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October 2, 2015

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RE: Halcyon Cemetery | Denial of Application is Warranted
Preliminary and Final Plat Application of Lee Rossow ("Developer")

Dear Mayor Pearson and Council Members:

I represent a group of Lake Elmo residents and homeowners (collectively, the "Concerned Neighbors") in connection with their objection to the Preliminary and Final Plat Application dated June 17, 2015 ("Application") for the Halcyon Cemetery and funeral establishment proposed for 11050 50th Street North in Lake Elmo ("Project"). Accordingly, I respectfully submit this letter in advance of the October 6th City Council meeting to supplement the 147 signed petitions collected from members of the community and the testimony to be provided from the Concerned Neighbors and other Lake Elmo residents in opposition to the Project.

For the reasons set forth below, the City Council is urged to depart from the recommendations of City Staff and the Planning Commission and deny the Application for the Project. At the outset, it is important to reiterate the purpose of rural districts according to the Lake Elmo City Code ("City Code") is to "preserve and enhance quality of living, and regulate structures and uses which may affect the character and desirability of the area." (§ 154.400)



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1. **Although a cemetery is a permitted use in the City's RR-Rural Residential zoning district ("RR District"), the Project itself does not comply fully with applicable zoning controls. Denial of the Application is warranted and defensible.**

Generally, a landowner is allowed to engage in a permitted use, except where that use does not otherwise comply with the zoning code or development controls. *Chase v. City of Minneapolis*, 401 N.W.2d 408, 413 (Minn. 1981). In the event of such non-compliance, a municipality is under no obligation to approve a land use application allowing the permitted use. *Chanhassen Estates Residents Association v. City of Chanhassen*, 342 N.W.2d 335, 340 (Minn.1984). This concept is echoed in the Lake Elmo City Code. Section 154.005 states:

Except as in this chapter specifically provides, no structure shall be erected, converted, enlarged, reconstructed or altered, and no structure or land shall be used for any purpose in any manner which is not in conformity with this chapter.

Therefore, while the "cemetery" facet of the Project may be considered a permitted use in the RR-Rural Residential zoning district pursuant to Table 9-1 of City Code § 154.401, all accessory uses and other improvements comprising the Project must also strictly conform to Lake Elmo's zoning code and applicable law, and the Developer must observe those controls throughout the planning, development, and operation of the Project. Based on the contents of the Application and the Developer's on-the-record narrative at public hearings, the Project appears to violate a number of applicable controls. Consequently, denial of the Application is appropriate and supported under existing Lake Elmo ordinances and Minnesota law.

- a. **In violation of City Code, the Project will be operated as a mixed-use Cemetery, Funeral Home/Mortuary, and Single Family Dwelling.**

The Application describes the Project as a cemetery and nothing more, and it is through that thin lens that the public discourse and City review of the Project has been focused and framed. Whether it was the too-broad definition of "cemetery" contained in the City Code that caused additional use regulations to be overlooked, a fresh eye to the operational aspects and business plan regarding the Project indicate the true uses of the property are multiple and nuanced. Troublingly, the separate uses are impossible to harmonize and as such denial of the Application is warranted..

- i. **Cemetery use is permitted in the RR District.**

The City Code defines a "cemetery" as land that is "used or intended to be used for the burial of the dead and dedicated for cemetery purposes, including columbariums, crematories, mausoleums, and mortuaries when operated in conjunction with and within the boundaries of such cemetery." (§ 154.012(B)(2)(a)) (hereinafter "Cemetery Definition"). Classified as a Public/Civic use type,



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cemeteries are allowable uses in only two of Lake Elmo's zoning districts: 1) in the PF-Public/Quasi-Public Open Space zoning district ("PF District") as a conditional use subject to performance standards (*see* City Code §§154.600 (B)(1)(a-b)); and 2) in the RR District as a permitted use without performance standards, as contemplated in the Application (*see* Table 9-1 of City Code § 154.401).

There is broad agreement between all stakeholders that the Project will be partially used as a "cemetery", which is a permitted use in the RR District pursuant to Table 9-1 of City Code.

ii. Funeral Home/Mortuary use is prohibited in the RR District.

The City Code does not specifically define the term "mortuary", however "mortuary" uses are allowed in cemeteries pursuant to the Cemetery Definition above, and also in "Funeral Homes." The City Code defines "funeral homes" as "[e]stablishments engaged in undertaking services such as preparing the dead for burial, and arranging and managing funerals. Typical uses include funeral homes or mortuaries." § 154.012(B)(3)(h) (hereinafter "Funeral Home Definition"). Classified as a Service use type, a funeral home is an allowable use in four of Lake Elmo's zoning districts.¹ However, as the Developer conceded at the July 21st City Council meeting, a funeral home use is prohibited in the RR District (City Council Meeting Video Archive, July 21, 2015; *and see* City Code § 154.401 explaining that uses not identified upon Table 9.1 as either permitted or conditional "shall be considered prohibited").² The opposite is also true – while funeral home uses are prohibited in the zoning districts where cemetery uses are allowed, cemetery uses are prohibited in the four zoning districts where funeral homes are allowed.³

The use conflict between funeral homes and cemeteries is irreconcilable. If mortuaries fall under the "funeral home" classification, by rule they cannot also be associated with the "cemetery" classification because the applicable zoning district regulations prevent cemetery uses and funeral home (mortuary) uses from coexisting as envisioned within the Cemetery Definition.

So what use classification does "mortuary use" slot into? Before diving deeper into the mire, some perspective: the "mortuary use" conundrum is only worth solving if the Developer plans to engage (or is deemed to engage) in a funeral home/mortuary use on the property under the existing Cemetery Definition (currently allowing for both a cemetery and a mortuary). The Application does

1 Funeral Homes are allowable in: 1) in the HDR-Urban High Density Residential zoning district as a conditional use subject to performance standards (*see* City Code Table 10-2 and § 154.454(I)); 2) in the VMX-Village Center zoning district as a conditional use without performance standards (*see* City Code § 154.501; Table 11.1); 3) in the CC-Convenience Commercial zoning district as a conditional use (*see* City Code Table 12.1); and 4) in the C-Commercial zoning district as a permitted use (*see* City Code § 154.551; Table 12.1).

2 Resolving the "allowable use" discrepancies by way of use variances would also be ineffective. City Code § 154.109 B (prohibiting use variances for all uses that are not listed as permitted or conditional use in the zoning district where the property is located.)

3 *See* provisions cited in Note 1 above, where each provides that all uses not classified as permitted or conditional in the respective zoning district shall be considered prohibited.



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not reference a planned mortuary/funeral home use and the Developer has consistently stated the Project “will not be a mortuary.” (City Council Meeting Video Archive, July 21, 2015). However, in light of the Developer’s articulated business plan and the related analysis below, there is little doubt the Project will be used as a mortuary, perhaps even despite the Developer’s best efforts. Therefore, it is important to determine whether a “mortuary” use should be included in the “Public/Civic – cemetery” classification, and thereby allowed in the RR District, or whether a mortuary is in the “Service – funeral home” classification.

Section 154.012(A)(2) of the City Code guides interpretation of zoning use types and classifications “in the event of any question as to the appropriate use type of any existing or proposed use.” In determining what classification an undefined use fits into, the Planning Director shall (a) “consider the operational and physical characteristics of the use in question” and (b) “shall consider the classification contained in the most recent edition of the Standard Industrial Classification [SIC] Manual published by the U.S. Office of Management and Budget.” (City Code § 154.012(A)(2)) The following analysis applies (a) and (b) to the undefined mortuary use:

(a) Operational and physical characteristics of a proposed mortuary use. As a starting point, common language usage suggests “mortuary” and “funeral home” are closely related terms, if not identical, whereas a practical distinction can be drawn between “mortuary” and “cemetery” uses. Webster’s Dictionary defines “mortuary” as “a place in which dead bodies are kept until burial; especially: funeral home,” and defines “cemetery” as “a place where dead people are buried.”⁴

Regarding operational and physical characteristics, the Developer’s own public narrative suggests that mortuary/funeral use will occur upon the Project. Aside from interment of the deceased in the facilities identified upon the Project’s site plans, the Project’s planned features also include a parking lot designed to park up to 53 multiple-occupant vehicles,⁵ plus a 1,600 square-foot addition to the Administrative Center (currently the single family residence on the property), which according to the Developer will be known as the “Palaestra” and will accommodate up to 295 guests for the purpose of hosting wakes, memorial services, funeral services, and related celebrations and ceremonies at the Project. Therefore, the Project will be used as both “a place where dead people are buried” (Webster’s: cemetery) and as “a place in which dead bodies are kept until burial” (Webster’s: mortuary) that is “engaged in...arranging and managing funerals” (City Code: Funeral Home Definition).

The operational and physical characteristics of the Project suggest a mortuary use, if any, should be classified as a “Service – funeral home” type and therefore prohibited in the RR District.

(b) Government classification of a proposed mortuary use. In 1997, the Office of Management and Budget replaced the SIC system identified in City Code with the North American Industry Classification System (NAICS). Under the NAICS, mortuaries and funeral homes are

⁴ Webster’s Dictionary accessed via <http://www.merriam-webster.com/dictionary>.

⁵ Based on City Staff’s trip forecasting data. (City Planning Commission Meeting Video Archive; July 13, 2015; City Council Meeting Video Archive, July 21, 2015)



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classified as code 812210: “Funeral Homes and Funeral Services.”⁶ This classification “comprises establishments primarily engaged in preparing the dead for burial or interment and conducting funerals (i.e., providing facilities for wakes, arranging transportation for the dead, selling caskets and related merchandise).” Meanwhile, the NAICS classifies cemeteries as code 812220: “Cemeteries and Crematories,” which comprises “establishments primarily engaged in operating sites or structures reserved for the interment of human or animal remains and/or cremating the dead.” Illustrative examples provided include “Cemetery Associations, Memorial Gardens, Mausoleums, and Crematories (except combined with funeral homes.)” The NAICS classifications suggest both a mortuary use, if any, should be classified as a “Service – funeral home” type and therefore prohibited in the RR District.⁷

Finally, in the Developer’s own words, the Project is “not just a lot where people will be buried,” but rather a state-of-the art establishment designed to facilitate funeral and gravesite services as well as wakes “where people come to grieve” and to “be by the side of a deceased loved one prior to interment.” (City Council Meeting Video Archive, July 21, 2015). To the extent the City Council believes a conflict exists in the City Code regarding what a “mortuary use” is and what zoning district(s) it fits into, the Council may direct the City Attorney to advise the Planning Director to issue a determination pursuant to City Code § 154.012(A)(2). However, it is abundantly clear the Developer seeks to engage a prohibited “funeral home” use within the Project, which use type has no place in the RR District. Whether this violation is intentional or not, the City Council should nonetheless deny the Application.

iii. Single Family Dwelling use is permitted in the RR District, but not as an accessory to cemetery or funeral home use.

The Project contains an existing single family residence structure that will be retrofitted to house the Administration Center, Palaestra, and resident caretaker’s quarters. This arrangement does not work in the RR District. City Code Section 154.401(A) allows for principal and accessory uses to be combined within a single RR District parcel. Although the term “principal use” is not specifically defined in the Code, the provisions regarding accessory uses in the RR District, and limitations imposed thereon, prohibit the Project’s implied mixed-use concept.

Here, the single family residence is being entirely repurposed to support the cemetery use. On this basis, we will presume the cemetery is the principal use of the Project, and the single family dwelling and residential use of the Project for the caretaker to be an accessory use. This is

⁶ NAICS searches for terms “mortuaries” and “cemetery” conducted at <https://www.census.gov/eos/www/naics/> using 2012 edition of NAICS.

⁷ Although not directly at issue for the purposes of this letter, it is extremely important to note that Chapter 149A of Minnesota Statutes will require the cemetery association operating the Project, and possibly engaged individuals as well, to be licensed by the Minnesota Department of Health. “No person shall, without being licensed by the Minnesota Department of Health ... arrange, direct, or supervise a funeral, memorial service, or graveside service.” Minn. Stat. § 149A.01, Subd 2(3).



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problematic however, because a residential use does not appear to be an allowed Accessory Use in the RR District. (*see* § 154.401, Table 9.1 (list of “Accessory Uses” does not include “residential use”). Moreover, because the single family residence pre-exists the cemetery use on the property, the Project further violates the “phasing” requirement of City Code § 154.405(A). Third, and as a practical matter, the Developer has explained that he does not expect profitability prior to year eight because “cemeteries take a long time to mature.” (Planning Commission Meeting Video Archive, July 13, 2015; City Council Meeting Video Archive, July 21, 2015). If true, the immediate need for a resident caretaker at the Project seems dubious at best, and an accessory residential use likely does not meet the Code’s “incidental to principal use” or “function” requirements, which provide that an accessory use “shall be incidental to and customarily associated with the principal use...” and “shall contribute to the comfort, convenience, or necessity of the... principal use served.” (City Code §§ 154(B)(D)) This is especially true in considering the extensive security fencing the Developer has demanded.

Under any permutation, the principal use vs. accessory use analysis generates a non-compliant mix of uses. Therefore, the Application does not meet with zoning regulations and should be denied.

b. The “maintenance garage” violates accessory structure regulations.

In the RR District, accessory buildings are limited to a size of 2,000 square feet. (City Code § 154.406, Table 9-3). The survey of the property contained within the Application depicts the “maintenance garage” accessory structure to measure 30.1 feet by 72.1 feet for a rough total area of 2,170 square feet. In addition, no detached accessory in the RR District may be located nearer the front lot line than the principal building, except by resolution of the City Council. (City Code § 154.406 (C)(2)) The survey depicts the accessory structure to lie 104.5 feet from the front lot line, while the principal structure lies 166.2 feet from the front. Upon information and belief, the City Council has not passed a resolution to approving this non-conformity. Alternatively, in the event the accessory structure is presently considered a legal non-conforming use, the Board of Adjustment will need to approve the accessory structure’s proposed change in use from residential to cemetery use, which upon information and belief such approval has not been sought or granted. (City Code § 154.151(F)) As a result, the Application does not comply with applicable zoning regulations and should be denied.

c. The proposed security fence violates fence regulations.

In the RR District, no permanent fence shall be installed without a fence permit. (City Code § 154.205(C)(1). Even with a permit, “a fence within a front or side (corner) yard setback may not exceed forty-two (42) inches in height and must be 50% open to air and light” and under no circumstances may a fence in a residential district exceed six (6) feet in height. (City Code §§ 154.205(E)(1-2)). The security fence proposed in the Application, which according to the Developer is essential to “keep out vandals,” is eight (8) feet in height. The proposed security fence for the



Project does not comply with applicable zoning regulations and therefore the Application should be denied.

d. The proposed off-street parking does not comply with zoning regulations.

City Code provides that “development of land within the rural districts shall follow established standards for traffic circulation, landscape design, parking, signs and other considerations as specified in Articles 5, 6, and 7” of the zoning code. (§ 154.404) In residential areas, on-street and off-street parking is limited to the use of residents and guests. (City Code § 154.210(C)(5)) As depicted in the site plans contained in the Application, the Project will provide off-street parking for up to 53 vehicles in a paved parking lot, plus parking along the 16 foot-wide bituminous driveways between the in-ground burial sections of the cemetery and around the perimeter of the property.

According to Table 5-2 in Section 154.210 of the City Code, the minimum parking requirement for cemeteries is “as determined by the Planning Director.” According to the Staff Report to the Planning Commission dated July 13, 2015, the Table 5-2 standard was applied by Staff to analyze the parking on the Project based on the Application, and the 53 provided spaces were deemed sufficient for the cemetery use articulated in the Application. However, City Code dictates that in the event of a conflict between more restrictive and less restrictive regulations for comparable conditions, “the regulations which are more restrictive... shall prevail.” (§ 154.006(B))

Alternatively, it is apparent from the Staff Report that the parking analysis of the Project contemplated cemetery use only. (Staff Report to the Planning Commission, July 13, 2015) The Developer has since articulated a business plan that implicates additional uses on the Project, including a funeral home use. (Planning Commission Meeting Video Archive, July 13, 2015; City Council Meeting Video Archive, July 21, 2015). In the scenario this impermissible mixed use is approved and if the Table 5-2 “minimum permissible parking” standard is determined to be the applicable standard for off-street parking, as opposed to the above standard limiting all parking in residential areas to residents and guests, a shared-use parking analysis will need to be conducted by staff pursuant to Section 154.210(G), which upon information and belief has not been completed.

Based on all of the foregoing, the Application does not comply with applicable zoning regulations and denial is warranted.

2. Denial of the Application will not create legal precedent binding the City vis-à-vis future developments that properly comply with the City Code and community objectives.

Municipal officials can be reluctant to deny land use applications due to concerns that such decision will limit their discretion in approving or denying later land use applications submitted by different property owners for different projects. However, such concerns are not supported by Minnesota law. Minnesota courts have consistently declared that land use decisions made by local



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governments fail to create any sort of binding precedent because every application involves different facts and circumstances and takes place at different times from previous situations whereby similar applications were considered and granted.

The Minnesota Court of Appeals rejected a property owner's argument that a county zoning board was required to grant him a setback variance because the zoning board had granted his neighbor a similar setback variance. *Stotts v. Wright County*, 478 N.W.2d 802, 806 (Minn. Ct. App. 1991), citing *In re Johnson*, 404 N.W. 2d 298, 301 (Minn. Ct. App. 1987), rev'd on other grounds 562 N.W. 2d 21 (Minn. Ct. App. 1997). In *In re Johnson*, the Minnesota Court of Appeals held that "an applicant for a variance is not entitled to a variance merely because similar variances were granted in the past. Otherwise, the granting of one variance would likely result in the destruction of the entire zoning scheme." *Id.* at 301. Accordingly, the City Council's decision to reject the Application must not be swayed by the false pretense that doing so would unfairly preclude this Developer or others from submitting plans that duly comply with City Code and the comprehensive plan while carefully considering the fabric of the community in which the development sits.

3. Conclusion

Based on the foregoing and on behalf of the Concerned Neighbors, we respectfully urge the City Council to deny the Application and take such follow-up action it deems necessary to further "preserve and enhance the quality of living" of Lake Elmo's distinguished and desirable rural areas. Thank you for your consideration.

Very truly yours,

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