

MINUTES

The Rogers City Council met in *regular session* in the Council Chambers of the Maurice H. Kolman City Hall Building on Tuesday, June 12, 2018 at 6:30 p.m. The meeting was called to order by Mayor Greg Hines. The Invocation was given by Rev. Melissa Ehrenhardt of Peace Lutheran Church. Those in attendance were led in the Pledge of Allegiance.

PUBLIC FORUM:

Christy Lamers, President of the Manor's POA, 4409 Blossom Way Drive, thanked the council for their service.

Lamers said arguments will be heard tonight regarding the appeal of the conditional use permit that the Planning Commission approved for the S.C. Bodner Group on May 15, 2018 to build the mixed use commercial multifamily development at 4601 Champions Drive. There are several reasons why the CUP should not be allowed, but two reasons that should be considered the most. The property was zoned A-1 and rezoned to C-2 where Mr. Watkins represented the Bodner Group and also requested the conditional use permit to allow residential use on the first floor of the eight buildings that are to be built to commercial standards and rented out as apartments until the market would allow the use as commercial. A visual prop was provided showing the proposed use of the buildings in the C-2 zone with the conditional use permit allowed and Lamers said that the building should not be built if commercial use is not going to develop because of the required "street to no-where" as Mr. Watkins had previously referred to it in that way. "In my opinion, if we already know that the interior eight buildings of the site plan with the CUP aren't going to generate commercial use, then our thought is that the developer should just not build it. The zoning is meant for commercial, and the developer should be held to that standard. If we allow the CUP, then eight buildings will be 100% occupied as apartments and we believe that the developer should build what they want to build and let them take the risk in development of the project and they themselves should admit from the

beginning that it will not succeed as commercial. We should hold them to the stated purpose of the zoning code. In doing this, we can ensure that future developers do not see this as a precedent being set and start requiring that the Planning Commission and City Council grant a CUP at the start of any commercial development. In addition, when Mr. Watkins spoke at the previous council meeting, he made a statement that is not included in the unapproved minutes. Mr. Watkins said the developers were unsure of what was going to be built and he had spoken to the developer just that morning about a different plan because of the C-2 zoning, unlike the PUD, was under no obligation to tell anyone what they were going to do. My argument is that once that CUP is granted by the Planning Commission, then it is specifically linked to that the site plan and land use. Once Mr. Watkins made that statement that they aren't committed to the original site plan that should negate the CUP. He cannot disconnect the CUP from the land use site. Ultimately Planning Commissioner John Schmelzle's summed it up best at the Planning Commission meeting where he voted against the conditional use permit and said, "It sounds like our code is not to the point where we want it to be if we are truly going to encourage true mixed used. To me, it just feels like we are trying to put a square peg in a round hole by saying it's commercial, but, oh, by the way, you can not use it for commercial." I would ask you to ask yourselves why grant the CUP on the forefront? I think you should deny it. I think they should build it to C-2 standards, and if a year or two years down the line they can't rent it out, and have proven that they have marketed it and advertised the availability, then maybe they come back to get a CUP. It sets a bad precedent to allow a developer a CUP on the front end of a project when you don't even know what it looks like."

Martin & Liza Porter, 4801 S. Champions Drive, spoke against the conditional use permit and displayed a map showing his property

location in relation to the C-2 zoning where the CUP was approved.

Porter said he and his wife came to the Planning Department to inquire about the possible zoning issues and comprehensive growth map which showed the property developed as C-2 (commercial) and specifically asked about apartments and multi-family and told that it was not allowed in those zones.

Porter said, “We have made the investment to build our home based upon that information. A lot of money, time and effort have been invested. At a previous meeting, Mr. Watkins said the Porters can sell their property and will be okay. It’s not that way, right now, Liza cares for their two grandchildren in our home and it’s not a good time to move. We were given assurances that this wouldn’t happen, but now it is. I ask you to deny the CUP and let the developer to live or die by what their process is and not allow apartments on the bottom floor as well.”

The Public Forum was declared closed.

COUNCIL MEMBERS PRESENT:

Mark Kruger, Buddy Wright, Betsy Reithemeyer, Gary Townzen, Marge Wolf, Clay Kendall, Jerry Carmichael and Barney Hayes were present.

OTHER OFFICIALS PRESENT:

City Clerk-Treasurer Peggy David, City Attorney Andrew Hatfield, Senior Staff Attorney Jennifer Waymack, Director of Parks & Recreation Jim White, Community Development Director John McCurdy, Public Relations Specialist Ben Cline, Water Utilities Operations Manager Brent Dobler, Water Utilities Shared Services Manager Jene Huffman, Finance Director Casey Wilhelm, Police Chief Hayes Minor, Human Resources Thomas Dunlap, District Judge Chris Griffin, and Planning Administrator Lori Ericson.

ACTION ON MINUTES:

(May 22, 2018)

Motion by Wright, second by Hayes to approve the minutes of May 22, 2018 as submitted.

Voice vote: Unanimous -Yes. ***Motion carried.***

Approves the suspending of rules for the meeting.

Motion by Kruger, second by Wolf to suspend the rules to consider all items on the agenda by title only and on a single reading.

Roll call: Unanimous – Yes. ***Motion carried***

REPORTS OF BOARDS AND STANDING COMMITTEES:

(Agenda Item #1)

RES. #R18-35 Approving the 2018-2022 Consolidated Plan and 2018 Action Plan for the Use of 2018 Community Development Block Grant Funds

The resolution was introduced by Councilmember Reithemeyer and read by title only by City Attorney Andrew Hatfield.

Reithemeyer, chair of the Finance Committee, reported the Finance Committee had met, recommended a “Do pass” and recognized CDBG Administrator Donna Johnston.

Johnston announced this is the five-year plan that has been written and provided for public review. The amount that will be received is \$459,265.00, which is \$38,000 more than last year. The plan will be submitted to HUD and the funds should be available in August.

Motion by Reithemeyer, second by Kruger to adopt the resolution.

Voice vote: Unanimous – Yes. ***The resolution is adopted.***

(Agenda Item #2)

RES. #R18-36 Amending the 2018 Budget to Appropriate \$10,000 from Court Automation Fund Reserves to Acct. #100-12-61110

The resolution was introduced by Reithemeyer and read by title only by Hatfield.

Reithemeyer reported the Finance Committee had met, recommended a “Do pass” and recognized District Judge Chris Griffin.

Judge Griffin reported that with the new computer software for the courts system that will be up and running in September has

resulted in a lot of clean-up of data and burning through the allocated amount of overtime. There will also be some overtime required for training on the new system, but we don't anticipate using the entire appropriation amount. The Court Automation fund is very limited on what it can be used for.

Motion by Hayes, second by Reithemeyer to adopt the resolution.

Voice vote: Unanimous – Yes. *The resolution is adopted.*

The resolution was introduced by Reithemeyer and read by title only by Hatfield.

Reithemeyer reported the Finance Committee had met, recommended a "Do pass" and recognized Police Chief Hayes Minor.

Minor reported the communication lines between the dispatch center and main radio system in the support building has needed to be upgraded and with the new communication system being installed, now is the time to do it. New conduit is needed between the dispatch and support building and the appropriation will cover both the labor and the materials.

Motion by Kruger, second by Townzen to adopt the resolution.

Voice vote: Unanimous – Yes. *The resolution is adopted.*

None.

(Agenda Item #3)

RES. #R18-37 Authorizing a Contact with Multi-Craft Contractors of Springdale, in An Amount Not Exceed \$16,000 for Upgrading Lines Between the Dispatch Center and the Support Building; Amending the 2018 Budget to Appropriate \$16,000 from CMRS Fund Reserves to Acct. #352-52-70160

OLD BUSINESS:

NEW BUSINESS:

(Agenda Item #1)

Appeal of Planning Commission's Approval of a Conditional Use Permit #18-12, at 4601 S. Champions Drive

Community Development Director John McCurdy reported that the appeal was received and accepted within the ten days period as allowed in the city code and it has been determined that the appeal has standing and the City Council shall hear such appeal and

consider all relevant evidence prior to rendering a final decision. The City Council may vote to grant or deny the conditional use permit. Staff has provided considerations and response to the appeal request as follows:

- a. Whether the use is a conditional use in the district requested and that the property under application is zoned correctly;
- b. Whether the use would be compatible with the adjacent property and uses would not set a precedent contrary to the City land use plan;
- c. Whether all other zoning requirements can be met; and
- d. Whether ingress and egress for the proposed use will create a traffic hazard.

McCurdy said the staff reviewed the appeal and provided a response to the appeal as follows:

- *The use is not a conditional use in the district requested.* Multifamily in Commercial Ready Space is allowed conditionally in the C-2 zoning District per Sec. 14-709(b)
- *The use is not compatible with the adjoining property and it sets a precedent contrary to the City land use plan.* Residential uses are allowed above the first floor in the C-2 zoning district. Residential uses are inherently less intense than commercial ones and allowing residential above the first floor allows for a more efficient use of land. This particular CUP presupposes the existence of residential space above the first floor. The allowance of a temporary residential use at street level within a portion of the proposed space does not create an incompatibility—the creation of an incompatibility would be allowing an unplanned more intense use adjacent to a preexisting less intense use. In this case, the opposite is true. The land use plan at this site calls for Commercial and Residential Office uses, either of which allowed for attached less intense residential uses. The time limit attached to this CUP is specifically intended to

ensure that the street level space is converted to commercial use as soon as market conditions permit.

- *It is not known if ingress or egress for the proposed use will create a traffic hazard as there is no proposed use.* The applicant will be held to the City's access management standards when they go through the large-scale process.
- *A CUP is not allowed under straight C-2 zoning.* Multifamily in Commercial Ready Space is allowed conditionally in the C-2 zoning district, per Sec. 14-709(b).

McCurdy said nature of the staff report in general is from a technical point of view where the requirements of the code is looked at and determines whether the request is a valid request and then evaluate whether it complies with the standards of the code. In this case, we believe that the four items that are raised in the appeal are not valid, because they do provide an argument in the appeal letter other than just saying it is not compatible.

McCurdy provided historical uses of conditional use permits for multifamily in commercial zones and said in 2017 the Planning Commission approved Residential use in commercial ready space on the ground level, conditionally. This is an accepted common practice across the country because it sets aside commercial property to promote commercial activity but allows residential to support the commercial uses and provides a better use of the land. The Planning Staff does not see anything that makes this an incompatible use or contrary to the Comprehensive Growth Map. The staff report is a technical analysis, and the staff doesn't have the authority to make a decision. The Planning Commission, not the Planning Staff, made two judgement calls when this was considered as follows:

1. *To allow a conditional use permit for a building that had not been built yet.* Mr. Watkins reminded the Planning Commission

that there was not a commitment to a specific site plan that had previously been submitted during the PUD process. The CUP is not linked to a specific site plan even though it allows residential along the frontage of the future street “the street to no-where” that would connect in the future to an adjacent development.

2. To issue the conditional use permit before the developer could establish that it really isn't a viable commercial space. The Planning Commission in the discussions agreed that if a commercial building was built, but the ground level floor could not be leased out that it would be better to allow the developer to temporarily use that space as residential there rather than an empty floor with “for lease” signs all over.

Wes Doss, attorney representing his clients David Gold and Wayne Bryant, said, “The elephant in the room is that how you can issue a conditional use permit when you don't know what the use is? Anything can be built in C-2 and you have no control and have given up your job. Your job is to control what goes on in the City of Rogers. Why is thousands of dollars spent on consultants to come up with growth and zoning plans? Why is it important? Because Mr. Porter came to the city, pulled out the maps, looked at the ordinances, verified that the comprehensive growth map would be complied with so he could build his house. Mr. Porter and others relied on the city's rule of law to protect them. *Sec. 14-723 (3) Consideration by the Planning Commission of the following factors:*

(a) Whether the use is a conditional use in the district requested and that the property under application is zoned correctly.

There is a technicality here, when the CUP was granted the zoning was A-1, not C-2. The CUP was passed on May 15, 2018. The C-2 zoning was passed on May 22, 2018. The only thing that you can find in the code that is close

to this is the DRDC which refers to downtown, but the infrastructure out west is completely different. You cannot apply the DRDC in the Pinnacle area. In March 2018, Ordinance #18-16 was passed to fix all of this, but it allows multifamily residential in C-2, C-3, C-4, O and R-O zones. That takes away your job. It's your job to decide if Mr. Porter and his neighbors are being hurt by the City of Rogers ordinances. I think this invalidates all of the zoning ordinances. That means you can put an apartment complex in almost every zone in Rogers. Is that what was intended? You would allow multifamily in almost any zone in Rogers? I do not think it was. It is an unintended consequence. You look at the ordinance it says "*The use classification of 'Multifamily Residential (above the first floor)' is adopted as permitted by right in C-2, C-3, C-4, O, and R-O zones.*" I've searched and cannot find this classification anywhere in the City of Rogers ordinances. I assume it was pulled from somewhere, but we cannot find it and have asked staff about it. It is a brand new classification that you all did not intend to pass. I guarantee you that you did not intend to pass this. What this does is insert that classification into every zone in the City of Rogers. I think that makes this ordinance void."

Doss continued, "The second issue of our appeal is whether the use is 3(b). *Whether the use would be compatible with the adjacent property and uses would not set a precedent contrary to the City land use plan.* We don't even need to discuss this. It's not compatible with the residents out there, a four, five or six story apartment, and an intensive use? I know that staff says that commercial is a more intensive use than apartments, but not those apartments that are zoned C-2. It's not commercial. The growth plan shows it as Commercial Office. C-2 is a use that is used along interstates, thoroughfares or arterial streets. There is not an arterial street anywhere near this. You have zoned it C-2 now, out of the requirements of the city

ordinances, right in the middle of a bunch of residences. It's not commercial, it's office. Mr. Porter relied on your growth plan which showed residential office. The next point is *Sec. 14-723(d) Whether ingress and egress for the proposed use will create a traffic hazard*. That's what you're supposed to consider when you grant a conditional use permit. It's not supposed to be eighteen-months from now. That's when you grant this. Every single one of these requirements has been violated. You consider ingress and egress when it is granted, not eighteen-months from now. Mr. Watkins was 100% right when he said we can't tell them how to use this because now it's zoned C-2. We don't know what the use is and here tonight we are granting a conditional use permit for a building that is going to be 1% or 2% of positive commercial use and the rest is residential. That is arbitrary and capricious. How do you do that? Let's get real. They offer a high intensive residential apartment complex in the middle of residences that was not contemplated or planned or passed by the city ordinances. They tried to fix it, but they messed that up too. How did we get here? We've passed ordinances, we've had meetings, and we've tried to get this passed. They were turned down, they tried again and I love their persistence. What it comes down to it is that we codified a classification that does not exist, multifamily above the first floor. The planning and growth plans have been changed to C-2 which Mr. Porter and his neighbors didn't count on. They didn't plan on being next to an off-ramp on I-49. They built their houses based on what the City of Rogers told them. It is cavalier, arbitrary and capricious in sticking a huge apartment in the middle of this. Rogers' citizens are injured by this. There is not an arterial road or frontage road near this. We didn't follow any of our ordinances. I think that Ordinance 18-16 is invalid. You stuck a zoning classification that did not exist into virtually every classification in Rogers. What is

zoning ordinances for? It is to tell people so they can plan. It gives you a chance to make sure that everyone is being treated fair. Right now, it is “by right” and you can’t do anything about this apartment complex. There is another apartment complex being planned across the street. Champions Drive is not an arterial street and was not planned as one. The City of Rogers did not plan for this use. Other people depended on it. The DRDC was applied to a radically different area and it didn’t come close. It is different infrastructure, different uses and not even come close. We’ve given S. C. Bodner a blank check. They can do anything they want and you can’t stop them. That takes away your responsibility of being as a city council. Since when did the City of Rogers give a developer a blank check? They asked for a CUP that was granted and we don’t even know what it is. Bodner asked for a C-2 and got it which is against the zoning code. This is not the right infrastructure for this development and now there won’t be any commercial, it will be 100% residential apartment complex zoned C-2 and not what the citizens of Rogers planned or expected. We are asking you to please follow the rules, follow the ordinances and do what is right because the citizens have relied on them. The neighbors are hurt, Mr. Porter is hurt. Just do what is right.”

Bill Watkins representing S. C. Bodner, said the eight or ten building that Ms. Lamers was referring to must be the ones that were included in the PUD plan which was thrown out prior to the rezoning request to C-2. The issue tonight is not the zoning, it is the conditional use permit that was approved by the Planning Commission for only two years and will only affect the buildings on the interior of the project that front on the “street to no-where”. If there are other buildings that are not on that street, they will not get the CUP. Mr. Doss was wrong when he said that this would be 100% apartments and

Mr. Doss was incorrect when he said this is not on an arterial street. This development is on Pinnacle Hills Parkway, which is an arterial street. The Conditional Use Permit would not apply to the building along Pinnacle Hills Parkway and those buildings will have to find commercial uses. Because his client is the first to develop in this area and has agreed to build a street at the city's request from north to south on the interior of this projects now referred to as the "street to no- where" should get some consideration on the interior street that will not connect with anything. This will affect the ability to rent the first floor as commercial. The city code allows for a conditional use permit for residential as allowed in Sec. 14-709 for this particular block of land. The developer is still developing a concept plan, but displayed the PUD that was previously presented as a way to show the interior buildings where the conditional use permit would allow residential use in the commercial ready space at the street level. There is nothing in the city code that says when the conditional use permit should be requested. The developer is going to build this to commercial standards which is much more expensive than residential and will be seeking commercial activities that can be rented at a higher rate than the residential use. The Planning Commission approved the conditional use permit for two years and the developer would have to come back to the Planning Commission if the additional time is needed. At that time, the Planning Commission may request a traffic study and any other evidence before them including another public hearing. There is responsible supervision by the city to oversee what the developer is doing. City staff supports the conditional use permit and the zoning is not an issue. The Planning Commission supported the conditional use permit on a six to one vote. This accommodation is for a specific situation and was adopted for this type of use. The first developer in an area shouldn't be punished for being the first, but reasonable accommodations should be made to encourage reasonable

development that still protects the public interest. Financing for any project will need some assurances or the project won't be developed. Planning Commission and staff have looked at this project for over one year and that should count for something. I would encourage you to uphold the conditional use permit.

Council member Kruger asked, "Mr. Watkins, do you have any ideas on how many units might be involved?"

Watkins responded, "My client spent a lot of money having plans drawn up for the PUD, so until the new design is developed, there is no way to know. When it goes to Large Scale and depending on the plan, the density committee may or may not have to make that determination. We just don't know yet."

Senior Staff Attorney Jennifer Waymack stated she did not have a recommendation to the council, but wanted to address some statements that were made.

Waymack said there was the assertion that the property was zoned A-1 at the time the conditional use permit was approved. That is not correct. The Planning Commission had recommended approval to the City Council the rezoning from A-1 to C-2 and adopted by City Council one week later, however the Conditional Use Permit is not effective until ten days after approval. The appeal of the conditional use permit put the permit on hold. The conditional use permit is not effective until the council makes a decision. The property has been rezoned to C-2. There was also an argument that Ordinance 18-16 was not in effect. There is a provision in the code that allows the Planning Commission to make changes in the schedule of uses throughout the year that become effective immediately. These changes are then codified annually which has been our long standing policy. Municode has not updated the recent changes on the website. "I have no concerns about the effectiveness of

ORD. #18-16. There were also allegations that actions thus far were arbitrary and capricious. “I have seen no evidence of anything arbitrary and capricious. In considerations for the Master Street Plan, Comprehensive Growth Map, our current law, our long term policy, our precedence, the positions of our Department of Community Development, the public, of Mr. Doss, of Mr. Watkins, of the elected officials, the staff, the appointed officials there have been extensive discussions with approvals, denials, and everyone who wants to be heard has been heard. They have been heard over and over. What I have observed from the outside looking in, not having a position or an opinion, is that there has been a policy discussion that was generated that was appropriate, considerate, deliberate, thought provoking. A policy discussion by our elected officials and by our city staff which considers what is best for our city as a whole and that included Mr. Doss and his clients, Mr. Watkins and his clients, Ms. Lamers, everyone out in the Manors and Pinnacle and every citizen in the City of Rogers. Everyone has been represented. If that is arbitrary and capricious then I just don’t know why we’re here in the first place. Mr. Doss said your job is to control development in the City of Rogers. I disagree. You do not control development. You protect people, you protect the code to make sure that people are safe, but to say that your job is to control what is going to happen and how people are going to utilize their constitutional protected rights and property is a terrible mistake of the law. In this discussion I have heard strong points on each side. The code grants you the authority to either approve or deny. The Conditional Use Permit that was approved by Planning Commission only applies to the buildings on the interior of the project facing the street and not fronting on Pinnacle Hills Parkway for two years. Whatever your decision, I’ll gladly defend it.”

McCurdy explained the commercial ready space definition appears in the DRDC but applies and there is not issue with it. The claim was made that there is no arterial streets, but there is a major arterial as shown during the discussion. It was mentioned because the ingress and egress were not discussed. The four factors listed are reasons to deny a request and are not a requirement. Ingress and Egress will be discussed during the Large Scale Development review. Mr. Watkins' characterization of the CUP is correct and the only thing approved for residential uses are the buildings on the interior and only those buildings that face the interior street. All other buildings are for commercial use. Any density in the multifamily portion of the project would be subject to review by the Planning Commissions Density Concept Plan.

Mr. Doss said the Master Street Plan on the website does not show that Pinnacle Parkway as an arterial street, but as a proposed arterial street.

McCurdy said even if it shows proposed, the developer would have to upgrade the street if it not already an arterial street.

Doss continued to argue whether Pinnacle Parkway was an arterial street.

Mayor Hines requested that Mr. Doss address the council not the staff.

Mr. Doss said it is unreasonable to approve a conditional use permit not knowing what its use is. It is arbitrary and capricious. It is not a gross mistake in the law.

Mayor Hines announced as a technical point. A "Yes" votes would approve the appeal and negate the Planning Commission's approval. A "No" vote upholds the conditional use permit.

Council member Kruger also clarified that the vote is on the appeal of the conditional use for

up to two years from the issuance of the certificate of occupancy, and not the zoning.

Councilmember Reithemeyer also clarified that in no way are we circumventing the Large Scale Development requirements and process.

McCurdy agreed with Kruger’s clarification and added to Reithemeyer’s comment that additionally the Planning Commission’s Density Concept Plan will be reviewed which takes into account elevations and other considerations.

The Conditional Use Permit appeal is denied.

The Mayor asked, “Shall the appeal be approved?”

Roll call: Wright, Reithemeyer, Townzen, Wolf, Carmichael, Hayes and Kruger – No; Kendall – Abstained. ***Motion fails.***

APPOINTMENTS:

Mayor Hines recommended the appointment of Rachel McLosky to the Planning Commission; to fill the unexpired term of Mike Shupe, who resigned. Term to expire September 23, 2021.

Approves the appointment of ***Rachel McLosky*** to the **Planning Commission**; to fill the unexpired term of Mike Shupe, who resigned, term to expire September 23, 2021

Motion by Kruger, second by Wright to approve the appointment of Rachel McLosky to the Planning Commission as recommended. Voice vote: Unanimous – Yes. ***Motion carried.***

Mayor Hines also recommended the appointment of Mike Malone to the Planning Commission to replace Myra Moran, whose term expired. Term to expire September 23, 2023.

Approves the appointment of ***Mike Malone*** the **Planning Commission**, to replace Myra Moran, whose term expired. Term to expire on September 23, 2023

Motion by Hayes, second by Wolf to approve the appointment of Mike Malone to the Planning Commission as recommended. Voice vote: Unanimous – Yes. ***Motion carried.***

Mayor Hines recommended the appointment of Aaron Smith to the Board of Adjustments; with a term to expire on March 11, 2021.

Approves the appointment of *Aaron Smith* the **Board of Adjustments**, as an additional member, term to expire March 11, 2021.

Motion by Kruger, second by Wolf to approve the appointment of *Aaron Smith* the **Board of Adjustments** as recommended.

Voice vote: Unanimous – Yes. ***Motion carried.***

There being no further business, motion by Kruger, second by Wolf to adjourn the meeting. Meeting adjourned at 7:38 p.m.

ATTEST:

APPROVED:

Peggy David, City Clerk-Treasurer

C. Greg Hines, Mayor