

**MINUTES
MINNETONKA CITY COUNCIL
REGULAR MEETING, MONDAY, OCTOBER 3, 2011**

1. CALL TO ORDER.

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

2. PLEDGE OF ALLEGIANCE.

All joined in the Pledge of Allegiance.

3. ROLL CALL

Council members Amber Greves, Brad Wiersum, James Hiller, Tony Wagner, Bob Ellingson, Dick Allendorf, and Terry Schneider were present.

4. APPROVAL OF AGENDA

Wiersum moved, Greves seconded a motion to accept the agenda with addenda to items 13A and 14B. All voted "yes." Motion carried.

5. APPROVAL OF MINUTES: None

6. SPECIAL MATTERS: None

7. REPORTS FROM CITY MANAGER & COUNCIL MEMBERS

Assistant City Manager Geralyn Barone 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. Bids for Linner Road watermain project

Barone gave the staff report.

Wagner moved, Allendorf seconded a motion to award the contract for the Linner Road watermain project to Minger Construction, Inc. All voted "yes." Motion carried.

B. Bids for Ranchview Court Roadway and Utility Improvements

Barone gave the staff report.

Greves moved, Wiersum seconded a motion to award the contract for the Ranchview Court Roadway and Utility Improvements Project No. 4990 to Machtemes Construction, Inc. in the amount of \$240,773.70. All voted "yes." Motion carried.

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

A. Ordinance deleting waste collector bond

Allendorf moved, Wiersum seconded a motion to adopt Ordinance No. 2011-22 All voted "yes." Motion carried.

B. Resolution approving a conditional use permit for an accessory apartment at 4827 Arlington Drive

Allendorf moved, Wiersum seconded a motion to adopt Resolution No. 2011-091 approving the request. All voted "yes." Motion carried.

C. Resolution approving conditional use permits for pedestrian improvements in Minnetonka Mills Park

Allendorf moved, Wiersum seconded a motion to adopt Resolution No. 2011-092 approving the requested conditional use permits. All voted "yes." Motion carried.

D. Resolution adopting the 2012 meeting schedule for the Minnetonka City Council

Allendorf moved, Wiersum seconded a motion to adopt Resolution No. 2011-093 establishing its 2012 meeting schedule. All voted "yes." Motion carried.

E. Agreement with the city of Wayzata to provide environmental health services

Allendorf moved, Wiersum seconded a motion to approve the agreement. All voted "yes." Motion carried.

F. Resolution appointing election judges and absentee ballot board for the Municipal General Election on November 8, 2011

Allendorf moved, Wiersum seconded a motion to adopt Resolution No. 2011-094 appointing the election judges for the November 8, Municipal General Election. All voted "yes." Motion carried.

11. Items requiring Five Votes: None**12. INTRODUCTION OF ORDINANCES:****A. Ordinance amending Section 710 of the city code regarding increases/changes in fees**

Community Development Director Julie Wischnack gave the staff report.

Wagner asked if concept reviews would count as public meetings in terms of the three meeting count for the proposed land use fee. Wischnack noted that the fee would apply for formal plan reviews. The concept review process the council had been using would not fall under the fee. She added the language in ordinance would be changed to make that clear.

Hiller asked why the city did not get more stringent in not granting extensions in the land use plan process rather than using the fee process. Wischnack said staff tries to work with an applicant and that at times an applicant will choose to take more time to address a staff concern. She said the issue is the fee doesn't anticipate the changes or additional review. It is difficult when staff is trying to collaborate with an applicant to not allow a delay.

Allendorf noted that in addition to staff requiring more time on behalf of the applicant, the council or the planning commission could as well. He asked what the ordinance language would be to make it clear to applicants that if it were staff, planning commission or the council requesting something that required more time, the applicant would not be charged an extra fifty percent at the end of the process. Wischnack said the current language in the proposed ordinance referenced "applicant requested." She said the language could be further clarified. Schneider said he agreed with the concern Allendorf raised.

Greves moved, Wiersum seconded a motion to introduce the ordinance. All voted "yes." Motion carried.

13. PUBLIC HEARINGS:**A. Resolution approving a request to vacate all of or portions of Marion Avenue, Hill Street and Earl Street in proximity to the residence at 2542 Crosby Road**

City Planner Loren Gordon gave the staff report.

Keith Benson, 2532 Crosby Road, said he purchased the property, which was a vacant lot, in the fall of 2007. The house was completed in June 2008. About a year ago he started pursuing the possibility of getting a dock on the channel. He researched the title information and discovered easements and streets connecting the outlying parcels to the adjacent land. He was not familiar with the regulations and government bodies that needed to approve the dock but he decided to move forward. He said the biggest barrier was nearly all the land on the parcels was deemed to be part of Lake Minnetonka and falls under the jurisdiction of the Lake Minnetonka Conservation District (LMCD). The only acceptable access seemed to be a series of boardwalks that the LMCD classify as docks or bridges. There would be some dredging required. He said he decided to take on the baby step of getting the street vacation first.

Benson said currently Earl Street divides his channel properties and since most of the street was vacated in 1987, his request was to complete the vacation and that was acceptable to the planning commission. Hill Street and Marion Street were included in the vacation proposal because it would provide further access and allow the Bensons to enjoy the lake. He said he recognized that the planning commission recommended against vacating Hill Street and Marion Avenue as it would diminish the public access to public land but if Hill Street were vacated and Marion Street was vacated behind his parcel, the public would still have direct access to the city land to the north and from Crosby Road.

Ellingson asked Benson to comment on the placement of the dock. Benson said he pursued a number of possibilities for a dock. He pointed to an area on the map where the most likely location would be. He said that location was the one the watershed district would favor. There also would be possible locations on parcel three and parcel four alongside the channel. Ellingson asked if LMCD approval was necessary to put in the boardwalk. Benson indicated it would require the LMCD approval. Ellingson asked if Benson had received any indication that the LMCD would approve the boardwalk. Benson said the LMCD seemed to be agreeable to something along the Hill Street property but was not agreeable to something going across the channel to parcel two. City Attorney Desyl Peterson noted the small channel that goes up to the bigger channel is on the city owned property so there would need to be some arrangement with the city to allow the boardwalk to occur.

Wiersum noted the proposal was complex and needed a lot of different approvals. He asked if the vacations had to occur first or if the LMCD would consider the plans even if the council did not approve the vacations. Benson said it would be difficult for the LMCD to accept something that was theoretical.

Greves asked Gordon to comment on the concerns raised by the neighbors about the environmental impact of Benson's proposal. Gordon said the concerns get into some of the policies in the comprehensive plan about how the city wants to protect areas. He noted that some of the low areas were areas where the city owned property. Benson's neighbors would like to preserve the integrity of the area as much as possible. The dock still might happen even if the street vacation was not approved.

Schneider opened the public hearing at 7:01 p.m.

Judy Simmons, 2558 Crosby Road, said she and her husband owned the neighboring property since 1979. She said the canal that was discussed is actually a beaver trail. She urged the council to follow the staff recommendation of not approving the vacation of Marion Avenue or Hill Street. She said Benson was offered access to the lake through one of the docks the Simmons own but Benson declined the offer because he said he wanted to own the dock. He offered the Simmons parts of marsh land property in exchange for approximately half of the Simmons' harbor. She saw no benefit in the trade for the Simmons but it would be of great benefit to Benson because any property that has lake access is worth a lot more. She said when Benson purchased his property there were lots available in Crosby Cove that had docks. Those lots were considerably smaller than the property Benson purchased, but were thousands of dollars more. She said her primary interest was preserving the wetlands around her property.

Benson said if a dock were put on the beaver trail it would be placed adjacent to the trail so it would not disturb the beaver run or any other access because the LMCD will not allow the blockage of any waterways. He said he looked at some of the Crosby Cove properties prior to the purchase of his property but chose his property because of its beauty and the possibility that there was a way to get to the lake. He noted that the Simmons offer to rent a dock was a back and forth discussion and he determined there was no benefit to him.

Schneider closed the public hearing at 7:07 p.m.

Wiersum indicated he had spoken with Benson about the proposal and at that time Benson was looking at a number of things. He said the challenge was that it was the council's job to work in the best interest of all the city's residents. The street vacations would benefit Benson's property but the cost would be loss of public access and a lack of unanimity in the neighborhood. He said he supported the staff recommendation and he told Benson when they talked that what he needed to do was to convince his neighbors his proposal was a good idea. Wiersum said Marion Avenue and Hill Street would never be developed because wetlands are no longer filled to create land so there was no public purpose in retaining the two as

streets. But there was a public purpose in retaining access to city owned land. He noted when a neighbor wants a street light installed the only way that can occur is with 100 percent agreement from anyone affected by the street light. He said the street vacations were an even bigger deal than a street light.

Wiersum moved, Allendorf seconded a motion to adopt Resolution No. 2011-095 which approves the vacation of Earl Street and denial of the request to vacate Hill Street and Marion Avenue based on the findings below.

Approval of the Earl Street vacation is based on the following findings:

- 1) The right-of-way does not provide a benefit to the general public for transportation purposes.
- 2) Vacation of public use would not diminish the ability for the public to access adjacent public land or waters.
- 3) Vacating this easement is in the public interest.

Denial of the Hill Street and Marion Avenue request is based on the following findings:

- 1) The right-of-way provides opportunity for connections to public owned land.
- 2) Vacation of public use would diminish the ability for the public to access adjacent public land or waters.
- 3) Vacating this easement is not in the public interest.

All voted "yes." Motion carried.

B. On-sale 3.2 percent malt beverage liquor licenses for New Wang's Restaurant LLC, 10928 Greenbrier Road

Wischnack gave the staff report.

Schneider opened the public hearing at 7:12 p.m. No one spoke.

Schneider closed the public hearing at 7:12 p.m.

Greves moved, Wagner seconded a motion to approve the license for New Wang's Restaurant, LLC. All voted "yes." Motion carried.

14. OTHER BUSINESS:

A. Items concerning a 2-lot subdivision of existing properties at 12910, 12918 Rutledge Circle and a parcel with an unassigned address on Rutledge Circle

Gordon gave the staff report.

Hiller asked if the applicant could go to the county and have all the lots merged removing the nonconforming issue, and then come back to the city for a lot split. Peterson indicated the applicant could combine the three lots and come back for a subdivision but that was basically what he was proposing to do. There is not sufficient buildable area to divide into two new lots. The only way to get the additional buildable area would be to do the flood plain alteration and do the rezoning out of the flood plain district.

Wagner noted if the flood plain did not exist then the proposal would be approved because it would meet all the city's specifications. The issue was the new flood plain model was not ready yet and the city had decided not to approve applications one by one as part of the flood plain model but instead would wait until the entire model was complete.

Curt Fretham, 12918 Rutledge Circle, noted there was agreement between himself, city staff, and the planning commission on several points. There was an agreement the proposal was to combine three lots into two, and that the two-lot subdivision met all the city's ordinances with the need only for a variance revolving around the 100 year floodplain elevation. He said when he purchased the property in 2004 he got all the necessary information ahead of time to ensure the property could be developed. He reviewed different plans with staff to address issues raised when the previous owner submitted an application to develop the property. He said staff agreed his two lot layout did conform with city code and ordinances without the need for variances. He noted the previous owner's application was not denied because of the 100 year floodplain issue. Staff recommended approval in December 2004 and it was not until the day before the December 2004 planning commission meeting that the 100 year floodplain elevation issue was raised.

Fretham said there was also agreement with staff that the basis for the floodplain elevation of 921 feet currently used by the city was inaccurate. The number comes from the city's water resources management plan completed nearly 30 years ago and the calculations were based on projections and not actual data. He said the actual data that exists from field conditions shows the floodplain elevation needs to be lowered. An engineer hired by Fretham determined the 100 year floodplain elevation would more accurately be 918.7 feet. In 2009 the staff and planning commission recommended denial of his application and said the proposal was premature as the city was undertaking its own modeling of the floodplain elevation. Fretham said he decided to wait one to two years for the city to complete its study. Since that time the Minnehaha Creek Watershed District completed a model that found the 100 year floodplain elevation to be 919.6 feet. That number would allow his proposal to move forward. He said the city engineer indicated it would likely be the end of 2012 or beginning of 2013 before the city completed its modeling. This

would mean under the best case scenario, Fretham would have waited nine years from the time he initially met with staff until he could start on the project.

Fretham said that based on the Minnehaha Creek Watershed District model, city staff granted permission to move forward with the project and staff recommended approval of the two-lot subdivision for the April 21, 2011 planning commission meeting. He said a few days before that meeting he received a call from staff stating that there was no mechanism to allow for the use of the watershed district's model. He met with staff to find a process that would work. He said following that meeting the city attorney issued a memo stating he was entitled to apply for a floodplain alteration permit and a request for rezoning the floodplain. He said he was surprised when he received the staff report for the July 21 meeting indicating staff was recommending denial. He indicated there were three options to allow his proposal to move forward. The first would be to amend the floodplain district. The second would be for the council to grant a variance. The third would be to approve a floodplain alteration permit and the request for rezoning. He noted only a small portion of one of the proposed house pads and/or driveway was affected by the current floodplain elevation.

Greves asked how staff usually handles a situation where a person brings in a plan and asks staff to informally review it to see if it might be approved. The plan receives positive feedback and later during the formal application process it eventually gets denied. Gordon indicated Greves' question was a common one and happens often. He said staff commonly provides basic information about development or redevelopment. This comes with a disclaimer that until a plan is formally received, specific issues cannot be reviewed by the appropriate city department and staff has to rely on the development review process to approve a project. Wischnack said staff always reminds applicants, particularly those with speculative type projects, the process is not done until there is a vote on the project. She said any experienced developer is aware of that.

Greves asked City Engineer Lee Gustafson to provide information about the timeline for the modeling. Gustafson said within the CIP there are years allocated for each of the four watershed districts within the city. Modeling began with the Minnehaha Creek Watershed District because it is the largest and the most volatile due to the main creek running through the city. Staff has always estimated the modeling process would take three years and that is the way the funding is allocated in the CIP. Work began in the fall of 2009. A lot of the work progresses as new information is needed by the consultant such as information about culvert elevation and size. This ensures the best data is available going into the modeling. He said staff is hopeful that by the fall of 2012 there should be a model to

review. He noted that it will take some time to fully review the information once it is complete.

Hiller asked for more information about not allowing the property owner to do the fill and compensate elsewhere on the property without getting into the issue of a nonconforming lot. Gordon said staff felt all the elements of the application were intertwined and were not separable. The applicant was proposing to create a buildable parcel. The buildable parcel had to happen through a subdivision. The subdivision ordinance has criteria in it for the buildable area and also has provisions that deal with nonconforming status of a property. All those things together led to the recommendation to deny.

Schneider said the council has had discussions over the years about what was appropriate fill and there were general guidelines. For a single lot that doesn't have enough buildable area, the city had allowed mitigation through fill as long as the fill does not take down substantial trees. The council has approved turning a nonconforming lot into a conforming lot numerous times over the years. Turning a nonconforming lot into a conforming lot was the same as creating a new buildable lot. He said he wasn't sure where the idea came the city could not consider fill because it might create a buildable lot. As far as he knew the council had never gone on record as supporting that position as a policy.

Wagner said he thought there were unique situations with this development. Gordon said the nonconforming lot of the zoning code states that if there is land in common ownership and the lots are not conforming to the code, there was no entitlement to develop the lots. Wischnack agreed with Schneider that the council had never adopted a policy about creating buildable area. In the past, staff has recommended against creating buildable area.

Wagner agreed with Fretham that if the property did not include a flood plain then a lot split could occur. Neighbors had indicated to him they were not in favor of the proposal. He said he felt for Fretham because the process had not been easy. One concern he had was the property was buildable with the watershed district's new guidelines but later on it might be determined that there are issues. This would leave a nonconforming property that previously was nonconforming. Another concern was the number of properties in the city that are adjacent to properties that are buildable. He did not want to see a bunch of proposals coming in for council approval until the model was complete.

Wiersum asked for more information about the culverts. He asked if there were issues upstream that could affect areas downstream and if some of the mistakes in elevation that were made downstream could have also

been made upstream. Gustafson pointed to a map of the drainage area in the section of the city the property was located. He pointed to the size of the drainage area that was taking drainage north of I394 as well as north of the city's border and the west side of I494. He said this showed the number of chances there were for error in the floodplain elevation that could lead to the property. Until the current data was available, the city had to abide by the current 100 year flood elevation.

Wiersum said he previously met with Fretham. He said that in looking at the process in totality he had concerns. Having been told by staff that the recommendation would be for approval, and then having to deal with a number of changes over the years made him have sympathy for Fretham but he was struggling with determining the right thing to do. It was likely that whatever the new floodplain elevation was determined to be, that it would not be 100 percent correct. This led him to think that the only thing that made sense to do in this situation was to allow the fill and take Fretham's proposal to build to 921 feet.

Greves said she shared Wiersum's sympathy for the process Fretham had been through. She said she was trying to determine who would assume the risk if the application was approved. If the lot changed but nothing was built, would there be a situation where the property owner held the property and later decided he/she wanted to do something with it only to find out the floodplain elevation changed? There also could be a situation where Fretham was allowed to build to 921 feet and it was determined the floodplain elevation number was not correct thus creating a potential nonconforming lot with a structure on it. Gordon said that allowing a structure on a lot that could become nonconforming was a risk and was one of the reasons for the staff recommendation.

Allendorf asked what the risk would be if the city allowed the house to be built at the 921 foot elevation and the model came in with a higher flood plain elevation. Peterson said the property would be the same as any property that became nonconforming because an ordinance changes. There would be no liability on the part of the city. Allendorf agreed with Schneider that in the past the council has looked at flood plain areas and as long as there was compensation, whether the water went over one way or another didn't matter as long as there was the flood plain capacity desired by the city. He said the risk was on Fretham or whoever bought the property and not to the city.

Wagner said what was being proposed were two quarter acre lots. That area was the only buildable area. He said all the factors including potentially setting precedence for other combining of properties to build buildable lots was why he would not support the proposal even though he

had sympathy for the process Fretham had gone through. He said at this point he did not see a public interest to allow the development.

Hiller noted there seemed to be agreement on the council that there was no choice but to use the 921 flood plain elevation level. There was no indication that was an inappropriate number even though a lower number might be more logical. He said there was no reason to debate whether to approve the proposal at 921 feet since any other property would be approved that was at the current flood plain elevation. He agreed that the option of allowing the applicant to fill in the flood plain was acceptable.

Ellingson noted one of the findings in the staff report was "the proposal is not consistent with the intent of the zoning or subdivision ordinances in that it creates a buildable lot on land that is marginal. The city has historically denied alteration of the flood plain district to create new buildable area." He said Schneider had indicated the council had allowed fill in the past but that was different from altering the flood plain district. This might be a legal issue because staff had indicated that the city did not allow alteration of the flood plain district until the model was done. He said he went and looked at the two lots last spring and saw a lot of standing water on both sides of the street. He did not see why the council would approve filling in the flood plain where there was standing water. Wischnack said historically the council had not allowed fill to create buildable area. The council has allowed fill to create a driveway to a lot or for an addition on to a home near a flood plain. Schneider said he disagreed. There were numerous times over the years that the council allowed the expansion of a buildable area because a home would not fit on to a lot when there was compensatory flood plain. He said there was no formal policy on the issue. Wischnack agreed there was no formal policy.

Schneider noted there was double protection related to Ellingson's comment about the flood plain zoning district. There was a designated flood plain based on the overall modeling that sets the elevation. This was the main criteria for how a flood plain should be determined. The city has chosen to memorialize the flood plain elevation by putting in an actual zoning district over the same line. He said from a reality standpoint the two should be coterminous. If the flood plain elevation changes the zoning should automatically change as well.

Wiersum said he has always been concerned about flood plains. But in this case if the fill was not required and there was enough buildable area at 921 feet, there would be little to discuss. The combination of factors was creating the issue. He said the issue was the risk of flooding and the overall process. He understood what Wagner said about the two quarter acre lots but in reality the 22,000 square foot requirement for half acre lots

were based on 22,000 square feet of an adequate building to buildable area.

Schneider said if the city required the applicant to fill the land to comply with the flood plain elevation and provide compensatory area for the 921 foot shift, then a public purpose was being met. Whenever the modeling was complete there would be excess capacity because more area had been dug out below the 919 foot or 918 foot level. This area would be additional flood plain that would not have been achieved any other way other than acquiring property. He suggested stipulating that the grading had to be done in conjunction with the lot split and not a future sale of the property.

Hiller moved, Greves seconded a motion to refer the item back to staff to prepare a resolution to approve based on the findings of the council.

Schneider said he wanted to make it clear the item was not being tabled and the item should come back for council action at the next council meeting.

Wagner noted the neighborhood had not received a notice about the item. He said it would be unacceptable if the neighbors were not allowed the opportunity to speak on the item at the next meeting. Schneider said he always allowed residents to speak on an item. Wischnack said the city's web site was updated and the most interested party who lived next door to the property was contacted.

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

B. Appeal of planning commission's decision regarding minor amendment to the existing Circuit City Plaza master development plan

Gordon gave the staff report.

Mike Obermueller, an attorney with Winthrop and Weinstine, said he was appearing on behalf of the adjacent property owner, DJD Partners I, LLLP. He noted the appeal relates to two issues. He said DJD was not seeking to overturn the original decision of the city council. There were contractual rights that permit DJD to withhold its consent to the extra right out. This issue was not before the council but was being litigated. He said the issue was whether the amendment to the amendment should be allowed. The planning commission hired an expert, SRF Consulting, to do an analysis of the property. One part of the analysis was if there would be significant queuing on the property that would be problematic. The analysis found

there would be significant queuing as a result of the Whole Foods side of the property. If no changes happened with the right out or the signal optimization the queues on average would be five cars waiting to exit the property. During peak hours there could be as many as 14 cars waiting to leave the property. He said SRF suggested three things to fix the issue. The first was doing a signal optimization study for the intersection of the frontage road and Plymouth Road. The second was to add a right out on to Plymouth Road. The final suggestion was to add a lane to the frontage road entrance.

Obermueller said when Whole Foods requested the installation of the right out be permissive rather than mandatory, the planning commission sent staff out to get a new analysis from SRF Consulting. SRF said that if the lane was added on the frontage road, and the signal optimization was done, then the right out was not necessary to alleviate the queuing because it would not help that issue much. Obermueller said the problem with the analysis was that the lane on the DJD side was not part of the staff recommendation. If the council was going to rely on the SRF analysis and it agreed to stop queuing, then it must require the extra lane be installed on the DJD side of the property. Without it, there would be a queue of 14 cars during peak hours. This would have a big impact on all the tenants. He said Whole Foods shouldn't be allowed to impose a problem on their neighbor. He noted the planning commission approved the addition of seven new parking stalls. Three of the stalls on the northwest corner would cause issues because Whole Foods intends to have 33 foot panel trucks turn around in back. No one has studied if the trucks still would be able to make the turn if the three stalls are allowed. He said his client would be impacted because if the trucks cannot turn around, they will have to back down the lane to exit. He requested a study of the issue should be conducted and the item be sent back to the planning commission for further review.

Schneider noted both parties would benefit by the right turn in and right turn out because it would reduce the amount of queuing on the site. He said he was confused however if Obermueller's client wanted the extra right out lane and the widening of the curb cut on the frontage road that would enable someone making a left turn not to block all the exiting traffic. Obermueller said DJD did want that lane subject to being able to look at the plans. DJD also did not want to pay for the installation because it wasn't its use that was causing the problem. Schneider said it was likely one parking stall would be lost but it would improve the circulation. Obermueller said the right out to Plymouth Road was a point of contention because it made the front of the property less safe.

Allendorf said during the planning commission's discussion it was noted there was room for three full lanes. He asked Gordon to clarify. Gordon

said during the planning commission hearing staff thought there was room for three full lanes but it was later determined there was not enough room. Allendorf asked for clarification what exactly was being voted on. He said the discussion about the frontage road lane and the loading dock was an issue between the two parties. This left the council to decide whether the right out should be mandatory or optional and whether the façade was done properly. Gordon confirmed that was correct. Wagner noted the council was not voting on signage.

Wiersum asked for more information about making the right out optional or mandatory. Gordon said the 2010 approvals included the site plan that showed the right out was going to happen with the project. He confirmed that a permit would be required from the county to build the right out. He said the site did not need the right out to go north on Plymouth Road in order to function properly. This would make the right out optional. Wagner suggested a requirement could be to have a "proof of right out" similar to the "proof of parking" that is often required. He said part of the issue was the queuing and there was one way out of the site with two and a half lanes and therefore the area on the frontage road was part of what the council was reviewing. Wiersum noted that grocery stores get busy and he has never driven out of the parking lot feeling that it was properly figured out. He said the most access and egress that could be built the better if Whole Foods was to be successful.

The Whole Foods representative, Christopher Penwell, with Siegal Brill, said from 1994 to 2009 there was a Circuit City in the space where Whole Foods was opening its store. Circuit City and Office Depot were adjoining tenants in the shopping center. During that time the center operated without a right out and without a right turn lane on to the frontage road. The property was zoned and guided for retail use. Because Whole Foods is a retailer, the right out was not required by the city. It was the applicant that asked for the right out to be built. If the applicant had not requested the right out, the item would not be before the council. He said the resolution before the council for appeal was identical to the resolution that was approved by the planning commission on December 2, 2010. All the information in the SRF report about the queuing was also in the September 9, 2010 SRF report. The planning commission approved the project on December 2, 2010 without requiring a right turn lane and the frontage road access.

Penwell said prior to the December 2010 meeting a representative of DJD, John Johansson, was invited by Wischnack to discuss the Whole Foods project. He had the September 9, 2010 SRF report. He also had notice of the December 2, 2010 planning commission meeting. Penwell said Johansson did not meet with Wischnack nor did he attend the planning commission meeting and did not appeal the planning commission's

decision. Penwell said Johannson should have brought up the right turn issue at the December 2, 2010 meeting or should have appealed the decision. The issue was first raised at the September 15, 2011 planning commission meeting. The access to the frontage road is on Johannson's property. Under the reciprocal easement agreement that governs the parking lot and the access points between the two parties, it is up to DJD to approach Paster Enterprises requesting approval of the right turn lane. He said part of the appeal was for the certificate of occupancy not to be issued and that would mean Whole Foods could not open the following week as scheduled. He noted that the planning commission chair indicated the dispute DJD had with Whole Foods was not in the commission's purview.

Penwell said the only thing before the council was making the right out optional. He noted the right turn issue, the maneuvering of the trucks in the northwest corner were both issues in the lawsuit. He said millions of dollars had been invested in the planning and construction of the Whole Foods store. Paster Enterprises retained a civil engineer, RLK, to look at the site including the truck maneuvering in the northwest corner. RLK determined and diagramed that trucks can maneuver correctly. He noted that queuing would not be in a single file line. Cars would come from a number of different directions. He said there was a five percent chance that 14 cars would be coming to the right turn lane during the peak hour.

Schneider noted Penwell's letter indicated that the right out on to Plymouth Road was a request from Whole Foods. This issue was part of the lawsuit. He said it was from Whole Foods property so they should either build the right out or not build the right out. Penwell said the issue was the reciprocal easement agreement that covered the area. Although it was on Whole Foods property, any change to the common areas requires approval from the adjoining landowner. The approval cannot be unreasonably withheld. DJD had raised objections to the right out. The dispute was if the objections were reasonable or not. He noted the right turn lane on to the frontage road was on DJD's property. If they wanted to make a change to that access point, they would have to come to Paster and asked for the change. He said after the September 15, 2011 planning commission meeting he reached out to DJD's counsel to ask for a proposal for the right turn lane. He has not received a proposal yet.

Schneider said both properties would benefit from having a functional right turn lane on to the frontage road and a right turn on to Plymouth Road. Penwell said what he was asking was that the council not make a decision that would derail the opening of the Whole Foods store over an issue that was being resolved in court. Schneider suggested that if all the money that had been spent on attorneys' fees had been spent on making the improvements, there would be a better project and functioning traffic flow.

He said the arguing back and forth between the parties did not sit well with him.

Greves noted the right turn out to Plymouth was an issue being dealt with in litigation. She asked if the appeal was to make the right out mandatory. Schneider said if the council upheld the planning commission's decision it would remain optional.

Allendorf said the same issues had been discussed at the planning commission. He said the two access points were not the real issue and there was something else causing the dispute. He did not want the council to get involved in the issues between the two parties. He said the two parties would eventually see solving the traffic flow issues would be beneficial to both of them.

Wiersum said it was his understanding that supporting the right out optional would enable things to move forward as smoothly as possible for both sides.

Wiersum moved, Allendorf seconded a motion to adopt Resolution No. 2011-096 upholding the planning commission's decision. All voted "yes." Motion carried.

15. APPOINTMENTS and REAPPOINTMENTS: None

16. ADJOURNMENT

Greves moved, Wagner seconded a motion to adjourn the meeting at 9:20 p.m. All voted "yes." Motion carried.

Respectfully submitted,

David E. Maeda
City Clerk