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St. Paul City Council
310 City Hall
15 Kellogg Boulevard West
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Re: Appeal of Planning Commission Decision (File No. 17-206-385)
Property Location: 1973-1977 Marshall Avenue, St. Paul

Dear City Council Members:

We represent Mary Anderson, Dean M. Nelson, and Scott Van Wert, members of the Historic Merriam Park Neighborhoods group, in connection with the Appeal of the Planning Commission's decision approving the Site Plan application for the above-referenced apartment project (the "Project"). We respectfully request that the City Council reverse the decision of the Planning Commission regarding the Project's Site Plan submitted by MCR Property Holdings, LLC (the "Developer") and instead deny approval of said Site Plan.

We have reviewed the action minutes from the January 12, 2018, Planning Commission meeting and the other materials submitted related to the Appeal, and wish to further emphasize and clarify the following bases for reversal of the Planning Commission's decision:

A. The Planning Commission Erred By Permitting The Developer To Raise The Existing Grade At The Property In Order To Comply With A Height Requirement Of The Zoning Code.

Key Zoning Code provisions:

Zoning Code § 66.231 sets strict building height requirements for structures in the RM2 zoning districts. The Zoning Code defines "Building height" as the "vertical distance measured from the established grade to the highest point of the roof surface for flat and shed roofs...." Leg. Code § 60.203-B. "Where a building is located on sloping terrain, the height may be measured from the average ground level of the grade at the building wall."[1] *Id.*

[1] The City requested that the Developer use the "average ground level" approach during the Project's November 7, 2017 Site Plan review.

Importantly, the Code does not permit a developer to hide the true height of his structure by manipulating or adjusting the grade around a building in order to make it appear that a building is shorter than it really is. *See*, Leg. Code § 60.203-B ("The existing grade of the property shall not be raised around a new building or foundation in order to comply with the height requirements of this code.") Instead, the determination of building height is based either on the existing, established grade (i.e., pre-construction grade) if the terrain is flat, or the "average ground level of the grade at the building wall" if the terrain is sloped. Leg. Code § 60.203-B.

Basis for Reversal of Planning Commission:

The Developer cannot permissibly hide the height of the lower level parking structure by raising the existing grade.

There is no dispute that the proposed lower level parking structure extends nearly 2 feet above the current (i.e., existing) established grade at the property in certain areas. There is also no dispute that unless the grade at the property is raised next to the walls of this parking structure, it will not comply with the Zoning Code's setback requirements for rear and interior side yards. Specifically, the parking structure is a "Building" under the Zoning Code,[2] and unless it is at or below grade, the setback requirements must be measured from the face of this structure to the relevant lot line and it violates the applicable setback requirements.

The Planning Commission and city staff apparently determined that the Developer would be permitted to raise the height of the existing grade at the property to ensure that the full height of the parking structure is at or below grade. This determination ignores the plain language of the Zoning Code which expressly prohibits a party from raising the existing grade of the property "to comply with the height requirements of this code." Leg. Code § 60.203-B.

The setback requirements in the Zoning Code include *de facto* "height requirements." Setbacks are "measured from the lot line to the above-grade faces of the building." Leg. Code § 66.203-S (emphasis supplied). It does not matter whether the above-grade portion of the building is 2 feet tall or 20 feet tall—if the building has an above-grade face, it is subject to the setback requirement. Thus, the Zoning Code contains a "zero foot" height restriction as it relates to setbacks—if the building is more than "zero feet" above established grade, it cannot be within a certain distance of a lot line.

As a result, a developer has every incentive to manipulate the grade on the property to eliminate any above-grade building face if the structure is too close to a lot line. By raising the height of the grade next to the building, the developer can make the actual height of the building appear lower than it really is—it can make a building that is "two feet" taller than the existing grade look like it is "zero feet" taller than the new grade and thereby eliminate "an above-grade face" that would be subject to the setback requirement.

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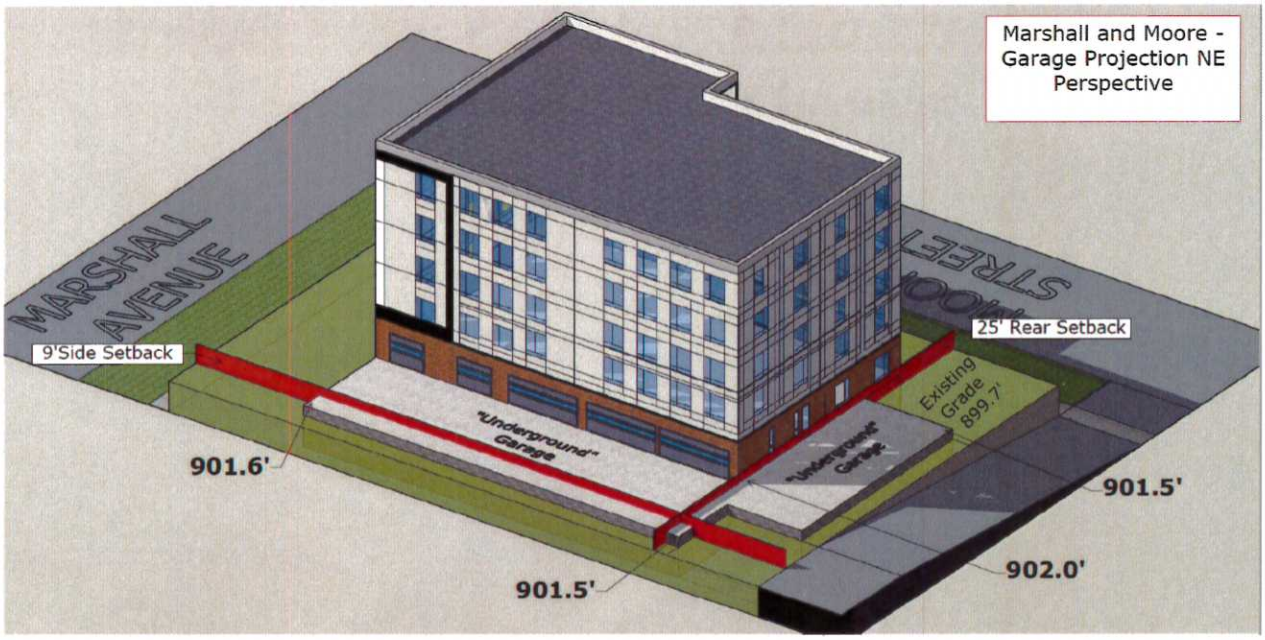
[2] Building is defined in pertinent part as any "permanent structure having a roof supported by columns or walls...." Leg. Code § 66.203-B.

That is precisely what the Developer is attempting to do in this case. As shown by the image below, the actual height of the proposed lower level parking structure is well above the existing grade and the only way to make it appear to be at "zero feet" above grade is to raise the existing grade around it.



There is no material difference between a developer manipulating the existing grade to meet a "50 foot" height restriction and a developer manipulating the existing grade to meet a "zero foot" height restriction—either way, the developer is trying to make his structure appear shorter than it really is. More importantly, neither of these tactics is permitted by the Zoning Code which specifically prohibits a developer from raising the grade around a building in order to make it appear that a building is a different height than it really is. *See*, Leg. Code § 60.203-B ("The existing grade of the property shall not be raised around a new building or foundation in order to comply with the height requirements of this code.")(emphasis added).

Since the lower level parking structure is indisputably within the rear and side yard setback areas of the property, and cannot meet the requirements of the setback unless the Developer is permitted to raise the height of the established grade, the Planning Commission should have denied the Site Plan application.

B. The Planning Commission Erred In Approving The Site Plan Because The Project Exceeds The Maximum Lot Coverage Density Permitted In An RM2 Zoning District.

Key Statutes and Zoning Code provisions:

- Minn. Stat. § 462.357. Minn. Stat. § 462.357 authorizes the City to enact its Zoning Code. Leg. Code § 60.102. This statute makes clear that a zoning code permits regulation on three distinct levels—(1) on the earth's surface, (2) in the air space above the surface, and (3) in subsurface areas.[3]

- Zoning Code § 66.231. Section 66.231 of the Zoning Code requires that multiple-family dwellings with 3 or more units be constructed only on lots larger than 9,000 square feet and requires a minimum of 1,500 square feet per unit (RM2 District).[4] Further, Table 66.231, Note (c) provides for a limited "lot area bonus" when a developer provides certain kinds of off street parking. Specifically, the lot area figure may be increased by 300 square feet for each parking space located "within a multiple-family structure or otherwise completely underground."[5]

Bases for Reversal of Planning Commission:

1. No more than 9 of the proposed parking spaces in the lower level parking facility are actually "within a multiple-family structure or otherwise completely underground."

The Developer proposes a total of 30 structured parking spaces for this Project in two parking facilities—8 spots in an above-ground parking structure and 22 spots in a parking structure that the Developer claims is "underground." However, as is clear from the Developer's plans, 13 of the 22 spots in the lower level parking facility are not "within a multiple-family structure" or "completely underground."

First, 13 of the 22 parking spots in the lower level parking facility are clearly not "within a multiple-family structure." The garage plan shown below clearly demonstrates that the 13 shaded parking spots fall outside the foot print of the proposed multiple family structure and instead encroach on the eastern side yard and rear yard. As such, no "lot area bonus" may be granted for these 13 spots because that they are not "within a multiple-family structure."

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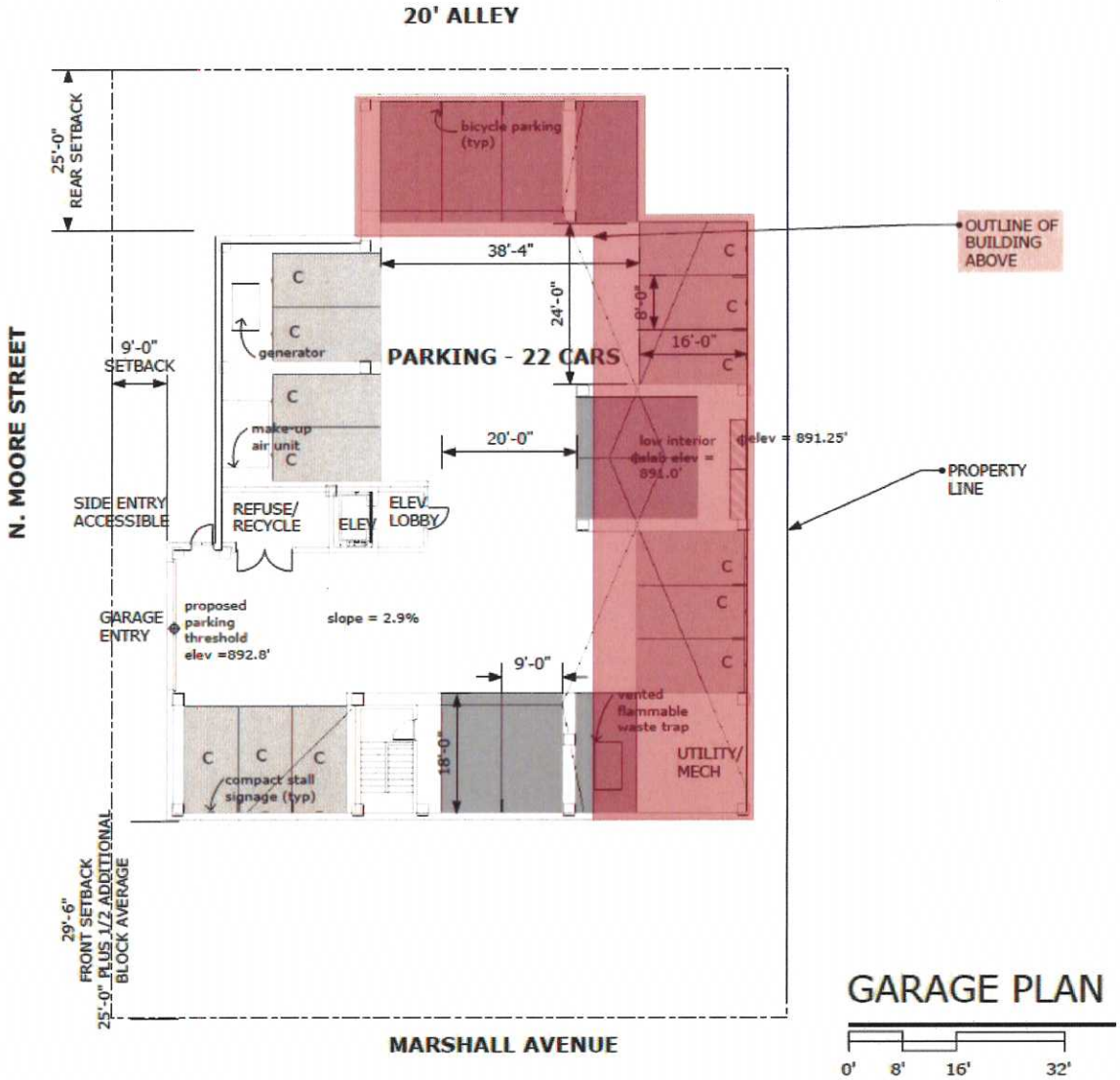
[3] Minn. Stat. § 462.357 ("a municipality may by ordinance regulate on the earth's surface, in the air space above the surface, and in subsurface areas, the location, height, width, bulk, type of foundation, number of stories, size of buildings and other structures....")

[4] Leg. Code § 66.231 ("No multiple-family dwelling shall be built...on a lot that is less than nine thousand (9,000) square feet in area.); Leg. Code § 66.231 (table)(setting 1,500 square foot minimum size for each unit)

[5] Leg. Code § 66.231 (Table, Note (c)) ("the lot area figure may be increased by three hundred (300) square feet for each parking space (up to two (2) parking spaces per unit) within a multiple-family structure or otherwise completely underground.")



Second, the Developer was not entitled to a "lot area bonus" on the basis that the parking spots in lower level parking structure are "completely underground." Based on well-established law, the language in a zoning ordinance must be given its plain and ordinary meaning.[6] The plain and ordinary meaning of the "underground" is "beneath the surface of the earth" and the plain and

[6] *See, e.g., SLS Partnership v. City of Apple Valley*, 511 N.W.2d 738, 741 (Minn. 1994); *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn. 1980); *Clear Channel Outdoor Adver., Inc. v. City of St. Paul*, 675 N.W.2d 346, 346 (Minn. Ct. App. 2004) (rev. den. 5/18/04). *See also*, Eric H. Galatz correspondence (1/30/2018) at 4 ("The Zoning Code requirements at issue here are not ambiguous and there is no opportunity for the exercise of judgment or discretion." (emphasis added)).

ordinary meaning of the adverb "completely" is "totally, utterly." Thus, the phrase "completely underground" means "totally beneath the surface of the earth." Here, using the plain and ordinary meaning of the phrase, 13 of the proposed parking spaces are not "completely underground."

Under the design proposed by the Developer, there is no "ground"—no soil, landscaping, or earth surface—above the 13 parking spots that encroach into the side and rear yards. Instead, the only thing that is over these 13 parking spots is the roof of the parking structure. That roof structure is not "ground"—it is made of cement and is intended to be a driving surface for the upper parking structure. In fact, none of the parking spots on the lower level are "completely underground" because they are all below either the proposed multifamily structure or the roof of the parking structure that protrudes above existing grade by nearly 2 feet in certain areas.

Moreover, the Planning Commission was not permitted to construe the "completely underground" language to mean "below grade" as it apparently did.[7] The plain language of Table 66.231 cannot be disregarded in pursuit of its "spirit."[8] The current ordinance does not provide for a "lot area bonus" for parking spots that are below the final grade for the property—it requires that the parking spots be "completely underground." A parking spot is not "underground" simply because the grade around the spot is higher than the surface of the parking spot. If that were the case, any parking spot located next to a hill or berm would be considered underground.

2. The Developer is at most entitled to a lot area bonus for 8 of the 9 lower level parking spots that are located within the footprint of the proposed multiple-family structure.

The Planning Commission also erred by granting a "lot area bonus" to the Developer for all of the proposed parking spaces located within the footprint of the building in the lower level parking facility.

The Zoning Code requires that 90 degree parking stalls be a minimum of 9 feet wide and 18 feet long. Owners of accessory parking facilities may designate up to 50% of available spaces for "compact cars only," which permits the size of those parking spots to be reduced in size. Here, only 9 permissible parking spaces exist in the lower level parking facility because 13 of the proposed lower level parking spaces impermissibly encroach into the side and rear yards and must be eliminated. Of these 9 permissible spaces, the Developer has designated 7 of them for "compact" cars—well above the permitted 50% threshold.[9]

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[7] *See* Zoning Committee Staff Report at 1 ("The applicant is proposing a new five-story, 16 unit apartment building with structured parking (22 in a below grade parking level accessed from Moore St. and 8 on the ground floor accessed from a driveway off the alley." (emphasis added)).

[8] *In re Haslund*, 781 N.W.2d 349, 354 (Minn. 2010).

[9] *See also*, SRP Status Update – Response (1/30/2018) (identifying City's concern that the Developer's "turning movement analysis is heavily reliant upon smaller vehicles.")

Since there is only so much permissible space within the building's footprint, the Developer will need to increase the size of several of these permissible parking spots and reconfigure the garage plan to meet the "under 50%" compact parking requirement. These changes will necessarily require the reduction of the number of parking spaces under the building because there is no way to fit 5 full parking spaces and four compact parking spaces inside the building footprint as currently designed.

The Developer was not entitled to a "lot area bonus" for parking spots that do not comply with the requirements of the Zoning Code. Since revision of the garage plan to comply with the "under 50%" compact parking requirement will result in the loss of at least one of the permissible parking spaces under the building, and the Developer should have received a "lot area bonus" for no more than 8 spots on the lower level parking structure.

3. The Project exceeds the maximum permitted density without the improperly awarded lot area bonus.

Only 16 of the Developer's 30 proposed parking spots meet the requirement of being "within a multiple-family structure or otherwise completely underground"—8 in the lower level parking facility and 8 in the upper level parking facility. As such, the Developer was entitled to a "lot area bonus" for only 16 parking spots or 4,800 square feet (16 x 1,500 SF = 4,800 SF).

When properly calculated, the maximum density for the Project site is 13 units or dwellings:

Lot Dimensions / Area:	14,171 square feet
One half of the Alley:	998 square feet
16 stall Lot Area Bonus:	4,800 square feet
Total Square Feet:	19,696 square feet
19,696 SF / 1500 SF =	13.13 (rounded down to 13 units)

Despite this reality, the Planning Commission approved a Site Plan with 16 individual units—3 more than the maximum permitted density.

Notably, the Developer did not request a variance from any of the requirements of the Zoning Code and, in fact, it could not do so because of the established development moratorium. Thus, the Planning Commission should have applied the plain language of the Zoning Code and rejected the Site Plan as exceeding the maximum permitted density. Leg. Code § 66.231. Since it did not, the City Council should reverse the decision of the Planning Commission and deny the Developer's Site Plan application.

C. Industrial Equities – Meridian, LLC v. City of St. Paul

The Ramsey County District Court's decision in *Industrial Equities – Meridian, LLC v. City of St. Paul*, 62-CV-12-831 ("Meridian") does not preclude the City from enforcing its Zoning Code pursuant to its plain and ordinary meaning, which is the primary objective of this Appeal. The

District Court concluded that City of St. Paul could not enforce its comprehensive plan as a design standard because the comprehensive plan could not be made "self-implementing simply by incorporating it into a municipality's zoning ordinance." As a result, the City could only enforce the standards adopted in its Zoning Code, which in the *Meridian* case, permitted the Site Plan features that the City Council believed were in conflict with its comprehensive plan. The objections raised in this Appeal are based on noncompliance with the express requirements established in the Zoning Code which also make the Developer's Site Plan inconsistent with the comprehensive plan. No similar objections were raised in the *Meridian* case and the case is clearly distinguishable on that basis.

For the foregoing reasons, and those set forth in the January 19, 2018 Appeal submitted by Erick G. Kaardal and in the record for this matter, we respectfully request that the City Council reverse the decision of the Planning Commission, and deny the Developer's Site Plan application.

Sincerely,

WINTHROP & WEINSTINE, P.A.

Michael E. Obermueller

cc: Erick G. Kaardal – Mohrman, Kaardal & Erickson, P.A.

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