

MINUTES OF THE MEETING OF THE BOARD OF ZONING APPEALS
CITY COUNCIL CHAMBERS, 330 CITY HALL
ST PAUL, MINNESOTA, MAY 14, 2012

PRESENT: Mmes. Maddox, Bogen, Porter and Morton; Messrs. Courtney, Ward, and Wilson of the Board of Zoning Appeals; Mr. Warner, City Attorney; Mr. Diatta, Ms. Lane, Mr. Saunders-Pearce and Ms. Crippen of the Department of Safety and Inspections.

ABSENT: None

The meeting was chaired by Joyce Maddox, Chair.

David Cossetta (#12-046263) 211 7th Street West: A variance from the storm-water runoff requirement of Section 63.319 (a) that requires storm-water runoff from parking lots to be released into the City sewer system at a controlled rate.

Mr. Saunders-Pearce showed slides of the site and reviewed the staff report with a recommendation for denial.

No correspondence was received opposing the variance request.

No correspondence was received from District 9 regarding the variance request.

Mr. Ward asked Mr. Saunders-Pearce if it was only within the City's jurisdiction to impose water management plans or are there other agencies involved, such as the Met Council or the Capitol Watershed District. Mr. Saunders-Pearce replied there are a number of agencies that administer storm-water management requirements depending on the scope of the project being proposed. As this project has been presented to the City it proposes to disturb less than 1 acre of land. When a project disturbs 1 acre of land or greater other entities become involved. A watershed Agency is often one entity that becomes involved, in the City we have several watershed agencies. The MPCA (Minnesota Pollution Control Agency) has a permit for projects that disturb 1 acre of land or greater. As this project has been presented to the City it falls below those particular thresholds. Mr. Ward asked Mr. Saunders-Pearce when the City went to the sustainability requirements that increased the control of water run-off. Mr. Saunders-Pearce replied as stated in the staff report on page 18 of the BZA (Board of Zoning Appeals), packet in the third paragraph, the date is July 1, 2010. Projects that initiated schematic design after that date fall under this policy. Mr. Ward and Mr. Saunders-Pearce discussed that the applicant and the City mutually agreed to apply the sustainable building policy requirements. The sustainable building requirements that were put into the development agreement for this project are partially due to the commitments that the City was making for financial assistance.

Mr. Courtney stated that he thought that the sustainable building requirements were being enforced only because there was a loan or money of two-hundred thousand dollars or more. Mr. Saunders-Pearce replied that is correct, that is a trigger for the sustainable building policy to apply. Mr. Courtney stated so if there were no City financial assistance being provided we would not be here. Mr. Saunders-Pearce replied correct. Mr. Courtney asked if that is what kicks in exhibit "J". Mr. Saunders-Pearce replied that exhibit "J" is part of the development agreement. Because it is part of the development agreement it has been somewhat removed from the policy itself, it is a legal commitment.

Mr. Courtney further questioned the applicant's statement that as far as storm-water run-off they would not be any worse off than if they continue as it is. Mr. Saunders-Pearce stated that is true if they were not to put in any storm-water control, at the moment the storm-water goes into the storm-water system from private properties without any controls.

Ms. Bogen asked about the discussion with the Public Works Department regarding assessing the fees. Mr. Saunders-Pearce replied that there was an inquiry whether the cost of the private property improvements, particularly the cost of storm-water management, could be assessed back to the property owner through taxes. He stated that it was determined that the City does not have the Legislative Authority to make this assessment work.

Ms. Porter asked Mr. Saunders-Pearce if during the schematic design phase whether the contractor sat down with City staff and address storm management at that time. Mr. Saunders-Pearce replied that he personally had at least six conversations with the applicant's agent and specifically with McGough Construction to talk about ways that the site could be approached to address storm-water management. He stated that he thinks at this point it is beyond schematic design. There were several meetings and the options that were proposed included putting in shallow rain water garden filtrations systems that would hold the water at the surface temporarily and then pass through a small drain into the public storm sewer system. Many of those approaches force the property owner to decide on economic priorities, using parking spaces is a critical item. Many of his suggestions were not pursued and he suspects that the economic trade offs were not desirable.

Mr. Ward asked Mr. Saunders-Pearce about his statement that if the system is designed properly it would not make much of a difference whether it is done this way or not at all. If it does not make a difference why is there a storm-water policy? And what would be the effect of large amounts of run-off, impacting the current storm sewer system. Mr. Saunders-Pearce stated that it is important to understand that there are two factors at hand. One is the variance request for the rate control which is part of the City Code. Secondly this project is bound to the development agreement which calls for enhanced storm-water management as well as meeting the basic rate control requirement. The rate control requirement is there to make sure that the storm sewer not only maintains capacity that is provided to all those that are serviced by it, but also to make sure with new projects that there is not an undue burden on the storm sewer system for drainage capacity. The storm sewer system was sized for with a particular set of assumptions for land use and having an allowable discharge rate is one critical factor to ensure that the design integrity of the sewer system is maintained. The applicant has been discharging storm-water from his property for quite some time and the rate control aspect is important in that it serves to provide equity amongst all properties that meet the criteria within the code. It is applied uniformly city wide so that the storm sewer system provides the conveyance capacity that is required but also so that there is no preferential benefits or demands attributed to private property on the public storm-water sewer system. The enhanced controls, while not part of the variance for 63.319, it is important to understand that there is a very significant improvement that would be gained through the water quality treatment. Having none in place right now allows for sediment and other pollutants to go directly to the Mississippi River. Having no storm-water management in place for this future development would result in the storm-water degradation. Basically sediment and other debris, dissolved materials go into the Mississippi River without prior treatment. Ideally there would have been an integrated system with rain water gardens that would provide multiple benefits. It would have provided rate control, as well as water quality and some of the interior landscaping required for the north lot site.

Mr. Courtney stated the letter provided by the applicant, on page 54 of the BZA packet, basically states that they have to spend 250,000 and they will not be getting any benefit from it. Mr. Saunders-Pearce stated that the submittal in the BZA packet from page 49 through 71 is not considered as part of the staff report. Mr. Courtney asked Mr. Saunders-Pearce to speak to the applicant's concern at spending \$250,000 that has no great benefit for the applicant. Mr. Saunders-Pearce stated that there were a variety of options that were discussed with the applicant's agents as to how storm-water management could be completed on site. City staff does not make decisions or tell people how to design their sites, that is up to them and their consultants, however, the path to compliance that was chosen by the applicant in this situation did not seem to fully consider all the potential avenues that were available and the applicant may not have selected the most cost effective investment of capitol funds for that site. He stated that he did not do a cost benefit analysis but he knows that there was no rigorous analysis provided back to him as the Water Resource Coordinator or to Public Works to his knowledge, that demonstrated the potential avenues that were discussed had any specific review. While the particular proposed improvement may cost \$250,000 with relatively little benefit, it was not clear that there were analysis performed on the other alternatives to understand what those costs would have been. There are other parts of their site that could have been used to provide storm-water management, however, those other portions of their site were prioritized for a different use, parking , roof top dining, things of that nature. Mr. Saunders-Pearce stated as staff we don't make decisions for the applicant or tell the applicant the best way to spend their money, that is not our role, we simply look at the plans to see if they conform to the particular requirements. There were many options that were presented to the applicant and there was no substantive engineering or economic analysis provided back to staff in response to what was discussed. Mr. Courtney stated so what Mr. Saunders-Pearce is saying is that they may be correct, but it is their plan and maybe they could have done a better job. Mr. Saunders-Pearce replied yes.

Mr. Ward and Mr. Saunders-Pearce discussed the many options that had been suggested during the numerous meetings with the McGough Construction manger and the civil engineer who were well versed in City requirements and codes as well as alternative sustainable practices. The system in place meets City's approval, however, there were a variety ways that could have been explored further that would have integrated many of the techniques to meet a number of requirements not only the storm-water management but also the interior landscaping requirements for the north lot.

The applicant **DAVID COSSETTA**, 211 7th Street West, was present, with Eric Galatz, 150 5th Street South, Attorney. Mr. Galatz stated what they are asking for is a variance from the requirements of Section 63.319(a) which requires rate control from the site. Rate control is about the speed that rain water enters the storm sewer system. He explained that the way most engineers deal with rate control is to build the parking lot like a bath tub that drains to the middle and when it rains real hard water can only flow through that hole so fast and the depth of the parking lot is built in such way that it holds the water until the sewer system is ready to accept the water. The city and the engineering principles deem it acceptable for the parkers to get their ankles wet once every 100 years. This option cost 0 dollars, it costs the same amount to build the parking lot flat as to drain it to the middle. Mr. Galatz explained that the large north parking lot on Smith Street is raised and slopes from the northeast to the southwest and the lower smaller south lot at Chestnut and 7th Street as shown in the photos the slope is easily seen. The problem that the slope creates is that the simple bath tub cannot be created to hold the water on the surface. Pervious pavers are not a reasonable alternative on a sloping site, the whole principal of pervious pavers is water sits on the pavers and soaks into the ground. If you have sloping ground the water does not sit it has no place to soak into. We were not able to make a significant dent into how much water we need to hold on site. The bottom line is we are talking about holding water and if you can't hold the water on the surface you have to hold it

underground. The choices for underground filtration are pervious pavers, where the water is soaking into the ground which works if you are in an area with sandy soil. In this case where we are on top of bedrock, the water is soaking through the ground is sitting on top of the bedrock and it has to go some place. That some place is through the porous limestone foundation of the building, both our older building and the older building to the north and east of Cossetta's, which is Maharajas. Mr. Galatz passed photos of Cossetta's limestone basement walls. Water in the ground finds its way through these limestone walls easily. We have the possibility of having the water come through a porous paver, if we had a level site which we do not have, to go down and set on the bedrock, finding its way through the fissures in the bedrock, into the fissures in our limestone walls into the basement. We thought that was a bad idea so we came up with a solution of putting in tanks. We have a 6 inch opening into the city storm sewer system and in front of that opening is a 10 foot deep 100 foot wide and 40 foot long trench in the parking lot with 4 foot diameter pipe snaking back and forth underground in the trench to hold water. Those are designed to hold 60,000 gallons of water for a short period of time, 12 hours or less in a 100 year storm. Our concern about overflow is secondary to our concern about the bigger trench this is all sitting in. We are going to cut 40,000 cubic feet of earth out of the ground and haul it away, 10,000 feet of that is bedrock. It will be broken up with large lath machines and hauled away with large loud trucks over a week or so and we will be left with this 10 foot deep, 100 foot long 40 foot wide trench under our parking lot. That trench will be filled with sand and gravel and these 4 foot diameter tanks. Our concerns are not just that those tanks will overflow and burst but also what happens with the negative space around those tanks. We are taking what was solid bedrock with some degree of fissuring and replacing it with sand and we are talking about that trench over time filling up with water and that water migrating through our limestone walls in the basement. Mr. Galatz stated that Mr. Cossetta's basement is where he is going to have food preparation/storage and it could be a very serious problem if the basement gets wet. He contended that it will get wet because it is a fissured limestone base which water will find a way through into the limestone foundation walls. Mr. Galatz stated that the development agreement on page 42-43 of the BZA packet lists out 11 undertakings that Bocce LLC/Cossetta's Inc., are going to incorporate into the project for environmental improvement. Item 7 (b) has been a problem for us since the beginning. We never did resolve things with the HRA (Housing & Redevelopment Authority), the resolution we reached with the HRA was if the City makes us do item 7(b) we will have to do it. Mr. Galatz read from Exhibit J Item 7(b): "Rate control: 1.64 cubic feet per second (cfs)/acres disturbed, or such other rate as is approved in the site plan approval process;" contending that this BZA variance request, is a part of the site plan approval process. He stated that the applicant needs to store 60,000 gallons of water and he might have made a modest dent in that number with porous pavers on the roof losing the rooftop dining and bar, we might have put a modest amount in the rain garden and lost some parking which might have brought us back to a need to store 50,000 gallon tank instead of a 60,000 tank. Once we dig that hole, blasting that rock and trucking it off, it did not make more sense to waste more money on reducing the size of those tanks once we have to put them in we might as well deal with the whole problem there. Mr. Galatz stated the applicant did sign off on this, a lot of the reason he did is because of necessity, their own construction schedule and expectations of what they would have to accept as conditions in order to go forward. Money does matter even though the variance standards state that economic considerations alone are not enough, it does not say that you have to ignore economic considerations.

Mr. Galatz stated while excavating the foundation for the new addition on the site, the filled basement that was a surface parking lot was being excavated and contaminated soil was found filling the old basement site costing \$250,000 for clean up and environmental remediation, that cost was not anticipated. We discovered in this process that the bedrock was immediately adjacent to the site and as close as 3 feet from the surface throughout most of the area we will be excavating. Because what we did take out of the site was contaminated, we do not know that we will not encounter further contamination while excavating for

the trench we are being asked to build. The best practices for this kind of issue from the PCA (Pollution Control Agency) is to leave it in place. We are being asked to dig up 40,000 cubic feet of soil and bedrock that we do not know what kind of condition it is going to be in. The other part of this is the water proofing for this site where it all slopes toward the building is not the best possible situation. The best solution for this is provide a solid membrane at the surface so water does not get down into the ground in the first place, which is what we would have with a paved parking lot. Instead we are going to provide an opening in which we are going to pour 60,000 gallons of water and we don't think that is a prudent thing to do. In the course of excavation we discovered that the limestone bedrock is fissured and we are going to cause more fissures in the course of our excavation for this trench, it is essentially a giant swimming pool next to the basement level kitchen and food preparation area. Mr. Galatz stated it is not prudent, it is not necessary and it is not what we want to do here.

Mr. Galatz read from the findings submitted for the applicant by his office, from pages 49-71 of the BZA packet. He contended for finding 1, that the applicant is not asking to be exempted from all of the storm-water management requirements; there are five subparagraphs to this and the applicant is not removing item (c) which is water quality management. The applicant won't have 60,000 gallons of water sitting for 12 hours but that system was not designed for sedimentation, there is a separate system for sedimentation. There will be a modest improvement in the rate of run-off from the site but it will not be meeting the 1.64 cfs standard without the tanks. The notion of there being a shared expense, the applicant is not creating any additional burden here, this is not virgin land that has not developed. This was a historical parking lot and building that the applicant is converting into some parking space and more building and to the extent that there will be new building there will also be rooftop collection and piping. The applicant is not doing anything to add to the burden, what he is being asked to do is to add 60,000 gallon capacity to the City's storm sewer system without any compensation. If it could be done practically, for free by just sloping the parking lot, as done on most parking lots, the applicant would do it happily but the applicant is being asked to spend \$250,000 to dig a trench that is going to create a very likely threat of water infiltration into the food preparation area.

Mr. Galatz continued for finding 2, the stated purpose is to reduce pollutants and reduce the negative impact of parking lots. The net amount of parking lot is being reduced and is being replaced with building. Water quality management devices are being installed to reduce the pollutants and improve the quality of water coming off the site. For finding 3, practical difficulties on the site itself relate to the slope of the site. Pervious pavers will not work on the site because it is not a flat site, rain gardens will not provide enough capacity to either make a difference or allow the applicant to avoid the tank. Once we have to put that tank in keeping it small does not help the applicant. Mr. Galatz contended for finding 4, that the plight is not self imposed by the applicant. What is being proposed is not just a reasonable purpose but is a purpose that the City thinks is fit to grant the applicant a \$200,000 loan assistance at favorable rates, and a component of it is a forgivable loan if the applicant provides the City with the jobs and benefits that were agreed upon a portion of the loan is forgiven over time. However, the plight was not created by the applicant it is created by ownership and development of an existing urban sloping site with an underlay of limestone bedrock.

Mr. Galatz stated that the ordinance section 63.319 incorporates by reference Minnesota Pollution Control Agency best practices and the Metropolitan Council best practices. The applicant's property for this project is just under an acre. If it was about 200 square feet larger in surface area the lot would be over an acre and would be subject to regulation by the Capitol Region Watershed District. By reason of being too small to be regulated by the Capitol Region Watershed District, the applicant was taken out of the opportunity for compliance. If this site was over 1 acre and had conditions including bedrock within 3 feet

of the surface, the best practices by the Capitol Watershed District would say not to break into the bedrock we should not try to deal with this on site, instead permission for alternative compliance should be applied for. The Capitol Watershed District's alternative compliance requirements includes doing what you can, that would include rain gardens and pervious pavers where possible and then a payment in lieu, a contribution to the Watershed District's Fund for Water Quality Improvement. Money is not the only consideration but as a significant measure of what is being asked of the applicant by the Water Resources Coordinator, the standard in the region is \$40,000 per acre. So if the Watershed District decided that compliance on site was not possible than instead they would accept a contribution to the Watershed and the contribution would be \$40,000. The applicant is being asked to spend more than six times that amount to. To put a trench next to the building that will fill up with water and flood the basement.

Ms. Porter asked Mr. Galatz what the percentage of completion is the project at today, and was there a built in contingency for unforeseen conditions or changes. Mr. Tom Hannasch, 12550 Dorchester Trail, Apple Valley, stated that the project is 60% completed. There was a significant contingency at the start of the project but finding the contaminated soils while excavating the basement for the addition, we also found a tunnel that was not anticipated, there were underground conditions that were not anticipated and they have taken up the bulk of the contingency funds at this point.

Mr. Ward and Mr. Hannasch discussed the project and his concern that a project this size did not seem to have done it's due diligence prior to starting the project. Mr. Ward questioned why more soil borings had not been done to discover the bedrock depth and conditions and why the contaminated soils were not found earlier. Mr. Galatz stated that the storm-water management has been an important issue from the beginning and the only surprise in all of this was the contaminated soil. Mr. Cossetta has owned this property for quite some time and before acquisition the due diligence was done. The contaminated soil was just a surprise. He stated that the applicant has been working with City staff on this issue from day one. He stated that a year ago they had the opportunity to put the project off and try to get this issue settled prior to signing the development agreement to get the project going. The compromise that the applicant reached with the HRA said that if he could get an exception from the City during the development process that was ok with the HRA. That was what was needed to get started, it was a risk, at a time that the applicant thought that he had a significant contingency in the project. It was either table it for an a year or more or take the risk and get started and hope that they would be able to work something out and that people would reach favorable decisions for the project. Mr. Galatz stated that it is really difficult for a developer to negotiate with the City. We had to get an application submitted to stay on schedule with our construction and to be able to present before this Board, so that we are not digging this hole in the middle of winter if that is the way this goes, while at the same time reaching out to staff to discuss it. But once that application was submitted, the door to having the discussion of alternate compliance was pretty much closed for the applicant to have that dialogue with the City. He stated that if there were a process for it, he would have withdrawn the application so he and the applicant could sit down with the city and talk about it. He stated that there are opportunities for alternate compliance. Mr. Cossetta owns a residential lot of about 5,000 square feet, the original site of Cossetta's restaurant within 2 blocks of this address if there were an opportunity to place a rain garden there and do some other improvements on the vacant lot that is a possibility. But the applicant has not had the opportunity to have that discussion. There were discussions during the design process that he was not involved in and Mr. Hannasch will address them.

Mr. Hannasch stated that when McGough originally entered into this project there had been a site plan that had been approved by the City but that turned out to have expired and that lead to the developing design. There were soil borings done although McGough had not been part of the organization when that was done, but you do the soil borings that are deemed necessary by the Geotechnical Engineer and those are relied

upon to be representative of the sub-soil conditions on the site. He asked the Board what the other component of the question was. Mr. Ward stated the other component was the bedrock. There was a lot of discussion of fissuring and water infiltrating the foundation. Mr. Hannasch stated that the bedrock was known to be in the location it is in, what was not known was the requirement for the underground storage. Because of the slope of the upper lot all the water drains off the lot. There was no way to place the tank on that lot because it would involve pumping to get the water to run up hill, so it had to be located on the lowest level lot. He stated that we do not have an alternative compliance method in order to do what would be appropriate. With regard to using a pervious paver there are certain slope requirements that are necessary so the water stays there. The recommendations for the permeable pavers suggest that you do not want to use them within 100 feet of a building, because water will eventually find its way into the basement. While it would reduce the volume needing to be stored it would not eliminate the storage need, the choice was to do one solution or do multiple solutions and still not meet the holding volume required.

Mr. Ward asked Mr. Hannasch if there were a way to water proof the basement of the building, or redirect the water so the basement does not get wet. Mr. Hannasch replied that they already do have a nice waterproofing on the building with drainage tile at the bottom of the foundation. He stated that the longer water sits adjacent to that wall the more likely that it is going to find a way in. Eventually water is going to find its way through that wall and to the extent that the drainage tile can handle it that is great. If that system becomes plugged up the hydrostatic pressure against the wall looking for a way into the building, it could come around the other side of the building and that is an old stone foundation and water could come in through there very easily if the water gets that far. Mr. Ward asked Mr. Hannasch with his expertise and practical knowledge of how to deal with this have you done the best that you can with the situation. Mr. Hannasch replied yes, if there is something else out there he does not know about it.

Mr. Courtney stated the one problem he has with regard to the applicant's argument is that he has spent a lot of time criticizing the agreement that he proposed, that the City accepted; it is the applicant's plan that is being criticized. He stated if he gave the applicant the benefit of a doubt looking at the findings 3, 4 & 6 he finds those marginal and would allow them, however, going back to findings 1 & 2 with the watershed district and the alternatives, he thinks that the applicant should be proposing an alternate plan saying that we will go a quarter of the way, that they will get it part way to the goal. But the applicant is not making an alternate proposal he is just asking for 100% relief from the requirements and is blaming it on the plan that he proposed, that is why he is having trouble with findings 1 & 2. Mr. Hannasch stated that the plan we came up with was for full compliance because there did not seem to be an avenue for partial compliance, this is the requirement for rate control. Mr. Courtney stated he does not think that is correct because exhibit J reads "or such other rate as is approved in the site plan approval process". Mr. Hannasch replied yes, that is what it says.

Ms. Maddox asked about Mr. Hannasch's statement that the rate of run-off under finding 1 would be a moderate improvement amount, can that be explained. Mr. Galatz requested that Nick Adam, Engineer come forward to answer some questions. We were going to have him give a little presentation but he can just come forward and answer some questions. He stated that from the applicant's standpoint if there is an opportunity to discuss options we are open to doing that. Mr. Galatz stated with regard to the construction schedule we are dealing with an open site right now, we have back fills in but we are not going to pave that lot. With regard to the waterproof membranes, nothing is water proof, it is water resistant and they are leaking right now. The condition we have right now is we have back fill, sand, and gravel against a water resistant membrane and when it rained the other day the basement got wet and that is what is going to happen when water is floating around under the parking lot.

Mr. Wilson asked during the construction how many times have they had to shut down due to rain. Mr. Hannasch replied that they have not shut down construction so much as having spent a fair amount of time to get the water out of the site. It didn't shut us down entirely, there were other areas to work on. Mr. Wilson asked how often they had to stop work or do something before they could get back to work. Mr. Hannasch stated that every time it rained there was work to do on that surface. Mr. Wilson asked, but not to the point of shutting down. Mr. Hannasch replied no not to the point of shutting down. Mr. Galatz stated shutting the construction project down, there is no one cooking in the basement right now it is a construction project. He stated even with the wall fully constructed two weeks ago when it rained they were bailing water out of the basement. Mr. Wilson asked (something about the basement wall construction could not hear.) Mr. Hannasch replied yes, they were able to continue with the wall mainly because it was completed during the winter.

Nicholas Adam, 11599 Avery Drive, Inver Grove Heights, with Rehder Associates, the engineer for the project. Mr. Adam stated that they looked into the porous pavers but it is just not an option with the location of the bed rock. According to the MPCA and the Capitol Watershed District you cannot have an infiltration basin within 3 feet of bedrock which would have been the case with this design. In order to use rain gardens in the parking lot, just using a couple of stalls would not be enough. We are talking about 600 feet of 48 inch pipe to store 60,000 gallons of water there is no way you can do that much on the surface without using half you parking stalls. Added to that is placing the pond on the Smith lot which is up hill from the site and you cannot get the water from the lower lot of the site to a pond on the upper lot. He stated that they are decreasing the impervious surfaces on both sites which will be a decrease in runoff from the site compared to the existing conditions. It does not meet the rate requirement but we will be decreasing the rates off the site making it better than the existing conditions. In addition with the water quality structure which removed sediments, phosphorus and pollutants is still being installed as part of the project.

Mr. Courtney asked Mr. Adam what you are telling the Board is that there are no middle of the road compromises available here. Mr. Adam stated that we looked at all the options and the underground tank was the most viable option at the time. We were not aware of the fissures in the bedrock that could possibly convey water to the foundation and at the time it was the best solution without using half the parking lot for a rain garden or ponds.

Mr. Adam asked to address some of the findings. Ms. Maddox replied that he could. Mr. Adams stated finding 1 the third paragraph reads: "the applicant's request to deviate entirely from the storm-water management plan by not providing any of the approved storm-water retention system..." but the applicant is providing a water quality structure that will remove pollutants from the water before it reaches the Mississippi River, the applicant is providing volume control on the site by reducing the amount of impervious pavement on the site. There will still be provided an operation maintenance plan for the storm-water structure that will provide the water quality. Mr. Adam continued with regard to finding 2, the report stated that the variance would not be consistent with the Comprehensive Plan because they would not be reducing the pollutant load to the water and specifically reducing the negative impact parking lots in the city have on water quality and water resources. Once again the applicant is providing a water quality structure that will remove pollutants from the water before it is sent down stream. Finding 3 the report stated that the applicant's claim that the water flow exceeding the retention system capacity would back-up into his food processing area and that his claim has not been substantiated by any technical hydraulic analysis or engineering. There is no guarantee that that system cannot fail and water from that system could leak and go toward his foundation. The report further stated that the applicant could have considered porous pavers instead of asphalt and a north and south lot. That was already discussed, that was not an

option due to other rules. The report also stated that the applicant could have devised a higher capacity retention system for the site. A larger system may reduce the risk of it overflowing at some point but there is still a risk of the system failing and water leaking toward the foundation no matter what size it is. Finding 4 stated that the applicant had available options such as compromising a small portion of revenue-generating real estate such as parking lot stalls or rooftop dining areas. Mr. Adam stated you could do some storage on the roof but you still have to have something in the parking lot for the rate control off the site. Finding 6 the applicant is proposing to be exempt from providing any storm-water management, as he stated earlier the applicant is providing water quality via a water quality structure; rate control by reducing the amount of impervious pavement on the site; and providing the operation maintenance plan for the water quality structure itself.

Mr. Ward asked Mr. Adam as a civil engineer your task is to come up with a plan that works for your client. Being you were hired by the applicant to design a system that meets the requirements of the municipality that you are working in, if that cannot be done isn't your charge to propose alternative solutions or research what else should be done. What do we do, how do we solve it. Mr. Adam stated given the information he now has he does not think that site is a viable site to do any storm-water management as far as tanks or on the surface storage. He stated that he would look to do it somewhere else within the same watershed system or find some mechanism for paying into a fund for water quality so you can do something somewhere else to benefit the storm-water system. Mr. Ward asked Mr. Adam if they thought that out ahead of time, did they know this would be an uphill battle. Mr. Adam replied no, that he had not been aware of the fissured bedrock and what it could entail if the system leaked, that was just brought to our attention. It was just discovered when we started the excavation we saw that the bedrock was fissured.

Ms. Maddox asked staff where has this been done around here under similar circumstances, with the bedrock and creating this holding tank. Mr. Saunders-Pearce replied that there are a lot of developments around the City that utilizes the techniques that this particular project is proposing. Some of them have similar but not necessarily identical situations, there might be contaminated soil. One example which is currently under construction is the PPL development on West 7th Street. Specifically they were able to meet the City's requirement for rate control as well as comply with the Watershed District standards through a combination of techniques. That particular site has bedrock very close to the surface and they used a combination of rain water gardens and porous pavers with under drain filtration to comply with the standards. In that particular case they had some open space that they were not utilizing as part of a parking lot or part of a building foot print so he believes that aided in some of their capacity. There are other instances of underground systems in numerous locations across the city. Some may have the bedrock proximate to the surface. He stated that he could not be as explicit with the example in that situation; often times it might be contaminated soil perhaps or just tightly draining soil. Ms. Maddox replied that she can understand that but has this tank been used with this type of bedrock and does it leak. Mr. Saunders-Pearce stated that the tank as proposed to the City is a concrete vault underground and as such there is no design intent that it would leak, exfiltrate or otherwise introduce water below the surface. It is a fully contained below-ground storage unit. The water comes in from the parking lot and is held in this vault and the pipe lets it go into the public storm-water system. Comments from Mr. Adams indicating that the PCA does not allow infiltration with bedrock 3 feet from the surface, the City is not asking for infiltration out of this storm-water management, we never have. Mr. Saunders-Pearce stated it is further complicating what is already a difficult situation to understand. He continued that with the storm-water management that is being proposed and the bedrock considerations, Mr. Galatz adequately categorized the concern which is the amount of physical rock that might need to be excavated to make room for their proposed improvement. The concrete vault itself as it was reviewed by City staff in the engineering documents has no intention to

let the water out of the system other than the pipe connecting it to the public storm sewer system. The comments by Mr. Galatz about a 4 foot diameter plastic pipe or something of that nature, may have to be explored a bit further. The plans that were approved as he understood it called for a dual concrete box culvert structure; essentially the kind of concrete structure that goes under a highway overpass. Mr. Saunders-Pearce stated that he is not aware of any design changes and that may be part of the confusion. They may have changed their design in the field or are contemplating some changes he is not aware of. The concrete structure that was approved by the City is considered water tight.

Dan Vruno, 888 Lake Street, stated that the concern with the water retention system is really a concern of the 40,000 cubic feet of excavation of bedrock limestone and what that does to the adjacent bedrock limestone just outside the food service basement wall. The migration of any water from the bathtub system, and the water migrating and it may not even come from that system but from around the tank and the fractures caused by the excavation. That water migrates not just to the wall to the waterproofing, but underneath the wall, under the footings and slab, with each rainfall in the last month there has been a considerable amount of water that has already migrated through to the basement and that is the proof of what potentially will happen.

Mr. Nick Adam, stated that regarding the tank design it was originally of concrete design. It was created with 12 foot by 3 foot culverts that you put together so it was not a solid tank that had no seams to it. It was kind of like a pipe connected together, then there was a six inch outlet pipe on the bottom. We priced out to go with a Contech material. It is not plastic pipe, it is steel pipe that is aluminized. It is made by Contech and that is what is being proposed right now. Ms. Maddox asked if Mr. Saunders-Pearce had any follow up questions. Mr. Saunders-Pearce replied no.

Mr. David Cossetta, 211 7th Street West, stated that this is a complicated issue but it comes down to a few simple principles. One, this is not a best management practice. Two, he believes with the kitchen wall next to the storm-water management tank is a really bad idea. The kitchen was and always has been there. He stated that the questions by Mr. Ward and Mr. Courtney were good questions about the core samples and it looked like a Swiss cheese out there. He stated that they did many core samples and test pits and nothing can tell you 100% of what is down there. Once we started digging the basement hole we found a city tunnel that we had to fill and put another piling in there, that had a lot to do with the contingency. There were different types of bedrock, some that was solid near the surface that took time to dug through then once we got next to the basement there was fissured bedrock. Mr. Cossetta stated that he brought in Mr. Vruno because he though they needed a second opinion on why it was not a best management practice to place the tank next the kitchen wall. The reason it is not a best management practice has to do with the Met Council's policy that would not allow this to be constructed and the alternative would be a buy out provision, and the reason why is because it is not a best management practice. Mr. Cossetta stated that he thinks that he has made a good faith effort in trying to make this work. He stated they actually started before the deadline for the sustainability but volunteered to comply with the sustainability because we though it was a good thing to do. We have done almost all of them, but every time we try to figure out a new answer to this holding tank there was not one to be had. Timing had a lot to do with all of this being we were one of the participants in the Build America Bond Project, there was a deadline of July 1st for breaking ground.

Mr. Ward asked Mr. Cossetta why they cannot just move the kitchen. Mr. Cossetta replied the site is too small. Mr. Ward stated its in the basement. Mr. Cossetta stated that all the reasons for placing the kitchen in the basement were always for economic reasons. Inside an urban setting and being in a B5 it is incredibly costly per square foot to be in that urban setting. He stated that he tries to use every square foot

for the right reasons, even our dishwashing is in the basement because it does not produce the revenues to pay back this amount of money.

There was no opposition present at the hearing.

Mr. Kawaljit Bhatia, 104 Heritage Circle North, Burnsville, stated that all the questions that Mr. Ward asked are very pertinent as he is located right next door to the applicant. He stated that nobody has contacted him and this was a surprise. It seems that Mr. Cossetta keeps asking for variances and the City is giving him the money. Mr. Bhatia stated that he has not been contacted about this except for the Public Hearing notification from the City two weeks ago and he does not know how all this will impact his buildings. He stated he would like to have some time to figure this out or get some research done or find out from all the research that he has not seen. A lot of this should have been done before they started the project. Ms. Maddox asked Mr. Bhatia if he was concerned about the water run-off. Mr. Bhatia stated that he does not know exactly what Mr. Saunders-Pearce has done, he has not seen any of the research and whether it is going to impact his building that is right next door the Cossetta's, where he owns a half acre of land. Mr. Bhatia stated that he needs some time to look at the research, he was given no notice of this until two weeks ago notifying him about this variance hearing.

Mr. Galatz stated with respect to the last speaker he pointed out the map on page 48 of the BZA packet showing the map of the location with a circle drawn around 350 feet of the parcel denoting the properties that he assumes the City notified as they are required to do. We are neighbors and part of the water that we are dealing with is coming off his parking lot as well, no one has asked us any questions and we would have responded if anyone had. The basic question here is are we putting the site to a reasonable use and we think that question has been answered in that the City has seen fit to loan \$250,000 at very reasonable rates providing financial aid for this project. We are not imposing any further burden on the City systems than had been being imposed before we started the project of reducing the burden. But we are faced with practical difficulties that are imposed on us by the nature of the site and by the surface conditions, slopes, and by subsurface conditions with what we are able to do below grade in a practical feasible manner. Mr. Galatz stated if the Board wants us to go back and see what use can be made of this separate site he does not think that the applicant would object, but he would ask that the Board allows them to proceed with the current construction as they are facing very serious issues with commitments that they have made to the City under the development agreement, to vendors and getting back into business on the new premises. All of this has delayed construction already and we run the risk of delaying it further. He stated that they have gone back and forth with City staff and the options suggested would not have solved our problems.

Hearing no further testimony, Ms. Maddox closed the public portion of the meeting.

Mr. Ward stated that he agrees with Mr. Courtney that this is their plan that they want to back out of, he would be ready to move to continue the matter for two weeks. He knows this may not be the best for everybody, but we are talking about giving a variance for water run-off and this is a sub-watershed within a larger watershed. All the systems that are in place right now are designed to work for a certain period of time. If there is going to be further development, if this particular project gets a variance, everybody that is going to build anything in the City of St. Paul is going to ask for the same variance if this is approved. It is something that the City is requiring if there are some Federal dollars being used. PLL is a nonprofit, they are making it work. Penfield is another project that is coming up that is being built not far from this same location, geologically he does not see how there is much difference. He thinks it is in the best interest of the City to give more time to hear how it is going to affect other neighbors, if the bedrock is fissured, if there is water that is migrating underground. If water proofing cannot be done or if the water resistant

barriers cannot be put in place, maybe there are some other alternatives. Maybe the outside of the foundation can be treated with bentonite or some other material that is aqueous so that the infiltration of water can be prevented. Maybe the whole foundation needs to be excavated around the foundation and it be supported in a different way. Mr. Ward stated it is hard for him to look at this and see that everything has been tried, an agreement is an agreement. The project is using tax dollars. We owe it to the citizens to come up with a solution rather than just give a variance. If it means crafting something like a park land dedication where one piece of land gets exchanged for another and a fee gets paid, we should take the time to figure out what can work.

Mr. Courtney stated that the applicant may want to go ahead to the City Council. He asked if the Board lays this over can the applicant appeal from the lay-over. Mr. Warner replied no, the applicant has to have a final decision from the Board to go to the City Council. Mr. Courtney asked and a lay-over is not a final decision. Mr. Warner replied no a lay-over is saying you have not made a decision. The code is pretty clear there has to be a final decision either to grant or deny the variance.

Ms. Morton stated that she is opposed to the lay-over, stating that she thinks that the Board has enough information to make a decision today.

Mr. Wilson and the Board discussed the deadline for action and whether the Board had time to lay the matter over.

Mr. Courtney stated that he thinks that the applicant should have the opportunity to move ahead to the City Council. He discussed making findings, giving the applicant time to come back either proving that they can meet findings 1 and 2 or coming up with an alternate plan, or more successfully arguing that there is no middle road here. Mr. Courtney stated he wants to make a finding now and tell the applicant what they have to do and if they do not want to do it they don't have to do it, they can appeal and go to the City Council. Ms. Maddox stated to Mr. Courtney so you are not in favor of the lay-over. Mr. Courtney replied no.

Mr. Courtney stated that we could re-open the public portion of the hearing and ask if the applicant wants to come back or if they just want to go to the City Council.

Ms. Bogen asked what the purpose would be for the applicant to come back before the Board. Mr. Courtney stated that the purpose from his stand point is that they go further toward satisfying the requirements. To come up with a plan that will more properly meet the findings of 1 & 2 instead of just saying because this plan cost too much, it is not cost effective, its too hard, and we don't have another plan, he thinks that they should come back with another plan consistent with this whole watershed theory that they should only have to spend \$40,000 per acre of land and come forth with some plan or if there is no middle of the road plan they should say there is not middle of the road plan. Ms. Porter asked if they should be working with staff or is it something that they should come up with on their own. Mr. Courtney stated that his hope is that if the Board gave the applicant a couple of findings, threw them a bone, maybe they could meet the other findings and we would not have to make a decision, at least they would be doing something. If we give them a free pass than everyone is going to want a free pass.

Ms. Bogen stated that the applicant still has to do water quality management, and they have to increase infiltration rates from the pre-project rate. All they are asking the Board is to not let it flow into the system at a certain rate. She stated that she cannot see how they would not have to still have the containing tank and some sort of filtration system to meet the rest of the sustainability requirements.

Mr. Saunders-Pearce stated that the plan presented and approved last fall showed the water quality component of their treatment approach was at the down stream end of their rate control at the concrete structure. The way he understands these water quality devices is to think of it as a manhole. In it you get sediment to settle out and you can come in at a later time and vacuum it and it is removed from the system. The rate control approach keeps the water quality device (the manhole) at a reasonable size. If the water quality device is maintained in the plan but does not have any rate control provisions, then the water quality device as is currently designed and specked out will very quickly become overwhelmed and will not operate according to its design. To some extent the treatment system is essentially one unified system that works together, if the rate control aspect is removed, if this Board makes that decision, water quality provisions are still required according to the development agreement and the device that they have in their plan would have to be significantly modified or upsized because there would be unregulated storm-water coming through it negating the effectiveness of the device.

Mr. Warner instructed there are a couple of things that the Board has to keep in mind. First of all the Board of Zoning Appeals, the Planning Commission, all the deliberative bodies that handle zoning matters have a long tradition of not giving advisory opinions to applicants. They come in, state their case, and the body either approves or denies the request. The idea of advising someone, as in Mr. Courtney theory that the Board is going to most likely deny the applicant's application unless they are going to come back with something better, does not really serve in making a clear decision that is then appealable to the City Council. The Board has to keep in mind that there are two things going on here. There is the flow rate which the applicant has asked to have a zero variance from that and to be completely relieved from that rate control and the Board can do that, it has that authority under the Zoning Code. Because when it comes to parking lots the BZA regulates the flow rate off of parking lots. Provided that the applicant can meet the burden of proof the BZA can certainly grant that. However, as Mr. Saunders-Pearce points out there is a separate agreement that talks about water quality and that agreement will be impacted by the Board's granting the variance request. By granting the variance the Board is modifying a contractual term and he suggests that the Board does not have the authority to modify a contractual term that is reached between Cossetta's and the HRA (Housing Redevelopment Authority). Mr. Warner stated to the Board that they cannot, the only people that can modify a HRA agreement are the HRA people. That is the bind in Mr. Courtney's suggestion. Mr. Warner stated that the contract says with respect to rate control, "1.64 cubic feet per second (cfs)/ acres disturbed, or such other rate as is approved in the site plan approval process;" there has been a site plan approval process, that has already been approved. Site plan approval processes under our code if you don't like the outcome of that site plan process it can be appealed, our code says it must be appealed within 10 days of the decision being made. It is clear by the documents submitted by the applicant that decision was made months ago and not appealed. That aspect as far as it affects site plan approval does not exist any more. Mr. Warner stated the Board's even considering this application is throwing him a bone. It depends on what the Board wants to do, there is staffs recommendation for denial, you have a motion that says we are probably going to deny it, but if you come back with something else we will vote on it. Mr. Warner advised the Board that they not follow that approach because it creates problems.

Ms. Maddox reopened the public portion of the hearing to hear from Mr. Galatz asking to just address if he would be willing to come back in two weeks. Mr. Galatz stated that they would prefer any answer something they can either appeal or live with. He stated that he thought the Board could approve the variance with a condition of the redesign of the water quality management system to meet the standards notwithstanding the loss of the rate control. He requested that the Board not lay it over.

Mr. Courtney seconded the motion, which failed on a roll call vote of 2-5(Morton, Porter, Bogen, Courtney, Maddox).

Mr. Ward moved to deny the variance and resolution based on findings 1 through 4, & 6.

Mr. Courtney stated that he thinks that findings 3, 4 & 6 are to harsh and he thinks that they have proven that there is a unique situation where there is going to be economic concerns and he thinks that the staff report is to harsh on the applicant, he would stick to findings 1 & 2.

Mr. Wilson seconded the motion, which passed on a roll call vote of 5-2(Courtney, Morton).

Submitted by:

Approved by:

Wes Saunders-Pearce

Gloria Bogen, Secretary