



Interdepartmental Memorandum

CITY OF SAINT PAUL

July 28, 2009

TO: Zoning Committee Members
Tom Beach, DSI- site plan review
Allan Torstenson, PED zoning
Patricia James, PED zoning

FROM: Peter W. Warner, CAO

RE: Request for legal advice regarding the extent to which the City's Comprehensive plans may be applied to site plan reviews under Leg. Code § 61.402(c)(1).

BACKGROUND

Semper Development, in PED Zoning File No. 09-089752, has applied for a site plan review for the purpose of constructing a new Walgreen's store at 2101 Ford Parkway. The zoning classification for this property is designated "B2." For zoning purposes, the proposed use is classified as "general retail." General retail uses in a B2 zoning district are classified as a "permitted use."

Leg. Code § 61.202(c) allows the Planning Commission to delegate site plan approval to the Zoning Administrator. Site plan approval has been delegated to the Zoning Administrator in Planning Commission Resolution No. 75-48. The delegation also allows the Zoning Administrator to refer a site plan application back to the Planning Commission and then schedule the matter for a public hearing. Pursuant to Admin. Code § 107.03, the Planning Commission's Zoning Committee conducts public hearings on matters that are duties of the Planning Commission.

This process for reviewing site plans prompted the public hearing of July 16, 2009. At the hearing, the Zoning Committee received testimony that the Comprehensive Plan prohibits the proposed use. In light of this testimony, the Zoning Committee asked the City Attorney's Office to what extent the City's Comprehensive Plan could be considered regarding the site plan application under consideration.

ISSUE

To what extent may the City review site plan applications for compliance with the City's Comprehensive Plan?

ANSWER

Under Minnesota case law, the extent to which a City may review a site plan for a building proposal is limited. Case law defines this limit based upon the zoning classification given the proposed use. The law draws a line on reviewing site plans against a municipal comprehensive plan based upon whether the proposed use is classified as a "permitted" use or as a "conditional" use.

LEGAL ANALYSIS

1. City Zoning Authority:

Minnesota municipalities possess only those zoning powers that are expressly conferred by statute or are implied as necessary in aid of the zoning powers expressly conferred. Welsh v. City of Orono, 355 N.W.2d 117 (Minn. 1984). The Minnesota legislature has expressly provided cities with the authority to regulate land use issues pursuant to enabling legislation contained in Minn. Stats. §§ 462.351-.365. These statutes are collectively referred to as the Municipal Planning Act (the "MPA"). The zoning power created under the MPA defines in a single body of law the procedural and substantive limitations on the exercise of municipal zoning and planning authority. Nordmarken v. City of Richfield, 641 N.W.2d 343 (Minn. App. 2002) cert. denied 2002 Lexis 460 (Minn. June 18, 2002). Pursuant to the MPA, Saint Paul has adopted various zoning regulations and codified them as Leg. Code Chaps. 60-69. These sections of the Legislative Code are collectively known as the Saint Paul Zoning Code.

2. City Planning Authority:

In addition to the procedural and substantive zoning and planning requirements placed on municipalities by the MPA, municipalities in the seven-county metropolitan area are subject to additional planning requirements contained in Minn. Stat. §§ 473.851-.871. This collection of statutes is referred to as the Metropolitan Land Use Planning Act (the "MLPA"). Under the MLPA, Metropolitan Area municipalities must adopt "comprehensive plans" and submit those plans to the Metropolitan Council for review. Minn. Stat. § 473.858. One significant feature of the MLPA is its requirement that a municipal zoning ordinance must be in conformance with the municipality's comprehensive plan. This requirement is found in Minn. Stat. § 473.858, Subd. 1. In pertinent part it provides: "If the comprehensive municipal plan is in conflict with the zoning

ordinance, the zoning ordinance shall be brought into conformance with the plan by the local government units” In conformance with the MLPA, Saint Paul has adopted a comprehensive plan.

3. Applicable City Zoning Ordinances:

The City, pursuant to Minn. Stat. § 462.357, Subd. 1, has adopted certain “official controls.” By enacting these official controls, the City has been divided into specific zoning districts. Leg. Code § 60.301. Lawful uses of land within these zoning districts have also been officially designated by type. Leg. Code Chap. 65. Lawful uses are further classified as “permitted” uses, Leg. Code § 66.101(a), “conditional” uses, Leg. Code § 66.101(b), or “prohibited” uses, Leg. Code § 66.101(c). Finally, the official controls relegate all lawful uses, whether permitted or conditional, to specific zoning districts and that some uses are then also subject to specified development standards, Leg. Code §§ 66.101 - .700.

In addition to the classification and designation of uses to specified zoning districts, the City has also enacted a set of official controls at Leg. Code §§ 61.401 - .402, which requires certain types of developments, including the development proposed by Semper to submit a “site plan” for City approval before the development may commence. The relevant portion of the site plan review ordinance is more thoroughly discussed below.

4. Application of City Zoning Ordinances to the Proposed Semper Development In Light of Minnesota State Law:

As noted above, the property where the proposed use is to be located is in a B2 zoning district. Leg. Code § 66.414 states that the B2 community business district “is intended to serve the needs of a consumer population larger than that served by the ‘local business district,’ and is generally characterized by a cluster of establishments generating large volumes of vehicular and pedestrian traffic.”

The use proposed in the site plan application is, apparently, a pharmacy. Leg. Code § 65.510(f) specifically defines a pharmacy as a “general retail” use. Under Leg. Code § 66.421, a “general retail” use is designated as a “permitted” use in a B2 zoning district.

Because the proposed pharmacy has been classified under the zoning code as a permitted use, the scope of the City’s zoning review is limited under Minnesota law. In Chanhassen Estates Residents Assoc. v. City of Chanhassen, 342 N.W.2d 335 (Minn. 1984), the Minnesota Supreme Court held:

“When a city designates a specific use as permissible in a particular zone or

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district, the city has exercised its discretion and determined that the permitted use is consistent with public health, safety and general welfare and consummate with the goals of its comprehensive plan.¹ Until the district is rezoned or the zoning ordinance is either amended or successfully challenged, that determination is conclusive.”

Id. at 340. The Supreme Court’s ruling in Chanhassen Estates sets the legal standard for reviewing zoning applications for permitted uses in Minnesota. Here, because the City has already exercised its discretion that a pharmacy is a permitted use in a B2 zoning district, the proposed use is deemed in compliance - (“consummate”) - with the City’s Comprehensive Plan.

In addition, any attempt to apply provisions of the Comprehensive Plan as a basis to deny the site plan application for this permitted use would be arbitrary and capricious. Such was the case in Chase v. City of Minneapolis, 401 N.W.2d 408 (Minn. App. 1987) where the Minnesota Court of Appeals held that denying a site plan application which otherwise met all zoning requirements for a use that was classified as a permitted use was improper. The Chase Court, noting the Chanhassen Estates differentiating standard of review for permitted uses and conditional uses held, “A city is not afforded similar discretion in reviewing a permitted use application because approval of a project complying with the zoning code follows as a matter of right.” Chase, 401 N.W.2d at 413. As the Supreme Court stated in Chanhassen Estates with respect to those uses which a municipality has deemed permitted, “The proviso demonstrates that the . . . review of an application for a permitted use need go only to the applicant’s compliance with the specific ‘requirements, regulations, and performance standards’ prescribed by the ordinance. Id., 342 N.W.2d at 340.

Accordingly, it is my legal opinion that the City’s review of Semper’s site plan application is limited under the law, based upon the classification of a pharmacy as a permitted general retail use in B2 zoning districts, to whether the application complies with applicable zoning code requirements, regulations, or performance standards. Because Semper’s zoning application is for a permitted use, there are two zoning provisions which the application may be subjected to for review.

One of these zoning regulations is set forth under Leg. Code § 66.101(d) which states that “permitted and conditional uses specified with a ‘√’ symbol in the development standards

¹ In contrast, zoning applications for uses that have been designated as conditional uses “may be denied for reasons related to public health, safety and general welfare or because of incompatibility between the proposed use and a municipality’s comprehensive municipal plan.” Hubbard Broadcasting, Inc. v. City of Afton, 323 N.W.2d 757, 763 (Minn. 1982) citing C.R. Investments, Inc. v. Village of Shoreview, 304 N.W.2d 320 (Minn. 1981).

column shall be subject to the specific standards and conditions of Chapter 65, Land Use Definitions and Development Standards, in addition to all the applicable provisions of this ordinance.” However, the column for general retail uses under Leg. Code § 66.421, does not have a ‘√’ symbol. General retail uses in B2 zoning districts are therefore exempt from any development standards.

The remaining zoning regulation applicable to the Semper site plan application is found under Leg. Code § 61.401 which provides in pertinent part that “All applications for building permits for all new buildings . . . shall be accompanied by a site plan”

Leg. Code § 61.402(c) requires 11 findings which the City must make in order to approve a site plan application. The staff report dated July 9, 2009 sets forth the 11 findings. The Zoning Committee has asked the City Attorney’s Office for guidance with respect to the finding required under Leg. Code § 61.402(c)(1) which reads:

(c) Site plan review and approval. In order to approve a site plan, the planning commission shall consider and find that the site plan is consistent with:

- (1) The city’s adopted comprehensive plan and development or project plans for subareas of the city.

The Zoning Committee staff report makes the following finding for Leg. Code § 61.402(c)(1):

“The site plan is consistent with this finding. The District 15 Highland Park Neighborhood Plan calls for “incorporating a mix of uses and a pedestrian-friendly environment in commercial areas.” (The plan also supports rezoning portions of Highland Village to TN2 which would bring additional design standards but this has not been done.)”

Based upon the Supreme Court’s analysis and holding in Chanhassen Estates, it is my legal opinion that the extent to which the City is able to consider the consistency of the proposed site plan with the City’s comprehensive and subarea plans is constrained by the fact that the proposed use is a permitted use. Accordingly, the City is not permitted to examine the site plan to determine if the use it proposes would be permitted under the City’s comprehensive plan. As noted in Chanhassen Estates, the City’s determination that the use proposed by Semper is a permitted use is “conclusive.” This determination forecloses any further discussion whether the proposed use is the type of “mixed use” contemplated by the Comprehensive Plan. It must be further noted that under the plain language of Leg. Code § 61.402(c), the matter under

consideration is the site plan, not the use.

In light of the analysis above, a finding under Leg. Code § 61.402(c)(1) might instead read:

(c) Site plan review and approval. In order to approve a site plan, the planning commission shall consider and find that the site plan is consistent with:

(1)The city's adopted comprehensive plan and development or project plans for subareas of the city.

This finding is met. The proposed general retail use is a permitted use in a B2 zoning district. General retail uses in B2 districts are specifically exempted from the specific development standards under Leg. Code Chap. 65.

CONCLUSION

Because the use proposed in the Semper site plan application is a permitted use under the zoning code, the City lacks the discretion to review the proposed use for compliance with the City's Comprehensive Plan. The City's review of the proposed site plan is therefore limited to whether the application meets all the findings required under the zoning code for site plan approval. In this light, a finding meeting the requirements of Leg. Code § 61.402(c)(1) has been provided.