

Zoning and Permitting Challenges for Community Solar Gardens

Presented by
Thomas Braun
October 18, 2016

AGENDA

- Overview of Relevant Land Use Permits
- Land Use Permits Applied to CSGs
- Problems/Solutions

Relevant Land Use Permits

GENERALLY

- Minnesota counties and municipalities derive their zoning authority from state statutes
 - Minn. Stat. §§ 394.301-3 (for counties) and Minn. Stat. §§ 462.3595-7 (for municipalities)
- Local governments enact ordinances pursuant to these state statutes
 - Permits that conflict with ordinances and ordinances that conflict with statutes are unenforceable

CONDITIONAL USE PERMITS

462.3595 CONDITIONAL USE PERMITS.

Subdivision 1. **Authority.** The governing body 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 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.

Subd. 2. **Public hearings.** Public hearings on the granting of conditional use permits shall be held in the manner provided in section 462.357, subdivision 3.

Subd. 3. **Duration.** A conditional use permit shall remain in effect as long as the conditions agreed upon are observed, but nothing in this section shall prevent the municipality from enacting or amending official controls to change the status of conditional uses.

Subd. 4. **Recording of permit.** A certified copy of any conditional use permit shall be recorded with the county recorder or registrar of titles of the county or counties in which the municipality is located for record. The conditional use permit shall include the legal description of the property included.

CONDITIONAL USE PERMIT

- Conditional use permits
 - Allow a land use in a zoning district so long as conditions placed on permit are met
 - Run with the land
 - Immune from zoning changes
- In short, provide assurance that the use can continue as long as conditions are met

INTERIM USE PERMITS

462.3597 INTERIM USES.

Subdivision 1. **Definition.** An "interim use" is a temporary use of property until a particular date, until the occurrence of a particular event, or until zoning regulations no longer permit it.

Subd. 2. **Authority.** Zoning regulations may permit the governing body to allow interim uses. The regulations may set conditions on interim uses. The governing body may grant permission for an interim use of property if:

- (1) the use conforms to the zoning regulations;
- (2) the date or event that will terminate the use can be identified with certainty;
- (3) permission of the use will not impose additional costs on the public if it is necessary for the public to take the property in the future; and
- (4) the user agrees to any conditions that the governing body deems appropriate for permission of the use.

Any interim use may be terminated by a change in zoning regulations.

Subd. 3. **Public hearings.** Public hearings on the granting of interim use permits shall be held in the manner provided in section 462.357, subdivision 3.

INTERIM USE PERMITS

- Interim Use Permits
 - Temporarily allow a land use in a certain zoning district
 - Must identify a date or event on which the permit will terminate
 - Does not run with the land
 - May terminate with a change in zoning regulations
- In short, does not provide assurance that the use can continue

Land Use Permits Applied to CSGs

CSGs AND IUPs

- Solar was mostly absent from zoning ordinances at the advent of the CSG program
- Counties and municipalities have had to decide how to plan for solar
- Many have chosen to treat solar as an interim use

EXAMPLES

- Sherburne County – Section 16.2

Under Minnesota Statutes, Sherburne County may approve an Interim Use Permit for a property if:

1. The use conforms to the zoning regulations;
2. The date or event that will terminate the use can be identified with certainty;
3. Permission of the use will not impose additional costs on the public if it is necessary for the public to take the property in the future; and
4. The user agrees to any conditions that Sherburne County deems appropriate for permission of the use. Any interim use may be terminated by a change in zoning regulations.

UNCERTAINTY

- “Any interim use may be terminated by a change in zoning.”
- Hard for lenders to get comfortable with potential zoning change and termination prior to payoff
- Hard to sell projects to sophisticated buyers conducting rigorous due diligence

EXAMPLES

- Sherburne County – Section 16.2

Subdivision 2: Permit Expiration and Transferability:

Any IUP issued under this Ordinance is granted solely to the applicant and/or the business entity named in the application, and for the premises named in the IUP application. No IUP of any sort granted pursuant to this Ordinance is transferable to any other person or premises. If a change of ownership, control, or location of any licensed premises occurs, whether pursuant to move, sale, transfer, assignment, or otherwise, the owner or proposed new owner must complete a new application subject to approval pursuant to this Ordinance. A change of ownership or control includes, but is not limited to:

- A. The sale of all or substantially all of the company assets;
- B. Sale or acquisition of forty (40) percent or more of the controlling interest (voting) stock if the company stock is publicly traded;
- C. Sale of fifty-one (51) percent of the voting stock if a non-publicly traded stock or closely held corporation;
- D. Execution of a management agreement; or
- E. The change of any officer or majority stockholder if the company is a closely-held corporation.

The IUP shall expire with a change of ownership, or unless otherwise required by the IUP's conditions as determined by the County Board. The IUP shall expire if the approved use is inactive for one (1) year or longer as determined by the Zoning Administrator and/or tax records indicating the use was inactive.

LACK OF TRANSFERABILITY

- “No IUP of any sort granted pursuant to this Ordinance is transferable to any other person of premises. If a change in ownership, control ... occurs ... the owner or proposed new owner must complete a new application”
- Often discovered at the time of a proposed sale
- Delay

EXAMPLES

- Coates Zoning Ordinance, Section 5.04

5.04 AG Agriculture

A. Purpose

The City of Coates establishes the AG Agriculture District for the purposes of protecting viable agricultural lands from non-farm influence; retaining valuable areas for conservation purposes; and preventing scattered non-farm growth.

B. Permitted Uses

1. Agricultural uses and structures
2. Farm dwellings at a density not exceeding one dwelling unit per quarter-quarter section.
3. Accessory uses to those listed above
4. Vegetable gardening
5. Produce stands for products raised on the premises
6. Greenhouses, nurseries, tree farms, and sod farms
7. Wildlife areas, forest preserves, public parks owned or operated by a government agency or nonprofit organization, and other open space uses
8. Home occupations in accordance with Section 4.05
9. Horses, livestock and fowl, not exceeding a density of one (1) horse or livestock animal per acre or three (3) fowl per acre
10. Essential services
11. Sexually-oriented businesses, as regulated by Section 7.08 of this Ordinance and subject to compliance with State of Minnesota Rules Part 7080 governing the design and installation of septic systems, and compliance with other applicable public health and safety regulations.

C. Interim Uses

1. Seasonal mineral extraction

SOLAR NOT LISTED AS AN INTERIM USE

- Ordinance states:
 - The interim use must be allowed in the zoning district where the property is located.
 - If a proposed interim use is not listed as a permitted use, a text amendment to the ordinance will be required before an IUP may be considered.
- Potential problem with the authority to issue

Potential Solutions to IUP Issues

UNCERTAINTY - SOLUTION?

- Empire Township Ordinance 400, Section 7.05
 - H. All interim use permits shall terminate on the occurrence of any of the following events, whichever occurs first:
 1. The termination date established by the Board of Supervisors and stated in the interim use permit.
 2. A violation of the conditions under which the interim use permit was issued.
 3. A change in this ordinance that causes the use to become nonconforming. If a lawfully existing interim use is rendered nonconforming as a result of a change in this Ordinance, the use may continue until it is terminated in accordance with the terms of the interim use permit issued for the use, or until the use is discontinued for at least twelve (12) months, whichever occurs first.
 4. The use has been discontinued for twelve (12) or more months.

TRANSFERABILITY - SOLUTION?

- Sherburne County – Section 16.2

Subdivision 2: Permit Expiration and Transferability:

Any IUP issued under this Ordinance, with the exception of Solar Farms as cited in Sec 16.2, Subd 5, Item 20 E., is granted solely to the applicant and/or the business entity named in the application, and for the premises named in the IUP application. No IUP of any sort granted pursuant to this Ordinance is transferable to any other person or premises. If a change of ownership, control, or location of any licensed premises occurs, whether pursuant to move, sale, transfer, assignment, or otherwise, the owner or proposed new owner must complete a new application subject to approval pursuant to this Ordinance. A change of ownership or control includes, but is not limited to:

- A. The sale of all or substantially all of the company assets;
- B. Sale or acquisition of forty (40) percent or more of the controlling interest (voting) stock if the company stock is publicly traded;
- C. Sale of fifty-one (51) percent of the voting stock if a non-publicly traded stock or closely held corporation;
- D. Execution of a management agreement; or
- E. The change of any officer or majority stockholder if the company is a closely-held corporation.

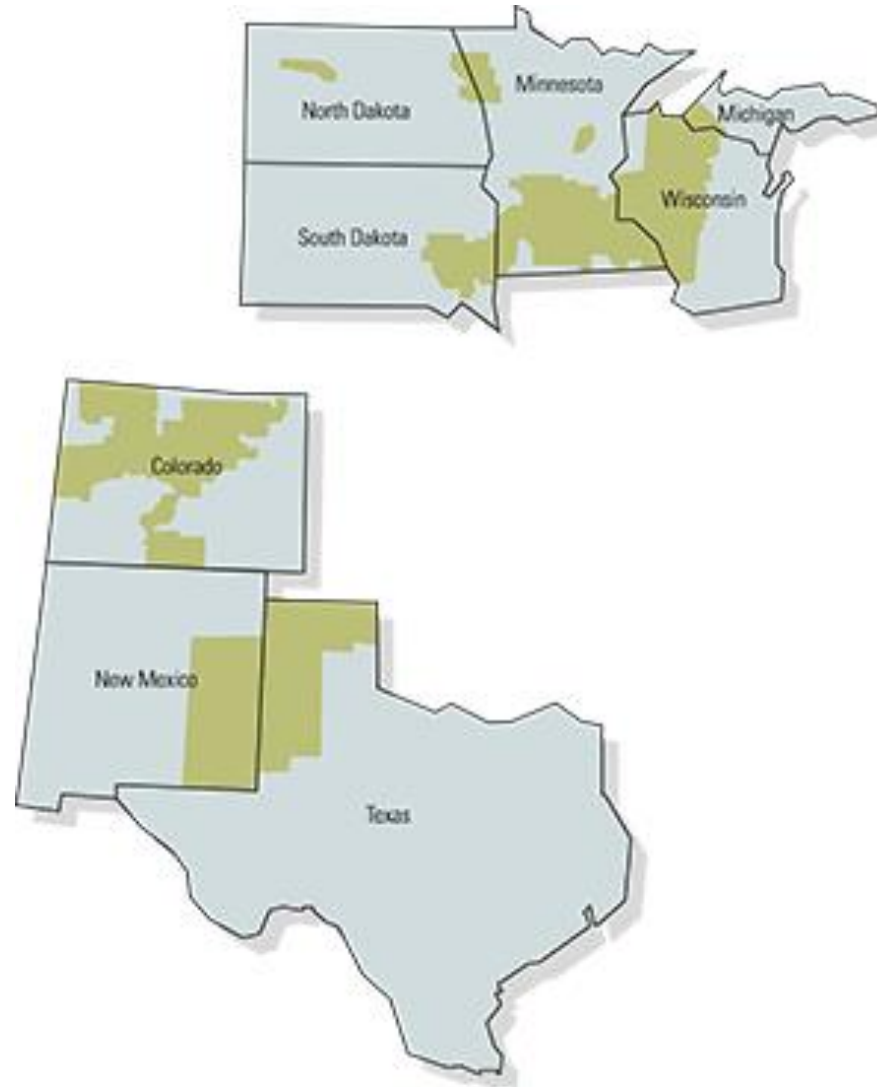
The IUP shall expire with a change of ownership, or unless otherwise required by the IUP's conditions as determined by the County Board. The IUP shall expire if the approved use is inactive for one (1) year or longer as determined by the Zoning Administrator and/or tax records indicating the use was inactive.

Why IUPs in the First Place?

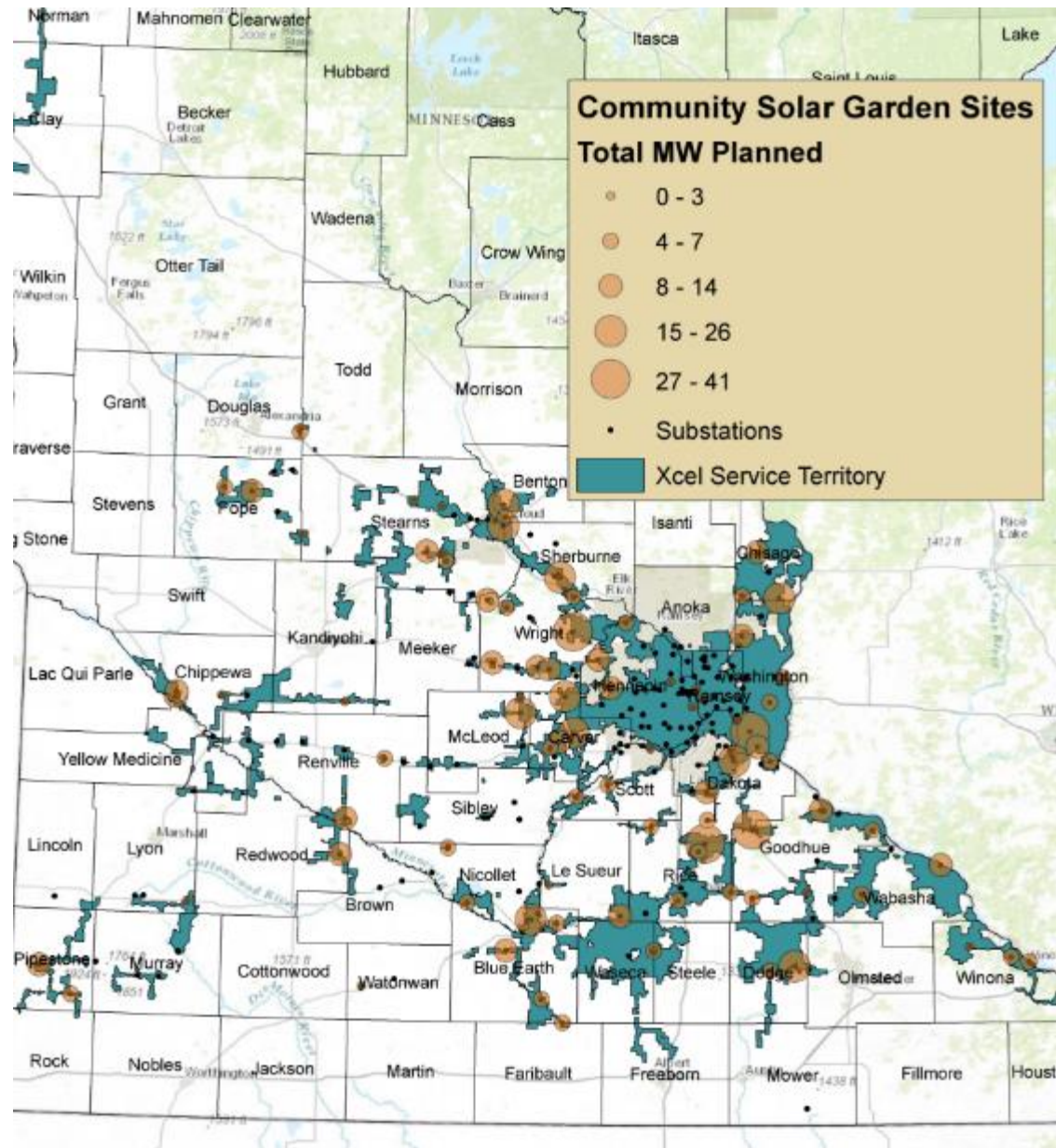
CSG GENESIS AND CONCEPT

- Solar access for all!
 - Subscribers must be Xcel customers
 - The CSG must be located in same or contiguous county as the subscribers

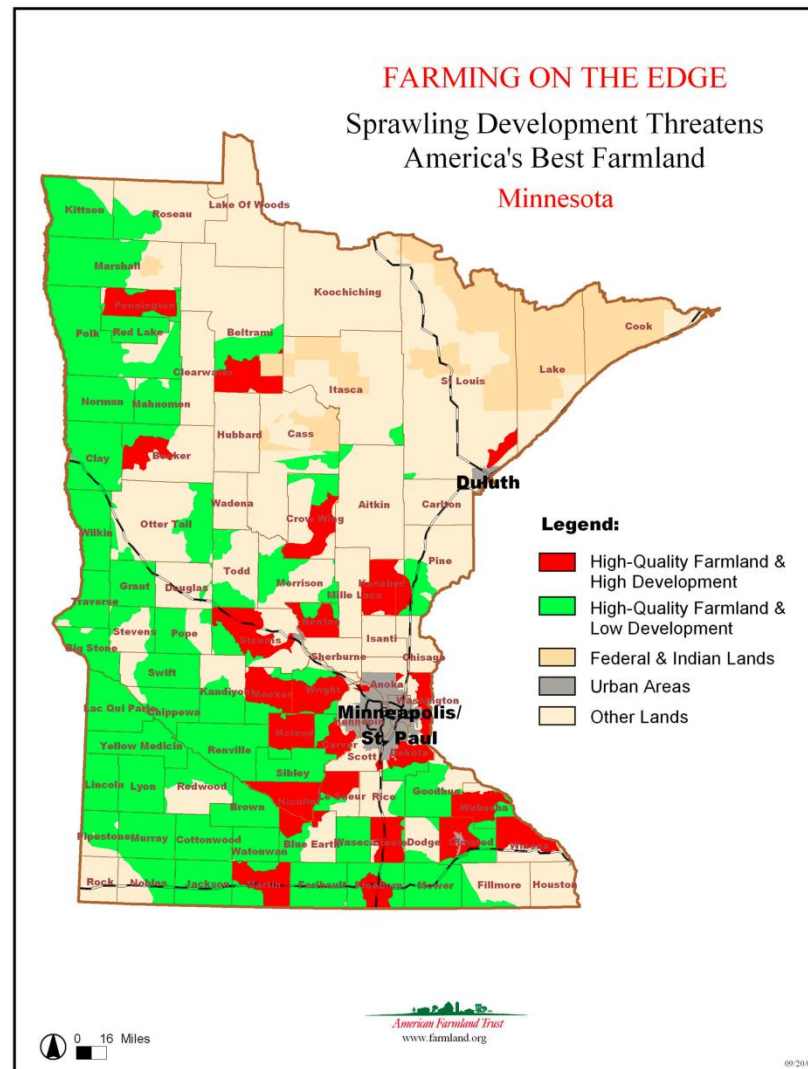
XCEL'S SERVICE TERRITORY



RURAL SETTINGS



RURAL SETTINGS IMPLICATE FARMLAND ISSUES



MN REGS RESTRICT DEVELOPMENT OF PRIME FARMLAND

- The Prime Farmland Rule prohibits the permitting of a power plant where the developed portion of the plant site occupies more than 0.5 acres of prime farmland per MW of net generating capacity “unless there is no feasible and prudent alternative.”
 - Minn. R. 7850.4400, subp. 4

PRIME FARMLAND, CONT.

- The Prime Farmland Rule is only relevant to large electric power generating plants (50 MW or more)
- BUT, the policy behind it still appears in the CSG context through some local permitting bodies' use of interim use permits
 - Land taken out of production for defined period of time
 - Can be put back into production with a change in zoning regulations

Conclusion

CONCLUSION

- Carefully read and understand these aspects of BOTH the zoning ordinance and interim use permit:
 - Solar as an interim use
 - Is it listed in the relevant zoning district?
 - Termination
 - Term, zoning change, yearly review?
 - Change of control
 - Reapplication?
- Bring in counsel early

Questions?