

Strategies For Land Use Approvals: Changes From A Veteran's Perspective

By Linda Fisher



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As we look ahead to what will drive the land use business in 2004, it may also be wise to look back.

As a land use approvals lawyer, I have witnessed changes over the last 25 years which have altered the nature of our business and are likely to accelerate in 2004. They fall into four areas: increased regulation, polarization of viewpoints, expansion of the Internet and increasingly challenging social issues.

INCREASED REGULATION

Some regulatory simplification has occurred, but in most cases, a new statute or ordinance that is hard to interpret takes the place of the one that is eliminated. The policies of one government agency frequently conflict with those of a sister agency. It is not uncommon today for a developer to receive totally contradictory rulings from different departments within the same municipality.

Examples abound. Just as U.S. Army Corps of Engineers general permits move toward one-stop wetland permitting, new watershed district wetland rules spring up to fill the regulatory gap. The Metropolitan Council encourages high density development near employment centers to reduce urban sprawl, but this runs afoul of another agency's protection policies. A city planning department wants a generous, landscaped streetscape, but the engineering department wants part of the streetscape dedicated for road improvements. A zoning code prohibits outdoor storage, but not all terms are clearly defined. This raises a question as to the legality of a big box retailer's staging practices.

POLARIZATION OF VIEWPOINTS

Positions are more and more polarized. Developers think cities "extort" unreasonable fees, dedications, and concessions. Neighbors distrust the process and think city councils "sell out" to big developers. Elected officials feel trapped in the middle.

To see this dynamic at work, go to a contentious public hearing on a proposal to rezone property from industrial to commercial for a shopping center. The project is consistent with the Comprehensive Plan and city staff recommends approval. The adjacent roads have adequate capacity, but the city wants the developer to dedicate land for a transit center and to pay an impact fee for future off-site road improvements. The developer objects, arguing that his property is being taken unlawfully. Neighbors oppose the

project for various reasons. When a city council member speaks in favor of the project, the neighbors say he is not listening to them. What they really mean is that he is not agreeing with them, and this is not how they want "their" elected official to behave.

EXPANSION OF INTERNET

The Internet is both positive and problematic. The Internet has made it much easier to navigate the "entitlement" waters. Most cities and government agencies have websites. Many include the text of the local comprehensive plan and city code. The better websites even include Planning Commission and City Council minutes. Property tax records, aerial photographs, and wetland maps can now be obtained with a mouse click.

However, plain, old fashioned research in city files is not obsolete and may be essential for certain projects. Nothing substitutes for a face-to-face meeting with a city planner or an elected official. "People" are still the best sources of certain kinds of information.

Thanks to the Internet, we have taken a giant leap forward (Query: or is it backward?) to direct citizen driven land use decision-making. Citizens now enjoy a "24/7" pipeline to the city council. With e-mail, citizens can voice opinions with little or no time investment and can do so anonymously. Aided and abetted by the Internet, opposition to a project can materialize overnight.

This was the harsh lesson learned by the owner of the Roseville Har Mar Mall when it proposed to locate a 24-hour Cub Foods store in the former Home Place space in the mall. The project seemed the classic "entitlements no brainer." Cub Foods was a permitted use, and the City Council did not even have to approve the site plan. All the developer then needed was council approval to vacate and relocate utility easements.

But when he strode into Roseville city hall for the utility vacation hearing, the City Council adopted, without notice, a shopping center district moratorium which brought the project to a screeching halt. It turns out that a barrage of citizen e-mail and Internet neighborhood organizing alerted elected officials to neighborhood concerns and contributed to the hasty City Council action.

Community Development Tools: *Property Tax Abatement and Special Assessments*

By Bradley Hennen

Have you ever thought of your property tax bill or special assessments as an economic development opportunity? In Minnesota, Property Tax Abatement and Special Assessments can provide community planners and developers with a mechanism to capture and use development dollars to help bring quality projects to the market.

WHAT IS PROPERTY TAX ABATEMENT?

Property Tax Abatement was created by the legislature in 1997. It allows cities, counties and school districts to capture the property taxes payable on certain properties, and to use the proceeds from those taxes for economic development and redevelopment projects. Under Minnesota's Property Tax Abatement system, property owners pay the full amount assessed on subject properties and the participating jurisdictions capture up to 100% of their respective shares of the taxes. The captured tax proceeds can then be applied to the designated uses.

and infrastructure improvements. Proceeds may also be used to subsidize renovation or repair of older properties, to reduce the cost of assessments on new developments in order to maintain affordability, to provide funds for an existing business to undertake significant expansion or to pay park fees or other community development fees.

WHAT ARE SOME OF THE PROS AND CONS OF PROPERTY TAX ABATEMENT?

The key benefit Property Tax Abatement offers is flexibility. Property Tax Abatement allows taxing jurisdictions to determine how to best capture tax proceeds and where to apply them. For example, Property Tax Abatement may be captured in a fixed amount of each year or in an aggregate amount over a period of years. A taxing jurisdiction may elect to capture only the increase of property taxes resulting from construction of improvements or it may elect to capture only the increase of property taxes resulting from market value changes. Unlike other economic development tools, Property Tax Abatement does not impose dogmatic "economic necessity" or "but for" tests on the use of proceeds. Creative developers and government officials are free to apply proceeds from Property Tax Abatement to wide range of uses.

limitations on the annual amount of tax captured and the duration over which taxes may be collected, Property Tax Abatement may generate fewer dollars than other economic development tools. In addition to its other limitations, Property Tax Abatement may not be used to abate taxes in an existing Tax Increment Financing (TIF) district or to abate an area-wide tax.

WHAT ARE SPECIAL ASSESSMENTS?

Special Assessments are a tool for connecting the cost of certain public improvements and services directly to the properties benefited by those improvements. The authority for a taxing jurisdiction to levy Special Assessments is granted under Minnesota Statute, Chapter 429.

WHAT CAN SPECIAL ASSESSMENTS BE USED FOR?

Special Assessments may be used to pay or reimburse costs of a number of public improvements, including: constructing and improving streets and lights, sanitary sewers, gas and electric utilities, creating and equipping parks, trails and recreational facilities, and creating and maintaining public plazas and malls (among other uses).

WHAT ARE SOME OF THE PROS AND CONS OF SPECIAL ASSESSMENTS?

Special Assessments can be particularly useful in projects that are designed to open greater areas of a community to subsequent developments or changing uses. Where new infrastructure is required before any project can begin, the first project should not be the only property that pays those costs. Special Assessments allow spreading the cost of new roads, lights and parks across all of the benefited properties, not just the first one. For larger development projects that span several properties (or that will later be subdivided into several properties), the community and developer can agree in advance as to how to allocate the improvement costs among the different properties.

Another benefit of Special Assessments is the amount of money available for improvements. Unlike Property Tax Abatement, which caps total funds available,

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WHAT CAN PROPERTY TAX ABATEMENT BE USED FOR?

Proceeds from Property Tax Abatement may be used for a project that is determined to be in the "public interest" by the taxing jurisdiction and that has an expected benefit to the community "at least" equal to its cost. Proceeds from Property Tax Abatement are available to pay the cost of both public and private improvements. Proceeds may be used to pay or reimburse a wide variety of costs, including: demolition and site preparation, soil correction, land acquisition

The benefits of Property Tax Abatement are balanced by limitations on the amount of taxes available for abatement and the duration of any abatement project. Property Tax Abatement is limited annually to \$100,000 or five percent of the taxing jurisdiction's total levy. The term of any Property Tax Abatement is limited to 15 years (assuming that only one taxing jurisdiction elects to participate). The term may be shortened if more than one taxing jurisdiction participates. Because of

Special Assessments can be used to pay the entire cost of permissible public improvements (subject, of course, to certain exceptions).

Because Special Assessments result in a tax increase for affected property owners, Special Assessments carry increased approval and compliance requirements when compared to many other economic development tools. Before a taxing jurisdiction may impose a Special Assessment, it must determine that the planned improvements are necessary, cost effective and feasible. This determination requires certain feasibility and engineering studies, notices to property owners and a public hearing before the assessment can be approved. In addition, property owners have certain rights to challenge the validity and the amount of the Special Assessment.

Although Property Tax Abatement and Special Assessments may both have their limitations, each can provide a way to capture and leverage project development funds. In a tight market, the funds available through Property Tax Abatement and Special Assessments could mean the difference between a good idea for a project and a good project. ■



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Another challenge is that Internet access to print media, corporate reports, and development plans submitted out-of-state brings a new global reach to local issues. This can be a double-edged sword. It enables the developer to efficiently marshal data to respond to local concerns. But it makes it easier for a city to verify the accuracy of an applicant's response. The credibility bar is now very high.

A big box retailer learned this the hard way a few years ago. When a city planner asked him to modify the company's prototype, the developer said his company had never agreed to such a change anywhere in the country, which he, in fact, believed to be the case. At the next meeting, city staff greeted us with a computer image of the exact same façade they had been touting. It was the retailer's own corporate store in another state, which had been forwarded to the city by a colleague who had relocated there. The developer's credibility abruptly nose dived, and it was difficult to recapture the high road.

CHALLENGING SOCIAL ISSUES

Big box retail and its alleged effects on "mom and pop" stores can be a gut-wrenching issue for small communities. Throw in an affordable housing development here, and a children's home there, and you have a potential local government powder keg. In such an inflammatory setting, it's pretty hard for a City Council to separate the true zoning issue wheat from the social policy chaff. For example, almost every zoning application for a new Home Depot sparks emotional citizen testimony that it will drive a beloved corner hardware store out of business. Regardless of the factual basis for such a claim, it often has nothing to do with the zoning ordinance criteria for reviewing the specific application.

In today's competitive world, many traditional developments must attract non-traditional tenants to be viable. For example, some older shopping centers are repositioning themselves by including theaters, grocery stores and schools. These "second generation" land uses may conflict with the comprehensive plan and require special permits and variances. They may also have operational characteristics that spark new neighborhood opposition.

NEW RULES FOR LAND USE APPROVALS

As developers start the new year, they will be wise to adopt new rules to survive in today's high-tech, rough and tumble entitlements arena. The new rules include:

Establish up-front a land use approvals strategy. Tailor it to the budget, the applicable law and politics. Be flexible: changed circumstances, such as discovery of a wetland that was not originally identified, may require a mid-course correction in strategy.

Assemble a development team with the right approvals quarterback. Consider: 1) Who meets with whom and when? 2) What should be submitted? 3) Who presents what at the hearing? 4) Is it more important to build a record, or to protect the budget and long-term relationships?

Leverage the Internet. Use it to keep your team on the same page. Employ it to focus the public debate, marshal support and communicate with staff and elected officials.

All politics are local. Party preferences do matter, but not as much as you may think at the local level. Don't underestimate the effect of significant citizen opposition. It can destroy initial City Council support for many projects. Make sure you check in with staff and elected officials after the staff report is issued and up to the date of the hearing.

It's a "relationships business." Credibility is critical in the post-Enron era. Developers are entitled to rely on government commitments. If the city enters into a subdivision agreement with the developer that states that the preliminary plat is valid for eight years, the contract should bind subsequent city councils, even if the prevailing political winds change.

But the developer's word must also be his bond. For example, don't make a promise not to display product in front of the store if you're not prepared to keep that promise. Be sure that this type of operational restriction is clearly communicated to store managers. Your word means little if those who operate the business are unaware of the restrictions and are not motivated to comply.

Be persistent. Staying power equals approvals leverage. Value sound advice, common sense and good judgment. Remember, every project is its own entitlements "work of art." ■

■ Larkin Hoffman attorney **Chris Dietzen** will be presenting at an upcoming seminar titled "Minnesota Land Use: Current Issues in Subdivision, Annexation and Zoning Law" on February 17, 2004. The seminar will provide specific tips for dealing with subdivision, annexation and zoning claims.

■ **Greg Korstad** is one of six lawyers recently appointed to the National Law Committee of the U. S. Power Squadrons, a 60,000 member volunteer organization promoting boating safety and education.

■ The Minnesota Supreme Court has appointed **Chris Dietzen** to the Advisory Committee to the Board on Judicial Standards considering changes to the Rules of the Board on Judicial Standards and the Code of Judicial Conduct. The committee will focus on conduct concerning judicial elections.

■ **Peter Coyle** recently represented CVS/Pharmacy in securing Site Plan approval for a retail location in the City of Plymouth.

■ **Jim McGreevy** has been retained to represent the Red Lake Band and White Earth Band of Indians. He will pursue legislative authority for a gaming facility in the Twin Cities area during the 2004 Legislative Session.

■ **Peter Coyle** recently presented a seminar on land use development trends to the Builders Association of the Twin Cities.

■ Larkin Hoffman attorneys **Chris Dietzen**, **Larry Martin** and **Greg Korstad** were members of the faculty for a January 26, 2004 course titled "Master of Science in Real Estate Appraisal." The course addressed in-depth studies of specialized topics and issues involving real estate appraisal. Topics included: highest and best uses analysis, valuation of utility easement, business valuation, condemnation, valuation issues in shopping center property taxation and the role of environmental conditions in valuation.

■ **Tim Keane** is representing an elderly couple faced with losing their home to a mortgage refinance company which is making unsolicited sales visits to elderly couples. Ameriquest is a California

company with offices in Minnesota. Rosella and Palmer Olson agreed to a refinance plan on the 3rd unsolicited sales visit and are now struggling with monthly payments which far exceed their social security income and an auction date for the sale of their house. Keane's case was recently the subject of a KSTP-TV report.

■ **Thomas Alexander, Daniel Kadlec, Jim Susag, Joseph Fittante, Jr., Joani Moberg, and Genevieve Beck** have been named Rising Stars by *Law & Politics* magazine. Rising Stars are nominated by their peers in the legal community. These attorneys will be featured in an upcoming issue of *Law & Politics*.

■ Larkin Hoffman recently sponsored a seminar titled, "Change in Plans for Regional Growth." This seminar focused on what the new 30-year plan outlined by the Metropolitan Council means for cities and developers, and whether a new focus will change the way development and infrastructure decisions are made. A panel discussion covered the plan's effects on rural redevelopment, regional development of controversial land uses, transportation and development inventory. **Peter Coyle, Linda Fisher, Bill Griffith** and **Greg Korstad** were members of the faculty for the seminar.

■ **Bill Griffith** and **Brad Hennen** were members of the faculty at a senior housing seminar on October 23, 2003 sponsored by the Minnesota Real Estate Journal and the University of St. Thomas. They spoke on "Putting It All Together: Critical Legal Issues for Senior Housing."

■ **Peter Coyle, Neal Blanchett** and **Jim Susag** were members of the faculty for "Zoning and Land Use in Minnesota," sponsored by Lorman Education Services on October 17, 2003. The seminar was intended to provide practical advice and insight into the zoning and land use process.

■ **Neal Blanchett** was a member of the faculty for a day-long seminar on October 21, 2003 that was titled, "Legal Issues Involving Local Governments."



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Mr. Hennen earned his B.A. in Philosophy from St. John's University, and his J.D. with *Honors, Order of the Coif*, from the University of Maryland School of Law in Baltimore, MD. He is a member of the Minnesota State Bar Association, the Hennepin County Bar Association and the National Association of Parliamentarians. ■

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