

# RE:VIEW

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Attorneys at Law™

FROM THE DESK OF GREGORY E. KORSTAD

## STRATEGIC THINKING: Making the Rules Work

GREGORY E. KORSTAD



In representing clients with controversial land use projects, my experience is that projects tend to develop “a life of their own” in spite of the best attempts to strategize. Local politics can change, environmental review may identify unforeseen complications, and decision makers may lose elections. As a legal adviser and “quarterback” for land use approvals projects, I have seen a significant advantage in getting to “yes” when the project management team has all of the legal considerations for a project well in mind both during development of the initial strategy and in making changes to the strategy as the project evolves.

What sets apart a well-managed and successful land use application and approvals process is the development and implementation of a comprehensive strategic approach to seeking approvals. This requires focusing on both what the developer seeks as well as what the planning commission or council can accept. It is in the latter that the legal considerations are particularly helpful. Although we recognize most local government decisions are political, the range of options for a political solution can be reduced by effective emphasis of the legal restrictions on the decision makers.

For example, managing the environmental review process even though a project may not appear to be appropriate for environmental review can play an important role in obtaining approval. The city council or planning commission may not want to take the political “heat” from denying a local opposition group its demand for delay for further study even though the project has been “studied to death.” Here, effective emphasis of the legal effect of environmental review can be just what the council needs to say no to the citizens group.

Immediate attention to court decisions interpreting zoning laws can trigger reconsideration of strategies and may help assure that a favorable decision, once made, is well-protected. A recent example of this approach is a matter handled for a client in a St. Paul suburb. When neighbors objected to the rezoning needed to accommodate the client’s development proposal, it became controversial. The city council was asked to avoid the controversy by subjecting the rezoning decision to the referendum

*Continued on page 1*

## LEGISLATIVE UPDATE! Minnesota's Tax Abatement Program Limits Increased

JIM MCGREEVY

City officials do not have much to smile about these days. The 2003 Minnesota Legislature approved reductions in the amount of money it sends to local governments through its Local Government Aid (LGA) program and further constricted local governments' ability to levy new taxes and use Tax Increment Financing (TIF), among other things.

However, the Legislature did give local officials one thing to smile about. The Legislature approved a helpful change to the local government tax abatement program. The tax abatement program was created in 1997 and is designed to give local governments a stronger hand in locally-based economic development efforts to help these governments attract and retain businesses in their communities.

The tax abatement program allows individual political subdivisions to return all or a portion of the property taxes attributed to a new development to the property owner, in exchange for the owner's agreement to use the abatement proceeds to fund property improvements or wage or job goals. The stated goals of tax abatement are typically outlined in a development agreement executed by the political subdivision and the property owner. Before the most recent legislative changes, the maximum amount a political subdivision could abate was five (5) percent of its total levy limit or \$100,000, whichever was greater. The 2003 Legislature increased that amount to ten (10) percent or \$200,000.

Over the last six (6) years, governments have used tax abatement incentives to redevelop blighted areas, help finance public infrastructure improvements and increase or preserve tax base. The program has been expanded in recent legislative sessions to make tax abatement a stronger economic development tool for local government. The changes have streamlined the financial limits and rules governing tax abatement, as well as allowed the use of bonding as a means to finance new development based on abatements. While tax abatement may never rival TIF in its size or scope, given recent legislative changes, tax abatement is a more attractive development tool for local governments strapped by economic and fiscal troubles.

The expanded tax abatement program gives local governments more flexibility to attract new businesses and retain existing businesses while meeting their responsibilities to local taxpayers. We expect to see more tax abatement initiatives now that the Legislature has raised the ceiling of authority given to Minnesota's local governments to assist in economic development through this creative and fiscally responsible program. ■



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### FROM GREGORY E. KORSTAD: *Continued from Cover*

required by the city charter. Petition/counterpetition drives began based on the assumption that the city charter requirement was the controlling approval process. When Larkin Hoffman was asked to intervene on behalf of the client, we immediately challenged the referendum election requirement because the Court of Appeals had recently ruled on that very issue.

We were able to protect that client's project from attack by keeping up with the court decisions and breaking developments in zoning law. Our approach is effective and efficient.

In this issue of *Re:View*, look for Tom Gump's article on property tax exemptions for non-profit organizations and Jim McGreevy's article on expansion of tax abatement.

GREGORY E. KORSTAD is the chair of Larkin Hoffman's Land Use and Real Estate Department. He is profiled on page 4 of this issue of *Re:View*. Greg can be reached at 952-896-3292 or [gkorstad@lhdl.com](mailto:gkorstad@lhdl.com). ■

# Property Tax Exemptions

THOMAS A. GUMP

Whether an owner of residential or commercial/industrial property, most Minnesotans can be heard muttering from time to time about property taxes. If you are affiliated with a non-profit organization, however, there is an exception that may provide property tax relief for your organization. You should also be aware of some changes the Minnesota Legislature made to tax exemptions during its most recent session.

All real property in the State of Minnesota is taxable, unless it is exempt by State law. Until this year, there were two exemptions from property taxes for non-profit organizations. The first exemption still exists and is available for non-profits that qualify as "Institutions of Purely Public Charity." The second exemption, which was repealed by the Legislature this year, was for "Low-Income Housing."

## INSTITUTIONS OF PURELY PUBLIC CHARITY

Case law provides a guide to be used in determining whether an institution fits the definition of an Institution of Purely Public Charity. To fit the definition, an institution must determine how it measures up to the six "North Star Factors." The North Star Factors are:

- 1] Whether the stated purpose of the undertaking is to be helpful to others without immediate expectation of material reward.
- 2] Whether the entity involved is supported by donations and gifts in whole or in part.
- 3] Whether the recipients of the charity are required to pay for the assistance received in whole or in part.
- 4] Whether the income received from gifts and donations and charges to users produces a profit to the charitable institution.
- 5] Whether the beneficiaries of the charity are restricted or unrestricted and if restricted, whether the class of persons to whom the charity is made available is one having a reasonable relationship to the charitable objectives.
- 6] Whether the dividends in form or substance or assets upon dissolution are available to private interests.

Tax assessors use these factors as a guide to determine whether a non-profit is an Institution of Purely Public Charity. If so, and if the non-profit uses its property solely for these purposes, the property will be exempt from taxation.

## LOW-INCOME HOUSING

Until this legislative session, Minn. Stat. § 272.02, Subd. 26 provided that "a structure...on real property is exempt if it is used for: housing for the elderly or low- and moderate- income families and funded by a direct federal loan; or housing lower-income families or elderly or handicapped persons."

To be exempt, a lower-income housing project must have met the following criteria: ...the facility must be owned by an entity operated as a non-profit; the facility must receive no or limited Section 8 housing payments (less than 90% of dwelling units in the structure); must operate a "mandatory" on-site congregate dining program; provide "assisted living or similar social and physical support services for residents;" must not have been assessed and did not pay tax under Chapter 273 prior to the 1991 levy, while meeting the other conditions; and it must have "permanent financing."

## THE BACKGROUND OF THE MARICE DECISION

Before October 1, 2002, the County Assessors had decided that in order for a senior housing project to be tax exempt under Minn. Stat. § 272.02, Subd. 26, residents had to be not only elderly but also lower-income. In July 2002, the Commons on Marice applied for a property tax exemption under Subd. 26, only to have the exemption denied by

Dakota County. The Commons filed suit, claiming that its property was improperly classified, unequally or unfairly assessed and the property was assessed at a greater value than its actual value.

## THE MARICE DECISION

On October 1, 2002, the Minnesota Tax Court ruled that Dakota County could not deny the Commons on Marice tax-exempt property status because it served "elderly" as opposed to "lower-income elderly." The court granted the Common on Marice's motion for partial summary judgment because the language of the statute in the court's opinion was clear. A structure housing elderly persons is exempt if it meets the other statutory requirements. The court also held that elderly persons do not need to be of lower-income for the exemption to apply.

## THE LEGISLATIVE REACTION

Under the court's ruling, the term "elderly" did not mean that the elderly must be of low-income to qualify for a property tax exemption. Not-for-profit housing providers who served the elderly would receive the same property tax exemption that non-profit providers for low- and moderate-income families received. For the Minnesota Legislature, this was apparently unacceptable. During the special session, the Legislature voted to repeal this exemption in its entirety. While this decision reduced the tax exemption possibilities for non-profits, it also served to focus the issue of non-profit tax exemptions on the Institutions of Purely Public Charity exception. For most non-profits, this exemption is the principal means to avoid taxation on the market value of its property. ■



THOMAS A. GUMP is an attorney in Larkin Hoffman's Land Use and Real Estate Department. He practices in all aspects of real estate law, representing builders, developers and homeowner associations. He is admitted to practice law in Minnesota, Wisconsin, California and Georgia. Mr. Gump can be reached at (952) 896-3209 or [tgump@lhd.com](mailto:tgump@lhd.com).

# LARKIN HOFFMAN

## BRIEFS

### ■ Griffith Represents

#### **Mall of America in IKEA Approvals**

**Bill Griffith** represented Mall of America Company in obtaining development approvals for a 330,000 square foot IKEA home furnishings store at Mall of America. Bill worked with Simon Property Group in negotiating development approvals, special assessments, public improvements and tax increment financing for Phase II of Mall of America. The Swedish retailer expects to commence construction of its first store in Minnesota in June and open at Phase II of Mall of America in Summer 2004. Larkin Hoffman attorneys have served as real estate, property tax and development counsel for Mall of America Company since 1988.

### ■ Coyle Named to Bridging, Inc. Board

**Peter J. Coyle** was recently named to the Board of Directors of Bridging, Inc. Bridging is a non-profit organization which provides home furnishings for people in need.

### ■ Dietzen Appointed to

#### **Commission on Judicial Selection**

Governor Tim Pawlenty recently announced the appointment of **Christopher J. Dietzen** to the Commission on Judicial Selection. The Commission on Judicial Selection solicits judicial candidates, evaluates applicants and recommends three to five finalists to the governor for district court and Workers' Compensation Court of Appeals vacancies that occur during the term of a judge. The commission consists of 49 members; 27 appointed by the Governor, and 22 by the Supreme Court.

### ■ Korstad Presents Conceal and Carry Seminar

**Greg Korstad** presented the facts on what Minnesota's new Conceal & Carry Gun Law means to your business during an informational session on Wed., June 11. The seminar was sponsored by the TwinWest Chamber of Commerce.

### ■ Hennen Joins Larkin Hoffman

Larkin Hoffman is pleased to announce that **Bradley J. Hennen** has joined the firm as an associate in the Corporate Law Department. He will practice in the areas of securities law, mergers and acquisitions, corporate finance, public finance and general corporate law. Hennen received his Juris Doctor with Honors, Order of the Coif, from the University of Maryland School of Law. He is a member of the Minnesota State and Hennepin County Bar Associations, as well as the National Association of Parliamentarians.

### ■ Attorneys Named Super Lawyers

Larkin Hoffman is pleased to announce that 11 of the firm's attorneys have been named "Super Lawyers" by their peers in an extensive state-wide survey done by *Minnesota Law & Politics* magazine. **Terry E. Bishop** and **John A. Cotter** are shareholders in the firm's Business Litigation Department. **Kenneth Corey-Edstrom** is a shareholder in the firm's Creditor, Debtor & Bankruptcy Group. **Christopher J. Haristhal** and **Dayle Nolan** are shareholders in the firm's Employment Law Department. **Frank I. Harvey** is a shareholder in the firm's Corporate Law Department. **Timothy J. Keane** and **Thomas "Tim" P. Stoltman** are shareholders in the firm's Land Use and Real Estate Department. **Charles S. Modell** and **Andrew F. Perrin** are shareholders in the firm's Franchise Law Group. **Kathleen M. Picotte Newman** is a shareholder in the firm's Family Law Department. These attorneys were designated as Super Lawyers in the August issues of *Minnesota Law & Politics*, *Twin Cities Business Monthly* and *Mpls. St. Paul* magazines.

### ■ Korstad and Martin Present Property Tax Workshop

In recent legislative sessions, commercial industrial property tax relief was a major focus. This workshop on March 27th, was presented by **Larry Martin** and **Greg Korstad** of Larkin

Hoffman and focused on techniques to understand how property taxes are determined; understand how property tax levies can be managed; and appeal valuation assessment and imposition of tax to the Tax Court.

### ■ Blanchett Speaks at NBI Land Use Seminar

Recent changes in developmental and environmental policies have significantly shifted land use regulations. **Neal Blanchett** presented at a seminar sponsored by the National Business Institute on May 9, 2003. The seminar gave attendees an in-depth knowledge of real estate transactions and developments.

### ■ Martin and Susag Present at St. Thomas Valuation Seminar

**Larry D. Martin** and **James M. Susag** presented two sessions during seminar on "Legal Issues in Valuation" at the University of St. Thomas on April 22 and 23, 2003. The first session on April 22, focused on "Appraisers Professional Liability." Martin presented a second session on April 23, 2003 which focused on "The Role of Appraisers in Condemnation."

### ■ Gump Negotiates Loan for Cedar Trails

**Tom Gump**, an attorney in Larkin Hoffman's Real Estate Department, was recently instrumental in the negotiation of a \$1.3 million loan from the City of St. Louis Park to Cedar Trails Condominium Association, Inc., a large condominium association. This was the first such loan directly from a city's treasury in the Minneapolis area.

### ■ Korstad Awarded Twin West Award

**Greg Korstad** was recently awarded the TwinWest Bravo Award for outstanding service and commitment to the TwinWest Chamber of Commerce. Korstad has been a member of the TwinWest Chamber for 14 years. ■



## Larkin Hoffman Announces Formation of Senior Housing Practice Group

Building upon its unique experience and the growth of senior housing in Minnesota, Larkin Hoffman has announced the formation of a practice group dedicated to the senior housing area. The Senior Housing Group will assist in every phase of senior housing from development to management and ownership. Larkin Hoffman is the first full-service firm in the Twin Cities area to form this type of practice area. The practice group is comprised of attorneys with extensive background in the areas of senior housing, land development and financing. It includes Linda Fisher, Bill Griffith, Greg Korstad, Gary Renneke, Lynn Starkovich and Brad Hennen. The Senior Housing Group currently provides services to major developers of senior housing, including Realife, Inc. which has developed and operates 25 cooperative senior living communities in Minnesota, Iowa, Nebraska and Michigan, The Hartford Group, Inc., which has designed and built multi-use developments including senior housing facilities throughout the Midwest, and Walker Methodist, which owns and operates senior facilities in Minnesota. ■

# PROFILE



## Providing Practical Advice on Land Use and Environmental Issues

GREGORY E. KORSTAD

Greg Korstad is a shareholder of Larkin, Hoffman, Daly & Lindgren, Ltd., and currently serves as chair of the Land Use and Real Estate Department. He joined the firm in 1987 after serving eight years as Isanti County Attorney. Mr. Korstad represents public and private clients on land use, zoning and environmental issues including acquisition and development of environmentally sensitive properties, environmental compliance auditing and management, Superfund liability defense, air emissions compliance and waste disposal issues. He has also defended corporations and individuals in environmental criminal matters.

In addition to general land use projects, Mr. Korstad has represented a variety of unique, regulated industries in permitting and compliance issues. These complex projects include solid waste facilities, aggregate production, mining, asphalt plants, feedlots, wind conversion facilities, and telecommunication towers. He says, "two of the keys to my success in getting controversial complex projects approved are to make the project and its impacts understandable and acceptable to decision makers, and to put the law to work for the client at a practical level!"

Mr. Korstad is on the Minnesota State Bar Association Environment and Natural Resources Section's Governing Council. He is an active member of the Twin West Chamber of Commerce, having served two terms on its Board of Directors, and is chair of its Government Affairs Committee. Mr. Korstad received his law degree from Drake University in 1976. ■

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