ZONING DECISIONS

Limitations and Pitfalls

I. INTRODUCTION

The importance of sound land use planning and zoning is becoming more apparent as our population increases and living patterns continue to change. Not so apparent are the many pitfalls and possible challenges a local government may encounter by choosing to engage in planning and zoning.

The purpose of this outline is to briefly point out some of the arguments that have been raised to challenge zoning ordinances and decisions. This outline is by no means exhaustive, and no attempt is made to fully explore each issue. Instead, the information highlights the limiting factors that have been imposed on zoning decisions by the legislature and courts. The goal of taking this decidedly negative perspective is to help identify some of the boundaries within which local governments must operate. Given the rather broad authority and discretion afforded local zoning decisions, it is possible to lose sight of the limits on that authority. Furthermore, better understanding the limits of zoning authority will help identify and support those decisions that fall within those limits.

II. ARBITRARY & CAPRICIOUS DECISIONS

Challenges to local zoning decisions often include the claim that the decision should be invalidated because the board acted arbitrarily and capriciously. While a variety of arguments are made to support such a claim, they usually allege that there was an insufficient basis for making the decision. The person making the claim generally has the burden of proving to the court the arbitrariness of the decision.[1] The burden of proof to show arbitrariness is lighter for landowners challenging denial of a permit than for objectors questioning approval of a permit.[2]

The Minnesota Supreme Court has indicated that courts are to review zoning decisions using the "rational basis test."[3] There are various ways to state this test, but it usually focuses on whether the decision is supported by any rational basis related to promoting the public health safety, morals, or general welfare.[4] Measuring zoning decisions on a rational basis standard gives deterrence to the decisions made by local governments. As long as there is some rational basis for the decision, even if the decision is debatable, the courts will not interfere.[5]

Even though the rational basis test is used to measure all local zoning decisions, the courts do take into consideration the nature of the matter under review as bearing on what is reasonable.[6] The distinction being referred to here is whether the matter is legislative or judicial in character. Decisions related to granting or denying special use permits or variances are referred to as quasi-judicial matters, whereas zoning, rezoning, and other broader zoning decisions are usually classified as legislative matters. Legislative zoning decisions involve the consideration of a wide range of value judgments.[7] These judgments are made in light of the statutory purpose for engaging in planning and zoning which is to

promote public health, safety, morals, or general welfare. As such, the reasonableness of legislative zoning focuses on whether the public policy being formulated by the ordinances and decisions promotes the public welfare.

Judicial decisions, on the other hand, involve applying specific standards established by local zoning ordinances to particular individual uses.[8] Rather than establishing public policy, judicial zoning decisions focus on whether the specific use is contrary the general welfare as already established in the zoning ordinance. Because judicial decisions involve applying established standards, the courts review such decision more strictly than the policy based legislative decisions. If an action of a municipality is found to be arbitrary, capricious, or unreasonable, a writ of mandamus may be available to compel the municipality to take the correct action.[9] {Add stricter standard and cases}

A. ARBITRARY AS A MATTER OF LAW

1. Occasionally, a decision is so lacking in support that a court is willing to find that the decision is arbitrary as a matter of law or is per se arbitrary. This essentially means that the decision is inherently arbitrary and therefore invalid.

2. When a zoning ordinance specifies standards to apply in determining whether to grant a permit or other zoning approval, denying the request of an applicant that fully complies with the specific standards is arbitrary as a matter of law.[10]

3. Failing to make contemporaneous findings to support a zoning decision is per se arbitrary and capricious.[11]

4. A local government failing to follow its own procedural rules may invalidate a zoning decision on the basis that it was arbitrary if the failure resulted in specific and demonstrable harm.[12]

5. A local government may attempt to rebut a presumption of arbitrariness at trial by introducing additional evidence relevant to the issues raised and considered before the municipal body.[13]

B. PREMATURE DECISIONS

1. In at least one case, the court found that a complete absence of an adequate record to support a decision, and the apparent need for further testimony on and consideration of issues related to a zoning request, rendered the decision premature, but not necessarily arbitrary.[14] Under such circumstances, the court gave the issue back to the local government for further, but limited, proceedings on the request. However, courts are usually reluctant to allow local boards an opportunity after the fact to substantiate or justify earlier decisions.[15] This reluctance has appeared to grow with recent cases to the point that it is unlikely the court will grant a second bite at the apple.

C. BASIS FOR DECISIONS

1. Whether or not a sufficient basis existed for a zoning decision is often at the heart of an arbitrary and capricious claim. The following are points taken from various cases in which the courts discussed the sufficiency of the reasons supporting a decision.

2. Neighborhood opposition to the issuance of a permit can be considered if it is based on concrete information.[16] However, the simple fact that some people in the community oppose a particular use of property is not a legally sufficient reason to deny a conditional use permit.[17]

3. Expert testimony may not be rejected without adequate supporting reasons, but those reasons need not be based on expert testimony.[18]

4. When a zoning ordinance expressly authorizes a use as a conditional use, denial of the conditional use permit must be for reasons relating to public health, safety, and general welfare.[19]

5. Denying a special use permit solely for the purpose of limiting the number of one type of use in a particular area is arbitrary in that it does not bear a sufficient relationship to the public health, safety, or general welfare of the community.[20]

6. Aesthetic concerns alone do not rise to the level of serious health, safety, or public welfare considerations which justify denial of a special use permit.[21] Nor can zoning decisions rest upon an intent to make certain areas subservient to others or destroy valuable property rights solely in adherence to the esthetic concepts of planning commissions.[22]

III. CONSTITUTIONAL LIMITATIONS

All government actions must respect the constitutional protections provided by the Constitution of the United States and the Minnesota Constitution. These constitutional protections provide a parameter within which government actions are measured. It is important to remember that an otherwise valid zoning ordinance can be found unconstitutional as applied in a particular case.[23] Part of the challenge when developing ordinances is to attempt to gauge its constitutionality both as written and as applied in a variety of situations. Such an analysis is never complete, but it is valuable tool to gauge and strengthening the validity of an ordinance.

A. PROCEDURAL DUE PROCESS

1. Due process under the law is a right protected by the Fourteenth Amendment to the United States Constitution (“nor shall any State deprive any person of life,

liberty, or property, without due process of law;"). A fundamental part of due process is the requirement that certain procedural safeguards are observed when the government acts to deprive, in a broad sense, a person of life, liberty, or property (e.g., notice, hearing, and right to appeal).

2. Procedural due process requirements are incorporated into the statutes authorizing local government action. The planning and zoning statutes contain many procedural requirements that must be followed by local governments exercising that authority. Failure to follow statutory procedures, particularly those providing due process protections, may result in a challenge based on process and ultimately invalidation of the action.

3. Failing to provide adequate notice or hold proper proceedings may invalidate a zoning decision.[24] Notice of a zoning hearing must indicate that a "public hearing" related to zoning is being held. Merely dealing with a zoning issue that requires a hearing as an agenda item at a regular meeting without more is not sufficient. The statutes provide some relief for boards that make a bona fide attempt to comply with the notice requirements.[25]

4. A substantive due process claim, which focuses on the arbitrariness of a decision, is also possible.[26]

B. REGULATORY TAKINGS

1. The Fifth Amendment of the United States Constitution, and Article 1, section 13 of the Minnesota Constitution, prohibit private property being taken for public use without the payment of just compensation. The issue of governmental takings was once limited to situations in which the government physically intruded onto private property (e.g., taking private property to establish a highway). However, eventually the United States Supreme Court began to recognize that it is possible for government regulation to go so far as to constitute a taking of property.[27] In such instances, the government is required to pay the owner compensation.

2. A zoning ordinance may effect a taking if it does not substantially advance a legitimate governmental interest.[28]

3. "[A]n otherwise valid zoning scheme constitutes a taking if it denies a landowner 'all economically viable or beneficial use of the property.'"[29]

4. A regulation resulting in a temporary taking may also require the payment of compensation.[30]

5. Conditions on a permit may constitute a taking requiring compensation unless they substantially further a legitimate government interest. An essential nexus

must exist between the government's underlying public purpose and the conditions.[31]

C. EQUAL PROTECTION & DISCRIMINATION

1. The Fourteenth Amendment to the United States Constitution indicates that a state may not "deny to any person within its jurisdiction the equal protection of the laws." The courts of indicated that the "guarantee of equal protection of the laws requires equality of application of the laws -- that all similarly circumstanced shall be treated alike."[32]

2. Congress has also created various statutes which prohibit the government from discriminating[33] or depriving persons of their rights.[34]

3. "A zoning ordinance must operate uniformly on those similarly situated."[35] "[T]he equal protection clauses of the Minnesota Constitution and of the Fourteenth Amendment of the United States Constitution require that one applicant not be preferred over another for reasons *unexpressed or unrelated* to the health, welfare, or safety of the community or any other particular and permissible standards or conditions imposed by the relevant zoning ordinances."[36]

4. Similarly situated persons must be treated equally.[37] Timing of the request or requirement is important in determining whether parties are similarly situated. For instance, persons requesting a similar permit at different times may not be considered similarly situated for the purposes of an equal protection claim.

5. Distinctions provided by ordinance must bear a reasonable relation to the purpose of the ordinance.

D. FIRST AMENDMENT PROTECTIONS

1. The prohibition against abridging the freedom of speech provided for in the First Amendment of the United States Constitution is a closely guarded right. In fact, the ordinary presumption of constitutionality afforded legislative enactments does not apply to laws restricting first amendment rights.[38] There are a number of ways in which a local zoning ordinance can impact First Amendment rights and, therefore, be subject to a challenge for allegedly violating those rights.

2. Ordinances restricting the time, place, or manner of speech are not constitutional unless they are: (1) justified without reference to the content of the regulated speech; (2) narrowly tailored to serve a significant governmental interest; and (3) leave open ample alternative channels for communication of the information.[39] A great deal of analysis is involved in applying this test to a particular ordinance.

E. VAGUENESS & OVERBREADTH

1. An ordinance is void if it is so vague that persons of common intelligence must necessarily guess at its meaning and differ as to its application.[40] While it seems this description fits many statutes and ordinances, the courts are sensitive to regulations that are too vague to be reasonably understood. Vague ordinances fail to provide fair warning to the public and impermissibly shift policy decisions to enforcement officials.

2. An ordinance may also be invalidated on the grounds that it is overbroad. The overbreadth doctrine applies when the ordinance is written so broadly that it would apply to both protected and unprotected activities. Challenges for overbreadth usually relate to First Amendment protections. Furthermore, a challenge for overbreadth may only be appropriate when it relates to constitutionally protected rights.[41]

3. To be effective, any restriction on land use must be clearly expressed.[42]

4. Ordinances not encompassing any constitutionally protected conduct are judged for vagueness in light of the conduct that is claimed to be in violation of the ordinance.[43] Such an ordinance must be definite enough to give notice of the conduct required to anyone who desires to avoid its penalties; it must be sufficiently definite to guide the judge in its application and the attorney in defending a person charged with its violation. No more than a reasonable certainty can be demanded.[44]

5. An ordinance that encompasses constitutionally protected conduct is more strictly reviewed and may be challenged on its face. A facial challenge can involve testing the ordinance under hypothetical conditions and may result in it being invalidated even though it may be constitutional under other circumstances.[45]

6. An ordinance will be invalidated on its face as overbroad if the overbreadth is real and substantial.[46]

IV. STATUTORY AND ADMINISTRATIVE RESTRICTIONS

A local government has no inherent power to enact zoning regulations.[47] Instead, a local government receives power to zone only by legislative grant of authority by the state.[48] As such, a local government cannot exceed the limitations imposed by the enabling legislation.[49]

The statutes authorizing local units of government to engage in planning and zoning do contain a number of procedures and restrictions that must be followed. Some of these requirements fall under the procedural due process heading discussed above. However,

there are other statutory provisions that place restrictions on a town's ability to implement planning and zoning.

A. PREEMPTION AND CONFLICT

1. It is possible for state law to cover a particular field of legislation to such an extent that there is no room for local regulation in that field.[50] Legislative intent to preempt a field can either be expressed by statute, or be implied by the courts.

2. A court will typically consider the following four questions to determine whether a particular local ordinance is preempted by state law: (1) What is the subject matter which is to be regulated? (2) Has the subject matter been so fully covered by state law as to have become solely a mater of state concern? (3) Has the legislature in partially regulating the subject matter indicated that is a matter solely of state concern? (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?[51]

3. Conflict is a related concept that measures whether or not a local ordinance is in harmony with and not repugnant to state law. It is possible for a court to find that an ordinance is not preempted by state law, but that it is in conflict with that law because of how it is written. Conflict is determined by considering the following principles: (1) Conflicts which would render an ordinance invalid exist only when both the ordinance and the statute contain express or implied terms that are irreconcilable with each other. (2) Conflict exists where the ordinance permits what the statute forbids. (3) Conflict exists where the ordinance forbids what the statute Expressly permits. (4) No conflict exists where the ordinance, though different, is merely additional and complementary to or in aid and furtherance of the statute.[52]

B. STRICTNESS AND CONSISTENCY REQUIREMENTS

1. The authority of towns to plan and zone is bounded by any county zoning restrictions that may exist.[53]

2. The official controls adopted by a town must not be less restrictive than those of the county.

3. Town official controls must be consistent with the county official controls.

4. Local governments in the seven county metropolitan area must submit their comprehensive plans to the metropolitan council for review.[54] These local governments must also comply with a variety of other requirements associated with planning including a requirement that official controls be in compliance with the comprehensive plan.[55]

C. AMORTIZATION

1. In 1999 the legislature amended the local government zoning statutes to prohibit the use of amortization to eliminate a use that was lawful at the time of its inception.[56] However, the legislature indicated prohibition on amortization does not apply to adults-only bookstores, adults-only theaters, or similar adults-only businesses, as defined by ordinance.

D. REGULATION OF PARTICULAR USES

1. Occasionally, the statutes mention a particular use and indicate the extent to which they may, or may not, be regulated.

2. No regulation may prohibit earth sheltered construction as defined by law, relocated residential building, or certain manufactured homes that comply with all other zoning ordinances.[57]

3. May not adopt zoning ordinances that have the effect of altering the existing density, lot-size requirements, or manufactured home setback requirements in any manufactured home park constructed before January 1, 1995 if the park complies with the density, lot-size and setback requirements existing when it was constructed.[58]

4. Regulations must be uniform for each class or kind of building, structure, or land and for each class or kind of use within a district.[59]

5. May not exclude handicapped persons and children from the benefits of normal residential surroundings.[60]

6. Must consider certain residential facilities, day care facilities, and group family day care facilities as permitted single family residential use of property for the purpose of zoning.[61]

E. NONCONFORMING USES

1. When an existing use is no longer permitted in the zone it is located, it is considered a nonconforming use. These are uses that could not be started in that present location, but because they preexisted the regulation, they are grand-fathered in and permitted to stay. However, the inconsistent nature of the use with surrounding uses typically leads local governments to impose strict limits on the nonconforming uses. These regulations usually: prohibit the expansion or change in the use; if the use is abandoned it may not be restarted; and if the used structure is destroyed it my not be rebuilt. While many local governments adopted similar nonconforming use standards, there was no statutory definition of nonconforming uses. This changed in 2001 legislative session when the legislature created Minn. Stat. § 462.357, subd. 1e.

F. VARIANCES

1. A necessary and difficult aspect of zoning is processing variance requests. Local governments must be extremely careful in the granting or denying of variances. The limited nature of variances increase the potential for challenge if a variance is improperly issued.

2. Because variances allow property to be used in a way forbidden by the ordinances, an applicant carries a heavy burden to show that the grant is appropriate.[62] A much lighter burden is carried by the applicant of a special use permit since the proposed use is expressly authorized by the ordinances.

3. A variance from the literal provisions of an ordinance is only appropriate where strict enforcement would cause ***undue hardship*** because of circumstances unique to the individual property under consideration and then only when the applicant can demonstrate that such actions will be in keeping with the spirit and intent of the ordinance.[63]

    * Undue Hardship means the property cannot be put to a reasonable use if used under conditions allowed by the official controls, 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.[64]

    * Economic considerations alone shall not constitute an undue hardship if reasonable use for the property exists under the terms of the ordinance.

    * A board may not permit as a variance any use that is not permitted under the ordinance for property in the zone where the affected persons land is located.

4. The authority to grant variances cannot exceed the powers granted by the statutes.[65]

5. A reviewing court will set aside a decision on a zoning variance matter if the decision is unreasonable.[66] Reasonableness is measured by the standard set out in the ordinance.

6. A court will not invalidate a city's zoning variance decision if the city acted in good faith and within the board discretion accorded it by statutes and ordinances, and its decision will only be reversed if its stated reasons are legally insufficient or without factual basis.[67]

G. PROCESSING TIME LINES

1. Beyond the standard processing and routing requirements contained in Chapter 462, the legislature has imposed a rigid time line within which zoning requests must be handled.

2. An agency, including towns, must approve or deny within 60 days a written request relating to zoning, septic systems, or other governmental approval of an action.[68] Failure to deny a request in writing stating the reasons for the denial within the prescribed period is deemed an approval of the request. There are certain exceptions to this rule and extension possibilities. Great attention must be paid to the administration and scheduling of zoning and septic request.

3. Zoning authorities must not underestimate the importance of the 60 day rule. Local plans can be seriously disrupted by uses approved by default by operation of the rule. Furthermore, it is not enough to simply have a motion to approve fail. Because the statute speaker of approving or denying a request, a failed motion to approve a request needs to be followed by a motion to deny.

H. INSPECTION & ENFORCEMENT

1. Inspection

   * Although issuing permits and conducting inspections are usually protected by discretionary immunity under the public duty doctrine, there are situations in which those activities may give rise to liability. The question that is discussed is whether the local government moved beyond mere issuance and inspection activities to actually have created a private duty going to the person. If such a direct and private duty is created, liability can result from the negligent performance of that duty.[69] The potential for liability increases if the breach of the private duty creates an unreasonable risk of injury that was reasonably foreseeable to the local government.[70]

2. Enforcement

   * Adopting an official control carries with it the duty of enforcement. Failure to enforce a local zoning ordinance could result in taxpayers petitioning the district court for a writ of mandamus requiring the enforcement of the ordinance.[71] However, tolerance of an unauthorized use by a municipality does not necessary stop it from preventing other impermissible uses.[72] Additionally, A county is not required to enforce a town zoning ordinance unless the town has contracted with the county for such services.[73]

* Liability may arise from enforcement activities if the local government acts negligently in undertaking a clear enforcement duty that does not require the exercise of discretion.[74]

V. ZONING PRACTICES

A. MORATORIUMS

1. Local governments are statutorily authorized to adopt an interim ordinance that may regulate, restrict, or prohibit any use, development, or subdivision for a certain period.[75] Interim ordinances often take the form of a moratorium prohibiting all or particular types of uses. Moratorium ordinances were upheld by the courts as a valid exercise of local zoning authority before the statutes expressly authorized such a restriction.[76]

2. The authority to enact interim ordinances must be exercised for the purpose of protecting the planning process.[77]

3. A municipality may not arbitrarily enact an interim moratorium ordinance to delay or prevent a single project.[78]

B. SPOT ZONING

1. Spot zoning is the reclassification of a small area of land in a manner that is not compatible with the surrounding neighborhood for the benefit of the property owner and to the detriment of others.[79] Such zoning is preferential treatment, piecemeal zoning, the antithesis of planned zoning.[80]

C. DEVELOPING A RECORD

1. An important procedural aspect of zoning is properly conducting the required hearings, which includes developing a complete record. Mishandling a hearing could give rise to a challenge based on a variety of arguments. On the other hand, a well-conducted hearing with a complete record can greatly reduce the likelihood of a successful challenge.

2. If a challenge is brought to district court, the court will Èestablish the scope and conduct of its review of a municipality's zoning decision by considering the nature, fairness and adequacy of the proceeding at the local level and the adequacy of the factual and decisional record of the local proceeding.[81] If local zoning proceedings are not fair, or if the record of the proceedings are not clear and complete, the parties are entitled to a trial or an opportunity to augment the record in district court.[82] Lack of a record also creates a presumption that the local government acted arbitrarily. If a decision is found to be arbitrary, the court is likely to overrule the decision on its face. Otherwise, the district court proceeding

will be “on the record” developed by the local government. Proceedings on the record have a limited scope, which is usually beneficial to the local government and results in a substantial saving of time and money. Every town engaged in planning and zoning must develop a procedure for developing a record.

ENDNOTES

1. State, by Rochester Association of Neighborhoods v. City of Rochester, 268 N.W.2d 885, 888 (Minn. 1978).

2. Sagstetter v. City of St. Paul, 529 N.W.2d 488, 492 (Minn. App. 1995) (citations omitted).

3. Honn v. City of Coon Rapids, 313 N.W.2d 409, 416-17 (Minn. 1981).

4. City of Rochester, 268 N.W.2d at 888.

5. Honn, 313 N.W.2d at 415 (citations omitted).

6. Id. at 417.

7. Id.

8. Id. (citations omitted).

9. Curtis Oil v. City of North Branch, 364 N.W.2d 880, 883-84 (Minn. App. 1985) (citations omitted).

10. Hay v. Township of Grow, 206 N.W.2d 19, 22 (Minn. 1973); see also Odell v. City of Eagan, 348 N.W.2d 792, 796 (Minn. App. 1984) (citations omitted).

11. Communications Properties, Inc. v. County of Steele, 506 N.W.2d 670, 672 (Minn. App. 1993) (citations omitted).

12. Alexandria Lake Coalition Inc. v. Douglas County, 348 N.W.2d 369, 371 (Minn. App. 1981).

13. Id. (citations omitted).

14. Earthburners, Inc. v. County of Carlton, 513 N.W.2d 460, 463 (Minn. 1994).

15. Id. (citations omitted).

16. SuperAmerica Group, Inc., a Div. of Ashland Oil, Inc. v. City of Little Canada, 539 N.W.2d 264, 267 (Minn. App. 1995) (citations omitted).

17. BBY Investors v. City of Maplewood, 467 N.W.2d 631, 635 (Minn. App. 1991).

18. SuperAmerica, 539 N.W.2d at 267.

19. Scott County Lumber Co., Inc. v. City of Shakopee, 417 N.W.2d 726, 726-27 (Minn. App. 1988) (citations omitted).

20. Metro 500, Inc. v. City of Brooklyn Park, 211 N.W.2d 358, 363 (Minn. 1973).

21. Luger v. City of Burnsville, 295 N.W.2d 609, 612 (Minn. 1980) (citations omitted).

22. Golden v. City of St. Louis Park, 122 N.W.2d 570, 577 (Minn. 1963).

23. State v. Northwestern Preparatory Schools, 37 N.W.2d 370, 371 (Minn. 1949).

24. Pilgrim v. City of Winona, 256 N.W.2d 266, 270 (Minn. 1977).

25. Minn. Stat. § 462.357, subd. 3; see also Minn. Stat. § 599.13.

26. Littlefield v. City of Afton, 785 F.2d 596 (8th Cir. 1986).

27. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

28. Naegele Outdoor Advertising Co. of Minneapolis v. City of Lakeville, 532 N.W.2d 249, 252 (Minn. App. 1995) (citations omitted).

29. Wheeler v. City of Wayzata, 511 N.W.2d 39, 41 (Minn. App. 1994) (citations omitted).

30. First Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 304 (1987).

31. Nollan v. California Costal Commn., 438 U.S. 825 (1987).

32. State v. Northwestern Preparatory Schools, 37 N.W.2d 370, 371 (Minn. 1949).

33. 42 U.S.C. § 1981 (Equal rights under the law); 42 U.S.C. § 1982 (Property rights of citizens); 42 U.S.C. §§ 3601-3617 (Fair Housing Act of 1968).

34. 42 U.S.C. § 1983. This section is often cited in suits based on a claimed deprivation of rights. The section provides that: Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party inured in an action at law, suit in equity, or other proper proceeding for redress.

35. Northwestern College v. City of Arden Hills, 281 N.W.2d 865, 869 (Minn. 1979) (citations omitted).

36. Id. (quoting Hay v. Township of Grow, 206 N.W.2d 19, 24 (Minn. 1973)).

37. Northwestern Preparatory Schools, 37 N.W.2d at 371.

38. Goward v. City of Minneapolis, 456 N.W.2d 460, 464 (Minn. App. 1990).

39. Id.

40. Connally v. General Construction Co., 269 U.S. 385, 391 (1926).

41. See State v. Holmberg, 527 N.W.2d 100 (Minn. App. 1995).

42. Medical Services, Inc. v. City of Savage, 487 N.W.2d 263, 266 (Minn. App. 1992) (citations omitted).

43. State v. Bjornson, 378 N.W.2d 4, 8 (Minn. App. 1985) (citations omitted).

44. Id. (citations omitted).

45. State v. Castellano, 506 N.W.2d 641, 645 (Minn. App. 1993).

46. Id. (citations omitted).

47. Costley v. Varomin House, Inc., 313 N.W.2d 21, 27 (Minn. 1981).

48. Id. (citations omitted).

49. Id.

50. Mangold Midwest Co. v. Village of Richfield, 143 N.W.2d 813, 819 (Minn. 1966) (citations omitted).

51. Id.

52. Id.

53. Minn. Stat. § 394.33, subd. 1.

54. Minn. Stat. § 473.859.

55. Minn. Stat. § 473.858; see generally M.S. §§ 473.851-.871.

56. Minn. Stat. § 462.357, subd. 1c.

57. Minn. Stat. § 462.357, subd. 1.

58. Minn. Stat. § 462.357, subd. 1a.

59. Minn. Stat. § 462.357, subd. 1.

60. Minn. Stat. § 462.357, subd. 6a.

61. Minn. Stat. § 462.357, subd. 7. See also, Minn. Stat. § 462.357, subd.8.

62. Luger v. City of Burnsville, 295 N.W.2d 609, 612 (Minn. 1980).

63. Minn. Stat. § 462.357, subd. 6(2).

64. Minn. Stat. § 462.357, subd. 6(2) (emphasis added).

65. Sagsetter v. City of St. Paul, 529 N.W.2d 488, 491 (Minn. App. 1995) (citations omitted).

66. Id. (citations omitted).

67. Id. (citations omitted).

68. Minn. Stat. § 15.99, subd. 2.

69. Gilbert v. Billman Const., Inc., 371 N.W.2d 542 (Minn. 1985); see Cracraft v. City of St. Louis Park, 279 N.W.2d 801 (Minn. 1979) (setting out factors to determine when a private duty is created).

70. Gilbert, 371 N.W.2d at 546 (quoting Lorshbough v. Township of Buzzle, 258 N.W.2d 96, 102 (Minn. 1977)).

71. Haen v. County Bd. Of Comrs, 495 N.W.2d 469 (Minn. App. 1993) (citations omitted).

72. NBZ Enterprises, Inc. v. City of Shakopee, 489 N.W.2d 531, 537 (Minn. App. 1992) (citations omitted).

73. Scinocca v. St. Louis County Bd. Of Commrs., 281 N.W.2d 659 (Minn. 1979).

74. Waste Recovery Co-op of Minnesota v. County of Hennepin, 517 N.W.2d 329, 333 (Minn. 1994).

75. Minn. Stat. § 462.355, subd. 4.

76. Almquist v. Town of Marshan, 245 N.W.2d 819 (Minn. 1976).

77. Medical Services, Inc. v. City of Savage, 487 N.W.2d 263, 267 (Minn. App. 1992).

78. Id. (citations omitted).

79. Amcon Corp. v. City of Eagan, 348 N.W.2d 66, 73 n.6 (Minn. 1984) (citations omitted).

80. Id. (citations omitted).

81. Swanson v. City of Bloomington, 421 N.W.2d 307, 312-13 (Minn. 1988).

82. Id. at 313.