If an amendment to a zoning ordinance involves changes in district boundaries affecting an area of five acres or less, a similar notice must be mailed at least 10 days before the day of the hearing to each owner of affected property and property situated completely or partly within 350 feet of the property to which the amendment applies. However, failure to give mailed notice to individual property owners, or defects in the notice shall not invalidate the proceedings, provided that a genuine attempt to comply with this subdivision has been made.

Following the public hearing, the planning commission (if one exists) must review the proposed zoning ordinances and any comments from the public hearing, and make any appropriate and reasonable revisions. The planning commission must then present the zoning ordinance and any amendments in final draft form and a report to the council.

Minn. Stat. § 462.357, subds. 2, 5 .

A.G. Op. 59-A-32 (Jan. 25, 2002).

If there is no planning commission, the city council itself should review and address comments from the public hearing and make any appropriate and reasonable revisions. Zoning ordinances must be adopted by a majority vote of all of the members of the council. For example, this would mean three votes on a five-member council. One Minnesota attorney general opinion has found that charter cities may not provide for different voting requirements in their city charter, because the Municipal Planning Act supersedes inconsistent charter provisions.

### b. Publication

Minn. Stat. § 412.191, subd. 4; Minn. Stat. § 331A.02;

Minn. Stat. § 331A.04.

After adopting or amending a zoning ordinance, the council must publish or summarize it in the official newspaper.

See Handbook, Chapter 7 for more information on publishing ordinances in summary form

## 3. Administering a zoning ordinance

### a. The 60-Day Rule: Strict timelines for review

See LMC information memo, Zoning Guide for Cities for more information on the 60-Day Rule

See also LMCIT risk management memos 60-Day Rule: Minnesota's Automatic Approval StatuteNecessity of Adequate Findings: Reasons to Support Municipal Land Use Decisions

Most importantly in administering a zoning ordinance, cities must remember that they generally have only 60 days to approve or deny a written request relating to zoning, including rezoning requests, conditional use permits, and variances. This requirement is known as the "60-Day Rule."

Minn. Stat. § 15.99

*Manco of Fairmont v. Town Bd. of Rock Dell Township*, 583 N.W.2d 293 (Minn. Ct. App. 1998).

*Hans Hagen Homes, Inc. v. City of Minnetrista*, 728 N.W.2d 536 (Minn. 2007).

The 60-Day Rule is a state law that requires cities to approve or deny a written request relating to zoning within 60 days, or it is deemed approved. The underlying purpose of the rule is to keep governmental agencies from taking too long in deciding land use issues. Minnesota courts have generally demanded strict compliance with the rule.

### i. The scope of the rule

Minn. Stat. § 15.99, subd. 1(c).

Minn. Stat. § 15.99, subd. 2(a).

Minn. Stat. § 462.358, subd. 3(b).

*Advantage Capital Mgmt, v. City of Northfield*, 664 N.W.2d 421 (Minn. Ct. App. 2003)

The rule applies to a "request related to zoning." The courts have been rather expansive in their interpretation of the phrase "related to zoning," and many requests affecting the use of land have been treated as subject to the law. The statute creates an exception for *subdivision and plat approvals*, since those processes are subject to their own timeframes. The Minnesota Court of Appeals has ruled that Minn. Stat. § 15.99 does not apply to building permits.

### ii. Applications

Minn. Stat. § 15.99, subd. 1(c).

A request must be submitted in writing on the city's application form, if one exists. A request not on the city's form must clearly identify on the first page the approval sought. The city may reject as incomplete a request not on the city's form, if the request does not include information required by the city. The request is also considered incomplete if it does not include the application fee.

Minn. Stat. § 15.99, subd. 3(a).

The 60-day time period does not begin to run if the city notifies the landowner *in writing* within 15 business days of receiving the application that the application is incomplete. The city must also state what information is missing.

Minn. Stat. § 15.99, subd. 3(c).

If a city grants an approval within 60 days of receiving a written request—and the city documents this—it meets the time limit even if that approval includes certain conditions the applicant must meet. Subsequently, if the applicant fails to meet the conditions, the approval may be revoked or rescinded. An applicant cannot use the revocation or rescission to claim the city did not meet the 60-day time limit.

*Tollefson Dev., Inc. v. City of Elk River*, 665 N.W.2d 554 (Minn. Ct. App. 2003).

When a zoning applicant materially amends his or her application, the 60-day period runs from the date of the written request for the amendment, not from the date of the original application. However, minor changes to a zoning request should not affect the running of the 60-day period.

### iii. Denials

Minn. Stat. § 15.99, subd. 2(a)

Minn. Stat. § 15.99, subd. 2(c).

*Hans Hagen Homes v City of Minnetrista*, 728 NW 2d 536 (Minn. 2007); *Johnson v Cook County*, No. A08-1501 (Minn. 2010)

If an agency or a city denies a request, it must give written reasons for its denial at the time it denies the request. When a multimember governing body such as a city council denies a request, it must state the reasons for denial on the record and provide the applicant with a written statement of the reasons for denial. The written statement of the reasons for denial must be consistent with reasons stated in the record at the time of denial. The written statement of reasons for denial must be provided to the applicant upon adoption.

Minn. Stat. § 15.99, subd. 2(b).

State statute provides that the failure of a motion to approve an application constitutes a denial, provided that those voting against the motion state on the record the reasons why they oppose the request. This situation usually occurs when a motion to approve fails because of a tie vote, or because the motion fails to get the required number of votes to pass.

### iv. Extensions

Minn. Stat. § 15.99, subd. 3(f).

The law allows a city the opportunity to give itself an additional 60 days (up to a total of 120 days) to consider an application, if the city follows specific statutory requirements. In order to avail itself of an additional 60 days, the city must give all of the following to the applicant:

- Written notification of the extension before the end of the initial 60-day period.
- The reasons for extension.
- The anticipated length of the extension.

*American Tower, L.P. v. City of Grant*, 636 N.W.2d 309(Minn. 2001); *Northern States Power Co. v. City of Mendota Heights*, 646 N.W.2d 919 (Minn. Ct. App. 2002).

The courts have been particularly demanding on local governments with regard to this requirement and have required local governments to meet each element of the statute. An oral notice or an oral agreement to extend is insufficient. The reasons stated in the written notification should be specific in order to inform the individual applicant exactly why the process is being delayed. Needing more time to fully consider the application may be an adequate reason. As demonstrated in one Minnesota Supreme Court case, the written notification should not take the form of a blanket statement on the zoning application that the city will need the extension.

Minn. Stat. § 15.99, subd. 3(g).

An applicant may also request an extension of the time limit by written notice. If a city receives an applicant request for an extension, this should be thoroughly documented.

Minn. Stat. § 15.99, subd. 3(g).

Once the city has granted itself one 60-day extension, additional extensions must be negotiated with the applicant. A city can only go beyond 120 days if it gets the approval of the applicant. The city must initiate the request for additional time in writing and have the applicant agree to an extension in writing. The applicant may also ask for an additional extension by written request.

Minn. Stat. § 15.99, subd. 3(d)(e).

Minn. Stat. ch. 116D.

Minn. R. ch. 4410.

The 60-day time period is also extended if a state statute requires a process to occur before the city acts on the application if the process will make it impossible for the city to act within 60 days. The environmental review process is an example. If the city or state law requires the preparation of an environmental assessment worksheet or an environmental impact statement under the state Environmental Policy Act, the deadline is extended until 60 days after the environmental review process is completed. Likewise, if a proposed development requires state or federal approval in addition to city action, the 60-day period for city action is extended until 60 days after the required prior approval is granted from the state or federal entity.

Minn. Stat. § 15.99, subd. 2(a)(e).

On occasion, a local city zoning ordinance or charter may contain similar or conflicting time provisions. The 60-Day Rule generally supersedes those time limits and requirements.

See LMCIT risk management memo, *Forms to Help Cities Comply with the 60-Day Rule*.

Cities should adopt a procedure or set of procedures to ensure planning staff, the planning commission, and the city council follow the 60-Day Rule. City staff should develop a timetable, guidelines, and forms (checklists for each application may be helpful) to ensure that no application is deemed approved because the city could not act fast enough to complete the review process.

## b. Uses and conditional uses

*Stodola v. City of Orono*, No. C2-93-2445 (Minn. Ct. App. 1994) (unpublished decision).

A key feature of zoning ordinances is to divide areas of the city into districts and then list the permitted and conditional uses. Permitted uses are those that the zoning ordinance allows outright. It is generally arbitrary and unlawful to deny a permit for a permitted use unless the zoning of the property is subsequently changed to prohibit that use.

Minn. Stat. § 462.3595.

Minn. Stat. § 462.3595, subd. 2.

See LMCIT risk management memo *Conditional Use FAQ*

*Upper Minnetonka Yacht Club v. City of Shorewood*, 770 NW 2d 184 (Minn. Ct. App. 2009)

Conditional uses are those activities that the zoning ordinance permits if certain conditions set forth in the city ordinance are met. The city must grant the conditional use permit (CUP) if the applicant satisfies all the conditions. Conditional uses remain in effect indefinitely as long as the use complies with the conditions. Once issued, a CUP's conditions may not be unilaterally altered by the city, unless a violation of the CUP has occurred.

See LMC information memo, *Zoning Guide for Cities*

See LMCIT risk management memos, *Land Use: The Neighbor Factor*" and *Conditional Use Permits: Frequently Asked Questions*"

*Trisko v. City of Waite Park*, 566 N.W.2d 349 (Minn. Ct. App. 1997).

It is important to stress that conditional uses, like permitted uses, ***must*** be allowed if the applicant can prove that the application meets all of the conditions and requirements of the city's ordinance and will not be detrimental to the health, safety, and welfare of the public. As a result, the list of conditional uses should only contain uses that the city is certain should be allowed once appropriate conditions are met. Neighborhood opposition alone to a CUP does not authorize the rejection of an application for a CUP.

## c. Variances

Minn. Stat. § 462.354, subd. 6.

See LMC information memo *Zoning Guide for Cities* for more information on variances

See LMCIT risk management memo *Variances: Frequently Asked Questions*"

Variances are an exception to rules laid out in a zoning ordinance. They are permitted departures from strict enforcement of the ordinance as applied to a particular piece of property if strict enforcement would cause the owner "undue hardship." Variances are generally related to physical 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 deviate from the rules that would otherwise apply

The law provides that requests for variances are heard by the board of adjustment and appeals. In many communities, the planning commission serves this function. Generally, the board's decision is subject to appeal to the city council. Under the statutory undue hardship standard, a landowner is entitled to a variance if, and only if, the facts satisfy the three-factor test for undue hardship, which are:

*Krummenacher, v. City of Minnetonka*, 783 N.W.2d 721 (Minn. 2010); *Rowell v. Board of Adjustment of the City of Moorhead*, 446 N.W.2d 917 (Minn.App.,1989)

- The property cannot be put to a reasonable use without the variance. **Caution!** In June 2010, the Minnesota Supreme Court issued a decision that changed the longstanding interpretation of the first factor. The Court held that the reasonable use factor is not whether the proposed use is reasonable, but rather whether there is reasonable use in the absence of the variance. This is a much stricter test, which considerably limits variance opportunities. A city will need to work closely with the city attorney to determine if a variance application can satisfy the first factor.
- The landowner's situation 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 and economic considerations alone cannot create an undue hardship.
- 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.

*Myron v. City of Plymouth*, 562 N.W.2d 21 (Minn. Ct. App. Apr. 15, 1997), aff'd, 581 N.W.2d 815 (Minn. 1998) overruled on other grounds by *Wensmann Realty, Inc. v. City of Eagan*, 734 N.W.2d 623 (Minn. 2007)

Variances are to be granted only if strict enforcement of a zoning ordinance causes undue hardship. A landowner who purchased land knowing a variance would be necessary in order to make the property buildable is not barred from requesting a variance on the grounds the hardship was self-imposed.

### d. Legal nonconformities predating the adoption of the zoning ordinance

Minn. Stat. § 462.357, subd. 1(c).

See LMC information memo *Zoning Guide for Cities* for more information on nonconformities

See LMCIT risk management memo *Land Use Nonconformities: Frequently Asked Questions*."

Legal nonconformities are those uses, structures, or lots that legally existed prior to the creation of a zoning district or adoption of a specific zoning regulation and, in recognition of the landowner's property rights, are allowed to continue even though they are now illegal. Besides being allowed to remain in effect, legal nonconformities also escape requirements subsequently enacted, such as setback requirements. The state statute on legal nonconformities supersedes any conflicting language in a zoning ordinance.

Minn. Stat. § 462.357, subd. 1(e).

While legal nonconformities must be allowed to continue, a zoning ordinance may prohibit them from being expanded, extended, or rebuilt in certain situations. However, nonconformities, including the lawful use or occupation of land or premises existing at the time of an amendment to the zoning ordinance, may be continued through repair, replacement, restoration, maintenance, improvement, but not including expansion, unless one of the following is true:

- The nonconformity or occupancy is not used for a period of more than one year.
- Any nonconforming use is destroyed by fire or other peril to the extent of greater than 50 percent of its market value, and no building permit has been applied for within 180 days of when the property is damaged. In this case a municipality may impose reasonable conditions upon a building permit in order to mitigate any newly created impact on adjacent property.

Minn. Stat. § 462.357, subd. 1(e)(c).

Nonconforming shoreland lots have additional protections under state law. In addition, cities can regulate nonconforming uses and structures to maintain eligibility in the National Flood Insurance Program. State law specifically authorizes city regulation of nonconforming uses to mitigate potential flood damage or flood flow.

## II. Enforcement of zoning and subdivision regulations

*See* LMC information memo, *Zoning Guide for Cities* and *Subdivision Guide for Cities*.

Minn. Stat. § 462.362

Minn. Stat. § 169.89, subd. 2.

Minn. Stat. § 609.02, subds. 3, 4a; 609.0332; 609.034.

Cities may provide for criminal penalties for violation of a land use ordinance. In an ordinance, cities may designate ordinance violations as misdemeanors or petty misdemeanors. Cities may impose maximum penalties for misdemeanors of a $1,000 fine or 90 days in jail, or both. In addition, the costs of prosecution may be added. The maximum penalty for a petty misdemeanor is a fine of $300.

Minn. Stat. § 462.362

*City of Minneapolis v. F and R, Inc.* 300 N.W.2d 2 (Minn. 1980); *Rockville Tp. v. Lang*, 387 N.W.2d 200 (Minn. Ct. App. 1986).

In many instances, criminal sanctions will not cure a land use violation. Where the city desires removal of building or use that violates the zoning or subdivision ordinance, civil remedies may be more effective than even repeated criminal fines. A city may enforce its zoning ordinance through requesting an injunction (a court order requiring someone to stop a particular activity or type of conduct) or other appropriate remedy from the court. These remedies can be used to compel owners to cease and desist illegal uses of their property or even to tear down structures that have been built in violation of the city's land use ordinances.

*State v. Dorn*, 1999 WL 153792, C6-98-2001 (Minn. Ct. App. Mar, 23, 1999).

A land use ordinance may provide that each day the violation exists constitutes a separate offense. Multiple citations are consistent with public policy because it would be unjust to allow individuals to pay the fine for the original charge and finish a building project without abiding by the appropriate codes and ordinances.

# III. Making a record and judicial review

*Swanson v. City of Bloomington*, 421 N.W.2d 307 (Minn. 1988).

See LMCIT risk management memos and materials: *Necessity of Adequate Findings: Reasons to Support Municipal Land Use Decisions Sample Findings of Fact: City of Burnsville. Sample Resolution to Approve a Conditional Use Permit City of Shakopee. Sample Resolution Denying a Preliminary Plat: City of Shakopee.*

To avoid or minimize the costly expenses of litigation related to land use activities and land use applications, cities should always keep an accurate record of meetings, including any evidence presented; make findings of fact contemporaneously with any actions taken; and provide an opportunity for interested parties to speak. It is recommended that cities base findings of fact on the record and discuss the legal standards imposed by the city's ordinances.

*Pelican Lake Prop. Owners Ass'n v. County of Crow Wing*, 1999 WL 618232, C5-98-1549 (Minn. Ct. App. Aug. 17, 1999).

See LMCIT risk management memos, *Land Use Claims: Ten Tips*, *Land Use Cook Book: It's Not All Cookie Cutter*; *Land Use Defense Coverage*

A city that does not follow the procedures in its own land use ordinances or fails to document the basis for decisions risks having its decisions reversed by a court.

*SuperAmerica Group, Inc. v. City of Little Canada*, 539 N.W.2d 264 (Minn. Ct. App. 1995).

*Trisko v. City of Waite Park*, 566 N.W.2d 349 (Minn. Ct. App. 1997).

See LMCIT risk management memo, *Land Use Claims: Ten Tips*;"

Councils should avoid making a decision on a land use issue based on citizen opposition alone. A decision-making body cannot use vague and speculative opinions and unsubstantiated concerns from citizens as the basis for a decision. However, expert testimony supporting the citizens' point of view may not be necessary if there is a factual basis for the opposition.