



## Developing Stories: A Primer on Building Height Restrictions

By Phil Kaplan

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With all the new construction in Minneapolis, building heights have been hot topics of conversation lately. Two recent newsmakers come to mind.

Developer Alex Duval raised eyebrows in December 2014 when he proposed to build an 80-story skyscraper on the former Nicollet Hotel block in downtown Minneapolis. The building would have eclipsed the current tallest building in Minnesota – the IDS Center – by 23 stories. The City of Minneapolis rejected Duval's proposal in January 2015, but it will not be long before another developer takes a shot at the IDS Center's 43-year reign atop the Minneapolis skyline.

Developer Mark Dwyer also made headlines due to his long battle over the height of a proposed condominium/retail building in the Linden Hills neighborhood of Minneapolis. Dwyer received preliminary approval to build five stories in February 2012. But political opposition, legal restrictions and economic constraints caused him to revise the height of his planned building twice – from five stories to three stories to four stories – before he finally scrapped the project altogether in February 2015.

Whether erecting a tower in downtown Minneapolis or building a condominium in a quiet residential neighborhood, every developer that reaches for the sky(line) faces myriad potential legal, political, practical and financial hurdles. The last thing an ambitious developer needs is to get tripped up on a legal technicality. Before starting a project, a developer should have a basic understanding of the applicable height restrictions and the legal process for exceeding them.

Municipalities have zoning ordinances that regulate the heights of buildings within their borders. If you want to erect a building that would be taller or have more stories than the governing

ordinance allows, you need the municipality to grant a variance or a conditional use permit.

A variance allows a property owner to use his property in a way that would otherwise be forbidden by an ordinance. "Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the variances are consistent with the [municipality's] comprehensive plan. Variances may be granted when the applicant for the variance establishes that there are practical difficulties in complying with the zoning ordinance." Minn. Stat. § 462.357, subd. 6(2). Practical difficulties that justify a variance exist when the landowner wants to use his property in a reasonable way, his plight is caused by "circumstances unique to the property not created by the landowner," and granting him a variance will not "alter the essential character of the locality." *Id.* "Economic considerations alone do not constitute practical difficulties." *Id.*

A conditional use permit allows a property owner to use his property in a way that is expressly allowed by an ordinance, as long as certain standards set forth in the ordinance are met. Minn. Stat. § 462.3595, subd. 1. For example, Section 548.110 of the Minneapolis Code of Ordinances allows height limitations (other than for single and two-family dwellings) to be increased by conditional use permit. The City Planning Commission must consider the following factors when determining the maximum building height allowed by a conditional use permit: the surrounding properties' access to light and air; shadowing on residential properties; significant public spaces or solar energy sources; the scale and character of surrounding properties; and preservation of views of landmark buildings, significant public spaces and bodies of water. *Id.*



If a municipality denies an application for a height variance or conditional use permit, the applicant may file a lawsuit in the district court to review the municipality's decision. Minn. Stat. § 462.361, subd. 1. The district court will reverse the municipality only if the municipality's decision was unreasonable, arbitrary or capricious. *Honn v. City of Coon Rapids*, 313 N.W.2d 409, 417 (Minn. 1981). A municipality's denial of an application is unreasonable if, for example, the municipality's purported rationale does not have "the slightest validity or bearing on the general welfare of the immediate area," is legally

insufficient, or lacks a factual basis. *VanLandschoot v. City of Mendota Heights*, 336 N.W.2d 503, 508 (Minn. 1983). In the case of a conditional use permit, a municipality's decision is also arbitrary if the applicant has met all of the standards laid out in the conditional use permit ordinance. *Zylka v. City of Crystal*, 167 N.W.2d 45, 49 (Minn. 1969).

Most developers will not have to go through this entire process to get their projects off the ground. But in case they run into opposition, developers should understand and be prepared to maneuver the legal limitations on building heights.

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