

**CITY OF LAKE ELMO
RESOLUTION NO. 2020-42**

**A RESOLUTION DENYING A PROPOSED AMENDMENT TO THE CONDITIONAL
USE PERMIT (RESOLUTION 2018-077) FOR THE PROPERTY AT 11530 HUDSON
BOULEVARD NORTH**

WHEREAS, the City of Lake Elmo (the “City”) is a municipal corporation under the laws of Minnesota; and

WHEREAS, the City adopted its 2040 comprehensive plan in October 2019 to guide the development of the community (“Comprehensive Plan”) (*See Ex. 18*); and

WHEREAS, the City has adopted a zoning ordinance and other official controls to implement the Comprehensive Plan; and

WHEREAS, Stillwater Area Public Schools – Independent School District 834, 1875 Greeley Street South, Stillwater, MN 55082 (“School District”) is the current owner of property at 11530 Hudson Boulevard North, Lake Elmo, MN 55042, Parcel ID: 36.029.21.43.0001, legally described as Lot 1, Block 1, Four Corners (“Property”); and

WHEREAS, the School District purchased the Property on October 23, 2018 from EN Properties, LLC (“Developer”); and

WHEREAS, prior to the School District’s purchase, the School District and the Developer made several land use applications to the City; and

WHEREAS, on May 4, 2018, the School District applied to the City to rezone the Property from Rural Development Transitional to BP – Business Park (“BP district”); and

WHEREAS, at the time, the School District also sought a zoning text amendment to allow school bus terminals as a conditional principal use within the BP district; and

WHEREAS, the School District also sought a Conditional Use Permit to operate a school bus terminal, i.e. a school district transportation on the Property; and

WHEREAS, the Developer sought Preliminary and Final Plat approval to subdivide the then-existing parcel at 11530 Hudson Boulevard North to create the 11-acre Property to be purchased by the School District; and

WHEREAS, at its meeting on July 17, 2018, the City Council approved the subdivision of 11530 Hudson Boulevard North and the creation of the Property, the rezoning of the Property to

the BP district, the zoning text amendment to allow “bus terminals” as conditional uses in the BP district (“Land Use Approvals”); and

WHEREAS, on July 17, 2018, by Resolution 2018-077, the City approved a “Conditional Use Permit for a School District Transportation Center for a Portion of the Property located at 11530 Hudson Boulevard North” (“Conditional Use Permit” or “CUP”)(Ex. 2); and

WHEREAS, the CUP required, among other conditions, that “9) The property shall be connected to sewer and water prior to operation of the bus terminal” (“Condition 9”); and

WHEREAS, the School District occupied the Property and began using it as a school district transportation center/bus terminal in late October 2019; and

WHEREAS, the Property was not then and is not now connected to municipal sewer and water; and

WHEREAS, on November 5, 2019, the School District applied for an amendment to Condition 9 of their CUP as follows: “The School District may operate its bus terminal at the property using the well and septic system (septic tank and temporary toilets) either until the School District connects to City sewer and water or until December 31, 2020, whichever occurs first. The School District agrees to connect to City sewer and water within 30 days after it becomes available.” (“First Amendment Application”) (Ex. 10, p. 2); and

WHEREAS, on January 21, 2020, by Resolution 2020-004, the City Council denied the First Amendment Application (Ex. 11.), and directed staff to institute the process for potential revocation of the CUP; and

WHEREAS, on March 12, 2020, the School District applied for the present amendment to Condition 9 of their CUP as follows: “The School District may operate its bus terminal at the property using its existing well and a new septic system as approved by Washington County, which shall be installed by August 30, 2020. The well and septic system may be used until the public services are installed and the connections are made to the Property.” (Ex. 1.) (“Second Amendment Application”); and

WHEREAS, the School District has met all submission requirements of City Code § 154.106 and the City determined that the application was complete on March 13, 2020; and

WHEREAS the Planning Commission held a public hearing on April 13, 2020 to review the Second Amendment Application, following mailed and published notice as required by law; and

WHEREAS, prior to the public hearing, the School District was provided a draft staff report notifying it of the basis for the staff’s recommendation to the Planning Commission, including supporting documentation, and the School District was provided the opportunity to submit documentation to the Planning Commission in advance of its April 13, 2020 meeting; and

WHEREAS, at the April 13, 2020 meeting, the School District was provided the opportunity to present their application; and

WHEREAS, at the close of the public hearing, after discussion, the Planning Commission voted 6-1 to recommend approval of the amendment to Condition #9 with the additions as follows:

“the property shall be connected to City Sewer and Water prior to operation of the bus terminal” to “The School District may operate its bus terminal at the property using its existing well and septic system until a new septic system is approved by Washington County, which must be installed by August 30, 2020. The well and septic system may be used until the public services are installed and the connections are made to the property. Any changes to the site plan must be approved by city staff.”;
and

WHEREAS, the City Council considered the Second Amendment Application at its May 5, 2020 meeting; and

WHEREAS, the City Council has reviewed any and all materials submitted by the School District; considered any and all oral and written testimony offered by the School District and all interested parties; considered all historical background of the Property, the City’s Comprehensive Plan and Zoning Code, and reviewed all material presented by City Staff, including the Planning Commission staff report dated April 13, 2020 and the City Council staff report dated May 5, 2020 along with information presented at the May 5, 2020 meeting.

NOW, THEREFORE, the City Council of the City of Lake Elmo makes the following:

FINDINGS

I. RECITALS

The above recitals are incorporated as if fully set forth herein.

II. APPLICABLE ZONING LAW AND REGULATIONS

A. Minn. Stat. § 462.351, *et seq.* grants the City, for the purpose of promoting the public health, safety, morals and general welfare, the authority to regulate the use of land within the City through zoning and other regulations.

B. City Code § 154.002 outlines the purpose of the city’s zoning code, which includes:

A. Protecting the public health, safety, comfort, convenience, and general welfare;

B. Implementing the City of Lake Elmo Comprehensive Land Use Plan;

C. Promoting orderly development of the residential, commercial, industrial, recreational and public areas;

Comprehensive Plan

C. The Comprehensive Plan includes “Visions, Goals, and Strategies,” of which one is Balanced Development & Growth (BDG).

i. BDG Goal #3 is, “**Recognize** that sewer development is planned specifically for guided areas and that those areas are appropriate for increased density and commercial uses.” (Ex. 18, p. 2-10.) Among the strategies to support Goal #3 is to “[e]ndorse the land use plan and apply it consistently.” (*Id.*)

ii. BDG Goal #4 is, “**Support and Create** a land use and phasing plan that promotes contiguous development, that has flexibility to respond to the market, and results in a balanced land use pattern.” (Ex. 18, p. 2-10.) Among the strategies to support Goal # 4 is “Prevent premature development of areas within the urbanizing areas to ensure adequate capacity within the infrastructure is available.” (*Id.*)

D. As noted in the Comprehensive Plan, “[t]he City’s objective is to plan for phased, contiguous growth to ensure adequate infrastructure and capacity are available to support development.” (Ex. 18, p. 3-24.) The Property lies in the South Planning Area for the Metropolitan Urban Service Area (MUSA). (Ex. 18, pp. 3-11, Map 3-2.)

E. The Comprehensive Plan distinguishes between the MUSA and areas outside it. Notably, “[p]ortions of Lake Elmo are within the Metropolitan Urban Service Area (MUSA), providing sanitary sewer and water services to included properties. A large portion of the city remains outside these boundaries through 2040 and is generally served by private well and septic systems (individual and community) (Ex. 18, p. 8-12). The Property is within the Business Park zoning district, which is a sewer district in the Comprehensive Plan. (Ex. 18, at p. 6.)

F. “The Existing and Future Sanitary Sewer Map (Map 9-1) shows the current sanitary sewer infrastructure as well as planned infrastructure to serve the MUSA areas in accordance with the Future Land Use plan in Chapter 3.” (Ex. 18, 9-2; *see also, Id.* p. 3-18.)

G. Specifically, “[t]he 2020 Staging Plan includes the extension of a second trunk sewer from the MCES Cottage Grove Ravine Meter Station to serve the portions of the Southeast Planning MUSA from Lake Elmo Avenue to Manning Avenue.” (Ex. 18, p. 9-3.) Map 9-1 highlights the existing and future sanitary sewer system.

H. Finally, as noted above, the Comprehensive Plan expressly provides for conditions under which septic systems are allowed: “Septic Systems are allowed for all land uses within the City outside of the planned sewer service areas in accordance with Chapter 4: Subsurface Sewage Treatment System Regulations of

the Washington County Development code as adopted by reference by the City of Lake Elmo. (Ex. 18, p. 9-13.)

Zoning Code

I. City Code § 154.106(A) defines a “Conditional Use” as “land use or development as defined by ordinance that would not be appropriate generally but may be allowed with appropriate restrictions as provided by official controls only” after the Applicant meets their burden to prove conformity with that section and the City makes specific findings required by that section, which include:

2. The use or development conforms to the City of Lake Elmo Comprehensive Plan. . . .

7. The proposed use will not be hazardous or create a nuisance as defined under this Chapter to existing or future neighboring structures.

8. The proposed use will be served adequately by essential public facilities and services, including streets, police and fire protection, drainage structures, refuse disposal, water and sewer systems and schools or will be adequately served by such facilities and services provided by persons or agencies responsible for the establishment of the proposed use.

9. The proposed use will not create excessive additional requirements at public costs for public facilities and services and will not be detrimental to the economic welfare of the community.

J. City Code § 154.106(E) provides, in relevant part, that the, “Council may attach whatever reasonable conditions they deem necessary to mitigate anticipated adverse impacts associated with these uses, to protect the value of property within the district and to achieve the goals and objectives of the Comprehensive Plan.”

K. City Code § 154.106(E)(3)(d) further provides that the City may place conditions on the use a property related to “controlling the location, availability, and compatibility of utilities.”

L. City Code § 154.1006(B) provides, “Conflict. Where the conditions imposed by any provision of this chapter are either more restrictive or less restrictive than comparable conditions imposed by any other law, chapter, statute, resolutions or regulation of any kind, the regulations which are more restrictive or which impose higher standards or requirements shall prevail.”

M. City Code § 154.005 requires that, “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.”

N. City Code § 154.107(C) requires that, “The Planning Commission shall hold a public hearing on each complete application for a conditional use permit as provided in § 154.102 of this Article.” Further, it provides, “[a]fter the closing of the hearing on a proposed conditional use permit, the City Planning Commission shall consider findings and shall submit the same together with its recommendations to the City Council.”

O. City Code § 154.107(D) recognizes, “The City Council shall make the final decision on a conditional use permit after a public hearing by the Planning Commission. The City may approve, approve with conditions, or deny the application.”

P. City Code § 154.107(F) mandates, “If the Planning Commission recommends denial of a conditional use permit or the Council orders such denial, it shall include in its recommendation or determination findings as to the specific ways in which the proposed used does not comply with one or more specific findings required by this chapter.”

Q. City Code § 10.99 provides general standards for compliance with the City Code, including Chapter 154. City Code §10.99(A)(1)), which includes, prohibiting the following:

... ..

(b) Violate, fail to comply with, or assist, authorize, or permit the violation of the terms and conditions of a city approval, including permits and licenses, required or granted under this Code.

(c) Knowingly make or submit a false statement, document, or material omission in connection with an application or procedure required by this code.

R. Furthermore, City Code § 10.99(B)(4): “A violation of Division (A) above constitutes sufficient grounds for denial of an application required by this code that is related to the violation.

III. LAND USE APPROVALS

A. Prior to July 2018, the Property was zoned Agricultural Business Park Holding Strict (“HD-A-BP”) and later Rural Development Transitional (“RT”).

B. The Property was subject to a Consent Agreement/Interim Use Permit (“IUP”). (Ex. 30; Ex. 25, p. 11). The IUP allowed the previous occupant of the Property to operate a truck terminal at the site with a well and septic system. The Interim Use Permit contained numerous conditions, including the following:

C. The interim use shall be located on that portion of the Applicant’s Property illustrated on the Site Plan. The remainder of the Applicant’s Property shall continue to be used for agricultural purposes.

...

E. The Interim Use Permit is valid until the first occurring following event:

1. For five (5) years from the date of the renewal of the Interim Use Permit (December 2, 2019);

...

3. Until a change in the City's zoning regulations, which renders the interim use non-conforming; or

4. Until the redevelopment of the Property for a permitted or conditional use as allowed by the City's zoning regulations.

(Ex. 30, pp. 2-3; Ex. 25, p. 11.)

C. At the time of the land use approvals, the School District represented that it did not want to operate under the current Interim Use Permit (Ex. 25, p. 11).

D. Prior to July 2018, the Property was zoned Rural Development Transitional ("RT"). The RT designation provides landowners with interim use options as they wait for the availability of sewer or until such time as the property owners requests a zoning change to a new district consistent with future guided land use. (Ex. 25, p. 2.)

E. The School District and landowner requested that the Property be rezoned to the BP district, which the land was guided for in the 2030 Comprehensive Plan. (Ex. 25, p.2.) The BP district is considered a sewer district in the Comprehensive Plan. (Ex. 18, p. 367, & p. 3-18 Map 3-4.)

F. In describing its use of the Property as a transportation center, the School District has acknowledged that approximately 200 people work at the facility, with morning and afternoon shifts of drivers and attendants, along with vehicle maintenance and administrative staff. Hours of operation are approximately 6:00 a.m. to 6:00 p.m. during the weekdays with occasional Saturday use. Parking for the school buses (total of 140) transportation vans (about 20) and personal vehicles of the employees (about 200) is provided on-site. (Ex. 5.)

G. In its application for the CUP, the School District acknowledged that: Water and sanitary sewer infrastructure are also proposed to this area of the City as part of the adjacent re-development and re-alignment of Hudson Boulevard, eliminating the need for septic systems for treatment of wastewater from this facility. As the water for the facility is switched from the well to municipal water, the existing well would be abandoned in accordance with Minnesota Health Department requirements. (Ex. 5, p. 2.)

H. As noted above, in July 2018, the School District also sought a zoning text amendment to add a Bus Terminal as a conditional use in the BP District. The

addition to the BP District was approved by the City as a conditional use, provided that certain specific conditions were met, including that it must be on property of at least 10 acres in size or more. (See City Code § 154.550, O.)

I. At the time of the CUP approval, the City Council approved the Preliminary and Final Plat to allow the Four Corners development, which included the Property, and created an 11-acre parcel for the School District. (See Ex. 25, Preliminary Plat Application.)

J. As part of the School District's applications, it provided a Plan for Bus Facility Improvements, which included significant paving over the 11-acre Property, the inclusion of stormwater ponds, a watermain easement, a 10-foot small utility easement and a utility plan. (Ex. 6.)

K. The Staff Report for Agenda Item #17, on July 17, 2018, noted "Because the property is guided in the City's Comprehensive Plan for 2020-2030 Regional Sewer Staging Plan and would discharge to the MCES Cottage Grove Ravine Interceptor, provisions for connecting to the municipal sanitary sewer service must be included with this application," and "Because the property is located in the MUSA, provisions for connecting to the municipal water supply must be included." (Ex. 25.)

L. The City Engineer provided a Memorandum, dated May 30, 2018, which was an engineering review of the plans for the Four Corners development, including the Stillwater Bus Facility Site Plans. (Ex. 7.) The Memorandum provided comments and recommendations for Stormwater Management, Streets and Transportation, Municipal Sanitary Sewer, and Municipal Water Supply.

M. The CUP, i.e., Resolution No. 2018-077, includes, but is not limited to, the following conditions relevant to the current use of the Property:

Condition #2: No construction or use of the bus terminal (unless in accordance with the Interim Use Permit approved by the City by Resolution 2014-095) may commence until all items as outlined in the City Engineer review memo regarding the Four Corners Preliminary & Final Plat (Stillwater Transportation Center) dated May 30, 2018 and all other subsequent construction plan memos regarding the Stillwater Transportation Center have been addressed; the Four Corners 1st Addition Final Plat has been recorded. (Ex. 2, p. 4.)

Condition #3: The applicant must obtain all other necessary City, State, and other governing body permits prior to the commencement of any construction activity on the parcel including but not limited to: an approved stormwater management plan, utility plans, grading plan, street construction plans (if required), parking lot permit, building permits, etc. (Ex. 2, p. 4.)

Condition #9: The property shall be connected to City sewer and water prior to operation of the bus terminal." (Ex. 2, p. 4.)

N. The CUP does not require the School District to pay for all improvements to the Property; it simply requires all the improvements to be constructed as a prerequisite to the occupation and use of the Property.

O. At the time of the City Council's consideration of the land use applications discussed above, including the CUP, the School District's representatives were provided with all staff reports and the proposed CUP. The School District did not make objection to the CUP or any of its conditions.

IV. IMPROVEMENTS SINCE CONDITIONAL USE APPROVAL

A. The Developer and the City negotiated a Developer's Agreement dated October 22, 2018, which required the Developer to build the water and sewer infrastructure and bring it to the Property.

B. The School District closed on its purchase of the Property on October 23, 2018. The CUP was granted months before the closing and the School District was aware of its requirements. The provision of water and sewer to the Property by the Developer was contemplated in the Purchase Agreement between the School District and the Developer. The City was not a party to the Purchase Agreement.

C. By e-mail dated April 16, 2019, the City Administrator stated, "We are allowing you to work under the IUP (Interim Use Permit) as referenced in Condition #2 of the CUP but, that expires this year. I honestly don't think Terry is going to have water and sewer to you by the end of the year so then you would not be in compliance with the terms of the CUP and you wouldn't be able to operate it as a school bus garage." (Ex. 19, p. 2.) (emphasis added.)

D. On July 11, 2019, the School District entered into a Site Improvement Agreement with the City to govern its construction of improvements required of the School District by the CUP. The Site Improvement Agreement did not address or approve of the installation of a fire suppression system, fire alarm system, including heat and smoke detection, and a temporary septic system. (Ex. 31)

E. On July 16, 2019, the City Administrator e-mailed the School District, and noted in relevant part:

Perhaps we should touch base on Terry's project and the status of water and sewer being extended to the site. Terry has asked for the City Council to review a change to the plans at their August work session. This may result in water and sewer not being extended this year. I wanted to make sure you were aware of this before moving ahead with the millions of dollars in improvements that may not be operational without the extension of water and sewer. (Ex. 19, p. 1.)

F. Despite the City Administrator's two warnings, the School District proceeded with improvements contemplated by the Site Improvement Agreement and those not contemplated by the Site Improvement Agreement.

G. The School District paved over approximately 3.8 acres of previous Agricultural land to the north of the building for its bus parking lot (i.e. its primary use). The School District landscaped the Property and installed a watermain and the additional improvements below.

Fire Suppression and Fire Detection

H. The School District installed a fire alarm system, which included heat and smoke detection.

I. The School District installed a fire suppression (sprinkler) system within the building. (Exs. 27- 29.) That system is not connected and not available for use. (*Id.*)

J. According to the City's Interim Building Official, while neither the fire suppression nor the fire alarm system were required to be installed by the School District, the installation triggered permitting and code compliance requirements. (Ex. 29). The Minnesota State Fire Code, Section 105.1.1, provides that when work is undertaken that it is regulated by the code (i.e. fire suppression and detection) and permits are required. (Exs. 27; 29.)

K. The fire alarm system (including heat and smoke detection) was installed without a permit.

L. The fire suppression system was installed pursuant to a permit. However, as noted by the Interim Building Official, "it is a requirement of the fire code that all installed fire sprinkler systems be maintained and operational, or they are to be removed (if they are not required). Specifically Minnesota State Fire Code Section 901.45 states, "Any device that has the physical appearance of life-safety or fire protection equipment, but that does not perform that life-safety or fire suppression function shall be prohibited." (Ex. 29, at pp. 1-2.)

M. Following a March 11, 2020 inspection, on April 21, 2020, the State Fire Marshal notified the City of Lake Elmo and the School District that (consistent with the Interim Building Official's review), the fire protection sprinkler system has to be addressed and suggested several alternatives, including provision of municipal water supply, installation of on-site automatic water supply/tank connected to a fire pump; installation of an additional on-site private well and pump; or demolishing the sprinkler system. (Ex. 28, pp 3-4.) The letter noted that "Further investigation is pending the verification of the building construction, building height and area, and occupancy use classifications as they relate to the possible requirements for the installation of a fire protection system." (Ex. 28, p. 4.)

Temporary Septic Tank

N. Prior to moving onto the Property, the School District installed a temporary septic tank and temporary toilets (i.e. porta potties).

O. The School District admitted that the temporary septic tank was not permitted by Washington County. Washington County confirmed that it did not approve the temporary septic tank. (*See also* Exs. 15-16, 21.)

V. OCCUPATION OF THE PROPERTY

A. On August 29, 2019, the School District Board considered Agenda Item IX.E. related to “Additional Transportation Facility Design.” (Ex. 8.) The staff report provided, “Because the planned development has not progressed, interim changes will be necessary for the District’s students transportation provider to occupy the facility,” and, “Based on the need to occupy the Transportation Facility prior to public utilities being available, Administration recommends proceeding with the proposal from Larson Engineering, Inc.” (Ex. 9.)

B. From August of 2019, through November 2019, City staff was unaware of plans by the School District to occupy the Property.

C. In Fall 2019, the School District began utilizing the property as its bus terminal. (Exs. 8, 9, 10.)

D. In its November 5, 2019 application to amend its CUP, the School District acknowledged that it was not occupying the Property pursuant to the IUP, stating, “The School District applied for and received approval for the rezoning of the property to Business Park on July 17, 2018, thereby automatically terminating the IUP.” (Ex. 10, p. 1.)

E. Its November 5, 2019 letter stated the following:

It is important to point out a few significant facts:

1. The School District will complete all of the on-site improvements by December 1, 2019, as required in its Site Improvement Agreement with the City. . . .

2. Prior to construction, the City informed the School District that it could request an extension of the IUP to operate at the property using a well and septic system for a temporary period of time. Based on that direction, the School District installed a temporary septic tank, supplemented by temporary toilets. The existing well has been approved by the Minnesota Department of Health and the temporary septic services have been approved by Washington County, pending acceptance by the city and a timeline for when City services will become available. The City and School District now know that the IUP was terminated upon the event of the rezoning, thereby making the extension of the IUP impossible. (Ex. 10, p. 2.)(emphasis added.)

F. In the letter, the School District further opined on the temporary septic:

1. The temporary services will not be detrimental to or endanger the public health, safety or general welfare. The existing well have been tested and approved by MDH. The septic tank and temporary toilets are a short-term solution and have been accepted by Washington County, pending city approval and a timeline for connection to City sewer. Well and septic systems have long been used in this area and the School District's short-term solution will not endanger the public. (*Id.*)

G. By e-mail dated February 20, 2020, the City Administrator was alerted to a potential issue with the temporary septic tank relied upon by the School District. (Ex. 15.) The City Administrator reached out to the Washington County Department of Public Health & Environment regarding the temporary septic. By e-mail dated March 17, 2020, Gary Bruns, Environmental Program Supervisor, stated, "The only permit we have issued the district is for the abandonment of one old septic tank on the property. We have been told a design for a septic system will be submitted, but we do not have that at this time." (Ex. 16.)

H. On April 1, 2020, on behalf of Washington County, Mr. Bruns provided a letter to the City which commented on the School District's Second Amendment Application. Relevant to the compliance with the CUP, the letter states:

1. The District states "The current 3,000 gallon septic tank is sufficient to accommodate those employees." This tank size is not sufficient as it does not meet the requirements of MN Rule Chapter 7080 or Washington County Ordinance # 206 requirements. (Ex. 21.)

I. By e-mail dated March 9, 2020, a representative from the Minnesota Department of Labor contacted the City Administrator regarding the improvements made by the School District noting, "A structure funded for a school district, of which the cost is \$100,000 or more, is considered a public building. This project would be required to be reviewed, permitted and inspected." (Ex. 17, p. 2.)

J. The City Administrator acknowledged that, according to representations from the School District, they installed sprinklers, fire alarms and heat and smoke detectors (Ex. 18, p. 1.)

K. The School District continues to use the Property as a bus terminal.

L. The School District has acknowledged that EN Properties, LLC has breached its contractual duties to the School District. (Ex. 12, p. 2.) The School District has sued the Developer under its Purchase Agreement, *Independent School District No. 834, Stillwater Area Public Schools v. EN Properties, LLC & E&E properties, LLC*, 82-CV-20-1422 ("Lawsuit"). In the Lawsuit, the School District is specifically seeking injunctive relief to require the Developer to furnish water and sewer to the Property. The School District asserts that it has a contractual remedy against the Developer which would allow it to accomplish the prerequisites to occupation of the Property as required by the CUP.

VI. REQUEST FOR CUP AMENDMENT TO ALLOW USE OF PROPERTY WITH PERMANENT ON-SITE SEPTIC SYSTEM

A. The School District requests that its CUP be amended to allow their use of the existing well and temporary septic tank on its Property until August 30, 2020, by which time they would install a permanent septic system approved by Washington County on their Property. Pursuant to the requested amendment, the School District would be allowed to use the well and septic system until the public services were installed and connection made to the Property. (Ex. 1.)

B. At the time of the application, the School District provided a one-page Utility Plan related to the proposed permanent septic system. (Ex. 1, p. 21.) In response to questions from the Planning Department, the School District's Facilities Manager provided some explanation. (See Ex. 22.)

C. On March 19, 2020, the City's Engineer provided a Memorandum reviewing the Amended CUP Site Improvements, which provides in relevant part:

i. Municipal Sanitary Sewer. The Engineer notes that, "[t]he proposed site is guided in the City's 2040 Comprehensive Plan for public sanitary sewer that would discharge to the MCES Cottage Grove Ravine Interceptor," and consistent with current city policy, he recommends that the School District be required to connect to the city sanitary sewer system and extend sanitary sewer to the property. (Ex. 20.)

ii. Municipal Water Supply. The Engineer states, "[t]he proposed facility resides within the Planned MUSA, therefore provisions for connecting to the municipal water supply should be included with the application," and consistent with current city policy, he recommends that the School District be required to connect to the city municipal water supply system and extend municipal water to the property. (Ex. 20.)

iii. Stormwater Management. The Engineer notes that the approved CUP required the construction of storm water management facilities meeting city and VBWD rules to address new and reconstructed impervious surfaces and internal parking areas and site improvements. (Ex. 20.) The facilities remain under construction pending verification by City staff. Additionally, storm water improvements were required as part of the development to urbanize Hudson Boulevard consistent with design standards, and were a condition for approval, which has not been realized to date.

D. On April 8, 2020, the School District provided a 58-page plan for septic system design. (Ex. 23.) The School District submitted the plans to Washington County on April 7, 2020.

E. The City Engineer provided a preliminary assessment of the proposed permanent septic design. (Ex. 24.)

F. Washington County has not issued a permit for the temporary septic system. As noted above, Washington County provided a letter dated April 1, 2020 regarding the School District's application. As to the proposed CUP amendment and proposed on-site septic, the Public Health and Environment Department acknowledged, as of the date of the letter, that they had not received an application for a replacement Subsurface Sewage Treatment System (septic system), and, therefore, could not make an assessment whether the plan and proposed use is feasible. (Ex. 21.)

G. With respect to the interim use of the temporary septic, the County noted that the current 3,000 gallon septic tank is not sufficient, as it does not meet the requirements of MN Rule Chapter 7080 or Washington County Ordinance #206. (*Id.*)

H. The County also noted that it has not commented on the capacity needed for the site, contrary to the representation made by the School District. (*Id.*) Finally, the County noted that the Utility Plan does not indicate where the replacement system will be located and does not accurately depict what is currently on site. (*Id.*)

I. On April 29, 2020, the City received communication from Washington County that the School District had submitted a new septic system design to the County on April 28, 2020. The County provided that proposal to the City. (Ex. 33.) The County provided the City a summary of the newly proposed system and acknowledged that it addressed the issues raised from the first design. (Ex. 32.) Its new plans appear to address the concerns raised by the City Engineer as well.

VII. FINDINGS ON DENIAL

Conditional Use Permit Findings – City Code § 154.106(A)

A. City Code § 154.106(A) provides that the City Council may grant a conditional use if it finds that the proposed use meets specific findings. The City finds that the School District did not meet its burden to show compliance with City Code § 154.106(A) and the proposed use does not comply with specific findings required by City Code § 154.106(A). Pursuant to City Code § 154.106(F), the City makes the following specific findings which require denial of the application and requested amendment:

i. The City finds the proposed use of the Property with a temporary septic and a permanent septic system does not conform to the City of Lake Elmo Comprehensive Plan. City Code § 154.106(A)(2).

a. The City approved the development of the parcel and the previous Conditional Use Permit with the expectation and requirement that the Property as developed be connected to sanitary sewer and water facilities.

b. The Property was originally a 5-acre site and developed by the School District into an 11-acre site to accommodate its proposed use.

c. The School District requested that the Property be rezoned to Business Park and requested an amendment to allow bus terminals as a conditional use in that district.

d. The Property is within the Business Park zoning district, which is a sewerred zoning district in the Comprehensive Plan. (Ex. 18, at p. 6). The Comprehensive Plan provides that septic systems are allowed for land uses "outside of the planned sewer services."

e. Because the Property is within a MUSA district, it was required to connect to City water and sanitary upon development. Consequently, the City made it an express condition in the CUP that it be connected to municipal sewer and water before occupation and use. (Ex. 2, p. 4 [Condition No. 9])

f. Since it is not connected to City water and sanitary sewer services, it is in conflict with the requirements of the MUSA district, as outlined by the Comprehensive Plan and the use should not be allowed to continue due to this conflict.

g. Finally, the School District's application is premised on their continued interim use of the Property (which has occurred since October 2019) until August 30, 2020 with its unpermitted temporary septic tank. The temporary septic tank does not comply with the Comprehensive Plan.

h. Even if outside the planned sewer service areas, which the Property is not, the Comprehensive Plan provides that the Property must still comply with Chapter 4: Subsurface Sewage Treatment Systems Regulations of the Washington County Development Code as adopted by reference by the City of Lake Elmo. (Ex. 18, at p.9-13). According to Washington County, the size of the temporary tank is not sufficient as it does not meet the requirement of MN Rule Chapter 7080 or Washington County Ordinance No. 206. (Ex. 21). Ordinance No. 206 and Chapter 4 of the Washington County Development Code are the same regulations. (Ex. 26). Consequently, the temporary septic contravenes the Comprehensive Plan. Because the further use of the temporary septic is integral to the School District's amendment request, the request must be denied.

ii. The City finds that the proposed use of the Property with a temporary septic system will be hazardous or create a nuisance, as defined under Chapter 154, to existing or future neighboring structures. City Code § 154.106(A)(7)

- a. The City incorporates the findings above related to the temporary septic in support of a finding that its use creates a hazard or nuisance.
 - b. The Amendment requires temporary use of the Property served by temporary toilets (i.e. "porta potties") and an existing unpermitted septic tank. The current septic system is not adequate for the site and constitutes a hazard to workers at the Property.
- iii. The City finds that the proposed use will be served adequately by essential public facilities and services, including streets, police and fire protection, drainage structures, refuse disposal, water and sewer systems and schools or will not be adequately served by such facilities and services provided by persons or agencies responsible for the establishment of the proposed use. City Code § 154.106(A)(8).
- a. City Code § 154.106(A)(8) provides that the City must determine that the proposed use will be adequately served by essential facilities, including but not limited to water and sewer systems, or the City can allow a proposed use if a property is adequately served by such facilities and services. Contrary to the assertion of the School District, this provision, however, does not require that the City make a finding that a permanent septic system be used merely because a Property owner wants to connect to a private system. It is written to allow conditional uses in areas of the City that are not sewered or readily capable of being connected to municipal water and sewer. This provision does not require that the City dispense with the other provisions of the City's zoning code and its comprehensive plan based upon an Applicant's prerogatives.
 - b. As noted above, the City approved the development of the parcel and the previous Conditional Use Permit with the expectation and requirement that the Property as developed be connected to sanitary sewer and water facilities.
 - c. The Property was originally a 5-acre site and developed by the School District into an 11-acre site to accommodate its proposed use.
 - d. The School District requested that the Property be rezoned to Business Park and requested an amendment to allow bus terminals as a conditional use in that district.
 - e. The Property is within the Business Park zoning district, which is a sewered zoning district in the Comprehensive Plan. (Ex. 18, at p. 6). The Comprehensive Plan provides that septic systems are allowed for land uses "outside of the planned sewer services."
 - f. Because the Property is within a MUSA district, it was required to connect to City water and sanitary upon development. Consequently, the

City made it an express condition in the CUP that it be connected to municipal sewer and water before occupation and use. (Ex. 2, p. 4 [Condition No. 9])

g. Since it is not connected to City water and sanitary sewer services, it is in conflict with the requirements of the MUSA district, as outlined by the Comprehensive Plan and the use should not be allowed to continue due to this conflict. It is not adequately served by essential public facilities at this time, which merits denial of the amendment request.

h. The School District argues that language in the City Engineer's Memorandum, dated March 19, 2020 (Ex. 14) compared with the Engineer Memorandum, dated May 30, 2018 (Ex. 7) and incorporated into the CUP conditions, indicates that the City does not, in fact, require connection to sewer and water. The City finds the School District's argument unavailing. At the time of the original CUP application, based upon rezoning, redevelopment, and the Comprehensive Plan, the City determined that the Property needed to be connected to water and sewer. The School District now wants to unwind a primary condition of that approval. The School District ignores that the March 19, 2020 Memorandum expressly calls out this issue. For example, it states, "The proposed site is guided in the City's 2040 Comprehensive Plan for public sanitary sewer that would discharge to the MCES Cottage Grove Ravine Interceptor. Therefore, provisions for connecting to the municipal sanitary sewer service should be included with the application. Instead, the application makes a request for continued use existing and proposed on-site septic systems and drainfields until sanitary sewer is available to the site." The City Engineer's March 19, 2020 memorandum merely represents the City Engineer's attempt to address an application which is contrary to the previous approval and conditions.

i. Furthermore, the School District's application is premised on their continued interim use of the Property (which has occurred since October 2019) until August 30, 2020 with its unpermitted temporary septic tank. For the reasons stated previously, the temporary septic tank is not adequate because it doesn't comply with Washington County regulations or the City's Comprehensive Plan.

Application of City Code § 10.99

Violating Conditions of Approval - § 10.99(A)(1)(b)

B. City Code §10.99(A)(1)(b) prohibits violating, failing to comply with, authorizing, or permitting the violation of the terms and conditions of a city approval, including permits and license. The City finds that the School District is using the Property in violation of the terms of its CUP as follows:

i. Condition No. 2 provides that no construction or use of the bus terminal may commence until all items as outlined in the City Engineer Review Memo dated May 30, 2018 (i.e. Ex. 7) and all other subsequent construction plan memos have been addressed. (*See also* Ex. 2).

a. The School District moved onto the Property in October 2019 and began using it as a transportation center.

b. The City Engineer has provided a Memorandum dated March 19, 2020 (Ex. 14.) which addresses the improvements required for the Property.

c. Based upon the foregoing, the Council finds that the School District is using the Property before the following improvements were completed:

- Hudson Boulevard Improvements (Ex. 7, p. 2, Ex. 14)
-including Traffic Impact Study (Ex. 7, p. 2; Ex. 14)
- Municipal Sanitary Sewer (Ex. 7, p. 2; Ex. 14)
- Municipal Water Supply (Ex. 7, p. 2; Ex. 14)
- Storm water management facilities (Ex. 7, p. 1; Ex. 14)

d. The School District does not dispute that the improvements have not been completed but blames both the Developer for not completing the improvements and the City for requiring them.

e. The City does not dispute that items complained of are the responsibility of the Developer. The CUP does not require that the School District complete them. It simply requires, like any other development or redevelopment, that the redevelopment be complete before final occupancy. Contrary to the suggestion of the School District, that is not an unusual practice. The School District has a purchase agreement with the Developer and has a contractual remedy to require the Developer to complete the improvements.

f. The City further finds that the School District created the conflict with the CUP. There would be no violation of Condition #2 absent the School District's determination to move onto and utilize the Property despite the prohibition in the CUP. The School District is responsible for this violation not the City or the Developer.

ii. Condition #3 provides that the School District must obtain all other necessary City, State, and other governing body permits prior to the commencement of any construction activity on the parcel.

a. The City finds that the School District has constructed a temporary septic tank on the Property without a permit and that

Washington County has not approved the School District's use of the temporary septic tank.

b. The City also finds that the School District installed a fire alarm (heat and smoke detection) system that required a permit under the Minnesota State Fire Code, but failed to get a permit.

c. The City further finds that the School District's decision to occupy and utilize the Property renders the failure to seek the appropriate approvals troubling. The permitting approvals are designed to protect the health, safety, and welfare, of the employees and persons using the Property as a transportation center as well as the public at large. The School District is responsible for this violation not the City or the Developer.

iii. Condition #9 provides that the property shall be connected to City sewer and water prior to the operation of the bus terminal.

a. Condition #9 does not allow use of the Property under any circumstances until connection to City sewer and water. The requirements are unequivocal.

b. The School District has used the Property since at least mid-October 2019. The Property remains unconnected to City sewer and water.

c. The City further finds that the School District created the conflict with the CUP. There would be no violation of Condition #9 absent the School District's determination to move onto and utilize the Property despite the prohibition in the CUP. The School District is responsible for this violation not the City or the Developer.

Misrepresentation – § 10.99(A)(1)(c)

C. City Code §10.99(A)(1)(c) also prohibits knowingly making or submitting a false statement, documents or material omission in connection with an application or procedure required by this Code. The City finds that the School District violated this section as follows:

i. Misrepresentation # 1

a. As found above, at the time of its occupation of the Property in October 2019, the School District had installed a temporary septic system. That septic system was not permitted or approved by Washington County.

b. On November 5, 2019, the School District applied for an CUP to legitimize its use and occupation of the Property. The letter

stated, in relevant part, “the temporary septic services have been approved by Washington County, pending acceptance by the city and a timeline for when City services will become available.”

c. The City finds that this statement was knowingly made and was false. The septic tank was not approved by Washington County on November 5, 2019.

d. In defense, the School District has made it clear that it does not regret its wording; nor does it claim a mistake. Instead, it provides an e-mail from a Washington County employee, which they claim supports their statement that they had approval from Washington County. (*See* Ex. A.)

e. This e-mail was not provided to the City prior to the revocation process and there was no evidence presented that City staff were aware of the School District’s claim that City staff were a roadblock to approval. Even if City staff had approved the use of temporary toilets and provided a timeline for extension of City sewer and water (which would not have been possible at that time), the e-mail itself states, “If we can get those things, we should be able to move forward with the permitting process.” (Ex. A, p. 2.) (emphasis added). The e-mail does not mention the word “approval” or suggest that if those two issues were satisfied that the tank was approved by Washington County.

f. In addition to the fact, later admitted by the School District at the Planning Commission meeting on April 13, 2020, that the septic tank was not permitted or approved at that time, the April 1, 2020 letter from Washington County (Ex. 21) casts significant doubt on the proposition that it would ever have been approved. The County noted that, “[t]his tank size is not sufficient as it does not meet the requirements of MN Rule chapter 7080 or Washington County Ordinance # 206 requirements.”

g. At best, given the e-mail provided by the School District, the phrasing of the sentence, purposefully made, concealed the truth that the permitting process was not complete pending acceptance by the City and a timeline for when City services will become available. The City also finds that this statement, knowingly made, contains a material omission by suggesting that approval was fait accompli.

h. This omission was material because the School District was relying on it to convince the City to allow their use of the Property. Furthermore, the School District suggested that “[t]he temporary septic services will not be detrimental to or endanger the public, health, safety, or general welfare.” The purpose of permitting and approval by Washington County, the entity with expertise on this

subject, is to ensure adequate safety for employees of the School District and the public at large.

i. The City finds that this knowingly false statement and material omission were related to the approval, i.e. the CUP.

ii. Misrepresentation # 2

a. In its application for an amendment, the School District represented, "The current 3,000 gallon septic tank is sufficient to accommodate those employees." (Ex. 1, p. 4.) The School District also represented, "Washington County has indicated that the septic tank needs to be larger, up to 58,000 gallons, and the septic system must be redesigned in order to accommodate the drivers as well."

b. In its April 1, 2010 letter, Washington County directly contradicting these assertions. Washington County stated that contrary to the assertion of the School District, the 3,000 gallon septic tank was not sufficient to accommodate the School District's on site employees as it did not meet the requirements of Minnesota Rule Chapter 7080 or Washington County Ordinance # 206. (Ex. 21.)

c. More troubling, the County stated, "In the CUP request, the District states that the Department has indicated the septic tank needs to be 58,000 gallons in capacity. The Department has not commented on proposed tank size requirements." (Ex. 21.)

d. The City finds that these were knowingly false statements related to the pending request for a CUP amendment.

D. Pursuant to City Code § 10.99(B)(4): "A violation of Division (A) above constitutes sufficient grounds for denial of an application required by this code that is related to the violation. The City finds that the violations described above of City Code §§ 10.99(A)(1)(b)&(c) are related to the School District's CUP and, therefore, related to this application. The City finds that the violations constitute grounds for denial of the application.

DECISION

NOW, THEREFORE BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF LAKE ELMO, MINNESOTA, based upon the information received and the above Findings, that the City Council of the City of Lake Elmo hereby denies the Applicant School District's request for an amendment to its Conditional Use Permit (Resolution 2018-077) for the Property.

This resolution was adopted by the City Council of the City of Lake Elmo on this 5th day of May 2020, by a vote of 4 ayes and 1 nays, as follows:

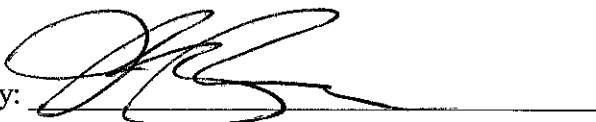
VOTE Pearson Boyer Dorschner McGinn Nelson

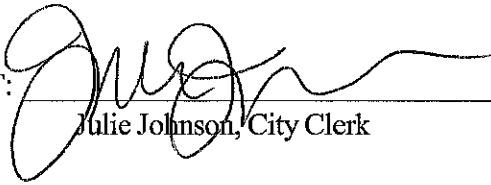
Aye

Nay

Abstain

Absent

By: 
Mike Pearson, Mayor

ATTEST: 
Julie Johnson, City Clerk