

## IX. Special Topics

There are a number of special topics which relate to land use management in general and have significant impacts on the effectiveness of land use management. Much of the time, when there is a legal problem with an action by a local government, the problem pertains to procedural issues and not to issues of judgement. Some of the most common areas where local government may run into trouble include: public hearings and notification, findings of fact, conflicts of interest, and ex parte communications.

### A. Public Hearings and Notification

Public hearings are a part of most procedures in zoning and subdivision regulation. They are required for ordinance amendments, subdivision plat approval, variances, and conditional use permits. Any public hearing requires publication of a public notice in advance of the hearing date. Enabling legislation specifies how far in advance notice must be provided, who must be notified of the hearing, where publication of the notice must be done, and what information must be included in the public hearing notice.

It is a common requirement for a public notice to be published in an official newspaper of the local government having jurisdiction over the matter. It is important to know when public notices need to be submitted to the official newspaper in order to ensure publication far enough in advance to meet the advance notice requirement. Public notice requirements may also include a mailed notice to certain property owners or citizens in the vicinity of a proposed zoning or subdivision action.

It is important to identify exactly who must be notified of a public hearing early enough to ensure they receive the appropriate notice information in the appropriate manner and time. In some cases, there are timelines within which zoning or subdivision decisions must be made. It is very important to be aware of all matters of timing to make sure that due process is carried out. For example, if a township has a fifteen day advance notice requirement for publication of a public hearing notice, and the township's official newspaper publishes only weekly and requires notices to be submitted three days before publication, there may only be five days from the date of a previous regularly scheduled monthly meeting until notice must be submitted to the newspaper to meet the timetable for the next regularly scheduled monthly meeting.

### B. Findings of Fact

Zoning and subdivision decisions often provoke strong emotional comments at hearings. However, it is not emotion, but the facts of a case that must be used to determine the appropriate decisions. Moreover, when a land use decision is made, the findings used to arrive at the decision must be clearly documented. In order to strengthen a local government's position if it ends up in court, it is essential that findings

of fact be clearly established. The following guidelines, developed by Gary A. Kovacic and Mary L. McMaster, should be used in developing findings before making a decision.<sup>39</sup>

First, it is important to identify assumptions. This is a matter of connecting all the logical dots. Even though everyone at a hearing is in agreement on an assumption, if it is not stated for the record, it leaves a gap in the decision process which may cause the decision to be overturned by the courts.

Second, whenever a land use decision is based on a condition, make sure the condition being imposed and the impacts of the project are clearly and logically articulated. Without this connection between the impact and the condition, the decision may seem arbitrary.

Third, when a project has been modified since findings were written, make sure the changes do not require a re-writing of the findings. If there are additional impacts or changes to the previous impacts, it is likely that the conclusions pertaining to a case may change or even be strengthened.

Fourth, make sure if state guidelines or local regulations require certain findings in order to make a certain decisions, that the findings meet the letter of these requirements.

Fifth, avoid findings that merely re-state the law. If one does not apply the specific facts upon which a decision is based, the decision will appear baseless.

Sixth, "put your findings in clear and understandable language."<sup>40</sup> Too much jargon may cloud the logic behind a decision. It is best to use plain common language to make the finding.

Seventh, be very careful to avoid decisions that may be considered discriminatory. This often happens when an assumption about a group or class of people is made. Any such attribution to a group must be strongly supported by the facts and reviewed with a local attorney.

Lastly, it should be noted that these findings must end up in the minutes of the meeting as well. To merely discuss these things and not put them into the minutes is to remove the record upon which your decision will be defensible in court.

### C. Conflicts of Interest

Conflict of interest under North Dakota law is a complex topic. When a local government official believes a conflict of interest may exist or questions if there could be a conflict of interest in any situation, the attorney advising the applicable local government agency should be consulted.

#### D. Ex Parte Communications

“Ex parte” communications are those oral or written communications between a decision-maker of a governmental body and an advocate for some issue which is being considered by the same governmental body which do not take place on the public record or during a public meeting. It is highly recommended that such communications be prohibited in order to preserve the integrity of the decision making process and to protect all parties from the appearance of wrongdoing.

#### E. Zoning District Types

Typically, zoning districts are designed to group compatible uses together and keep incompatible uses separated. Zoning districts often fit into categories like:

- Residential
- Commercial
- Industrial
- Public/Institutional
- Agricultural

A zoning ordinance may specify variations of these general categories of zoning districts in order to create districts that respond to specific situations within the community. For example, there may be a Highway Commercial district that defines appropriate land uses adjacent to high volume roadways. There may be several different residential districts, such as Low Density Single Family Residential or High Density Multiple Family districts which establish the density levels of dwelling units within that district.

#### F. Extraterritorial Authority

North Dakota enabling legislation gives cities the ability to establish zoning and subdivision controls beyond their municipal boundaries. Counties and townships do not have this authority. This is typically called extraterritorial authority, or extraterritorial zoning and subdivision control. Extraterritorial authority can be exercised only by explicitly establishing the subdivision and/or zoning authority via an ordinance (similar to the process of establishing zoning and subdivision controls within municipal boundaries). Changes to the enabling legislation occurred in 1997 and subsequent years which have changed some of the procedures related to establishing this authority. It is advisable to consult an attorney before initiating the process to ensure all necessary actions will be completed. One of the main features of the North Dakota enabling legislation regarding extraterritorial authority is the distance to which cities can establish authority beyond their municipal boundaries. As of this writing, there are three categories:

- Cities having a population of less than 5,000 at the last official regular or special federal census can extend their authority up to 1 mile.
- Cities having a population of 5,000 or more, but less than 25,000, at the last official regular or special federal census can extend their authority up to 2 miles.

- Cities having a population of more than 25,000 at the last official regular or special federal census can extend their authority up to 4 miles.

The actual area over which extraterritorial authority can be established is not exactly 1, 2, or 4 miles, since the enabling legislation further specifies that the extension of this authority may be to each quarter quarter section of unincorporated territory the majority of which is located within 1, 2, or 4 miles as the case may be.

#### G. Additional Land Use Control Tools

In recent years a number of new zoning tools have begun to emerge in the United States to address limitations which have been found with the traditional tools of zoning and subdivision regulation. While North Dakota enabling legislation does not explicitly grant the use of any of these tools, they are mentioned here to provide local governments with a direction to research if they wish to add options to the way they may currently manage land use within their jurisdiction. Among these tools are:

- Planned Unit Developments (PUD's)
- Overlay Zones
- Floating Zones
- Incentive Zoning
- Transfer of Development Rights (TDR's)
- Cluster Development

It is beyond the scope of this Handbook to explain the theory and potential use of these or other tools which may be emerging in the field of land use management. It is recommended that local government attorneys or land use planning experts be consulted regarding the appropriate use of such tools in North Dakota.