INFORMATION MEMO

Zoning Decisions

Zoning decisions are the source of controversy and confusion in many communities. Understanding a city's zoning authority and the standards associated with various zoning tools is important in navigating controversy and dispelling confusion. This memo discusses the nature of a city's decision-making authority and the legal standards associated with variances, conditional use permits, and nonconformities.

RELEVANT LINKS:

Learn more about zoning decisions in LMC information memos *Zoning Guide for Cities* and *Planning and Zoning 101*.

I. Level of authority

Zoning is a method of establishing a land use pattern by regulating the way land is used by landowners. A zoning ordinance, comprised of text and a map, generally divides a city into various districts and sets standards regulating uses in each district. A city has considerably broader authority when creating its zoning ordinance than it does when administering the same ordinance. Consequently, it is important for a city to be aware of what authority it is acting under whenever making a particular zoning decision.

When adopting or amending a zoning ordinance, a city council is exercising so-called "legislative" authority. The council is advancing health, safety, and welfare by making rules that apply throughout the entire community. When acting legislatively, the council has broad discretion and will be afforded considerable deference by any reviewing court. City councils are ultimately accountable to the voters for legislative decisions.

In contrast, when applying an existing zoning ordinance, a city council is exercising so-called "quasi-judicial" authority. The task is to determine the facts associated with a particular request, and then apply those facts to the legal standards contained in the zoning ordinance and relevant state law. A city council has less discretion when acting quasi-judicially, and a reviewing court will examine whether the city council applied rules already in place to the facts before it. In general, if the facts indicate the applicant meets the relevant legal standard, then they are likely entitled to the approval. Variances and conditional use permits are two commonplace zoning tools that are quasi-judicial in nature.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

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RELEVANT LINKS:

See Appendix A: Pyramid of discretion.

The amount of discretion a city has when making legislative versus quasi-judicial decisions is represented by the planning and zoning "pyramid of discretion." The bottom of the pyramid is where a city has the most discretion—when creating a comprehensive plan and corresponding land uses ordinances, such as a zoning ordinance. A city has less discretion when making quasi-judicial decisions as represented by the middle of the pyramid—the city is constrained by the ordinance and law that make up the foundation below.

II. Variances

LMC information memo, *Land Use Variances*.

Variances are an exception to rules laid out in a zoning ordinance. They are permitted departures from strict enforcement of an ordinance provision as applied to a particular piece of property if enforcement would cause "practical difficulties." Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan. Variances are generally for dimensional standards (such as setbacks or height limits) and may not be used to allow a use that is prohibited in the particular zoning district. Essentially, variances allow the landowner to break the dimensional rules that would otherwise apply.

A. Practical difficulties

Minn. Stat. § 462.357, sub. 6.

"Practical difficulties" is a legal standard set forth in state law. Minnesota cities must apply the state statutory standard when considering applications for variances. The statute provides that requests for variances are heard by a body called the board of adjustment and appeals; in many smaller communities, the planning commission serves that function. Generally, the board's decision is subject to appeal to the city council. Under the statutory practical difficulties standard, a city may grant a variance if the facts satisfy the three-factor test for practical difficulties.

1. Use property in a reasonable manner

The first practical difficulties factor is that the property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a particular reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance. For example, if the variance application is for a building too close to a lot line, or does not meet the required setback, the focus of the first factor is whether the request to place a building there is reasonable.

RELEVANT LINKS:

2. Circumstances unique to the property

The second practical difficulties factor is that the landowner's plight is due to circumstances unique to the property not caused by the landowner. The uniqueness generally relates to the physical characteristics of the particular piece of property; that is, to the land and not personal considerations of the landowner. The statute further notes that economic considerations alone cannot create practical difficulties.

3. Maintain essential character of the locality

The third practical difficulties factor is that the variance, if granted, will not alter the essential character of the locality. This factor generally contemplates whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area.

B. Granting variances

If the facts surrounding a variance application satisfy all three of the statutory factors, then a city may grant the variance. State statute further provides variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance, and when the terms of the variance are consistent with the comprehensive plan. So, in addition to the three-factor practical difficulties test, a city evaluating a variance application should make findings as to:

- whether or not the variance is in harmony with the purposes and intent of the ordinance, and
- whether or not the variance is consistent with the comprehensive plan.

Whatever the ultimate decision on a particular variance application, a city should carefully consider each of the three factors of the statutory practical difficulties standard. While past practice may be instructive, it cannot replace the need for analysis of all three of the practical difficulties factors. Cities should review their zoning ordinance for provisions relating to variances to be sure they are consistent with the state statutory standard for practical difficulties.

RELEVANT LINKS:

If a city finds it is issuing many variances to a particular standard, then the city may wish to consider the possibility of amending the ordinance to change the standard. In other words, if a city is consistently allowing landowners to break a particular rule, perhaps the need for the rule should be revisited. It could appear that the properties' plight was not particularly unique, or even that there is not an underlying reasonable basis for the rule. City councils have broad legislative authority when writing the rules, but when evaluating a variance application cities are limited to the quasi-judicial role of applying the state practical difficulties standards to the facts before them.

III. Conditional and interim use permits

Minn. Stat. § 462.3595.

LMC information memo, *Land Use Conditional Use Permits.*

Conditional use permits are authorized under state law. Whether to grant or deny a conditional use permit application is another zoning decision that is quasi-judicial in nature. A conditional use is a use that is generally compatible with a particular zoning district but because of hazards inherent in the use itself or because of special problems that its proposed location may present, the use is allowed by permit only if the special concerns are addressed as set forth in the zoning ordinance.

The zoning ordinance typically details both the general standards that apply to all conditional uses, and the specific conditions that apply to a particular conditional use in a given zoning district. The conditions must be reasonable and practical. Unlike a permitted use, which a landowner is generally entitled to as a matter of right, a conditional use is allowed only after a statutorily required public hearing. Reasonable conditions may be attached to a conditional use permit based upon factual evidence contained in public record.

Learn more about land use issues in the land use section of the League's website.

City councils sometimes misunderstand the level and the nature of discretion they have when reviewing applications for conditional use permits. If a proposed conditional use satisfies the conditional use standards set forth in the zoning ordinance, then generally the landowner is entitled to the conditional use permit. The city made the legislative decision about the appropriateness of a kind of use in a zoning district when the council adopted the ordinance providing for the use as conditional. When considering a conditional use permit application, the city is tasked with the more limited quasi-judicial role of considering whether the facts of a particular application satisfy the standards set forth in the ordinance. If the belief is that a kind of use is unacceptable in a given zoning district, then consider not listing the use as a conditional one in the district in the first instance.

RELEVANT LINKS:

Minn. Stat. § 462.3595, subd. 3.

A.G. Op. 59-A-32 (February 27, 1990).

A conditional use permit is a property right that "runs with the land" so it attaches to and benefits the land and is not limited to a particular landowner. The state statute provides that a conditional use permit shall remain in effect as long as the conditions agreed upon are observed. The attorney general has opined that time limits such as sunset provisions or automatic annual review to include possible termination are not consistent with state law. The attorney general explained that cities may not enact or enforce ordinance provisions for conditional use permits which allow the city to terminate permits regardless of whether or not the conditions agreed upon are reserved. However, a city can certainly revoke a conditional use permit if there is not substantial compliance with conditions, so long as the revocation is based upon factual evidence, after appropriate notice and hearing.

Minn. Stat. § 462.3597.

If a city wishes to place time constraints on particular uses, then the appropriate zoning tool is an interim use permit, rather than a conditional use permit. A state law passed in 1989 authorizes interim use permits for a temporary use of property until a particular date, until the occurrence of a particular event, or until zoning regulations no longer permit it.

Cities may wish to employ interim use permits for uses that are not consistent with the city's long term plan and vision for the particular area, or where the use itself has a limited lifecycle. Interim use permits should be provided for in the city's zoning ordinance. A public hearing is required prior to issuance, and the land owner generally enters into an agreement with the city.

Cities should periodically review their zoning ordinances to determine whether the conditional uses listed are uses that remain appropriate for the particular zoning district, and to make sure the conditions under which the uses will be allowed are specifically set forth. Cities have broad legislative discretion when establishing uses and conditions in their ordinance. But when administering conditional uses set forth in the ordinance, cities are acting in their more limited quasi-judicial capacity and are constrained to applying the standards in the ordinance to the facts of a particular application.

RELEVANT LINKS:

IV. Nonconformities

Nonconformities are uses, structures, or lots that do not comply with the current zoning ordinance.

A. Legal nonconformities

LMC information memo, *Land Use Nonconformities.*

Minn. Stat. § 462.357, sub. 1e.

Legal nonconformities are those that were legal when the zoning ordinance or amendment was adopted, in that they complied with preexisting ordinance and law. The rights of legal nonconformities are often referred to as grandfather rights. Legal nonconformities generally have a statutory right to continue unless:

- the use is discontinued for more than one year, or
- the structure is destroyed by more than 50% of its assessed market value, and no building permit is applied for within 180 days.

Legal nonconformities may be continued, including through repair, replacement, restoration, maintenance, or improvement, but not including expansion. There is a limitation to the continuance rights for nonconformities in National Flood Insurance Program (NFIP) floodplain areas. Despite their right to continue without complying with the current zoning ordinance, it is important to keep in mind that all legal nonconformities must generally comply with other city ordinances, such as a nuisance ordinance or a licensing ordinance.

B. Non-legal conformities

In contrast to legal nonconformities, non-legal nonconformities are those that were not permitted when established and they do not have the rights associated with legal nonconformities. Before assuming a particular nonconformity is entitled to the statutory right to continue, it is important to consider whether the nonconformity ever complied with existing ordinance or law.

Historically, the theory behind legal nonconformities was that the property would eventually comply with the zoning ordinance. The statutory right to continue was more limited, and cities could phase out nonconformities over time through a process called amortization. Furthermore, the nonconformity could not be upgraded or replaced, and nonconforming rights would cease if the nonconformity was discontinued or destroyed. But in 2001, the legislature prohibited amortization, except for adult uses. And in 2004, the legislature both altered the rule about destruction and afforded nonconformities the right to replacement, restoration or improvement, but not expansion. Cities should review their ordinance provisions concerning nonconformities and make sure they are consistent with the current state statute.

RELEVANT LINKS:

V. Creating a record

Whatever the nature of or standard for a particular zoning decision, a city should create a record that will support it. If the city action is challenged, courts will review the decision on the public record. The record must demonstrate the city exercised the appropriate level of discretion and applied the relevant standards in a reasonable fashion. It may not matter that the city acted reasonably if the city is unable to prove its actions through the public record.

Minn. Stat. § 15.99.

LMC information memo, *Zoning Guide for Cities,* Section V-A, The 60-Day Rule.

When creating a record to support a zoning decision, every city should be aware of Minnesota's 60-day rule. Under state law, a city must either approve or deny a written request related to zoning within 60 days of the time it is submitted to the city. The city may extend the time period for an additional 60 days, but only if it does so in writing before expiration of the initial 60-day period. Under the 60-day rule, failure to approve or deny a request within the statutory time period is deemed an approval. So it is vitally important that cities scrutinize applications as they come in the door to first make sure all required information is present, and then to process those applications in an expeditious manner.

A. Public hearings

LMC information memo, *Zoning Guide for Cities*, Section V-C-2-b on conducting a public hearing.

Holding a public hearing is an important component in developing the record. Public hearings are generally required before the adoption of any zoning ordinance or amendment, and before the granting of variances, conditional use permits, or re-zonings

Minn. Stat. § 462.357, subd. 3.

Under state law notice of the time, place, and purpose of the hearing must be published at least 10 days prior to the day of the hearing. If the decision affects an area of five acres or less, mailed notice may be required to property owners within a 350-foot radius of the land in question.

Public hearings should include a complete disclosure of what is being proposed and a fair and open assessment of the issues raised. A public hearing should include an opportunity for the general public and interested parties to hear and see all the information and to ask relevant questions, provide additional information, and express support or opposition. In order to help the public hearing process run well, it is helpful for the city council to develop a written set of policies and procedures to follow at each public hearing.

RELEVANT LINKS:

Neighborhood opposition is perhaps the most challenging issue for any city council or planning commission to deal with when considering the merits of a particular zoning application. Case law holds that the views of neighbors should not be the sole basis for a particular city action. In this regard, it is helpful to distinguish between what might be termed the "quantity" of the comments, as opposed to the "quality" of the comments. For example, well-supported testimony that brings forth relevant facts is the kind of information upon which a city council can rely. On the other hand, unsupported and unsubstantiated emotional opposition to a particular project should not be the basis for a decision.

B. Written statements

After a public hearing, the city should make findings to support its decision. In the case of a denial of a particular zoning application, Minnesota's 60-day rule requires the reasons for a denial be put in writing and those reasons be adopted within the statutory timeframe. Failure to do so may result in the city council decision being overturned. Even where the application is approved, a written statement explaining the decision is advisable.

LMC information memo, *Taking the Mystery Out of Findings of Fact.*

The written statement explaining the reasons for the zoning decision is particularly important for quasi-judicial decisions such as variances and conditional use permits. The League recommends the city adopt written findings of fact and conclusions of law whenever a city makes such decisions. The document should identify the relevant legal criteria such as statutory standards or code provisions, explain the relevant facts relating to the particular application, and then apply those facts to the legal criteria. The document should provide a court with everything needed to uphold the zoning decision.

VI. Further assistance

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Zoning decisions can be controversial and confusing, and this memo is by no means a comprehensive discussion of all issues that may arise. If you have further questions relating to zoning decisions, please feel free to contact the League's Loss Control Land Use Attorney.

When dealing with particular issues, it is also important to seek specific legal advice from your own city attorney.

Appendix A: The pyramid of discretion

The pyramid framework illustrates how much discretion the city has to make land use decisions based on the role it is playing.