

**MINUTES  
MINNETONKA CITY COUNCIL  
REGULAR MEETING, MONDAY, JUNE 30, 2008**

**1. CALL TO ORDER.**

Acting Mayor Allendorf called the meeting to order at 6:33 p.m.

**2. PLEDGE OF ALLEGIANCE.**

All joined in the Pledge of Allegiance.

**3. ROLL CALL.**

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

**4. APPROVAL OF AGENDA.**

City Manager John Gunyou noted addenda to items 10H and 14D.

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

**5. APPROVAL OF MINUTES:**

**A. May 19, 2008 regular meeting.**

Schneider moved, Wiersum seconded a motion to approve the minutes of the May 19, 2008 Minnetonka City Council regular meeting. Wiersum, Hiller, Schneider and Ellingson voted "yes." Wagner and Allendorf abstained. Motion carried.

**6. SPECIAL MATTERS:**

**A. Review of the 2007 Financial Report with the city's audit firm of Kern, DeWenter, Viere, LTD.**

Steve Wischmann from Kern, DeWenter, Viere, LTD gave the report.

Allendorf thanked the Finance Department's staff for all its work.

Schneider asked if the transition to the Government Accounting Standard Board rules is complete. Wischmann said it has been about five years since GASB 34 was implemented and thus bond agencies have five years of data to consider long term financial

conditions. He noted Minnetonka's condition is excellent, and commended the city for its exceptional financial management. He said few cities have as excellent an audit report. Minnetonka has very little debt with a significant amount of assets over the liabilities. One item that is forthcoming is a new GASB statement 45, which addresses post employment benefits. He said the item will not be a significant component of the city's liabilities.

**7. REPORTS FROM CITY MANAGER & COUNCIL MEMBERS.**

Gunyou said the 11,654 people who attended this year's Summer Festival and Ice Cream Social was near last year's record attendance. The record attendance at the fireworks was around 7,800 people. The nonprofit food vendors reported doing very well. There was a 16 percent increase in attendance at the Ice Cream Social with around 3,500 people attending. There were 1,000 bratwurst and hot dogs sold with 75 gallons of ice cream consumed. The Art Fair's vendors spoke highly of the event with one vendor commenting that his sales were equivalent to what he made at the Edina Art Fair.

Gunyou also reported on the schedule for upcoming council meetings.

Wiersum thanked staff for all the work done in conducting the Summer Festival.

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

No one appeared.

**9. BIDS AND PURCHASES:**

**A. Consideration of bids for the lining of watermain pipe.**

Gunyou gave the staff report.

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

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

**A. Claims for council authorization – June 23, 2008.**

Wagner moved, Wiersum seconded a motion to approve the June 23, 2008 claims which includes checks numbered 212609 through

212799 and 212944 through 213087, totaling \$1,260,898.16. All voted "yes." Motion carried.

**B. Resolutions to clear title for the Exchange plat.**

Wagner moved, Wiersum seconded a motion to adopt the following resolutions:

- 1) Resolution No. 2008-065 rescinding Resolution No. 1995-9917.
- 2) Resolution No. 2008-066 rescinding Resolution No. 1997-080.

All voted "yes." Motion carried.

**C. Agreement with Xcel Energy to provide overhead utility line burial on Ridgewood Road.**

Wagner moved, Wiersum seconded a motion to execute the agreement with Xcel Energy in the amount of \$224,787.00. All voted "yes." Motion carried.

**D. Request to move a garage at 2526 Crosby Road to Dayton, Minnesota.**

Wagner moved, Wiersum seconded a motion to approve the permit, subject to the following stipulations:

- 1) Compliance with Section 520.030 of the City Code.
- 2) City staff must approve any tree trimming in connection with the move.
- 3) That the move be directly monitored by appropriate city staff.
- 4) That the move be a continuous trip from the property to outside the city limits, and that the house cannot stop or be parked within the city.

All voted "yes." Motion carried.

**E. Approval of an encroachment agreement with MCImetro Access Transmission Services LLC.**

Wagner moved, Wiersum seconded a motion to approve the encroachment agreement with MCImetro Access Transmission Services LLC for the purpose of installing telecommunications on street right of way and public easements. All voted "yes." Motion carried.

**F. Request for 2008 funding of the Crown Ridge Advantage Center programming and services.**

Wagner moved, Wiersum seconded a motion to approve a \$4,000 grant in order to provide funding for programming and services at the Crown Ridge Advantage Center. All voted "yes." Motion carried.

**G. Request for twelve-month time extension for filing of the FETTERLY VIEW plat, a 3-lot subdivision at 11519 Fetterly Road W.**

Wagner moved, Wiersum seconded a motion to approve the one-year time extension. All voted "yes." Motion carried.

**H. Resolution ordering the abatement of long grass nuisance conditions.**

Wagner moved, Wiersum seconded a motion to adopt Resolution No. 2008-067 with the addendum ordering the abatement of the nuisance conditions. All voted "yes." Motion carried.

**I. Resolutions ordering the abatement of nuisance conditions.**

Wagner moved, Wiersum seconded a motion to adopt the following resolutions ordering the abatement of the nuisance conditions:

- 1) Resolution No. 2008-068 at 11300 Friar Lane.
- 2) Resolution No. 2008-069 at 4310 Windwood Way.

All voted "yes." Motion carried.

**11. Items requiring Five Votes: None.**

**12. INTRODUCTION OF ORDINANCES:**

**A. Rezoning of existing properties on Shady Oak Road.**

City Planner Loren Gordon gave the staff report.

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

**B. Items concerning WOOLMAN WOODS.**

Gordon gave the staff report.

Wagner noted two different streets are proposed. He asked if there had been any consideration to a private drive. Gordon said Woolman Drive on the north side of the project is the primary access. There is also a street on the south side that is platted but likely is not a good access point because of the topography and conditions present. Wagner asked if the easterly piece was a private drive. Gordon confirmed it was a private drive.

Hiller said there was concern from a neighbor north of the property about how the exit would proceed on to Woolman Drive. He asked if the concern was resolved. Gordon said as part of the application there will be a review about where the proposed new street will be located. He said staff believes adjustments can be made to the new street that will address the situation. There will be issues with the wetland on the west side of the road that will need to be taken into consideration.

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

### **13. PUBLIC HEARINGS:**

#### **A. Public hearing to consider increasing utility fees.**

Gunyou gave the staff report.

Wiersum asked if city costs were increasing in line with the increases or if the proposed increases were based on the revised approach. Finance Director Merrill King said the analysis conducted by Ehlers and Associates looked specifically at finances over the next ten years. The proposed increases are directly related to the cost of operations. She noted the Met Council costs for sewers were increasing at a significantly greater rate than in the past.

Wagner said he noticed quite a few sprinklers on during the middle of the day in commercial areas. He supported the proposed changes to be more in line with the city's cost structure and also to encourage conservation. He asked how the city would conduct enforcement of violations. Public Works Director Brian Wagstrom said the ordinance has two penalty provisions. Currently the city has focused on educating people to let them know of violations to the ordinance.

Gunyou said that some of the commercial violations might be a matter of the property owners not tracking when their sprinkler systems are on. With the amount of water being used it might be enough to point out the issue to these property owners. He said the penalty provisions could be strengthened in the future if necessary.

Wagner agreed with the education first approach but said a lot of the companies have property management firms that have the sprinkler systems set to go on automatically. He said next year if improvements are not seen alternatives could be considered. Gunyou encouraged people to notify staff when they see violations.

Allendorf said a lot of times the penalties are passed on to the tenants. He said he would like to see information sent to the commercial users encouraging conservation.

Wiersum said the restriction of not sprinkling in the middle of the day is not being abided by as much as it should be by those with automatic sprinkler systems. Given the greater awareness of conservation issues people are more receptive to a message of why the rules exist and why they should be enforced.

Allendorf opened the hearing for municipal water rates and sanitary sewer charges at 7:09 p.m. No one spoke.

Allendorf closed the hearing at 7:10 p.m.

Hiller moved, Schneider seconded a motion to adopt Resolution No. 2008-070 providing for a change in municipal water rates and sanitary sewer charges. All voted "yes." Motion carried.

Wagner asked if the costs of the storm water infrastructure were increasing more quickly than the sanitary sewers. King said that was correct. The increases were anticipated and were in line with the CIP. Allendorf noted the proposed increase was 6.25 percent.

Allendorf opened the hearing for storm water utility fees at 7:13 p.m. No one spoke.

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

Hiller moved, Wiersum seconded a motion to adopt Resolution No. 2008-071 increasing storm water utility fees. All voted "yes." Motion carried.

**B. Items concerning the proposed on-sale liquor licenses at Redstone American Grill at 12501 Ridgedale Drive.**

City Attorney Desyl Peterson gave the staff report.

Hiller asked if staff was confident it was an isolated incident or if other bar owners should be trained and reminded of the notification requirement. Peterson said staff will address the issue at the annual seminar.

Wiersum said the staff recommendation did a good job at finding an appropriate middle ground.

Allendorf said he was pleased with the amount of the fine because it recognizes the importance of the notification requirement but is not draconian.

Wiersum moved, Wagner seconded a motion to adopt the findings, conclusion, and order authorized. All voted "yes." Motion carried.

Wischnack gave the staff report on the liquor license.

Allendorf continued the hearing at 7:21 p.m. No one spoke.

Allendorf closed the hearing at 7:21 p.m.

Schneider moved, Wagner seconded a motion to grant the on-sale and Sunday on-sale intoxicating liquor licenses. All voted "yes." Motion carried.

**14. OTHER BUSINESS:**

**A. Items concerning 2827 McKenzie Point Road.**

Gordon gave the staff report.

Schneider said he was pleased to see the general McMansion criteria were met.

Allendorf agreed and said the floor area ratio was wonderfully low.

Wiersum said the house fits well on the lot and the mitigation makes it a better lot.

Schneider moved, Wagner seconded a motion to adopt Resolution No. 2008-072 which approves the construction of a new home at 2827 McKenzie Point Road. This resolution includes the following:

- Conditional Use Permit for construction of a home located on fill within the floodplain.
- Floodplain Alteration Permit for fill and mitigation of floodplain.
- Floodplain Setback Variance from 20 feet to 8 feet.
- Driveway elevation above floodplain elevation Variance from 1 foot above to 0 feet above.

Approval is based on the following findings:

- 1) The proposal meets the general and specific conditional use permit standards as outlined in the "Supporting Information" section of the staff report.
- 2) The proposal is reasonable and would meet the required standards for a variance, because:
  - a. Given the presence of floodplain on the property, it would be difficult to place a home on the property without the need for a floodplain setback variance. This is a unique circumstance for an R-1 zoned property and also constitutes an undue hardship.
  - b. The applicant proposes to fill enough floodplain to place the home at an 8-foot setback from the floodplain. Staff finds that a floodplain setback variance meets the intent of the ordinance, as the creation of a greater setback would result in more volume of floodplain being filled.
  - c. The subject property was previously used for residential purposes. The applicant's proposal would renew the residential use. Therefore, the proposal would not alter the essential character of the neighborhood.
  - d. Because McKenzie Point Road is not located at least 1 foot above the floodplain elevation, it would not be reasonable to require the applicant's driveway to meet ordinance requirements. Therefore, staff finds that a variance for the proposed driveway elevation is reasonable.

Approval is subject to the following conditions:

- 1) Prior to issuance of a building permit:
  - a. A copy of this resolution must be recorded with the County and a copy of the recorded document returned to the city.
  - b. The existing detached garage must be permanently removed from the property.
  - c. A revised survey must be submitted. The survey must:



- construction within 15 feet directly northeast of the trunk of the tree or north of the of the redline illustrated.
- b. A 4-foot tall chain-link must be installed at the grading and construction limits around the tree to prevent impacts during construction. This fencing must be installed prior to removal of the existing garage.
  - c. Proposed grading must not negatively impact the critical root zone of the trees on the subject property or adjacent property.
  - d. The contractor must arrange a pre-construction meeting with city staff prior to issuance of the building permit to discuss required tree protection, utility locations, removal of the existing driveway, and actions required to prevent disturbance to, and enhance the survival of, the tree.
- 6) The existing drive may not be used as a construction entrance as indicated on the plans.
  - 7) Permits may be required from other outside agencies, including but not limited to the United States Army Corps of Engineers, Minnesota Department of Natural Resources, Minnehaha Creek Watershed District, and the Lake Minnetonka Conservation District. It is the applicant's and/or property owner's responsibility to obtain any necessary permits.
  - 8) This variance will end on December 31, 2009, unless the city has issued a building permit for the project covered by this variance or approved a time extension.

All voted "yes." Motion carried.

**B. Items concerning a five-lot subdivision at 2714 Oakland Road.**

Gordon gave the staff report.

Wiersum said given the pending proposed tree ordinance that the Planning Commission approval seemed to indicate it would be preferable to see how the ordinance comes out before moving ahead. He noted that Gordon said the tree ordinance was before the Planning Commission on July 3 and he asked when the ordinance would be brought before the council. He also asked if there were options to ensure that this proposal was consistent with any changes to the tree ordinance. Gunyoun said the Planning

Commission was expected to act on the tree ordinance at its July 3 meeting and the ordinance would come back to the council July 14. The deadline to act on this project is August 12. Gunyou said there would be three council meetings before that deadline. Wiersum asked if there were options or if the council needed to act on the proposal during this meeting. Peterson said state law required action by August 12 and there was no requirement to take action before that date.

Wagner said the staff report indicated a four lot PUD would not meet the original proposed tree ordinance as introduced to the Planning Commission. He asked if this was correct. Gunyou said the four lot PUD proposal would not meet the criteria for the preservation area as it was introduced and in the proposed ordinance. Under the current version of the ordinance before the Planning Commission, the four lot PUD would meet the criteria.

Wagner asked for clarification on how the protections in the proposed tree ordinance related to the two year look back would apply to the proposal in a situation where the six lots are split and sold to a developer. Could the developer cut the trees down in two years that were supposed to be protected in the PUD? Gordon said the unique aspect to the project was it was being proposed as a planned unit development. This gives the city additional measures by which it can protect resources on the property. The plans show the amount of tree loss and identify trees that may or may not be removed. This will serve as guidance going forward for development of individual lots. Peterson said the stipulations could be strengthened to make it clear the trees need to be preserved as part of the PUD.

Wiersum asked if there was enough difference between the R1 proposal and the five lot PUD proposal to prefer one versus the other. Gordon said a difference between the PUD and the R1 proposals is there would be more removal of trees under the traditional R1 half acre lot. This is primarily due to shifting the line between lots four and five to the east to make lot four more conforming to the R1 standard. Wiersum asked if staff believes between the two options a five lot PUD is preferred even though some of the lots would be less than 22,000 square feet. Gordon indicated that was a fair statement.

Wagner said the staff report indicated the current plans for the pond will not control for quality. He asked if this was a concern. Assistant City Engineer Steve Lillehaug said staff has worked with the applicants and determined that what is being presented does not

meet the city's standards so further work is needed. Several options have been given to the applicant. One option is to expand the pond. This would impact trees. Another option is for underground facilities. Wagner said usually the issue is not left as unresolved in a staff report and asked if there was a reason agreement has not been reached prior to final approval. Lillehaug said staff is comfortable with moving forward. An underground facility underneath the roadway is a possibility but agreement has not been finalized with the applicant. The conditions would require the applicant to meet the city's standards.

Allendorf asked if approval could be given with the four divergent alternatives. He said he would be hard pressed to say water quality is something the council should give over to staff without knowing how the issue would be resolved. Wagner said one of the options will impact trees and he agreed he is uncomfortable moving forward with the issue being open.

The applicant, Charlie Lefevere of 27243 Minnesota Highway 15 in Dassel, said the rectangular lot is 4.2 acres with about 1 acre of wetland. He said five conforming lots fit comfortably on the parcel and meet or exceed all subdivision standards. The road is constructed in the only place it can be constructed along the current driveway and is in a place that represents the least grading and least loss of trees. The road itself has 25 percent impact on the woodland preserve area. He said under the first draft of the ordinance including the road would mean the end of the development.

Lefevere said it is a routine plat and that would be true under a straight subdivision without a PUD. The proposal is for a PUD and would allow more trees to be saved. He said the trees are the only thing keeping the subdivision from being routine. The application is not for a four lot option. His understanding is the four lot option would prohibit building on lot five. Lot five is the lot closest to Oakland Road. The lot is close to three quarters of an acre. He said by giving up lot five it would mean losing about a third of the buildable land and that is not an option. Every reasonable effort has been made to save the trees with the PUD. The road has been shortened so the runoff will be less and the pond can be smaller. As a consequence the width of lot two would be reduced. In order to cluster the lots the proposal moves them into the less wooded area making lot three a smaller lot.

Lefevere said the staff report indicated a straight five lot subdivision would have an impact of more than 50 percent. The PUD would

allow land to be developed with no impact to the wetland. There would be no construction on the steep slopes. There would be an 80 foot wooded buffer on the west overlooking the wetland. There would be an 80 foot wooded buffer on the west overlooking Oakland Road. There is a hill from Coyote Court rising to the south. Along the north side of the hill the woods would be substantially undisturbed except for a driveway. The average number of trees after the houses are built will be approximately 24 significant trees per lot. Outside of the roadway approximately 75 percent of the significant trees would be saved. The Planning Commission recommended approval with no one appearing at the hearing. He said a couple of people showed up at the neighborhood meeting with no negative comments.

He said the tree preservation ordinance is in a state of flux and it isn't known what the final result will be. The original proposed ordinance provided that only 25 percent of the woodland preserved area could be disturbed. He said his property was over that limit with the road. The Planning Commission recommendation allowing 25 percent for the road. Beyond that another 25 percent is allowed. Lefevere said his proposal is close to that percentage and meets the current ordinance. If all subdivisions met the standards met in his application, a tree ordinance would not be needed.

Lefevere said Wagner expressed a concern to him about the possibility of a developer coming in and cutting down all the trees. Lefevere suggested adding a condition similar to the provision for single family homes that allows protected trees to be removed without mitigation only if the principle structure has been in existence and not externally expanded for two years, and if the structure will continue to remain in existence for two years.

Schneider said he understood the language to be standard for single family homes but since this application was for a PUD his interpretation was that the trees would be permanently protected. Lefevere said that depends on what the PUD says. Allendorf said his understanding was that a PUD tree removal restriction would be more blanketing than the language Lefevere was suggesting. A PUD amendment would be required that would require council approval. Wischnack said a PUD would lock in the primary and secondary grading plan. There would be potential removal of trees after the secondary grading plan is complete. Peterson said language could be added to make it more clear the council's preference. She said in prior discussion the council had expressed a concern that a property owner should be able to take down a tree to put in something like a swimming pool and the language being

discussed addresses that concern. If the council preferred a more defined approach with the approval of the PUD, then stronger language could be drafted.

Wagner said he has seen subdivisions with primary and secondary grading plans and the lot sits for two years before anything is built. His concern is that a lot will sit for two or three years while the developer is trying to sell it and after two years someone will come in and impact the trees more. He still believes a property owner should be able to manage their property after living on the property for awhile but he wants to prevent a developer potentially trying to make more buildable space for a lot that sits for a couple of years.

Hiller asked if the two year look back provision provides additional protection. Wischnack said the look back provision applies to new development.

Schneider said he was reluctant to delay the project until the council figures out what it wanted for the tree preservation ordinance. He said he has reservations that a 25 percent threshold could be onerous. The intent of maximizing the preservation of trees on a site while providing reasonable development ability is an art more than a science. He said the plan is more creative on the pond size than the one presented prior to the moratorium. It will be an attractive development that looks like a woodland preserve from Oakland Road. He said he isn't too concerned about what might occur in two years if someone wants to remove trees because on the lots facing the wetland the slope is too steep. There is some potential on lots three and four for tree removal. He said he was glad the item was before the council because it provided a viable comparison of a truly defined woodland preserve and if the ordinance does or does not work. His concerns were related to the percentage and the area defined as a woodland preserve. He suggested leaving the storm water ponding issue to the discretion of staff subject to no further tree loss.

Hiller said looking at the application the question for him was the difference between the four lot and five lot options. The major difference was the position of one house. The discussion concerned the removal of trees on the interior of the plan around the single plat. Although he would like to protect more of the trees, nothing was being proposed that would affect neighboring houses so he could support not delaying action on the application.

Wiersum said the discussion got to the essence of the tree ordinance with the desire to save as many trees as possible while

recognizing the property rights of the property owner. He shared Schneider's concern about delaying action on the item until August 12 because the tree ordinance may not be completed by then. He said the development would be instructive as the city works through the tree ordinance.

Wagner asked what the width of the road was. Wischnack indicated it was 26 feet which is the standard street width. Wagner asked if the staff had considered narrowing the width. Lillehaug said staff could look at narrowing the street to 24 feet but the two feet would likely not save many trees. Wagner agreed the application was a good test case for the tree ordinance. He would like more definition of how the trees would be protected after the lots are subdivided and stronger language on the east buffer on lot five.

Ellingson said the issue isn't only about the tree ordinance but also the water quality concerns. He said those issues might be resolved with more time and it would be better if the application was consistent with the final tree ordinance.

Lefevere said he would support addressing Wagner's concern by extending the time to four years for lot five. He said the proposed condition for the storm drainage system is that surface storm water treatment facilities must meet the city's minimum design criteria. When the application comes back with final plan drawings, the drainage system will have to meet the city's design criteria.

Gunyou noted that staff didn't believe the language proposed by Lefevere would address Wagner's concerns. It would allow the remaining trees to be removed.

Allendorf said he thought it would be helpful to see what the Planning Commission had to say about how their recommended tree ordinance applies to the application. Were there lessons to be learned? He said there are very few similar lots in the city that would help inform the council on the effectiveness of the tree ordinance.

Wagner said he would like staff to come back with language on three items:

- Addressing the water quality issues with no additional tree loss;
- Strengthening the language about lots being split and future tree loss off the approved PUD plan;

- Determining a natural breakpoint or some type of buffer from Oakland Road that would provide protection for longer than two years and would prevent clear cutting the whole side of the lot.

Schneider said he agreed with the first two items Wagner identified. He suggested for the third item a conservation easement along Oakland Road might be appropriate because it would set the tone for the entire development. Wagner said he agreed with Schneider's point.

Wagner moved, Schneider seconded a motion to continue the item until July 14. All voted "yes." Motion carried.

**C. Appeal of the planning commission's approval of a variance to allow expansion of a non-conforming detached garage.**

Gordon gave the staff report.

Hiller said as he visited the site questions came up about reducing the setback from 50 feet to 17 feet. He asked for clarification on how this relates to the property line, the trail and the road. Gordon said the 17 foot setback was measured from the front property line that is also the north edge of the right of way of Ridgewood Road. Hiller asked if it was correct that the footprint of the building was not being changed except for the steps. Gordon said that was correct. Hiller said he was concerned that the additional height of the building would have a great impact on the people walking the trail. He was also concerned about the big window of the garage that would overlook the trail and its impact on the privacy of the people walking the trail. He said because of the proposed design the neighbor would look at a nine and a half foot tall shingled wall that would be 22 feet wide. His final concern related to having a nonconforming structure that would have new uses that would have significantly higher intensity of use. If the structure was new it is likely the proposed use would not have been approved.

Peterson said the proposal was for an expansion of a nonconforming use. The city's ordinance prohibits the expansion so the variance is to that provision. She said the use of the property was not changing but the types of residential uses would be expanded. She said the council should be cautious about the issue of expansions of nonconforming uses and the precedence that would be established for future applications.

Ellingson asked if there had been no appeal if the matter would be before the council or if the Planning Commission approval would have been sufficient. Peterson said the matter would have come before the council. Ellingson asked if fewer than five councilmembers voted to overturn the appeal if the Planning Commission would prevail. Peterson said the commission's approval would stand.

Wagner said that when he served on the Planning Commission one of the first items he dealt with related to an expansion of a nonconforming use on McKenzie Point. The proposal was for a house that wanted to add a second floor. The staff recommendation was for approval. He asked Peterson to elaborate on her concern about setting precedence. Peterson said there is a distinction between expanding a detached structure versus expanding a principal use of a house and the expectations people have about what is appropriate for a residential structure. The expectations are less for a detached structure.

Schneider said the proposal is for a modification to a nonconforming structure and not a nonconforming use. The reason the structure is nonconforming is that it is too close to the road. The current structure is right next to the road and provides no inherent value or aesthetic value to the neighbor or the public. He said the proposal would improve the aesthetics to the area.

Wiersum said there were two good options- either approve the structure or tear it down. If the proposal was for a new structure with the same proximity to the road, it would not be approved. The structure has been grandfathered in and the proposal would provide a significant improvement for the neighborhood and structure. He said the building meets the zoning requirements in terms of its height and fits within the neighborhood. The issue involves fundamental property rights and what a property owner is allowed to do with a property. Improving the structure and putting it to a better use is in the best interest of the area.

Ellingson asked if the item was approved, if the applicant would be allowed to tear down the structure and rebuild it or if they would have to build upon the current foundation and walls. Peterson said the applicant would not be allowed to tear down the current structure. If more than 50 percent of the building is destroyed the property owners lose their grandfather rights.

JoAnn Liebeler of 17622 Ridgewood Road said she plans to landscape the strip of land adjacent to the wall of shingles. She

said while the front door of her home and her neighbor's home look to the east, nearly all the windows look out to the west overlooking Headwater Lake. Liebeler said she was glad the structure is sound enough to rebuild and she doesn't have to build something new. The structure would be used to store two vehicles.

Dan McGinley of 17622 Ridgewood Road said the window overlooking the trail would be over six feet up so the majority of the window would not allow a person to peer down onto the trail. The window is to provide natural light. He said when the proposal was developed the ideas of an architect, a professional builder, a contractor, a mason, and a landscaper were incorporated into the plan.

Paul Chamberlain said he was an attorney representing the neighbor, Beat Krummenacher. Chamberlain said Krummenacher's view to the east from his living room would be materially changed. He questioned the necessity of adding a second floor that would be used as a family room, craft studio, and yoga studio. He said improving the area could be accomplished by sprucing up the property as it sits in its present contour. The view from the street of the front of the structure could be improved. Krummenacher's view could also be improved by adding surfacing to the side and adding membrane to the top. Chamberlain said Krummenacher's concern is the addition of a second floor family room to a space that is an accessory structure.

Chamberlain said a garage is defined in the ordinance as an accessory structure designed or used for the parking and storage of vehicles and not for a family room. The other definition for an accessory structure in an R1 location is an uninhabited subordinate building. He said the plan for a heated and air conditioned family room is not an uninhabited subordinate building. He said there are also issues related to the flood plain. The city's ordinance states that accessory structures must not be designed for human habitation. Also the ordinance states a legal nonconformity in a flood plain may not be expanded. The ordinance does not allow for a variance to that requirement. Chamberlain said he received information from Lillehaug indicating the property is in a flood zone. A realtor's description of the property from 2004 indicates a size of 2,975 finished square feet. Chamberlain said this indicates that there is not a need for a family room for the property.

Wagner asked for staff comment on the flood plain issue. Gordon said the applicability of the flood plain ordinance and the expansion of structures are not met by the garage. Portions of the property

may be in the flood plain but the physical location of the garage is outside of the flood plain. Chamberlain said the property is in the flood plain and information he received from the city engineer doesn't indicate the garage is not in the flood plain.

Chamberlain said the goal of the proposal could be met by eliminating the top part of the garage and making it fit the contours of the building. He said if the use of the garage is not expanded the variance would not be needed.

Wiersum asked if the applicants built the exact same garage but only used it for storage if Krummenacher would have the same issues. Chamberlain said there would be little point in increasing the height for storage. If the height of the structure in a flood plain district was increased then a variance would be required. Wiersum said since the city engineer indicated the garage was not within the flood plain then that section of the ordinance does not apply. Chamberlain said he has not seen any documents indicating the garage was not in the flood plain and the documents provided to him indicated it was in the flood plain.

Allendorf asked Gordon if he had documentation that the structure was not in the flood plain. Gordon said aerial information and overlays show the structure is out of the 100 year flood plain. Allendorf said the proposal would be an improvement visually to the existing structure.

Schneider moved, Wiersum seconded a motion to adopt Resolution No. 2008-073 which upholds the planning commission's approval of the proposed variance to allow an expansion of a non-conforming garage at 17622 Ridgewood Road. Approval is based on the following findings:

- 1) The proposal is reasonable and would meet the required standards for a variance, because:
  - a. UNDUE HARDSHIP: There is an undue hardship due to the topography of the site, width of the lot, location of the driveway and existing vegetation.
  - b. UNIQUE CIRCUMSTANCE: The existing, non-conforming setback is a circumstance that is not common to every similarly zoned property.
  - c. INTENT OF THE ORDINANCE: The improvements would not increase the footprint of the garage, and would comply with the zoning ordinance requirements for a detached garage for maximum height and size.
  - d. NEIGHBORHOOD CHARACTER: The garage improvements would not alter the character of the

neighborhood. The improvements would visually enhance the exterior of the garage. There is also a detached garage on the property to the east that is set back 17 feet from Ridgewood Road.

Approval is subject to the following conditions:

- 1) Prior to issuance of a building permit:
  - a. The stairs and landing accessing the back door of the garage must be reoriented as to not encroach on the existing driveway.
  - b. A copy of this resolution must be recorded with the County and a copy of the recorded document returned to the city.
  - c. Install a temporary rock driveway, erosion control, tree protection and wetland protection fencing as required by natural resources staff for inspection and approval. These items must be maintained throughout the course of construction.
- 2) The garage cannot be used for any commercial activities.
- 3) The driveway must be paved from the garage to the access point along Ridgewood Road.
- 4) Submit a construction management plan addressing traffic, parking, access and hours of operation if garage construction is utilized for television production.
- 5) This variance will end on December 31, 2009, unless the city has issued a building permit for the project covered by this variance or approved a time extension.

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

**D. Appeal of the planning commission's denial of a side yard setback variance for the construction of an attached deck.**

Gordon gave the staff report.

Wiersum said he met with the applicant who indicated the original application may have asked for too major of a variance. Wiersum noted there was an alternative plan in the council packet that would have a three and a half foot variance as opposed to a seven foot variance. He asked for the staff perspective on the alternative plan. Gordon said the original proposal had a minimum setback of 10 feet measured from the west wall of the structure to the property line shared with the outlot. The original proposal set the deck back two and a half feet from the property line. The modified proposal would also maintain a setback that would keep it out of the seven

foot easement. Gordon said the encroachment issue on the trail and the open space would still be compromised.

The applicant, Donald Kyllonen of 14440 Woodruff Road, said there has been a question about possible utilities that would run along the left side of the home where the deck is proposed. He indicated there is telephone cable that runs about six inches underneath the surface. Kyllonen said it was suggested putting the deck in the back of the house so a variance would not be needed. He said the foliage and location of the proposal was ideal and would help mitigate freeway noise. The footings for the deck would be kept within the six foot buildable area and cantilever the deck over three feet thus avoiding the seven foot easement. This would provide for a nine foot deck on the front side and a nine and a half foot deck on the back. He said 28 letters went out to neighbors with the original proposal. Four people responded and there were no objections to the location of the deck. Two more neighbors submitted favorable responses for the council meeting.

Allendorf said the Planning Commission asked about an alternative with the deck six feet off the kitchen wrapping around the back. He asked Kyllonen what he thought of that alternative. Kyllonen said he would not object going around the side but he would like the nine and a half foot primary living area of the deck on the west side. A six and a half foot side would not provide enough space to put chairs and a table. Allendorf asked about the size of the previous deck. Kyllonen said it was about seven and half to eight feet by 12 feet.

Wagner said he could support a variance in this case because of the proximity to I494.

Schneider said generally he is on the liberal end of determining what qualifies as a practical difficulty. He looks for a viable alternative that avoids a variance. He said in this case while the proposal would place the deck in a nicer location and the 25 foot outlot would provide more separation, if he had to say whether there is no alternative and there is a true practical difficulty, then he would have to say the same thing for the next similar proposal. He said he was having difficulty justifying granting a variance when an obvious solution could be done without the variance.

Wiersum said the alternative design keeping the footings on the property line with a conforming distance would not impact potential digging in the area. One of the difficulties is the property being adjacent to I494 and the trees that provide a visual and sound

barrier would impede a deck around the rear of the house. He said the compromise was reasonable.

Allendorf agreed it was reasonable to grant a variance as asked for in the revised application. He said there probably would not be another application with similar circumstances with a property adjacent to a small city owned property that likely would not be developed.

Wagner said his viewpoint would have changed if the location was not backed up onto I494.

Schneider said the council discussion convinced him there are practical difficulties including the slope on one side and the freeway noise.

Schneider moved, Wiersum seconded a motion to overturn the planning commission's decision and approving the alternative setback variance as outlined in Resolution No. 2008-074 . Approval is subject to the following conditions:

1. Prior to issuance of a building permit:
  - a. A copy of the resolution must be recorded with the County and a copy of the recorded document returned to the city.
  - b. Install a temporary rock driveway, erosion control, tree protection and wetland protection fencing as required by natural resources staff for inspection and approval. These items must be maintained throughout the course of construction.
2. This variance will end on December 31, 2009, unless the city has issued a building permit for the project covered by this variance or approved a time extension.

All voted "yes." Motion carried.

15. **APPOINTMENTS and REAPPOINTMENTS:** None.

16. **ADJOURNMENT.**

Wiersum moved, Wagner seconded a motion to adjourn the meeting at 9:48 p.m. All voted "yes." Motion carried.

Respectfully submitted,

David E. Maeda  
City Clerk