

## **BOARD OF ZONING APPEALS**

Meeting Minutes of **June 5, 2008 –6:30 p.m.**

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Members present: Bowman, Lowe, Blaufuss, Lane, Carpenter, von Tersch, Kimball  
Staff present: Patterson, Parker, Miller

### **ITEM NO. 1            COMMUNICATIONS**

Paul Patterson provided the Board a copy of communications received on June 4, 2008, from Mr. Ronald Schneider, 900 Massachusetts street, regarding University Park Planned Residential Development at 1301 Iowa Street.

von Tersch stated she received the same communications from Mr. Ronald Schneider, 900 Massachusetts street, regarding University Park Planned Residential Development at 1301 Iowa Street.

No agenda items deferred.

### **ITEM NO. 2            MINUTES**

#### **ACTION TAKEN**

Motioned by Lane seconded by Lowe to approve the May 1, 2008 Board of Zoning Appeals minutes.

Motion carried unanimously, 7-0.

### **ITEM NO. 3            PENNY'S CONCRETE; 800 EAST 8<sup>TH</sup> STREET [PGP]**

**B-04-06-08:** A request for a variance as provided in Section 20-1309 of the Land Development Code in the Code of the City of Lawrence, Kansas, 2008 edition. The request is from the provisions in Article 12, Section 20-1204(e)(1)(viii)(a) of the City Code as it pertains to storage of materials and equipment in the regulatory floodplain. The request is specifically asking to allow the storage of fuel within a concrete walled containment area located in the 100-year flood hazard area of the Kansas River. The subject property is Penny's Concrete located at 800 E. 8th Street. A legal description of the property is available for inspection in the Planning Office. Submitted by John E. Selk, Landplan Engineering, for the property owners of record, VAN, LLC.

#### **STAFF PRESENTATION**

Mr. Paul Patterson presented the item.

Carpenter asked if the project at 800 east 8<sup>th</sup> street was purely an economic issue.

Mr. Patterson stated the applicant would address Carpenters question.

#### **APPLICANT PRESENTATION**

Mr. John Selk stated the applicant's current fuel storage tank was functionally not good for the type of traffic in the area. He said the applicant would like to add a new fuel storage tank that was adequate and would serve access to the trucks. He said the new storage tank would line up with the entrance of east eighth street. Mr. Selk stated the applicant did not know a building permit was needed and they wanted to increase the safety by building a concrete containment vault for the fuel storage tank. He said Staff had determined the project was subject to site plan approval. Mr. Selk stated the project was on the edge of the flood plain and there was no effect on the base flood plain elevation.

David Hoover, President of Penny's Concrete stated he had been associated with the property since 1979 and water had never been to the elevation of the tank. He said over time the decision was made to eliminate the storage facilities that stored fuel. Mr. Hoover stated the event of fueling the trucks occurred one time a day and the reason for upgrading and relocating the fuel storage tank was for safety, security and environmental reasons. He said there would be a passageway that would allow trucks to get by on each side of the fuel storage tank. He said the fuel storage tank was computer operated and automatically shut off at 90% capacity. Mr. Hoover stated there were safety features and the tank was under camera surveillance.

Lane asked if the containment was placed on a concrete slab.

Mr. Hoover stated there was concrete paving, a slab, and a three foot high retaining wall.

von Tersch asked if the containment area was built without a building permit being issued.

Mr. Hoover stated a building permit was needed to place the tanks inside the concrete storage.

Blaufuss asked if the tanks were on the site at the present time.

Mr. Hoover stated the tanks had been eliminated. He said there was one 1000 gallon tank and it was designed by a registered engineer. Mr. Hoover stated the tank met all of the Environmental Protection Agency's regulations.

Blaufuss asked Mr. Hoover if the permanent tank would be larger than the current tank.

Mr. Hoover stated the permanent tank would be larger and safer. He said the property owners were totally revamping all of the fuel storage.

Lowe asked Mr. Hoover if the Kansas Department of Health and Environment would be involved with the removal of the storage tanks.

Mr. Hoover stated the Kansas Department of Health and Environment investigated the removal. He said all of the storage tanks were registered with the Environmental Protection Agency.

Carpenter asked Mr. Hoover if the Kansas Department of Health and Environment and the Environmental Protection Agency approved the new fuel storage tank.

Mr. Hoover stated the Environmental Protection Agency and the local fire marshal would perform random inspections at the site.

#### **PUBLIC COMMENT**

No one from the public spoke to this item.

#### **BOARD DISCUSSION**

Lane asked Staff if the City Stormwater Engineer had reviewed the project.

Patterson stated Ms. Amy Miller, Long-Range Planner, and the City Stormwater Engineer had reviewed the project.

Carpenter asked if the criteria were different for hardship under the floodplain regulations than the criteria for the regular zoning codes.

Patterson stated the definition was the same.

von Tersch said there should be consideration that half of the property was in the flood plain.

Lowe asked Staff what a local flood plain permit would consist of.

Patterson stated if a property touched a 100 year flood plain a Flood Plain Development Permit would be required.

#### **ACTION TAKEN**

Motioned by Lowe, seconded by Kimball, to approve the variance for 800 East 8<sup>th</sup> street based upon Staff's recommendation and based on the findings of fact presented in the body of the staff report with one condition of approval of a local flood plain development permit.

Motion carried unanimously, 7-0

#### **ITEM NO. 4 APPEAL FROM ADMINISTRATIVE DECISION; UNIVERSITY PARK PLANNED RESIDENTIAL DEVELOPMENT, 1301 IOWA STREET [JJM/PGP]**

**B-05-08-08:** An appeal of an administrative decision as provided in Section 20-1311 of the Land Development Code in the Code of the City of Lawrence, Kansas, 2008 edition. The appeal is from the administrative decision to republish for review on the April 21, 2008 Planning Commission Agenda, or any time thereafter, the Preliminary Development Plan for University Park (PDP-02-02-08) separate from its RS7-PD District (Z-02-05-08) request. The appeal is related to a proposed new residential housing development on property at 1301 Iowa Street. The appeal was submitted by Robert W. and Elizabeth T. Lichtwardt.

#### **STAFF PRESENTATION**

Mr. John Miller, Staff Attorney, stated notice of the current hearing was provided in compliance with the code. He gave an overview of the issues, what the current code stated and asked the Board of Zoning Appeals to direct Staff on how to proceed and prepare findings for the Board to approve. Mr. Miller asked the Board to provide Staff with any emails they had received regarding the project. He said the issue was limited and the Board of Zoning Appeals should not re-hear merits of the Zoning issue or the Preliminary Development Plan that would be heard by the City Commission on June 10, 2008. He said on February 20, 2008, Mr. Allen Belot, on behalf of Mount Oread Development LLC, submitted a rezoning request for 9.27 acres from RS-7 to RS-7 plan development overlay and an application for a Preliminary Development Plan. Mr. Miller stated on March 2, 2008 public notice was published in the Lawrence Journal World regarding the Monday, March 24, 2008 Planning Commission meeting for rezoning University Park; Z-02-05-08, and a Preliminary Development Plan for University Park; PDP-02-02-08. Mr. Miller stated on March 24, 2008 the Planning Commission held a public hearing for a rezoning, item 4a, and a Preliminary Development Plan, item 4b. He said the Planning Commission recommended approval of the rezoning with a vote of 7-0 and deferred item 4b with a vote of 5-2, to the April 21, 2008 Planning Commission meeting. He said item 4b was deferred to allow the developer and the neighborhood to discuss remaining issues. Mr. Miller stated on March 30<sup>th</sup>, 2008 the Lawrence Journal World published the agenda for the April 21, 2008 Planning Commission meeting which included the Preliminary Development Plan for University Park. He said on April 8, 2008 the applicants filed an application to appeal the administrative decision to republish the revised Preliminary Development Plan, which was deferred from the April 21, 2008 Planning Commission meeting at Staffs request. Mr. Miller stated on April 27, 2008 the Lawrence Journal World published the agenda for the May 19, 2008 Planning Commission meeting which included the Preliminary Development Plan for University Park. He said on May 19, 2008 the Planning Commission held another public meeting for the deferred University Park Preliminary Development Plan and recommended approval 8-0-1. Mr. Miller stated the Zoning Map Amendment and the Preliminary Development Plan would be presented June 10<sup>th</sup> 2008 to the City Commission. He said the application was submitted on February 20<sup>th</sup>, 2008 and Staff told the applicant that the item would not be presented to the

City Commission until the Planning Commission made a recommendation on the Preliminary Development Plan and both items would then be sent to the City Commission as required by code. Mr. Miller stated the power and authority of the Board of Zoning Appeals was pursuant to K.S.A. 12-759 and the authority granted under the Development Code Section 20-1402. He said the Planning Commission was not an administrative official for the purpose of the Development Code and the Board of Zoning Appeals had no jurisdiction to consider an appeal from any action, determination, or failure to act by the Planning Commission. He said the request for the appeal was outside the jurisdiction of the Board of Zoning Appeals.

Lane asked if the code required the rezoning request be reheard.

Mr. Miller stated the code did not allow the republication of the decision of the Planning Commission regarding the rezoning. He said the Planning Commission made the decision on March 24<sup>th</sup>, 2008. Mr. Miller stated the property owners surrounding the project filed a protest petition so any decision by the governing body would require a majority vote of the City Commission at that time.

Carpenter asked if there was a valid protest petition for the rezoning decision.

Mr. Miller stated there was a valid protest petition for the rezoning decision.

von Tersch asked if the Planning Commission made an administrative decision when it had been decided not to keep the public hearing open.

Lane stated a decision made by the Planning Commission would not be an administrative decision.

Carpenter asked Staff if there were further issues the Board of Zoning Appeals should consider.

Mr. Miller stated there was a jurisdiction issue and the standard of review of the Board of Zoning Appeals over the administrative officials decision. Mr. Miller stated the issue lacked justiciability and under the regulations the Board of Zoning Appeals could not grant the requested relief. He said the approval criteria under 20-1311g basically stated the Board of Zoning Appeals had to find substantial factual evidence that the administrative official had made an error. He said the claim was regarding the republication and stated the planning director had to republish the item once it was deferred and set for a future public hearing date.

Blaufuss asked who republished the item.

Mr. Miller stated the Planning Staff republished the item.

Carpenter stated the applicant should be heard to determine if the Board of Zoning Appeals had jurisdiction.

### **APPLICANT PRESENTATION**

Ronald Schneider stated he and Mr. Miller had discussed the issue and had not agreed. He said the item did not need republished. He said the Planning Commission continued the Zoning Amendment and waited for the Preliminary Development Plan to be reviewed additionally. He said the initial publication was still valid and the Planning Commission had the authority to continue the case and there was no requirement for further publication. Mr. Schneider read section 20-1304 that stated there had to be a concurrent application. He said the publication separated the Zoning from the Preliminary Development Plan which was improper. Mr. Schneider stated the code was clear and the administrative decision to publish a separate hearing on the Preliminary Development Plan was a mistake and it was appealable. Mr. Schneider stated the administrator should have realized that the original zoning decision was not concluded but actually held as a continuance and the two should have been held together. He said there was no requirement for a new publication and the separation was the error.

Blaufuss asked Mr. Schneider what remedy he was seeking by filing the appeal.

Mr. Schneider said the decision by the Planning Commission to ultimately hear the matters separately should be set aside and the Planning Commission should be directed to hear the matters together and the publication notice given accordingly. Mr. Schneider stated once zoning amendments were made they were far more permanent than a Preliminary Development Plan.

Carpenter asked Mr. Schneider what the Board of Zoning Appeals had the authority to do if they found they had jurisdiction over the matter.

Mr. Schneider stated there was an administrative error and he wanted the Board to make the finding and direct the item be reconsidered with proper new publication holding both the Zoning and the Preliminary Development Plan, as required by the code, to be concurrently published, concurrently heard and concurrently decided.

Lane asked Mr. Schneider if the Planning Commission had made an error by passing one issue and not the other issue.

Mr. Schneider stated his client was appealing the formal separation that occurred with the publication.

Lane asked Mr. Schneider if he was referring to the second publication.

Mr. Schneider stated he was referring to the second publication.

Carpenter said the items were almost always listed as separate agenda items.

Mr. Schneider stated Site Plans were listed as separate agenda items and not Preliminary Development overlays.

Carpenter asked Mr. Schneider if the original agenda that separated the rezoning request from the overlay plan was in error.

Mr. Schneider said during the Planning Commission deliberation the Commission made the decision to separate the two items.

Carpenter asked if the problem was with the republication.

Lane stated both the Rezoning and the Preliminary Development Plan were applied for concurrently and were presented to the Planning Commission concurrently. He said the Planning Commission voted on one issue and the other was deferred which separated the two issues.

Mr. Schneider asked if the Planning Commission minutes reflected the Zoning matter was continued. He said the Preliminary Development Plan was deferred for one month and there was a continuance so there did not need to be a new publication.

Lane asked Mr. Schneider what harm was done by republishing the item.

Mr. Schneider stated when the item was republished it put in motion the formal separation of the Zoning and the Preliminary Development Plan. He said when the two processes were separated it took away the mandatory Conditional Use required on Zoning and just dealt with the Preliminary Development Plan which imposed conditions if they were not on the prior zoning matter.

Blaufuss asked Mr. Schneider if his definition of 'processed' meant 'to completion'.

Mr. Schneider stated the definition of processed was to completion. He said he was arguing the fact the zoning amendment required a use restriction. He said the use restriction should have been placed on the zoning amendment that made limitation to a single family, detached dwelling on its own lot, and fronted on a dedicated public street. He said the definition should be the same as the definition of 'family' currently in the Land Development Code as of May 19<sup>th</sup> 2008. He said the Planning Commission did not put it as a condition of Zoning but they put it as a condition of the Preliminary Development Plan.

Blaufuss asked Mr. Schneider how the Board of Zoning Appeals would tell the Planning Commission to rehear the issue if they did not have jurisdiction.

Mr. Schneider stated the Board of Zoning Appeals did have jurisdiction over the Planning Commission. He said the appeal process was meaningless if there was no remedy for an error.

Lane asked Mr. Miller if he had anything to add to Mr. Schneider's statement.

Mr. Miller stated he would like to respond to the jurisdiction issue.

Blaufuss asked Mr. Miller if 'processed' under the statute meant 'to completion'.

Mr. Miller stated concurrent process occurred and there was no case or controversy. Mr. Miller stated Planning Staff kept the process concurrent and there was no error. He said the item was on the City Commission agenda on June 10<sup>th</sup>, 2008, and the items were being processed concurrently in accordance with the Development Code. He stated republication of items that required public notice was now being used to grant jurisdiction to a body to make review of an issue that were Planning Commission and City Commission issues. He said republication in a community that required public notice is now being used to grant jurisdiction to the Board of Zoning Appeals to interfere with the Planning Commission process.

Carpenter stated the applicant believed the rezoning was separated from the plan. He said it was possible the City Commission could rezone the area. He asked if the Board of Zoning Appeals was the proper body to make a decision on the issue.

Mr. Miller stated the Board of Zoning Appeals could not provide relief for the item. He said there were other legal remedies to address the issue.

von Tersch asked what would happen if the Board of Zoning Appeals determined they did have jurisdiction over the issue because of an administrative error.

Mr. Miller stated the applicant was asking to interrupt the process which had not been finished and the last phase would be June 10<sup>th</sup>, 2008 at the City Commission meeting.

Carpenter asked if the Board of Zoning Appeals decided the body does have jurisdiction would it then go to District Court.

Mr. Miller stated modification to the code would be looked at and also the City of Lawrence could bring civil action and appeal the decisions of the Board of Zoning appeals in District Court. He said members of the public, neighborhood associations and the applicant could also bring civil action and appeal the decisions of the Board of Zoning appeals in District Court.

Lane asked what the next step would be if the Board of Zoning Appeals decided they had jurisdiction and a City Administrator had made an error by republishing the item.

Mr. Miller stated if the Board of Zoning Appeals made the decision a City Administrator made an error the applicant would go to the City Commission meeting June 10<sup>th</sup>, 2008 and make the claim the City Commission could not consider the items based on the Board of Zoning Appeals decision.

Blaufuss asked if the City Commission would send the issue back to the Planning Commission.

Mr. Miller stated the City Commission had the authority and was the decision making body.

Blaufuss asked if an appeal of an error made by the Planning Commission would go to the City Commission.

Mr. Miller stated an error made by the Planning Commission would be litigated in court.

Blaufuss stated an improper separation of the items would be remedied by hearing the items at the City Commission level on June 10<sup>th</sup>, 2008.

Mr. Miller stated there were other remedies available to the applicant.

Lane stated the issue was not a zoning issue. He asked the Board of Zoning Appeals if they felt they had jurisdiction.

Lowe said he did not feel the Board of Zoning Appeals had jurisdiction over the Planning Commission.

von Tersch said the Board of Zoning Appeals did have jurisdiction because the minutes of the Planning Commission meeting stated the Preliminary Development Plan was deferred for one month to allow Staff and neighborhood groups to meet and discuss issues. She said by republishing and starting over with the issue the Planning Commission voted to defer the item and not have it separated from the discussion for the rezoning. She said the fact that it was republished was the issue and that was the administrative error.

Bowman said he did not believe the Board of Zoning Appeals had jurisdiction over the Planning Commission.

von Tersch said it was not the Planning Commission that made the error it was a staff member. She said the item did not need to be republished if it was deferred.

Bowman stated the Planning Commission made the decision to defer the item.

Blaufuss asked how the applicant was harmed by republishing the item.

Carpenter stated the Board did have jurisdiction to find there was an administrative error by the City.

Bowman said the Board of Zoning Appeals did not have jurisdiction over the Planning Commission if there was or was not an error.

Mr. Miller stated the Planning Commission was not an administrative official for the purpose of the code and the Board of Zoning Appeals had no jurisdiction over the Planning Commission.

Bowman said the Board of Zoning Appeals could not make a decision without finding they had jurisdiction to do so.

Blaufuss stated the Board of Zoning Appeals could find there was no case or controversy because the item was being heard concurrently.

Bowman stated the opinion of the Board of Zoning Appeals is irrelevant if there was no jurisdiction.

Carpenter stated if the Board of Zoning Appeals had no jurisdiction over the Planning Commission the item should not be discussed.

#### **ACTION TAKEN**

Motioned by Carpenter, seconded by von Tersch, finding the Board of Zoning Appeals has jurisdiction to decide if the City Administration was in error by republishing the Preliminary Development Plan.

Motion carried, 5-2

#### **PUBLIC COMMENT**

Allen Belot stated he had attended the Planning Commission meeting and Mr. Schneider was not present. He said there was over three hours of discussion over both issues together. He said the Zoning and the Preliminary Development plan go together and they can not be discussed separately. Mr. Belot said the issues were voted on separately because one was an amendment to the zoning map and the other was a preliminary plat, but they were discussed together. Mr. Belot stated no one was left out of the discussion process and no one was left out of the public hearing of conditioning the zoning before it was voted on. He said the zoning was voted on, the Preliminary Development Plan was discussed and the Planning Commission decided to put the Preliminary Development Plan on hold until there was more discussion with the neighbors. He said everyone had left the meeting knowing the two issues were still together and nothing would go forward to the City Commission. He said the Planning Commission makes the recommendation and the City Commission takes action. Mr. Belot stated anyone who attended the meeting on the night of March 24<sup>th</sup>, 2008 knew the items were not separated. He said the reason the City Commission heard the Preliminary Development Plan first is because if the Preliminary Development Plan did not get passed the zoning would not be acted upon. He said if both issues were passed together and nothing happened there are safe guards in the zoning ordinance that do not allow the issues to go on forever. He said the ordinance states the plat has to be filed and the Final Development Plan has to be filed, each one can be renewed once and then they die.

Mr. Schneider stated Staff had made the incorrect findings of fact. He said the error was made when the public was given notice that the Preliminary Development Plan would be heard and not in conjunction with the rezoning. He said the two were inseparable and concurrent.

#### **BOARD DISCUSSION**

Carpenter stated the Development Code was beyond anything the Board of Zoning Appeals could do. He said City Staff had no leeway when agendas are published. He stated City Administration had not made an error republishing the Preliminary Development Plan.

#### **ACTION TAKEN**

Motioned by Carpenter, seconded by Blaufuss, finding the City Administration made no error republishing the agenda as presented to them by the Planning Commission.

Motion carried unanimously, 7-0

#### **ITEM NO. 5**

#### **MISCELLANEOUS**

- a) Staff stated the July 2008 Board of Zoning Appeals meeting will be held on July 10<sup>th</sup>, 2008.

#### **ACTION TAKEN**

Motioned by Lane, seconded by Blaufuss, to adjourn the Board of Zoning Appeals meeting.

Motion carried unanimously, 7-0

**ADJOURN – 8:40p.m.**

Official minutes are on file in the Planning Department office.