

**MINNETONKA PLANNING COMMISSION  
MINUTES**

**AUGUST 5, 2010**

**1. CALL TO ORDER**

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

**2. ROLL CALL**

Commissioners Sjeklocha, A. Thomas, Daeges, Lehman, Magney, and Cheleen were present. Adams was absent.

Staff members present: Community Development Director Julie Wischnack, City Planner Loren Gordon, Principal Planner Susan Thomas, Planning Technician Stephanie Scott-Sims, City Attorney Desyl Peterson, and Project Engineer Nate Stanley.

**3. APPROVAL OF AGENDA:** The agenda was approved as submitted.

**4. APPROVAL OF MINUTES:** July 1, 2010

*Daeges moved, second by Sjeklocha, to approve the July 1, 2010 meeting minutes as submitted.*

*Sjeklocha, A. Thomas, Daeges, Lehman, Magney, and Cheleen voted yes. Adams was absent. Motion carried.*

**5. REPORT FROM STAFF**

Gordon briefed the commission on land use applications considered by the city council at its meeting of July 19, 2010:

- Adopted the resolution approving the request to amend the existing conditional use permit for Faith Presbyterian Church at 12007 Excelsior Boulevard.
- Adopted the resolution amending the existing conditional use permit for Rakhma, Inc. at 5126 Mayview Road.
- Adopted the resolution approving a conditional use permit for an accessory apartment at 14465 Orchard Road.
- Adopted the resolution approving a conditional use permit to operate a commercial kennel at 6133 Baker Road.
- The applicant withdraw review of a minor amendment to the existing Ridgedale Festival master development plan removing a

condition limiting the length of delivery trucks allowed on site. The condition is no longer valid given the industry recognized sizes of delivery vehicles. The item will be reviewed at a future meeting.

- Tabled action on a request for a 12-month extension for the Fetterly View final plat located at 11519 Fetterly Road West.
- The applicant withdrew a concept plan for Hillside Senior Living at 5431 Williston Road. The item will be reviewed at a future meeting.

Gordon noted that the next planning commission meeting will be August 19, 2010.

**6. REPORT FROM PLANNING COMMISSION MEMBERS:** None

**7. PUBLIC HEARINGS: CONSENT AGENDA:** None

**8. PUBLIC HEARINGS**

**A. Items concerning Minnetonka Animal Hospital at 3318 Groveland School Road and 17408 Minnetonka Blvd. (10019.10a)**

Chair Cheleen introduced the proposal and called for the staff report.

Scott-Sims reported. She recommended approval of the application based on the findings and subject to the conditions listed in the staff report.

Chair Cheleen said that the application is pretty clear cut. He asked where the clean out for the sewer line would be located and if it would decrease clog issues to locate the clean out further west. Stanley stated that the reason for the frequency in clogs has not been determined. A build up may have been caused by material used to patch vehicle dents or oil. The capacity of the sewer would be maintained by the way it would be routed. The current amount of fall into the street would be equal to the fall that would travel north and bend around into the street. Staff worked with the applicant to procure an easement. The access may not be hard cover, but it would be drivable. Stanley noted that upsizing the pipe or increasing the slope would not necessarily solve the problem.

Reed Robinson, Golden Valley, applicant, appreciated Scott-Sims' report and was present to answer questions.

The public hearing was opened. No testimony was submitted and the hearing was closed.

A. Thomas asked if a sign would identify the main entrance. Scott-Sims pointed out two existing monument signs that would remain. Mr. Robinson confirmed that the monument sign would remain. The design calls for the entrance to be located in the front. A motorist approaching the building would see an entrance that should be welcoming. Notifications would be sent to existing clients. A. Thomas favored a temporary sign identifying the entrance rather than motorists traveling down Groveland Road. Mr. Robinson preferred to send notifications to clients.

Kent Howe, father of the owner of the clinic, stated that the redesign would help the whole situation. The address was Wayzata, but would now be Minnetonka. The proposal would improve the situation.

Chair Cheleen lives right behind the site. He agreed that the situation would be improved because the building would be larger and it would be more obvious that the whole building is the animal hospital. Motorists would be more inclined to access the business from Minnetonka Boulevard. Minnetonka Boulevard is very busy when school begins and ends. The whole situation should improve.

***Lehman moved, second by Sjeklocha, to recommend that the city council approve the following items concerning Minnetonka Animal Hospital at 3318 Groveland School Road and 17408 Minnetonka Boulevard:***

#### REZONING

- 1) *Recommend the city council adopt the ordinance on pages A20–A22 of the staff report which approves a rezoning from B-2 to PUD, and adopts a master development plan, for the property at 3318 Groveland School Road. Approval is based on the following findings:*
  1. The rezoning would be consistent with the city's guide plan; and
  2. The rezoning would be consistent with the public health, safety, and welfare.

#### CONDITIONAL USE PERMIT

- 2) *Recommend the city council adopt the resolution on pages A14–A17 of the staff report which approves a conditional use permit for an animal hospital at 3318 Groveland School Road. Approval is based on the following finding:*

- a. The proposal would meet all conditional use permit standards as outlined in City Code 300.21 Subd.3(e)

Approval is subject to the following conditions:

- a. Prior to issuance of a building permit, record this resolution with the county. A copy of the recorded resolution must be returned to the city.
- b. The city council may reasonably add or revise conditions to address any future unforeseen problems. Future traffic or site access issues may result in closure of the existing Minnetonka Boulevard access and construction of a new access onto Groveland School Road.
- c. Any change to the approved use that results in a significant increase in traffic or a significant change in character would require a revised conditional use permit.
- d. The applicant must agree to the above conditions in writing.

### **SITE AND BUILDING PLAN**

- 3) *Recommend the city council adopt the resolution on pages A27–A35 of the staff report, which approves final site and building plans, for additions to the existing Minnetonka Animal Hospital and associated parking improvements.*

Approval is based on the following findings:

- a. The proposal would meet all ordinances and standards for a site and building plan approval

Approval of the site and building plans is subject to the following conditions:

- a. Subject to staff approval, the site must be developed and maintained in substantial conformance with the following plans, unless modified by the conditions below:
  - Site plan date-stamped May 17, 2010
  - Grading plan date-stamped May 17, 2010

- Landscaping plan date-stamped May 17, 2010
  - Building elevations date-stamped May 17, 2010
- b. A grading permit is required. Unless authorized by appropriate staff, no site work may begin until a complete grading permit application has been submitted, reviewed by staff, and approved.
- 1) The following must be submitted for the grading permit to be considered complete.
- (a) Final site, grading, drainage, utility and erosion control and must be submitted for staff approval.
- (1) Final site plan must show:
- A 20-foot wide easement over the new sanitary sewer pipe. The new sanitary sewer pipe must be centered within the easement.
  - Increased pedestrian access from the north parking lot to the south (main) entrance.
- (2) Final utility plan must:
- The full extent of the new sanitary sewer easement must be covered with hardcover, acceptable to the public works department, in order to allow for drivable access for maintenance vehicles.
  - The portion of the existing sewer line proposed to be abandoned cannot remain in place, unless it is utilized for service. If not utilized for service, the line must be completely removed to the manhole and the manhole must be plugged per city standard.
  - The buildings, once combined by the new addition, can only have one sanitary sewer service and one water service per city ordinance. Other service lines to the buildings

must be removed in their entirety up to the main.

- (b) Individual letters of credit or cash escrow for 125% of a bid cost or 150% of an estimated cost to comply with grading permit, landscaping requirements, and to restore the site. The developer may submit one itemized letter of credit, if approved by staff. The city will not release or reduce the letters of credit or cash escrow until work has been completed according to the plans approved by the city.
  - (c) A construction management plan. The plan must be in a city approved format and must outline minimum site management practices and penalties for non-compliance.
  - (d) A right-of-way permit from the city for any work in public right-of-way.
- 2) Prior to issuance of a grading permit:
- (a) Submit an electronic PDF copy of the plans and specifications.
  - (b) Submit two full size and three 11x17 sets of construction drawings and three sets of project specifications.
  - (c) Submit all required administration and engineering fees.
  - (d) Submit a SWPPP.
  - (e) Install a temporary rock driveway, erosion control, tree and wetland protection fencing for staff inspection. These items must be maintained throughout the course of construction.
  - (f) Permits may be required from other outside agencies including, but not limited to Hennepin County, the Minnehaha Creek Watershed District, and the MPCA.

It is the applicant's and/or property owner's responsibility to obtain any necessary permits. Copies of all required permits must be submitted to the city.

- 3) The existing sanitary sewer shall remain in service until final acceptance of the new sanitary sewer construction is given by the city engineer. No service disruptions are permitted during construction and temporary bypass pumping used must meet the requirements of the city of Minnetonka and all applicable agencies.
  - 4) Must restore Groveland School Road and any right of way disturbed due to construction per city standards.
  - 5) Must maintain a minimum of 7.5 feet of cover over water main and all services at all times.
- c. Prior to issuance of a building permit:
- 1) Submit the following items for staff review and approval:
    - (a) A construction management plan. This plan must be in a city approved format and outline minimum site management practices and penalties for non-compliance. If the builder is the same entity doing grading work on the site, the construction management plan submitted at the time of grading permit may fulfill this requirement.
    - (b) A landscaping and tree mitigation plan. The plan must meet minimum landscaping and mitigation requirements and values as outlined in the city's ordinance. However, at the sole discretion of natural resources staff, mitigation may be decreased based on any of the following: the health of trees removed; the ability to appropriately install trees and other shrubbery given existing vegetation and/or topography.
    - (c) Cash escrow in an amount to be determined by city staff. This escrow must be accompanied by a document prepared by the city attorney and signed by

the builder and property owner. Through this document the builder and property owner will acknowledge:

- The property will be brought into compliance within 48 hours of notification of a violation of the construction management plan, other conditions of approval, or city code standards; and
  - If compliance is not achieved, the city will use any or all of the escrow dollars to correct any erosion and/or grading problems.
- (d) An electronic CAD file or certified as-built drawings in microstation or DXF and PDF format.
- (e) A letter of credit or cash escrow for 125% of a bid cost or 150% of an estimated cost of all required landscaping.
- (f) An illumination plan for staff approval.
- (g) A maintenance plan for the rain gardens must be drafted, approved by the city engineer, and filed with Hennepin County.
- d. Pay all required connection fees.
- e. Landscaping in the south half of the property must be integrated with the landscaping located in the right of way along Minnetonka Boulevard.
- f. The property owner is responsible for replacing any required landscaping that dies.
- g. All rooftop and ground-mounted mechanical equipment, and exterior trash and recycling storage areas, must be enclosed with materials compatible with the principal structure, subject to staff approval. Low profile, self-contained mechanical units that blend in with the building architecture are exempt from the screening requirement.

- h. Construction must begin by December 31, 2011, unless the planning commission grants a time extension.
- i. This resolution does not approve any signs. Separate sign permits must be submitted for staff review and approval.

#### VACATION

4) *Recommend the city council hold a public hearing and adopt the resolution on pages A36–A38 of the staff report, which vacates existing utility easement at 3318 Groveland School Road. Approval is based on the following findings:*

- a. The petitioner is the owner of the land abutting the subject right-of-way and are, therefore, proper petitioners.
- b. Upon relocation of the existing sewer line and establishment of a new easement, the city will no longer require the subject easement.
- c. Vacating the subject easement is not counter to the public interest.

The vacation is subject to the following conditions:

- a. Submit a 20-foot wide utility easement over the new sanitary sewer pipe. The new sanitary sewer pipe must be centered within the easement. The easement document must be drafted by an attorney knowledgeable in the area of real estate and is subject to the review and approval of the city attorney.
- b. This vacation of an existing easement is effective only when:
  - (1) The new sanitary sewer is accepted into service by the city engineer; and
  - (2) An approved resolution has been recorded with Hennepin County.

***Sjeklocha, A. Thomas, Daeges, Lehman, Magney, and Cheleen voted yes. Adams was absent. Motion carried.***

The item is tentatively scheduled to be reviewed by the city council August 16, 2010.

**B. Conditional use permit for a pedestrian trail on the south side of the south frontage road between Ridgedale Drive and Hopkins Crossroad. (10027.10a)**

Chair Cheleen introduced the proposal and called for the staff report.

S. Thomas reported. She recommended approval of the application based on the findings and subject to the conditions listed in the staff report.

A. Thomas asked what the advantage of asphalt would be compared to mulch or crushed rock. Stanley noted that the trail is intended to serve bicyclists as well as pedestrians; bituminous would not erode into the wetland buffer area and wetland; and bituminous would be able to be plowed and the trail used in the winter.

A. Thomas asked if the runoff from the trail would affect Crane Lake. Stanley explained that the trigger for stormwater management is an acre or more of a linear project with hard surface cover. The project would equal .7 of an acre. The runoff is not anticipated to cause any problems related to pollution or volume.

In response to A. Thomas' question, Stanley stated that the trail would be adjacent to the curb in order to narrow the trail and mitigate any possible impact.

A. Thomas was curious if the snow plowed off the street and onto the trail would be plowed on the other side of the trail. Stanley noted that public works' staff are pioneers with mitigation of effects of road salt and deicing activities.

A. Thomas asked if there would be an access to Crane Lake. Stanley responded in the negative.

Sjeklocha asked how the city determines which trails get done and how they are funded. Wischnack explained how trails are usually part of capital improvement programs. The proposed trail is being funded by available funds in conjunction with an improvement to the south frontage road. The trail is part of a "missing link" priority list of trails. Staff asked residents where trails are needed. That is how the "missing trail link" map was created. Opportunistic types of projects, like this one where it would make the best use of the funds to complete the trail at the same time as the road improvement project, are also given priority. The city council makes the final decision.

Lehman asked if there is a plan to provide a crosswalk to cross the frontage road at the park and ride to get to the trail. Stanley explained that the access would be located near the intersection of County Road 73 and the South Frontage Road where there is a controlled intersection. When Lehman asked the question again, Stanley explained that studies have shown that crosswalks at uncontrolled areas away from intersections are found to create more of a hazard to pedestrians than benefit. The city has not, historically, allowed or marked mid-block crosswalk locations due to the false sense of security it may give a pedestrian. Signing and striping has not been shown to significantly change driver behavior. If one is to cross at an unmarked location, then it is better that the pedestrian be fully aware of the hazards.

Lehman asked if a trail crossing had been considered. A trail crossing would include a stop sign for the trail user. Stanley said that has been discussed and is being considered. The area also has a bus stop. The most appropriate location is being considered. Lehman supported that being considered.

Chair Cheleen asked for the height of the retaining wall and whether or not a safety rail would be needed. Stanley answered that the retaining wall would be 5 feet to 6 feet at its highest point and it would have a guard rail.

The public hearing was opened. No testimony was submitted and the hearing was closed.

***Sjeklocha moved, second by A. Thomas, to recommend that the city council adopt the resolution on pages A10–A12 of the staff report. This resolution approves conditional use permits for an impervious trail and associated retaining walls to be located with the shore impact zone of Crane Lake and with a wetland buffer. Approval is based on the following findings:***

- 1) The proposed trail will provide for appropriate pedestrian travel within a public right-of-way that currently lacks a pedestrian route.
- 2) The proposed trail is consistent with policies of the comprehensive plan.
- 3) The location of the proposed trail would not impact adjacent shoreland, floodplain, or wetland areas.
- 4) The proposed trail would not have an undue adverse impact on the public health, safety or welfare.

Approval is subject to the following conditions:

- 1) A grading permit is required. Unless authorized by appropriate staff, no site work may begin until a complete grading permit applicant has been submitted, reviewed by staff, and approved.
  - a. The following must be submitted for the grading permit to be considered complete:
    - (1) Final grading, drainage and erosion control plans must be submitted for staff approval.
    - (2) A construction management plan. The plan must be in a city approved format and must outline minimum site management practices and penalties for non-compliance.
  - b. Prior to issuance of a grading permit:
    - (1) Install a temporary rock driveway, erosion control, tree and wetland protection fencing for staff inspection. These items must be maintained throughout the course of construction.
- 2) In areas where a wetland buffer does not exist between the trail and the delineated wetland edge, such wetland buffer must be installed.

***Sjeklocha, A. Thomas, Daeges, Lehman, Magney, and Cheleen voted yes. Adams was absent. Motion carried.***

**C. Ordinance amending city code regarding expansion of non-conforming uses. (07013.10a)**

Chair Cheleen introduced the proposal and called for the staff report.

S. Thomas reported. She recommended approval of the application based on the findings and subject to the conditions listed in the staff report.

Chair Cheleen appreciated S. Thomas' clear report.

Lehman understood that if a property has nonconforming status, that it does not automatically mean that anything done to the property has to be reviewed by the planning commission. S. Thomas agreed. She provided an example of a house

that has a front yard setback of 18 feet from the property line and the property owner proposed to build an addition on the rear of the property that would meet setback requirements. A building permit would be the only necessary city approval. The addition would not require a variance.

In response to Lehman's question, S. Thomas explained that the nonconforming use ordinance is in place. The proposed amendment would not change a property's status. For example, property owners with garages taller than current height requirements would not be required to apply for a variance.

Lehman asked if there is a distinction between nonconforming properties that have an approved variance with properties that do not have an approved variance because either the nonconforming situation complied with ordinances at the time it was done or it was done without gaining approval. S. Thomas explained that if a variance is granted, then whatever the variance was approved for would be in conformance.

Lehman confirmed with S. Thomas that the nonconforming ordinance did not apply to applications that were granted a variance from ordinance requirements. Lehman was still confused. He provided an example of an application for an addition to a residence that already has an 18-foot setback, in violation of ordinance requirements. He asked if an expansion permit would not be required because a variance had been granted. S. Thomas explained that a variance is granted for a specific project. If a variance was approved 2 years ago for an 18-foot setback for a garage, then the variance would apply only to that project and the required setback must be met. S. Thomas provided a diagram and explained a similar scenario. Lehman was still confused if a variance or expansion permit would be required.

Peterson explained that if a property has received a variance, then the property is not a nonconforming use. Therefore, the property is not subject to the restrictions that are in the ordinance code regarding nonconforming uses. That has always been a benefit to a property, because it does not have to worry about the language on expansions and nonconforming uses. Now, the reverse is happening. If the property had not gotten a variance, the property owner could apply for an expansion permit. If a variance had been granted, then the setback would be considered conforming and, therefore, have to apply for a variance. So, the question is if that is what the planning commission wants to have happen and, if not, what would be preferable. Lehman was comfortable with the idea that if a property had an existing nonconformance due to not meeting existing setback requirements and wanted to expand without decreasing the setback further, then the expansion permit could be used. He was not sure if he was comfortable

treating a property with a variance approving a deviation from the setback requirement the same as one that does not have a variance. He does not want to reward property owners who violated ordinance requirements without receiving a variance. Peterson agreed. That issue will need to be examined and other implications considered. Before, it was a benefit to the property to get the variance because then it was not subject to the requirements of nonconformity, but now it may be adverse to a property's interests in that respect.

Lehman was concerned that in a situation where a conditional use permit was not approved but a business was operating that a variance would not be approved because there is reasonable use of the property. Peterson explained the difference between a legal, nonconforming use and an illegal, nonconforming use. If the situation existed prior to the change in the ordinance being adopted that put the restriction in place, then the property owner is not required to get any type of permission. That is the "grandfathered" situation. If a property owner violated an ordinance when it was in place, then there are various ways to deal with that including requiring the structure to be torn down or requiring an after-the-fact variance application.

Lehman confirmed with Peterson that the state statute handles a variance for a point intrusion the same as any other variance.

Sjeklocha asked S. Thomas to speak about the other land uses and institutions such as schools in terms of variances and nonconforming uses. S. Thomas responded that the nonconforming use ordinance is independent of zoning classification. All zoning classifications would be treated the same.

Sjeklocha asked for an example of a school or church that would be denied now for a nonconforming use. S. Thomas recalled a variance request for a school in regard to floodplain setbacks for ball fields that would not be allowed now. The sign variances that were previously approved would not be allowed now. Peterson noted a typical variance for a business is the minimum number of parking spaces required. Those variances would all be denied since the change in the state statute, unless it can be shown that the property cannot be put to a reasonable use, which is pretty unlikely particularly if there is an existing use.

The public hearing was opened.

Anne Malm-Hossfeld, 14616 Glendale Street, stated that:

- The Minnesota Supreme Court case was a Minnetonka case. In 2008, there was a garage that was an existing nonconforming use

that had less of a setback and the property owner wanted to add a second story. The variance was passed by the city and the decision was appealed by a neighbor and overturned by the state supreme court.

- She understood that the state supreme court denied the application because the site was an existing legal nonconforming use. The language to allow an expansion permit addresses that specific case. If there was a variance granted in the past by the city and overturned by the state supreme court, then it would have to be reviewed again by the city. It sounds like the expansion permit is creating something to do exactly what the state supreme court denied.
- She asked the reason behind creating the expansion permit concept.
- She did not fully understand the idea of variances as they apply to conforming uses. When an expansion is applied for, then the variance cannot be granted. If the city has leeway to write its own language for what it can approve, then why cannot the ordinance simply be written so that a resident, for any nonconforming use, whether it is expanded beyond the nonconforming use or stays within the current setback, and get rid of language requiring the variance and just say that everything requires an expansion permit or can get an expansion permit.
- She asked if there are legal or state restrictions that disallow the city council from totally getting rid of the use of a variance.
- She asked if it is the city's choice to still require variances under the now extremely straight interpretation for some nonconforming uses or can the city change all of the language in the nonconforming use ordinance to not require a variance at all because that is what the state supreme court restricted.
- She stated that if the proposed amendment only addresses nonconforming uses, then if a variance was granted for less of a setback, does that now become a conforming use even though that particular property does not conform with the ordinance in general, but that property now has been granted a variance. She questioned if that property is now conforming. She heard that the answer was yes, so therefore that takes it out of the city's ability to grant a variance.
- She questioned if the city is restricted by the state statute from allowing expansions for a conforming property by anything other than a variance. Meaning, can the city simply write a city ordinance

to allow an expansion permit for any type of request. She did not know if those are clear questions or not.

Christopher Tyler, 4740 Dominick Drive, asked how a property becomes nonconforming. He lives on a property that last year was conforming and now he has a four-foot sidewalk and is nonconforming because he had a 35-foot setback and sold 4 feet to the city. He wanted to make sure that is right. If his property was conforming, he would be allowed to build a porch 5-feet into the front setback. As a nonconforming property, his understanding is that he would not be allowed to do that. He wanted commissioners to give thought to treating nonconforming property as close as possible to conforming properties with regard to things like porches.

No additional testimony was submitted and the hearing was closed.

Peterson explained that the proposed ordinance amendment is not directed at any one property. Over half of the variance applications received in the last 5 years have involved a nonconforming use issue.

In response to the question if variances should be eliminated and expansions be the only tool, Peterson answered in the negative. The state statute says that the only way a city may allow exceptions to regulations is with a variance. There is another statute adopted more recently that says that the city can allow expansions of nonconforming uses through an ordinance process, but it does not say what kind of process that is. Those statutes need to be interpreted together. Peterson believed that if the city said that a nonconforming use can become more nonconforming that the city would be pushing into the variance area because the city would be allowing an exception. If the city decided that would be characterized as an expansion, then the city is risking another lawsuit from an unhappy neighbor. The city is proposing an amendment as far as it can go with this idea of an expansion permit and not a variance. The reason why staff is proposing this amendment is because the statute does give the city flexibility in the area of nonconforming uses and the city already has a number of applications that are in this particular area. The city has the flexibility to deal with and address that immediately. There is a much bigger issue regarding what should be done with a variance situation since the city needs flexibility due to it not being a grid-street city. Lot sizes are not uniform. That makes it difficult to determine the right standards because every lot is a different shape. One of the reasons that staff has done an examination of variance applications was to see if the ordinance should be changed to try to put in standards that address these potential situations that will come up so a variance would not be needed. That is a much bigger issue that needs a lot of thought and time to examine how it

should be approached. The city may end up having to deal with that issue if a legislative change does not happen.

Peterson requested commissioners have a discussion to address Ms. Malm-Hossfeld's question regarding nonconforming and conforming uses. That part of the amendment could be fixed before it is reviewed by the city council.

Chair Cheleen reviewed that Mr. Tyler sold 4 feet of his property for a sidewalk. Now his front yard setback is 31 feet. He questioned what would happen if Mr. Tyler wanted to add a porch on front. Peterson was not prepared to address a pending application. She referred to a provision in the ordinance regarding nonconforming uses that talks about creation of nonconformities by public action. If action taken by a city either through eminent domain or a negotiated sale renders that property in violation of one or more ordinances than it would become a legal nonconformity by operation of that action. It would have the benefits of the ordinance, but not the limitations. That ordinance would be looked at as the application is reviewed. That portion is already part of the ordinance; not part of the proposed amendment.

Melissa Tyler, 4740 Dominick Drive, was confused over legal nonconforming uses being treated as a conforming property in regard to expansion. Gordon stated that the Tyler's application would be reviewed in accordance with ordinance requirements.

Lehman defined nonconforming properties as those that did not receive a variance and were not grandfathered versus legally nonconforming properties which are now legally conforming because the property received a variance or have been grandfathered. He was asking if the ordinance could be fixed to treat the properties equally. Most of the properties are legal conforming properties that already received a variance and the application continued that same setback. He was concerned that if the ordinance stands as it is written right now, certain homeowners who received a variance would no longer be able to make use of the expansion permit. They would be considered conforming properties and subject to the variance state statute and prohibited from having any expansions.

Peterson added that there are restrictions on nonconforming land uses. If a property has a variance, then it is not subject to them. If a structure burns down and the property is legal, then the property owner has the right to rebuild and wait as long as the owner wants. If a nonconforming structure burnt down, then the owner has one year to rebuild or else it is not allowed. There is a benefit to getting a variance. There would be detrimental impacts to making properties with variances into nonconforming uses. Lehman did not intend to change any rights

as they exist now. He only tried to deal with the proposed amendment. He wanted to make the expansion permit ordinance amendment encompassing enough so that it would include the legally conforming situations because of the variance or the grandfathering status. In other words, the only properties that the expansion permit applies to would be the nonconforming properties. He would like to see if the ordinance could be drafted to be more expansive to include nonconforming properties and properties that have a variance and seek a variance, but not expand the deviation approved by the original variance. Peterson understood. The problem is that the ordinance provides good and bad regulations for nonconforming uses. The city cannot find a property a nonconforming use in one situation and not a nonconforming use in another situation. Lehman did not intend to do that. He was not trying to change how the statute or ordinance defines nonconforming uses. He asked that staff look at the expansion permit ordinance and find a way to make the ability for the expansion permit apply to a property whose owner is seeking to continue its approved setback by a variance deviation. Peterson responded that, unfortunately, the city is not allowed to do that. The city is only allowed to allow expansions of nonconforming uses. Wischnack provided an example. Lehman was concerned that it is counterproductive and unfair that the property owner who was granted a variance would be in a worse-off position than a property owner who has the same application, but the property is nonconforming and has superior rights to the use of the property. Peterson pointed out that would apply for only one aspect, because the property owner with a nonconforming property is worse off in other aspects and so the issue is if the situations offset each other.

Lehman asked if it was worth creating the expansion permit if it would apply in so few situations. Peterson answered that it would apply in quite a few situations.

Chair Cheleen noted that the proposal is a way, under the existing law, that the city can allow property owners to move forward with projects in lieu of waiting for a new law that may occur in this or the next legislative session to improve the language of what a city is allowed to do. This proposal is one that will help people with nonconforming uses while cities encourage the legislature to clean up the language. Peterson agreed.

Lehman asked to what properties the amendment would apply. He said that grandfathered properties are conforming. Peterson corrected him. Grandfathered properties are legal nonconforming uses and the proposed ordinance amendment would apply. That is the definition of a legal nonconforming use, that they predated an ordinance change which made the property legally nonconforming. Lehman now agreed that the proposal would affect a lot of properties. He was comfortable with staff's recommendation.

Chair Cheleen felt it makes sense to allow an improvement if it would not increase the reason for the nonconformity.

Sjeklocha asked if staff had thoughts in regard to the comprehensive guide plan. Her guess is that would come in time. Gordon said that the proposal would not make it harder to achieve the goals of the comprehensive guide plan. Peterson provided that the planned unit development (PUD) is a tool that can be used to get at some of the redevelopment areas and village centers. The comprehensive plan's goals can still be achieved, but PUDs may be used more frequently than previously.

A. Thomas suggested that legal and illegal nonconforming uses be defined on the city's website to prevent confusion.

Chair Cheleen asked if commissioners provided enough feedback. Peterson asked if commissioners would be comfortable with the way the procedures would be structured to allow 5 votes for approval of a variance and 4 votes for approval of an expansion permit. A. Thomas asked for the rationale. Peterson stated that since a variance requires a higher standard that it should be more difficult to approve and require more votes. An expansion permit is granted more flexibility and, therefore, does not need to be as high a standard in terms of the number of votes to pass a motion.

Lehman noted that the commission needs five votes to pass action for a final item as opposed to four votes to pass a motion making a recommendation to the city council. Peterson noted the five-vote requirement for the city council to overturn a final action made by the planning commission and that site plan approvals only require four votes for the planning commission to pass a motion for final approval.

Sjeklocha asked if five of the seven commissioners would be present, then how many votes would it take. Peterson responded that the number of necessary votes to pass a motion changes if there are vacancies, but not if there are only absences.

Chair Cheleen agreed with four votes because the situation would not be made worse, it would allow continuance of what is there. In his opinion, four votes would be enough.

Ms. Malm-Hossfeld thought the new process would give more flexibility, but the standard for granting an expansion permit now seems much easier. A variance

had to have an undue hardship and unique circumstances. The test for granting the expansion permit is if the request is reasonable and not detrimental to the surrounding neighborhood. A variance provided a hard hoop to jump through, but the expansion permit takes away the ability to oppose it strongly by neighbors.

Peterson explained that the proposal's intent is to put into the ordinance the standard that existed for 20 years for variances under the court of appeals' decision. The tests that the courts were using at the time would apply. They are less than what the state supreme court found is needed for a variance, but all of the criteria is the same. There needs to be reasonable use of the property, functional and aesthetic justifications, and other factors need to be considered including off street parking, off-site impacts, appearance, stability of the neighborhood, etc. The standards also include that the property cannot be common to other property (must be unique); the proposal cannot be done solely for economic considerations; and it cannot adversely affect or alter the characteristic of the neighborhood. The city is not diluting at all what the court of appeals stated the standard was; the city is adopting those standards.

Lehman asked that "neighbors' rights" be explained. Peterson stated that neighbors have the right to speak at public hearings and the right to sue if they disagree with the city's action.

***Lehman moved, second by Magney, to recommend that the city council adopt the ordinance on pages A1–A8 of the staff report which amends City Codes § 300.29 and § 710.005 regarding expansion of non-conforming uses with the modification provided in the change memo dated August 5, 2010.***

***Sjeklocha, A. Thomas, Daeges, Lehman, Magney, and Cheleen voted yes. Adams was absent. Motion carried.***

The item is tentatively scheduled to be reviewed by the city council August 16, 2010.

## 9. ADJOURNMENT

***A. Thomas moved, second by Daeges, to adjourn the meeting at 9:05 p.m.  
Motion carried unanimously.***

By: \_\_\_\_\_  
Lois T. Mason  
Planning Secretary