

PLANNING COMMISSION MINUTES - CITY OF INVER GROVE HEIGHTS

Tuesday, September 21, 2010 – 7:00 p.m.
City Hall Chambers - 8150 Barbara Avenue

Chair Bartholomew called the Planning Commission meeting to order at 7:00 p.m.

Commissioners Present: Tom Bartholomew
Paul Hark
Harold Gooch
Pat Simon
Tony Scales
Christine Koch

Commissioners Absent: Dennis Wippermann (excused)
Damon Roth (excused)
Mike Schaeffer (excused)

Others Present: Tom Link, Community Development Director
Allan Hunting, City Planner
Heather Botten, Associate Planner

APPROVAL OF MINUTES

The minutes from the September 7, 2010 meeting were approved as submitted.

CITY OF INVER GROVE HEIGHTS – CASE NO. 10-20ZA

Reading of Notice

The notice was read at the August 17, 2010 Planning Commission meeting.

Presentation of Request

Heather Botten, Associate Planner, explained the request as detailed in the report. She advised that at the July 6, 2010 public hearing staff was directed to create an ordinance to ban all future OWBs and to incorporate reasonable performance standards for existing OWBs in the City. At the August 17, 2010 meeting the ordinance was tabled for staff to obtain additional information on five different issues. The first question was whether scrubbers were used on OWBs and whether they were effective. Staff spoke with a representative from a Central Boiler dealer, who stated he was not aware of any reburners or scrubbers that could be added to existing units, however, some of the newer models have a fusion chamber/reburner which would help reduce emissions. The second question was whether OWBs could be eliminated at point of sale of the property. Ms. Botten advised that unless a City declares non-conforming OWBs to be nuisances which require their removal, the City cannot force a seller or buyer to remove a non-conforming OWB from the property when it sells. The third question was whether the City could establish a deadline or sunset provision on existing OWBs. Ms. Botten advised that the City should either adopt performance standards that it believes will eliminate the nuisance posed by the OWB or declare OWBs to be nuisances and provide for their removal with a sunset clause. The fourth request was for staff to explore further the reasoning for stack height, especially as it relates to the impact on neighboring properties. Ms. Botten advised that after staff review it was determined that monitoring chimney heights from neighboring structures would have administrative difficulties and therefore, staff does not support chimney height requirements from neighboring structures. The last question was whether existing OWBs could be enlarged or expanded. Ms. Botten advised that Minnesota Statute permits owners to repair, replace and maintain their nonconformities; however,

they are not permitted to expand.

Ms. Botten advised that City staff does not have a consensus for a recommendation. She advised there are six known existing OWBs in the city; and some staff believe they should be considered legal non-conformities as long as they comply with approved performance standards. There are other staff that believe that even with performance standards there will be continual complaints with no enforcement solutions, and therefore they believe all future OWBs should be banned and existing ones should be removed.

Commissioner Hark asked for clarification of the recommendation listed in the report.

Ms. Botten stated that the recommendation was taken from the last planning report. She advised there has been discussion since, however, and some staff believe that existing OWBs should be removed so there is a split recommendation.

Commissioner Hark recommended that Section 10-17-1-D-3 be changed to require that owners of existing OWBs comply with Sections 10-17-D-2(a) on or before October 1, 2011 (the start of the burning season) rather than December 1, 2011.

Ms. Botten stated staff would be agreeable to that date.

Commissioner Hark asked if staff had received complaints only on the one property.

Ms. Botten replied in the affirmative, stating they have officially received a complaint about the one property.

Opening of Public Hearing

David Gaydos, 11660 Albavar Path, asked for clarification of the issue regarding removal of existing OWBs on point of sale.

Ms. Botten replied it was determined that the City cannot require the removal of existing OWBs on point of sale.

Mr. Gaydos asked for clarification on the repair of existing OWBs.

Ms. Botten replied that according to the City Attorney existing OWBs could be repaired and replaced to the same size or smaller, but no expansion would be allowed.

Mr. Gaydos asked if only the six properties would be affected by that, assuming that the City banned all future OWBs.

Ms. Botten replied there were only six known OWBs in the city at this point, but the rule would apply to any existing OWBs in the city.

Richard Larson, 7038 Angus Avenue East, stated it seemed like extreme actions were being taken over a single complaint. He stated he had a petition signed by 12-14 property owners within a quarter mile of his home stating they had no issues with his OWB.

Chair Bartholomew asked if Mr. Larson presented the petition to the City, to which Mr. Larson replied he forgot to bring it along but had it available.

Chair Bartholomew asked if Mr. Larson had a chance to read the proposed ordinance, to which he replied he did not.

Chair Bartholomew asked if Mr. Larson had received any complaints on his OWB in the years he had owned it, to which Mr. Larson replied he had not.

Bob Heidenreich, 11632 Akron Avenue, stated he had never received complaints on his OWB and felt it was unfortunate that the issue had gone to this level over one complaint. He stated that OWB dealers were at the State Fair this summer and he found a number of boilers that have improved technology which run nearly smokeless and can be put in detached accessory buildings. He stated he would hate to see the City take a path which would result in OWB owners not being allowed to upgrade as technology improved. He stated one of the OWBs burned during the entire State Fair with no complaints.

Chair Bartholomew asked if the ordinance as written would allow homeowners to upgrade their existing OWBs as new technology becomes available, to which Ms. Botten replied in the affirmative.

Armando Lissarague, 11730 Albavar Path, stated that although he was the only complainant on record, he questioned being the only one as there were a number of other residents on Albavar Path that were concerned about the effects of OWBs. He advised that the emissions from OWBs were not only a nuisance, but a serious health issue and he encouraged the Commission to completely ban all OWBs in the city. Mr. Lissarague recommended that all OWBs be banned, and questioned why existing OWBs, which probably emit more toxins than new ones, would be allowed. He stated that the health of the neighbors should be considered of greater importance than the monetary loss to OWB owners. He stated he was concerned as well about depreciation of neighboring homes. Mr. Lissarague read an email that was forwarded to him from Don Henk at 11325 Albavar Path. Mr. Henk's email stated he was concerned about toxins released from OWBs as well as an OWBs impact on real estate values. He stated that one uncontrolled OWB could cost thousands of dollars per resident in lost property value, which would offset any heating costs an OWB owner might save. He stated that stove ratings are based on high quality fuel and therefore there are no guarantees that a stove will meet the manufacturers listed emission rate since there is no way to regulate what is burned in the OWBs. Mr. Lissarague stated that the emissions from OWBs have the same chemicals and characteristics as second hand smoke, however, property owners in close proximity to OWBs do not have an opportunity to avoid the discharge.

Richard Elbert, 8569 Alverno Avenue, stated he did not go to the State Fair this year because he has gotten ill in the past from the emissions from the OWBs on display. He stated his wife went, however, and spoke with a representative from a boiler company. She was told they were aware of no afterburner, but that the new ones were much better. Mr. Elbert stated there were likely many people affected by OWBs that just did not complain, and he questioned how the toxins from OWBs were affecting gardens and yards in the area.

Sandra Larson, 7038 Angus Avenue, stated she did not agree that the smoke from OWBs was a health hazard. She advised she has had asthma since she was a child, and the OWB they own has not exacerbated that condition and, in fact, she is on less medicine now than she was ten years ago. She questioned a previously stated concern that OWBs lower property values, stating her home was recently appraised and the appraiser never mentioned anything about the OWB affecting their property value. Ms. Larson questioned how they would be able to pay their heat bills if they had to remove their OWB, stating it saved them \$3,000 a year and they are on a fixed income.

Don Frost, 7132 Ballard Trail, requested that this issue be dealt with on the basis of the facts rather than by the number of complaints. He stated that smoking in public places was banned not

because of complaints, but because second hand smoke was proven to be a significant health hazard. Mr. Frost stated this was a serious situation because a person could choose not to visit an establishment that allowed smoking, however, a homeowner did not have the same opportunity to walk away if there was an OWB in their neighborhood.

Planning Commission Discussion

Chair Bartholomew advised that Commissioner Wippermann was unable to attend tonight's meeting but asked that it be reiterated that he supported the banning of all OWBs, both existing and future.

Commissioner Koch stated she supported a ban on future OWBs because the preponderance of evidence indicates that OWBs are a nuisance. However, she has difficulty requiring the removal of existing OWBs as the rights of the OWB owners should be considered as well. Commissioner Koch questioned how to resolve the issue regarding performance standards and the fact that there is contradiction as to the most beneficial stack height. She asked for clarification on whether existing OWBs could stay in existence if they were deemed a nuisance.

Tim Kuntz, City Attorney, advised that the law states that a legal non-conformity (a use which once was legal but now is prohibited) can continue and can be improved, repaired, maintained, or replaced but cannot be expanded. He stated that one option is to prohibit OWBs and allow those in existence to continue as legal non-conformities. Option 2 would be to deem OWBs as public nuisances. In regards to existing OWBs, the law states that if a city declares OWBs to be a public nuisance the city can impose reasonable performance standards to lessen the impact of the nuisance, or another option would be to eliminate all existing OWBs as a public nuisance. Therefore the City has the option of banning all future OWBs as a nuisance and only regulating the existing, or banning the future and existing OWBs and setting a reasonable date at which they have to cease.

Chair Bartholomew asked for clarification of the intent of the draft ordinance in the report.

Mr. Kuntz advised that the ordinance in the report was drafted on the basis of future OWBs being prohibited as nuisances, and existing OWBs being allowed to continue only if they meet the performance standards - if not they must cease.

Chair Bartholomew stated that because the preponderance of evidence shows OWBs to be a health hazard, he would be in favor of banning all OWBs and requiring that existing OWBs be given a sunset date at which they must be removed.

Commissioner Hark stated he was leaning in favor of declaring OWBs a public nuisance and banning all future ones but applying performance standards to those that exist. He stated the proposed ordinance seems to be a good effort at finding middle ground on this issue. He noted that only one of the six OWBs in the city was on a lot smaller than two acres, and that one was in an industrial area. He stated there was some question as to whether the recommended stack height would create more problems.

Commissioner Scales stated he did not support removal of existing OWBs, comparing it to prohibiting someone from driving classic cars because they put out more pollutants than newer vehicles.

Commissioner Koch questioned whether the existing OWBs could be improved without being expanded.

Mr. Kuntz stated the State Statute does not allow a non-conforming use the right to expand,

however, a city may by ordinance allow expansion.

Commissioner Gooch questioned whether only the one OWB that received complaints could be defined as a nuisance, and whether the City Attorney had any suggestions for an ordinance provision that would be an alternative to a neighbor having to take civil action against an offending OWB owner.

Mr. Kuntz stated that the regulations imposed by the Zoning Code must be uniform with respect to the zoning district in which they apply. In terms of creating a performance standard that would provide increased protection for the surrounding properties; he stated it would be difficult to create a standard that would prohibit smoke from entering a neighbor's property while still being enforceable. Mr. Kuntz stated that it is against the law to have a public nuisance; however, it is a difficult situation to deal with in terms of judgment, monitoring, and enforcement. Therefore, the City is trying to be more specific and identify what the public nuisance is. In this case the City may make a judgment with the proposed ordinance that an OWB is a nuisance.

Commissioner Simon stated she was in favor of banning all future OWBs and requiring that all existing OWBs be removed by October 1, 2011. She stated she was a proponent of individual property owner rights; however, in this case the smoke from an OWB could not be controlled and confined to just the OWB owners' property.

Planning Commission Recommendation

Motion by Commissioner Hark, second by Commissioner Scales, to approve the ordinance amendment prohibiting new outdoor boilers and establishing performance standards for existing outdoor wood burners/boilers, changing the deadline for existing OWB owners to comply with Sections 10-17-D-2(a) on or before October 1, 2011 rather than December 1, 2011.

Motion failed (3/3 – Bartholomew, Gooch, Simon).

Motion by Commissioner Simon, second by Commissioner Gooch, to recommend to City Council an ordinance which bans future OWBs as a public nuisance and requires the elimination of existing OWBs by October 1, 2011.

Motion failed (3/3 – Koch, Hark, Scales).

Commissioner Gooch stated there was passion from the Planning Commission on both sides of this issue, and they should forward it on to City Council as a split vote. He stated he was disappointed that neither the State nor the Federal government have adopted regulations or standards in regards to OWBs.

Commissioner Simon stated she would like the City Council to see that the Planning Commission was as mixed on this issue as City staff was.

Ms. Botten suggested perhaps making a motion in regards to future OWBs and sending the portion regarding existing OWBs on without a recommendation.

Motion by Commissioner Simon, second by Commissioner Gooch, to ban all future OWBs based on the fact that they have been determined to be a public nuisance, and to pass on with no recommendation the request to establish performance standards for existing OWBs.

Motion carried (6/0). This item goes to the City Council on October 11, 2010.

OTHER BUSINESS

Allan Hunting, City Planner, gave a brief update of the Housing Task Force's final report and recommendation to City Council. The report recommended that City Council address three main issues: housing education, senior housing, and affordable housing. The City Council received the 2010 Housing Action Plan Report and then directed staff to prepare a resolution creating a permanent Housing Committee which will be appointed to discuss and determine how to implement the ideas found in the Housing Task Force report. That resolution is scheduled to go to City Council on September 27, and if adopted, staff will then begin the process of seeking volunteers to serve on the committee.

Commissioner Hark asked if the City had received any inquiries about 'granny pods', to which Mr. Hunting replied they had not.

Tim Kuntz, City Attorney, gave an update on variance review criteria. He advised that for a number of years there were two or three court of appeals cases which indicated that if the application for a variance was in keeping with the spirit and intent of the ordinance, if the variance did not alter the essential character of the locality, if economic considerations alone did not constitute the undue hardship, if the property had a uniqueness to it, if there was practical difficulty caused because of all the above in meeting the code standard, and if the proposal seemed reasonable, then the variance would be upheld. As a result of those cases it became common in cities throughout the state to grant variances. However, in 2010 a new case went to the State Supreme Court at which time the court pointed out that the statute which allows cities to grant variances contains the criteria that he talked about earlier, but also requires that there be an undue hardship. Mr. Kuntz advised that when used in connection with the granting of a variance, undue hardship means the property in question cannot be put to a reasonable use if used under the conditions allowed by the official controls. In this particular instance the case came to the Supreme Court because the city had granted a variance and the city found the request complied with the variance criteria, except they could not make the finding about the property having no reasonable use unless a variance was granted. The Supreme Court determined the variance could not then be granted, and stated they could not in their local code change or soften the criteria of the statute. Mr. Kuntz stated the City's power to grant variances is granted by statute, and if the statute requires undue hardship, and if undue hardship means there has to be no reasonable use to the property without the variance, then that is the finding the City must make. He stated this dramatically shrinks the City's opportunity to grant a variance. In the future, staff will now list reasonable use as a separate criterion and the City Council and Planning Commission will have to make their decisions accordingly. In response to this the League of Cities, spurred on by their member cities, seems to be joining with the Builders Association in a joint effort to go back to the legislature and request more flexibility in granting variances. This will then be debated in the next legislative session. If the ruling does not change, in the future cities may have to use a conditional use permit to gain that flexibility in lieu of a variance.

Commissioner Koch asked if the court's decision regarding variances applied only to residential, to which Mr. Kuntz replied it applied to every land use.

Commissioner Koch questioned what would happen if the City did something which forced the property owner to request a variance (i.e. widening of the road, etc.).

Mr. Kuntz replied that in an instance such as that although the City's action created a smaller lot, the property owner would still have reasonable use of their property.

Commissioner Koch stated what is considered 'reasonable' seems to be subjective.

Mr. Kuntz stated that subjectivity has been greatly reduced with this latest variance criterion as it

would be difficult for the homeowner to argue that he had no reasonable use of his property just because it was smaller.

Commissioner Koch questioned whether individual property rights were taken into account.

Mr. Kuntz stated the statute recognizes the right of the property owner to be there, and in a taking situation, the property owner is protected by their non-conforming rights to repair, maintain, replace, and improve – just not expand.

ADJOURNMENT

Chair Bartholomew adjourned the meeting at 8:32 PM.

Respectfully submitted,

Kim Fox
Recording Secretary