FLAHERTY | HOOD P.A.

MEMORANDUM

To: Ben Martig, City Administrator **VIA EMAIL ONLY**

From: Christopher M. Hood, City Attorney

Date: August 31, 2021

Re: **Roles of City Council – Legislative and Quasi-Judicial, Types of Land Use Applications, Timing of Consideration, Example of a Quasi-Judicial Proceeding, and Communications by and with Interested Parties**

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As requested, the following memorandum generally discusses some of the legal and process related issues that may arise when the City Council or another City board or commission (e.g., Planning Commission, Zoning Board of Appeals) considers a land use application under the City of Northfield ("City") Land Development Code ("LDC") as contained in Chapter 34 of Northfield City Code. This memorandum addresses the following subjects: the different decision-making roles of the City Council; the types of quasi-judicial land use applications; the timing for consideration of land use applications; an example of a quasi-judicial proceeding; and issues and procedures regarding communications by and with interested parties (ex parte communications) with respect to a pending quasi-judicial decision regarding a land use application.

Roles of City Council - Legislative and Quasi-Judicial Decision-Making

- **Legislative**

When the City Council is establishing policy or adopting an ordinance, it is acting in a legislative capacity to promote the health, safety, and welfare of the City by establishing rules, regulations and laws that are applicable within the corporate limits of the City. In such capacity, the City Council has broad discretion in its decision-making and ultimately those decisions are weighed by voters in municipal elections. Courts afford such legislative decisions considerable deference regarding a council's discretionary decision-making.

- **Quasi-Judicial**

Unlike when the City Council typically considers matters in a legislative capacity, in some cases the City Council and some boards and commissions act in a quasi-judicial capacity. When acting in a quasi-judicial capacity rather than legislating for the broad population as whole, the City Council is instead acting in a judge-like manner to determine the facts associated with a particular land use application and apply those facts to the legal standards and specific criteria contained in City Code and relevant state statutes. In such cases, the Council and/or board or

commission is called on not to determine what the law should be, but to apply the law as it exists to specific situations. In acting in such role, the City Council has less discretion and must confine its consideration of a land use application to those criteria and standards contained in City Code and applicable state law. In general, if an applicant meets the relevant legal standards and criteria contained in City Code and applicable law, then the application likely must be approved, and the City usually has no legal basis to deny such a land use application.

Types of Quasi-Judicial Land Use Applications

There are many types of land-use applications and many more circumstances under which they are submitted to the City pursuant to the LDC. Some of the quasi-judicial land-use applications that can be submitted to the City for consideration of approval pursuant to City Code, include but are not limited to the following:

1. Conditional Use Permits;

2. Nonconforming Uses;

3. Re-zoning a single property or properties related to a specific development proposal as part of a land use application based upon the request of the property owner/developer of such property(ies) (Note: re-zoning multiple properties or making district changes not related to a specific land use application is a legislative decision);

4. Subdivision applications (Preliminary and Final Plats); and

5. Variances to zoning requirements.

While not discussed in this memo, Certificates of Appropriateness considered for approval by the Heritage Preservation Commission are also quasi-judicial decisions, subject to appeal to the Zoning Board of Appeals, and subject to the same requirements applicable to other land use applications relating to zoning as discussed further below.

Timing for Consideration of Land Use Applications

- **60-Day Rule**

Minnesota Statutes, Section 15.99, requires that the City approve or deny land use applications related to zoning within 60 days of the date of receipt by the City of an application. This requirement is commonly referred to as the "60-Day Rule". The 60-Day Rule applies to such applications, including but not limited to, those specified above, with the exception of preliminary plat applications, which are instead subject to the 120-Day Rule discussed below, and final plat applications, which are subject to their own 60-day rule as contained in Minnesota Statutes, section 462.358, subd. 3b.

The consequence of the City failing to comply with the 60-Day Rule is that the land use application as presented by the applicant would be deemed approved without action by the City

Council or such other governing body having decision-making authority. Minnesota courts generally demand strict compliance with the 60-Day Rule.

This law also requires that: "If an agency denies the request, it must state in writing the reasons for the denial at the time that it denies the request." See Minn. Stat.§ 15.99, Subd. 2 (a). This means that the City Council or such other governing body having decision-making authority must make written findings supporting its decision of denial and do so within the required time limit.

The 60-Day Rule does allow for some limited extension of the initial 60-day period. The City may unilaterally extend the initial 60 days by up to another 60 days (120 days total) by simply providing written notice to the applicant. The City's notice, however, must be provided to the applicant before the end of the initial 60 days and must state the reasons for the extension and its anticipated length. See Minn. Stat.§ 15.99, Subd. 3 (f). The City can only go beyond 120 days with the written approval of the applicant. See Minn. Stat.§ 15.99, Subd. 3 (g).

- **120-Day Rule – Preliminary Plats Only**

Minnesota Statutes, Section 462.358, subd. 3b, has an alternate timeframe to the above 60-Day Rule for a decision on an application for a preliminary plat. It provides in part that:

"A subdivision application shall be preliminarily approved or disapproved within 120 days following delivery of an application completed in compliance with the municipal ordinance by the applicant to the municipality, unless an extension of the review period has been agreed to by the applicant"

Thus, for preliminary plats only, a decision to approve or deny a preliminary plat must be made by the City Council within 120 days of the date of submission of a completed application to the City. Such timeframe can only be extended beyond 120 days with the agreement of the applicant.

- **Alternate 60-Day Rule for Final Plats**

Minnesota Statutes, Section 462.358, subd. 3b, has an alternate timeframe to the above 60-Day Rule for a decision on an application for a final plat. It provides in part as follows:

"Following preliminary approval the applicant may request final approval by the municipality, and upon such request the municipality shall certify final approval within 60 days if the applicant has complied with all conditions and requirements of applicable regulations and all conditions and requirements upon which the preliminary approval is expressly conditioned either through performance or the execution of appropriate agreements assuring performance. If the municipality fails to certify final approval as so required, and if the applicant has complied with all conditions and requirements, the application shall be deemed finally approved, and upon demand the municipality shall execute a certificate to that effect."

Thus, for final plats only, a decision to approve or deny a final plat must be made by the City Council within 60 days of the date of submission of a completed application for final plat to the City provided the application meets/complies with City Code and the conditions of preliminary plat approval. The statute does not provide an option for the extension of such timeframe, which means that failure by the City to meet the same is deemed approval of the final plat application.

An Example of a Quasi-Judicial Proceeding

Section 8.5.12 of Northfield City Code provides the procedure and criteria for consideration of a preliminary plat. The Planning Commission hears such matters and then makes a recommendation of approval or denial of the same to the City Council for ultimate approval or denial of the same by the City Council.

The courts in Minnesota have held that a decision on a preliminary plat is a quasi-judicial decision:

> "The denial or approval of a preliminary plat application is a quasi-judicial administrative decision that we review to determine whether the decision is unreasonable, arbitrary, or capricious. *National Capital Corp. v. Village of Inver Grove Heights*, 301 Minn. 335, 336–37, 222 N.W.2d 550, 551–52 (1974) (per curiam); *Good Value Homes, Inc. v. City of Eagan*, 410 N.W.2d 345, 348 (Minn.App.1987)." *Hurrle v. County of Sherburne ex rel. Bd. of Com'rs*, 594 N.W.2d 246, 249 (Minn. Ct. App. 1999)

The decision of the City Council on a preliminary plat therefore should always be in the form of a written resolution making specific written findings addressing the applicable and required standards and criteria contained in City Code; as City Code is the governing law on this subject.

Section 8.5.12 (B) (2) sets out the required criteria for consideration of a preliminary plat and states as follows:

> "The planning commission and city council shall consider the following criteria in the review of a preliminary plat. Criteria (a) and (g) must be met and (b) through (f) shall be considered:
>
> (a) The proposed subdivision must be in full compliance with the provisions of this LDC;
>
> (b) The proposed subdivision must be in accordance with the general objectives, or with any specific objective, of the city's comprehensive plan, capital improvements program, or other city policy or regulation;
>
> (c) The physical characteristics of the site, including but not limited to topography, vegetation, susceptibility to erosion and sedimentation, susceptibility to flooding, water storage, and retention, must be such that the site is suitable for the type of development or use contemplated;

(d) The site must be physically suitable for the intensity or type of development or use contemplated;

(e) The design of the subdivision or the proposed improvements must not be likely to cause substantial and irreversible environmental damage;

(f) The design of the subdivision or the type of improvements must not be detrimental to the health, safety, or general welfare of the public; and

(g) The design of the subdivision or the type of improvement must not conflict with easements on record, unless those easements are vacated, or with easements established by judgment of a court."

The word "shall" as used above is mandatory. The Planning Commission and the City Council are therefore required by law to act within the confines of the stated criteria. Thus, the Planning Commission's and the City Council's respective review of a preliminary plat application is limited to the above criteria with only criteria (a) and (g) being required to be met by the applicant.

While public input on such matters is important and can be considered by the Planning Commission and City Council, it is just one factor in the analysis of a land use application and it, by itself, does not provide a legal basis for approval or denial of a land use application. Public input can often provide important facts to help the City address whether an application meets the governing criteria, but unsubstantiated opinions or irrelevant facts and reactions to an application are not a legitimate basis for a decision. The LDC and state law ultimately must govern the approval or denial of a land use application. If the criteria in the LDC for a land use application are met by the applicant, then the application should logically be approved. If the LDC criteria are not met, then the application should logically be denied. Public input cannot and does not change that process or the parameters for a decision, which decision is governed by the above ordinance.

Property owners also have certain private property rights to use and develop their properties within the requirements of and in compliance with the LDC and state law as it exists at the time a land use application is submitted to the City. If a City board or commission or the City Council were to otherwise ignore City Code, and thereby arbitrarily deny such rights as given through City Code, such action would be a violation of City Code and may subject the City to legal challenge.

Under quasi-judicial review and decision-making, both the Planning Commission and City Council reviews, respectively, are limited to applying the above City Code as the same exists at the time of the land use application. With respect to a preliminary plat, Minnesota Statutes, Section 462.358, subd. 3b, provides in part that:

"A municipality must approve a preliminary plat that meets the applicable standards and criteria contained in the municipality's zoning and subdivision regulations unless the

municipality adopts written findings based on a record from the public proceedings why the application shall not be approved."

Thus, "based on a record from the public proceedings", if the applicant factually meets the written criteria contained in City Code for a preliminary plat, then the Planning Commission and the City Council are required by law to approve the preliminary plat, and vice versa. Either approval or denial must also be based upon written findings applying the facts presented and addressing the applicable Code based criteria and standards. Finally, from the date an application is submitted to the City until the final decision of the City Council is made to approve or deny the same, the same must not exceed 120 days, unless the applicant agrees to an extension of such time period.

Communications by and with Interested Parties (Ex Parte Communications)

Communications by and with interested parties (ex parte communications) with respect to a pending quasi-judicial decision regarding a land use application may present legal complications for the decision as well as any Council and/or board/commission members having engaged in such communications.

- **Code of Ethics – Ex Parte Communications and Conflict of Interest**

Communications outside the public record by Council and/or board/commission members regarding a quasi-judicial matter coming before such body are generally referred to as ex parte communications. Ex parte communications are generally considered to be contacts, whether oral or written, which occur outside a public meeting and which seek to influence the decision of the City Council and/or individual members, as well as boards and commission having jurisdiction, thereby creating potential bias in the body's decision, and are contrary to the City's Code of Ethics.

All City Council members and board and commission members are subject to the City Code of Ethics. Specifically, the City Code of Ethics, Northfield City Code, Section 2-122, states in part that:

> "The proper operation of democratic government requires that public officials be independent, impartial, and responsible to the people; *that governmental decisions and policy be made in the proper channels of the governmental structure*; that public office not be used for personal gain; and that the public have confidence in the integrity of its government. …"

(Emphasis added.)

Northfield City Code in Section 2-125, further states in part that:

> "Public officials are agents of public purpose and hold office for the benefit of the public. They are bound to uphold the Constitution of the United States, the constitution of this state and the city Charter and to observe and carry out impartially the laws of the nation,

state, and city and thus to foster respect for all government. They are bound to observe in their official acts the highest standards of morality and to discharge faithfully the duties of their office regardless of personal considerations, recognizing that the public interest must be their primary concern."

Finally, Northfield City Code, Sec. 2-127. - Conflict of interest, clause (b), provides as follows:

> "Other conflicts. Any public official who engages in any business or transaction or has a financial *or other personal interest*, direct or indirect, including an interest arising from blood, adoptive, or marriage relationships or close business or personal associations, *which interest is incompatible with the proper discharge of his/her official duties in the public interest or would tend to impair his/her independence of judgment or action in the performance of official duties*, shall disclose the nature of such activity or interest and shall disqualify himself/herself from discussion and voting, provided that such member shall be allowed to participate in discussion as a member of the public. Disqualification is not called for, however, if discussion and action by a public official will not affect him/her more than any other member of the same group, neighborhood, business classification, profession, or occupation."

(Emphasis added.)

To engage in ex parte communications violates the City's Code of Ethics and could ultimately jeopardize the decision of the respective bodies having jurisdiction over a quasi-judicial matter under the theory that such board/commission members and/or City Council members were, based upon such ex parte communications, biased, unduly influenced, and/or pre-judged the matter coming before them for a vote outside the hearing/meeting process and record.

City Council and board/commission members having jurisdiction over a quasi-judicial matter should refrain from such ex parte communications so as not to violate the City Code of Ethics and jeopardize the independence and integrity of the City's quasi-judicial decisions. It should be noted that violation of the City's Code of Ethics is a criminal misdemeanor punishable by a fine of not more than $1,000.00, imprisonment for a term not exceeding 90 days, or any combination thereof. See Northfield City Code, Secs. 1-8 and 2-123.

- **Suggested Response to Attempted Ex Parte Communications**

In the event such a member is approached by a person seeking an ex parte communication related to a quasi-judicial matter coming before a City body upon which the member serves, such member should politely decline such communications and instead inform such person that the member cannot discuss the matter, except at the scheduled meeting of the body, and that if the inquiring person has questions or comments, that person should instead contact City staff and/or attend the scheduled public meeting and give testimony at such publicly noticed meeting.

Further, if an interested person wants to provide information/documentation to the respective body, then that person should be informed that such information/documentation should be submitted to City staff for distribution by City staff to the respective body considering the matter.

A key consideration with this suggested response is the maintenance of the integrity of the public quasi-judicial process by treating all interested parties uniformly and fairly in presenting their position to the governing public body as a whole in the context of the public meeting/hearing process.

- **Suggested Response to Ex Parte Communications That Have Occurred**

In the event that a City Council member and/or board/commission member have engaged in ex parte communications outside the public process on a quasi-judicial land use application the following process should be utilized under the City Code of Ethics:

1. The ex parte communications should be disclosed to City staff and disclosed publicly on the record at the beginning of the agenda item at the respective public meeting where the agenda item will be considered by the body;

2. The member should disclose the substance of the communication on the record and who the communication was with, and whether, in the opinion of such member, such communication has caused such member to become biased;

3. If, in the opinion of such member, an ex parte communication has caused such member to become biased in connection with an upcoming vote of the body on such quasi-judicial matter, then the member should not participate in any discussion of such matter as a member of the body, and such member cannot vote upon the matter.

- **Policy Recommendation**

Based on the foregoing discussion of quasi-judicial proceedings, it is recommended that the City Council consider adopting a policy on ex parte communications by members consistent with the above in order to provide guidance for all City Council and board/commission members in the future.

Should you have any questions or require additional information regarding the foregoing, please do not hesitate to contact me at (651) 225–8840.

CMH/sw