

May 13, 2015

Council President Russ Stark
City of St. Paul
320-C City Hall
15 Kellogg Blvd., West
Saint Paul, MN 55102

Re: Shepard Development LLC (1475 Davern Street) Variance Appeal

Dear Council President Stark:

This firm represents Friends of Shepard Davern, LLC (“FSD”) with regard to the appeal of the height variance granted to the proposed mixed use development located at 1475 Davern Street (the “Property”) in the City of St. Paul (the “City”). FSD is an organization that consists of residents and property owners of the Shepard Davern Area, including residents of Highland Pointe Condominiums. On April 24, 2015, the City Planning Commission approved the land use applications by the developer of the Property, Shepard Development LLC (the “Developer”), for site plan review and a variance to construct a mixed use building (the “Project”) at a height of 73.5 feet, which is 33.5 feet taller than the height permitted by the City Code. On May 4, 2015, the Friends of the Mississippi River appealed the Planning Commission’s decision. On behalf of FSD, we respectfully request that the City Council grant the appeal and deny the Developer’s applications on the following legal basis.

1. Legal Standard for Variances

Under Minnesota law, a variance may be approved only when it is “in harmony with the general purpose and intent of the ordinance and when the ordinances are consistent with the comprehensive plan.” Minn. Stat. § 462.357, subd. 6(2). A variance request must be predicated on “practical difficulties” in meeting the municipality’s ordinance standards. This can be shown by demonstrating that: 1) the applicant proposes to use the subject property in a reasonable manner not permitted by the zoning ordinance; 2) the condition giving rise to the variance is due to a unique circumstance relating to the subject property; and, 3) if granted, the variance will not alter the essential character of the locality. Economic considerations alone do not constitute practical difficulties. *Id.*

When reviewing a municipality’s zoning decision, the courts will reverse a zoning authority’s decision to deny a variance and issue a permit if the decision is arbitrary and capricious. *In re Livingood*, 594 N.W.2d 889, 895 (Minn. 1999). A decision is arbitrary and capricious where it is based on insufficient evidence or arising from a failure of the zoning authority to apply relevant provisions of the applicable law. *In re Decision of County of Otter Tail Bd. of Adjustment*, 754

N.W.2d 323, 332 (Minn. 2008). Given the basis for the approval of the variance as described in the City's staff report, not only was the variance decision inconsistent with the City's Comprehensive Plan (the "Comp Plan"), but it failed to satisfy the required findings under Minnesota law.

2. The Proposed Height is Inconsistent with the Comprehensive Plan and is Therefore Inconsistent with Minnesota Law.

The staff report provides only one reference to height guidance in the Comp Plan, which was found in the Shepard-Davern Area Plan and calls for "3-5 story mixed use development." The staff report concludes that, notwithstanding the fact that the 6-story Project is a story taller than the Comp Plan guidance, it is "similar in height" to certain buildings along Shepard Road, so it must therefore be consistent with the Comp Plan. This is a non sequitur, in light of the fact that, according to the LIDAR data provided by the National Park Service, the tallest nearby buildings on Shepard road are 13.5 to 18.5 feet shorter than the proposed Project height. Moreover, the properties presumably referenced by the Staff Report are zoned either RM2 or RM3 Districts, which is irrelevant and inapplicable to the T3 zoned Property. There are additional inconsistencies between the approved height and the Comp Plan, many of which have been cited on the record and will not be reproduced here for the purposes of brevity.

3. The Developer Has Not Shown that Practical Difficulties Exist Under Minnesota Law.

The applicant has failed to demonstrate practical difficulties under Minnesota Statutes Section 462.357, subd. 6(2). The proposed height of the Property is not a reasonable height in light of the location and surrounding environment or the applicable policy. The condition necessitating the variance is shallow bedrock, which is not unique to the subject Property; it is a condition of all properties along Shepard Road and the bluff. The staff report acknowledges that many other structures on Shepard Road are built on shallow bedrock. The variance will also alter the essential character of the locality by disrupting view sheds on both sides of the river with a height that exceeds the highest buildings in the vicinity by 13.5 to 18.5 feet. Additionally, it is worth noting that the adjacent parking garage, which is also referenced in the staff report to justify the height of the Project, is 29.5 feet shorter than the proposed Project height, and the new height will dramatically alter the views of the river. Moreover, it is apparent that the primary driver of this application is to maximize rental units and increase revenues, which cannot, under the law, constitute a practical difficulty.

4. The Project Should be Treated as a Multi-Family Residential Structure.

The Developer has only proposed 1,200 square feet of retail in the 218,000-square foot Project. This very limited amount of retail accounts for less than 1% of the entire building, and can hardly be classified as "mixed use." It seems apparent that the intent of characterizing the Project as a "mixed use" building was to increase the maximum allowed height in the T3 District from 45 feet for multi-family residential buildings to 55 feet. While the Project has been evaluated and approved as a mixed-use development, the retail is *de minimis* and too trivial to warrant the classification of the Project as mixed-use development.

5. The Variance Ignores More Than 1.5 Years of Community Work to Adopt the Current T3 Zoning of the Property.

The Shepard Davern Task Force worked to adopt the new Traditional Zoning District for this area over a period of 1.5 years. The City Council finalized the recommendation and adoption of this zoning only 3 months ago. In determining these zoning classifications, the Council considered every constituency within the Shepard Davern neighborhood, including the possible development of the Property. This is the first proposal for new construction since the new zoning requirements have been adopted; approval of the variance ignores the height restrictions that were just recently adopted. Allowing this height increase establishes a precedent that the height requirements offer little protection to the neighborhood and will discourage future neighborhood group participation in similar planning processes.

FSD urges the City Council to grant the appeal and deny the height variance for the Project to allow a 73.5-foot tall building. FSD would support a height of 55 feet for the Project, which is the maximum allowed in the T3 District, but any additional height is unjustified. The Developer has not demonstrated the required practical difficulties under Minnesota law and the decision is inconsistent with the Shepard-Davern Area Plan. Consequently, the approved variance is inconsistent with Minnesota law and likely would be found arbitrary and capricious by a reviewing court.

Thank you for considering this letter of behalf of FSD in support of the appeal initiated by Friends of the Mississippi River challenging the building height variance for the Project.

Sincerely,



Peter J. Coyle, for
LARKIN HOFFMAN

Cc: Friends of Shepard Davern, LLC
Councilmember Dai Thao
Councilmember Dave Thune
Councilmember Chris Tolbert
Councilmember Amy Brendmoen
Councilmember Dan Bostrom
Councilmember Bill Finney