LIVESTOCK, LOCAL GOVERNMENTS, AND LAND USE

A GUIDE FOR MINNESOTA LOCAL OFFICIALS





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MINNESOTA DEPARTMENT OF AGRICULTURE
FROM THE FARM TO YOUR FAMILY

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Prepared by

duncan associates

for the

MINNESOTA DEPARTMENT OF AGRICULTURE
FROM THE FARM TO YOUR FAMILY

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INTRODUCTION

WHY HAS THIS GUIDE BEEN WRITTEN?

In early 2005, the Local Siting Committee of Governor Pawlenty's Livestock Advisory Task Force recommended that the Minnesota Department of Agriculture update the 1996 handbook, *Planning and Zoning for Animal Agriculture in Minnesota*. The committee's directive stemmed from its recognition that local governments are still struggling with feedlot siting issues nearly ten years after the first handbook was prepared. More focused than the previous handbook, this updated guide is intended to provide concise, practical advice for local government officials on the subject of land-use planning and livestock facility siting.

Livestock Advisory Task Force

The Livestock Advisory Task Force was appointed by Governor Pawlenty in 2003 to evaluate the status of Minnesota's animal agriculture industry and make recommendations to support its retention and growth. The 14-member panel included representatives from the state's livestock industry, as well as agricultural finance, producer organizations, academia, and state government. The task force's final report was issued in June of 2004.

Local Siting Committee

To address issues of livestock siting, a task force subcommittee was appointed. This Local Siting Committee included representatives from the Association of Minnesota Counties, the Minnesota Association of Townships, and two members each of the Minnesota Senate and House of Representatives. The Local Siting Committee issued its recommendations in January 2005.

Perhaps even more than in 1996, when the original handbook was prepared, local officials are still caught in the crossfire of a heated debate over the best approach to dealing with the changing face of agriculture and sometimes haphazard rural land-use patterns. Residents are increasingly demanding the adoption of feedlot ordinances that will, they hope, "protect air and water resources, property values, and their quality of life." Livestock farmers, on the other hand, continue to remind elected officials, that agriculture, in its many forms, is the lifeblood of most rural communities. They point out that efforts to restrict growth and modernization will have a lasting, adverse impact on local and state economies.

In issuing its final recommendations, the Livestock Advisory Task Force's siting committee stated:

> "The Local Siting Committee recognizes the economic significance of Minnesota's livestock industry and its importance to rural communities and the state, and believes that diversity of species and of sizes and types of livestock facilities is critical to maintain the vitality of the livestock industry and of the overall state economy. The committee's goal is to maintain Minnesota's commitment to local government zoning and environmental quality while at the same time improving the transparency, predictability, cost effectiveness, fairness, and civility of the local siting process."

These principles and goals provide the philosophical foundation for this guide, which represents the first component of the task force's recommended "comprehensive training and technical assistance program for local government officials."

WHO IS IT WRITTEN FOR?

The guide is written for all local government officials in Minnesota. As with the previous handbook, it is expected that county officials will be a primary audience since so much of the ongoing debate over livestock and land use is

occurring at the county level. In light of the growing number of townships entering the planning, zoning, and feedlot regulation arena, it is also hoped that the guide will find a receptive audience among officials in townships that have chosen to address feedlot siting at the township level.

While recognizing township officials as an important potential audience, the guide is *not* intended as a "call to zone" for all townships in Minnesota. It is recognized, however, that some townships have and may continue to make the determination that their local interests are not fully addressed by state- and county-level controls. In those instances, the guide may serve as a useful source of information and advice.

How will this guide help local officials?

This guide addresses some of the basic questions and issues raised in debates about feedlot siting. By providing practical and (usually) concise responses to basic questions about livestock facility siting and land use policies, it is hoped that the guide can help reduce the level of stress and internal conflict that some local officials experience when thrust into the middle of siting controversies.

Why was the Livestock Task Force's Local Siting Committee so concerned about local siting?

Because of the significant economic impact of animal agriculture in Minnesota, creating predictability in the siting process is critical.

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According to the Livestock Advisory Task Force's analysis, a lack of predictability and uniformity in the siting process at the local government level can be seen as a significant barrier to expansion, modernization, and new investment. Such impediments are viewed as contributing to an uncertain future for animal agriculture in Minnesota. Viewed in this light, finding ways to rationalize the local siting process is a high priority because the economic stakes are so high.

In 2001, cash receipts from animal agriculture totaled nearly $4.3 billion, or more than 50% of Minnesota's overall agricultural sales.[1] When indirect and induced impacts are considered, the full economic impact of livestock production in the state exceeds $10.7 billion.[2]

Livestock production also means jobs. The state's pork industry alone employs more Minnesotans than Northwest Airlines, 3M, and Target Corporation combined. All told, the animal agriculture sector of the Minnesota economy directly and indirectly supports nearly 100,000 jobs.[3]

Given the economic impact of livestock production, it is no wonder that promoting animal agriculture is official state policy. Yet, despite its vital role in fueling state, regional, and local economies, recent trends suggest what once would have been unthinkable: that Minnesota's livestock sector can't be taken for granted.

1 Minnesota Agricultural Statistics Service, 2003.
2 IMPLAN analysis of agriculture's economic value to Minnesota, Su Ye, Minnesota Department of Agriculture.
3 Ibid.

The state's dairy industry is a case in point. Once the crown jewel of Minnesota agriculture, dairy production is leaving the state at an alarming rate. Between 1993 and 2003, Minnesota lost 173,000 dairy cows,[4] 21 dairy processing plants,[5] and hundreds of millions of dollars in related economic activity. By and large, milk production is shifting to western states such as California and Idaho. The success of these states has been credited to a number of different factors, including their more accommodating stance when it comes to the siting of dairy farms.[6] Wisconsin is a notable exception to this westward trend. The Wisconsin Legislature has passed several initiatives to provide incentives for dairy farm modernization and a more transparent livestock local siting process. As a result, the Badger State has been able to maintain fairly stable levels of milk production.

IS THE LOCAL SITING PROCESS THE ONLY CHALLENGE FACING ANIMAL AGRICULTURE?

Livestock farmers face many challenges, including decreased profit margins and local resistance to farm size increases.
(Image source: NRCS Photo Gallery, USDA)

By no means. Today's uncertain outlook for livestock farmers is a result of many forces. As input costs have increased and commodity prices have remained relatively static, profit margins have shrunk. This has driven some farmers out of business, while others have chosen to farm part-time and work off the farm to supplement their farm income. Some have chosen to switch to alternative farming methods such as grazing or organic production.

For still other farmers, the answer has been to increase farm size (acres or animal units) to offset declining per-unit returns. In the wake of dwindling profit margins due to flat or reduced commodity prices and increasing expenses, some farmers have decided they have no choice but to attempt increased efficiencies through alternative marketing solutions and strategies and by growing the size of their farm. Their attempts to grow and improve are sometimes, however, met with resistance by those who are opposed to such changes.

WHY IS THERE SO MUCH CONTROVERSY SURROUNDING THE SITING OF LIVESTOCK FARMS?

The level of controversy is the likely result of a collision of three strong forces: (1) increases in farm size and specialization, (2) continued growth in rural, nonfarm population, and (3) heightened public awareness of environmental and land-use issues.

While the number of farms continues to decrease, farm size—whether measured in acres of cropland or number of animals—continues to climb upward. At the same time, many new livestock farms bear little resemblance to the open-air pastures and feedlots of 40 years ago. Today's livestock barns allow greater control over the environment in which animals are raised and offer increased production efficiencies.

4 Minnesota Agricultural Statistics Service, 1993, 2003.
5 Dairy and Food Division, Minnesota Department of Agriculture.
6 Governor Pawlenty's Livestock Advisory Task Force, 2004.

Livestock farming has changed dramatically over the years, with increased farm size, specialization and controlled environments designed to increase output.

(Image source: NRCS Photo Gallery, USDA)

Increased farm size and specialization have allowed many farmers to increase output, which helps to partially offset slim profit margins. While such changes have typically had a positive impact on farmers' bottom lines, some people are concerned about the socio-economic, environmental/health, and land-use impacts associated with increased farm sizes and specialization. Others may be concerned not so much with increased farm size and specialization per se, but rather who owns some of today's farms. Such feelings can sometimes be heard simmering just beneath the surface when people use terms such as "family farm," "factory farm," and "corporate farm."

Rural growth management policies (or occasionally, the lack of such policies) also share some of the blame. Policies allowing suburban-style residential development to encroach into agricultural areas—sometimes into very *active* farming areas—contribute to an increase in the number and severity of land-use conflicts. The nature of such land-use conflicts is well known. Nonfarm neighbors, particularly newcomers to rural areas, complain about odors, noise, dust, crop spraying, and slow-moving vehicles on rural roads. Farm operators cite increasing incidents of vandalism, theft, illegal dumping, and trespassing (by people and their pets). Encroachment of nonfarm development into active farming areas can be particularly troublesome for livestock farmers, regardless of whether they are large or small operators, or whether they have confined feeding or grazing operations.

Finally, some of the attention that local feedlot siting controversies have received is surely the result of growing public awareness of zoning, land-use, and environmental issues and of how to engage in the process of making or changing such rules. Thanks to the Information Age, people have ready access to an incredible amount of information on this subject—sometimes reliable, sometimes not. Google the term "feedlot controversy," for instance, and you will find a listing of thousands of web sites, legislative bills, news stories, articles and miscellaneous musings on the subject. Read a few of these and it's easy to come away with the impression that there is no room for compromise.

Suburban development encroaching into agricultural areas has contributed to the frequency and severity of land-use conflicts.

(Image source: Metropolitan Design Center Image Bank. © Regents of the University of Minnesota. All rights reserved. Used with permission.)

All of these ingredients provide a potent recipe for a classic land-use controversy.

WHOSE POINT OF VIEW IS EXPRESSED HERE? IS IT A FAIR AND BALANCED PERSPECTIVE?

The guide attempts to advance the point of view of the Local Siting Committee—an offshoot of the Governor's Livestock Advisory Task Force. To help ensure a balanced perspective, the siting committee was made up of a sub-group of the task force, as well as representatives from the Association of Minnesota Counties, the Minnesota Association of Townships, two State Senators, and two State Representatives.

The preparation of this guide occurred under the general oversight of a review panel that, like the local siting committee, included representatives from a diverse range of interest groups (See sidebar). Throughout the process of preparing the guide, the panel insisted that the information presented be factual and that opinions and advice reflect a fair and balanced perspective. Their participation in the project is testament to the guidebook's balanced perspective as a whole. At the same time, it is important to note that the participation of these groups does not necessarily mean that every statement, concept or recommendation in the guide was unanimously endorsed.

Guidebook Review Panel Representatives:

- Minnesota Pollution Control Agency;
- Association of Minnesota Counties;
- Minnesota Association of Townships;
- Minnesota Association of County Feedlot Officers;
- Minnesota Association of County Planning and Zoning Administrators;
- University of Minnesota;
- Minnesota Farm Bureau Federation;
- Minnesota Farmers Union;
- Minnesota Association of Cooperatives;
- Minnesota Milk Producers Association;
- Minnesota Turkey Research and Promotion Council;
- Minnesota Soybean Research and Promotion Council;
- Minnesota Pork Producers Association; and
- Minnesota Cattlemen's Association.

Whose point of view is expressed here? Is it a fair and balanced perspective?

GETTING A HANDLE ON LAND USE AND LIVESTOCK ISSUES

WHERE DO WE BEGIN?

Rather than *where,* let's start by addressing *when* a jurisdiction should begin to get a handle on livestock and land use issues. Sometimes, it seems, local governments wait until a land-use issue becomes a broiling land-use controversy before taking action. Then, when controversy erupts over a feedlot proposal, the immediate response is often the adoption of a feedlot ordinance or new zoning regulations. Those who've been down this *reactive* path sometimes discover their well-meaning attempts to take quick action are ineffective or have unintended negative consequences.

This guide, like its predecessor handbook, recommends that local governments begin to get a handle on rural land use issues—including the proper location of farms, feedlots, *and* nonfarm land uses—well *before* actual development proposals are submitted or siting controversies arise. Moreover, it recommends that land-use policies be developed after examining the "big picture" in a planning process.

WHAT IS "PLANNING"?

Planning is a process by which cities, counties, and townships (1) take stock of where they are, (2) establish a shared vision of the future, and (3) chart a path toward realization of that future vision. A thoughtful, broad-based and inclusive planning process can help rural communities:

- preserve open space and rural character;
- conserve natural resources;
- promote economic development;
- make wise use of limited fiscal resources; and
- manage the impacts of agriculture and other land uses.

When it comes to animal agriculture and feedlot siting, the most important thing that can be accomplished through planning is the identification of areas of the jurisdiction that are appropriate for various land uses and activities. In areas where land-use patterns are already established, planning can help manage and even avoid the types of land-use conflicts that arise when farm and nonfarm uses are located in close proximity to one another. It can also help keep the livestock sector and the infrastructure that serves it vital, while at the same time promoting protection of environmentally sensitive areas.

Figure 1. Typical Planning Process

The planning process provides a *systematic* method for weighing competing interests and arriving at decisions after careful consideration of all relevant factors. It does so by engaging individuals and groups who may not normally interact with one another in an open dialogue. In doing so, it provides a policy-making forum that is insulated from the passions and politics that often dominate individual, site-specific land-use controversies.

Even when a truly *comprehensive* planning process is not feasible, local governments should follow a planning-oriented process when establishing important land-use policies.

WHY IS PLANNING SO IMPORTANT?

Proposals to establish new or expanded feedlots can generate considerable controversy. Jurisdictions that do not have a sound, up-to-date plan in place may be ill-equipped to deal with such matters. Whether the controversy involves a feedlot, big-box retailer or gravel pit, up-front planning can go a long way toward ensuring that siting decisions are handled in a "transparent, predictable, cost-effective, fair, and civil" manner.

How-to Guide: *Under Construction*

The former Local Planning Assistance Center prepared a guide to help local governments start local planning and develop good comprehensive plans. It discusses the following topics:

- Why planning is important
- How to start the planning process and get the public involved
- What is included in a comprehensive plan
- How to craft a vision and goals and policies to achieve it
- How to implement and update a plan

Under Construction is available at www.lpa.state.mn.us.

Planning—whether it's called that or not—underlies rational public policy-making. As anyone who has held elected or appointed office knows, it can be difficult to make sound and rational decisions when emotions on all sides are running high. In the typical land-use case, some people will focus solely on projected economic benefits. Others will downplay such claims and focus exclusively on what they see as possible negative impacts. When decision-makers attempt to weigh these types of competing interests in the absence of established policy, it can be very difficult to reach a rational decision. All sides may have valid points to be considered, but they are so unrelated it is difficult to strike a balance between them.

Through planning, however, communities can hope to establish long-range policies to direct day-to-day actions and provide guidance for dealing with difficult matters. Counties and towns in Minnesota and elsewhere have long used planning to accomplish just such purposes. Through planning and policy making they have decided that some businesses—banks and retail stores, for example—belong in the downtown area while others, like auto body shops, do not. They have reached a decision that some types of businesses—offices, perhaps—are acceptable home-based businesses, while most other commercial enterprises are generally not compatible with residential neighborhoods.

Through planning, jurisdictions can avoid some land-use controversies and prepare for those that cannot be avoided. At their best, plans can help prevent future land-use conflicts from developing and help address present conflicts by providing self-implementing guidance for what otherwise might be difficult planning decisions. When that does not work, plans at least provide a method for weighing competing interests.

Planning provides a vital foundation for dealing with tough land-use issues like feedlot siting. It provides a forum for stepping back, taking a look at the forest as well as the trees, and charting a course based on long-term goals. Regardless of the motivation, however, one of the most important steps in the planning process is the first one:

recognizing the need and setting out to get it done. The time to plan, in other words, is now…before specific controversies arise.

WHAT DO WE NEED TO CONSIDER WHEN WE PLAN?

There are many excellent how-to guides available to assist those interested in carrying out local planning processes. Rather than attempting to restate that general information here, it may be useful to explore the types of specific issues and considerations that should be taken into account when establishing land-use policies for animal agriculture.

The planning process almost always starts with an assessment of what currently exists, in effect, exploring "where we are today." As part of this early inventory and analysis work, don't forget to examine local economic conditions and the role that agriculture plays in the area economy. Things to consider include:

- How many local jobs are provided by agriculture in general and livestock production activities in particular?
- How much local economic activity (direct and indirect) is generated by all forms of agriculture?
- How much does agriculture contribute to the town's total income?
- How much tax revenue is generated by agriculture?

Benefits of a Comprehensive Plan

1. Provides legal justification for a community's land use decisions and ordinances
2. Gives residents an opportunity to guide their community's future
3. Helps a community identify issues and accommodate change
4. Provides ways for neighboring jurisdictions to work together to solve problems and manage resources
5. Makes the most of public investment
6. Ensures that growth will make the community better, not just bigger
7. Fosters economic development
8. Helps communities maintain its natural resources
9. Protects property rights
10. Protects property values
11. Helps a community think through the future results of today's decisions

Source: Minnesota Planning, "Under Construction: Tools and Techniques for Local Planning."

For many farm communities, this research is likely to confirm that their long-term prosperity is highly dependent on agriculture. Such findings can highlight the importance of finding a place for agriculture; a place where farming operations of all types can grow and thrive.

Finding appropriate places for all forms of agriculture requires an examination of the general suitability of land for agriculture and other land uses. Traditionally, this process begins with an identification of "constraints" or areas that will generally *not* be suitable for particular land uses.

Because of their important ecological functions and because they are often protected by environmental regulations, sensitive natural resource areas generally pose a constraint to intensive development—farm and nonfarm alike. Mapping the presence of priority resource areas will provide a good starting point for the preparation of a future land-use map that promotes natural resource protection. For example, a project on behalf of the Minnesota Milk Producers by the Center for Rural Design at the University of Minnesota mapped priority resource areas (see box on following page).

Besides sensitive natural resource areas, most jurisdictions will view areas of existing concentrated development as another form of constraint. Mapping the location of existing residential and commercial development (and areas that are most likely to become developed) is also important in gauging areas of potential conflict and in anticipating the likelihood that certain areas will remain in farming for the foreseeable future.

After removing constrained areas from consideration, it is time to analyze what's left. Soil suitability and other measures can be used in part to identify the best areas for growing crops. Identifying the location and extent of existing farm operations and land in agricultural use is also important. When farmers and farmland—including livestock operations—are "clustered" in an area, it can help existing agricultural infrastructure, such as agricultural input and service suppliers, transportation networks, and marketing outlets. The presence of farm equipment dealers, feed suppliers, and large animal veterinarians, for example, can make an area more conducive to livestock farming. Of course, basic infrastructure such as good roads and sources of water and power help as well.

When it comes to finding a place for nonfarm residential development, it's really a process of elimination. After removing from consideration environmentally sensitive resources, prime farmland and production agricultural areas, most jurisdiction will discover that what's left are lands in cities, towns, and carefully defined urban expansion zones.

Directing nonfarm growth away from areas best suited for agriculture or resource protection will not only help minimize rural land-use conflicts, it will also work to support wise use of fiscal resources. As revealed in the *Cost of Public Services Study* (see box below), sprawling, low-density residential development outside of urbanized areas is more costly to serve than compact, close-in development. If concerns about "maintaining the tax base" tend to drive decisions about where development should occur, you may wish to analyze the revenues and costs generated by development (fiscal impact analysis) to test your assumptions.

Example: Mapping Priority Resource Areas

1. Surface Water Priority Areas
   - Special Protection Area:
     - Protected waters and protected wetlands; and
     - Intermittent streams and ditches
   - Shoreland Protection Area
     - Land within 1,000 feet from the normal high water mark of a lake, pond, or flowage, and
     - Land within 300 feet of a river or stream or landward of floodplain delineated by ordinance
   - Shoreland Protection Area
     - 1,000 feet from the ordinary high water level of a water basin
2. Ground Water Priority Areas
   - Wellhead protection zones
   - 100 feet of cased wells
   - 200 feet of uncased wells
   - 1,000 feet of public (i.e., municipal) supply wells
   - Depth to bedrock
   - Overburden permeability
   - Presence of bedrock aquifer
   - Presence of quaternary aquifer
3. Habitat Priority Areas
   - Habitat patch size (contiguous areas of forest, brushland, grassland, and wetland)
   - Presence of core forest
   - Potential coincidence between pre-settlement vegetation and current land cover
   - Degree of disturbance from human land use
4. Social Sensitivity Priority Areas
   - Odor-related separation distances derived from *OFFSET: Odor From Feedlots Setback Estimation Tool*

Source: University of Minnesota Center for Rural Design

Cost of Public Services Study

The Cost of Public Services Study included both a statewide statistical analysis of over 500 local government entities (counties, cities, townships, water and wastewater utilities, and school districts) and a case study analysis of the fiscal impacts of growth on local governments in five counties, both historically and prospectively over a 20-year period. The key finding of the study is that fiscal impacts of new residential development are more favorable when development occurs within or adjacent to established urban areas than when it occurs in outlying rural areas. (See www.mda.state.mn.us/agdev/publicservices.htm.)

Finally, a note about *who* to consider in preparing plans. The growing interest in zoning at the township level can be traced in part to a perception that exists among some residents and officials that countywide plans and regulations sometimes aren't responsive to the needs and desires of town and city residents. Another familiar refrain is the desire for greater cooperation and coordination among county, township, and city governments. In short, successful planning and implementation requires that everyone's views and concerns be taken into account and that government officials at all levels work together to address issues that transcend jurisdictional boundaries.

WHERE DO WE GET ALL THE INFORMATION WE NEED?

An analysis of agriculture's role in the local economy (rather than a mere compilation of economic statistics), involves measuring the direct economic contributions of the farm sector such as income from self-employment as well as rates of employment in farming. In addition, it involves gauging the indirect economic activity that is generated when farmers purchase goods and services and any local processing of agricultural commodities. It is also helpful to examine how the agricultural base contributes to property values and local tax rates.

On the surface, conducting an economic analysis can appear intimidating and expensive. There are, however, tools, and resources that can help local governments conduct a good analysis in an efficient manner. One commonly-used economic impact analysis technique is "input-out" analysis, which can be performed using IMPLAN®, a PC-based economic analysis model developed by the Minnesota IMPLAN Group, Inc. (see box). Performing economic analyses requires some expertise. Jurisdictions without in-house expertise should consider seeking outside assistance. Many consultants, universities, and state agencies, including the Minnesota Department of Agriculture, are able to provide advice.

Natural resource inventory data can be obtained from a variety of sources, often in a format ready for use in local Geographic Information Systems (GIS).

DIAMaTR ®
This software was developed by the Minnesota Department of Agriculture to analyze the costs and revenue impacts of residential development on local budgets. See www.mda.state.mn.us/land/preservation/diamatr.htm.

IMPLAN ®
This is a software program and database that allows users to estimate the impacts of economic changes to their communities. For example, it can demonstrate how a change in demand for a product affects production of that product at the local level.

GIS
Geographic information system technology allows communities to inventory assets and analyze information on maps. The Minnesota Land Management Information Center provides data at www.lmic.state.mn.us/.

When it comes to designating areas that should be reserved for agricultural use, one time-tested method is the Crop Equivalent Rating (CER) system, which ranks soil types on a scale from 1 to 100, based on their ability to produce an economic return. One significant drawback of the CER system, however, is its one-dimensional nature. It focuses exclusively on soil suitability for row crops, and it ignores the potential suitability of lands for livestock farming and other forms of agriculture, such as in the sand plains of central Minnesota and the hilly pastureland in southeastern Minnesota. For a more comprehensive determination of land suitability for agriculture, jurisdictions should consider use of the Land Evaluation and Site Assessment (LESA) tool or a GIS-based variation on the LESA rating system.

The LESA system was developed by the Natural Resource Conservation Service. It has been used in Minnesota and throughout the U.S. to assess the overall suitability of land for agricultural use based on soil and non-soil factors, such as land tenure, capital investment, location, and land-use compatibility. LESA systems can be customized to reflect local conditions and values, including factors that affect suitability for animal agriculture, such as density of livestock, housing density, historical livestock use, or agriculturally-related support businesses.

Stearns County, for example, uses a local adaptation of the LESA system to promote agricultural land preservation and manage nonfarm residential development outside of urban expansion areas. Since its adoption in 2000, Stearns County's LESA tool has been used at least 175 times by townships, county staff, the planning commission, and the county board in rezoning requests, plats, and more recently in the siting of new homes on agriculturally zoned property.

Since the initial creation of LESA, GIS modeling tools have been developed using numerical scoring similar to LESA. In Minnesota, Olmsted, Rice, and Winona Counties have used these types of GIS models for comprehensive planning, and Todd County recently developed an agricultural land preservation model that takes animal agriculture into account.

The LESA system and related GIS models were designed to aid in assessing local agricultural suitability. While not magic bullets for dealing with rural land-use issues, they provide objective and consistent tools for evaluating the relative importance of specific lands for continued agricultural use.

Many methods and tools exist for conducting fiscal impact analyses, or in other words, projecting the revenues *and* costs associated with various forms of development. Some, including the Minnesota Extension Service worksheet, *Estimating Fiscal Impacts of Residential Developments in Smaller Communities*, are best suited for conducting analyses of specific development proposals. Others, such as DIAMaTR (see sidebar on previous page) can be helpful in preparing local plans by helping to estimate revenues and costs across entire counties and multiple years.

IMPLEMENTATION OPTIONS

WE'VE DONE OUR PLANNING AND ANALYSIS, AND WE'RE READY TO SET THE PLAN IN MOTION. WHERE SHOULD WE BEGIN?

Start by considering *all* of the plan implementation tools at your disposal. Sometimes, by focusing immediately on the adoption of new regulations, we can forget the importance of nonregulatory tools. Communication and education, for example, have a very important role to play, such as:

- notifying newcomers to rural areas that living near farms may cause some irritations and inconveniences;
- encouraging farmers to notify their neighbors about upcoming odor events; or
- educating farmers about best management practices for feedlot operations.

For those who have decided that additional local regulations are needed to implement long-term planning goals, avoid the temptation to simply "cut and paste" regulations from neighboring jurisdictions. Your approach should reflect your own planning goals, your own staff capabilities, and your own regulatory and risk tolerances.

The Realities of Rural Living

The Minnesota Farm Bureau Federation and several counties have developed rural living guides designed to educate newcomers to rural areas about the realities of living in the country. The guides used by Nobles County and Morrison County, for example, are intended to let new residents in farming areas know about the possibility of noise, dust, and odors. Stearns County's brochure—*What You Need to Know About Moooooving into the Country*— is available online. (www.co.stearns.mn.us/departments/environment/downloads/scratchsniff.pdf).

The Minnesota Farm Bureau Federation's guide, *Moving to the Country: What you should know about agriculture in rural Minnesota*, is available by contacting the Minnesota Farm Bureau at 651-905-2117 or info@fbmn.org.

One thing you should do very early in the process of crafting feedlot regulations is gain an understanding of what is regulated at the state and federal level. Doing so will help provide an understanding of safeguards imposed by other levels of government and, in turn, help identify the types of issues that need to be addressed in your own local ordinance. Such an analysis will also help eliminate any misconceptions about local governments being the only line of defense in protecting the public health, safety and general welfare. To the contrary, few if any states have devoted more attention to addressing animal agriculture's potential impacts on public health and the environment than the State of Minnesota.

WHAT ASPECTS OF ANIMAL AGRICULTURE ARE REGULATED AT THE FEDERAL AND STATE LEVEL?

The short answer is that state and federal regulations aimed at feedlots focus primarily on protecting air and water quality and human and animal health. The State of Minnesota assumes primary responsibility for addressing the overall economic structure of agriculture through its anti-corporate farm law.

Animal agriculture is subject to a variety of state and federal environmental regulations. Although the summary that follows focuses on air and water quality-related regulations, countless other rules can come into play, such as those governing protection of flood-prone areas, wetlands and other natural features.

Table 1: Key Federal and State Feedlot Regulations

Subject Matter	Federal Regulations	State Regulations
Water Quality	CWA; CAFOs must obtain NPDES Permit (40 CFR 123.23)	Feedlot Rules Technical Standards (Minn. Rules Ch. 7020) governs location of new and expanded feedlots relative to surface waters, wells, and floodplains; special conditions may be imposed in karst regions based on MPCA karst workgroup recommendations [Note: local ordinances may establish more restrictive standards]
Air Quality—Hydrogen Sulfide	CAA, CERCLA and EPCRA	Ambient Air Quality Standards (Minn. Rules Ch. 7009)
Air Quality—Particulate Matter	CAA	Ambient Air Quality Standards (Minn. Rules Ch. 7009)
Air Quality—Ammonia	CAA, CERCLA and EPCRA	No state regulations; Health Risk Values established by Minnesota Department of Health for advisory purposes only
Air Quality—Odor/Odorous VOCs	None	No state regulations; subject of continuing research at state and federal levels; CAFO proposals must include air emission plan addressing odors
Dead Animal Disposal	USDA-APHIS	Disposal for different species of animals; Minn. Rules Ch. 1719, administered by Minnesota Board of Animal Health
Closure and Abandonment	None	Feedlot Rules Technical Standards (Minn. Rules Ch. 7020)
Commercial Manure Applicator Certification	None	Commercial Animal Waste Technician Requirements (Minn. Stat. §18C.430)

Water Quality

Feedlots are subject to regulation under the federal Clean Water Act (CWA), which is administered by the Minnesota Pollution Control Agency (MPCA) through its feedlot rules (Minn. Rules Ch. 7020). As a general rule of thumb, feedlots with a capacity of 1,000 or more animal units trigger compliance with federal water quality regulations, including National Pollution Discharge Elimination System (NPDES) permit requirements. Under the terms of the state's "delegated county program," the MPCA may enter into agreements with counties to administer state feedlot rules for feedlots with fewer than 1,000 animal units. Outside of delegated counties, review, registration, and permitting are handled by the MPCA. In very rare circumstances, smaller feedlots may also be required to comply with federal regulations, as determined by the MPCA.

Both federal and state regulations govern the location of feedlots relative to water sources and the handling of manure.

Protecting the quality of Minnesota's surface water and groundwater resources is a particular emphasis of the feedlot rules (Minn. Rules Ch. 7020). These rules, originally adopted in 1971, have been subject to periodic review and update in response to continuing state research and shifting federal priorities. The most recent update, in 2000, included several major revisions designed to increase the program's effectiveness.

Water quality-related provisions of the state feedlot rules include:

- restrictions on the location of new and expanded feedlots relative to surface waters, groundwater, wells, and floodplains;
- standards governing manure handling and storage; and
- controls on land application of manure. (Feedlot Rules Technical Standards, Minn. Rules Ch. 7020).

The wellhead protection provisions of the state feedlot rules are supplemented by well code rules administered by the Minnesota Department of Health (Minn. Rules Ch. 4725).

As evidence of the state's on-going efforts to address water quality concerns associated with livestock farms, a special workgroup was formed shortly after the revised feedlot rules became effective (in 2000) to study water quality vulnerability in Minnesota's karst regions. As a result of that work, feedlots and liquid manure storage facilities proposed in the southeastern portion of the state are often subject to additional standards and conditions designed to protect ground water resources.

Air Quality

Feedlots are subject to regulation under the federal Clean Air Act (CAA). The Act requires the U.S. Environmental Protection Agency (EPA) to establish national Ambient Air Quality Standards. As with water quality regulations, states have primary responsibility for ensuring compliance, which generally means they must develop implementation plans to meet standards for six "criteria" pollutants: particulate matter, sulfur dioxide, ozone, nitrogen oxides, carbon monoxide, and lead.

The U.S. EPA has also developed standards to aid in carrying out the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA: 40 CFR Part 302). Under this act, regulated hazardous substances (CERCLA 40 CFR Parts 355 and 370) emitted from a point-source may not exceed 100 lb/day for ammonia, hydrogen sulfide and a number of other pollutants. The U.S. EPA also regulates the notification of air pollutant discharges through the Environmental Planning and Community Right-to-Know Act (EPCRA). In 2005, the U.S. EPA instituted a voluntary air quality consent agreement to livestock producers. This consent agreement requires the producer to pay a fine in exchange for waiver of past violations of Federal standards.

EPA Air Quality Rules
For more information on air quality rules, see www.epa.gov/agriculture/anafoidx.html#afoair.

Minnesota addresses air quality issues from animal agriculture in several ways. First, the MPCA maintains Ambient Air Quality standards for hydrogen sulfide and particulate matter. Second, the Minnesota Department of Health has established advisory Health Risk Values (HRV) for hydrogen sulfide and ammonia. In addition, state feedlot rules require that proposals for feedlots with more than 1,000 animal units include an air emission plan, which must specifically address the control of odors.

Animal Health

The Board of Animal Health is the State of Minnesota's official animal disease control and eradication agency. The agency was created to protect the health of the state's domestic animals. In carrying out its mission, the Board of Animal Health is part of a network of state agencies protecting public health and providing an abundant, wholesome food supply to consumers. The board works in cooperation with USDA's Animal and Plant Health Inspection Service (APHIS) in enforcing federal and state animal health regulations. The Board's rules and standards for regulating animal diseases are found in Minn. Rules Ch. 1719.

Besides regulating disease, the Board of Animal Health also regulates animal mortality composting and dead animal disposal. The board's specialists and regional veterinarians enforce these regulations and also assist producers who need help in doing on-farm composting or incineration of mortalities.

"Setbacks" vs. "Separation Distances"
Although sometimes used interchangeably, these two terms have different meanings. "Setbacks" refer to a minimum horizontal distance that must be maintained between a structure and a property line.

"Separation distances" refer to a minimum horizontal distance that must be maintained between one structure or feature and another. In the case of a separation distance from a feedlot to a nonfarm, public, or quasi-public use, the structures or features exist on separately-owned parcels of land. In the case of a separation distance from a feedlot to a specified natural resource, the natural resource may or may not exist on the same parcel of land as the feedlot.

WHAT ASPECTS OF FEEDLOT SITING DO LOCAL GOVERNMENTS REGULATE?

As you might expect, it varies, but there are some commonalities. In 2000, the Minnesota Department of Agriculture conducted a comprehensive survey of animal agriculture-related regulations being used by counties and townships throughout the state. The survey revealed that most Minnesota counties and several townships have feedlot ordinances or special zoning regulations governing feedlots.

Most local ordinances, according to the survey's findings, follow a three-part regulatory formula: (1) they impose minimum setbacks from specified natural resources; (2) they require minimum separation distances between feedlots and nonfarm uses; and (3) they establish special review and approval procedures for feedlots above specified (varying) size thresholds. Some ordinances supplement these types of requirements with additional environmental and health standards governing such matters as odor control, manure management, and dead-animal disposal, although there is far more variation among local ordinances on these points.

ARE EXISTING FEDERAL AND STATE REGULATIONS ADEQUATE? DO WE NEED TO ADOPT OUR OWN ENVIRONMENTAL CONTROLS?

Feedlots in Minnesota are subject to more rigorous federal and state standards than ever before. That being said, the adequacy of those regulations is a determination that each jurisdiction will want to make for itself. Some people assert that existing state and federal environmental regulations have not kept pace with changes in agriculture, and they have looked to local governments to fill the perceived void. Others believe that even if more needs to be done to protect air and water resources, it can't be done effectively at the local government level since air and water rarely respect political geography.

For those jurisdictions that choose to impose their own environmental controls, there are two important things to keep in mind. First, jurisdictions should obtain legal advice on whether the

Voluntary Stewardship Programs
Programs initiated by the agriculture industry itself could play a significant role in addressing environmental concerns of feedlots. Such programs can establish basic performance criteria beyond what is required by law.

Minnesota Milk Producers Association (MMPA), Environmental Quality Assurance Program
This program certifies Minnesota dairy producers that achieve certain quality standards in five areas: water quality, odor and air quality, soil quality and nutrient management, habitat quality and diversity, and community image.

The MMPA will schedule an environmental assessment for dairy producers wishing to be designated as an "EQA Certified Five-Star Dairy." An environmental action plan will be developed, and the MMPA technician will assist the producer in finding technical assistance and any cost-sharing funding sources that may be available. When adequate scores have been achieved in each of the five areas, the dairy will receive Five-Star certification. Certified dairies must maintain the EQA standards, and certification can be used to promote the dairy as a good neighbor and as an example of an environmentally-sound operation in the eyes of government officials.

controls they are considering are preempted by federal or state regulations. Secondly, such controls need to be supported by good reasons and sound science. Simply deciding to "up the margin of error" by, for example, increasing construction setbacks from open water wells may be considered unreasonable by those seeking to expand a feedlot operation, thereby inviting a legal challenge.

WHAT ARE THE BENEFITS OF ADOPTING LAND-USE CONTROLS AT THE TOWNSHIP LEVEL? ARE THERE ANY DRAWBACKS?

Township officials considering taking on the responsibility for land-use planning and zoning should carefully weigh both the benefits *and* costs.

The most frequently cited advantage of adopting township-specific zoning controls is that such regulations can be tailored to fit the specific needs of the township. Implicit here is the notion that countywide zoning ordinances sometimes do not adequately account for variations among areas within the county. Whether this is true depends, of course, on the degree to which counties have sought the involvement of township leaders and residents in the preparation of countywide plans and ordinances and the extent to which those plans and ordinances are responsive to local concerns.

A key distinction between city and township planning and implementation is that official controls for townships (zoning and subdivision regulations and maps) cannot be inconsistent with or less restrictive than the county's controls.

On the minus side of the ledger, adopting township zoning will place increased burdens on local government. These burdens include the costs of preparing, administering, and enforcing such ordinances, which can be relatively high for smaller communities. Local planning and zoning efforts also require a commitment of time, money, and energy to devise a sound planning and zoning strategy for the township and sticking with it over time. Negotiating the technical, legal, and political aspects of the zoning ordinance preparation and adoption process can be challenging, and local governments should anticipate at least some political controversy as the process unfolds. Finally, there is the risk of litigation when affected landowners and residents feel they have not been treated fairly by the new controls.

Before setting out to adopt zoning, township officials should clearly identify the reasons for doing so. They should carefully review county ordinances, and make a list of the concerns they feel are not adequately addressed. After making such a list, board members and residents should discuss their concerns with county officials. In the words of the Minnesota Association of Townships, "[o]nly after determining that the county is either unwilling or unable to adequately address the concerns by amending its ordinances should a township proceed with adopting its own comprehensive plan and land-use regulations." [7]

[7] Township Planning and Zoning: A General Overview, Document No. PZ1000, Minnesota Association of Townships, November 2001.

What are the benefits of adopting land-use controls at the township level? Are there any drawbacks?

ZONING AND LAND-USE CONTROLS

WHAT ARE LOCAL GOVERNMENT'S RESPONSIBILITIES IN REGARD TO ZONING AND LAND USE?

Local officials have a very difficult job to do in the face of the on-going controversy over local feedlot siting policies. Most recognize the value of the livestock industry to their communities, as well as to the entire state. At the same time, they know the importance of being sensitive to the expectations of their electors, who may genuinely believe that the next proposed LULU (locally unwanted land use)—be it a feedlot, an apartment complex, or a discount retailer—will wreak havoc on the environment, their health, and their quality of life.

Local government's first responsibility in the midst of this controversy is to recognize its primary role. That is, in dealing with the land-use aspects of feedlots: where they should be located, where nonfarm uses should be located, and how sites should be developed. Although the day-to-day business of county and township governments may have more to do with roads and public safety than with disputes over land use, a fundamental responsibility of government in our society is to balance competing interests and to provide a reasonable set of rules to protect *all* interests.

HOW CAN CONFLICTS BETWEEN FARMERS AND RURAL RESIDENTS BE MINIMIZED?

Agriculture in the 21st century is ever-changing and diverse, encompassing a wide range of sizes and types of farming operations. As residential and other nonfarm development gravitates to heretofore rural areas, the number and severity of land-use conflicts continues to escalate. When it comes to minimizing land-use conflicts between active farming and nonfarm land uses, nothing is likely to be as effective as separation.

Rural land-use plans should recognize the inherent incompatibility of farm and nonfarm land uses and focus on promoting land-use guidance strategies that protect prime agricultural lands, natural resources, rural residents *and* farmers. Prohibiting the encroachment of nonfarm development into agricultural areas is one of the most effective techniques for supporting viable agriculture and reducing rural land-use conflicts. By the same token, once a land-use plan has been established, active farming operations should be discouraged from encroaching into areas reserved for nonfarm development.

Rational Basis and the Need for Standards

The courts in Minnesota have expressly stated that there must be evidence in the record to support land-use decisions, and they have been quite willing to reverse local land-use decisions where they found no such evidence. Although the courts will typically show deference to the decision of local decision-makers, they have and will rule against local governments if the reasons given for decisions are "legally insufficient or without factual basis."

The Minnesota courts have clearly indicated that it is essential that decisions in conditional (or special) use permit processes be based on specific facts or findings, ideally related to standards adopted in the ordinance. For example, the Minnesota supreme court ordered the issuance of a conditional use permit for construction of a church where the evidence did not support the governing body's finding that the increased traffic caused by the church would have an adverse effect on the neighborhood and that the proposed use would be incompatible with surrounding residential area. (*Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Snee*)

Separation can be achieved in two ways: (1) through the creation and mapping of zoning districts that do not permit incompatible nonfarm development in active farming areas and (2) through the imposition of required separation distances between those incompatible uses.

HOW CAN WE PROMOTE SEPARATION OF INCOMPATIBLE FARM AND NONFARM LAND USES?

Ag-specific zoning is generally the most effective tool, particularly in areas where the resources exist to support animal agriculture, such as land, agricultural infrastructure, potential suppliers, and markets. See "What do we need to consider when we plan?" (p. 9) for more information on determining which areas are most suitable for agriculture and animal agriculture.

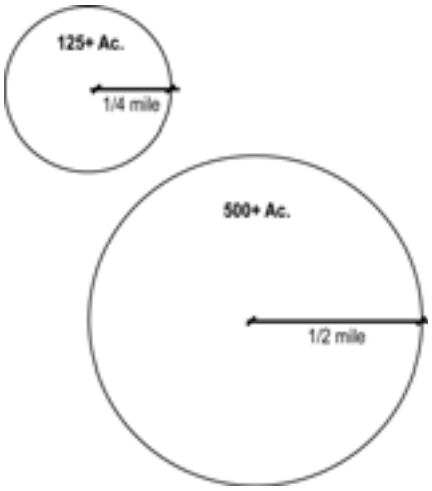
Exclusive agricultural zoning should be considered for areas determined to be suitable for modern agricultural operations. Incompatible nonfarm development—particularly residential development—should be prohibited or very strictly limited in such areas. For those jurisdictions that wish to accommodate rural nonfarm development, such development should be steered to areas zoned for such purposes, ideally closer to towns.

Separation distance requirements should be reserved for cases where significant nonfarm development already exists and yet there remains significant potential for productive agricultural use.

Some cautions, however. First, separation distances are a two-way street; state law requires that they be reciprocal. In other words, an agricultural zoning district that requires a minimum separation distance between new feedlots and existing residences must impose the same requirement on new residences located in areas with existing feedlots. Second, increases in separation distance requirements geometrically decrease the land area available for building or expanding feedlots (or for building new residences because of the reciprocal separation distance). A quarter-mile separation distance, for example, means that approximately 125 acres are off limits for the subject activity. Doubling that separation distance to a half-mile puts approximately 500 acres "off limits."

Recommended Agricultural Zoning Practices

1. Conduct a LESA or similar GIS-based analysis to determine areas with a high priority for livestock and other productive agricultural uses. (See "Where do we get all the information we need?" p. 11)
2. Establish agricultural zoning in large blocks, and resist carving out small areas of nonproductive land for residential or other nonfarm zones.
3. Seriously consider making your agricultural zone an "exclusive agricultural zone" where residential, commercial, or industrial development is prohibited (not just limited), unless it is directly related to agriculture.
4. Where residential is allowed in farming areas, establish densities lower than one dwelling unit per quarter-quarter section.



A quarter-mile separation distance means that approximately 125 acres are off limits for the subject activity. Doubling that separation distance to a half-mile puts approximately 500 acres "off limits."

Finally, the requirements themselves should be derived only after careful study of the distances required to mitigate the specific impacts that are intended to be addressed. In the case of odor-based separation requirements, for example, local governments are advised to use tools that have a credible scientific basis, such as OFFSET (see box on the following page). Studying and documenting the basis for requirements will help to ensure that the requirements can withstand a legal challenge related to whether they have a "rational basis."

OFFSET

Odor From Feedlots Setback Estimation Tool

OFFSET is a scientific method of predicting the odor impacts of animal facilities and manure storage. In order to measure the impact of odor on the surrounding area, OFFSET takes the following factors into consideration:

- Animal species
- Manure storage and handling methods
- Use of odor control technologies
- Housing types
- Size of the odor sources
- Weather conditions

Once the "total odor emissions factor" is calculated using these factors, the setback distance needed to avoid annoyance odors is determined. See www.extension.umn.edu/distribution/livestocksystems/DI7680.html.

WE ALREADY HAVE AN AG ZONE. IS THAT GOOD ENOUGH?

Probably not. Many agricultural zones in Minnesota limit residential density by, for example, restricting residential development to one dwelling unit per quarter-quarter section. "One-per-40" zoning may have served the state fairly well in the past, but with a continuing boom in real estate, commuters living further and further from their workplaces, and farm sizes increasing, agricultural zones are increasingly being populated with nonfarm residents. For these reasons, downzoning or creating even lower density districts may be needed to keep the "ag" in agricultural zoning.

These are not easy decisions for local officials. Land represents the primary nest egg for many farmers. This fact, combined with an aging farm population and uncertainties in the farm economy, has meant that farmers are frequently among the most insistent proponents of allowing nonfarm development in rural areas.

As a result, even in counties with very low-density agricultural areas, local officials may be reluctant to adopt zoning standards that limit nonfarm development, or they may be quick to approve rezonings that allow nonfarm development on "nontillable" lands. Ultimately, however, these types of actions, however understandable, weaken agricultural zones and make viable farming, particularly animal agriculture, less viable.

Traditionally, agricultural zoning districts have tended to lump all types of farming together. Multi-tiered zoning schemes recognize that not all agricultural uses are the same when it comes to impacts on surrounding uses. A multi-tiered strategy allows jurisdictions to distinguish among the types of agricultural uses that will be allowed in different areas. The result offers residents in and near agricultural areas greater predictability about the types of agriculture likely to occur nearby. It also offers local governments the ability to clearly indicate to farm operators exactly where their activities are welcome and supported by local planning policies.

MANY LOCAL ORDINANCES SEEM TO DEAL WITH THE SAME ISSUES ADDRESSED IN THE STATE'S FEEDLOT RULES. IS THAT A GOOD WAY TO STRUCTURE OUR ORDINANCE?

Many local animal agriculture-related ordinances *do*, in effect, restate provisions of state feedlot rules, water quality rules, wellhead protection regulations, and federal NPDES requirements. This is probably due, at least in part, to a desire to simplify or restate applicable state and federal regulations in the jurisdiction's "own words" and to consolidate applicable regulations in one place. In addition to the desire to make local ordinances user-friendly, some

local governments may regulate the same subject matter addressed by state and/or federal regulations because they do not believe that such controls offer adequate protection or sufficient local control.

Despite the laudable intent, restating state and federal rules in local ordinances can create problems. First, by doing so, local ordinances may need to be amended each time state or federal law changes—not an uncommon occurrence in today's world. Second, restating rules and statutes in local ordinances may increase the risk of inconsistent interpretations. Finally, codifying another agency's rules may send confusing signals and lead ordinance users to the unintended conclusion that they do not need to consult the original source of the state/federal rules.

There are three real options when it comes to structuring local feedlot ordinances. They can, like many, contain a combination of local and nonlocal standards and requirements. Another option is for local ordinances to include only those regulations that are purely local in nature and perhaps include cross-references to state and federal laws or adopt "external" rules by reference. Finally, some jurisdictions find that the best way to bring information on federal, state, and local requirements together in one document is through supplemental user's guides or fact sheets that are not adopted by ordinance. When used, such fact sheets or guides should contain a disclaimer similar to that contained in *The Minnesota Livestock Producer's Guide to the Feedlot Rules*:

> "This guide is intended to help livestock producers better understand environmental regulations that could impact their operations—the Feedlot Rules and Environmental Review Rules. It is not intended to substitute for the Rules, nor address every section or provision of them. The guide does not alter the Rules or change their meaning. If any inconsistencies arise between this guide and the Rules, the Rules will prevail."

WHY DO SO MANY LOCAL ORDINANCES REQUIRE A CONDITIONAL USE PERMIT FOR NEW OR EXPANDED FEEDLOTS?

The statewide survey of county feedlot regulations conducted by the Minnesota Department of Agriculture revealed that the majority of counties require conditional use approval for some types and sizes of feedlots. Those who favor the conditional use approach to regulating feedlots typically view it as a statutorily authorized, time-honored way of dealing with land uses that can have widely varying impacts. It should be noted, too, that feedlots *must* be reviewed as conditional uses in shoreland areas, pursuant to the Minnesota Shoreland Rules (part 6120.3300, subp. 7).

Minnesota's County and Municipal Planning and Zoning Enabling Acts (Chapters, 394 and 462, respectively) provide express authorization to use the conditional use approach. Both statutes use nearly identical language to describe local governments' conditional use authority:

> The [governing body/board] may by ordinance designate certain types of developments, including planned unit developments, and certain land development activities as conditional uses under zoning regulations. Conditional uses may be approved [by the governing body or other designated authority] if the applicant demonstrates that the standards and criteria stated in the ordinance will be satisfied. [The/Such] standards and criteria shall include both general requirements for all conditional uses, and insofar as practicable, requirements specific to each designated conditional use.
>
> --Bracketed text indicates difference in County/Municipalities Enabling Acts: text before slash (/) is from Municipalities Enabling Act.

ARE THERE ANY CONCERNS WITH USING THE CONDITIONAL USE APPROACH?

When the Governor's Livestock Advisory Task Force observed a general lack of predictability and uniformity in the local feedlot siting process, the task force was referring, in part, to the conditional use approach.

Under Minnesota law, conditional uses require public notice and review in at least one public hearing. Final decision-making authority—approval or denial—is typically given to the local governing body. Although the statutory authorization for conditional uses suggests that decisions about whether to approve or deny a conditional use must be based on the zoning ordinance's standards and criteria, those criteria may in fact be written to allow for a fair amount of subjectivity. Moreover, the public hearing process itself can result in a fair amount of political pressure to make decisions that seem to enjoy majority public opinion. These criticisms are not meant to suggest that the conditional use process can't be used effectively, but rather that care must be taken to avoid potential pitfalls.

Another factor to consider in deciding if the conditional use approach is appropriate is the definition of "conditional use" provided in Minnesota's County Zoning Enabling Act. That Act defines a "conditional use" as "a land use or development as defined by ordinance that would not be appropriate generally but may be allowed with appropriate restrictions." [Minn. Stat. §394.22 Subd. 7; emphasis added] Based on this definition, it can be argued—for counties at least—that a decision to require conditional use approval for feedlots is, in effect, a statement that some types and sizes of agricultural operations are not appropriate generally in agricultural zones.[8] County officials should consider whether regulating feedlots as conditional uses in agricultural zoning districts is consistent with the purpose of agricultural zoning.

ARE THERE ALTERNATIVES TO THE CONDITIONAL USE APPROACH?

The most obvious alternative to the conditional use approach is to regulate feedlots as an "as-of-right" use,[9] particularly in those zoning districts exclusively geared toward accommodating and promoting agriculture. As-of-right uses do not require public notice, hearings or special reviews by boards or commissions. Approval (or denial) of as-of-right uses is "ministerial," meaning the use is reviewed (by administrative staff) merely for its ability to comply with objective ordinance standards. If it complies, the necessary permits must be issued. If it doesn't comply it must be denied.

Another variation on the as-of-right or by-right use is what is sometimes referred to as a "limited" use. Limited uses (sometimes referred to simply as permitted uses that are subject to additional use-specific standards) are uses that are allowed in the subject zoning district only if they are found to comply with the standards applicable to all other uses in the district, plus an extra set of objective, use-specific standards or limitations.

Since the use-specific standards that apply to limited uses are objective in nature, review of plans is conducted by administrative staff. The reliance on administrative staff review and easy-to-administer, objective standards is the key difference between a "limited use" and a "conditional use." Conditional uses are subject to public hearing requirements and are typically reviewed for compliance with a mix of measurable and "judgment-call" criteria. Common examples of use-specific standards applicable to a "limited use" might include the type of road to which the use takes access, the size of the regulated facility, or the location of the proposed use relative to other types of uses.

[8] The Municipalities Zoning Enabling Act does not provide a definition of "conditional use."

[9] "As-of-right" uses are also commonly referred to as "permitted uses" and "uses permitted by right." The term is intended solely to distinguish uses allowed as of right from those that are allowed only upon review and approval through an administrative or quasi-judicial process.

Performance-oriented regulations represent a third alternative. The idea behind performance-oriented land-use regulations is that how a use "performs" against measurable criteria is more important than determining whether the proposed use rigidly adheres to "fixed" ordinance standards. Most often, performance-oriented regulations are written as an alternative to fixed standards. In this way, those proposing new development have a choice: demonstrate compliance with fixed standards or demonstrate that the proposal does an equal or better job of addressing the objective that lies behind the standard. Perhaps the most common example of performance-oriented regulations in zoning ordinances are visual screening requirements, where proposals are evaluated for whether they meet designated opacity objectives rather than whether they comply with fixed requirements for buffer widths and plant material quantities. The biggest downside of such an approach is that these types of regulations require more technical expertise to administer.

WE THINK THE CONDITIONAL USE PROCESS CAN BE EFFECTIVE AND FAIR. WHAT CAN WE DO TO AVOID PROBLEMS SOMETIMES ASSOCIATED WITH THE APPROACH?

To help avoid arbitrary decisions, make sure that standards and procedures for conditional uses are clear and that they are understood by everyone involved in administering the process: staff, the planning commission, and the local governing body. Applicants too should also be apprised of what the process entails, as should those who are provided with notice of upcoming public hearings. Giving people an early "heads-up" about the process and the basis for final decision-making can help avoid misunderstandings and frustrations down the line.

Minnesota law requires that decision-making on conditional use applications be based on standards and criteria contained in the zoning ordinance. Notices should be written to let people know that discretion on such matters is limited and that final decisions to approve or deny an application will be based on whether the proposed use complies with ordinance standards and criteria.

Conditional use criteria are sometimes stated in overly general, sometimes subjective terms. Vague and subjective decision-making criteria should be avoided. Particularly in the case of feedlots and other potentially controversial land uses, decision-making criteria should be as specific and detailed as possible.

All conditional uses must be reviewed in a public hearing, and such hearings must provide the public with a reasonable opportunity to participate in the process. When conditional use decisions are challenged in the courts, judicial reviews will often focus, at least partly, on whether the hearing process was properly conducted. It is important, therefore, for jurisdictions to establish rules and procedures for public hearings—and to follow them once they are established. (See the Sample Public Hearing Procedure on page 53 and the Sample Public Hearing Notice on page 55.)

WHAT SHOULD WE USE FOR STANDARDS?

Refer to the "Sample Zoning Regulations" begining on page 27 for recommended land-use and zoning standards. Beyond that, the ordinances of other jurisdictions can sometimes be a source of information and ideas. Be careful though in "borrowing" the regulations of those around you. Although not wanting to "re-create the wheel" is understandable, those regulations may have no relevance to your situation and may not have been developed with an eye towards legal sufficiency or towards striking a balanced approach to the issue.

Whether a land-use or development standard will pass legal muster is obviously an important consideration. [See "Legal Issues" appendix]. Equally important, however, is the issue of "balance"—whether the regulation strikes the right balance between *effectiveness* and *reasonableness*. In the case of land-use standards, that means balancing protection of the public health, safety, and general welfare with protection of property rights and the support of local economic development (or, as discussed in "Local Government's Role," "to balance competing interests and to provide a reasonable set of standards to protect all interests.")

To best ensure legal defensibility and balance, regulations should be built on a sound planning foundation. The standards should be carefully crafted to be both effective (protect the public health, safety, and general welfare) *and* reasonable (protect property rights and promote local economic development). This is particularly true as regulations become more onerous, since the stricter the standard, the more likely it will raise questions of reasonableness and fairness. Most of all, local officials should take great care to ensure that land-use regulations are legitimately used to protect the public health, safety, and general welfare and not misused to advance other agendas.

Required Notification of New or Amended Feedlot Ordinances

Pursuant to Minn. Stat. §394.25 Subd. 3c and 462.357 Subd. 1g), municipalities, townships, and counties proposing to adopt or amend a feedlot ordinance are required to notify the Commissioner of Agriculture and the Pollution Control Agency at the beginning of the process (no later than the notice of the first hearing).

According to the law, local governing bodies may submit a copy of proposed ordinances to the Pollution Control Agency and to the Commissioner of Agriculture for review and comment prior to adoption. Local governments may also ask for recommendations on the environmental and agricultural effects of the proposed regulations. The agencies' response to the local government may include:

- recommendations for improvements to the ordinance; and/or
- legal, social, economic, or scientific justification for the proposed regulations.

SHOULD THE LOCAL FEEDLOT REVIEW PROCESS OCCUR BEFORE OR AFTER STATE REVIEWS?

As discussed in "Implementation Options," the siting of a feedlot often requires at least two permits: one under the Minnesota Feedlot Rule (and possibly on the federal Clean Water Act) and another based on local zoning or feedlot ordinances. A water appropriation permit from the Minnesota Department of Natural Resources is also typically required. The state/federal permit focuses primarily on protecting air and water quality as well as human and animal health, while the local permit typically addresses land-use compatibility issues, such as proximity to property lines and neighboring land uses. Some local governments conduct their review and issue permits before the state permitting process. Others conduct their reviews and issue permits after the state process is complete.

From the viewpoint of a livestock producer trying to operate in a world in which local governments tend to rely on review processes (such as the conditional use permit process), it makes the most sense to conduct local reviews first since there's little benefit of undergoing (rigorous and expensive) state review procedures only to have a proposal turned down at the local level. On the other hand, if state reviews have not been completed at the time of local review, there may be some question about whether the proposal complies with federal/state rules and requirements.

The appropriate review sequence depends, therefore, on the nature of the local siting process. If it involves a conditional use permit or similar process, it's probably wise for that to come first and for any approvals to be conditioned (or made contingent) upon obtaining all necessary state/federal permits and approvals. If the local review process involves only an objective determination of whether the proposal complies with local standards, then it's probably wise to have state/federal reviews come first.

Should the local feedlot review process occur before or after state reviews?

SAMPLE ZONING REGULATIONS

UNDERLYING PRINCIPLES

The sample regulations presented in this section have been written to implement hypothetical local policies—such as those found in a comprehensive plan—that support economic growth and development by preserving and enhancing the vitality of agriculture in agricultural districts. The regulations are based on the following six principles and practices, many of which are promoted in the *Animal Agriculture Generic Environmental Impact Statement* (Environmental Quality Board, 2002).

1. *Being proactive rather than reactive*
   The best way of ensuring the creation of technically sound, fair, and efficient land-use controls is to prepare plans and regulations before controversies arise. As we all know from life experience, decisions made in the heat of the moment are often not our best decisions.

2. *Basing regulations on well-founded planning goals*
   This guide stresses the importance of laying a solid planning foundation before attempting to construct regulatory responses. Only those regulations that flow from thoughtful consideration of a community's long-term goals can be expected to help achieve those goals.

3. *Using agricultural zoning as a key tool*
   Traditionally, zoning ordinances have lumped all types of farming together in a single zoning district. Multi-tiered zoning schemes recognize that not all agricultural uses are the same, especially when it comes to their impacts on surrounding uses. A multi-tiered strategy allows jurisdictions to distinguish among the types of agriculture uses that will be allowed in different areas. The result offers residents in and near agricultural areas greater predictability about the types of agriculture likely to occur nearby. It also offers local governments the ability to clearly indicate to farm operators exactly where their activities are welcome and supported by local planning policies.

4. *Promoting notification, education, and communication*
   In focusing on regulation, it is easy to forget the importance of giving people access to information, such as notifying newcomers to rural areas that living near farms may cause some irritations and inconveniences; letting neighbors know about upcoming odor events; or educating farmers about best management practices for feedlot operations. In short, communication and education have a very important role to play.

5. *Imposing clear, objective standards*
   Clear, objective standards offer predictability for everyone: farmers, nearby residents, and the community as a whole. By treating all similar situations in the same way, such standards are also equitable.

6. *Enforcing the rules once they're put in place*
   Obviously, regulations are of little use if they're not enforced. Consistent, rigorous, and fair enforcement of local regulations will help reduce conflicts and controversies, thereby ensuring new applicants are not punished because of the past bad acts of others. Local ordinances should include clear statements about the types of actions that constitute violations of feedlot regulations and provide for the full range of penalty and enforcement options available under Minnesota law.

OVERVIEW OF SAMPLE REGULATIONS

A multi-tiered zoning strategy provides the core foundation for the sample feedlot zoning regulations. The approach presented relies on two agricultural zoning classifications: (1) an "Agricultural Enterprise" district and (2) a "Limited Agricultural" zoning district. (Some jurisdictions may determine that three or more such classifications are necessary to address local issues.) Under the sample regulations, feedlots are permitted as of right in AE, Agricultural Enterprise district. They require conditional use approval in the A-1, Limited Agricultural district.

A multi-tiered agricultural zoning district scheme recognizes that not all agricultural uses are the same when it comes to potential impacts on surrounding uses, including agricultural uses. Such an approach allows jurisdictions to distinguish among the types of agricultural uses that will be allowed in different areas. The result offers residents in and near agricultural areas greater predictability about the types of agriculture likely to occur nearby. It also offers local governments the ability to clearly indicate to farm operators exactly where respective forms of farming activities are welcome.

While the sample zoning district regulations answer the basic question of where various land uses are allowed, it is the feedlot land-use and siting standards of Section 200 that address specific issues related to siting and operation of feedlots. These types of rules are referred to as "use-specific" standards since they do not apply district-wide, but rather only to certain types of uses—in this case feedlots. Compliance with use-specific standards can be required whether or not such uses are regulated as conditional uses.

The proposed feedlot land-use and siting standards include the following components:

- required compliance with state feedlot rules, water quality rules, wellhead protection regulations, federal NPDES requirements, and all other applicable federal, state, and county/township standards;
- minimum odor-related separation distance standards; and
- "performance" compliance options available as an alternative to "fixed" standards.

The sample regulations also include a conditional use approval procedure (section 300) and terminology (section 400).

Choice of the term "sample" regulations was deliberate. These provisions are not intended as a model that will fill every jurisdiction's needs. Those interested in drafting local zoning and land-use regulations should consult legal counsel.

SECTION 100 | AE, AGRICULTURAL ENTERPRISE DISTRICT

100-1 Purpose

The [county's/township's] declared policy is to support economic growth and development by accommodating a broad range of economically beneficial uses, including responsible livestock production activities. The AE, Agricultural Enterprise zoning district is intended to help implement this policy by accommodating a broad range of agricultural uses, thereby promoting agriculture as a vital component of the local and state economy. The regulations are also intended to provide a reasonable degree of certainty for feedlot owners, as well as for property owners and residents located near feedlots. Other specific purposes of the regulations are to:

100-1.1 protect the public health, safety, and general welfare;

100-1.2 protect property values;

100-1.3 avoid potential land-use conflicts associated with the encroachment of nonfarm land uses into active agricultural areas;

100-1.4 control environmental and operational impacts sometimes associated with new or expanded feedlots;

100-1.5 establish fair, efficient, and predictable approval processes for new and expanded feedlots; and

100-1.6 establish standards that are objective and have a rational basis.

100-2 Uses Permitted as of Right

The following uses are permitted as of right in the AE zoning district, subject to compliance with all applicable standards of this ordinance:

100-2.1 Animal agriculture, subject to the feedlot land-use and siting standards of Sec. 200.

100-2.2 Crop agricultural

100-2.3 Utility, minor

100-3 Conditional Uses

The following require conditional use permit approval pursuant to Sec. 300:

100-3.1 Mining or extractive uses

100-3.2 Utility, major

100-3.3 Nonfarm residential uses on parcels that are covered by a resource management easement

100-3.4 Agricultural processing and packaging

100-3.5 Agricultural sales and service

100-3.6 Agricultural storage

100-3.7 Agricultural research and development

100-3.8 Stable, commercial

100-4 Lot Area and Dimensional Standards

100-4.1 Lot Area

100-4.2 Lot Width

100-4.3 Building Setbacks

100-4.4 Building Height

SECTION 101 | A-1, LIMITED AGRICULTURE DISTRICT

101-1 Purpose

The A-1, Limited Agriculture zoning district is intended to help preserve existing agricultural land resources and prevent the premature conversion of rural lands to nonfarm use. The district's use and development regulations are designed to implement the Comprehensive Plan by discouraging urban and suburban development in areas that have prime agricultural soils and that are not well served by public facilities and services. The district can also be used as a transitional zoning designation to buffer designated growth areas from the possible impacts of production agriculture uses.

101-2 Uses Permitted as of Right

The following uses are permitted as of right in the A-1 zoning district, subject to compliance with all applicable standards of this ordinance:

101-2.1 Crop agricultural

101-2.2 Utility, minor

101-2.3 Nonfarm residential uses on parcels that are covered by a resource management easement

101-3 Conditional Uses

The following require conditional use permit approval pursuant to Sec. 300.

101-3.1 Mining or extractive uses

101-3.2 Utility, major

101-3.3 Agricultural processing and packaging

101-3.4 Agricultural sales and service

101-3.5 Agricultural storage

101-3.6 Agricultural research and development

101-3.7 Stable, commercial

101-3.8 Animal agriculture, subject to the feedlot land-use and siting standards of Sec. 200

101-3.9 Places of worship, subject to Sec. 200-6.4

101-3.10 Schools, subject to Sec. 200-6.4

101-3.11 Parks, subject to Sec. 200-6.4

101-3.12 Residential uses

101-4 Lot Area and Dimensional Standards

101-4.1 Lot Area

101-4.2 Lot Width

101-4.3 Building Setbacks

101-4.4 Building Height

SECTION 200 | FEEDLOT LAND-USE AND SITING STANDARDS

200-1 Purpose

The [county's/township's] declared policy is to support economic growth and development by accommodating a broad range of economically beneficial uses, including responsible livestock production activities. The regulations of this section are intended to protect the public health, safety, and general welfare and to provide objective and predictable rules governing the siting and management of feedlots. The regulations are intended to provide a reasonable degree of certainty for feedlot owners, as well as for property owners and residents located near feedlots. Other specific purposes of the regulations are to:

200-1.1 protect the public health, safety, and general welfare;

200-1.2 protect property values;

200-1.3 avoid potential land-use conflicts associated with the encroachment of nonfarm land uses into active agricultural areas;

200-1.4 control environmental and operational impacts sometimes associated with new or expanded feedlots;

200-1.5 establish fair, efficient, and predictable approval processes for new and expanded feedlots; and

200-1.6 establish standards that are objective and have a rational basis.

200-2 Compliance with Other Regulations

The regulations of this section are intended to supplement other regulations that apply to feedlots. Feedlots are subject to compliance with state feedlot rules, water quality rules, wellhead protection regulations, federal NPDES requirements, and all other applicable federal, state, and county/township standards. In the event that one or more of these regulations conflict, the stricter regulation governs, to the extent allowed by law.

200-3 Odor-Related Separation Distances

200-3.1 *Purpose*

The separation distance standards of this section are intended to help protect the public from the odor impacts of feedlots.

200-3.2 *Fixed Standards*

Except as otherwise expressly stated, manure storage structures and associated livestock enclosure buildings must comply with the following odor-related setbacks and separation distances:

Protected Use/Feature	Minimum Setback/Separation Distance by Facility Size (feet)		
	Type 1 **1–300 AUs**	**Type 2** **301–1,000 AUs**	**Type 3** **1,001+ AUs**
Liquid Manure Storage Structures and Associated Livestock Enclosures			
Residence	Setback: 330 Separation: 660	660 + 1 per AU over 300; need not exceed 1,320	
Place of worship			
Public park			
School			
Residential hamlet [1]			
Municipality	Setback: 600 Separation: 1,320	1,320 + 1 per AU over 300; need not exceed 5,280	
Urban expansion zone			
Solid Manure Storage Structures and Associated Livestock Enclosures			
Residence	Setback: 165 Separation: 330	330 + 1 per AU over 300; need not exceed 1,000	
Place of worship			
Public park			
School			
Residential hamlet			
Municipality	Setback: 330 Separation: 660	660 + 1 per AU over 300; need not exceed 2,640	
Urban expansion zone			

[1] concentration of 10 or more residences located on 20 or fewer acres that is not located within a municipality, urban expansion zone or agricultural zoning district

200-3.3 *Exemption for Protected Uses Covered by Resource Management Easements*

The separation distance standards of Sec. 200-3.2 do not apply to uses covered by a recorded resource management easement.

200-3.4 *Reciprocal Requirements for Protected Uses*

The protected uses of Sec. 200-3.2 must comply with the separation distance standards that apply to manure storage structures and associated livestock enclosure buildings unless such uses are covered by a recorded resource management easement.

200-3.5 *Measurements*

Distances must be measured from buildings containing protected uses to manure storage structures and associated livestock enclosure buildings.

200-3.6 *Performance Standard*

A. In lieu of complying with the fixed standards of Sec. 200-3.2, applicants may elect to use the "Odor From Feedlots Setback Estimation Tool" (OFFSET), developed by the University of Minnesota Department of Biosystems and Agricultural Engineering. In such cases, applicants for feedlot permits must provide those separation distances necessary to achieve 96% annoyance-free levels at municipal boundaries and urban expansion zone boundaries and 91% annoyance free levels at the site of other protected uses identified in Sec. 200-3.2.

B. Applications proposing to use the odor-related performance standards of this subsection must be reviewed and approved in accordance with the conditional use review process of Sec. 300.

SECTION 300 | CONDITIONAL USE PERMIT PROCEDURE

300-1 Procedure

300-1.1 Applicants for conditional use permits must fill out and submit to the [insert official] a conditional use application form. Applications must be received at least 25 days before the scheduled planning commission hearing.

300-1.2 After determining that the application is complete, the [insert official] must forward the application and supporting documentation to the planning commission for their review in a public hearing.

300-1.3 The planning commission must hold a public hearing on the proposal. Notice of the public hearing must be published in the official newspaper at least 10 days before the hearing. Notice of the hearing must also be provided to the governing bodies of all towns and municipalities within one mile of the subject property. In unincorporated areas of the county, property owners of record within one quarter (¼) mile of the subject property, or the 10 properties nearest the subject property, whichever is the greater number of property owners, must be notified in writing of the public hearing. In incorporated areas of the county, property owners of record within 500 feet of the subject property must be notified in writing of the public hearing.

300-1.4 The applicant or their authorized representative must appear before the planning commission to answer questions concerning the proposed conditional use.

300-1.5 The report of the planning commission shall be placed on the agenda of the [insert decision-making body], at its next regular meeting following referral from the planning commission.

300-1.6 Following consideration of the application, the [insert decision-making body] must act to approve the application, approve the application with conditions, or deny the application. Decisions must be based on the criteria of Sec. 300-2.

300-1.7 In granting approval of a conditional use permit, the [insert decision-making body] may impose conditions it considers necessary to avoid or mitigate adverse land-use impacts associated with the proposed use and protect the public health, safety, and welfare. Any conditions imposed must relate to a situation created or aggravated by the proposed use and must be roughly proportional to the impact of the proposed use.

300-1.8 A written copy of the [insert decision-making body's] decision, including an explanation of the basis for the decision, must be provided to the applicant.

300-1.9 An amended conditional use permit application will be processed in the same manner as a new conditional use permit.

300-1.10 No application for a denied conditional use permit may be resubmitted for a period of 6 months from the date of denial.

300-1.11 In the event that the applicant violates any of the conditions set forth in the approved conditional use permit, the [insert decision-making body] is authorized to revoke the conditional use permit, following the same procedure as required for considering a new conditional use permit request.

300-2 Review and Decision-Making Criteria

300-2.1 The decision of the [insert decision-making body] must be based on the application's compliance with applicable standards, expressly including the feedlot land-use and siting standards of Sec. 200. The [insert decision-making body] may deny a conditional use application only if it determines that

the application does not comply with all applicable standards and/or it determines that evidence exists showing the proposed use would:

A. create an excessive burden on existing parks, schools, streets, and other public facilities and utilities that serve or are proposed to serve the area;

B. be so incompatible with nearby uses in terms of appearance, traffic, noise, or emissions that homes will be depreciated in value;

C. provide no community benefit to the [jurisdiction];

D. be inconsistent with the purposes of the zoning code or the purposes of the subject zoning district;

E. cause a traffic hazard or result in unreasonable levels of traffic congestion; or

F. adversely affect area business trade because of noise, glare, or general unsightliness.

300-2.2 In evaluating proposals, the [insert decision-making body] may consult with recognized experts.

SECTION 400 | TERMINOLOGY

400-1 General

Words and terms that are not defined in this section have the meaning given in the latest edition of Merriam-Webster's *Unabridged Dictionary*.

400-2 Definitions

The following words and terms have the meanings ascribed.

Agricultural Sales and Service: an establishment primarily engaged in the sale or rental of farm tools and small implements, feed and grain, tack, animal care products, farm supplies and the like, excluding large implements, and including accessory food sales and machinery repair services.

Agricultural Storage: facilities for the warehousing of agricultural products. Typical uses include grain elevators.

Agriculture, Crop: the use of land for the production of row crops, field crops, tree crops; timber, bees, apiary products, and fur-bearing animals.

Animal Agriculture: the use of land for "feedlots" or "animal waste areas."

Animal Waste Area: a holding area or lagoon used or intended to be used for the storage or treatment of animal manure and other waste products associated with an animal feedlot.

Feedlot: a lot or building or combination of contiguous lots and buildings intended for the confined feeding, breeding, raising, or holding of animals and specifically designed as a confinement area where manure may accumulate, or where the concentration of animals is such that vegetative cover cannot be maintained within the enclosure. Open lots used for the feeding and rearing of poultry (poultry ranges) shall be considered animal feedlots, but pastures will not be considered animal feedlots.

Pasture: areas where grass or other growing plants are used for grazing and where the concentration of animals is such that a vegetation cover is maintained during the growing season except in the immediate vicinity of temporary supplemental feeding or watering devices.

Urban Expansion Zone: a boundary or mapped area surrounding a municipality and officially designated by the governing body of the municipality as the area in which future urban development will be allowed to occur as the municipality grows.

APPENDIX A: LEGAL ISSUES

PLANNING AND IMPLEMENTATION AUTHORITY OF MINNESOTA LOCAL GOVERNMENTS

The Police Power: Generally

Local governments regulate the use and development of land under the "police power." Most valid local government regulations fall under the police power. Among those is zoning. Courts in Minnesota have broadly construed the concept of the police power to uphold local zoning and land-use controls. "Under its police power, the governing body of a...municipality, in the interests of public health, safety, morals, or general welfare, may restrict an owner's use of his property for commercial or annoying occupations deemed undesirable to the community as a whole."[10] The police power gives a local government broad legislative discretion, and the courts are reluctant to second-guess decisions of local governing authorities.[11]

Property owners sometimes view zoning and other police-power regulations as attempts to interfere with their property rights. In fact, property owners were among those who lobbied for the creation of the earliest zoning ordinances, primarily to protect property rights. Zoning and other land-use regulations protect property rights by keeping factories out of residential neighborhoods, by keeping dangerous activities (such as the manufacture of explosives) far from most other human activities, and by protecting agricultural areas from the unnecessary intrusion of incompatible uses. "A zoning ordinance is not a safety statute in the usual sense of that term. Generally, zoning ordinances are regarded as being aimed primarily at conserving property values and encouraging the most appropriate use for land. Nevertheless, the general safety of the community is unquestionably improved by such ordinances; and...safety ranks among the purposes for their enactment."[12]

The apparent conflicts between the police power and property rights are discussed later in this chapter, but it is important to understand that "The right to use property as one wishes is subject to and limited by the proper exercise of police power."[13] As those early property owners who lobbied for zoning recognized, it may be necessary to limit individual action to protect the rights of all. Through the police power, responsible local governments attempt to balance the interests of individual liberty with the interests of the larger community in preserving order. Thus, most local governments prohibit junkyards in residential areas, choosing to protect the interests of the residents even at the expense of limiting the freedom of action of a property owner in the area who might prefer to enjoy the profits of a junkyard on his or her property.

To understand the scope of authority of Minnesota's local governments to engage in planning and zoning, it is important to look at the enabling acts that set forth both the authority to plan and zone and a number of limitations on that authority.

Legal Authority for Local Planning and Zoning for Agriculture: Statutory Powers to Regulate Land Use

Zoning as a tool of the police power has been in use in the United States for nearly ninety years. Minneapolis actually adopted an early form of limited zoning in 1914, even before more general zoning came into use. The basic concept of zoning is simple—it involves the division of the jurisdiction into districts and the adoption of regula-

[10] State ex. rel. Howard v. Village of Roseville, 244 Minn. 343, 70 N.W.2d 404 (1955). In this case, the Minnesota Supreme Court denied the Plaintiff's application for a writ ordering the local government to issue permits for a trailer park in a "farm residential" zone.

[11] Concept Props. v. City of Minnetrista, 694 N.W.2d 804 (2005).

[12] Hutchinson v. Cotton, 236 Minn. 366, 53 N.W.2d 27 (1952).

[13] City of St. Paul v. Carlone, 419 N.W.2d 129 (Minn.Ct.App. 1988) (citing McShane v. City of Faribault, 292 N.W.2d 253 (Minn. 1980).

tions that vary by district. Traditionally the regulations address the **use** of land or buildings; the **intensity or density** of that use; and some of the **dimensional** aspects of building design and location, including building height and requirements for yards or setbacks.

The Legislature has separately authorized planning and zoning authority for counties, municipalities, and the Twin Cities metro area. Those statutes can be found in the following sections of the state code:

- Planning and zoning for counties, Minn. Stat. §§394.01 et seq.
- Planning and zoning for municipalities, Minn. Stat. §§462.01 et seq.[14]
- Metropolitan planning (Twin Cities), Minn. Stat. §§473.01 et seq.

In addition, there are separate provisions for regional planning.[15] The state law on agricultural preservation,[16] (discussed separately, below), limits the exercise of planning and zoning authority in certain circumstances.

The scope of authority granted to municipalities and counties differs somewhat. It is not the purpose of this report to describe all of the differences. (It is important, however, for any local government considering the adoption or amendment of such controls to review carefully the specific provisions applicable to it).

Despite the differences in statutory authority, there are similarities among the authorizing provisions. For example, local zoning in all jurisdictions should be based on a comprehensive plan, which is defined under the county provisions as:

> the policies, statements, goals, and interrelated plans for private and public land and water use, transportation, and community facilities, including recommendations for plan execution, documented in texts, ordinances and maps, which constitute the guide for the future development of the county or any portion of the county.[17]

Special Procedure for Adopting Ordinances Regulating Feedlots

The Minnesota statutes contain a special procedure to be followed by a local government adopting a "feedlot zoning ordinance."[18] The requirements found in the county statutes are as follows (comparable statutes exist for municipalities):

> Feedlot zoning ordinances.
>
> (a) A county proposing to adopt a new feedlot ordinance or amend an existing feedlot ordinance must notify the Pollution Control Agency and commissioner of agriculture at the beginning of the process, no later than the notice of the first hearing proposing to adopt or amend an ordinance purporting to address feedlots.
>
> (b) Prior to final approval of a feedlot ordinance, a county board may submit a copy of the proposed ordinance to the Pollution Control Agency and to the commissioner of agriculture and request review,

[14] Townships also have express zoning authority under Minn. Stat. § 366.10-181, although the trend is for townships to use the broader zoning authority found in Ch. 462.
[15] Minn. Stat. §472.371 et seq.
[16] Minn. Stat. §40A.01 et seq.
[17] Minn. Stat. §394.22, Subd. 9.
[18] Minn. Stats. Ann. §394.25 Subd. 3c.

comment, and recommendations on the environmental and agricultural effects from specific provisions in the ordinance.

(c) The agencies' response to the county may include: (1) any recommendations for improvements in the ordinance; and (2) the legal, social, economic, or scientific justification for each recommendation under clause (1).

(d) At the request of the county board, the county must prepare a report on the economic effects from specific provisions in the ordinance. Economic analysis must state whether the ordinance will affect the local economy and describe the kinds of businesses affected and the projected impact the proposal will have on those businesses. To assist the county, the commissioner of agriculture, in cooperation with the Department of Employment and Economic Development, must develop a template for measuring local economic effects and make it available to the county. The report must be submitted to the commissioners of employment and economic development and agriculture along with the proposed ordinance.

(e) A local ordinance that contains a setback for new feedlots from existing residences must also provide for a new residence setback from existing feedlots located in areas zoned agricultural at the same distances and conditions specified in the setback for new feedlots, unless the new residence is built to replace an existing residence. A county may grant a variance from this requirement under section 394.27, subdivision 7.

Differences in Powers among Types of Governmental Entities

The differences between municipal zoning power and county zoning power in Minnesota are largely related to the different types of geographic areas that they serve. Their fundamental powers to zone and regulate the use of land appear to be substantially similar.

There is one aspect of the enabling legislation that is important to understand in rural areas and that is the relationship between planning and zoning activities of a township and the planning and zoning of the county of which it is a part. The statutes address this explicitly:

> The governing body of any town may continue to exercise the authority to plan and zone as provided by law, but after the adoption of official controls for a county or portion thereof by the board of county commissioners, no town shall enact official controls inconsistent with the standards prescribed in the official control adopted by the board. Nothing in this section shall limit any town's power to zone more restrictively than provided in the controls adopted by the county.[19]

With the increasing interest in comprehensive planning and land-use patterns in rural areas, the pattern of overlapping regulation by townships and counties will likely continue and expand.

Inherent Limits on the Police Power in the Statutes

The general view is that the broadest form of the police power rests with state government. Local governments exercise the police power only in accordance with the terms of various constitutional provisions and "enabling acts." Through enabling acts, addressing zoning and many other subjects, the state gives to local governments the authority to exercise the police power for specific purposes. Those acts typically set forth explicit terms and limitations under which a local government may exercise that particular aspect of the police power.

[19] Minn. Stat. §394.33.

There are significant procedural limitations on the exercise of zoning and land-use controls. Those limitations are discussed below under "Implementation Issues," on page 47. Constitutional limitations on regulatory takings are discussed separately beginning on page 45.

There is an important substantive limitation on local zoning and land-use controls, however, that is a part of the enabling acts, and that is the requirement that zoning follow, at least to some extent, the comprehensive plan. Although the courts have not addressed the issue as directly as one might hope, it seems clear that a county engaging in land-use regulation must do so substantially in accord with an adopted comprehensive plan. The county enabling act provides that the board of county commissioners "shall have the power and authority to prepare and adopt by ordinance a comprehensive plan."[20] In the next section, the act provides that "Official controls, which shall further the purpose and objectives of the comprehensive plan and parts thereof shall be adopted by ordinance."[21] Clearly any official controls adopted by a county must "further the purpose and objectives of the comprehensive plan." That may not require rigid adherence to every detail of the plan, but it certainly requires consistency with its spirit and intent.

Although there has been no reported litigation over the effect of this statutory standard, there has been litigation involving when municipal governments, who are subject to a similar but not identical planning requirement, must follow the plan. The first Minnesota case to interpret the interaction of zoning with planning is *Connor v. Chanhassen Township*.[22] The court "examined the authorities" and "interpreted the enabling act to say:

> The term 'comprehensive zoning' does not necessarily mean a plan which makes allowances for the establishment of districts to be set aside for various commercial and professional purposes which provide a defined area with complete business and professional service. The term comprehends that the ordinance shall take the place of and include within its provisions the numerous ordinances which were formerly enacted independently and included such subjects as "tenement house codes,' 'sanitary codes,' 'fire zone' provisions and parts of 'building codes,' as well as provisions with reference to codes relating to restrictions with reference to height, proportion of parcels that must be kept open, and unbuilt yard lines, etc.

In *Rochester Association of Neighborhoods v. City of Rochester*, the court interpreted the language of the enabling act (which is still the language in the statute) concerning the enactment of zoning ordinances "for the purpose of carrying out the policies and goals of the land-use plan." In this case, the city rezoned a parcel of land. Subsequent to the approval of the rezoning, the city amended the land-use plan to conform to the rezoning classification. The court held:

> We read the statute to require only that a land-use plan be adopted before the initial zoning ordinance is adopted. The statute in fact does not require even that the zoning ordinance conform exactly to the city's land-use plan. While it may seem desirable as a matter of municipal planning to amend the land-use plan before adopting an inconsistent zoning ordinance, such a requirement is properly a matter for the legislature, not for this court, to consider. This court has frequently noted consistency between a city's land-use plan or planning commission's recommenda-

[20] Minn. Stat. §394.23.
[21] Minn. Stat. §394.24 Subd. 1.
[22] 249 Minn. 205, 81 N.W.2d 789 (1957).

> tion and the zoning ordinance as a factor supporting the reasonableness of the city's legislative judgment in passing the zoning ordinance.[23]

The court decided in favor of the city. Thus, rigid adherence to the comprehensive plan is not required, but a failure to follow the comprehensive plan in adopting a zoning ordinance or amendment will be considered as evidence that the local government's action was arbitrary.[24]

The State Role: Laws Protecting Agriculture as an Activity and a Land Use

Minnesota law recognizes the unique land-use status of agriculture in the state under several state laws. Two particularly important ones are the so-called "right-to-farm" law[25] and the Minnesota Agricultural Land Preservation Act.[26]

The state's right-to-farm protects from most public and private nuisance actions "agricultural operations" that have operated in substantially the same way for two or more years and that continue to operate "according to generally accepted agricultural practices." "Agricultural operations" are defined as "a facility and its appurtenances for the production of crops, livestock, poultry, dairy products or poultry products, but not a facility primarily engaged in processing agricultural products." An agricultural operation is operating according to "generally accepted agricultural practices" if it is "located in an agriculturally zoned area and complies with the provisions of all applicable federal and state statutes and rules or any issued permits for the operation."

Although the state's definitions provide broad protection to agricultural operations, a specific provision of the same statute exempts some animal agriculture operations from protection:

> (4) ... an animal feedlot facility with a swine capacity of 1,000 or more animal units as defined in the rules of the pollution control agency for control of pollution from animal feedlots, or a cattle capacity of 2,500 animals or more[.][27]

The state's Agricultural Land Preservation Act also establishes state policies recognizing the importance of agricultural land and provides a great deal of regulatory protection for agriculture, at least for lands included in "agricultural preserves."[28] Land in an agricultural preserve is more difficult to annex, and the ability of public agencies to condemn and use such lands for public projects is significantly restricted. Under the Agricultural Land Preservation Act, local governments accept or adopt preemptions of some local regulations in agricultural preserve areas. Moreover, the Act specifically directs local governments to address the issue of residential density within preserve areas. The Metropolitan Agricultural Preserves Act provides similar protection for lands within the Twin Cities Metropolitan Area.[29] Additionally, the State Agricultural Land and Conservation Policy provides some protection from state agency actions that would adversely affect agricultural land.

Through the planning process for agricultural land preservation and the right to approve the formation of a preserve area, counties retain very significant control over the location of protected agricultural activities.

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[23] Rochester Association of Neighborhoods v. City of Rochester, 268 N.W.2d 885, at 889-90 (Minn. 1978), citing Amcon Corporation v. City of Eagan, 348 N.W.2d 66, at 75 (Minn. 1984).
[24] Concept Props. v. City of Minnetrista, 694 N.W.2d 804, 818 (Minn. App. 2005).
[25] Minn. Stat. §561.19.
[26] Minn. Stat. Ch. 40A.
[27] Minn. Stat. §561.19.
[28] Minn. Stat. §40A.01 et seq.
[29] Minn. Stat. §473H.01 et seq.

The State Role: Preemption of Some Aspects of Regulation

Local governments have only the authority expressly granted them through state enabling legislation. As discussed in other sections of this report, the enabling legislation in Minnesota provides a good deal of authority for local governments to plan for animal agriculture and other farming operations and to adopt regulations to help implement land-use objectives.

Certain types of regulation, however, are "preempted" by the state. In general terms, when a higher level of government, such as the state, has, within its constitutional and statutory authority, regulated a matter, it is said that the higher government level "preempts" lower levels of government from regulating the same matter. In legal parlance, the state has "occupied the field." Thus, for example, once the state has set age limits for those buying or consuming alcoholic beverages, local governments cannot set lower or higher age limits for the same activity.

Preemption prevents local governments from enforcing laws that conflict with state laws. Another way to consider the preemption is that local governments derive all of their power from the state; if the state exercises a particular power, this implicitly suggests that it is denying local governments the authority to exercise that power, and is choosing instead to exercise it at the state level.

The issue becomes somewhat more complex, however, when federal or state regulations do not fully cover a subject. What if, for example, the state prohibited the operation of hazardous waste facilities in agricultural zones. Could a local government then prohibit such facilities in other zones? Could a local government prohibit other types of industry in agricultural zones? The courts resolve such questions by trying to determine whether the state intended to "occupy the field" or whether it simply intended to pass a very narrow law addressing a very specific issue.

Mangold Midwest Co. v. Village of Richfield, appears to be the leading Minnesota case on the issues of preemption and conflict.[30] Plaintiff operated a retail store in the village of Richfield. In 1962, the village passed an ordinance prohibiting the sale of "restricted items" by a business on Sundays. After the passage of the ordinance, plaintiff began closing its store on Sunday. Other businesses, however, did not close and openly sold "restricted items." Plaintiff notified the village of its intent to reopen on Sundays. On the first Sunday plaintiff reopened, the village issued the owner a citation for violation of the ordinance.

The Court referred to preemption as the "occupation of the field" concept, and set forth a four-part test for determining if the state has intended to preempt the field of legislation on a particular issue:

> (1) What is the "subject matter" that is to be regulated? (2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern? (3) Has the legislature in partially regulating the subject matter indicated that it is a matter solely of state concern? (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state?[31]

In *Mangold*, the court concluded that the state Sabbath regulation did not preempt the field. The subject matter was not such that local regulation would have unreasonably adverse effects upon the general populace of the state. Moreover, it was not a matter solely of state concern, like taxing or traffic provisions, but a "rather complete policy

[30] 274 Minn. 347, 143 N.W.2d 813 (1966).
[31] 143 N.W.2d at 820.

statement" by the legislature which the local municipality could shape to its own needs by supplementary ordinances.

The question of preemption is important to the issue of regulating animal agriculture when local governments attempt to address environmental aspects of animal agriculture through performance standards and other land-use controls. That subject is discussed below.

Principles Applied to Agriculture: Generally

Zoning originally evolved primarily in urban and suburban areas, providing a management tool to separate relatively intense but sometimes incompatible uses from one another. Land-use conflicts were less significant in rural areas, largely because the level of activity was less intense. The combination of large spaces between rural land-uses and a relatively low intensity of those uses that existed tended to mitigate the sorts of problems that led to early demands for zoning in cities and suburbs.

Zoning expanded to counties and townships for several reasons. First, a proliferation of special districts and other service providers in many states permitted suburban-type development to take place outside of municipalities. The intensity and character of that development often required suburban-type regulations to manage it and mitigate land-use conflicts. Second, as suburbanites fled the suburbs for rural areas, they often sought the protection of suburban-type zoning in their new, exurban environments. Third, as family farmers expanded their scope of activities, the nature of land-use conflicts in rural areas increased. Although a corn farmer might have lived in relative peace next to a soybean farmer or even a dairy farmer, when one of the farmers built a machine shop or a trailer court on the family farm, neighbors sometimes became concerned about conflicts between the different land-use types. Finally, local governments began to use zoning to ensure that development in rural areas occurred on lots large enough for septic tanks and wells where those provided the only form of services.

Thus, beginning in the 1950s, zoning in rural areas became increasingly common. Now all states except Texas provide zoning authority to the counties and/or townships that have general jurisdiction over rural areas, and a significant number of counties and townships in most of those states have used that authority to implement their own zoning controls.

As zoning has evolved and spread, it has also changed. Early zoning ordinances in urban areas often allowed single-family homes everywhere in the community. Similarly, early rural zoning frequently permitted all agricultural activities in every zone. The assumption underlying such regulations was that the fundamental purpose of zoning was to protect residential and agricultural uses from incompatible uses. Although that remains one of the valid purposes of zoning today, many communities have begun to recognize that some uses besides agriculture and residences need protection. For example, major industries now prefer to be located in industrial parks where residences are prohibited, thus eliminating a possible source of citizen complaints and/or suits.

Communities have also begun to recognize that residences and agriculture may need protection from one another. The location of new subdivisions near agricultural lands may limit the ability of farmers to use pesticides and other farm chemicals, and that proximity may also lead to conflicts between the children and dogs who live in subdivisions and the animals and plants that live on farms. Further, many people have an idyllic view of rural life and believe that they might welcome the opportunity to live in a subdivision next to a cornfield or meadow with a few cows. When faced with an animal feedlot, some may not be as comfortable with the odor, noise or hours of operation of such a facility. Thus, contemporary zoning involves distinctions and protections that did not seem necessary and that thus typically did not exist under early zoning regulations.

Part of the difficulty of addressing the issue of animal agriculture through planning and zoning is that many people still think of rural zoning as something that allows or even encourages the development of a variety of agricultural and residential uses in comfortable proximity to one another. In most cases, that is not a realistic scenario today.

Principles Applied to Agriculture: Preemption of Local Regulations

As noted in the discussion above, the leading Minnesota case on preemption is *Mangold Midwest Co. v. Village of Richfield.*[32] In *Mangold*, the Minnesota Supreme Court set out a four-part test regarding the preemption issue. (1) What is the "subject matter" that is to be regulated? (2) Has the subject matter been so fully covered by state law as to have become solely a matter of state concern? (3) Has the legislature in partially regulating the subject matter indicated that it is a matter solely of state concern? (4) Is the subject matter itself of such a nature that local regulation would have unreasonably adverse effects upon the general populace of the state? [33]

Due to the MPCA's role in regulating the environmental impacts of feedlots, the question of whether local governments can address environmental issues with their land-use regulations has been a subject of ongoing debate and judicial scrutiny.

In *Crooks Township, Renville County v. ValAdCo.,*[34] for example, the Minnesota Court of Appeals ruled that Crooks Township was preempted from regulating the establishment of a feedlot because the regulation involved a permitting system, applicable only to feedlots, that was very similar to the state's environmental review permitting requirement.

The continuing evolution of the law on preemption is reflected in a more recent district court case involving Blue Earth County's feedlot regulations.[35] In that case, the court found that local governments and the state share responsibility for regulating animal confinements. That court, in ruling on a motion for a preliminary injunction, determined that the state has not fully occupied the field of regulating animal confinements and that there is both the opportunity and the need for local governments to participate in that regulation.

A 1998 decision by the state high court dealt with a challenge to a local zoning ordinance that required a conditional use permit for large livestock operations.[36] The operation at issue had obtained appropriate permits for such a facility from the Minnesota Pollution Control Agency.[37] The crux of the ordinance was to establish a setback requirement, which started at 200 feet and increased in proportion to the number of "animal units" permitted at the facility. The court followed its own earlier decision in *ValAdCo* and struck down a portion of the ordinance dealing with waste discharges; it distinguished the rest of the ordinance as being based on odor concerns (not addressed by the state) and thus agreed with the district court that the ordinance was a valid local zoning action.[38] Here, the state agency did not claim to have preempted the field. According to the court:

> Specifically, the MPCA informed the Solvies that: (1) the feedlot permit does not exempt you from any permitting requirements the county or township may have. I recommend that you contact your local planning and zoning office to obtain any additional permits that may be required; (2) the township may require a conditional use permit; and (3) "all zoning issues have to be handled by local units of government." Given the narrow purpose and scope of the ordinance, the

[32] 274 Minn. 347, 143 N.W.2d 813 (1966).
[33] 143 N.W.2d at 820.
[34] 504 N.W.2d 267 (Minn.Ct.App. 1993), rev. den. by 1993 Minn. LEXIS 675 (Minn. 1993).
[35] Blue Earth County Pork Producers, Inc. v. County of Blue Earth, 558 N.W.2d 25 (Minn. Ct. App. 1997).
[36] Canadian Connection v. New Prairie Twp., 581 N.W.2d 391 (Minn. App. 1998), rev. den. by 1998 Minn. LEXIS 652 (Minn. 1998).
[37] 581 N.W.2d at 393.
[38] 581 N.W.2d at 394.

> lack of specific authority in state law, and the statements by the MPCA recognizing the land-use authority of local governments, we cannot say the state has expressly or impliedly occupied the field of addressing concerns regarding odor from feedlots.[39]

In rejecting the operators' arguments that the town lacked a rational basis for adopting the setback ordinance to address odors, the court cited an earlier decision upholding a limit on the number of dogs per residential unit, in part in response to complaints about odors.[40] In finding that the ordinance was "fairly debatable," the court also cited with favor the participatory planning process that the town used in adopting the ordinance.

CONSTITUTIONAL AND OTHER OVERARCHING LIMITATIONS ON REGULATORY AUTHORITY

Regulatory Takings of Property: Introduction

"Nor shall private property be taken for public use without just compensation." Although this provision of the Fifth Amendment to the U.S. Constitution was drafted by people who were concerned with physical seizures of property by government, it has, over the last eighty years, been applied by the courts to limit the scope and effect of land-use regulations. Where such a regulation goes "too far," it will be considered an unconstitutional taking of property, potentially requiring compensation. That possible consequence of adopting an unconstitutional regulation acts as an effective deterrent to governments that might otherwise consider the adoption of extremely restrictive regulations.

The critical question, of course, is how far is too far? The U.S. Supreme Court has also established some categorical rules for determining when an unconstitutional taking has occurred:

- Where a local ordinance purports to permit others to invade the physical space of the landowner, there is an unconstitutional taking. *Loretto v. Teleprompter Manhattan CATV Corp.*[41] This case involved stringing television cable across buildings, but the same principles would apply to a law that permitted utility or canal companies to cross rural lands without easements.
- Where an ordinance deprives a landowner of "all economically viable use" of her or his land, there is an unconstitutional taking. *Lucas v. South Carolina Coastal Council.*[42] In that case, state law designed to limit the exposure of people and property to hurricanes, prohibited the owner from building residences on two residential building lots that appeared to have little other use.
- There must be a "rational nexus" between the purpose of a regulation and its effect; otherwise there may be an unconstitutional taking. *Nollan v. California Coastal Commission.*[43] In that case, the Court found insufficient nexus between the owner's proposal to replace one house with a larger house on the same lot and the state's demand that the owner dedicate land for a beachfront trail.
- Where there is a rational nexus between the purpose of the regulation and its effect, there must also be a "rough proportionality" between the burden imposed on the property owner and the impact of the owner's proposed use or development. *Dolan v. City of Tigard.*[44] In that case, the Court found insufficient evidence of

[39] 581 N.W.2d at 394.
[40] Holt v. City of Sauk Rapids, 559 N.W.2d 444, 445 (Minn. Ct. App. 1997).
[41] 102 S.Ct. 3164 (1982).
[42] 112 S.Ct. 2886 (1992).
[43] 107 S.Ct. 3141 (1987).
[44] 114 S.Ct. 2309 (1994).

proportionality where the city demanded dedication of land for a trail and installation of a variety of improvements as conditions of approving the expansion of an existing business.

- In difficult cases, the courts will evaluate the severity of the burden placed on the property owner. *Lingle v. Chevron U.S.A., Inc.*[45] It is unclear to what extent this will be balanced against the public purpose of the regulation, although the Supreme Court made it clear in this case that the courts will defer to legislative bodies and generally presume that there is a valid public purpose for the enactment.

Note that the effect of the *Lucas* rule is limited by the "parcel as a whole" doctrine, under which the Court has held:

> ""Taking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the 'landmark site.'"[46]

This limitation becomes extremely important when considering regulations that establish setbacks or buffers or that otherwise severely restrict portions of larger parcels. Property owners may argue that there is a "denial of all economically viable use" as to the restricted portion of the parcel, but, under this doctrine, the relevant unit of measure is the "parcel as a whole."

It is quite clear, also, that where the purpose of the regulation is to prevent a clear nuisance or otherwise to protect essential public health and safety values, a local government has greater authority to impose significant restrictions on property. For example, in *Dolan*, the Court saw no constitutional bar to the city's adoption of a very restrictive floodplain ordinance; it simply objected to the city's requiring that the owner transfer title to the floodplain to the city.

Evolution of Takings Law in the Minnesota Courts

In a 1974 decision, the Minnesota Supreme Court implied that the takings cause of the Minnesota constitution must be given a broader interpretation than that of the U.S. Constitution.[47] However, since that decision was handed down, the U.S. Supreme Court has broadened the interpretation of the federal "takings" clause and the recent evolution of case law at the federal and state levels appears generally consistent. Minnesota treats separately the cases of physical invasion by governmental activity and restriction of use by governmental regulation. The cases involving direct physical invasion by government are not discussed here, because they are not directly pertinent to this analysis. Under the category of taking by governmental regulation, the Minnesota courts have defined and treated separately two types of governmental activity— "enterprise functions" and "arbitration functions."

Takings law in Minnesota evolved during a period when some of the issues remained unsettled in the U.S. Supreme Court. The leading Minnesota case on regulatory takings appears to be *McShane v. Faribault*, decided in 1980.[48] In *McShane,* the Minnesota Supreme Court, for the first time, recognized a distinction between regulation intended to implement a comprehensive plan, where there are "reciprocal benefits and burdens" accrue to most or all affected landowners from the planned and orderly development of land use (what the court called "the arbitra-

[45] 161 L. Ed. 2d 876, 888-89 (2005).
[46] Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency, 535 U.S. 302, 327, 122 S. Ct. 1465, 1481 152 L. Ed. 2d 517, 543 [footnote omitted], quoting Penn Central Transp. Co. v. City of New York, 438 U.S. 104, at 130-31 (1978).
[47] Alevizos v. Metropolitan Airport Commission, 298 Minn. 471, 216 N.W.2d 651 (1974).
[48] 292 N.W.2d 253, 1980 Minn. LEXIS 1357, 18 A.L.R.4th 531 (Minn. 1980).

tion function"), and regulation for the sole benefit of a "governmental enterprise" where "the burden of its activities falls on just a few individuals while the public as a whole receives the advantage of property rights for which it did not pay" (the enterprise function).[49]

The *McShane* court went on to state that the appropriate judicial remedy was an injunction against enforcement of the ordinance, not mandamus to compel eminent domain proceedings, as the plaintiffs requested. However, it also stated that money damages may be available if the damage caused by the challenged regulation is irreversible and an injunction would not return the property owner to his original status. "If the city decides it is wiser to close the airport than to spend potentially huge amounts of money on the necessary property rights, clearly it has the discretion to do so."[50]

Takings Law in Minnesota Courts: Application to Regulation of Animal Agriculture

It is unlikely that carefully considered local regulation of agriculture will result in a regulatory taking of property. The reason for providing this discussion is to outline the parameters of regulatory takings so that local officials will know when they might be approaching the edges of such an action. The test most likely to be brought into a regulatory taking case involving agriculture is the *Lucas* "denial of all economically viable use" test, but the probability that a local regulation would deny a farmer of "all economically viable use" of property is extremely small; growing corn or soybeans *is* an economically viable use of most Minnesota farmland, and it is hard to imagine a local ordinance that would bar those activities. To the extent that a buffer zone restriction may be particularly harsh, the "parcel as a whole" rule will help local governments to avoid successful takings claims. Note that "economically viable use" is different from "highest and best use." "Highest and best use" is an appraisal term. Although every property owner may wish to achieve the "highest and best use" of her or his property, there is no Constitutional right to such a use.

IMPLEMENTATION ISSUES

Making Defensible Decisions: Relationship to Planning

Communities typically focus on the relationship of regulations to the comprehensive plan when the regulations are adopted. The requirement of relating land-use controls to the comprehensive plan (see page 40), however, is one that applies to amendments to the regulations and to permitting decisions made under the regulations.

Making Defensible Decisions: Limitations on Local Discretion

The Minnesota high court held in 1968 that "zoning regulations need not be a necessity but need only be reasonably related to public health, safety, morals or the general welfare of the community to meet constitutional requirements of reasonableness."[51] Since that time, the court has stayed fairly close to that relatively limited standard of review.

A case that clearly sets out the current status of Minnesota case law on judicial review of zoning decisions is *Honn v. City of Coon Rapids*.[52] In *Honn*, the Minnesota Supreme Court recognized the distinction between zoning map amendments, conducted under the broad legislative authority of local governments, and other types of zoning decisions, exercised under much more limited, quasi-judicial authority. In that case, the Court held:

[49] 292 N.W.2d 253, 257-58 (Minn. 1980). For a more recent case following this reasoning, see Zeman v. City of Minneapolis, 552 N.W.2d 548 (Minn. 1996).
[50] 292 N.W.2d at 259.
[51] Naegele Outdoor Advertising Co. of Minnesota v. Village of Minnetonka, 281 Minn. 492, 162 N.W.2d 206 (1968), upholding an ordinance prohibiting replacement of nonconforming billboards in city limits.
[52] 313 N.W.2d 409 (Minn. 1981).

> Our case law distinguishes between zoning matters which are legislative in nature (rezoning) and those which are quasi-judicial (variances and special use permits). Even so, the standard of review is the same for all zoning matters, namely, whether the zoning authority's action was reasonable. Our cases express this standard in various ways: Is there a "reasonable basis" for the decision, or is the decision "unreasonable, arbitrary or capricious," or is the decision "reasonably debatable?" Nevertheless, while the reasonableness standard is the same for all zoning matters, the nature of the matter under review has a bearing on what is reasonable....For rezoning the standard is whether the classification is reasonably related to the promotion of the public health, safety, morals or general welfare....But the approach is different in a special use permit case...[where] an arbitrary denial may be found when the requested use is compatible with the basic use authorized within the particular zone and does not endanger the public health or safety or the general welfare of the area affected or the community as a whole.[53]

Cases decided since *Honn* have substituted "rational basis" for "reasonable basis," but the test itself has remained consistent. Although this is a limited standard of review, it is a meaningful one of which local governments should be conscious in their actions. [54]

Although the decision to rezone land is a legislative one under Minnesota law, with a presumption of validity, the rational basis test imposes real limitations on the legislative discretion involved. The Minnesota courts have specifically held that there must be evidence in the record to support the decision and the reasons given for it. On general legislative matters, the courts generally defer to the judgment of the legislative body unless the law is clearly unconstitutional or beyond the authority of the governing body to adopt. On zoning matters the Minnesota courts "make an independent examination of an administrative agency's record and decision," clearly with the intent of ensuring that there is actually evidence in the record to support the decision.[55]

There is still a good deal of deference to the decision of the legislative body. "The municipal decision should stand unless the reasons given for its decision are legally insufficient or without factual basis."[56] But the Minnesota courts have been quite willing to reverse local zoning decisions where there was no evidence in the record to support those decisions.[57] The courts give particular scrutiny to decisions involving variances and conditional use permits (discussed below, beginning at page 50), because, in those cases, the local body is to act in a "quasi-judicial" capacity. But the Minnesota courts have overturned legislative zoning decisions, as in *Curtis Oil v. North Branch,*[58] where the local legislative body made no findings in support of its decision to deny the rezoning, and there was considerable evidence in the record to support the case for rezoning. In that decision, the court relied on the earlier decision of the state supreme court, in *Honn v. Coon Rapids.* In that case, the high court held that, at a minimum, a rezoning decision should include:

> [E]vidence presented to the city council….Ordinarily this evidence will include documents received by the city council, such things as maps, plans, surveys, studies and reports prepared by both the city staff and by the landowners. At the least, a summary of statements of interested

[53] 313 N.W.2d at 417-17.

[54] See, for example, Communications Properties v. Steele County, 506 N.W.2d 670 (Minn. 1993).

[55] Northwestern College v. City of Arden Hills, 281 N.W.2d 865, 868 (1979), zoning case, quoting from and applying principles from a non-zoning case, Reserve Mining Co. v. Herbst, 256 N.W.2d 808, 822 (Minn. 1977).

[56] Northwestern College, 281 N.W.2d at 868.

[57] C.R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320, 328 (Minn. 1981); Scott County Lumber Co. v. City of Shakopee, 417 N.W.2d 721, 728 (Minn. App. 1988); Northern States Power Co. v. Blue Earth County, 473 N.W.2d 920 (Minn. App. 1991).

[58] 364 N.W.2d 880 (Minn. App. 1985).

> persons at the hearing should be made at the time of the hearing by the city council and kept in the official file.…
>
> * * * *
>
> The municipal body need not necessarily prepare formal findings of fact, but it must, at a minimum, have the reasons for its decision recorded or reduced to writing and in more than just a conclusory fashion. By failing to do so, it runs the risk of not having its decision sustained.[59]

Making Defensible Decisions: Specific Procedural Requirements

Minnesota law contains specific statutory requirements for procedures to be followed in making zoning decisions. Those include:

- A public hearing on any proposed rezoning or conditional use permit;[60]
- Publication of the time, place, and purpose of the hearing at least ten days prior to the hearing[61];and
- Mailing of notice if proposed rezoning affects five acres or less.[62]

These are standard but essential requirements. It is important to remember that the published (or mailed) notice is "jurisdictional," meaning that, if proper notice has not been given, the decision-making body has no jurisdiction to hear the matter.[63] Minor defects in notice (such as a spelling error in a name or address) can often be addressed by having the decision-making body make findings on the subject—noting that it is aware of the defect and that it finds that it was a minor error that did not or would not have confused anyone. A notice that is given too late or that gives the wrong location for the property or that does not accurately describe the proposed action at the meeting, however, can be fatally defective; the only cure for that sort of error is to give proper notice for a future date and to hold the hearing at that time.

Making Defensible Decisions: The Need for Standards

Approval of facilities for animal agriculture typically goes through a "conditional use permit" process. The Minnesota courts have made it clear that it is essential that decisions in such a process be based on specific facts, ideally related to standards adopted in the ordinance. In making such decisions, local review bodies in Minnesota (and most other states) act in a "quasi-judicial capacity."[64] An earlier section of this chapter contained a discussion of the limitations imposed on legislative rezoning decisions in Minnesota under the "rational basis" test. It is important to understand, however, that decisions on conditional use permits are even more carefully circumscribed. In its quasi-judicial capacity, it is the duty of the local review body to apply the law (typically the local zoning ordinance) to the facts presented to it. In such decision there is no concept at all of legislative discretion or other flexibility in the decision-making process.

For example, the Minnesota high court has ordered the issuance of a conditional use permit for construction of a church where the evidence did not support the governing body's finding that the increased traffic caused by the

[59] 313 N.W.2d at 416.
[60] For proposed rezoning, Minn. Stat. §462.357 Subd. 3; for conditional use permit, Minn. Stat. §462.3595 Subd. 2.
[61] Minn. Stat. §462.357 Subd. 3.
[62] Minn. Stat. §462.357 Subd. 3.
[63] Glen Paul Court Neighborhood Ass'n v. Paster, 437 N.W.2d 52 (Minn. 1989).
[64] Kletschka v. Le Sueur County Board of Comm'rs, 277 N.W.2d 404 (Minn. 1979).

church would have an adverse effect on the neighborhood and that the proposed use would be incompatible with surrounding residential usage.[65]

But, in another case, it held that here were legally sufficient reasons, with a factual basis in the record, to support a city's denial of an application for a special permit to build a commercial satellite station in an agricultural-conservancy zoning district.[66] There the court found, for example, that there was evidence that the mound upon and around which the station was to be constructed was a geologically rare formation and was of aesthetic value to the community. Also, there was testimony by real estate brokers that the satellite station would "impact on the general welfare of the community by reason of the impact on the property values of the area."

The state high court has held that the following standards, established in a local zoning ordinance, were adequate and provided a reasonable basis on which the reviewing authority could grant such a permit:

> No Conditional Use Permit shall be approved or recommended for approval by the County planning commission unless said Commission shall find:
>
> 1. That the Conditional Use will not be injurious to the use and enjoyment of other property in the immediate vicinity for the purposes already permitted, nor substantially diminish and impair property values within the immediate vicinity.
>
> 2. That the establishment of the Conditional Use will not impede the normal and orderly development and improvement of surrounding vacant property for uses predominant in the area.
>
> 3. That adequate utilities, access roads, drainage and other necessary facilities have been or are being provided.
>
> 4. That adequate measures have been or will be taken to provide sufficient off-street parking and loading space to serve the proposed use.
>
> 5. That adequate measures have been or will be taken to prevent or control offensive odor, fumes, dust, noise, and vibration, so that none of these will constitute a nuisance, and to control lighted signs and other lights in such a manner that no disturbance to neighboring properties will result.[67]

The Minnesota Supreme Court dealt with this issue in the context of animal agriculture, when it affirmed an appellate court decision directing issuance of a conditional use permit for the expansion of a hog confinement facility because there was insufficient evidence to support the county's determination that the proposed expansion would constitute a health threat to a neighbor.[68] The court noted that there were apparently problems with the recording device normally used at the meeting, resulting in a scant record before it, and that three letters from doctors, which were supposed to be in the record, were not in the record before it.[69]

[65] Minnetonka Congregation of Jehovah's Witnesses, Inc. v. Snee, 303 Minn. 79, 226 N.W.2d 306 (1975).
[66] Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757 (Minn. 1982).
[67] Schwardt v. County of Watonwan, 656 N.W.2d 383, 2003 Minn. LEXIS 60, at 8-9 (Minn. 2003), citing the Sherburne County Zoning Ordinance.
[68] In the matter of Livingood, 594 N.W.2d 889 (Minn. 1999).
[69] 594 N.W.2d at 892-93.

Making Defensible Decisions: Fair Procedures

The Fifth Amendment to the Constitution of the United States guarantees us all "due process" when our rights are affected by governmental action. The Fourteenth Amendment applied the Fifth Amendment to the states. Similarly, Art. I, Sec. 7 of Minnesota's own constitution provides in part that "No person shall…be deprived of life, liberty or property without due process of law."

The concept of due process has been extended in our society to deal not only with situations that might result in jailing of an individual or physical seizure of an individual's property, but also with situations where a governmental action may affect some aspect of one's liberty or property rights.[70]

The basic elements of due process are similar to the statutory requirements for zoning actions, although they go a bit further:

- A person whose rights are affected is entitled to a hearing before an impartial tribunal; and
- The person should receive notice of that hearing.

The Minnesota Supreme Court has said simply that, in a zoning procedure, due process requires "reasonable notice of hearing and a reasonable opportunity to be heard."[71] Clearly, however, a "reasonable opportunity" to be heard implies that the hearing will be fair and impartial. Some basic elements of a fair hearing include:

- Ensuring that all persons affected by the decision and attending the hearing have an equal opportunity to speak;
- Ensuring that speakers are not interrupted unreasonably by board or audience members;
- Careful and attentive listening by members of the decision-making body; and
- Decision-making that reflects the concerns and issues raised at the hearing.

The suggestion that decision-making should reflect concerns and issues of those attending the hearing does not mean that the decision-makers must agree with everyone who spoke. Decision-makers should, however, make findings of fact on major issues and, when finding that one fact is true and an apparently contrary one false, explain how the choice between the two was made.

Note that following the plan and having standards to guide the process are excellent ways to demonstrate that a decision-making process is fair.

Enforcement

Regulations are effective only if they are enforced. There are two corollaries to this basic principle:

- Local governments should enforce the regulations that they adopt; and
- Local governments should adopt only regulations that they can actually enforce.

[70] See Hooper v. St. Paul, 353 N.W.2d 138 (Minn. 1984), where the court held that due process principles applied to provide protection to a use that had become nonconforming under the zoning ordinance. And see Costley v. Caromin House, Inc., 313 N.W.2d 21 (Minn. 1981), where the court held that the refusal of a local government to approve a group home was arbitrary and capricious and denied the applicant due process.

[71] Kletschka v. Le Sueur County Board of Comm'rs, 277 N.W.2d 404, 405 (Minn. 1979).

APPENDIX B: SAMPLE PUBLIC HEARING PROCEDURE

(Adapted from Township Planning and Zoning - A General Overview [Minnesota Association of Townships Legal Staff, edited by: Kent Sulem, Attorney, November 12, 2001])

The following procedure is designed to provide opportunities for everyone to participate. Such a procedure is particularly beneficial if the issue being considered is known to be controversial. This procedure, however, is intended only to be an example of the type of procedure that can be followed. Each jurisdiction should modify this sample, or adopt another one, as is determined to be in that community's best interests.

I. INTRODUCTION BY CHAIRPERSON

The chair of the Planning Commission, Board of Adjustment/Appeals, or the governing body provides a description of the public hearing procedure and what factors are to be considered by the body. See *Appendix C*, *Sample Public Hearing Notice and Chairperson's Opening Statement.*

II. STAFF PRESENTATION

A. Presentation by Staff
The jurisdiction's staff identifies the subject property, describes the nature of the application, presents the zoning and planning issues, and explains the action to be taken by the Planning Commission, Board of Adjustment/Appeals, or the local governing body. A concise description of the issues should be given.

B. Questions to Staff from the Commission, Board of Adjustment/Appeals, or Governing Body
This is to ensure that the Planning Commission, Board of Adjustment/Appeals, or governing body fully understands the information that has been presented by the staff and the information that is in their background materials packet.

C. Questions from Applicants
This provides the opportunity for the applicants to ask questions to clarify information that has been presented by the township/county or included in the planning report.

D. Questions to Staff from the Public
This provides an opportunity for anyone in the general public or other interested parties to ask questions about the information presented by the township/county.

III. APPLICANT'S PRESENTATION

A. Presentation by the Applicant
In this portion of the proceeding, the applicant has the opportunity to present his or her case. This is the applicant's opportunity to present factual information to demonstrate the proposal's compliance with the jurisdiction's comprehensive plan and zoning ordinance standards.

B. Questions for the Applicant from the Commission or Board of Adjustment/Appeals or Governing Body
The Planning Commission, Board of Adjustment/Appeals, or governing body has the opportunity to ask whatever questions they have about the proposal and information presented by the applicant.

C. Questions for the Applicant from the Public

The public is allowed to ask questions of the applicant. No statement either for or against the proposal should be accepted at this point.

IV. Statements from the Public

A. Statements from the Public in Support of the Application

This is a particularly important part of the proceeding if the proponents are in the minority. Even though large crowds against a proposal may be intimidating, the Chairperson must ensure an opportunity for those who wish to speak in favor of the proposal.

B. Statements from the Public in Opposition to the Application

The Chairperson should encourage people to keep their comments as concise as possible and as accurate as possible and to be factual with the evidence that they present for public consideration.

V. Close the Public Hearing

Following the close of the formal portion of the public hearing, the Planning Commission, Board of Adjustment/Appeals, or governing body should discuss the proposal. It should be remembered that for purposes of the Open Meeting Law, the discussions must be open to the public.

VI. Action

The Planning Commission or Board of Adjustment/Appeals should make a recommendation or the governing body should either deny or approve the application. The matter may also be continued for further consideration.

APPENDIX C: SAMPLE PUBLIC HEARING NOTICE AND CHAIRPERSON'S OPENING STATEMENT

Public hearing notices for zoning and land-use matters often contain only the minimum information required by statute. Unfortunately, this is often just enough information to elicit fear or confusion in the minds of those receiving the notice. By providing a detailed description of the proposed project and the rules governing conditional use decision making, the following type of notice and chairperson's statement can go a long way towards ensuring a predictable, efficient, and fair public hearing process.

Public Hearing Notice (Sample)

[insert date]

RE: Conditional Use Permit for [insert project type/address]

Dear Property Owner:

This letter is to inform you that a request for conditional use permit approval has been submitted by [insert applicant's name and address]. The request is to establish/expand a [insert detailed description of proposed use], on property located at [insert street address or township and range of subject property].

This matter will be considered in a public hearing by the Planning Commission on [insert date]. The meeting will begin at [insert time] in the [insert building name and address].

As nearby property owner, you have the right to be informed about and comment on this matter. If you have any information that should be considered by the Planning Commission, you may send it to us prior to the meeting. You may also attend the meeting and speak at the public hearing.

Please be aware that conditional use permits may be denied by the [insert name of county/township decision-making body] only if the Planning Commission determines that the proposed use/development does not comply with the standards and criteria established in the zoning ordinance.[72] Denial of a conditional use request must be accompanied by written explanation of the basis for the decision. In approving conditional use permits, the [insert name of county/township decision-making body] may impose reasonable conditions to ensure that any potential negative impacts are addressed.

Copies of the conditional use application and supplementary information are available for inspection at the [department/agency and address] during regular business hours.

If you need special accommodations to attend, please contact the [insert office] at least 24 hours before the meeting.

SAMPLE CHAIRPERSON'S STATEMENT

This hearing will be conducted in the following manner:

1. Staff will give a presentation, which will be followed by an opportunity for questions from the **[insert decision-making body]**, then the applicants, then the public.

[72] It should be noted that this recommended practice is stated more restrictively than some provisions of state law. Minn. Stat. §394.301, Subd. 1, states: "Conditional uses may be approved by the governing body or other designated authority by a showing by the applicant that the standards and criteria stated in the ordinance will be satisfied. The standards and criteria shall include both general requirements for all conditional uses, and insofar as practicable, requirements specific to each designated conditional use." Similar language exists in the municipal planning and zoning statute, Minn. Stat. §462.3595, Subd. 1.

2. Next, there will be a presentation by the applicant, which will be limited to **[time limit, such as "15 minutes"]**.

3. Next will be an opportunity for statements from the public in support of the application. Statements will be limited to **[time limit, such as "5 minutes"]**.

4. Next will be an opportunity for statements from the public in opposition to the application. Statements will be limited to **[time limit, such as "5 minutes"]**.

5. After statements from the public, the public hearing portion of the meeting will be closed, and the **[insert decision-making body]** will deliberate and take action. The **[insert decision-making body]** may ask further questions of the staff, applicants or members of the public.

I encourage everyone to:

- keep your statements as concise and accurate as possible;
- not to repeat statements that have already been made; and
- make sure any evidence you present for public consideration is factual.

The **[insert decision-making body]** may deny a conditional use application only if it determines that the application does not comply with all applicable standards and/or it determines that competent evidence exists showing the proposed use would: [73]

1. create an excessive burden on existing parks, schools, streets, and other public facilities and utilities that serve or are proposed to serve the area;

2. be so incompatible with nearby uses in terms of appearance, traffic, noise, or emissions that homes will be depreciated in value;

3. provide no community benefit to the **[jurisdiction]**;

4. be inconsistent with the purposes of the zoning code or the purposes of the subject zoning district;

5. cause a traffic hazard or result in unreasonable levels of traffic congestion; and

6. adversely affect area business trade because of noise, glare, or general unsightliness.

The **[insert decision-making body]** will not consider any other factors.[74]

[73] See footnote 72.
[74] See footnote 72.

Minnesota Department of Agriculture
625 Robert Street North
Saint Paul, MN 55155-2538

Phone: (651) 201-6012

www.mda.state.mn.us