ADEQUATE PUBLIC FACILITIES:

ONE CITY'S EXPERIENCE

1. Rochester, Minnesota

   A. Estimated population of 95,500.

   B. Third largest city in Minnesota.

   C. Home of world-renowned Mayo Clinic.

   D. Land use approvals include general development plan, preliminary plat, final plat and various incentive and restricted forms of development plans.

   E. In Minnesota, the only statutorily-authorized form of impact fee a city may impose on a development is park land dedication.

2. Pre-1999

   A. Land use approvals occurred without regard to adequate public facilities.

   B. Proposed subdivisions were approved despite all parties conceding the lack of adequate public facilities.

   C. City Council struggled to explain to residents of a new subdivision why the streets were in bad shape, the subdivision was not being served by the local transit system and the lack of a bike path connected to the city's main bike trail. Those same residents also complained about the assessments recently adopted in order to pay for the extension of water and sewer to their new development.

3. 1999 Subdivision Regulations

   A. Minnesota law allows cities to adopt subdivision regulations requiring adequate public facilities.

      (1) Minnesota Statutes, Section 462.358, subd. 1a, states that "[t]o protect and promote the public health, safety, and general welfare, to provide for the orderly, economic, and safe development of land, … and to facilitate adequate provision for transportation, water, sewage, storm drainage … and other public services and facilities, a municipality may by ordinance adopt subdivision regulations establishing standards, requirements, and procedures for the review

and approval or disapproval of subdivisions;"

(2) Minnesota Statutes, Section 462.358, subd. 2a, states that "[t]he standards and requirements in the regulations may address without limitation: the size, location, grading, and improvement of lots, structures, public areas, streets, roads, trails, walkways, curbs and gutters, water supply, storm drainage, lighting, sewers, electricity, gas, and other utilities; … and the protection and conservation of flood plains, shore lands, soils, water, vegetation, energy, air quality, and geologic and ecologic features;"

(3) Minnesota Statutes, Section 462.358, subd. 2a states that "[t]he regulations may permit the municipality to condition its approval on the construction and installation of sewers, streets, electric, gas, drainage, and water facilities, and similar utilities and improvements;"

(4) Minnesota Statutes, Section 462.358, subd. 2a states that "[t]he regulations may permit the municipality to condition its approval on compliance with other requirements reasonably related to the provisions of the regulations and to execute development contracts embodying the terms and conditions of approval;"

B. In 1999, Rochester adopted new subdivision regulations. As part of those regulations, Rochester adopted adequate public facility standards. Developers strongly resisted the adoption of these standards contending they will increase the cost of housing (and thus making housing less affordable) and will stifle growth in this growing community. Neighbors encouraged the Council to adopt these standards so that new development, rather than the current taxpayers, becomes more responsible for its costs.

C. The new subdivision regulations adopted the adequate public facilities standards by reference and incorporation. For example, the criteria for approval of a general development plan were amended to include a requirement that on and off site public facilities must be adequate as measured by the adequate public facilities standards. A copy of those standards is found in Attachment 1.

4. The Results

A. Minnesota law allows a city to approve, approve with conditions or deny a subdivision application.

B. Rochester has historically approved an application with conditions.

C. Three scenarios

(1) The city approves the subdivision application with a condition that severely limits any development occurring on the property. In this scenario, the following is a typical condition imposed upon the city's approval of a proposed subdivision with inadequate public facilities:

Because on and off site public facilities are currently inadequate to handle the proposed development, the development must be phased-in in a manner consistent with the City's planned infrastructure improvements. Specifically, there are no plans for sanitary sewer to serve the property within the first three years of the City's current six-year Capital Improvement Program. Further, no other arrangements have been made to ensure that adequate utilities will not be available concurrent with the proposed development. Additionally, there are no plans to reconstruct 65th Street N.W., or Bandel Road to handle the additional traffic that this development will generate. As such, no development will occur and no further development permit will be issued until the Council determines public facilities are adequate to accommodate this development.

(2) The city approves the subdivision application with a condition that either limits the amount of development or requires phased-in development (so that the level of development is commensurate with the adequacy of the public facilities). In this scenario, the following is a typical condition imposed upon the city's approval of a proposed subdivision with inadequate public facilities:

The development shall be phased so that 50th Street N.W., north of 55th Street N.W., does not exceed approximately 3,000 average daily trips before it is upgraded.

(3) In some cases, when faced with the inadequate public facilities condition, a developer will indicate its willingness to execute a development agreement. Under this scenario, the following is a typical condition imposed upon the city's approval of a proposed subdivision with inadequate public facilities:

As noted in General Development Plan #X, on and off site public facilities are currently inadequate to handle the proposed development. As such, the development must be phased-in in a manner consistent with the City's planned infrastructure improvements. No development will occur and no further development permit will be issued until the Council determines public facilities are adequate to accommodate this development. Alternatively, should the developer voluntarily agree to join with the City in making these inadequate public facilities adequate for this development, the developer may enter into a development agreement

that outlines the developer's and City's obligations relating, but not limited, to: [Here, you would insert your laundry list of public improvement concerns that would be addressed in the development agreement].

D. The Development Agreement Option

(1) Minnesota law (Minn. Stat. Section 462.358, subd. 2a) expressly authorizes a development contract consisting of the terms and conditions of the city's conditions of approval of a proposed subdivision.

(2) It is the city's position that the development agreement scenario or option is entirely voluntary on the developer's part. It exists to allow a developer to proceed with the planned development without waiting for the public facilities to become adequate. There is no requirement that the developer enter into a development agreement. If the developer can live with the first or second scenario (and there are those who fall within this category), the city can live with it as well.

(3) I always ask the developer's representative to state on the record whether the developer agrees to the conditions of approval, including the inadequate public facilities condition and the option for the execution of a development agreement. If the developer balks at the inadequate public facilities condition or the development agreement option, I ask the appropriate city department to make a record as to the inadequacy of the public facilities and the voluntary nature of the development agreement.

E. Building Boom answers the "No Growth" Argument

(1) Building permits increased from 1999 (1500 permits) to 2003 (4100 permits – a record yearly amount).

(2) Building permit valuations increased from 1999 ($198 million) to 2003 ($306 million).

(3) Dwelling unit permits increased from 1999 (325 permits) to 2003 (894 permits)

(4) Dwelling unit permit valuations increased from 1999 ($91 million) to 2003 ($152 million).

5. Secrets to Success

A. Council Commitment

(1) The Council must adhere to the adequate public facilities requirement. There can be no exceptions. Once you allow a development to proceed despite the lack of adequate roads, bike trails, transit connections, water or sewer, you pull the rug from underneath the entire adequate public facilities concept. And you create a precedent that other developers will want to follow.

(2) If the Council is less than serious about adhering to the adequate public facilities concept and enforcing it uniformly, then don't even bother.

B. Keep the Development Agreement Option as a Voluntary Option

(1) The City's public works and planning departments will want to push development agreements at every opportunity. They will act as if the developer must sign off on a development agreement. You will have to counteract this pressure by constantly reminding city staff, the City Council and, for purposes of the record, the developer that a development agreement is a voluntary option.

(2) In Rochester, it is apparent that the development industry is eagerly looking for some way to challenge this entire process. They are watching to see any act or statement that might lead one to believe the City is doing nothing more than imposing an impact fee when it has no such authority. Be vigilant in keeping the record straight as to how the development agreement is nothing more than a voluntary option for developers to consider if they want to proceed with a development despite the lack of adequate public facilities. I always keep a running list of those developments that have fallen into the first or second scenario and have not opted for the development agreement option. That list will help in defending any suggestion that I am attempting to impose an unauthorized impact fee.