

January 30, 2018

By US Mail and email

St. Paul City Council
310 City Hall
15 Kellogg Boulevard West
Saint Paul, MN 55102
Phone: 651-266-6556

Re: Response to Appeal of Planning Commission Decision
1973-1979 Marshall Avenue; Marshall & Moore Apartments
PED Zoning File #17-206-385

Dear City Council Members:

Please accept this letter on behalf of MCR Property Holdings, LLC, the Applicant in Zoning File #17-206-385 (1) supporting the unanimous decision of the Planning Commission, and the recommendations of the Zoning Committee and Planning staff approving the Site Plan Review application for Marshall & Moore Apartments (the "**Application**") and (2) opposing the appeal of that same Planning Commission decision by appellants identifying themselves as "Historic Merriam Park Neighbors" (the "**Appellants**").

The Planning Commission, Zoning Committee, and Planning Staff have each properly exercised its duties and its judgment with respect to procedure, interpretation of the Zoning Code, and its determination that the Application complies with the requirements of the Zoning Code and is consistent with applicable provisions of the Comprehensive Plan. There is therefore no basis for the Appeal.

Despite the fact that the Planning Staff Report review was thorough and supports its recommendation of Site Plan Review approval, many of Appellant's stated grounds for appeal attack the Planning Staff determination that the Application complies with the objective, technical requirements of the Zoning Code. Under separate cover, Applicant's architect, Pope Associates, and its civil engineering consultant are submitting their detailed technical response to Appellant's baseless claims about the inadequacy of the design.

This letter addresses the lack of legal basis for the 13 specific grounds for appeal that the Appellant raised, and the City Council should dismiss, as follows:

A. Planning Staff properly determined that the October 18, 2017 Application was complete and properly allowed the Applicant to modify its application materials after submittal in response to comments by Planning Staff after initial review. Items 1 and 2 Appellant's January 19, 2018 letter in support of its appeal (the "**Appeal Letter**") wrongly asserts that the October 18 Application was incomplete when submitted, and was not made complete until after October 25, 2017, the effective date of Ordinance 17-54, which imposed a moratorium on development on Marshall Avenue between Wilder and Wheeler (including the Marshall & Moore project site). Pursuant to authority delegated by the Planning Commission, the Planning Staff determined that the Applicant prepared and submitted its Application for Site Plan Review in accordance with the general requirements of Code Section 61.300 and the specific requirements of Section 61.402, and accepted the Application as complete on October 18, 2017, seven days before the City Council adopted Ordinance 17-54.

The fact that the Applicant revised the site plan and other design drawings after the Planning Staff accepted the Application as complete is not evidence that the Application was not complete. In fact, the Site Plan Review Ordinance and rules expect the Applicant to make changes to its site plan submittal after the Planning Staff and Planning Commission review the site plan. The Site Plan Review process, as described in the Saint Paul Department of Safety and Inspections "Site Plan Review" web page, requires the applicant to review the site plan with Planning Staff and other City department representatives. After that review meeting, if staff does not reject or approve the site plan as submitted, the applicant is expected to revise the site in response to staff comments. According to the web page:

At the end of the meeting, staff either approves the plan, denies it or approves it subject to the applicant making revisions. If revisions are required, the applicant may resubmit a revised plan.

According to the more detailed "Review Process" linked to the Department of Safety and Inspections web page, steps 4, 5, and 6 of the Site Plan Review process are a staff meeting, staff comments, and revision to site plan in response to the staff comments:

4. APPLICANT MEETS WITH STAFF 2 TO 3 WEEKS AFTER SITE PLAN IS SUBMITTED.

* * *

5. STAFF EMAILS APPLICANT A SUMMARY OF THE SITE PLAN MEETING.

* * *

6. APPLICANT SUBMITS REVISED SITE PLAN.

When the Planning Staff determines that the site plan should be reviewed by the Planning Commission, as was the case for the Marshall and Moore project, Planning Staff schedules the Planning Commission meeting after Planning Staff determines the revised site plan is acceptable. Even after the Planning Commission reviews the site plan, Code Section 61.402 (d) provides the applicant up to six (6) more months to revise and resubmit its site plan in response to Planning Commission comments.

The Applicant met with a Site Plan Review committee consisting of St. Paul Planners Tia Anderson and Larry Zangs and representatives of several other City of St. Paul departments, including Parks and Recreation and Public Works, Ramsey County and Metro Transit on November 7, 2017, one day short of 3 weeks after Applicant submitted the completed Application. Staff provided Applicant with 12 pages of comments, including required and suggested revisions, on November 9, 2017. None of those comments required Applicant to provide information the Applicant was required to but failed to submit with its original Application.

Applicant revised its site plan and other drawings, in consultation with Planning Staff, and submitted its revised plans on December 28, 2017. Applicant submitted, and the Planning Staff accepted, its revised site plan and other drawings in accordance with the Planning Commission rules and policies. Applicant's December 28, 2017 submittal was a revision of the completed October 18, 2017 submittal, not a new application and not evidence that the October 18, 2017 Application was incomplete.

B. The Planning Commission, Zoning Committee, and Planning Staff properly made the 11 findings Zoning Code Section 61.402(c) require as a condition of Site Plan Review Approval.

1. The Planning Commission properly relied on the technical expertise of its Planning Staff. Items 3 through 7 of the Appeal Letter make unfounded arguments about compliance with the physical requirements of the Code, challenging the competence and judgment of the Applicant's licensed architects and engineers, the Planning Staff and the Planning Commission. Specifically, Appellant challenges the Planning Commission's determinations that (1) the parking structure is underground and therefore the project is eligible for a height and density bonus, (2) the building height is within the maximum allowed after the bonus, (3) the project complies with storm water management requirements, (4) the project complies with accessibility requirements, and (5) the drives and parking areas comply with the zoning ordinance. Further, although the scope of Site Plan Review is limited to determining whether the proposed project is consistent with the Zoning Code and the Comprehensive Plan, the Appellant challenges whether the design could even be built.

With respect to the Appellant's assertions in Items 5 through 7 of the Appeal Letter that the design does not comply with the Zoning Code, the Planning Commission and the Applicant are entitled to rely on the Planning Staff to interpret the Zoning Code. The Zoning Code requirements at issue here are not ambiguous and there is no opportunity for the exercise of judgment or discretion. The Zoning Code requires the Applicant to determine building height by reference to existing grade. The existing grade is what it is and is determined by a licensed surveyor. The Zoning Code requires the Applicant to determine whether a level of a building is underground by reference to the proposed new grade. The proposed new grade is what it is and is determined by a licensed civil engineer and a licensed architect. The same is true for setbacks, accessible entries, the location of drives and garage doors, and the design of storm water facilities. The Zoning Code sets specific physical criteria for those elements, licensed design professionals are required to design to meet those criteria and the Planning Staff is charged with determining whether the design in fact meets those criteria. Because the design meets the criteria, as the Planning Staff determined and Planning Commission confirmed, there are no grounds for appeal.

2. Site Plan Review is not the place to determine whether a project can actually be built. With respect to the Appellant's assertion in Item 5 of the Appeal Letter that the project cannot be built as designed, the submittal requirements do not call for drawings that would allow for assessment of whether the project could be built, the Zoning Code does not address construction requirements, and the Zoning Code does not require the Planning Commission make findings about whether the project can be built. The site plan and other drawings demonstrate that the design meets the requirements of the Zoning Code, as the Planning Staff determined and Planning Commission confirmed. Before the Applicant proceeds with construction, the Applicant will have to obtain a building permit, which will require review by the Department of Safety and Inspections to determine that the design complies with the building code. Speculations about whether the Applicant's architects and engineers can prepare construction documents that comply with the building code are not grounds for appeal of a zoning decision.

3. The proposed site plan complies with the Zoning Code and therefore is conclusively determined to not be a nuisance and to be consistent with the Comprehensive Plan. The fact that the project complies with the Zoning Code rebuts the Appellant's assertions in Item 6 of the Appeal Letter that the completed project will create a nuisance, in item 7 that the project does not comply with the Comprehensive Plan, and in Item 8 that the project does not comply with the Union Park Community Plan. To accept Appellant's assertions in Items 6, 7, and 8, the City Council would have to find that a project that complies with strict requirements of the Zoning Code creates a nuisance and is inconsistent the Comprehensive Plan and the Union Park Community Plan.

The Minnesota Supreme Court held that a use that is permitted use in a zoning district is conclusively determined to be "consistent with the public health, safety, and general welfare and consonant with the goals of its comprehensive plan," in Chanhasen Estates Residents Association v. the City of Chanhasen, 342 N.W.2d 335 (Minn. 1984):

. . . when a city designates a specific use as permissible in a particular zone or district, the city has exercised its discretion and determined that the permitted use is consistent with the public health, safety, and general welfare and consonant with the goals of its comprehensive plan. Until the district is rezoned or the zoning ordinance is either amended or successfully challenged, that determination is conclusive.

In other words, once the City determines that a project complies with its zoning code, the City must find that the project is not a nuisance and is consistent with its comprehensive plan.

Section 60.215 of the Zoning Code defines Nuisance as "A substantial unreasonable and continuous invasion of the use and enjoyment of a property right which a reasonable person would find annoying, unpleasant, obnoxious or offensive." To find that a design that conforms with the strict requirements of the Zoning Code, without variance, is a nuisance is to find that the Zoning Code is not "consistent with the public health, safety and general welfare."

To find that a permitted use, designed in accordance with the Zoning Code is not consistent with the Comprehensive Plan and neighborhood plans adopted by the City Council would be to find that the Zoning Code does not comply with Minnesota Statutes Section 473.858 subdivision 1, which provides that a "local government unit shall not adopt any fiscal device or official control which is in conflict with its comprehensive plan"

Because the Marshall and Moore project complies with the Zoning Code, the City Council must find that the project is not a nuisance and is consistent with the Comprehensive Plan and the Union Park Community Plan.

C. The Zoning Committee did not make any errors in procedure.

Appellant does not, and could not, assert any basis for Appellant's assertions in Items 11 through 13 of the Appeal Letter that Appellant was deprived of due process by the two minute limit on presentations, inadequate consideration of written submittals, the presence of a Union Park District Council board member on the Zoning Committee. Supporters of the Applicant and Appellant were all subject to

the two minute speaking limit. Planning Commission Committees and the City Council commonly use a two minute limit to ensure efficiency and an opportunity to be heard for all who attend hearings on controversial applications. Planning Commission Committees and City Council accept written comments before hearings to provide all concerned parties an opportunity to assert their positions in a context that allows contemplation and review before the hearing. Publication of those written comments before the hearing also provides other concerned parties an opportunity to support or rebut the comments.

The Appellant and Applicant can only speculate about whether the Zoning Committee provided due consideration to written materials submitted at the hearing. Whether or not the Committee had time to review the late submittals at the hearing, the Committee findings are only advisory to the Planning Commission. The Planning Commission had more than sufficient time to review those materials before the Planning Commission unanimously accepted the Zoning Staff and Zoning Committee recommendations and approved the Site Plan for the Marshall and Moore project.

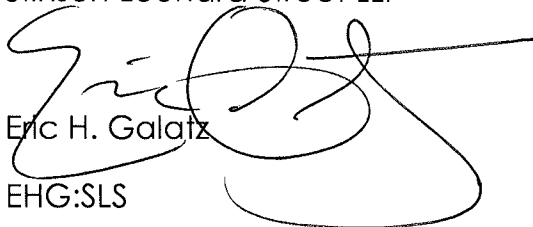
Appellant does not explain, and Applicant cannot imagine, how either party is prejudiced by the fact that Commissioner Adrian Perryman voted to approve the site plan as a Union Park District Council Member and as a Planning Commissioner. Commissioner Perryman was consistent in both votes, voted on the basis of facts before the Commissioner in each instance, and displayed no bias in either instance. The fact that the vote at the Planning Commission was unanimous suggests that it would not have made any difference if Commissioner Perryman had recused himself.

Conclusion

MCR Property Holdings, LLC, the Applicant, respectfully asks the City Council to deny the appeal, and uphold the Planning Commission unanimous decision to accept the recommendations of its Zoning Committee and Planning staff to approve the Site Plan Review Application for Marshall & Moore Apartments at 1973 – 1977 Marshall Avenue.

Sincerely,

Stinson Leonard Street LLP



Eric H. Galatz
EHG:SLS