

**PLANNING AND ZONING ESSENTIALS**  
**TOWN LAW REVIEW**  
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# TOPICS

- Open Meeting Law Considerations
- Record
- Findings
- Public Hearing Process
- Variances
- Conditional Use / Interim Use Permits
- Rezoning / Spot Zoning
- Non-conformities
- Conflict of Interest Considerations

# PUBLIC MEETINGS



# OPEN MEETING LAW

- **Purpose:** The Open Meeting Law serves three purposes:
  - (1) "to prohibit actions being taken at a secret meeting where it is impossible for the interested public to become fully informed concerning [public bodies'] decisions or to detect improper influences";
  - (2) "to assure the public's right to be informed"; and
  - (3) "to afford the public an opportunity to present its views to the [public body]." *St. Cloud Newspapers, Inc. v. Dist. 742 Cmty. Schs.*, 332 N.W.2d 1, 4 (Minn. 1983) (citations omitted).
- These purposes are deeply rooted in the fundamental proposition that a well-informed populace is essential to the vitality of our democratic form of government. (footnote omitted)
- Because the Open Meeting Law was enacted for the public benefit, it was construed in favor of public access.

# OPEN MEETING LAW

- **Meetings**

- What is and is not a meeting?
- Statute simply says all meetings must be open to the public.
- The Minnesota courts have determined the Minnesota Open Meeting Law applies to any gathering or “meeting” of a quorum or more of public officials where the members discuss, decide or retrieve information as a group on issues related to the official business of the public body.
- Common misconception – didn’t decide anything, but you did “receive” something.

# SITE INSPECTIONS



# PRINTED MATERIALS

- Minn. Stat. § 13D.01, subd. 6:
- Public must have access to at least one copy of the printed materials provided to the council for public inspection.
  - Including: memos, e-mails, other documents
  - Classified material does not apply

# NOTICE OF MEETINGS

- A schedule of regular meetings is to be kept on file.
- The same notice required for a special meeting must be given when a regular meeting occurs at a different time or place than what is stated in the schedule of regular meetings.
- Notice of the date, time, place and purpose of special meetings must be given three (3) days before the date of the meeting.
- Emergency meetings (requiring immediate consideration on a matter) may be held upon good faith efforts to provide notice, including the subject of the meeting, to each medium that has filed a written request for notice.
- Notice requirements also apply to closed meetings.

# NOTICE OF MEETINGS

- State law sets forth the notice requirements for public hearings involving conditional use permits and variances. This includes requirements regarding published notice, notice to neighbors, etc.
- The notice must identify the general purpose of the hearing. They do not require the specific details of the proposal be disclosed.

# THE RECORD

- The record consists of that evidence considered by the municipality when making the permit decision. ***Swanson v. City of Bloomington*, 421 N.W.2d 307 (1988)**.
- The record includes all documents that come before the Board or Council as a part of "the file", including minutes, reports, letters, applications, other submittals and findings.
- The record may also include documents not physically submitted at the hearing on an application if the documents were referred to or testified to at the hearing and had been received by the decision-maker previously.
- Documents reflecting the historical designation, regulation and character of the property, including photographs, are part of the record even if they were not presented to the decision-making body.

# THE RECORD

- Observations at a site visit are part of the record if they are reduced to some sort of writing. For example, Board or Council members' shared observations of what they saw of a property are often reflected in minutes.
- In almost all cases, an adequate record precludes the applicant from introducing new data during an appeal of the municipality's decision.
- During judicial review, a court will review the "record," and determine whether the decision of the Board or Council was reasonable in light of record evidence.

# THE IMPORTANCE OF THE RECORD

- The general standard of judicial review in zoning matters is whether the zoning authority's action was reasonable. Substantial deference is given to the decisions of municipalities in zoning matters.
- It is not the province of the court to substitute its judgment for that of the municipality, but merely to determine whether the body was within its jurisdiction, was not mistaken as to the applicable law, and did not act arbitrarily, oppressively or unreasonably, and to determine whether the evidence could reasonably support or justify the determination.

# THE HEARING - DUE PROCESS

- Under state and federal law the right to due process means the right to notice and an opportunity to be heard.
- The right to procedural due process does not normally include the right to cross examine witnesses.
- The right to procedural due process can be analogized to a right to a fundamentally fair process. Time limits are fine.

# PREJUDGMENT/BIAS

- The test for determining whether a decision maker is unbiased is whether the decision maker's situation could tempt "the average man" as a judge to forget the burden of proof required to rule against an alleged violator.
- ***In re Khan*, 804 N.W.2d 132 (Minn. App. 2011)** (Kahn failed to show that a three year contract with the city to provide hearing officer services would tempt an average judge to forget burden of proof and rule in favor of city.)

# PREJUDGMENT/BIAS

- Prejudgment/bias shown before hearing can invalidate a decision.
  - ***Continental Property Group v. Minneapolis*, 2011 WL 1642510 (Minn. App.).**
  - ***Living Word Bible Camp v. County of Itasca*, 2012 WL 4052868 (Minn. App.).**
- Constituent contacts.

# FINDINGS OF FACT

- Findings of fact are necessary to support a decision.
- Findings of fact apply the facts in the record to the standards set forth in the ordinance.
- Findings are your reasons why a permit should be granted or denied.
- Must follow ordinance requirements for findings. **Bio Wood Processing, LLC v. Rice Cty. Bd. of Comm'rs** (remanding denial of an application for an amended conditional-use permit to correct a procedural defect).

# FINDINGS OF FACT

- The use of a checklist is acceptable.
- Samples provided.

# NEIGHBORHOOD OPPOSITION

- The saying "neighborhood opposition itself is not enough to justify the denial of a permit" is shorthand for a more nuanced principle.
- Neighbors can and often do have information pertinent to the decision being made.
- "Concrete information" from neighbors can be pertinent and relied upon. This means observations concerning personal experiences regarding current conditions capable of being observed by average citizens are the type of information courts say is "concrete" and capable of being relied upon by decision-makers.
- Generalized statements reflecting speculative fears of future occurrences, and statements not within the realm of the person's personal knowledge, are not "concrete."

# BOARD COMMENTS

- Personal experience and knowledge can be the basis for a finding, also if based on “concrete information.”
- Be careful to avoid inflammatory comments.

# THE VARIANCE STATUTE

## **Minnesota Statutes § 462.357, Subd. 6**

- Variances shall only be permitted when they are in harmony with the general purposes and intent of the official control and when the variances are consistent with the comprehensive plan.
- Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the official control. "Practical difficulties," as used in connection with the granting of a variance, means that the property owner proposes to use the property in a reasonable manner not permitted by an official control; 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.
- No variance may be granted that would allow any use that is not allowed in the zoning district in which the subject property is located.
- The board of adjustment may impose conditions in the granting of variances. A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.

# USE VARIANCE



# ORDINANCE / COMPREHENSIVE PLAN

- Is the variance in harmony with the general purposes and intent of the official control?
- Is it consistent with the comprehensive plan?

# PRACTICAL DIFFICULTIES

- The property owner proposes to use the property in a reasonable manner not permitted by an official control.
- The plight of the landowner is due to circumstances unique to the property not created by the landowner.
- The variance will not alter the essential character of the locality.
- Economic considerations alone do not constitute practical difficulties.

# FINDINGS, FINDINGS, FINDINGS

- **BOA must find ALL statutory criteria is met to justify the grant of a variance.**
- Avoid voting to simply grant or deny variance, before discussing all the statutory criteria.
- Deferential standard of review.
- Use Checklists.

# BOA STRUGGLES WITH FINDINGS

***In re Appeal from a Decision by St. Louis Cnty., Bd. of Adjustment, 2016 WL 3129417 (Minn. App. June 6, 2016), review denied, (Aug. 23, 2016)***

- Appellant was granted an after-the-fact setback variance for his garage and his neighbors appealed the BOA's decision. The district court granted the neighbors' summary judgment motion, ordering appellant to remove or relocate the garage.
- On appeal, the court concluded some of the BOA's findings were inconsistent with its ultimate conclusion and reversed and remanded for the BOA's reconsideration of the variance application.

# CONDITIONS

- A condition must be directly related to and must bear a rough proportionality to the impact created by the variance.
- Be careful with legal non-conforming structures. **See Minn. Stat. § 117.184.**
  - Requiring the removal of a legal non-conforming use as a condition for the issuance of a variance constitutes a taking and is prohibited without the payment of just compensation.

# SAMPLE CONDITIONS

- That the applicant undertake the project according to the plans and specifications submitted to the town with the application.
- That the variance is invalid, or expires, if the holder has not substantially completed the building within [insert period of time] of the granting of the permit.
- That the variance will be periodically reviewed by the town to assure compliance with the permit and permit conditions.
- That the town may enter onto the premises at reasonable times and in a reasonable manner to ensure the variance holder is in compliance with the conditions and all other applicable statutes, rules and ordinances.

# CONDITIONS TO AVOID

- Removal of non-conformity
- Precedent
  - This is not a statutory factor
  - Each application is assessed individually
- No further variances will be granted for a property

# AFTER-THE-FACT VARIANCES

- Additional considerations – still must meet statutory criteria:
  - Did the applicant act in good faith and attempt to comply with the ordinance?
  - Did the applicant make a substantial investment?
  - Is the construction completed?
  - Are there similar structures in the area?
  - Are the town's benefits outweighed by the applicant's burden if the applicant were required to comply with the ordinance?

# CONSISTENCY / EQUAL PROTECTION

- A zoning ordinance must operate uniformly on those similarly situated.
- The 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.”

***Nw. Coll. v. City of Arden Hills***, 281 N.W.2d 865, 869 (Minn. 1979).

# ZONING UPDATES

- If a town finds it is issuing many variances to a particular standard, then the town may wish to consider amending the ordinance to change the standard.
- In other words, if a town is consistently allowing landowners to break a particular rule, perhaps the need for the rule should be revisited.

# CONDITIONAL USE PERMITS

- Conditional uses may be approved by the governing body or other designated authority by a showing by the applicant that the standards and criteria stated in the ordinance will be satisfied.
- **Minn. Stat. § 462.3595, subd. 1.**

# CUP DECISION-MAKING

- State law places burden on applicant to “show” that its proposed use meets the standards and criteria for granting a CUP.
- Quasi-judicial decision, which is afforded deference – grants of CUPs are held to a lower standard than denials.

# CUP - CONDITIONS

- If a municipality can impose additional conditions on a CUP that will satisfy any issue raised during the application process, denying the application rather than issuing the CUP subject to the additional conditions may indicate arbitrary action. See ***Trisko v. City of Waite Park***, 566 N.W.2d 349 (Minn. App. 1997) (“Evidence that a municipality denied a conditional use permit without suggesting or imposing conditions that would bring the proposed use into compliance may support a conclusion that the denial was arbitrary”); ***In re Lawrence***, 2009 WL 438058 (Minn. App. 2009); ***Buberl Recycling & Compost, Inc. v. Chisago County***, 2009 WL 274623 (Minn. App. 2009).

# CUP - CONDITIONS

- The Vigstols sought a CUP to use their property as a wedding venue, which the planning commission recommended with 20 conditions. The county board denied the permit after substantial public opposition. The court of appeals reversed, finding the reasons cited by the board for denial were too speculative and not supported by the record.

***Vigstol v. Isanti County Board of Commissioners***, 2014 WL 6862933 (Minn. App. Dec. 8, 2014).

# CUP - CONDITIONS

- There must be a nexus between the condition imposed and the land use desired. **See *Middlemist v. City of Plymouth***, 387 N.W.2d 190 (Minn. App. 1986) (finding there was not a sufficient nexus between the city's requirement for a donation of land for a collector street and the proposed land use).

# CUP - RECORDING

- A CUP must be recorded. The recording shall include a legal description of the property.

# CUP – COMPREHENSIVE PLAN

- ***RDNT, LLC v. City of Bloomington***, 2014 WL 30382 (Minn. App., Jan. 6, 2014) (indicating conflict with comprehensive plan typically is a legally sufficient ground for denying a CUP application)
- Minnesota Supreme Court affirmed, but did not reach comprehensive plan issue.



# CUP DENIALS

- Bio Wood asserts that the factual findings are not supported by the record. But the planning commission transcript shows that it considered each of the topics related to the findings it eventually made on the record: the concern about nighttime noise, the best interests of the community in restricting nighttime noise, the incompatibility of unrestricted use with the uses of surrounding land, the negative effect that 24/7 use would have on a business, Bio Wood's inconsistent compliance with previous CUP conditions, and the necessity of restricting hours of operation to protect public health and safety.

***Bio Wood Processing, LLC v. Rice Cty. Bd. of Comm'rs,***  
2015 WL 7202504(Minn. App. Nov. 16, 2015)

# CUP DENIALS

- County board could consider effects of noise from landowner's desired use of property even if noise level did not surpass Minnesota Pollution Control Agency noise standards.

***August v. Chisago Cty. Bd. of Comm'rs***, 868 N.W.2d 741 (Minn. App. 2015)

# CUP DENIALS

- The findings also express a concern that granting the request for 20 days per year of new crowd-drawing events in addition to Hay Days, with no limitations on scale beyond the physical limitations that the event be contained within Sno-Barons' 140 acres and 8,600 parking spots, would draw too much traffic and congestion to a rural area with limited road access

***Sno-Barons Snowmobile Club, Inc., v. Chisago Cty. Bd. of Commissioners***, 2017 WL 1157888 (Minn. App. Mar. 27, 2017)

# CUP - DURATION

- CUP shall remain in effect so long as the agreed upon conditions are observed.
- Can time limits be included in CUPs? See *Minn. Op. Atty. Gen. 59A-32* (1990) (stating conditions in CUPs issued pursuant to Minn. Stat. § 462.3595 could not include limitations on the duration of the permit, especially since the legislature created a mechanism for limited land use permits – interim permits).
- Municipalities can amend their official controls thus changing the status of a conditional use to one of a legal non-conforming use.

# CUP – FAILURE TO ACT

- CUP can have a time limit to act on it, or it is void and never effective. **See *State by Minneapolis Park Lovers v. City of Minneapolis***, 468 N.W.2d 566 (Minn. App. 1991) (finding CUP voided where city ordinance stated a CUP expired if the conditional use ceased for more than one year).

# CUP- REVOCATION

- A conditional use permit shall remain in effect as long as the conditions agreed upon are observed. Minn. Stat. § 462.3595, subd. 3.
- Any revocation proceeding requires due process, meaning notice and a hearing.

# INTERIM USE PERMITS

- **Minnesota Statutes § 462.3597**
  - Authority to allow a use until a particular date, event, or until zoning ordinance no longer permits.

# REZONING

- A decision to rezone a property is a quasi-legislative decision, entitled to deference. It is a policy decision.
- Consistency with comprehensive plan a factor.
- Still subject to review of the record and findings to determine if the decision was reasonable, and not arbitrary and capricious.

# SPOT ZONING

- Spot zoning represents the reclassification of a small area of land in a manner not compatible with the surrounding neighborhood for the benefit of the property owner and to the detriment of others. ***Alexander v. City of Minneapolis***, 125 N.W.2d 583, 586 (Minn. 1963).
- It applies when a zoning change establishes a use classification inconsistent with surrounding uses, creating an island of nonconforming use within a larger zoned district.
- The burden of demonstrating spot zoning rests with the litigant attacking the zoning change with the usual presumption of validity attaching to the zoning amendment.

# NON-CONFORMITIES



*Mertensotto v. Crow Wing County (2004)*

# NON-CONFORMITIES

- **Minnesota Statutes § 462.357, subd. 1e**
- **Subd. 1e. Non-conformities. (a) Except as otherwise provided by law, any non-conformity, including the lawful use or occupation of land or premises existing at the time of the adoption of an additional control under this chapter, may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion . . .**

# NON-CONFORMITIES

- How do you define expansion versus improvement?

# SAMPLE DEFINITIONS

“Expansion,” “enlargement,” or “intensification” means any increase in a dimension, size, area, volume, or height, any increase in the area of use, any placement of a structure or part thereof where none existed before, any addition of a site feature such as a deck, patio, fence, driveway, parking area, or swimming pool, any improvement that would allow the land to be more intensely developed, any move of operations to a new location on the property, or any increase in intensity of use based on a review of the original nature, function or purpose of the non-conforming use, the hours of operation, traffic, parking, noise, exterior storage, signs, exterior lighting, types of operations, types of goods or services offered, odors, area of operation, number of employees, and other factors deemed relevant to the town.

# SAMPLE DEFINITIONS

“Improvement” means making the non-conforming use better, more efficient, or more aesthetically pleasing, including any change that does not replicate what pre-existed, but does not include an expansion, enlargement or intensification.

# SAMPLE DEFINITIONS

“Replacement,” “reconstruction,” or “restoration” means construction that exactly matches pre-existing conditions.

# CONFLICT OF INTEREST



# PROHIBITED CONFLICTS

- Minn. Stat. § 471.87: “Except as authorized in Section 471.88, a **public officer** who is authorized to take part in any manner in making any **sale, lease, or contract** in official capacity shall not voluntarily have a **personal financial interest** in that sale, lease, or contract or **personally benefit** financially therefrom. Every public officer who violates this provision is guilty of a gross misdemeanor.”

# EXCEPTIONS

- Minn. Stat. § 471.88, subd. 5: A contract for which **competitive bids** are not required by law.
- Minn. Stat. § 471.88, subd. 2: The **designation of a bank** as an authorized depository for public funds, or as a source of borrowing upon certain conditions.
- Minn. Stat. § 471.88, subd. 3: The **designation of an official newspaper** when it is the only newspaper complying with statutory requirements relating to designation or publication.
- Minn. Stat. § 471.88, subd. 4: A **contract with a cooperative association** of which the officer is a shareholder.

# EXCEPTIONS - CONTINUED

- Minn. Stat. § 471.88, subd. 6: A **contract with a volunteer fire department** for the payment of compensation to its members or for the payment of retirement benefits.
- Minn. Stat. § 471.88, subd. 13: **Rental of space in a public facility** at a rate commensurate with that paid by other members of the public.
- Minn. Stat. § 471.88, subd. 15: **Franchise agreement** - employee of a public utility may serve as a city council member during the term of the franchise agreement so long as the council member abstains from voting on official action relating to the franchise agreement and discloses the reason for the abstention in the minutes.

# CONSEQUENCES OF A VIOLATION

- Contract is void.
- Applies to any contract in which official is “authorized to take part.” Therefore, it does not matter whether or not officer abstains from voting.

# CONFLICT IN NON-CONTRACT SITUATION

- The purpose behind the creation of a rule which would disqualify public officials from participating in proceedings in a **decision-making capacity** when they have a **direct interest in its outcome** is to ensure that their decision will not be an arbitrary reflection of their own selfish interests. There is no settled general rule as to whether such an interest will disqualify an official.

# CONFLICT IN NON-CONTRACT SITUATION

*Lenz v. Coon Creek Watershed District:*

- The nature of the decision being made.
- The nature of the financial interest.
- The number of interested officials.
- The need, if any, for the interested persons to make the decision.
- Other means available.

# CONFLICT

- Since a town board member owned property across from a bar that was subject to a liquor license renewal decision, he was disqualified from voting on the license renewal. The town board member stated his property had been devalued by \$100,000 since the bar had opened, and he was elected to the board based largely on his opposition to the bar. The court stated, “A more direct, admitted, financial interest is hard to imagine.”
- In *E.T.O., Inc. v. Town of Marion*, 375 N.W.2d 815 (Minn. 1985)

# EXAMPLES OF NON-CONTRACT SITUATIONS

- Improvement of Creek – **No conflict**
- Establishment of ditch that drained Commissioner's land – **Conflict**
- Renewal of liquor license located next to Town Supervisor's land – **Conflict**
- Church affiliation – **No Conflict**
- Street Vacation – **Conflict**
- Rezoning on your own property - **Conflict**

# CONSEQUENCE OF A VIOLATION

A disqualifying interest does not affect the result if the requisite majority without the interested official takes action.

Actions for which a disqualified member votes are void where the vote of the member is necessary to make up the number of votes required to take the action.

# DISCLOSURE

- Minn. Stat. § 10A.07: If an official is required to take an action or make a decision that would substantially affect the official's financial interests:
  - (a) Prepare a written statement describing the matter requiring action or decision and the nature of the potential conflict of interest;
  - (b) Deliver copies of the statement to the official's immediate supervisor, if any; and
  - (c) if a member of the governing body, deliver a copy of the statement to the presiding officer of the body of service.

# CONFLICT CHECKLIST

Consult with the town attorney.

- Make disclosure at the earliest stage preceding the discussion.
  - Make oral disclosure to the governing body or board.
  - Make written disclosure, as necessary.
- Do not vote or take any official action unless the town attorney decides there is no prohibited conflict of interest.
- Do not influence others.
- Do not participate in the discussion, either at the time of the vote or earlier.
- Leave the room when the governing body is discussing the matter.

# NO BRIBERY

- Minn. Stat. § 375.09, Subd. 2 “No commissioner shall receive any money or other valuable thing as a condition of voting or inducement to vote for any contract or other under consideration by the board.”
- Any votes or contracts made contrary to this section are void.

# QUESTIONS