use of property until a particular date, until the occurrence of a particular event, or until zoning regulations no longer permit it." Minn. Stat. § 462.3597, subd. 1. To grant an interim use it must comply with zoning regulations, the date or event that will terminate the use must be identified, granting of the use will not impose additional costs on the public, and the user agrees to any conditions the town places on the use. A public hearing must be held before an interim use can be permitted. Providing for interim uses can be a valuable tool for towns, especially in transitional areas of the town.

D. Nonconforming Uses

Nonconforming uses are preexisting uses that were legal when established, but which are no longer consistent with the current regulations of the district in which they are located. These uses are sometimes referred to as having been "grandfathered" in because they existed before the creation of the regulations with which they do not

comply. Even though a use may be completely inconsistent with those designated as appropriate within the district, they can continue as before, subject to certain restrictions. Allowing nonconforming uses to continue is done to acknowledge the owner's investment in the use and to avoid a takings claim. The challenge always is to strike an appropriate balance in recognizing the interests of owners to continuing their preexisting uses of the property and the interests of the neighboring owners and the community as a whole in separating or eliminating inconsistent uses.

In the past, the opportunity to rebuild a partially destroyed nonconforming use was controlled by the local ordinance. Now, the local ordinances must allow a nonconforming use to rebuild even after it is destroyed by more than 50% of its market value if the owner applies for a building permit within 180 days of when the property was destroyed. Minn. Stat. § 462.357, subd. 1e. However, in such cases the local government may impose reasonable conditions on the building permit to mitigate any newly created impact on adjacent property.

§ 16-13. Types of Official Controls

Official controls local governments may adopt as part of their planning and zoning are defined as including "ordinances establishing zoning, subdivision controls, site plan regulations, sanitary codes, building codes and official maps." Minn. Stat. § 462.352, subd. 15. The types of official controls a local government adopts depends on its perception of the community's needs and the local government's resources. Furthermore, many of the codes that come into play with planning and zoning are controlled by state rule and not by local ordinance. As such, the local zoning ordinances may integrate and require compliance with various building, fire, electrical, etc. codes, but the content of those codes are set out in rules established by state agencies that preclude, in most cases, local governments from altering them. This section will briefly list some of the more common types of official controls and codes involved in local zoning.

A. Subdivision Regulations

Local governments are authorized to "by ordinance adopt subdivision regulations establish-

ing standards, requirements, and procedures for the review and approval or disapproval of subdivisions." Minn. Stat. § 462.358, subd. 1. Subdivision generally means an owner dividing his or her land into two or more parcels or lots for residential, commercial, industrial, or other uses. The process of platting land is also subject the requirements contained in Chapter 505.

Subdivision regulations are specifically authorized under Chapter 462 and allows local governments to enact a broad range of regulations to address the following without limitation: "the size, location, grading, and improvement of lots, structures, public areas, streets, roads, trails, walkways, curbs and gutters, water supply, storm drainage, lighting, sewers, electricity, gas, and other utilities; the planning and design of sites; access to solar energy; and the protection and conservation of flood plains, shore lands, soils, water, vegetation, energy, air quality, and geologic and ecologic features." Minn. Stat. § 462.358, subd. 2a.

B. Shorelands

To protect the state's shorelands the legislature established special procedures in 1990 that apply to the use of land in shorelands throughout the state. Minn. Stat. § 103F.201. "Shoreland" is defined as the land within 1,000 feet from the normal high watermark of a lake, pond, or flowage and land within 300 feet of a river or stream or the landward side of a floodplain delineated by ordinance on the river or stream, whichever is greater. Minn. Stat. § 103F.205, subd. 4.

Given the abundance and sensitivity of shorelands in this state, the legislature took the unusual step of directing the Department of Natural Resources to develop standards and criteria imposing minimum regulations for development in shoreland areas. Minn. Stat. § 103F.211. A model ordinance was also developed for areas outside of cities. The standards addressed issues such as designating types of land uses, establishing minimum buildable lot sizes, setbacks from roads and shorelines, placement of sewer facilities, changing bottom contours of public waters, and preservation of natural shorelands through the restriction of land uses. These standards were codified into Minn. R. Chap. 6120 and constitute a set of regulations that must be treated as a package.

Another unique aspect of shoreland regulations are the requirements imposed on a town wishing to regulate shore lands. Under Minn. R. 6120.3900, subp. 4a, a town may only adopt shoreland regulations if they are at least as restrictive as those adopted by the county. That is true of all town zoning ordinances, but with shoreland regulations a town must demonstrate to the county board that its administration is at least as restrictive as the county's. Taken literally, the requirement makes little sense since the effectiveness of one's ordinance administration is not measured in degrees of restrictiveness. The standards established in the ordinances are more or less restrictive, but the administration of those standards may be more or less effective, efficient, aggressive, etc.

The rule goes on to require a town to "provide for administration and enforcement of

shoreland management controls at least as effective as county implementation." Minn. R. 6120.3900, subp. 4a. While the intent of the requirements seem clear, they unfortunately embody a number of assumptions that are not necessarily true. For example, the requirements assume county administration and enforcement is sufficient while the adequacy of town administration must first be demonstrated. They also assume the county is in the proper position and is capable of accurately judging a town's ability to administer shoreland regulations. Despite the county bias inherent in the regulations, towns do have the authority to regulate shoreland regulations if they work through the procedure to put in place regulations that are at least as strict as those adopted by the county.

One issue encountered with zoning for designated areas such as shorelands is the application of other zoning regulations in those designated areas. For example, how do a town's zoning ordinances apply in shoreland areas if the town has not adopted shoreland regulations? These types of issues resulted in series of discussions between the Minnesota Association of Townships, the Association of Minnesota Counties, and the DNR in 2003. The discussions resulted in a letter setting out various options towns can consider to pursue regulations. One recommendation recognizes that if a town chooses not to adopt shoreland regulations, the other ordinances it adopts for its territory do also apply within shoreland areas if they are at least as strict as the shoreland regulations the county has in effect for the area.

C. Floodplains

As with shorelands, the legislature has imposed minimum standards for floodplain areas. However, the legislature went even farther and mandated the creation of floodplain ordinances. All such ordinances must be reviewed by the commissioner of natural resources before a local government can adopt them. Minn. Stat. § 103F.121. Floodplains in towns are typically regulated by the counties, but there are several towns that have worked through the process to adopt a floodplain ordinance.

D. Septic Systems

Regulation of individual sewage treatment systems (typically septic systems) is mandated by the legislature. In the late 90's a great deal of effort was directed toward the regulation of septic systems. This effort resulted in the adoption of comprehensive septic system rules (Minn. R. Chap. 7080), licensing requirements for septic installers, inspectors, and pumpers, and a mandate to counties to adopt and enforce the septic tank rules in all towns and cities that have not adopted their own rules. Minn. Stat. § 115.55. The rules now refer to septic systems as subsurface sewage treatment systems and the applicable regulations, including for licensing professionals, are spread among Minn. R. Chaps. 7080-7083.

E. Building Code

Minnesota has a state building code and local governments are authorized to adopt and enforce the code if they maintain at least the minimum requirements contained in the code. Minn. Stat. § 326B.121. A local government wishing to impose stricter requirements must base those requirements on geological conditions in the area and receive permission from the state for the restrictions. The Department of Administration oversees the development and implementation of the code.

The building code itself is stretched over several chapters in the Minnesota Rules starting with Minn. R. Chap. 1300 through 1370. The Minnesota plumbing code is found in Minn. R. Chap. 4715. Questions about the building code can be directed to Department of Administration staff.

Administering the state building code is a significant undertaking and one ultimately controlled by the state. If the Department of Administration does not believe a local government is properly enforcing the code, it is authorized to take over administration activities and charge the costs back against the local government. Minn. Stat. § 326B.121, subd. 3. If the code is in effect in a town it is most often administered by the county, but there are several towns that have adopted and administered the code.

A city may extend its enforcement of the building code up to two miles into the adjacent towns if the code is not already in effect in those towns and the town boards give the city permission. Minn. Stat. § 326B.121, subd. 2.

F. Amortization

Amortization is a type of regulation that requires the elimination of certain non-conforming uses over time. An example of a type of use traditional subject to amortization was billboards. As with other issues in recent years, the legislature chose to wade into the issue of amortization and limit local government's ability to use it as a regulatory tool. Now, local governments "must not enact, amend, or enforce an ordinance providing for the elimination or termination of a use by amortization which use was lawful at the time of its inception." Minn. Stat. § 462.357, subd. 1c. The one exception where amortization is still permitted is adult bookstores and other similar adult-only businesses.

§ 16-14. Adopting Zoning Ordinances

Zoning ordinances are the tools used to implement the comprehensive plan. Creating zoning ordinances is a deliberative process of identifying the goals of the plan, drafting the language to bring about the goals while remaining within the allowed legal parameters, and imagining the impact of the ordinances as drafted to gauge their potential scope and consistency with the plan.

The assistance of planning and legal professionals is valuable in this process. Having an attorney review all proposed ordinances before they are adopted is vital. Just because another community has virtually identical ordinances in effect is no guarantee they are legally valid even if they seem to be “working” for the other community. Each community is responsible for its own ordinances and should not

rely on an assumption that another entity got it right when they drafted their ordinances. For general information on drafting ordinances refer to Document Number **TP6100** and **TP6100A**.

The zoning chapter assumes the planning commission will develop the proposed ordinances and submit them to the town board. Before an ordinance can be adopted, a public hearing must be held after providing ten days’ published notice. As with all ordinances, once adopted the town must comply with the ordinance formality requirements contained in Minn. Stat. § 365.125 (urban towns see Minn. Stat. § 368.01, subd. 21) and Minn. Stat. § 394.33, subd. 1. For additional information on adopting ordinances refer to Document Number **TP6000**.

§ 16-15. Amending Zoning Ordinances

Amendments to a zoning ordinance may be initiated by the town board, the planning commission, or upon request of an affected property owner as provided in the zoning ordinance. Minn. Stat. § 462.357, subd. 4. Any amendment not initiated by the planning commission must be sent to the commission for study and a report to the town board. The town board may not act on an amendment until the commission has provided its report or if the commission fails to provide a report within 60 days.

A public hearing must be held before an ordinance amendment may be adopted. At a minimum, ten days’ published notice of the hearing must be given. If the amendment involves changing a district boundary affecting an area of five acres or less, the notice must also be mailed at least ten days before the day of the hearing to each owner of affected property and property situated wholly or partly within 350 feet of the property to which the amendment relates. Minn. Stat. § 462.357, subd. 3.

§ 16-16. Administering Zoning

A town adopting its own zoning ordinances is required to provide for the administration and enforcement of those ordinances. The administration of town zoning ordinances can be accomplished with existing town staff, by hiring additional staff, sharing zoning staff with one or more other local governments through a joint powers arrangement, or contracting with the county (or other local governments) to

provide those services to the town. Properly administering zoning ordinances has always been a challenge, but in recent years has become even more challenging as a result of legislatively imposed limitations and burdens such as the 60-day rule. This section will briefly highlight some of the more critical administration issues towns with zoning ordinances must be aware.

A. 60-Day Rule

One of the most significant procedural challenges faced by towns administering their own zoning ordinances is complying with the requirements of the 60-day rule. This rule is found in Minn. Stat. § 15.99 and was developed to respond to a perception that in some cases it was taking too long for governmental entities to make permit decisions. The legislature responded by requiring local governments to approve or deny a written request relating to zoning and septic systems within 60 days. Minn. Stat. § 15.99, subd. 2. If a local government fails to meet this deadline, the request is automatically deemed approved. The 60-day rule does not apply to the review and approval of subdivisions. Instead, Minn. Stat. § 462.358, subd. 3b indicates preliminary plats need to be acted on within 120 days and the final plat within 60 days.

Under the 60-day rule, the clock begins to run as soon the town receives the written request provided it contains all the information required by law or by a previously adopted rule, ordinance, or policy and is accompanied by the applicable application fee. If the written request is not complete, the town only has 15 business days in which to provide the applicant written notice of what information is missing or else the clock continues to run. Minn. Stat. § 15.99, subd. 3(a).

If a town needs more than 60 days to adequately review and act on an application, it may extend the period for up to an additional 60 days if it provides the applicant written notification of the extension before the initial 60 days has elapsed and the notice must state the reasons for the extension and its anticipated length. Minn. Stat. § 15.99, subd. 3(f). The reason can be as simple as the town's need for more time to consider the matter. The applicant may agree to a longer extension and may also submit a written request for an extension.

Few can argue with the goal of requiring the prompt review of zoning applications; however, this rather simplistic approach has resulted in some very negative results and has arguably created more problems than it solved. Court decisions on the various challenges brought under the rule have helped to further define the scope and applicability of the law. One such issue addressed by the courts and then the legislature is the effect of a failed motion to approve a request. Based on the amended language, the failure shall constitute a denial of the request if "those voting against the motion state on

the record the reasons why they oppose the request." Minn. Stat. § 15.99, subd. 2(b). The amended language also clarified the fact that the statute applies only to requests relating to zoning, septic tanks and the expansion of the metropolitan urban service area. A definition of "request" was added to the statute making it clear a request must be submitted on an application provided by the local government, if one exists, and include any required application fee.

Despite the amendments, there remain several significant problems with the statute, some of which have yet to be fully realized. As mentioned, a local government's failure to comply with the 60 day rule results in an automatic granting of the request. However, what if the applicant requested to use the property in a way that is completely inappropriate for the particular zone?

A related issue local governments have already experienced is the automatic granting of a conditional use permit, but with no opportunity to place reasonable conditions in the permit. In some cases the court finding the violation of the 60 day rule has allowed the local government to add conditions on the grant, but what if a court does not have the foresight to grant the local government that opportunity? The effect could be the granting of a use that directly contradicts the plan and brings about all the negative consequences zoning exists to mitigate. One scheduling mistake on the part of the local government could result in the creation of a perpetual problem for the community. For additional information on the 60 day rule refer to Document Number **PZ3000**.

B. Zoning Fees

Towns may prescribe fees for those seeking zoning approvals; however, those fees "must be fair, reasonable, and proportionate and have a nexus to the actual cost of service for which the fee is imposed." Minn. Stat. § 462.353, subd. 4(a). A town annually collecting zoning fees more than \$5,000 must set fees by ordinance, either within the zoning ordinance or as part of a separate fee schedule adopted by ordinance. Towns collecting less than \$5,000 in zoning fees may adopt their fee schedule by resolution instead of an ordinance, but in either case notice of the intent to adopt or amend a fee schedule must be published for at least ten days. Minn. Stat. § 462.353, subd. 4a.

Because of growing concerns by builder groups and others complaining the fees they pay are being si-

phoned off for non-zoning purposes, the legislature now requires zoning authorities to “adopt management and accounting procedures to ensure that fees are maintained and used only for the purpose for which they are collected. Upon request, a municipality must explain the basis of its fees.” Minn. Stat. § 462.353, subd. 4(b). In most cases towns are not the focus of this concern. Nevertheless, towns are subject to this requirement since the term “municipality” as used in the chapter refers to both cities and towns.

Another product of the concern over fees was the creation of an appeals process to challenge the amount of the fee related to a specific application. An applicant now has up to 60 days after the approval of an application to appeal the amount of the fee. Minn. Stat. § 462.353, subd. 4(d). The applicant must deposit the fee amount in escrow, but can proceed with the project as though the fee was paid. A town is prohibited from conditioning approval of a development on an agreement to waive the right to appeal the fee.

A practice growing in popularity is to require an applicant to escrow funds with the town to pay the actual professional costs the town incurs to process the request. The town establishes an amount of the escrow the applicant must submit in addition to the application fee. The application fee pays the usual administrative costs for processing the application and the escrow is used to reimburse the town for the costs it incurs to have professionals (planner, attorney, engineer) assist it with the application. Requiring an escrow avoids the town’s taxpayers subsidizing private development and helps ensure the applicable requirements are followed for the benefit of both the town and the applicant.

C. Dedications

A town may require as part of its subdivision regulations that a portion of a proposed subdivision be dedicated to the public for roads, utilities, or storm water purposes. Minn. Stat. § 462.358, subd. 2b(a). A town may also require the dedication of a reasonable portion of a proposed subdivision for recreational purposes, wetlands, or open space. Minn. Stat. § 462.358, subd. 2b(b). An “essential nexus” must exist between the dedication and the public purpose to be achieved by the dedication and bear a “rough proportionality” to the need created by the proposed subdivision. Minn. Stat. § 462.358, subd. 2c(a). A town may accept cash in lieu of part or all of a dedication of land based on fair market value. All such cash payments must be placed in a special fund and

can only be used for the public purpose for which it was obtained. Minn. Stat. § 462.358, subd. 2b(b).

Counties are also authorized to require park dedications in those areas where the town or city does not require a dedication. If a county does require a park dedication, it must adopt a capital improvement program and at least 75% of the funds collected from within a town must be spent according to the plan within that town. Minn. Stat. § 394.25, subd. 7. The town board can agree to allow the county to spend more than the allowed 25% outside of the town. In either case, the county must annually report where funds were collected and where funds were expended in the past year.

A very contentious aspect of dedications is whether local governments can require developers to pay other costs associated with the new development such as the impacts to the road leading to the development. Sometimes called impact fees or development exactions, local governments generally believe such fees are a reasonable means of responding to increased costs while many developers disagree saying the fees are not authorized. In Minnesota, the issue of whether such fees are permissible was discussed in *Country Joe, Inc. v. City of Eagan*, 560 N.W.2d 681 (Minn. 1997).

In 1978 the City of Eagan imposed a “road unit connection charge” as a condition of issuing all building permits to help pay for major street construction. The amounts collected were placed in a separate street improvement fund, but there was no attempt to target the funds to the areas where they were collected. A builder challenged the charge as unlawful and the city responded arguing the road unit connection charge was within its broad authority under Chapter 462 and was an allowable impact fee.

The court did not agree the authority to impose the road charge could be implied from the Chapter 462 authority. However, because the court determined the road fee did not constitute an impact fee, it avoided ruling on whether impact fees are permissible and chose instead to “reserve” the issue. Because the fee was a revenue raising measure and not a true permit fee tied to the costs associated with issuing the permit, the court ultimately found the fee to be an unlawful tax. *Id.* 687.

After the case, various legislative proposals were introduced to clarify the issue of impact fees in Minnesota. Those efforts were unsuccessful, leaving the validity of impact fees very much in doubt. Absent legislative authorization for these types of fees, towns should avoid attempting to impose impact

fees or exactions. Because this is such a significant issue for builders, any attempt to impose such fees would likely be met with strong resistance and a lawsuit challenging their validity.

D. Findings of Fact

Developing written findings of fact is critical for any important local government decision, and zoning decisions are no exception. Those who challenge zoning decisions often allege the local government acted arbitrarily and capriciously in reaching its decision. In other words, they allege the town did not have a legitimate basis for its decision. Whether a local government is able to successfully fend off such challenges depends in large part on whether they had adopted good written findings of fact.

Findings of fact can be structured in different ways, but for the most part they contain a description of the:

- (1) matter being considered;
- (2) procedural background;
- (3) factual background; applicable legal references;
- (4) conclusions regarding any factual or legal issues involved;
- (5) basis for the decision; and
- (6) the decision.

Essentially, a story is developed describing the case from the time the application was submitted to the final decision on the matter. The person drafting the findings must always keep in mind it is being written for someone (like a district court judge) unfamiliar with the case and attempting to determine based on the story whether the town acted in a fair and reasonable way and reached a rational decision.

Just as a town must develop procedures for how to handle zoning requests, it must also develop a process for developing findings of fact. This means the decision makers must push themselves to get into the habit of developing and articulating reasons for their decisions that can be included in the findings of fact. Furthermore, local governments only have a limited time in which to develop findings of fact. Courts have indicated findings must be developed contemporaneously with the decision to avoid the potential of developing rationale for a decision after it is made. Using resolutions to make zoning decisions is a good method for incorporating findings as part of the decision rather than developing a separate set of findings.

Coupling the contemporaneous requirement with the 60-day rule means towns have very little time in which to develop good findings of fact. Whenever

possible, findings should be adopted at the meeting in which the decision was made. Furthermore, it is recommended towns audio record their hearings and keep the recordings as part of the official record. These recordings become extremely important if the town's decision is challenged. For additional information on developing findings of fact refer to Document Number **TP4000**.

E. Enforcement

Enforcing zoning ordinances presents its own set of challenges. A 1991 opinion of the Minnesota Attorney General found a general duty for local governments to enforce their zoning ordinances. Minn. Op. Atty. Gen. 477B-34 (1991). According to the opinion, implicit in the grant of authority to enact zoning ordinances "is the notion that an ordinance adopted pursuant thereto will be enforced." *Id.*

Determining how best to identify violations, provide notice of violations, and take action to bring violators into compliance are all issues that should be discussed before a town adopts a zoning ordinance. Each enforcement action takes on its own life depending on the circumstances, but the basic procedural approach for enforcing the ordinances need to be worked out in advance.

Towns have the general authority to make a violation of its ordinances a penal offense and to prescribe penalties for a violation. Minn. Stat. § 366.01, subd. 10. However, the penalties may not exceed the penalties prescribed in law for a misdemeanor. A somewhat unique addition to this authority is the ability to add the cost of prosecution to the penalty. In most cases, the cost of prosecution is not charged back against the violator. As such, a town seeking such costs is occasionally met with uncertainty and skepticism, but the authority exists to seek the recovery of those costs.

Under the zoning chapter itself, Minn. Stat. § 462.362 gives cities and towns broad authority to provide for the enforcement of its ordinances and to prescribe penalties. Enforcement measures can take the form of a criminal prosecution or the seeking of mandamus, an injunction, or any other appropriate remedy. A town must work with its attorney to decide the best approach for enforcing a particular violation.

It seems the most popular enforcement method is to seek an injunction asking the judge to order the person to come into compliance. The courts have expressed a preference for this method of enforcement as the most efficient way of dealing with continuing zoning violations. *City of Minneapolis v. F and R, Inc.*,

300 N.W.2d 2, 3 (Minn. 1980). However, there appears to be an increasing number of violators being criminally prosecuted for their violations. Each case must be judged on its merits, but the potential of going to jail for violating a zoning ordinance can certainly capture the violator's attention.

F. Variances

One of the most misunderstood and misapplied aspects of zoning are variances. No matter how much foresight is put into developing a plan and ordinances there will inevitably occur a situation that unintentionally falls through the cracks. In general, variances exist to address situations where an owner wishes to use his or her property in a reasonable way that is consistent with the surrounding uses, but is prohibited from doing so under a strict reading of the ordinances.

Because planning and zoning cannot occur with perfect knowledge and foresight, the opportunity to grant variances to the ordinances exist under law. However, because variances are literally the exception to the rule the ability to grant them is limited by law and should be used sparingly.

Variance requests are heard by the board of appeals and adjustments. Variances can only be granted when the applicant shows that there are practical difficulties in complying with the zoning ordinance. Practical difficulties mean "that the property owner proposes to use the property in a reasonable manner not permitted by the zoning ordinance; the plight of the landowner is due to circumstances unique to the property not created by the landowner; and the variance, if granted, will not alter the essential character of the locality. Economic considerations alone do not constitute practical difficulties". Minn. Stat. § 462.357, subd. 6.

The law on variances has undergone considerable changes in recent years. In 2010, the Minnesota Supreme Court limited the undue hardship standard for variances to the very rare situations where the land cannot be used for any reasonable use without the variance. This decision further wid-

ened the difference between town and county variance standards. In 2008, the Court lowered the standard for county variances when it said that under the county land use authority in Chapter 394, a land owner only had to show that the zoning ordinance created practical difficulties in using their property.

In response to the Court's decisions, the legislature adopted a uniform variance standard for towns, cities, and counties in 2011. In doing so, the legislature eliminated the reference to undue hardships for variances in towns and cities and sought to define what amounts to a practical difficulty. As with any major statutory change, the full impact will be worked out in the court system in the coming years.

It remains that a variance cannot be used to allow a use that is not permitted under the ordinance for the particular zone. Finally, conditions may be added to the granting of a variance to ensure compliance and to protect adjacent properties. The conditions must be "directly related to and bear a rough proportionality to the impact created by the variance." Minn. Stat. § 462.357, subd. 6. It is also possible to grant variance to subdivision regulations when applying the subdivision regulations would cause an unusual hardship. Minn. Stat. § 462.358, subd. 5.

Making the case for a variance is not, or at least should not be, an easy task. The legislature intentionally limited the circumstances in which it is appropriate to grant variances, meaning a town's hands are tied even when the variance being requested does not seem to be a "big deal." The problem is that if a variance is granted without the requisite findings of practical difficulties and the other variance standards, the town can be accused of violating its own ordinances. As a practical matter, granting variances when they are not clearly authorized can create an expectation of entitlement among other owners who may be interested in seeking a variance.

§ 16-17. Should a Town Adopt Zoning?

As the result of years of legislative efforts by the Minnesota Association of Townships, the year 1982 saw planning and zoning authority granted to all towns under Chapter 462. As a result, with the exception that town regulations must be at least as strict as those of the county in which the town is located, the smallest town in the state has the same authority to zone as Minneapolis, Duluth, or Rochester. MAT's efforts have also resulted in several other improvements to town zoning authority.

Unfortunately, all the state-wide local government associations have had to struggle to preserve local zoning authority from an increasing number of attempts to narrow, block, or outright eliminate part of that authority. Attacks on town zoning authority are often accompanied by claims that towns are not capable of properly administering planning and zoning. Many times these claims are based on nothing more than the fact that most towns are small. Fortunately, the legislature continues to recognize that small communities should have the same right to direct their future as larger communities. Skill at planning and zoning is not an inherent trait of one form of government over another, or of one size of government over another. Regardless of the community, whether planning and zoning is effective is directly related to how much effort the community is willing to put forward.

MAT recognizes the authority to regulate a person's property is accompanied by the responsibility to do so wisely. That is why our strong position of support for town zoning authority does not include a belief that every town should actually take on zoning. Part of the fight to preserve local control is recognizing that communities, and their local officials, are in the best position to determine if adopting zoning is right for them. The Association has spent decades providing planning and zoning education to towns to help them make informed decisions on whether zoning is right for them. One of the important messages we try to convey to towns is that adopting zoning ordinances is a "big deal."

Creating local law by ordinance is always a se-

rious matter. That is even more the case with zoning ordinances, which create a relatively complex set of obligations and consequences for failing to satisfy those obligations. Experience has shown that zoning is one of the primary causes of lawsuits against towns. In fact, even though relatively few towns have adopted zoning ordinances, defense of zoning-related lawsuits has rapidly become the most significant cost factor for MATIT. While being sued does not necessarily mean the town did anything wrong, it certainly places a strain on local government officials given the amount of work and potential consequences involved.

Only towns truly committed to "doing it right" should adopt zoning ordinances. Because zoning is a big deal it must be approached with a willingness to put in the work necessary to get it right. That generally means hiring a planner and land use attorney to help develop, administer, and enforce the comprehensive plan and zoning ordinance. It means being willing to deal with the strong emotions that often surround land use decisions and being equally willing to see those decisions discussed and criticized in the local newspaper. Ultimately, it means being thick-skinned enough to make and support unpopular decisions.

However, even those towns that do not want to adopt zoning ordinances should consider the value of informal planning. Engaging in some form of planning can yield benefits for all communities, can often be done by the board and town residents, and is not limited to regulating land uses. Planning can include evaluating which roads will be improved and in what order, when and where the town will build a new town hall, when to purchase new equipment and how to pay for it, whether to develop or expand a recreation program, create a lake access, or almost anything else that might confront a town board. Even if a town does not want to adopt a comprehensive plan and a zoning ordinance, the process of reviewing a community's history, evaluating where it is, and looking to its future is a valuable tool for every town.

§ 16-18. Special Provisions Related to Feedlots

As a result of a process started at the urging of various animal agriculture groups and supported by the Governor, a list of legislative recommendations were developed to address concerns raised by the industry regarding the siting of feedlots. Most of the recommendations were adopted during the 2005 legislative session and have an impact on towns with feedlot ordinances and those wishing to enact such ordinances.

A zoning ordinance that “contains a setback for new feedlots from existing residences must also provide for a new residence setback from existing feedlots located in areas zoned agricultural at the same distances and conditions specified in the setback for new feedlots, unless the new residence is built to replace an existing residence.” Minn. Stat. § 462.357, subd. 1g (e). This mutual setback requirement was added to the county zoning chapter years ago and so most towns adopting their own setbacks needed to reflect this requirement in order to remain at least as strict as the county’s ordinances.

If a town wishes to adopt an interim ordinance regulating livestock production it must first provide at least ten days’ published notice and hold a hearing before adopting the ordinance.

Minn. Stat. § 462.355, subd. 4 (b). The notice and hearing requirement does not limit a town’s ability to adopt such an ordinance.

A town proposing a new feedlot ordinance or amending an existing feedlot zoning control is required to notify the Pollution Control Agency and the Commissioner of Agriculture before the notice is given of the first hearing related to its adoption. Also, a town has the option of sending its proposed ordinance to the Pollution Control Agency and the Commissioner of Agriculture before it is adopted for their review, comment, and recommendations. Again, this review is not required and does not limit a town’s ability to enact its proposed ordinance.

Finally, regardless of whether a town has a feedlot ordinance, a person seeking an MPCA permit to construct or expand a feedlot with a capacity of 500 animal units or more must send a “notice by first class mail to the clerk of the town in which the feedlot is proposed not less than 20 business days before the date on which the permit is issued.” Minn. Stat. § 116.07, subd. 7a. It is not clear how someone is to know the date on which a permit will be issued, but presumably the person will provide the notice early in the process to insure compliance with the required notice period.