

**MINUTES
MINNETONKA CITY COUNCIL
REGULAR MEETING, MONDAY, MARCH 24, 2008**

1. CALL TO ORDER.

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

2. PLEDGE OF ALLEGIANCE.

All joined in the Pledge of Allegiance.

3. ROLL CALL.

Councilmembers Bob Ellingson, Tony Wagner, Dick Allendorf, Brad Wiersum, James Hiller, Terry Schneider, and Jan Callison were present.

4. APPROVAL OF AGENDA.

City Manager John Gunyou noted addenda to items 9B, 12B and 14A.

Wagner moved, Hiller seconded a motion to accept the agenda with the addenda. All voted "yes." Motion carried.

5. APPROVAL OF MINUTES: February 25, 2008 regular meeting.

Wiersum moved, Allendorf seconded a motion to approve the minutes of the February 25, 2008 Minnetonka City Council regular meeting. Ellingson, Allendorf, Wiersum, Hiller, Schneider, and Callison voted "yes." Wagner abstained. Motion carried.

6. SPECIAL MATTERS: None.

7. REPORTS FROM CITY MANAGER & COUNCIL MEMBERS.

Gunyou reported on the schedule for upcoming council meetings.

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

No one appeared.

9. BIDS AND PURCHASES:

A. Consideration of bids for the 2008 Pavement Rehabilitation Program, Project No. 5617.

Gunyou gave the staff report.

Schneider, Wiersum seconded a motion to award the bid for the 2008 Pavement Rehabilitation Program, Project No. 5617 to G.L. Contracting, Inc. in the amount of \$973,943.57. All voted "yes." Motion carried.

B. Consideration of bids for the Ridgewood Road Reconstruction Project No. 07404.

Gunyou gave the staff report.

Allendorf moved, Wiersum seconded a motion to award the bid for the Ridgewood Road Reconstruction, Project No. 07404 to Imperial Contractors, Inc. in the amount of \$1,148,274.11. All voted "yes." Motion carried.

10. CONSENT AGENDA (Items Requiring a Majority Vote):

A. Claims for council authorization – March 10, 2008.

Allendorf moved, Wagner seconded a motion to approve the March 10, 2008 claims which includes checks numbered 210434 through 210751, totaling \$2,335,718.93. All voted "yes." Motion carried.

B. Claims for council authorization – March 24, 2008.

Allendorf moved, Wagner seconded a motion to approve the March 24, 2008 claims which includes checks numbered 210752 through 211019, totaling \$1,305,883.85. All voted "yes." Motion carried.

C. Resolution authorizing execution of a Limited Use Permit with the Minnesota Department of Transportation for the McGinty Road retaining wall project No. 07209.

City Attorney Desyl Peterson asked for the item to be pulled from the consent agenda for discussion. She said she had concerns about the indemnification provision. The indemnification language is unlimited and doesn't recognize the city has certain immunities under state law. Peterson said the council could approve the permit and she would continue to seek limits to be added to the language.

Callison asked if there was a reason the council could not delay taking action until Peterson concluded negotiations with the state. City Engineer Lee Gustafson said MNDOT would stop discussions unless the resolution was adopted signifying the city's intent to work towards a negotiated agreement. He said MNDOT is aware of Peterson's concern.

Schneider asked if the statute would not overrule the agreement. Peterson replied that state law recognizes the city could agree to go beyond the normal limits.

Gustafson said if the negotiations fell apart the city could just let MNDOT take care of the wall. He said this was not the best option because although the wall is located in MNDOT's right of way, it is the city's wall and trail. The city is trying to work with the department.

Ellingson said he is a state employee and his agency has run into similar issues on occasion. He said on those occasions he has gone to the attorney general's office to get the language changed.

Peterson suggested the council could adopt the resolution with direction to staff to continue working on the indemnification language.

Wiersum asked if it would strengthen the city's position if staff went back to MNDOT and told the department the issue was brought to the city council and the council did not approve the resolution. He agreed with Peterson that approving an agreement that the city has a problem with does not seem logical. Gustafson said staff has already indicated to MNDOT that the council may not approve the resolution. He said essentially the resolution authorizes the signatures but does not require the mayor and city manager to sign it.

Wiersum moved, Wagner seconded a motion to adopt Resolution No. 2008-018 authorizing execution of a Limited Use Permit with the Minnesota Department of Transportation for the McGinty Road retaining wall project No. 07209. Staff is directed to continue to negotiate indemnification language with MNDOT. All voted "yes." Motion carried.

D. Proposed order for liquor license stipulation.

Allendorf moved, Wagner seconded a motion to adopt a motion issuing Findings of Fact, Conclusion, and Order for Cost Plus, Inc. All voted "yes." Motion carried.

E. Approval of recycling contract extension with Waste Management.

Callison pulled the item from the consent agenda. She asked Gunyou to provide background.

Gunyou said for many years the cities of Minnetonka, Golden Valley, and Plymouth have jointly cooperated on a recycling contract. Recently the cities have been considering both a contract extension for the existing joint recycling service and also inviting new bids. Golden Valley strongly feels the current service quality and pricing are fine and wants to extend the contract. Gunyou said staff generally agrees with Golden Valley's position. The Plymouth City Council wants to change the contract to include organics composting, business and apartment pickups, textiles recycling, and have a say in the glass recycling market. Staffs of all three cities have concerns with these changes. Most notably, state law would need to be clarified to allow apartment pickups.

Gunyou said with the divergent needs and philosophies, it has been difficult to develop one set of specifications. Minnetonka staff thinks it would be useful to explore entering into its own recycling contract. Initial discussions with the existing contractor indicate it's likely the city could obtain a single city contract with the same prices as in the staff report and possibly retain the current two day pickup schedule. Gunyou suggested rather than take action on the item, the council could provide staff some guidance on how the city should proceed.

Wagner said although he appreciates staff comments on the existing partnership, his experience in dealing with clients and suppliers is it is not good practice to not bid a contract for over seven years. He said he is also concerned about increasing the number of collection days without coordinating the days with the city's open system hauling. The city has seen benefit from contractors moving collection days to coincide with recycling pickup. Wagner asked staff to comment on the pros and cons with single bin collection specifically related to mixed glass.

Public Works Director Brian Wagstrom said staff has been working on a dual process. An RFP is being developed for a new solicitation while at the same time staff is looking at renewing the current contract. A consultant that works primarily in the recycling and garbage industry has been hired. The consultant believes the proposal before the council is a good proposal based on what he has seen in other cities. Wagstrom said the city may or may not get better pricing with an RFP. If the city does solicit bids it is likely the existing Waste Management proposal would be withdrawn because the company would submit on the new solicitation.

Schneider said there are benchmarks and criteria to evaluate if the proposal before the council was good. He said in the past Waste Management has done an extraordinarily good job providing service to residents. There are virtually no customer complaints. If the city were to decide to expand the recycling program similar to Plymouth, then it would make sense to do an RFP. He said as costs continue to increase, it might make sense to look at the need for weekly pickup or if it makes sense to go to an every other week schedule. In the past because of the three way agreement there was no way for the city to do that. If the city should enter into its own agreement, Schneider said he would like to look at the benefits and drawbacks to that type of system.

Wiersum said he supports collaboration if it provides a specific benefit to the city. If no specific benefits and flexibility can be gained then the city should enter into its own recycling contract with the contractor. He asked if Waste Management is currently recycling the glass or if it goes to the landfill. Wagstrom said the glass recycling market is tenuous and is market driven. Waste Management has told the city that glass is not going into the landfill. The company has talked about hauling glass to Chicago where there is a successful glass market but the company has indicated it is not economical to haul all the glass down there.

Callison said the collection method also has an impact. When everything is put into one bin there is more glass breakage and potentially more byproduct that can't be used. Wagstrom said that some residents have raised an objection to a single sort method because of the bigger carts that are needed. Single sort is easier for the contractor. He said some residents have raised issues with the dual sort system because all the items are put into one container in the back of the truck. The city's recycling coordinator has indicated it's still a good practice for residents to sort items because if in the future the city decides dual sort is the way to go, the public would not need to be retrained.

Allendorf said he has no problem with a negotiated settlement with a vendor that is doing a good job. He said he has never heard a complaint about the city's recycling system. To change pickup schedules would be unsettling and confusing to residents. He said collaboration is fine but when there is a divergence of objectives and if the price remains in line with the collaborative price, there are benefits for the city controlling its own destiny. He agrees with Schneider to look at the idea of an every other week pickup schedule, but he already sees a lot of full recycling bins in the city.

The council took no action on this item.

F. Resolution to approve a grant agreement with the Metropolitan Council on behalf of WHAHLT.

Allendorf moved, Wagner seconded a motion to adopt Resolution No. 2008-019 to approve a grant agreement #SG007-124 with the Metropolitan Council for livable communities act local housing incentives account funds. All voted "yes." Motion carried.

G. Ordinance amending the closing hours for off-sale liquor stores.

Callison pulled the item from the consent agenda.

Community Development Director Ron Rankin said there was a call from one liquor operator not in favor of the change and a call from another who was in support.

Allendorf said conforming with state's provisions gives people the option of extending hours. By allowing the option of extended hours the decision to stay open will be economically driven by the market.

Schneider said there has always been concern making sure the city's commercial areas maintain vitality. This will allow more opportunity for that to happen. He said extended hours also provide convenience to residents who work late or have odd work hours.

Callison said she agreed with Allendorf and Schneider that the ordinance would allow decisions to be market driven and also there is no public health risk involved.

Wagner moved, Hiller seconded a motion to adopt Ordinance No. 2008-06 amending City Code §600.070(10) regarding hours of operation for liquor license establishments. Wagner, Allendorf, Wiersum, Hiller, Schneider, and Callison voted "yes." Ellingson voted "no." Motion carried.

11. Items requiring Five Votes: None.

12. INTRODUCTION OF ORDINANCES:

A. Items concerning Wesley Addition, a proposed residential subdivision of the existing property at 12029 James Road.

Wiersum moved, Wagner seconded a motion to introduce the ordinance and refer it to the planning commission. All voted "yes." Motion carried.

B. Ordinance authorizing sale of certain land on County Road 73 and I-394.

Peterson gave the staff report.

Wagner asked if the five extra feet could have been used for setback. City Planner Julie Wischnack said a lot of rededication has to happen through the platting process because of the additional road width and trails so it is unlikely it would have helped with the positioning of the building.

Schneider moved, Allendorf seconded a motion to introduce the ordinance. Ellingson, Wagner, Allendorf, Hiller, Schneider, and Callison voted "yes." Wiersum abstained. Motion carried.

13. PUBLIC HEARINGS:

A. Items concerning the subdivision of 11501 K-Tel Drive into three lots (proposed Encore Park).

Wischnack gave the staff report.

Callison opened the hearing at 7:13 p.m. No one spoke.

Callison closed the hearing at 7:13 p.m.

Schneider moved, Allendorf seconded a motion to:

1) Adopt Ordinance No. 2008-07 which approves the proposed rezoning and master development plan. This ordinance is based on the following findings:

a. The rezoning would be consistent with the city's guide plan;

b. The rezoning would be consistent with the public health, safety, and welfare.

The rezoning, master development plan, and final site and building plans are subject to the following conditions:

a. The site must be developed and maintained in substantial conformance with the following plans, unless modified by the conditions below:

- Preliminary plat date-stamped February 25, 2008.

- Final plat date-stamped February 25, 2008.
The above plans, as modified by the conditions below, are adopted as the Encore Park master development plan.
- 2) Give preliminary and final approval to the Encore Park plat, date-stamped February 25, 2008. Approval is based on the following findings:
- a. No construction is proposed; rather this is simply a proposal to place each building on its own separate parcel.
 - b. Though the applicant has requested a rezoning from I-1 to PUD, the proposed lots would generally meet I-1 requirements.
 - c. The applicant is proposing to place a drainage and utility easement over portions of the property that lie within floodplain. Furthermore, the applicant has agreed to enter a stormwater pond maintenance agreement with the city.
- Approval is subject to the following conditions:
- a. Complete the following before final plat approval:
 - (1) All existing drainage and utility easements shall be vacated and new drainage and utility easements shall be dedicated on the proposed plat as required by the city engineer as follows:
 - (a) Drainage and utility easements are required at, or above, the 100-year flood elevation (903.0-feet).
 - (b) Drainage and utility easements required for all public utilities, 20-foot minimum width centered on the utility.
 - (2) Show minimum 10-foot wide drainage and utility easements adjacent to the public right-of-way and along all other lot lines on the final plat.
 - (3) All existing topography and proposed, elevations, contours, easements, proposed features, delineations, etc. must be based on a certified survey (in lieu of the city topography mapping). Respective city benchmarks shall be used and labeled on the plans.
 - (4) City of Minnetonka standard construction details must be used and shown in the plans.
 - b. The following items must be submitted to the city before the city releases the final plat:
 - (1) An electronic CAD file of the final plat in microstation or DXF on a CD disk.

- (2) The following documents must be prepared by an attorney knowledgeable in the area of real estate, and submitted for the approval of the city attorney:
- (a) Title evidence that is current within thirty days before release of the final plat.
 - (b) Restrictive covenants to be recorded against the individual lots within the plat. The covenants must include conditions that have not been met as of the release of this plat.
 - (c) Private utility easements for private utility lines, 20-foot minimum width centered on proposed and existing utilities or 10 feet beyond outside edge of parallel utilities (30-foot easement required for joint sanitary sewer forcemain and water service line).
 - (d) A private driveway easement and cross-access agreement between Lots 1, 2 and 3. The easement must state the maintenance responsibilities of each owner.
 - (e) A copy of drainage easement document No. 1271793. If the document is a public easement, it must be included in the vacation documents.
 - (f) A "stormwater pond maintenance agreement" exhibit displaying entire property printed on 8½ x 11 paper.
 - (g) Revised legal description of public easements to be vacated as required by the city engineer.

These documents must be recorded with the final plat, and a drawing of any easement must be attached to the easement deed.

- (3) Any other requirements by staff included with final plat approval.
- c. Vacation of public easements shall not be effective until final plat has been recorded with Hennepin County.
 - d. Submit the following documents:
 - (1) A recorded copy of the preliminary plat, all required easements, and restrictive covenants.

- (2) A letter from the surveyor stating that boundary and lot stakes have been installed as required by ordinance.
- 3) Adopt Resolution No. 2008-020 vacating the drainage and utility easements, subject to completing the following conditions before the city releases the resolution:
 - a. Deed new easements to the city. The description of the new easements is subject to staff approval.
 - b. Provide title evidence as required by the city attorney.

All voted "yes." Motion carried.

14. OTHER BUSINESS:

A. Items concerning the shoreland ordinance and other associated ordinances.

Gunyou said the council considered different aspects of the ordinance over the past year. There were particular objections to the shoreland buffer and easement provision in an earlier draft version of the ordinance. That provision has been removed. He noted there is a continuing misunderstanding about the DNR's role. The DNR must approve the shoreland ordinance, and the earlier version had been approved by the department. Because the buffer and easement provision was removed, the ordinance had to go back to the DNR for approval. Gunyou said there were tradeoffs required by DNR, and those are incorporated into the latest version of the ordinance. Without the DNR's approval, the department has the authority to remove the city's regulatory authority and assume that authority. If that happened the DNR's model ordinance would be enforced, eliminating the flexibilities retained in the proposed ordinance.

Wischnack and Natural Resources Manager Jo Colleran gave the staff report.

Wagner asked if the Crossroads development could have been approved if the proposed ordinance had been in place. He also asked how the ordinance impacts the comprehensive plan process. Wischnack said the shoreland district hits the edge of the Crossroads property. The height of the southern parking ramp is about 18 feet. The building itself is higher but probably falls outside the shoreland district. She said the DNR does have comment authority over any variance action the city takes. As an example, if there was a redevelopment proposal involving multi-housing on the Kmart site, the 35 foot height maximum could be problematic.

Wischnack said there might be instances where the council would have to consider possible variance actions, but the variances could be evaluated on a case by case basis.

Wagner asked if staff had any concerns with the 13 items previously approved that might not have been recommended for approval had there not been a buffer. Wischnack said staff believes shoreland buffers had some nexus between what was being proposed and how that could be remedied or lessened in terms of the impact of the variance. She said staff understands this is a major policy shift in which the city will promote, rather than require, buffers but that is something the council is not interested in doing.

Allendorf asked if the northeast quadrant of the Crescent Ridge project would have been approved given the height restrictions. He also questioned the hard surface provisions. Wischnack said the northeast quadrant of the intersection of the Crescent Ridge project falls outside the shoreland district. She said the 30 percent hard surface regulation applies to the first 150 feet. Beyond that there is a 75 percent allowance. A PID district typically has about 75 percent while an industrial district typically has 85 percent. The more restrictive percentage probably makes sense given the proximity to water bodies. Gunyou noted the council still has the ability to approve variances. As the comp plan is being prepared, the areas that will likely require tradeoffs are portions of the Highway 7 and County Road 101 area and the Ridgedale area.

Wiersum asked if shoreland buffers would be taken totally off the table for negotiation purposes if the ordinance was passed. In the past a resident may have asked for a variance that normally wouldn't be approved but could have agreed to put in a buffer in exchange for a more favorable treatment of the variance request. Gunyou said that staff still believes buffers work, but the city was not in a position to require buffers without broader regional and state support. The DNR is currently considering whether to require buffers statewide. Peterson said the council could still require a buffer as a condition of a variance as long as the buffer is related to the requested variance.

Colleran said in addition to the potential of a buffer the question might be what a property owner can do to mitigate increased hard surface. That might not be a buffer but a rain garden or some other type of infiltration. She said metro area cities are under pressure to hold back storm water. Gunyou said historically buffer requirements were granted as tradeoffs for multiple variances. One option

available to the council would be to not grant as many multiple variances.

Wiersum said he learned a lot through the process. He learned people really care about the quality of the lakes. He also learned the large lakes seem to be doing well but the small lakes are deteriorating. If buffers are not enacted the city needs to work with residents who live on and near the small lakes to help improve the water quality.

Callison noted staff is putting into place steps to encourage residents to work with voluntary buffers. Colleran said staff recently held a workshop about shallow lakes and ponds. This workshop was the first in a series and was attended by about 50 people. Many residents around Wing Lake, Lake Rose, and Holiday Lake attended. Staff is working with the Nine Mile Creek Watershed District to look at the impacts occurring in the three lakes and what can be done to turn the quality of the lakes around.

Schneider said from a policy standpoint instead of tying a buffer to side yard setback in the future when a variance is requested for hard surface coverage, the city will require mitigation.

Hiller said over the past year the discussion has been about stewardship over the lakes. The discussion has changed to how to meet what the DNR is asking from the city. He said he is concerned that there hasn't been a clearer statement if the ordinance is what is needed to protect the lakes. Hiller said he has talked with residents near Lake Rose and Wing Lake and others and clearly they are tired of talking about the issue. He said he is concerned that if the shoreline ordinance is raised again in a year or two people will be upset. He asked if staff feels there are compromises that should be further evaluated. Wischnack said the state has done a lot of research to come up with regulations so staff feels comfortable that the appropriate protections are in the model ordinance that has been used as a starting point. She said as water quality issues become more and more of a concern other alternatives will need to be looked at to mitigate storm water runoff. Over time the ordinances will change to catch up with new requirements and technologies however staff believes the proposed ordinance will protect the city's water quality.

Hiller asked if there was a concern the ordinance would limit what the city could do in the future. He asked if there should be some comment added notifying residents that the city may want to make changes in the future. Wischnack said staff has separated the

issues. One issue is individual homeowners doing projects on their properties. The other involves subdivisions that have a little bigger impact on the overall storm water issues. She said the city reserves the right through the PUD ordinance and other subdivision provisions to still advocate for protection elements. The PUD standards in particular give the city a lot of flexibility in what can be required in the subdivision procedure. Gunyou noted the city has historically been a leader on a lot of environmental issues. The city was ahead of much of the state on the buffer issue, so it was appropriate to back off and make other commitments, such as focusing on educational efforts. Staff is encouraged that residents near the smaller lakes seem more open to embracing shoreland treatments. Gunyou said staff was disappointed that no residents from Gray's Bay or Libbs Lake attended the sessions, since they were the most vocally opposed to the buffer requirements, but is hopeful that will change in the future. He said the city has a good relationship with the DNR and many of the environmental groups and that the city is looked at as a party that reasonably tried to achieve regulatory balance. He noted that the ordinance would likely continue to evolve.

Ellingson said the staff report indicated the DNR requires 50 percent open space in a PUD. The ordinance creates two categories. For undeveloped land the requirement is 50 percent. For redevelopment area the requirement is 20 percent. He asked what the rationale was for this approach. Colleran said the DNR's model ordinance is written from the premise of little or no development. In the proposed ordinance, there is recognition that the city is mostly developed. As part of a redevelopment the applicant would have to show how at least 20 percent of the land would be put into open space. The raw land would still follow the DNR model.

Ellingson asked for examples of areas in the city that would be a PUD that is eligible for redevelopment. Colleran said there are properties near Sparrow Road and Woolman Drive that have larger parcels of land within the Riley Purgatory Creek overlay with the potential for redevelopment.

Schneider said there was good progress in developing a workable ordinance that balances the rights and needs of residents to use their property while still meeting the DNR's desire to meet a pristine natural environment. He said staff is correct that the DNR has the authority to require the city to adopt an ordinance or the department could take over the regulatory authority but that has to be looked at in context of how the department got the authority. Legislation was

passed that asked the DNR to develop shoreland rules for the entire state. The process went on for several years. Outstate communities didn't seem to have any issues with the rules but when the rules were applied to urban settings, there was a huge outcry. Legislation was proposed to revoke the DNR ordinance and take the regulatory authority away from the department. Schneider said the laws were amended to limit what the department can do. The department cannot require any municipality to adopt a shoreland ordinance unless there was a formal letter from the department and reasonable flexibilities must be granted to accommodate the urban environment. The city of Minnetonka received such a letter.

Schneider said one concern with the proposed ordinance is that it is based on maintaining lake users views of having as natural a property as possible. He said this is an appropriate goal for Lake Minnetonka but may not be for the smaller lakes. Another concern is the 12 percent slope provision that prohibits the removal of vegetation without screening the facilities. Wischnack said language could be added to the provision that would clarify wetlands which are considered public waters, but are not covered by the shoreland district requirements.

Wiersum said there had been a lot of progress made throughout the process. There was a lot of public input. The proposed ordinance is one that residents can feel comfortable with and support. The real objective is to protect the water quality of the city's lakes.

Callison thanked the staff for all the work. She thanked residents who brought forward valuable issues. She said the process worked. Staff brought forward an idea they thought would be good for the community and reflected the community's values. The council recognized it was a challenging and far reaching proposal and sought public input. The input shaped the ordinance.

Schneider moved, Wiersum seconded a motion to:

- 1) Adopt the following ordinances:
 - a. Ordinance No. 2008-08 amending City Code Section 300.25 regarding the shoreland district.
 - b. Ordinance No. 2008-09 amending City Code Section 300.26 regarding conditional use standards in the wetland, floodplain, and shoreland districts.
 - c. Ordinance No. 2008-10 amending City Code Sections 300.01, 300.02, 300.06, 300.07, 300.22, 300.23,

300.24, 300.28, 400.020, 400.025 and 925.080 regarding the shoreland district.

Approval is based on the following findings:

- a. The ordinances protect, promote, and enhance the quality of the city's lakes and creeks.
 - b. The shoreland ordinance is required by the Department of Natural Resources and would meet standards negotiated by Department of Natural Resources representatives and city staff.
 - c. The amendments to associated ordinances would ensure consistency with the shoreland ordinance.
- 2) Adopt the following resolutions which remove shoreland buffer/conservation easement conditions associated with previously approved variances on lakeshore properties. Approval is based on the finding that removal of such requirements would be consistent with the shoreland ordinance.
- a. Resolution No. 2008-021 approving a shoreland variance from 35 feet to 25 feet from a line drawn from the closest shoreward corners of the adjacent structures and a floodplain variance from 35 feet to 1-foot at 5658 Seven Oaks Court.
 - b. Resolution No. 2008-022 approving a shoreland setback variance from 75 feet to 50 feet for a house addition at 15613 Dawn Drive for Tracy Thie.
 - c. Resolution No. 2008-023 approving a lot area variance from 22,000 square feet to 10,330 square feet buildable area variance from 2,400 square feet to 1,400 square feet, lot width at setback variance from 110 feet to 88 feet, and floodplain setback variance from 35 feet to 10 feet at 16940 Gray's Bay Boulevard.
 - d. Resolution No. 2008-024 approving variances for a second-story addition to the home at 2819 McKenzie Point Road.
 - e. Resolution No. 2008-025 approving multiple variances to tear down and build a new home at 2813 McKenzie Point Road.
 - f. Resolution No. 2008-026 approving variances to rebuild a home at 2510 Bantas Point Lane.
 - g. Resolution No. 2008-027 approving multiple variances to tear down and rebuild a home at 2513 Bantas Point Lane.
 - h. Resolution No. 2008-028 approving a floodplain alteration permit for construction within a floodplain, with variances, at 16904 Gray's Bay Boulevard.

- i. Resolution No. 2008-029 approving a conditional use permit and variances to demolish an existing home and build a new home within the floodplain at 2504 Bantas Point Lane.
- j. Resolution No. 2008-030 approving a front yard setback and hardsurface coverage variances to demolish the existing house and build a new house at 17202 Gray's Bay Boulevard.
- k. Resolution No. 2008-031 approving multiple variances for a new home at 16930 Gray's Bay Boulevard.
- l. Resolution No. 2008-032 approving a conditional use permit and variances to demolish the existing home and construct a new home at 2529 Bantas Point Road.

All voted "yes." Motion carried.

Callison called a recess at 8:12 p.m.

Callison called the meeting back to order at 8:26 p.m.

- B. Two ordinances related to sexual solicitations:**
- 1) An ordinance regulating public restrooms.**
 - 2) An ordinance amending the regulations prohibiting indecent solicitation.**

Peterson said the issue came to the attention of the police department last December. Prior to that time there were rumors about activities in the restroom at Purgatory Park. As a result of the December incident, the police department conducted a three day undercover operation. Each day an individual was arrested or potentially charged. Two of the people pled guilty. The third person was referred to the legal department for potential charges. It was determined there were not sufficient facts to justify charging the person. Peterson said the city had a history of this kind of incident. About 15 years ago the department received several cases involving activities in the restrooms at Ridgedale. She said it is likely the issue will be ongoing and if efforts are made to address one area of the city the activity likely will move someplace else.

Peterson said she was asked why the city could not just use existing state statutes. There are two ordinances that were used in prosecuting the previous cases. One was the disorderly conduct statute which has issues when a sting operation is used. The other statute was the interference with privacy statute. Again, issues

arose because of the use of undercover police officers. Peterson said the defenses used in the Sen. Larry Craig case have raised issues related to the two statutes and the use of an undercover operation. She said the purpose of the proposed ordinances is to specify the conduct not allowed. She said one of the pieces of information used as a reference in drafting the ordinances was the United States Department of Justice's manual on illicit sexual conduct in public places. One point raised in the manual was that if the prosecution relied on state statutes that dealt with intent, it makes it difficult for undercover officers because it appears they are trying to entrap people.

Peterson said there were significant concerns previously raised by the council about the affirmative defense provision. She said there are other areas of state law where an affirmative defense is used. One is for someone arrested for being under the influence of alcohol where the person has to prove he/she was not driving under the influence but rather consumed the alcohol after driving. She also gave other examples and said that affirmative defenses are appropriate when the information is within the control of the defendant.

Hiller asked why the city was pursuing the changes. He has talked with police officers and officials in other cities who are not proposing similar ordinances, and questioned why they were necessary. Peterson said this isn't the first time the city has taken action on the issue. She said what is generating the interest this time is the notoriety of Sen. Craig's case and the defenses being offered in his case. Because of the notoriety of that case and if the defenses are upheld on appeal it will make it far more difficult for any jurisdiction to get guilty pleas and to stop the activity.

Hiller said he was concerned that Minnetonka was the only city dealing with the issue. Peterson said the city has never been afraid to be out front to do something to address a problem. The city is addressing the issue because of the December incidents. Callison added one of the advantages of having attorneys on staff is being able to be more proactive and to respond to incidents.

Schneider said the issue is easier to address when it is first starting rather than when it gets entrenched throughout the community. He said a similar process was done when graffiti started popping up in areas of the city. Peterson said the issue has already impacted residents.

Callison said she remained concerned with the affirmative defense provisions. The issue is where the balance of power lies between government and individuals. She said the staff report indicated that experience shows that police officers and prosecutors are unlikely to charge persons who possess legitimate affirmative defenses. This indicates in most cases it is known if an affirmative defense exists, therefore the argument that those involved need to wait until court to see if there is an affirmative defense is not persuasive. Peterson said she understood Callison's point but what she was stressing was the believability of a person's defense. If a person has a believable reason for violating the ordinance the city would not pursue the charge. When the defense is questionable, then the city would pursue prosecution and it is appropriate to require a person to prove their defense.

Ellingson said the problem with affirmative defense is the ordinance makes something illegal without any regard to any explanation as to why two people might be together in a bathroom stall. Peterson said that is no different than making it illegal to sell alcohol to a minor but allowing an affirmative defense that there was a good reason why that was done. Similarly it is illegal to leave the scene of an accident but it is OK if you are taking someone to the hospital. In that situation it is up to the person to prove that was why they left the scene. Callison said one might look at it as it shouldn't be illegal for two people to be in a stall because there may be a good reason why they are, but it is probably always illegal to leave the scene of an accident.

Schneider said it may be an issue of the terminology being used. He said for the shoreland ordinance there are rules that provide for an exemption. In this case a police officer will see the situation and make a good sense judgment to exempt the person.

Hiller said the first two findings in the proposed ordinance stating "public sexual activity is often preceded by physical or visual intrusions into a toilet stall" and "physical or visual intrusions into toilet stalls may be facilitated by the assumption of unusual positions on fixtures" may be reasonably true, but the converse of the statements would require the majority to rely on the affirmative defense.

Phil Duran, the staff attorney of Outfront Minnesota at 310 38th Street East, Minneapolis, acknowledged that a number of the organization's initial concerns had been addressed, and thanked the staff for being responsive. He noted a typographical error in the proposed solicitation ordinance. He said the organization is

concerned with the two second rule for glancing into a stall. The ordinance would allow a person to glance into a stall for less than two seconds in order to determine if the stall was occupied. Duran questioned how one would establish by a preponderance of the evidence that someone took a one second look or a two second look. The organization suggested removing the language of "for less than two seconds," and leaving the affirmative defense by the preponderance of the evidence.

Duran said another concern is with the invasion of privacy section of the city's existing code. That section contains language relating to entering the restroom of the other sex. Duran said the language is virtually identical to language that existed in the city of Minneapolis and the Minneapolis Park and Recreation regulations. Both boards realized the language had unintended consequences for transgender people, for people with disabilities with care attendants who were of the other gender, and for parents with young children. Minneapolis repealed the ordinance in 2003 and the parks board amended its regulation. Duran said a letter sent to the city outlined three alternatives to the language. He said given the issues it might be appropriate to defer council action and allow the city attorney to work on the issues.

Hiller said he read the Department of Justice's manual. A common thread in the manual is that there has to be a multi-faceted approach rather than just police enforcement. Effective strategy includes other measures such as using surveillance cameras, changing the lighting, and making the police more visible. He said the city should first consider those options before adopting the proposed ordinance. Police Chief Mark Raquet explained the department has already been using various other deterrents, including adding temporary signage indicating the area is under surveillance, having plain clothes officers monitoring activities, and having uniformed patrols drive through the park to provide more of a visual presence.

Schneider cautioned against the city overreacting. He said in similar situations when an issue is identified and a clear message is sent that the activity is not acceptable the activity tends to go away. He said the proposed ordinances send a very strong message that the city is willing and prepared to arrest and prosecute for the activity. If more needs to be done, that can be evaluated later on.

Allendorf said the city periodically looks at the ordinances to address those that may be deficient or if something has changed. He said the proposed ordinances fall into that category and he

doesn't categorize the ordinances as helping arrest people but rather they may help prosecute people. He doesn't know if two seconds is the correct amount of time but he agrees with the objectivity of defining what a glance is.

Wagner said he had some concern with the affirmative defense provision because it puts residents in the position of having to defend themselves in certain situations. He said if the affirmative defense is determined to be too onerous he would ask the council re-examine the ordinance. He said although he agrees with an objective standard to define a glance, he was concerned that two seconds is too quick a standard. He said he also would support having a separate discussion about the issue Durand raised about the city's ordinance that prohibits someone helping out another person of the opposite gender.

Wiersum said he agreed with Wagner and Durand. He said his two disabled adult daughters need help in the restroom and he helps them. There could be a situation based on accessibility where a literal reading of the ordinance could cause an issue. He said he disagreed with Wagner that two seconds is too short a time and thought two seconds is longer than most people realize. He said it is important for the city to do something to put a stop to the activity in an affirmative way. There are two issues that necessitate the proposed ordinances: 1) there is a situation that needs to go away and the city needs to be proactive in resolving the issue; 2) the situation with Sen. Craig has raised the awareness of the defenses to the charges. Wiersum said he supports the affirmative defense provision as written by staff. There has to be trust in the police officers to demonstrate discretion and to use common sense. The police department needs to feel supported with laws that are prosecutable.

Schneider said he supported the general ordinance but his preference would be to use the terminology "exemption" rather than affirmative defense. He agreed two seconds is an appropriate time. He said the issue about when a person is allowed to go into the opposite sexes' bathroom should be left up to the discretion of the police department. If there was potential for bias, he would amend the ordinance.

Callison said this is an issue of the staff being proactive and that there isn't a major problem with the issue in the community. There have been incidents that have raised concerns about whether the city could effectively deal with the issue. She said she preferred the staff report's alternative to the affirmative defense provision. She

agreed two seconds was an appropriate standard. She said she is sensitive to the issues of allowing people to assist a person of the opposite sex and that ordinances should say what they mean rather than having to rely on someone's discretion.

Peterson noted the language in the ordinance said a glance is "less than two seconds." Given the council discussion she suggested changing the language to read, "for two seconds or less."

Allendorf asked why the alternate language does not do the same as the affirmative defense language. Peterson said the affirmative defense language would be better from the staff's perspective because it shifts the burden to the defendant to prove there was a justifiable reason to be in the stall rather than the city having to prove the absence of a justifiable reason. She said the alternate language would work.

Schneider moved, Wiersum seconded a motion to adopt the following ordinances with the alternate language to the affirmative defense provision in section 5 of the ordinance regulating public restrooms "Exceptions to prohibition of intrusion into toilet stall or changing stall.

a. Subdivision 4 above does not apply to an individual who is assisting a person in need of assistance in a normal use of a toilet stall or changing stall.

b. Subdivision 4(c) does not apply to an individual who looks into a toilet stall or changing stall for 2 seconds or less solely for the purpose of determining whether a stall is occupied."

1) Ordinance No. 2008-11 regulating public restrooms.

2) Ordinance No. 2008-12 amending the regulations prohibiting indecent solicitation.

Ellingson, Wagner, Allendorf, Wiersum, Schneider, and Callison voted "yes." Hiller voted "no." Motion carried.

C. 2008 Community Development Block Grant allocation and reprogramming of prior years funds.

Gunyou gave the staff report.

Allendorf moved, Wagner seconded a motion to adopt Resolution No. 2008-033 All voted "yes." Motion carried.

D. Request for easement encroachment at 13939 Emerald Ridge.

Wischnack gave the staff report.

Wagner asked Wischnack to clarify the length of encroachment of the setback for the right of way and drainage. Wischnack said the drainage and utility easement is about 10 feet wide. The length is about 15 to 20 feet. The right of way is specifically called out in the restrictive covenant. The city doesn't specifically regulate the drainage and utility easement. The property owner is put on notice.

Allendorf asked if the council denied the request, what activity the property owner would have to engage in. Wischnack said typically the city does not find out about an encroachment until a project is proposed and a survey submitted. A rebuild of the retaining wall and removal of its location in the right of way would probably be needed.

Schneider moved, Wiersum seconded a motion to deny the request. All voted "yes." Motion carried.

15. APPOINTMENTS and REAPPOINTMENTS:

A. Appointment of advisors for the 2008 Board of Review.

Allendorf moved, Wagner seconded a motion to appoint Mr. Kriedberg, Mr. Bacal, Mr. Lees, Mr. Nagel, and Ms. Hart as advisors for 2008. All voted "yes." Motion carried.

16. ADJOURNMENT.

Wiersum moved, Wagner seconded a motion to adjourn the meeting at 9:24 p.m. All voted "yes." Motion carried.

Respectfully submitted,

David E. Maeda
City Clerk