ENTREPARTNER

Michael J. Mergens
mike@entrepartnerlaw.com
D: (612) 207-5660

November 25, 2014

Bloomington City Council
City of Bloomington
1700 W 98th St.
Bloomington, MN 55431

RE: Request for Appeal on the Imposition of Condition 10
Case File No. 5660B-14

Dear Mayor Winstead and councilmembers:

This firm is legal counsel for Jennifer Development Company, Inc. ("JDC"), owner of the property located at 10701 Hampshire Avenue, Bloomington, MN 55438 (the "Property"). This letter is offered in support of JDC's Request for Appeal from the decision of the Planning Commission to impose a condition upon the approval of the revision to JDC's Final Site and Building Plan (the "Site Plan"") that JDC replace the existing sidewalks on the Property pursuant to its legally incorrect interpretation of Section 21.301.04 of the Bloomington City Code (the "Code"). The appeal is solely to the condition requiring replacement of the existing sidewalks. If that condition is removed, JDC will move forward with the project as otherwise approved. JDC appeals on the ground that the Planning Commission's application of Section 21.301.04(b)(1) of the Bloomington City Code ("Code") to require sidewalk replacement is contrary to law.

Applicable Code Provision

At issue in this appeal is Section 21.301.04(b)(1), which states, "All new development or significant redevelopment must construct public sidewalks and provide sidewalk easements conforming to the standards of this Section . . ." Since the revision to the Site Plan involves the remodel of and additional to an existing building, the question is whether the proposed revision is a significant redevelopment. The Code defines significant redevelopment" as "either a full redevelopment of a site <u>or an addition that would increase floor area on a site by 25 percent or more</u>." Code § 21.301.04(b)(3) (Emphasis Added).

Background

As it sits today, the Property is improved with office/warehouse buildings totaling 153,472 square feet. Nearly half of that space is functionally obsolete warehouse space.

More than four years ago, JDC recognized that obsolescence and submitted an application that called for a remodel of the existing warehouse and addition that increased the floor area on the site by approximately 12,000 square feet; just as it is doing now. On October 7, 2010 in Case File No. 5660B-14, the City, through the Planning Commission, approved

JDC's planned renovation and did so without any requirement for sidewalk replacement. The sidewalk provisions found in Code Section 21.301.04 had the exact same language as it does today.

Unfortunately, with the real estate contraction, JDC was unable to implement the approved revision to the Site Plan before it expired. Now, with the gradual upturn in the real estate market, JDC returned to the City seeking approval of remarkably similar revisions to its Site Plan ("Proposed Project") that the City approved on October 7, 2010.[1] Just as was the case in 2010, JDC is proposing a renovation of the existing warehouse area, in which the existing exterior walls and roof of 68,874 square feet of warehouse are removed and replaced (leaving the existing floor slab and potentially interior columns in place), completely razing a small building and constructing a new addition that collectively increases the floor area from the existing 153,472 square feet to165,696 square feet of floor space. In other words, the Proposed Project increases the floor areas on the site by12,224 square feet, an 8 percent increase over the existing 153,472 square feet.

Having previously received approval without a requirement that it replace the sidewalks, JDC was surprised to learn that the City was now interpreting Section 21.301.04 to apply to the Proposed Project and require replacement of existing sidewalks. It appears that unlike the case four years ago, the Planning Commission no longer interprets Section 21.301.04 as requiring a straightforward comparison of the floor area existing on the site before a redevelopment project to the floor area on the site after the redevelopment project to determine the amount of increased floor area. JDC objected to the interpretation as contrary to the plain language of the section. On November 20, 2014, the Planning Commission approved the Proposed Project but with the requirement that JDC "[r]econstruct a 10 foot bituminous sidewalk along West Old Shakopee Road and a six foot concrete sidewalk within the aforementioned sidewalk/bikeway easement, as approved by the City Engineer."

Legal Analysis

It is axiomatic that a City's land-use decision that is based on an incorrect legal interpretation cannot stand. *See, e.g. Krummenacher v. City of Minnetonka*, 783 N.W.2d 721 (Minn., 2010). Thus, the question before the City Council is the proper interpretation of Section 21.301.04, and specifically the definition of "significant redevelopment."

In construing a zoning ordinance, there are three aspects to consider: "(1) the ordinance should be construed in accordance with the plain and ordinary meaning of its terms, (2) the ordinance should be construed strictly against the governmental entity and in favor of the property owner, and (3) the ordinance must be considered in light of its underlying policy." *Mohler v. City of St. Louis Park*, 643 N.W.2d 623 (Minn. App., 2002). That said, "where the meaning of an ordinance or statute is free from ambiguity, there is no room for

[1] Technically, the current request includes the same building renovation and addition, but is now enhanced by an upgraded landscaping plan.

EntrePartner Law Firm, PLLC
4470 West 78th Street Circle Bloomington, Minnesota 55435
(office) 612.814.0499 (fax) 612.233.1441 www.entrepartnerlaw.com

construction." *Glen Paul Court Neighborhood Ass'n v. Paster*, 437 N.W.2d 52, 56 (Minn. 1989) (Emphasis added). Only if the an ordinance is ambiguous, may the City consider the legislative intent behind the ordinance and construe it so as to effectuate that intent. *In re Welfare of A.L.F.*, 579 N.W.2d 152, 155 (Minn.App.1998). Or as the Minnesota Supreme has stated frequently, unless the language of a law is ambiguous, attempts to decipher the meaning or intent of the plain language are "neither necessary nor permitted." *See, e.g., In re Linehan*, 594 N.W.2d 867, 886 (Minn. 1999). Stated alternatively, where the language is plain and unambiguous, the language must be applied as written regardless of the result.

An ordinance is ambiguous if it is susceptible to two or more meanings. *Hamline-Midway Neighborhood Stability Coalition v. City of St. Paul*, 547 N.W.2d 396, 399 (Minn.App.1996), review denied (Minn. Sept. 20, 1996). But as noted above, where there are two reasonable interpretations, the law mandates that the correct interpretation of an ordinance is the one that is more favorable to the landowner. *Mahler*, 643 N.W.2d at 634; *Frank's Nursery Sales, Inc. v. City of Roseville*, 295 N.W.2d 604, 608-09 (Minn.1980). And an interpretation that requires the interpreter to read words into the law that do not exist is not a reasonable interpretation. *See State v. Carufel*, 783 N.W.2d 539, 545 (Minn. 2010) ("[T]he court cannot add words to a statute not supplied by the [L]egislature.").

Here, the Proposed Project involves the remodeling and addition of an existing building. Therefore, it is not a "full redevelopment." Rather, as noted above, the language at issue is the following: "an addition that would increase floor area on a site by 25 percent or more." This plain language calls for a calculation of the "increase" of the "floor area on a site." This plain and unambiguous language calls for a comparison of the existing floor area to the completed floor area, period. Under that calculation, the floor area increased by 12,224 square, an eight percent (8%) from the existing floor area. Since the Proposed Project only increases the existing floor area by eight percent (8%), it is not a "significant redevelopment" under the plain and unambiguous language of the Code. As noted above, the City has no legal authority to look beyond that plain language or attempt to consider the intent. Of course, this very interpretation is consistent with the fact that the City approved the nearly identical building plan in 2010 without requiring replacement of the sidewalks.

Despite having been presented with this analysis, the Planning Commission adopted an interpretation that essentially rewrote the definition of significant redevelopment to read as follows: "an addition that would increase the floor area remaining on a site after any contemporaneous demolition, whether complete or partial, by 25 percent or more." Such an interpretation that requires reading words into the provision is not legally permissible. Equally important, even if the plain language could reasonably be read to permit the intermediate calculations adopted by the Planning Commission, it would at best be one of two reasonable interpretations. Under well-settled law, that would render the definition of significant redevelopment ambiguous. Under equally well-settled law, an ambiguous ordinance must be construed against the City and in favor of the landowner.

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It should also be noted that during the Public Hearing, it was suggested that this reading of the plain language did not need to be followed because it would lead to an "absurd" result. The notion that the ordinary meaning of the language as written and adopt is "absurd" raises many questions. But as it applies to this case, it simply is not true. For a result to be "absurd, it must be more than a result that is not desirable or not considered. It must one that is "ridiculously unreasonable." It is inconceivable that the very result that was previously approved by the City is ridiculously unreasonable.

JDC is excited to renovate a functionally obsolete warehouse to meet the modern requirements of potential tenants as part of substantial increase in the value and appear of a large industrial site. While it may be that the City would like to see wider sidewalks in the area of the Property and that it wished it had adopted a different definition of "significant redevelopment," the plain language that was adopted is what must used and followed. Anything else is legally impermissible. We respectfully request that the City Council follow the plain language of the definition of significant redeployment and approve the Proposed Projects as proposed (and previously approved).

Regards,

Michael J. Mergens for
ENTREPARTNER LAW FIRM, PLLC

cc: Traci Tomas (via email)
Scott Wiesling (via email)

EntrePartner Law Firm, PLLC
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CITY OF
BLOOMINGTON
MINNESOTA

Request for Appeal
Planning Commission Approval or Denial

Right of Appeal
City Code Section 21.501.01 (c) provides the applicant or the member of the public the right to appeal a final decision of the Planning Commission to the City Council. Any appeal must use this form and must be submitted to the Planning Division **within three days** of the Planning Commission's decision.

Notice and Schedule
The City Code requires that any appeal of a Planning Commission final decision receive a public hearing before the City Council. Notice of the hearing must be sent to all property owners within 500 feet of the site and published in the official newspaper. The appeal will be placed on the next available City Council agenda that allows time to provide the required advertisement and notices.

Fees
To defray the costs of sending notices and holding a hearing, the City Code requires submittal of a $200 fee for an appeal made by the applicant. There is no fee for an appeal made by a member of the public not affiliated with the applicant.

Required Information

Application Information:

City Case File Number: 5660B-14

Appellant Information:

Name: Jennifer Development Company Inc. (owner)

Address: 10701 Hampshire Avenue, Bloomington, MN 55438

Phone and E-Mail: 952-473-1700; ttomas@leasespace.com

Reason for Appeal (attach any supporting documentation):
On November 20, 2014, the Planning Commission approved the revision to teh Final Site and Building Plans subject to the conditions listed in the staff report. One of those conditions, objected to at the Planning Commission is the requirement to replace the existing sidewalks. The owner appeals the imposition of this conditions. See attached for more detail.

Traci Tomas 11/25/14

Signature **Date**

Traci Tomas for Jennifer Development Company Inc.

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