

**MINUTES
MINNETONKA CITY COUNCIL
REGULAR MEETING, MONDAY, JUNE 14, 2004**

1. CALL TO ORDER.

Mayor Anderson called the meeting to order at 6:30 p.m.

Anderson paid tribute to city employee Jim Udell, who passed away from cancer on June 8. She noted his commitment throughout his 14-year career with the city. She expressed sympathy to his wife, Joan, and his children—Sara, John and Melissa. A moment of silence was observed in Jim's honor.

2. PLEDGE OF ALLEGIANCE.

All joined in the Pledge of Allegiance.

3. ROLL CALL.

Councilmembers Jan Callison, Terry Schneider, Al Thomas, Tony Wagner, Bob Ellingson, Brad Wiersum, and Karen Anderson were present.

4. APPROVAL OF AGENDA.

City Manager John Gunyou reviewed the addendum. The final plat date for the Portico plat, item #10E, was changed to June 14th, and item #12B, introduction of an ordinance regarding Yellowstone Trail, was pulled from the agenda at the applicant's request.

Schneider moved, Thomas seconded a motion to accept the agenda with the addendum. All voted "yes." Motion carried.

5. APPROVAL OF MINUTES: May 24, 2004 regular council meeting.

Wiersum asked for an amendment to the mayor's comments about the Lake Minnetonka shore land, and Anderson concurred.

Callison moved, Wiersum seconded a motion to approve the minutes of the May 24, 2004 Minnetonka City Council meeting as amended. All voted "yes." Motion carried.

6. SPECIAL MATTERS:

A. Minnetonka Community Action Recognition Award.

Callison recognized Cub Scout Pack 426 and Boy Scout Troop 430 and their leader, Janice Dummer. Pack members included Michael Dummer, Sam Illies, Jared Rasula, Neal Leines, Garrett Leatherman, John Seylar, Jack Holm, Jordan Mullin and Jacob Benson. Troop members include Josh Dummer, Christian Helland, Mark Haakenstaad, Tim Overstreet, Ryan Mullin, Blake Mullin, Justin Mullin and Joel Overstreet. The scouts hold an annual garage sale to raise money for charity. Their latest effort provided enough revenue to purchase 150 sleeping bags for Caring and Sharing Hands. Anderson and Callison presented Dummer and the scouts with certificates and pins.

Dummer thanked the city council and said that the honor goes to the scouts and their families for the time they dedicate to the project. Michael, Josh and Jared said that it makes them feel good to help those in need.

B. Choral performance and presentation to City Council by Minnetonka Chamber Choir.

Anderson provided background information about the Music Association of Minnetonka, and the Chamber Choir, which consists of young women in 9th to 12th grade. The group tours and competes internationally. The Chamber Choir performed two numbers for the audience.

Roger Hoel, Musical Director, presented a flag to the mayor. The choir received this flag from Minnesota National Guard members returning from Iraq, as they attended a concert in Newfoundland. He also presented a photograph of the choir with the National Guard members. Anna Boyer, President of the Chamber Choir, presented a certificate about the flag from the troop's commander.

Hoel noted that the group will tour Prague, Vienna and Salzburg this year, and they hope to represent the city well in European competitions. Anderson noted that the group spreads the name of Minnetonka throughout the world. Hoel thanked the city council for their 30 years of kindness and support for the association.

7. REPORTS FROM CITY MANAGER & COUNCIL MEMBERS.

Gunyou reviewed the schedule of upcoming city council meetings, and reminded viewers of the Minnetonka Summer Fest and Burwell Ice Cream Social scheduled for June 26.

Callison provided information about a conference on supportive housing scheduled for the following week.

6. CITIZENS WISHING TO DISCUSS MATTERS NOT ON THE AGENDA.

No one spoke.

9. BIDS AND PURCHASES: None.**10. CONSENT AGENDA (Items Requiring a Majority Vote):****A. Claims for council authorization – June 14, 2004.**

Wiersum moved, Callison seconded a motion to approve the June 14, 2004 claims list, including checks numbered 182379 through 182751 totaling \$2,512,910.98. All voted “yes” except that Callison abstained as to check number 182743. Motion carried.

B. Resolution approving a conditional use permit for telecommunications antennas and ground equipment at 10700 Cedar Lake Road for Voicestream Minneapolis.

Wiersum moved, Callison seconded a motion to adopt Resolution No. 2004-061 approving a conditional use permit for telecommunications antennas and ground equipment at 10700 Cedar Lake Road for Voicestream Minneapolis. This resolution is based on the following findings:

- 1) The city code recognizes telecommunications facilities as valuable public resources.
- 2) The proposal meets all of the conditional use permit standards.

Approval is subject to the following conditions:

- 1) Record this resolution with the county before the city issues a building permit.
- 2) The site must be developed and maintained in substantial conformance with the plans dated April 9, 2004.
- 3) The exterior surface of the antennas and equipment must be painted to match the existing light towers.
- 4) A green mesh screen must be woven into the chain link fence, similar to the adjacent tennis courts, to provide screening.
- 5) The city council may reasonably add or revise conditions to address any future unforeseen problems.
- 6) The applicant must agree to the above conditions in writing.

All voted “yes.” Motion carried.

C. Resolution ordering the demolition of a fire-damaged structure at 209 Park Lane South.

Wiersum moved, Callison seconded a motion to adopt Resolution No. 2004-062 ordering the demolition of a fire-damaged structure at 209 Park Lane South. All voted "yes." Motion carried.

D. Resolutions ordering the abatement of nuisance conditions.

Anderson pulled this item for an update from staff on the current status of these properties. Community Development Director Ron Rankin indicated that only two properties remained in violation.

Wiersum moved, Thomas seconded a motion to:

- 1) Pull the order for the abatement of nuisance conditions existing at 4763 Coventry Road East.
- 2) Adopt Resolution No. 2004-063 ordering the abatement of nuisance conditions existing at 16720 Excelsior Boulevard.
- 3) Adopt Resolution No. 2004-064 ordering the abatement of nuisance conditions existing at 15929 Highwood Drive.
- 4) Pull the order for the abatement of nuisance conditions existing at 17729 Susan Drive.
- 5) Pull the order for the abatement of nuisance conditions existing at 404 Whitegate Lane.
- 6) Pull the order for the abatement of nuisance conditions existing at 12900 Woodbridge Trail.

All voted "yes." Motion carried.

E. Approval of the PORTICO final plat at 2201 Crosby Road (Cargill property) for Keith Waters & Associates, Inc.

Wiersum moved, Callison seconded a motion to approve the PORTICO final plat at 2201 Crosby Road (Cargill property) for Keith Waters & Associates, Inc., that was received on June 14, 2004, subject to the following conditions:

- 1) Compliance with all preliminary plat conditions, especially the specific conditions for release of the plat; and
- 2) Unless the city council approves a time extension, the final plat must be recorded within one year of council approval of the final plat.

All voted "yes." Motion carried.

F. Request from Northland Institute for a grant of \$12,500 to help start the Twin Cities Community Capital Fund (TCCCF).

This item was pulled from the consent agenda by Anderson, who asked staff to provide additional information about the program. Rankin provided that information.

Schneider moved, Thomas seconded a motion to approve a \$12,500 challenge grant for the Twin Cities Community Capital Fund (TCCCF). All voted "yes." Motion carried.

11. Items requiring Five Votes:

A. Preliminary plat, with buildable area variances, to divide the property at 16451 McGinty Road West into two lots for Chad Winter.

Wagner moved, Wiersum seconded a motion to give preliminary approval to the Winters Addition, date stamped October 1, 2003. Approval is based on the finding that, apart from requested buildable area variances, the plat meets the required standards and ordinances.

- 1) The variance is based on the following findings:
 - a. Strict enforcement would cause undue hardship because of the following circumstances that are unique to this property:
 - (1) The applicant is proposing to use the property in a reasonable manner. With a 20-foot floodplain setback, as proposed by staff in an updated floodplain ordinance, the proposal would not require any variances.
 - (2) The property is unique. The staff proposed change to the floodplain setback would double the buildable area of proposed Lot 2.
 - b. The variance would be consistent with the spirit and intent of the ordinance for the following reasons.
 - (1) The applicant's proposal would not alter the unique character of the area. There is wide variety in the size, access, and visual character of surrounding lots.

Approval is subject to the following conditions:

- 1) Complete the following before final plat approval:
 - a. Show the following on the final plat:
 - (1) At least ten- foot-wide drainage and utility easements next to any existing or proposed public street rights-of-way and at least seven foot-wide drainage and utility easements along all other lot lines.
 - (2) Drainage and utility easements over the 931.5 elevation.
 - (3) Dedicate an additional 7 feet of right-of-way along McGinty Road West.
 - b. Pay the city a park dedication fee of \$2,375.

- c. Submit evidence that there are no existing driveway easements on the property, or if there is, the easement must be vacated.
- 2) The following items must be submitted to the city before the city releases the final plat:
- a. An electronic CAD file of the final plat in microstation or DXF.
 - b. The following documents for the city attorney's approval:
 - (1) Title evidence that is acceptable to the City of Minnetonka attorney. Title evidence must be current within thirty days before release of the final plat.
 - (2) Conservation easements over all site wetlands and required wetland buffers and a drawing of the easements for the approval of the city attorney. The easements and drawing must be recorded with the final plat.
 - (a) A 16.5-foot wetland buffer is required around the small wetland on the north side of Lot 2.
 - (b) A 25-foot wetland buffer is required around all other wetlands on Lots 1 and 2.
 - (3) A private driveway easement over proposed Lot 2, benefiting proposed Lot 1.
 - (4) Private utility easements over proposed Lot 2, covering all utilities servicing proposed Lot 1.
 - (5) Provide restrictive covenants to be recorded against the individual lots with the plat. The covenants must include the conditions below that have not been met as of the release of the plat. These covenants must first be submitted for the city attorney's approval.

These documents must be recorded with the final plat, and a drawing of any easements must be attached to the easement deed.
- 3) The following must be submitted to the city before the City of Minnetonka issues a building permit:
- a. Final grading, drainage, and erosion control plans must be submitted for staff approval. The sewer and water services must be shown to minimize impact to the significant trees.
 - b. All conservation easements and trees to be preserved must be fenced and erosion control measures must be installed for staff approval.
 - c. The installation and maintenance of a temporary rock driveway, erosion control, tree protection and wetland

- protection fencing for each lot must be installed, subject to review and approval of the city's environmental resources coordinator.
- d. Copies of the recorded plat, conservation easements, and covenants required to be recorded.
 - e. A hookup fee for sanitary sewer and water.
 - f. A letter from the surveyor stating that boundary and lot stakes have been installed as required by ordinance. If the grading for proposed streets has not been completed, the planning director may approve a time extension to this requirement.
- 4) The buildable area variances approved as part of the plat do not approve floodplain setback variances for any future house. Any proposed house must meet the zoning ordinance in place at the time of building permit application. During construction, the streets must be kept free of debris and sediment, and the tree protection fencing, and erosion control fencing must be maintained.
 - 5) Trees must be planted to compensate for significant trees removed from each site that would be outside of the building pad and driveway area. The trees must be primarily species native to the area. They must be at least 2 1/2 inches in diameter for deciduous trees and 6 feet tall for coniferous trees. The property owner or original developer must replace the required trees if they die within one year after installation.
 - 6) Provide a driveway turnaround for Lot 2 before the house is occupied.
 - 7) The city must approve the final plat within one year of preliminary approval or receive a written application for a time extension or the preliminary approval will be void.

All voted "yes." Motion carried.

12. INTRODUCTION OF ORDINANCES:

A. **Ordinance rezoning 5431 and 5439 Williston Road from R-1, low-density residential, to PUD, planned unit development for MSC Concrete, Inc.**

Schneider noted that visitor parking seemed inadequate, and asked that staff and the planning commission look at that issue.

Wiersum moved, Wagner seconded a motion to introduce the ordinance rezoning 5431 and 5439 Williston Road from R-1, low-density residential, to PUD, planned unit development and refer it to the EDA and planning commission. All voted "yes." Motion carried.

- B. Ordinance approving a major amendment of a master development plan, with final site and building plans, at 408 Parkers Lake Road for Yellowstone Trail, LLC.**

This item was pulled from the agenda at the applicant's request.

- C. Ordinance amending City Code Section 135.010 concerning the Community Heritage Commission.**

Gunyou provided a brief staff report for this item.

Callison moved, Thomas seconded a motion to introduce an ordinance amending City Code Section 135.010 concerning the community heritage commission. All voted "yes." Motion carried.

13. PUBLIC HEARINGS:

- A. Continued public hearing to consider applications by Pomodoro, Inc., for on-sale and Sunday on-sale intoxicating liquor licenses for The Big Buck Roadhouse, an American Grille, 17805 State Highway 7.**

Gunyou provided a brief staff report. Anderson noted that the public hearing had previously been opened, and invited public comments. There were none.

Schneider moved, Thomas seconded a motion to continue the public hearing to consider applications by Pomodoro, Inc., for on-sale and Sunday on-sale intoxicating liquor licenses for The Big Buck Roadhouse, an American Grille at 17805 State Highway 7 to June 28, 2004. All voted "yes." Motion carried.

14. OTHER BUSINESS:

- A. Appeal of the planning commission's denial of a request for approval of multiple variances to tear down and rebuild a home at 2505 Bantas Point Lane for Kathleen Nelson.**

Planning Director Geoff Olson provided the staff report, and noted that the planning commission denied the request by a five to two vote.

Callison asked about the height difference between Nelson's house and the house at 2515 Bantas Point Lane. Olson thought the other house was about five feet shorter than Nelson's.

Callison noted the three tests considered for a variance, and that a height variance was not requested. Olson said that staff was

concerned about the lot being large enough to accommodate the proposed house. Staff's concerns related to the mass of the structure within the setbacks, and the increase in non-conformities. Staff felt that reducing the height of the structure would help to address those concerns.

City Attorney Desyl Peterson clarified that the applicant would have the right to construct a 35-foot high house within the 60 square foot buildable area allowed under the ordinance. However, the applicant was seeking to put that additional height into the setback area where there would normally not be a structure. Peterson noted that structures are three-dimensional.

Callison asked if the applicant could construct a one-story home now, and later add up to 35 feet of height to the house. She also asked about options for surrounding properties. Peterson said that most of buildings along Bantas Point Lane are non-conforming in one way or another. The ordinance states that expansions of non-conforming buildings, such as this, have to go through a site plan approval process, and applicants must reduce the extent of the impact on adjacent properties. Whether the council granted or denied this request, the applicant could not subsequently build to the 35-foot height without city approval because the additional height would constitute an expansion of the non-conforming building.

Anderson was confused with the home being characterized as two and one-half stories. She noted that the plans clearly show three full living levels, and a pull-down stairway above the third level to usable space. Olson said that there are three levels. The applicant refers to the home as a two and one-half story because some of the roof elevations are not to full height. Anderson recognized that the applicant was reluctant to lose space on the third level, and that there are three-plus levels to the home.

Wiersum questioned what the future character of the neighborhood should be. He saw this as a neighborhood that will likely redevelop due to the number of tiny houses and tiny non-conforming lots. He noted past council discussions about the mass of structures. He thought it important to look at this and similar structures in the neighborhood to determine the type of development that would be appropriate. He noted the issues that arise with changes in lakeside lots, especially when they affect the view. He said that those issues would arise not just with this house, but also with others in the neighborhood. Wiersum said that the character of this neighborhood will change, and was concerned if this house were too big, it would create problems. He wondered about the type of

structure that would not overly infringe upon the neighbors' right to a view.

Kathleen Nelson, 3063 Zarthan Avenue South, St. Louis Park, spoke as the applicant. Her comments included the following:

- This issue is very important to her because she has invested a great deal of time, energy, and resources into it.
- She retained an attorney after the planning commission denial of her request to protect her interests.
- The space accessed by the pull-down stairs will not be usable living space. It was planned for storage because the house has no basement.
- Nelson contemplated the purchase of this lot for three years and did much research, including consulting with the planning staff. She understood what the variances were, and tried to be thoughtful about them. She was taken aback when she was told that the planning staff would not recommend approval.
- Nelson tried to work out the differences with the planning staff. When those discussions reached their end, she brought her request to the planning commission, where she was denied.
- Nelson pointed out what she believed to be an error in the planning commission record, which she noted in her June 10 letter. At the planning commission, the height of the home was a primary issue, and she felt that the city code had been misrepresented at the meeting. Nelson felt that was a critical factual error that worked against her.
- After the planning commission's denial, Nelson did additional research looking for comparable situations in Minnetonka. She felt that McKenzie Point Road was the most comparable street in the city, and noted there had been recent teardowns and rebuilds on that street. She noted that all of the two-story homes on McKenzie Point Road were taller than her proposed home. Nelson said that her home is a two and one-half stories because the top level is nestled into the roofline.
- Nelson felt that the city's approval of 2811 McKenzie Point Road set precedent. The existing home was torn down and a new home was built in 1993. That home was taller than her proposed home, and a 42% hard surface coverage variance was granted that was later increased to 49%. That hard cover did not include the driveway. She felt that home had more mass and bulk than her proposed home, which would only require 30% hard surface coverage. Nelson did not ask for a height variance because the proposed height is allowed by code. Nelson also said that most of the homes on McKenzie Point Road and Bantas Point Lane have more hard surface coverage than she proposes.
- Nelson said that in her opinion, her proposed home was designed to meet every criteria of the code and it would improve

upon the existing non-conformities, rather than increase them as staff characterized.

- Nelson noted on page three of the staff report, that staff said that the exact same variances she sought would be required to build any home on the lot. Nelson said she was not asking for anything exceptional; she only wanted to be treated fairly, and pursuant to the code, other precedent within the city, and the state statutory requirements.
- Nelson responded to the staff's reasoning to recommend denial:
 - 1A – A reasonably sized home could be built with similar variances. She questioned staff's interpretation of reasonableness. Nelson said that in other cases, City Attorney Desyl Peterson had opined that this standard does not mean that the applicant must show that the land cannot be put to a more reasonable use, but rather the criteria is that the owner would like to use the property in a reasonable manner. Nelson said that her property is zoned as residential, she wants to build a residence on it, she only required 30% hard surface coverage, and she's within the allowed height. Nelson believed that hers was a reasonable use.
 - 2A – the proposed structure is not of reasonable size for the lot. At 2811 McKenzie Point Road, there was a higher ratio of home to lot, more mass and more bulk than her proposal. She did not feel that the standard was being equally applied.
 - 2B – the scale is not consistent with the neighborhood. Nelson said that other homes in her area would have the right to do something similar.
 - 2C – non-conforming setbacks would not be decreased due to the height. Nelson felt that this was a factually incorrect application of the ordinance. The non-conforming setbacks in her proposal are reduced, and the lake setbacks would be decreased. The height is conforming.
 - 2D - the proposed home would be more imposing on nearby property. Nelson cited case law that indicated that zoning ordinances do not create property rights for the adjacent landowners.

In conclusion, Nelson said that the variances she requested would be the same to build any home on the property. Variances resulting in greater non-conformities have already been granted to nearly every other home on Bantas Point Lane, and they continue to be applied to other homes within the city. Nelson's proposed home would not require a height variance, and is comparable to or shorter than other two-story homes. To deny these variances, Nelson felt, would deprive her or any owner of any use of the property.

Anderson questioned the factuality of some of Nelson's statements, but said that she would have the city attorney respond to them after her attorney's comments. Anderson noted that Nelson is seeking 11 variances. She agreed that a height variance is not required, and that some variances would be needed for any new home on the property. Anderson said that Nelson is seeking special treatment. Anderson said that it would be very difficult to compare Nelson's property to other areas of the city. She noted that the house across the street has all sorts of different characteristics.

Nelson felt that other homes on Bantas Point Lane had received very similar variances, and in many cases had greater non-conformity. Anderson said that the extent and number of the variances Nelson was seeking were different.

Peter Beck, 80 south 8th Street, Minneapolis, spoke as the attorney for the applicant as to the legal issues.

- He said that the issue was not the lot and setback variances, and referred to the staff report indicating that staff would support a home with the same footprint with less height. Beck said that all agreed that the lot and setback variances were required for this property to be used, the issue was how many stories. Beck said that the variances were consistent with others granted in the neighborhood.
- Beck said that the issue was also not about the length of the driveway. He questioned staff raising this issue at the last minute because it had no relation to any city standard. Beck characterized it as a "red herring." He said that the issue was whether or not the height was reasonable.
- Beck said that the key setback was from Lake Minnetonka. The applicant would increase that setback from 15.5 feet to 24 feet, and the floodplain setback from 11 to 17 feet. He felt those changes would decrease the non-conformity. The house would be taller, but it would be within the city's height requirement.
- Beck referred to the staff report's reference to a St. Louis Park case. He did not believe that case would uphold a denial of Nelson's variances. Beck said that issues of that case were a height variance and an additional use over a garage. The St. Louis Park City Council had recently denied an ordinance to allow a second story over garages. The court said that it was not reasonable to allow a height increase, or an additional use, because that was not consistent with the neighborhood. Nelson is not seeking a height variance or a new use. She is seeking to build a single-family home on a single-family lot in a single-family neighborhood. The request complies with the height requirements and only those lot and setback variances were

requested that were needed to use the property for a new home.

- Beck said that the key issue was reasonable use of this property. The staff report referred to a reasonably sized home. The proposed home would be 2,300 square feet in size. If the upper level were removed, the house would be 1,350 square feet in size. Beck questioned if the reduced size would be a reasonable use of Lake Minnetonka waterfront property. Beck noted that some cities have minimum square footage standards, and thought 1,350 would be at the low end of those standards. Anderson said that Minnetonka does not have such a standard. Beck felt that 1,350 square feet would be substandard for any new construction in Minnetonka, let alone on Lake Minnetonka lakeshore. The third level is needed because the garage is in the house in order to comply with the 30% hard surface coverage standard. Beck noted that Olson said that the garage could go out from the house. Beck said that would require a variance for 50% hard surface coverage, which was not reasonable and which would have a greater impact. Beck also felt that a garage off to the side would block more views than placing living space above. Beck said that unless the council decided that 1,350 square feet was all anyone could have on this property, going up was the only option. He felt that the better solution for the neighborhood was to meet the impervious surface standards, and stay within the height requirements. Beck said that neighbors would not have to seek a variance for height, but they would be required to get site plan review.

Beck felt that the standards for a variance had been met, and that his client was asking for a reasonable use of the property. He did not feel the home would adversely impact the essential character of the neighborhood because it will comply, to the greatest extent possible, with the lot and setback variances. It will allow Nelson to build a home commensurate with her property.

Anderson noted that Nelson had earlier agreed to return some of the shore land to natural area. She asked if Nelson had changed her position on that issue.

Beck said that there is specific case law from the United States Supreme Court regarding taking of those kinds of easements across waterfront property. In this case, Nelson is moving the home further away from the water, so there is not a connection. Nelson asked him about the request. He noted that the requirement had not been imposed throughout the city or that neighborhood, and Beck did not feel the request was lawful.

Vicky Mitchell, spoke on behalf of herself and her husband. They own the properties at 2426 and 2510 Bantas Point Lane. They watched the planning commission meeting on tape, because they were out of town. They noted that one of the issues at the planning commission meeting was whether neighbors wanted to preserve the character of the neighborhood. Mitchell said that they support tearing down substandard houses to build livable homes. They plan to do that with one of their lots. The Mitchells would support changing the character of the neighborhood to better it, and they felt that Nelson's proposed home was reasonable.

At Peterson's request, Olson presented a factual comparison of Nelson's request to the property at 2811 McKenzie Point Road. Olson noted:

- The lot at 2811 McKenzie Point Road is approximately 7,400 square feet, which is about twice the size of Nelson's.
- A two-story home was built at 2811 McKenzie Point Road, versus Nelson's request for a three-story home.
- At 2811 McKenzie Point Road, the variance was to reduce the minimum lot area and the lot width at setback, as well as a setback variance from 7 to 4 feet, and a floodplain setback from 35 to 20 feet (versus 11 feet for Nelson).
- Olson's notes indicated a 35 to 36% hard surface variance for 2811 McKenzie Point Road.
- The height of the McKenzie Point Road home was 27 feet, three feet less than Nelson's.
- In the findings, the McKenzie Point Road home was noted to decrease the non-conformity on the site over the previous situation.
- The McKenzie Point Road owner downsized the proposed height of his home to something more reasonable during his negotiations with staff.

Olson also referred to Beck's comment that the driveway issue was thrown in as a "red herring" at the last minute. Olson noted that the issue was raised in the planning commission and council reports. The reports noted that the 11-foot long driveway was substandard in length to typical driveways. There would be safety concerns because the public street is only about 10 feet wide. There would be potential for a parked vehicle to protrude into the narrow street. Olson said that this had been an issue from the beginning.

Olson was puzzled by Beck's characterization that the lake setbacks would improve. He thought they looked about the same except that an accessory building would be eliminated, which would be a positive; otherwise, only a little bump out on the front of the building would be moved back. Olson said that basically, the

setback is very similar to the current house, and the setbacks would be significantly decreased at the street, increasing the required front setback variance.

Peterson noted that the applicant stated that the property at 2811 McKenzie Point Road set precedent, and that the city council set the standard. Peterson clarified that was not what the courts have said—they have held that matters granted over ten years ago would not create a precedent. Peterson said that the courts have held that city councils have to treat similarly situated properties equally. The council must look at the time period in addition to the actual facts in terms of dimensions and property size. The courts have said that decisions more than a year old are not contemporaneous, and so they are irrelevant. The courts have also said that properties must be similarly situated. As Olson noted, there are lots of differences in terms of size of lots and actual height.

Peterson also felt that she had been misquoted when Nelson referred to her opinion about the property being put to a more reasonable use. Peterson said that the question was not whether the property could be put to a reasonable use. The question was if the use was reasonable—that is the courts' view. Nelson said that if the city denied the variances, it would deny any reasonable use of the property and that was not correct. Peterson said that a smaller home could fit on this property and that would be considered a reasonable use. Peterson thought a court would recognize the existing home as a reasonable use because it has been used for many years.

Peterson said that the St. Louis Park case facts were very different. Staff only referred to that case for the legal tests for a variance that the council should use and apply to this particular case.

Peterson did not agree that the property was “complying to the greatest extent possible.” She noted that there were many ways to reduce the setback variances even more. To say that these same variances would be required for any new construction was an overstatement. Peterson said there was no reason why these same variances would have to be granted. There could be a combination of a smaller footprint and a taller building, and that might be perfectly appropriate. Peterson said that being turned down for one variance did not constitute denial for all reasonable use. Applicants try again until it's absolutely clear that nothing would be acceptable. Peterson noted that staff said a shorter building could be positively received. Peterson said that it was true that a height variance was not required, but noted that the request did not take into account the mass that would be put into the setbacks. Peterson said that it

would not be just one story in the setback, it would be three stories. Peterson said that the building envelope was a valid consideration. The council need not consider solely the issues of the building's width and length because the height also determines the building's envelope. Peterson said that she was very comfortable from a legal standpoint that the city council had the right to deny the variances requested by Nelson.

Peterson agreed that the conservation easement could not be required.

Wagner did not recall the hard surface coverage variances on McKenzie Point Road as being that large. Olson said that the hard surface coverage at 2811 was increased from 35 to 36%.

Peterson said that the McKenzie Point Road property was not relevant—it was not in the same neighborhood, it was on the other side of the bay, and that neighborhood was configured differently. Even though both properties happened to be on Lake Minnetonka, they could not be compared. Anderson noted that the lots on McKenzie Point Road are substantially larger as an overall neighborhood.

Callison said that Wiersum's point summarized the crux of the issue—what is this neighborhood going to become? She said that the problem is that the city does not want Bantas Point to become like the McKenzie Point neighborhood. This application would open the door to a series of buildings that could be quite tall, which would be a concern to her. She said that Nelson's house was very attractive, and she understood that it could have been taller. Callison said that it was a lot of building for a very small lot, and that was her concern. She wondered if this was the right building for this lot, and asked how it would look if there were a series of similar buildings on Bantas Point Lane. She questioned if that would be a good result for the community. Callison noted that the proposed home would provide a fair amount of square footage for a small lot, and Callison did not believe that the design recognized the smallness of the lot and what should fit on it. Callison was concerned about how the area should look in 10 years, and said that this property will establish what the other property owners will do.

Anderson agreed with Callison. Anderson noted Peterson's comment that it wasn't just the height, it was the maximization of the building when you consider the extraordinary setback variances and the height within those setbacks. Anderson said that does not occur on McKenzie Point Road, but acknowledged that the neighborhood comparison wasn't relevant.

Anderson said that the setback variances might be appropriate for a building with a different mass.

Wiersum said that the question was not the character of the neighborhood today, but the character of the neighborhood in the future. This is a lousy lot in a great location. It's a tiny, little lot on the lake. The proposed house is nice, but the lot is too small for the proposed house. Wiersum's vision was for a house consistent with the property. He noted past council discussions about the scale of houses, and the building of too large homes on too small lots. Wiersum said that some variances would be appropriate to build a house on this lot, but because of the small size of the lot, a home could not be built with this much mass. Wiersum agreed with Callison that three to three and one-half story homes would be drastically different from the homes in that area now. Wiersum could imagine a beautiful cottage and future cottages. He noted that nowhere else in the city, but on the lake, would there be a discussion about building on a 4,000 square foot lot. Wiersum said that too much house is too much.

Schneider noted that some of the applicant's statements had been corrected by staff, such as that the variances were being improved all around when they are not. Schneider also felt that the top floor was not truly nestled into the roofline. He said that a homeowner should expect to get a two-car garage and entry on the first level, even if the living space is above the garage. It is not reasonable to expect that a guest's car would encroach on the public right of way. The building should be set back far enough to allow for guest parking. Schneider said that this got back to the idea of the kind of building envelope that would be proportionate for the lot, and how the house would fit with the surrounding homes. Schneider hates the word "neighborhood" because it is subject to interpretation. He would rather look at the physical bulk and siting of various structures within this unique, little point, and said that special consideration was needed to ensure that in the end, the area looks like it worked and was not a huge mistake. Schneider said that additional study was needed.

Schneider complimented the architect for creatively using the roof slopes to change the appearance of the top floor. He said the architect truly stretched the usage of the roof slope as part of the height. He was not inclined to approve the house as it is, but might consider approval with some reduction of the size of the building footprint. With creative redesign of the top floor, it could become more of a true ceiling space or roof space instead of a full floor. Schneider said the current proposal stretches beyond a reasonable use for this particular property.

Callison asked if Schneider was suggesting a smaller footprint. Schneider thought that the street setbacks should increase, which might decrease the square footage a little. He also suggested moving the garage, which might require reducing some of the first floor space, to accommodate a full driveway. If the hard surface coverage remained at 30%, Schneider said that he might support a revised request.

Callison suggested looking at increasing the footprint to reduce the height, but said she would have to see how such a change would look. She understood the applicant's desire for more space, but said that space might not have to come from more height. She wondered if additional space would be available on the south side of the property.

Anderson said this issue was difficult for her. She has seen how other areas of the city, particularly those associated with the lake, have drastically changed in the past 12 to 14 years. She knew that this neighborhood will also change drastically. She asked how the city could be assured that it will end up with something that is beneficial for this area and the city as a whole.

Anderson appreciated Nelson's research. She noted that staff works positively with any applicant, and is always up front about variances that might be needed. Anderson noted that there is always a risk when variances are needed, and staff always encourages people to work toward the best solution. She would be upset if staff automatically sent an applicant out the door if they requested 11 variances. Staff tries to work with the applicant, and Anderson appreciated the way Nelson had worked with staff.

Anderson liked the grasscrete concept, but felt the drive area wasn't large enough. She noted that during her site visit, she had to warn children across the street that she would be backing out of the driveway. She thought there might be a creative solution, such as angle parking. She would have raised the issue of the driveway if staff had not.

Anderson did not appreciate Nelson's unwillingness to alter the house design. The same configuration was presented to the planning commission and the city council. She believed that the height of the house could be reduced without losing the third floor. She did not have a figure for the ultimate height of the house, but said that it must match the mass of the structure. The height would depend on how much the rest of the structure fills the rest of the property. Anderson noted that the envelope of the proposed house was substantially larger than the existing home, and three

dimensionally, the new structure would be much larger than the existing structure. Even if that were appropriate for this case, the other houses on the street will likely be replaced in the future, and this property could set a precedent that would force the city to allow extreme variances on every lot on the street. Anderson said that a larger lot could support more mass. She was very reluctant to set that precedent. Anderson said that a house could be built on the lot that was perfectly reasonable in size and mass, but that would not be this particular house.

Nelson responded that the most recent home was built in 1998, and its driveway was less than 11 feet in length. She said that the driveways of many of the homes in the area were that short. Nelson also pointed to a staff report that referred to a 49% hard surface variance for 2811 McKenzie Point Road.

Nelson said that the height was a trade off to keep the hard surface coverage to code and reduce the number of variances. Nelson noted that drainage is a problem in the area, so it was important to minimize hard surface coverage.

Wagner emphasized that this decision would set the precedent for the whole area. A key issue for him was reduction of the non-conformity, and this proposal did not do that. He said that there are standards about expansions of non-conformance. He suggested that guidance might be needed concerning the council's expectation for this area of the city.

Nelson disagreed with Anderson's characterization that she had not compromised. Nelson said that she met with staff numerous times. The conservation easement was posed as a matter of compromise. After the planning commission, she asked her architect to alter the plan to drop the roof line a couple of feet, but staff said that would not change their recommendation. Nelson said that she had tried everything. She asked the council for some direction.

Anderson noted that Nelson was seeking 11 variances, which was not abiding by the code or the ordinances. That explained why she was hearing different options from the council. Anderson said that she would not permit the city council to redesign the home or give clear guidance of what will be accepted or expected, because that would be very difficult to do in a public forum. She said that the council relies on staff and their judgment. Anderson suggested that the applicant continue to work with staff.

Callison was not aware if there had been discussions about the hard surface coverage, and suggested it as an option to discuss.

She said that if staff did not support it, she would not second-guess them.

Anderson said that compromises were needed, and felt that a two and one-half story house was unreasonable, particularly when it provided three full levels and a pull down to an attic.

Callison noted that the council sometimes provides an opportunity to negotiate further so that the process does not need to start again. She appreciated Nelson's efforts to improve the area, and suggested that there might be a way to continue to work on the application.

Anderson said that would require the applicant's consent to extend the deadline. Peterson said that request would need to be in writing.

Schneider said that would be the applicant's choice and would depend on if the applicant felt she had enough direction to prepare a plan that could come closer to meeting the council's objectives. He said that might be more productive than starting over from scratch.

Nelson said that she had already granted a time extension. She did not feel that the planning staff was willing to accept any compromise, except removal of the top level. Nelson said that she could not accept a 1,300 square foot home.

Gunyou responded that the planning staff works cooperatively with all applicants, but said that Nelson has been unwilling to compromise, other than to reduce a foot or two from the house here or there. He said that an extension would need to be requested in writing by the applicant at this meeting, otherwise the council should vote to deny.

Nelson said that the total height of her proposed home would be no more than the height of two-story homes. The height to the midpoint of the structure would meet code. Nelson noted that there were no indications of height in the documents for other homes constructed on Bantas Point. She said that her home would only be one foot taller than the latest home built, but the planning staff was not willing to support it.

Anderson noted that Nelson's lot was substantially smaller than the comparisons she cited.

Schneider suggested that a majority of the council could provide some direction and clarity to the applicant. If that met her comfort

level, she could proceed. For Schneider to consider approval, the garage would need to be reduced in size or moved to give better distance from the public street. That might be accomplished through reorientation or angling. More significantly, he felt that the top floor should be reduced to fit inside the roof peak line instead of being a full floor hidden by slopes. That would probably mean that the number of bedrooms on the top level would need to be reduced. He would have to see drawings to decide. Schneider said if the applicant was not comfortable with that direction, the council could vote to deny.

Anderson said that because Schneider is an architect, it was easier for him to visualize. She said if the smaller third level would be similar to dormers, that might be reasonable.

Wiersum said that good compromise usually results in neither party being totally happy. Staff has gone as far as it can, and the applicant is unwilling to go further, so there is an impasse. To Wiersum, the question was whether there was sufficient council direction to indicate that they were united. If not, the council should vote on the existing proposal.

Callison thought that Schneider's suggestion might be a way to break the impasse.

Beck responded that if five council members would agree to Schneider's suggestions, Nelson would agree to a time extension.

Anderson said that she would not ask the council for a vote. Beck said he was not seeking a vote. He said if five council members agreed with Schneider, they would extend. Otherwise, they would take a denial and let the courts decide.

Anderson said that a poll would not be helpful or binding. Beck was not suggesting that the poll be binding, but said that it would give them some comfort in moving ahead toward a compromise.

Schneider said he would not support polling the council for their opinion, but said that council members could voluntarily indicate if they would be open to the approach he described.

Beck said they would give an extension if five council members were willing to work with the idea.

Schneider asked the applicant if she had heard enough information to consider his alternative or whether she thought the alternative was unacceptable.

Beck said that the alternative looked like it could be acceptable, but they would need to consult with their architect. The applicant hoped that the home could have at least two bedrooms.

Schneider noted that the applicant has invested money in this project, and suggested she look at the economics of resubmitting her proposal.

Anderson said that additional debate would be fruitless.

Gunyou recommended that the city council vote for denial and allow the process to restart. He was concerned that the applicant and individual council members might not fully understand the various compromises being discussed. He did not believe that negotiating in a public forum served anyone very well.

Anderson noted the number of legal opinions and compromise offered, and agreed that it would be dangerous to negotiate in a public forum.

Wiersum asked about the implications of a denial.

Peterson said that the applicant could submit a different application, with something reduced in size. Staff could discuss waiving the fee, but Peterson would want to check the city's policy in that regard. The applicant could submit an application for reduced variances.

Anderson asked if the council could direct staff to consider a fee waiver. Peterson suggested that staff research that, and that the council not address the issue in the motion.

Callison said that if the council denied the request and the process restarted, both sides would still be dug in and that might not accomplish much. She supported granting an extension, clarifying direction, and trying to get the two sides to resolve the issues. She wanted to salvage the process rather than repeat it. Anderson said that would require a written extension from the applicant.

Schneider said that if the applicant would not grant the extension, he would make the motion to deny.

Nelson responded by saying she appreciated the openness of the city council, but said that the planning staff would not support her.

Schneider moved, Thomas seconded a motion to uphold the planning commission's decision and deny the variances to build a 2.5-story home at 2504 Bantas Point Lane. Denial is based on the following findings:

- 1) Strict enforcement would not cause undue hardship because of the following circumstances:
 - a. A reasonable sized home could be built on the site with similar variances. The size of the home could be reduced to a story and a half to be more in character with the neighborhood.
- 2) The variance would not be consistent with the spirit and intent of the ordinance for the following reasons:
 - a. The proposed structure is not considered of reasonable size for this lot.
 - b. The scale of the proposed 2.5-story home is not consistent with the existing homes in the neighborhood.
 - c. The nonconforming setbacks would not be decreased, due to the increase in the height of the building.
 - d. The proposed home would be more imposing on nearby properties.

All voted "yes." Motion carried.

B. Items concerning construction of a single-family home on the vacant property at 3505 Elmo Road for Mary Anders:

- 1) **A lot area variance with a floodplain setback and buildable area variance.**
- 2) **Ordinance amending the floodplain district boundary.**

Gunyou provided a brief introduction, noting that staff recommended denial. Olson provided the staff report.

Anderson clarified that the entire lot is now in the floodplain and the floodplain would have to be filled to provide buildable area. She asked if there were any other areas in the city where an entire lot was floodplain and compensation was made. Olson was not aware of anything within his tenure, nor was Peterson. Schneider mentioned the lots along Ridgewood Road. Anderson said that in that case, the whole area was reconfigured.

Mary Anders, 14308 Brandbury Walk, Minnetonka, spoke as the applicant. She has been working with staff for about two years, and said she has been flexible to make the changes recommended by staff. Although staff was initially cautious, she characterized them as more positive as discussions continued. She noted that the rear setback could be reduced by eliminating the 16' x 20' family room. She questioned whether the entire lot was in the floodplain, and said that her engineer supported changing the footprint of the house.

Anders said that a denial would deny her reasonable use of the property. She said that staff was aware that she would sell the property at 3507 Elmo Road, on which the home was located, and retain the open lot at 3505 Elmo Road. Anders said that reasonable use would be to allow her to build on the open lot.

Anders questioned if the variances were self-created. She said that everyone knew that she owned both lots, and that she could still use both lots to eliminate and recreate the floodplain. When she sold 3507, she retained the legal right to do grading on that property. She said the necessary filling and excavation would not be huge, and pilings would be used. Anders was willing to work with the existing drainage problems in the area. She suggested that wetland and floodplain filling was a common occurrence.

Anderson noted that wetland requirements are very strict.

Anders said that she met with staff and took action to make the lot buildable. She was surprised when staff told her that they would recommend denial. After the amount of time she had worked on the project, she thought there would be more staff recommendations to pursue. She noted that only two of the neighbors oppose her request, primarily based on the lot being too small. She noted that Olson said that her lot was in keeping with the lot sizes of the neighborhood.

Gunyou responded to Anders' representation of staff discussions. Staff believes that people have a right to make reasonable use of their property and tries to work with them to facilitate their plans. He said that staff had never indicated to Anders that they would recommend approval for her project. Staff worked with Anders as long as they did because of her persistence in doing something with the property. It should not have been a surprise to Anders that staff recommended denial.

In response to Schneider's question, City Engineer Lee Gustafson clarified that the FEMA elevation is used for flood insurance. The city's floodplain is based on comprehensive plans from the watershed districts and is more accurate, so that is the floodplain designation used.

In response to Ellingson's question, Olson said that staff has worked with the applicant exploring many alternatives, but they have run out of options and have concluded that this is not a buildable lot.

In response to Wiersum's question, Olson said that this project would not have an impact on drainage in the area because they are

providing compensating flood storage area for what they are filling. Neighbors have called about street flooding beyond the 100-year flood level, but this proposal would not aggravate that situation.

Schneider noted that both lots were platted with the original subdivision, and they had never been combined. They happened to have been owned by the same person. In response to his question, Peterson clarified that this lot has a separate legal description.

Schneider had asked for historical data about how this lot has been treated from the standpoint of developability, sewer and water assessment, and tax valuation. The property was specially assessed as a buildable lot, and its value for tax purposes was \$96,000, which implies full value as a buildable lot. Schneider said that the lot was obviously not buildable and struggled with the inconsistencies.

Peterson said that the issue of the lot having a separate legal description did not matter. She noted a Minnesota Supreme Court case on a similar issue where two lots were platted separately but were in common ownership at the time the ordinance creating the non-conformity was enacted. The landowner sold one lot. The court said it was a case of "buyer beware" because the lots together had a reasonable use at the time the non-conformity was created. The landowner sold the lot with the understanding that it was a substandard lot. Peterson felt that case fully applied to this situation.

Regarding special assessments and value, Peterson said that both issues have been raised in court cases in similar situations. The courts have said that the information was interesting and might have some moral value, but it had no legal relevance to the issue before the city council.

Anderson said that the city constructs utility stubs in all possible locations. She asked if the property owner would have recourse to change the property's value if the lot were declared unbuildable. Peterson said that she could pursue that. Rankin did not know if that could be done retroactively, and said that he would ask the assessing staff to contact Anders.

Callison appreciated Schneider's points. Her experience with changes this large in terms of floodplain made her very reluctant to approve this as a buildable lot. She had a vision of a house with a lot of water in the backyard. She said that the city has been there, done that, and it was not pleasant. This council has the ability to not create a problem. The issue of taxes and special assessments is a

separate question. Callison was not inclined to approve the lot based on past experience.

Wiersum noted the situations where residents have come to the council with significant water problems. The council has said that if it had known the end result, they would not have approved those lots. This appeared to be a similar situation, and was a problem waiting to happen if the lot were approved. Wiersum was concerned that the applicant would not be living in the new house, and someone could purchase it unaware of the potential issues. He thought the council would regret approving the lot. Wiersum said that from past experience, when the council tries to demonstrate compassion, it comes back to bite them. In this case, the facts do not warrant approval. The lot is in the floodplain and floodplains flood. He would hate to be the owner of a house on the lot. Wiersum concurred with Callison.

Thomas agreed, and said that not every lot in Minnetonka is buildable. He would be very reluctant to support filling floodplain to create a buildable area. He knows what will happen and who will be called, from past experience. He was not willing to go there again.

Wagner agreed. He said that the floodplain exists for a reason. He did not want to see a house on this lot.

Anderson said that her voting record has been stringent for lots that have higher areas with just a portion in the floodplain. She has been reluctant to change the contours to create buildable area. In this case, the whole lot is in the floodplain—there is nothing to reconfigure. That would mean bringing a great deal of dirt from somewhere else. Anderson noted that during her site visit, the ground was saturated with water. Experience has shown that it is not good to allow such lots. Anderson noted the city attorney's comment that during her tenure she did not recall a lot that was all floodplain that was allowed to be altered to make it buildable.

Anders said that she heard the council's concerns. She said that she persisted because she was never told that this lot was not a possibility. She would eliminate the floodplain and recreate it in equal amounts utilizing the lot next door. She did not understand why she had to go through the process of revising her plans if the lot were not buildable. Anders acknowledged that staff never said this "is a go" but they said they would help her get to the point of submitting something to the council that would be acceptable.

Anderson said that the city staff works hard to help people accomplish their goals as property owners in the city. Sometimes,

they reach a point where things don't work. In this case, they have exhausted the options.

Anders said she was not told this would not work. Anderson responded that she was never told that the city council would approve it. Anders questioned having to get a topography of the wetland at a cost of \$1,500. Anderson said that was because the wetland is beyond the edge of her property. If her property had been wetland, she would have been told the lot was not buildable immediately, because those standards are more stringent. Anders was concerned about the way the matter was handled by staff.

Peterson said that she periodically teaches a land use class for planning commissioners, planning staff and council members. Just last week, a planning commissioner asked her what to say or think when an applicant said that staff never told them no. Peterson said that it is a difficult situation, particularly when Minnetonka's staff tries very hard to work toward any possible way to achieve the desired result. Unfortunately, Peterson said that when people want to achieve their goal, they hear what they want to hear, which may not always be what staff is saying. Neither party is at fault, they are just talking in different languages. She said the only other option would be for staff to take a hard-nosed approach and not provide any guidance, but that is not consistent with the direction they have received from the council. It has been the tradition of Minnetonka to work with applicants.

Anders said that she took the property value increasing from \$10,000 to \$97,000 in three years as an indication that the city was viewing the lot as buildable. She disagreed with staff in terms of how things were presented to her. She said she should have been told if staff had that many reservations about the lot.

Thomas moved, Wiersum seconded a motion to:

- 1) Deny the request for the proposed lot area variance from 22,000 square feet to 16,295 square feet; floodplain setback variance from 35 feet to 10 feet; and buildable area variance from 3,500 square feet to 96 square feet. Denial is based on the following findings:
 - a. Denial of the variances would not deny reasonable use of the property. The existing buildable lot to the east with the existing house constitutes reasonable use.
 - b. The requested variances are self-created. They are based on an attempt to distribute existing buildable area between two lots.
 - c. There are existing drainage problems in this area due to the 100-year floodplain.

- d. The proposal may set a precedent for similar variance requests for filling a floodplain to create a buildable area.
- 2) Deny the proposed floodplain boundary change. Denial is based on the following findings:
 - a. Denial of the variances would not deny reasonable use of the property. The existing buildable lot to the east with the existing house constitutes reasonable use.
 - b. The requested variances are self-created. They are based on an attempt to distribute existing buildable area between two lots.
 - c. There are existing drainage problems in this area due to the 100-year floodplain.
 - d. The proposal may set a precedent for similar variance requests for filling floodplain to create a buildable area.

All voted "yes." Motion carried.

C. Administrative hearing regarding the tobacco license of Wholey Smokes Minnetonka, Inc., d/b/a Wholey Smokes.

Anderson noted that this was a quasi-judicial hearing, and the council would seek advise from the city attorney. The city council had received the report from the hearing officer and the recommendations. She appreciated the complete staff background information.

Peterson noted that no one from Wholey Smokes Minnetonka, Inc. was present in the audience. Anderson verified that.

Peterson said that the licensee's attorney was not coming, but he was not sure if his client was coming.

Peterson clarified that the store is closed, not because of the city's action, but due to a dispute about the ownership of the store. The store was closed by court order while the ownership issue was being decided. In addition, the building owner has given notice to various possible owners that they must vacate the premises by the end of the month. While the city action might be considered somewhat irrelevant as a result of these actions, Peterson said it was not from staff's perspective. She said that staff supported the recommendation primarily to send a message to tobacco license holders that this city will not tolerate tobacco sales to underage individuals.

Peterson said that the hearing officer found that there were four illegal sales to minors on four occasions (October 6, 2003, November 24, 2003, and March 3 and 25, 2004). The hearing officer found sufficient evidence to support that. The hearing officer also made some penalty recommendations, but they differed from staff's. Staff also recommended revocation of the license.

Peterson noted a typographical error in the Order in the packet. After the council hearing, staff would correct that, and note that no one appeared on behalf of the licensee so no one presented any information to the city council. The proposed action would be inserted and the order would be served on the licensee on June 15. The revocation of the license would be effective immediately.

Anderson supported the recommended action. She was troubled by the fact that there were clearly four instances of this particular business selling tobacco to a child (a person under 18) on four occasions within a six-month period. Revocation would be a stunning penalty, because in essence they could no longer operate as that type of business. That action would be a little easier because the business is closed for other reasons.

Anderson wanted to make it clear in the record that these violations were serious and they were real. The hearing officer verified that they were real. She asked for a description of the offenses.

Peterson said that the first three sales were made without requesting identification. During the fourth one, the store employee looked at the license, apparently didn't read it correctly, and made the sale anyway. The first two violations occurred with citizens at the store and were reported to the city. The last two sales resulted during police operations.

Anderson noted the importance of the community's cooperation--parents and children letting the city know where there are violations.

Callison noted that this penalty will set a standard, and asked what revocation would mean. Peterson said that revocation of the license would be grounds not to grant a new license. She suggested that there could be a review after a reasonable period of time with no violations, such as ten years. The licensee might be eligible for a new license, but not in the near future.

Callison asked for the basis of the revocation. Peterson said it was based on four violations in a six month period, and because the store never checked the identification. This store had become notorious as an easy buy for someone under 18.

Peterson said that this is also a convenience store, so the license revocation would not put them out of business. They sell other products, but tobacco is a large portion of their profits. Peterson recommended that the council adopt the findings of fact, conclusion and order.

Thomas moved, Callison seconded a motion to receive the hearing officer's report and find that 4 violations occurred, impose fines of \$250, \$500, \$600, and \$1200, suspend the license for 7 days because of the 3rd violation, and revoke the license because of the cumulative 4 violations.

All voted "yes." Motion carried.

Rose Osbourne-Aboud, 1018 Grant Circle South, Anoka, spoke as the owner of Midwest Development Inc, holder of the certificate of assumed name of Wholey Smokes. She felt sadness and distress about these incidents.

Osbourne-Aboud started litigation in October 2003 regarding the ownership of Wholey Smokes. Her understanding was that one of the violations occurred prior to her bringing the litigation and the others after. She assured the city council that if she had been successful in gaining control of Wholey Smokes when she intended, she would have embarked on a campaign of employee education, hyper-vigilance and zero tolerance for sales to minors. She did not know if she would have occasion to be an active Minnetonka business owner, but hoped that these events regarding the lawsuit or the violations would not color the city's expectation regarding her future potential. Whether or not she gets that opportunity, she expressed her apologies for the violations and the disruptions around Wholey Smokes. She expressed her appreciation for the fairness and consistency she encountered in interactions with city officials and the Minnetonka police department. She said that Minnetonka has a lot to be proud of.

Anderson thanked Osbourne-Aboud for staying to the end of this long meeting to make her statement. She said that the statement served Osbourne-Aboud well and it will be part of the record.

15. APPOINTMENTS and REAPPOINTMENTS:

A. Appointments to the ArtsCenter Advisory Committee.

Schneider moved, Wagner seconded a motion to approve the following appointments to the ArtsCenter Advisory Committee:

One-Year terms (June 1, 2004 – May 31, 2005)

- Roger Hoel (Music Association of Minnetonka)
- Katherine Johnson (District Theater Curriculum)
- Miles Mortensen (District Music Curriculum)
- Anne Reason (District Student)

Two-Year terms (June 1, 2004 – May 31, 2006)

- Lester Hughes-Seamans (Community)
- Annie Paul (District Elementary/Middle School)
- Sandy Ryan (Community)
- Perry Schwartz (Community)

Three-Year terms (June 1, 2004 – May 31, 2007)

- Mary Adamson (Community)
- Kelly Denzer (Community)
- Bob Gilbertson (Community)
- Harriet Katz (Community)
- Randal Spotts (Community)

All voted “yes.” Motion carried.

16. ADJOURNMENT.

Thomas moved, Wiersum seconded a motion to adjourn the meeting at 10:04 p.m. All voted “yes.” Motion carried.

Respectfully submitted,

Kathleen Magrew
City Clerk