

**City of Leawood  
Planning Commission Minutes  
October 7, 2008  
Meeting - 6:00 p.m.  
Leawood City Hall Council Chambers  
4800 Town Center Drive  
Leawood, KS 66211  
913.339.6700 x 160**

**CALL TO ORDER/ROLL CALL:** Shaw, Jackson, Rohlf, Munson, Williams, Elkins, and Heiman. Absent: Roberson, Neff-Brain.

**APPROVAL OF THE AGENDA**

**Motion to approve the agenda made by Elkins; seconded by Williams. Motion passed unanimously with a vote of 6-0. For: Shaw, Jackson, Munson, Williams, Elkins and Heiman.**

**CONTINUED TO OCTOBER 14, 2008 MEETING:**

CASE 53-06 LDO AMENDMENT – SECTION 16-2-5.7 (RP-4 DISTRICT) – HEIGHT;  
Request for approval of an amendment to the Leawood Development Ordinance.  
**PUBLIC HEARING**

CASE 54-06 - LDO AMENDMENT – SECTION 16-2-10 – ARCHITECTURAL  
STANDARDS – Request for approval of an amendment to the Leawood Development  
Ordinance. **PUBLIC HEARING**

CASE 55-06 LDO AMENDMENT – SECTION 16-2-5.2 (RP-A5 DISTRICT) – HEIGHT;  
Request for approval of an amendment to the Leawood Development Ordinance.  
**PUBLIC HEARING**

CASE 56-06 LDO AMENDMENT – SECTION 16-2-5.3 (R-1 DISTRICT) – HEIGHT;  
Request for approval of an amendment to the Leawood Development Ordinance.  
**PUBLIC HEARING**

CASE 57-06 LDO AMENDMENT – SECTION 16-2-5.4 (RP-1 DISTRICT) – HEIGHT;  
Request for approval of an amendment to the Leawood Development Ordinance.  
**PUBLIC HEARING**

CASE 58-06 LDO AMENDMENT – SECTION 16-2-5.5 (RP-2 DISTRICT) – HEIGHT;  
Request for approval of an amendment to the Leawood Development Ordinance.  
**PUBLIC HEARING**

CASE 62-08 – LEAWOOD SOUTH COUNTRY CLUB – SPRINT WIRELESS  
COMMUNICATION TOWER – Request for approval of a rezoning, special use permit,  
preliminary site plan, preliminary plat, final site plan and final plat; located at 3801 W.  
123<sup>rd</sup> Street. **PUBLIC HEARING**

CASE 77-08 LDO AMENDMENT – SECTION 16-2-5.1 AG – HEIGHT; Request for approval of an amendment to the Leawood Development Ordinance. **PUBLIC HEARING**

CASE 66-08 – BI-STATE CENTENNIAL PARK LOT 12 – Request for approval of a preliminary site plan and final site plan; located north of 141<sup>st</sup> Terrace and east of Overbrook, within the Bi-State Business Park Lots 12. **PUBLIC HEARING**

CASE 71-08 – VILLAGGIO – NEIGHBORHOODS AT SHARON LANE – Request for approval of a special use permit, preliminary site plan and final site plan; located south of 137<sup>th</sup> Street and east of Roe Avenue. **PUBLIC HEARING**

CASE 81-08 - LDO AMENDMENT – SECTION 16-4-9.3 FENCES AND WALLS - Request for approval of an amendment to the Leawood Development Ordinance. **PUBLIC HEARING**

**CONTINUED TO OCTOBER 28, 2008 MEETING:**

73-08 – CVS PHARMACY – Request for approval of rezoning, special use permit, preliminary site plan, and preliminary plat; located on the southeast corner of 151<sup>st</sup> Street and Mission Road. **PUBLIC HEARING**

**NEW BUSINESS:**

CASE 59-08 - SIENNA II – CITY PROJECT – Request for approval of a rezoning and preliminary site plan, located on the southeast corner of 137<sup>th</sup> street and Mission Road.

Chair Rohlf: The first item is to move into an executive session, so if I could have a motion.

**Motion to move to Executive Session was made by Munson; seconded by Elkins.**

Chair Rohlf: That will be for a period not longer than 15 minutes.

**Motion passed unanimously with a vote of 6-0. For: Shaw, Jackson, Munson, Williams, Elkins, and Heiman.**

Ms. Bennett: Madame Chair, if we could note this is for purposes of discussing matters protected by the attorney/client privilege and be a recess; not an adjournment.

*Commissioners recessed into Executive Session.*

Chair Rohlf: It should be noted that no action was taken in our Executive Session, so we are back in session. The city shall make its presentation.

**Applicant Presentation:**

Diane Binckley with Ochsner, Hare & Hare at 2600 Grand, Kansas City, MO, appeared before the Planning Commission as a representative for the city and gave the following presentation:

Ms. Binckley: With me this evening is Brett Carlgren with BHC Rhodes, and he will be able to answer engineering-related questions. The request tonight is for rezoning and a preliminary plan for property located at approximately the southeast corner of 137<sup>th</sup> and Mission Road, which is the plan to my right (*points to plan*). The plan I'm going to describe was developed in collaboration with the city to ensure proper buffering of existing developments. This plan also takes into account a number of comments from the Interact Meeting, which was held in June of 2008. (*Ms. Binckley steps over to plan.*) Mission Road is on the west side of this plan. To the north is the proposed 137<sup>th</sup>, and to the east is Tuscany Reserve. To the south is the Oddo Homestead property. To the southwest is Leawood Meadows. Up here is Villaggio, and then to the north is Mission Corner. Properties in this portion is zoned RP2 (single-family villas). RP1 is just south of there (villas on slightly larger lots). The property on the south is all AG. In the Leawood meadows area, it's R1. Coming up to the north slightly from there is RP4 and then a commercial zoning of SDCR. Then on the north is MXD zoning.

(*Ms. Binckley continues to refer to the plan.*) The project before you this evening has 242 units total. Within that, there are 192 apartments in 17 buildings and 50 twin-villa units in 25 buildings. The zoning on the property is being proposed to buffer the twin villas on the west, south and east. It also allows for the apartment development in the central and northern portions. There are three access points proposed: two on the north accessing 137<sup>th</sup> Street and then one to the west that would access Mission Road. Proposed with this plan is a right-in, right-out ultimately when Mission Road is expanded to four lanes. At this time, the drive would still be intact, but with emergency access only. There's a fire station south of here on Mission Road, as well as one to the north. If access were necessary to the site from the south, they would have the opportunity to pull in here and make a right in, as opposed to going to 137<sup>th</sup>, coming over and cutting back into the property. Another part of the plan includes three ponds to help with the drainage of the site. One of the concerns from the neighbors presented at the Interact Meeting relates to flooding problems on their property, and the design of this would help with that in the future.

(*Ms. Binckley continues to refer to the plan.*) Also there were two deviations with this plan. One relates to the dwelling units per acre, and the other deals with setbacks between the buildings. Regarding the dwelling units per acre, it's specifically in the portion related to the RP4. It is slightly higher than what's allowed because we've allowed for more green space over in the twin villa area. If you look across the board on the project, the overall dwelling units per acre is significantly less than what's required. The other deviation is for site setbacks. There are some areas where the site setbacks are slightly less than what is allowed by ordinance. I will open for questions.

Comm. Williams: On the RP4, you're talking about the increased density. What is the distance between the buildings?

Ms. Binckley: Ordinance requires a minimum of 30'. There are a couple locations where it goes to less than 30'.

Comm. Williams: What would that distance be?

Ms. Binckley: I think the closest point is 15'.

Comm. Williams: Can you point those out?

Ms. Binckley: (*Refers to plan*) Here, which is between the villa and apartment.

Comm. Williams: So it would be the side of where the apartment building and the back of the villa?

Ms. Binckley: Yes, and then there are a couple areas on the villas where they are a little snug.

Comm. Williams: Given the increased density of the apartments, would it be more advantageous to have more space between those higher density buildings than to necessarily have the lesser density in the villa areas? I say that from a scale perspective, both of people and buildings.

Ms. Binckley: Part of it is related to where the line is drawn in relation to the zonings. As you can see in this area, there's a significant amount of green space between the buildings, allowing for usable space (*refers to plan*). Again, I think on the overall property, we're only to eight units per acre, as opposed to allowing ten units per acre in the apartment section.

Comm. Williams: Did I hear you use the term that this is a "Proper Buffering Plan"?

Ms. Binckley: I stated that the goal of the plan was to allow for proper buffering to the adjoining properties, yes.

Comm. Williams: That's enough for now. Thank you.

Comm. Jackson: Can you lay out against that plan where the zoning is currently between the RP3 and the RP4?

Ms. Binckley: I can give you a general, but they have a plan here to help me identify definitely (*refers to plan*). Essentially the current zoning comes here, juts over and comes back down. This would be the RP3, and the remainder of the property is RP4 in the current zoning.

Comm. Jackson: And where are the condos on the other plan?

Ms. Binckley: The twin-villa (two-unit pieces) are right here.

Comm. Jackson: All of them are over there?

Ms. Binckley: Yes.

Comm. Jackson: That's all I have.

Chair Rohlf: Diane, I was just going to clarify the access from Mission. How much of that would be permanent? As it dips down there, that will be a regular private street within the development, and that's the only part. What would be the emergency part of that?

Ms. Binckley: There would just be an emergency gate, some sort of bollard or something along that line. We haven't designed it exactly, but it would be completely installed.

Chair Rohlf: So there would be some sort of notification there where the streets meet that access beyond that point is limited?

Ms. Binckley: Correct.

Chair Rohlf: All right, Mr. Williams?

Comm. Williams: Going back to this question of buffering, on the east side against the Tuscany, what is the distance between structure and property line and the approximate distance then to structures in Tuscany?

Ms. Binckley: At this point, it's approximately 30'. Then I'm not sure of the distance from Tuscany. I would say they have approximately a 30' setback. The closest point would be 60'. In this range, it is about 70', give or take.

Comm. Williams: And the 30' meets the 30' side yard setback?

Ms. Binckley: Yes.

Comm. Williams: The existing zoning was established on a plan that goes back to roughly 1988. Is that correct?

Ms. Binckley: I'm double checking with Staff, and they're nodding "yes."

Comm. Williams: And it has been re-approved several times since, so it's the current zoning on the property.

Ms. Binckley: Yes, the zoning has been intact.

Comm. Williams: My reason for asking that question goes back to the question of buffering with Tuscany. Do you know when Tuscany was zoned? Do you know if it was before or after the current zoning on the property we're viewing?

Ms. Binckley: This was zoned after 1988.

Comm. Williams: My reason for asking the question is the developer knew what this property was likely to be because this zoning was in place?

Ms. Binckley: Yes.

Comm. Williams: So this hasn't been a surprise to them over the past several years. I thought I read there are supposed to be berms, as well as additional landscaping on that east buffer.

Ms. Binckley: Yes.

Comm. Williams: In terms of the plan as you have it drawn, help me understand why you placed the clubhouse in the northwest corner?

Ms. Binckley: (*Refers to plan*). The clubhouse is located here for ease of access for folks who are coming to the property maybe to rent.

Comm. Williams: So that would be your leasing office as well?

Ms. Binckley: As well as your location to pick up mail and those sorts of things.

Comm. Williams: So you're anticipating it would be a central mail drop-off?

Ms. Binckley: Yes.

Comm. Williams: No further questions at the moment.

Chair Rohlf: Does anyone else have questions?

Comm. Elkins: Ms. Binckley, you've talked about the density of the various types of zoning or the rezoning that's being proposed in connection with this plan. I know this is trying to predict the future, but based on standards in your profession for the number of people you would expect to ultimately be in these duplexes and apartments, can you give us a ballpark idea of how many people are likely to live in this combined area?

Ms. Binckley: The duplex would be more of a family setting, so potentially 2-2 ½ folks per unit would be a good average. The apartment portion, if it's a single unit, would have 1-2 people. Then for multiple bedrooms, you would look at 2-3.

Comm. Elkins: So ballpark, what would you think the total number would be in this development?

Ms. Binckley: Probably 600.

Comm. Elkins: So effectively, the exit onto Mission isn't really going to be an exit onto Mission, but rather for emergency vehicles until Mission gets widened. Is that correct?

Ms. Binckley: That's correct.

Comm. Elkins: So we've got two entrances into this area that's going to house about 600 people.

Ms. Binckley: I would say 500-600 as an estimate.

Comm. Elkins: You've been doing this for a long time. Does that seem reasonable and rational to only have two entrances for this many people?

Ms. Binckley: I think it's reasonable. Again, I think having a right-in, right-out is going to help facilitate getting folks in and out.

Comm. Elkins: The city's capital improvement plans do call for Mission to ultimately be a four-lane road, correct?

Ms. Binckley: Yes.

Comm. Elkins: An in your plan, you would tie the entrance into Sienna to the widening of Mission Road?

Ms. Binckley: Yes.

Comm. Elkins: I'd like to follow up on "proper buffering". I'd like to know that the standards are for proper buffering.

Ms. Binckley: Two things are guiding us here. One would be zoning. You want to transition your types of zoning from more to less dense. In this situation, we believe that proper buffering is that here you have single-family (*refers to plan*). Then you're going into a two-family and finally a multi-family. By transitioning through the zoning, you're allowing for proper buffering.

Chair Rohlf: Anything else?

Comm. Williams: I'd like to follow up on the "proper" again. The current zoning has been in place since '88. Are you saying that predecessors of this body, current members of this body and members of the City Council in past years did not take into consideration proper buffering when they approved the plans?

Ms. Binckley: I think they looked at this as a form of medium density. I think what actually developed long-term ended up being not as close to medium density. I believe with the commercial uses around and going from a more single-family type environment to a more multi-family that this allows for that transition. I don't know that I can answer the other questions.

Comm. Williams: Are you saying in that regard that the Tuscany project was changed and allowed to be more single-family development, rather than what was anticipated when this zoning was originally approved?

Ms. Binckley: Again, I believe the comprehensive plan shows that as medium density. RP2 does meet the medium-density criteria, but I'm saying that normally the larger homes that ended up in this area are not typical of the RP2. The city was looking for something denser in this area to be a better transition.

Comm. Williams: With the RP3 zoning and the structures that are shown on this plan right now, are they the maximum size that is allowed in RP3 zoning?

Ms. Binckley: Do you mean maximum as far as number of units per building?

Comm. Williams: No, in terms of square footage. Can they get bigger?

Ms. Binckley: They could.

Comm. Williams: No further questions for the moment.

Chair Rohlf: Thank you. Is there anything else at this time? Thank you, Ms. Binckley. We will now hear from the owner. Because we do have a Public Hearing tonight and there are some people here who would like to speak, I would like to see if we could limit the owner's response to about 20-30 minutes. Then there will be time for questions.

Jim Bowers, attorney with White Goss Bowers, 4510 Belleview, Kansas City, MO, appeared before the Planning Commission on behalf of the Oddo Development Company and made the following comments:

Mr. Bowers: With me tonight is my co-counsel, Mr. Doug Patterson; Mr. Rick Oddo, representing Oddo Development Company and Mr. Bill Preloger, the project architect. I've been doing this sort of work for the past 36 years. I represent cities as well as developers. This is the first case I am aware of anywhere in the country in which a city has not only down-zoned property, but is also proposing to adopt a development plan for that property. That's a very unusual procedure.

I'd like to address a couple housekeeping measures before I get into my presentation. On September 12<sup>th</sup>, I sent a letter to each member of the Planning Commission, and I want to make sure it's part of the record. The reason I'm asking that is I got a copy of the Staff Report, and it wasn't in it. I'm also aware of other letters that have been sent to you in opposition, and I want to make sure those are in your record as well. First, there's a letter dated September 24<sup>th</sup> from Tom Turner, Grand Bridge Real Estate Capital. If that's in your packet, I won't give you copies. We'll address that. There's also a letter from Mr. David Henchman, Brokerage Services, Commercial Properties dated October 2<sup>nd</sup> in opposition to the plan.

Chair Rohlf: We did receive a number in our original packets, and they've been supplemented by e-mails. Then tonight, another set was included.

Mr. Bowers: Maybe just to expedite things, I'll ask Mr. Patterson to get copies to you and Staff. Third, I have a letter from Citizen's Bank – Mr. Randy Edge, Vice-Chairman and CEO.

Chair Rohlf: I don't believe we have that one either.

Mr. Bowers: Next is a letter from Mr. Dan Jensen of Kessinger Hunter dated October 6<sup>th</sup>.

Chair Rohlf: We do have that one.

Mr. Bowers: Finally is an e-mail that went to the mayor from Mr. Pat Daniels at the Land Source. I'll ask Doug to provide you with a copy of that as well. (*Mr. Patterson hands out copies.*)

Chair Rohlf: Thank you for providing copies. We'll probably continue to glance at them as you proceed.

Mr. Bowers: As I said in my letter on September 12<sup>th</sup>, you should not proceed with this case this evening. It's bad public policy. The reason you should not proceed is that there's a lawsuit pending over a recommendation you previously made to the City Council in support of my client's final plan that the City Council denied. For the city to proceed in the manner in which it's proceeding this evening breaks the moral compact that is between the city and developers with respect to the integrity of zoning.

Because we're here, I have to address the procedural defects that are in the city's application. In asking to down-zone the Oddo property, you may violate state law. Most certainly, it violates the city's LDO [Leawood Development Ordinance]. State law does allow the city to initiate a rezoning of the property over the owner's objection, and they've done that. The state law may not allow the city to provide you with an application for a development plan. That is not clear, and that will be litigated if the city proceeds in this manner. What is clear is that the LDO has certain requirements with respect to any application to rezone, whether it is made by the owner or the city. The primary requirement of an application is the owner's consent. Let me be clear if it's not clear already - the city does not have the owner's consent to proceed with this application. It is over the city's objection. The city is not the Oddos' agent, which is the other alternative provided for in the LDO. Either the owner or an agent of the owner can proceed with a rezoning according to state law, but there is no allowance for it in the LDO. If the city proceeds, as it is this evening, it will be doing so in violation of the LDO. Litigation surely will follow.

As to the specific procedural matters in addition to the lack of owner's consent and the proof of ownership affidavit that is required in every case, there is no traffic study in this case, which is the first requirement for any rezoning or development plan. There's no storm water study. The next procedural violation is one that I find very unusual. The plan that was shown to the neighbors at the Interact Meeting isn't the plan you're looking at tonight; it's substantially different. The plan that was in front of the Interact Meeting showed 250 dwelling units; the plan that is before you tonight shows 242 units. There has been a substantial increase in the square footage of each of the units in the plan that's before you tonight that wasn't in the plan at the Interact Meeting. If this were any other Applicant, Staff would immediately send the Applicant back to have another Interact Meeting before proceeding in front of the Planning Commission.

There's no legal description of the property to be rezoned or of the zoning districts. I can't imagine an application being filed without a legal description. Also, the engineering on this case doesn't work. There are easements shown all over the face of the plan, but there is no identification of the specifics of them. The LDO requires the owner to dedicate those easements, and there is no way the city can dedicate easements on property it doesn't own without taking our property in violation of law. As Diane mentioned, the plan violates the 30' minimum distance rule between buildings. The far-east cul-de-sac, which is identified on the Staff Report as being 550' feet in length, is closer to 700' in length when scaled on the plan. This violates the city's plan with respect to cul-de-sacs. The berms that were discussed aren't shown on the plan, and neither are the building types. The elevation requirements set out in 16-3-5, Subparagraph B, Subparagraph G, Subparagraph 2 of the LDO aren't shown. The grading plan doesn't work for the type of buildings that are shown on the plan, and it also

doesn't match the development plan when you look at the contours. The contours of the so-called detention areas aren't, in fact, graded to be such. The parking requirements as shown on the plan aren't sufficient to meet the parking requirements identified as 192 spaces. The landscaping plan doesn't meet the requirements of the LDO. The acknowledged deviations from the requirements that Diane mentioned have no support in terms of a statement of need for deviation, as required by the LDO. The vehicular connection to Mission Road, which has morphed from a regular right-in, right-out to an emergency connection, makes no sense to us. It's not a technical defect in the sense that it either is or isn't required, but it would violate every policy I've heard the city announce with respect to connections to Mission Road and will provide no additional benefit to either the residents of Sienna or Tuscany.

There are additional defects in this plan that I haven't mentioned because I haven't had time, since we just got the plan today. Those are the ones that quickly came to our attention. In addition, when I looked at the city's file, there is an amazing lack of correspondence between the city and Ms. Binckley – in fact, there's none – to suggest what authority she has to proceed in this manner on the city's behalf. I'm sure there's a contract, but it's certainly not in the file. Nor are there any e-mails in the file that typically are shown in these development projects in city records. It's a highly unusual case and one that will set precedent throughout the state of Kansas, if not the nation, if it proceeds. It will certainly be the subject of additional litigation and is beyond anything I've seen in my 36 years of experience.

Our final witness tonight is Mr. Ken Jagers of Integra Realty, who will talk to you about the impact this type of down-zoning of property will have on the property. I'll answer any questions if you have any.

Comm. Williams: Mr. Bowers, could you clarify the cul-de-sac length again?

Mr. Bowers: In fact, I'd ask Mr. Preloger to address that issue directly as the project architect.

Bill Preloger, architect with Nearing, Staats, Preloger and Jones, appeared before the Planning Commission and made the following comments.

Mr. Preloger: The cul-de-sac on the east side of the site measures 700' long from the center of the cul-de-sac on the north end to the edge of the curb where it intersects with the street immediately to the west of it at the southern portion of the property. I just want to amplify one other thing. That's the issue of the deviation of the city's required space between buildings. As near as I can tell on this plan, there are 29 instances of that deviation. Most of them are reducing the required 30' to 15'. I could probably stand up here for two hours and catalog other specific deviations, either from the ordinance as it relates to the exhibits that have been prepared or from the application materials submitted to initiate and support this application; but I'll not take that time now.

Ms. Bennett: Madame Chair, I don't mean to interrupt; but I understand what Mr. Bowers recalls. We used to have a cul-de-sac requirement, but that was repealed a year or two ago.

Comm. Elkins: I have a question for Mr. Bowers, please. One of your first points was that the LDO requires the owner's consent, and you made it clear in this case that the owners do not consent. Can you give us the LDO reference that you're making?

Mr. Bowers: Article V of the LDO states that only the landowner or the agent may apply for development plans. In addition to that, when you look at the rezoning guide, the rezoning application, the residential and commercial development guide and the site development plan application; you'll find on those documents the requirement that the owner or the owner's agent sign.

Comm. Elkins: Thank you.

Kenneth Jagers, Managing Director of Integra Realty Resources, 1901 West. 47<sup>th</sup> Place, Shawnee Mission, KS, appeared before the Planning Commission and made the following comments:

Mr. Jagers: I'm here to speak a little bit about how, in general, a change in zoning and a change in the development plan may influence this tract and tracts in Leawood. Then we'll talk a little bit about some larger considerations that we'll want to explore. First of all, when a developer is seeing a development, they'll find a tract of land and get it under contract and purchase it as AG zoned at a particular time, as were many tracts in Leawood. They go through the entitlement process to get that tract zoned in accordance with the city ordinance and also with what the market may perceive to be optimum development for that tract. As part of that, obviously there will be lending involved for the vacant land, on the land as it's going into development and then ultimately on the property based on the building improvements thereon. Now more than ever, but historically over the last 12-15 years, there has been a significant difference in the amount of a loan that a raw land tract would support, as opposed to a land tract that has entitlements. That's just how the lending process goes. That's a backdrop for my comments regarding what a precedent of this sort would do to land values and transactions and development in Leawood. When a developer goes to get a loan to secure a builder, they'll secure a survey and title report, which will provide zoning endorsements. If there is a perceived lack of precision in the zoning based on whatever that may be (including the actions considered here or any other number of things) it will influence the ability of developers to build homes, shopping centers, churches – everything. It will be very difficult, I think, for developers in the future to come and, with any degree of reliability, enter into acquisitions and proceed with developments based on what I know of this and how I expect this may affect transactions in the future.

Frankly, in the 20 years I've been involved in commercial and residential real estate, I have not experienced or heard of a situation such as we're discussing here. Moving on to larger considerations right now, presently we've discussed the sub-prime meltdown. We don't need to go into that, but what's happening finally is that communities are starting to dig themselves out of their existing inventory of available lots and homes for sale. At first glance, there is abundance – and possibly an oversupply - of lots available for development and homes for sale in the Leawood area, but there certainly is no oversupply of high-quality rental housing and townhomes in the area. Strictly from a market perspective, if you built two units per acre, for instance, of single-family, that would be approximately 116 housing units based on my rough calculations. That is 1 ½ times the total number of housing permits issued from January 1 to August 1, 2007; and it's almost three times the number of single-family permits issued from January 1 to

August 1, 2008, based on the Homebuilders Association. I know there are a lot of influences on those numbers from the market and everything else, but just from a 10,000' view, it would seem that adding to the supply of that inventory makes less sense than multi-family.

Also, I would like to mention that from a market standpoint, multi-family is far more attractive as an investment than is single-family. There are different yield requirements, and that only goes to the level of entitlement that was provided on this property. The property was brought before you with a certain level of density that the owner had relied upon, which was pretty significant in their decision making and the decision making of all developers that may choose to come to Leawood or are in Leawood and choose to move forward. I'd be happy to answer questions.

Chair Rohlf: Does anyone else have additional questions for the owner?

Comm. Jackson: Mr. Bowers, what's the distance between the city's plan on the northeast corner where that condo is with Tuscany versus the apartment complex on your plan and Tuscany? Is there much difference in the distance?

Mr. Bowers: I don't have our plan with me, so I can't be precise to the nearest foot.

Comm. Jackson: I believe it's right there.

Mr. Preloger: (*Refers to plan*) The scale looks like 1 to 60, so it looks like the closest building is almost 30' away from the property line. On the plan that we had submitted at 1 to 50, we were 30' at the closest point. Since you've asked the question, I'd like to expand on that just a little bit. If you look at the rest of the buildings down here, you'll notice that they're about 80-85' away from the property line. The rest of the buildings we had proposed down the rest of this site varied from 138' at the closest point to 137' distance from the property line to the closest point on those buildings. This plan actually had substantially more green space as a buffer than does this plan.

Comm. Jackson: Did your plan meet the 30' building distance requirements?

Mr. Preloger: With every building.

Comm. Jackson: Where are your ponds?

Mr. Preloger: Our ponds and their ponds are in essentially the same location. There is a little difference in that we provided an overflow route between the first and second pond and between the second and third pond. Those routes have been closed up, and the pavement between the buildings is now totally contiguous. The space here (*refers to plan*) is down to 15' for an overflow path from this pond to this pond. This development would require that all storm flow would have to be contained and piped. There could be no storm overflow over land with this design.

Comm. Jackson: And then where were your street entrances and exits?

Mr. Preloger: We had an entrance off 137 Street at this point and this point (*refers to map*), and we had no entrance on Mission Road. Their entry points are off 137<sup>th</sup> Street in approximately the same location we were proposing. They've proposed an additional

entry point on Mission Road at this point. We're concerned about that for a number of reasons, but the primary reason is that for 20 years, we've been working with the Leawood Meadows people who have owned homes and have been our neighbors since 1988 when we first started working on development plans for this site. All along, we have promised them we would not introduce additional traffic on Mission Road because Mission Road is a difficult two-lane, no-curb, open-ditch street. I understand that some of the neighbors, particularly at Tuscany, believe that putting an entrance here is somehow going to lessen the traffic on 137<sup>th</sup> Street that would prefer to go east. I would contend that anybody who lives in this development as proposed who wanted to go east is going to come up through our road system that is shown here, get onto 137<sup>th</sup> Street and go east. I don't expect that anybody who's wanting to go east is going to come out to Mission Road and go anyplace except up to 137<sup>th</sup> Street. Traffic flows like water and takes the path of least resistance. It doesn't take drivers long to figure out the quickest route from Point A to Point B, even if it's circuitous. If 137<sup>th</sup> Street actually went anyplace going east of here and if people perceived that 137<sup>th</sup> Street were an easier route than 135<sup>th</sup> Street, they would take it. Whether they come out here (*refers to map*) and take a turn and go east on 137<sup>th</sup> Street or come up here and take a turn and go east on 137<sup>th</sup> Street is irrelevant.

Comm. Jackson: Thank you, that's all I need.

Chair Rohlf: All right, do we have any additional questions? If not, we're going to move along to the Public Hearing.

Comm. Williams: Mr. Preloger, the issue was brought up on current proposed plan by the city of the cul-de-sac that is 700' long. I seem to recall there is a cul-de-sac on the left side of your plan. Are there cul-de-sacs elsewhere on the plan?

Mr. Preloger: There is a cul-de-sac on the west side of our plan that's 550' long.

Comm. Williams: That's on the west side along Mission Road.

Mr. Preloger: As you can see, there's a little cul-de-sac up in our northwest corner on that plan that's maybe 200-225' long. If the city made the change, then we weren't aware of it because as of the last plan we submitted, the issue of a cul-de-sac length of 550' was part of the Staff Comments.

Comm. Williams: Thank you.

Chair Rohlf: I would ask how many people, by a show of hands, would like to speak this evening.

## **PUBLIC HEARING**

Jane Ross, 4004 West 137<sup>th</sup> Terrace, Leawood, KS, appeared before the Planning Commission and made the following comments:

Ms. Ross: Tonight, I am here to represent the Leawood Meadows Homes Association Board. At the Interact Meeting for this plan, I also represented the Homes Association Board and went on record as being opposed to any exit or entrance onto Mission Road. Hopefully that was made part of the notes in the public record. We also had several

homeowners recently send letters from our subdivision indicating they would be opposed to any entrance or exit on or off Mission Road from this development. If I could just give a history lesson, and I apologize if some of you already know this. Before my husband and I moved to Leawood Meadows in 2001, we looked into the plans because we knew this was a ripe area for development. We saw that this particular tract of land was planned for apartments, which we weren't exactly thrilled with. We queried some of the neighbors about the plan, and they let us know that after a lengthy battle with the developer and some negotiations with the city and the developer, some compromises had been made that made the idea of apartments a little bit more palatable, including an overall lower density from the original request of the developer and duplexes to be put in along Mission Road as they still are on both of these plans that would act as a buffer between the apartments and Leawood Meadows. The buildings were not going to exceed 2-story, and there would be no exit or entrance on or off Mission Road. After we learned this, we made the decision that it was still worth investing in our property and moved to Leawood Meadows. Now, enter Tuscany and perhaps some neighbors who maybe didn't do the same due diligence that we did or maybe didn't realize the impact to the traffic due to new development in the area, and suddenly this whole exit/entrance on Mission Road that we fought against and thought we won is now at risk. I just want to emphasize that fairness to all the neighbors needs to be considered as you're making your decisions, and adding more traffic on Mission Road will create a huge bottleneck - not just for Leawood Meadows, but for Sienna, Mission Prairie, Mary Lee Farms and even our neighbors south of 143<sup>rd</sup> St, who are affected as they travel north on Mission Road such as the Pavilions. The Planning Commission and City Planners hopefully will give credence to agreements that were forged between the city, the developers and the neighbors under past negotiations and certainly should not develop entire plans based on one subdivision's input. We're counting on this level of fairness for this plan as we are for all development in our area. Thank you.

Chair Rohlf: Thank you. Is there anyone else?

Tony Ross, 4004 West 137<sup>th</sup> Terr., Leawood, KS, appeared before the Planning Commission and made the following comments:

Mr. Ross: My wife just covered about 90% of what I was going to discuss, so I'll be brief. Again, I'm up here because of the Mission Road thing. If any of you have driven down clear down to 199<sup>th</sup> recently, you can see all the scraped ground we have down there. This is not just a problem for us; it's a thing that's going to be coming in the next few years with Overland Park south of Leawood. There's much more development coming, and we don't need another blockade for traffic. We've got a grade school at 133<sup>rd</sup>, which causes a great deal of traffic problems; and we've got another one at 141<sup>st</sup>. With all that traffic and another turn coming in or out, even if it's four-lane, it's going to cause more havoc with the developments and the stoplights that will be coming shortly. That's my objection to the Mission Road exit. Also, I don't think they need a fire entrance there. That didn't come about over all these years until just recently with the complaints from Tuscany.

The other thing I'd like to know is how much is the city paying to hire a developing plan to develop someone else's property? This kind of bothers me that our city taxes are being used. I realize the Planning Commission is not involved in that, but I would like to have that question answered. Thank you.

Chair Rohlf: Thank you. Is there anyone else in the audience who wishes to speak about this plan? If so, please raise your hand.

Greg Pickert, 3313 West 138<sup>th</sup> Street, Leawood, KS, appeared before the Planning Commission and made the following comments:

Mr. Pickert: Since Leawood Meadows has made their plea with regard to the traffic at the entrance/exit on Mission Road, I would feel remiss if I didn't make the appeal for Tuscan Reserve. First of all I must just say it's mind-boggling to me when a developer and a subdivision would sit down and determine where the access into their project would be on public streets. That just doesn't really make a whole lot of sense that an agreement like that would be made and stand. Getting back to the actual exit and entrance, of course Mission Road is going to be four-lane traffic. Of course, four-lane traffic is much more conducive to handle a higher degree of traffic. 137<sup>th</sup> is a two-lane road; and in addition to that, according to the approved plans for Mission Corners, there is underground parking approved. All of that traffic is also going to come out on 137<sup>th</sup> Street, which will further congest that immediate area. So any relief that we might be able to get by having some traffic going out on Mission certainly makes a lot of sense to me and my neighbors. Also, at this point, 137<sup>th</sup> does not go through eastbound; so consequently, everybody wanting to go east who would be exiting the apartments going north on Mission would automatically take 137<sup>th</sup> Street couldn't. Consequently, there would be an awful lot of traffic that would go up to 135<sup>th</sup> and go east. I thank you for your time.

Chair Rohlf: Thank you. Is there anyone else in the audience who wishes to speak?

Barbara Green, 13921 Canterbury Circle in Tuscan, Leawood, KS, appeared before the Planning Commission and made the following comments:

Ms. Green: I basically would like to second Mr. Pickert's request for access on Mission Road. I think it's important and necessary. I think this probably is irrelevant at this point, but I would like to have it known that the buyers in Tuscan were not aware of this project. While we've been told and understand we should have done our own due diligence, we were dealing with what we considered to be a reputable realtor and developer and specifically asked the question and were not told anything about this. I find this not quite right. Thank you.

Chair Rohlf: Is there anyone else?

**As no one else was present to speak, motion to close the Public Hearing was made by Jackson; seconded by Elkins. Motion passed unanimously with a vote of 6-0. For: Shaw, Jackson, Munson, Williams, Elkins and Heiman.**

Chair Rohlf: That takes us up to our discussion on this plan. Does anyone else have questions that have been brought up through the Public Hearing?

Comm. Williams: We've been handed a plan just a moment ago. My vision isn't that good across the room, but I think it's good enough to show that plan doesn't match this plan. Mr. Preloger made reference to a cul-de-sac, I believe, in the northeast corner, and there's no cul-de-sac on this drawing.

Chair Rohlf: Who handed us these plans?

Comm. Williams: Julie.

Mr. Preloger: Could I clarify something? The plan that I think you've been handed was actually the last plan that we had before you. It's the one that was considered, I believe, right before the City Council voted against you.

Comm. Williams: So the plan up there is the approved plan up to this point, and this plan that we're looking at has not been approved by Council.

Mr. Preloger: That's correct, and in this plan, in response to concerns that were expressed by the Tuscan Reserve residents, we had eliminated the four-plex that you see on the black and white plan on the right-hand easel. We had pulled it farther away from the corner and incorporated it into another part of the plan itself. Actually, in the plan that's in front of you, the distance from that building to our property line was 125'. This plan actually had a continuous green buffer all along our east property line that's common with the Tuscan Reserve rear property lines. All of these buildings are substantially farther away, and the street is farther away in the plan that's currently before you tonight for your consideration.

Comm. Williams: Refresh my memory. Did you say that based on your best measure of the proposed plan here that the buildings were roughly 30' at one point and 70-75'?

Mr. Preloger: 70-75' – they vary a little bit because it's a curved street.

Comm. Williams: Just as the buildings on the plan that was handed out to us tonight, it starts at 125, goes to 135 and looks like it doesn't get less than 135'.

Mr. Preloger: That's correct.

Chair Rohlf: Len, this is not the plan that we approved.

Comm. Williams: I understand.

Comm. Elkins: I'd like to ask the City Staff to comment on Mr. Bowers' suggestion of technical defects in the application. I don't necessarily need for Staff to go through them one by one, but I am curious as to Staff's view of the technical sufficiency of the application.

Ms. Bennett: I'll speak on a couple of things, Mr. Elkins. I don't know that I can speak on all of them. One, I know Mr. Bowers believes it's unprecedented. In Kansas, it is not unprecedented to down-zone property. Overland Park has done it, and I'm told Lenexa has done it relatively recently as a matter of fact. Two, the LDO does not portend to override or preempt the state statute, which does give the city the right to rezone. With that, we abide by the statute. As far as the technical aspects of it, I believe Ms. Binckley addressed most of them. If not, she could address specific questions you have. For instance, on the deviations, the existing zoning that was approved in 2001 allowed for a deviation on units per acre, if I remember correctly. To that extent, what Mr. Bowers or Mr. Preloger said may have applied on setbacks, but not on units per acre. The same type of thing asked for before is what's asked for now.

Comm. Elkins: Ms. Bennett, to follow up on the point of state statutes versus the LDO, what I thought I heard Mr. Bower suggest was that he conceded the state statute permits a change of zoning over the objection of the landowner but suggested that there's not state law that addressed the issue of the plan. In fact, when I inquired about the specifics of the LDO relative to the plan, it did sound like there was at least a requirement of an owner signature on the plan. Is that not correct? I'm focusing on the plan and not the down-zoning now.

Ms. Bennett: State statute allows for rezoning and also allows for plan zoning. For zoning in Leawood, this Planning Commission and this Council has always required a plan as well as the zoning. This may well not be built. I believe Mr. Oddo or his lawyer said at the Interact Meeting that it won't be built by Mr. Oddo. However, it is here in front of you as a concept. It is here to allow you to zone the RP3 buffer, which Ms. Binckley talked about on the exterior of the property. Yes, that is what the state statute allows.

Comm. Elkins: Thank you.

Chair Rohlf: Are there any more questions? We are ready for discussion, then.

Comm. Williams: I guess this goes out to Staff again regarding the deficiencies to which Mr. Bowers refers. Comment on what we're presented here with tonight, including the issues with grading and required elevation that would occur per the LDO for rezoning. Parking doesn't, according to Mr. Bowers, meet the requirements of the project as presented. He listed several others, but maybe we'll stop with that if someone could address it. Also in that regard, could someone comment on the traffic and drainage study?

Ms. Binckley: The proposed plan before you has less density and fewer overall units compared to the plan that was provided at the previous application. Based on that, we evaluated the traffic and storm water study that was provided with that other application. Because this is less dense and has less coverage, this plan meets it fine. That's why an additional one was not provided. I believe the ordinance allows for the staff to waive the requirement if they so choose, and that was their choice.

Comm. Williams: They typically don't choose to waive that requirement?

Mr. Ley: We waived that before on the development at the northwest corner of 135<sup>th</sup> and Mission, as well as on a couple other developments in the last few years.

Ms. Binckley: As far as for other requirements, the Staff has the right to waive any requirement they see appropriate. They did not require us to provide elevations for the buildings, as that could be a final site plan requirement at that time. It's the same for the landscape requirements and those sorts of things. It's not to say the ordinance wouldn't be met at final site plan.

Comm. Williams: Per your plan, are the buildings' footprints basically the same as what was on the previously approved plan?

Ms. Binckley: Yes, sir.

Comm. Williams: No other questions at the moment.

Comm. Munson: The city's proposed zoning and with it, the preliminary project conveys to me the thought that a development is going to take place; but the city doesn't plan to develop the property. Is that correct - they don't own it, so they're not going to develop it?

Ms. Bennett: That is correct.

Comm. Munson: So this is really to illustrate to a court the reason to rezone?

Ms. Bennett: To illustrate for you and for City Council.

Comm. Munson: If it goes that far, okay. So I'm in a quandary in trying to figure out just exactly how narrow our view is supposed to be on this. Based on what I understand, it's to discuss and give our feedback on the plan as proposed by the city. Is that correct?

Ms. Bennett: Give your recommendation to the City Council as you would on another plan.

Comm. Munson: The fact that the city doesn't own it is neither here nor there with this?

Ms. Bennett: True.

Comm. Jackson: If you'd like to start with comments, I'd be happy to start. I like the fact that there are apartments going in here. I think it's even more important in this economy and with the price of gas than it's ever been. We want quality teachers, police officers, city employees, etc. With the price of gas going up, they're not going to look to commute very far to work. We need to provide them with affordable housing. I don't like the fact that the city is decreasing the density on this project, and I don't like the way they did it. I don't like the fact that they have all the apartment units crammed in a very small area with a pond taking up most of the green space in that area. I believe the buffer zones between this property and Tuscany and the area to the south is still the same amount of area to where the housing begins. I don't believe you have to have the condos surrounding that area. It just takes too much green space away from the apartments where most of your people are going to be living. That's my real objection to this plan. I'd like more density. Leawood is short on this type of housing and running out of area in which to put it, and I don't see a reason to cut out so many units when the other plan left more green space and allowed for more units. Thank you.

Comm. Munson: On the plan that was just distributed up here, what is the distance between the apartment buildings and the property line on the east and south side? What I'm driving at is to find out if there's enough room there with berms and landscaping, etc. to establish a buffer strip?

Mr. Preloger: Yes, sir, you're referring to the plan that was generated by my firm. Along the south side, you'll see that the distance between the south property line and the buildings at the closest point is 125'. If you look at the plan that's been proposed by the city, the duplexes there are probably on the order of about 70' away. We actually have a larger green space, our private drive is farther away, and we have more space for berms – something quite comparable to what we provided along the Tuscany boundary. That

changes a little bit as you get up to the where the west cul-de-sac of Twin Villas is. There, we went to a 30' setback. That is contiguous with Oddo's property. We have already actually constructed a berm and landscaped that property line along there.

Comm. Munson: How high is the berm?

Mr. Preloger: It undulates, but at the highest part of the undulations it varies from 3-4'.

Comm. Munson: And approximately how wide is it?

Mr. Preloger: 25-30' wide and fairly densely landscaped already.

Chair Rohlf: This plan that was passed around, can you tell me how that came to be? It's dated the same night we received the other plan. Is this something that was in your hands as an alternative proposal or in response to the comments at the Public Hearing last time? Is that why that one unit's been drawn in?

Mr. Preloger: I've done so many plans.

Chair Rohlf: I don't like this one being passed out as representative of what's been approved because that's not true.

Mr. Preloger: I don't know that it's representative of what's been approved.

Chair Rohlf: Then why do we have it?

Rick Oddo appeared before the Planning Commission and made the following comments:

Mr. Oddo: This was in response to the Planning Commission's removal of the building to get it farther away. We drew it up and gave it at the City Council meeting. The one you see there (*points to easels*) is the one Planning Commission saw; the one you have in your hand is after your responses that we thought would be the compromise since we were in a different situation than most applicants.

Chair Rohlf: So this is the plan you presented to the Council that was ultimately denied?

Mr. Oddo: Correct.

Ms. Bennett: Madame Chair, this is not the one that's in court right now. This was a mediation plan and nothing that was approved by either party.

Chair Rohlf: I just wanted to figure out why there was that change.

Mr. Preloger: The change of this building location on the plan was shown in front of the City Council, responding to one of the more significant comments that the Planning Commissioners had made when they viewed and recommended approval of our previous plan. Our hope was that the City Council was going to remand that back because as you know, you reviewed it with no stipulations since Staff failed to prepare them. We expected that the plan would be remanded back with this improvement in this corner in response to some Tuscany resident comments, and that you and Staff would

have been instructed to prepare appropriate and proper stipulations to be attached to that final development plan. That's where this came from, but this was the last plan the City Council saw.

Comm. Williams: I have several comments. I guess the first is it seems like even though we're given a plan to look at here tonight and review and judge on its merits, it's almost as though we're being presented with competing development plans. The problem is it's not a redevelopment project out for competitive proposals you sometimes see in cities, and you pick the best ones for its merits. We have a plan that has been in place for a number of years that has had the opportunity to come back before our body and the City Council. On several occasions it has been reviewed, approved and passed on (to a large extent) with the same Staff that we have today who are telling us it's not proper setbacks. What's being presented here today has proper setbacks on that east property line. In that regard, I would say that if this was the initial plan presented to us, I could see where this zoning would have some merit with the setbacks. I do like the fact that the property owner tried to go back and address our comments after the last meeting. Although we're not reviewing that plan tonight, that's a compromise plan as this is a compromise plan; and in that, they've got greater setbacks and screening to the east side. They've maintained the density, don't have the deviations between buildings and don't cram the buildings together as this plan tends to do. I think that's the wrong place to be tightening the plan. In that regard, I have problems with the plan that's presented to us tonight.

This is probably a separate issue from the plan itself, but I guess I'll say it anyway. I have issues with the steps the city has taken to address a piece of private property and a private developer's plan that has previously been approved by the governing body, has been in place for a number of years, has gotten Staff and regulatory approval and (from what we've even heard here tonight) was in place before neighboring development went in. Staff didn't raise issues at that time apparently. I say "apparently" because I think when Tuscany went in, I was not a part of this body, but it went in. I have sympathy for the Tuscany resident who said she didn't know about this particular plan. She may have done what she thought was jurisprudential in that respect, but it's a problem more aimed at the seller of the Tuscany property, whether it is the developer or the real estate agents more so than at the city. This plan was in place. Others clearly knew that and took action purchasing property as a result of that particular plan. The city is coming in on this too late in the game, and I think as a result, it's a wrong direction for the city to be going. It bothers me, too, that we're being asked to review a hypothetical plan. Typically on a plan that's brought before us, there's intent to develop that plan based on what's presented to us. We had discussions back and forth with that developer that began to make changes to hopefully make it better. On this, it's a hypothetical and Staff has said that if Mr. Oddo chooses not to build this, it's not going to happen per this plan. Nothing may ever happen, or we'll be back at some later date looking at another plan with another rezoning possibly. I think that's the wrong move for us and the city to be taking. As a result, I can't support the rezoning.

Comm. Elkins: Madame Chair, I find myself in a quandary similar to the one described by Commissioner Munson. I'm troubled by a number of things related to this plan. There is a sense, in my mind, that all applicants ought to be treated the same, whether it's the City of Leawood or a developer or an individual who's moving to rehab their house by himself. As an initial comment, I guess I would say I'm troubled by a number of things Commissioner Williams just spoke to in terms of the timing and all of that, in

terms of the history of the plan that has currently been approved for this particular piece of property. I'm concerned about the technical defects in it. I'm not saying there are technical defects, but I'm concerned that the property owner has raised those. And by "technical defects" I'm not talking about necessarily the setbacks, but the procedural issues in terms of something as seemingly simple as signing the application for the development plan. That does seem to suggest there is an issue not with respect to the rezoning because I respect the City Attorney's perspective on that. She's our counsel, and I certainly respect her thoughts regarding the authority of this body collectively to recommend and with the City Council, ultimately to rezone the property. This has to do with the plan itself, and there were a lot of other technical defects that Mr. Bowers mentioned that we really didn't get into in terms of specifics. I think particularly in this context, the City Staff as Applicant indeed need to do it as well as or better than what we expect as a city of the individual developers. I am troubled a little bit that this may be bad policy. If anything, that's what I'm really struggling with as I speak up here. I think there is potentially an issue that approaching land use from this perspective may well burden Commerce. I think there is something to a bit of a social compact between the governing body and the developer. I think also there is an issue about burdening property owners' rights.

But having said all that, what we are about here as the Planning Commission, in my view, is planning, which has to do with looking toward the future and not the past. As a Planning Commission and a city, in fact, we need to be able to have the flexibility to adjust to what is and not what was in 1988. One way or the other, Tuscany has grown up. How we got there, I don't know that it's worth anybody's time to go back and dissect nor whether it was supposed to be a higher density originally than it is today or not. It is what it is, and part of what we need to do as planners is to look toward the future. I think there are many positive aspects to this plan. I understand and sympathize with Commissioner Jackson's comments on the density. Frankly, I think this plan has addressed, in a compromised fashion, the density issue. You'll note that it's not proposed that apartments be completely removed from the plan. There has been some adjustment. Commissioner Williams appropriately notes that as part of that adjustment, we've got some buildings that are awfully close together. One of the things that has always been an attribute for Leawood land use and planning has been the setbacks and the fact that we don't have lots of houses that are on postage stamp lots.

On the traffic issue, I also sympathize with the neighbors who expressed concern about the traffic; although I would note that the plan and part of the plan that's been done here is for Mission Road to be a four-lane road. I understand that for the last 35 years, Mission Road has been a two-lane asphalt road. The point is that in the future, it's going to be a four-lane road; and it's difficult for me to understand how adding this exit once it becomes a four-lane road is going to unduly burden the neighborhood in terms of the amount of traffic that's on there, particularly in the context of the alternative of only having two exits for over 600 people going out onto 137<sup>th</sup> Street. I think contrary to what some of my colleagues have suggested that this is a good plan when set alone. It addresses some changed circumstances in a fashion that addresses another issue. I'm reminded of the first time I observed this body in action, nearly 20 years ago now, when the Wilshire Development was being proposed. I was in a room absolutely full of people, and this body was trying to address the question of dealing with density coming off 135<sup>th</sup> Street and people concerned that their home values were going to be decreased because of what was going in at 135<sup>th</sup> Street. We could be addressing it from that situation, looking at what's happening along 135 Street moving to the south. When you

look at the overall planning process, this tends to address that with commercial activity along 135<sup>th</sup> Street, creating a need for some transition that gets us to Tuscany and the other neighborhoods farther south. This approach of having a relatively high density residential transitioning into this idea of a buffer to the duplexes and then on to the larger single-family residences makes some sense to me. I'm struggling, but what I think I would suggest to the other Commissioners on the panel tonight is that rightly or wrongly, what we are told is that we are to consider this plan as we would any other plan. As Commissioner Williams suggested, this is not an instance in which we're comparing competing plans and we're supposed to pick the best one. What we have in front of us tonight is a plan that's been proposed by the city, and our standard for recommending approval or not should be that plan on its merits and not that plan compared to another plan that's possibly approved for that particular piece of ground or any number of different plans handed out to us and shown to the City Council. What we have before us is the plan. I would respectfully suggest to my fellow Commissioners that what we've been instructed is that our obligation and our task here is to look at this plan standing alone in the context of the development around it, whether we would find this particular plan to be acceptable. The rest of it is all, in my view, for the lawyers to figure out on another night. I don't believe this is our task tonight. I'm open to others' opinions on this. When I look at this plan, it's with some reluctance that I will support it because I think it does provide transition from relatively large single-family residences through the duplexes into the apartments and ultimately into the mixed use that is to the north. I think it does address traffic issues looking into the future of what Mission Road is going to be. It balances the burden on Mission Road versus trying to get 600 people out of this relatively small area of land every morning and back in every afternoon. As I look through other attributes of the plan on its own and ignoring the rest, which is a cause of some trepidation for me, I find myself supporting this plan. I apologize for the length of my comments.

Chair Rohlf: Thank you, that's all right.

Comm. Munson: Mr. Ley, the capital improvements program for the widening of Mission Road to four lanes, what will be the right-of-way, and also will that have a median within the road itself?

Mr. Ley: Mission Road is not within the 5-year CIP, but Mission Road would have 50' of right-of-way south of 137<sup>th</sup> Street. Then with this right-in, right-out, we would construct an island from 137<sup>th</sup> to 138<sup>th</sup> to ensure that it functions as a right-in, right-out.

Comm. Munson: I think it's important to note that to the homeowners who were concerned about traffic at an intersection there. The right-in, right-out takes away a lot of the problems with an unrestricted access to Mission Road. Is that correct?

Mr. Ley: That's correct.

Comm. Jackson: I think it's kind of up in the air what it is we're to be doing, but if we're just looking at this plan in and of itself as if nothing else had ever come before this body, I don't think if an Applicant brought it forward that the City Staff would be recommending approval because of the number of diversions from the code, especially in regard to the setbacks. They've recommended denial because of setbacks before, and you're also over the density on the RP4 area quite significantly from what that area that they've zone

RP4 in their plan would allow. I just don't see the Staff recommending this if it had come forward in any other situation.

Comm. Elkins: Mr. Klein, is the density in the plan that's presented to us in excess of the zoning that's being proposed?

Comm. Jackson: For the RP4 area.

Mr. Joseph: Look at Page Two of the Staff Report. I have three tables on there. The final plan, which is the Settlement Plan 2008, had a deviation of 11.89 dwelling units per acre for the apartments. The total density was 10.35 dwelling units per acre. The third table is the preliminary plan for the city project. It shows the total apartments is 13.92 dwelling units per acre and the total density is 8.58 dwelling units per acre. In the previous plan, the Oddos requested a deviation for the apartments, and it was granted in 2001.

Comm. Jackson: What is the density allowed for RP4 in the code?

Mr. Joseph: It's 10.79 dwelling units per acre.

Comm. Jackson: So 10.79, and then we recommended approval to go to 11.89. Now with the city's, it's 13.92.

Mr. Joseph: Correct.

Comm. Williams: In that regard, don't we typically review the density and deviations based on the zoning and not necessarily on the overall development?

Mr. Joseph: Basically in this case since the townhomes were expanded, that reduced the density for the RP3 portion but increased the density for the RP4 portion. Overall, the density came down, so that was favorable for City Staff.

Comm. Williams: So can you give me an example on a private developer project where we have also taken that similar approach of looking at the whole piece if we have multiple zonings on a tract of land and either looking at the F.A.R. or the density, versus looking at the individual pieces of zoning?

Mr. Joseph: In the 2001 plan, we actually recommended that deviation, so it was approved for 11.72 at that time. We actually approved that deviation already.

Comm. Williams: I understand that. You're making an issue out of the fact that the overall development with the RP4 and RP3 as an 8.58 density, whereas, the individual tract of the RP4 is of substantially higher density than in the previous plan. My question to you is where on other projects have we taken the position of, in essence, granting approval for this kind of approach on the overall project versus looking at the individual zoning components of that development?

Mr. Joseph: Not for any mixed use developments, but in the previous plan in this case, we actually looked at the overall density. Since just the apartments were higher, we recommended approval with the deviation.

Comm. Williams: So because of the low density on the RP3, we gave them the slight deviation on the RP4.

Mr. Joseph: Yes.

Comm. Williams: What is the percentage increase in the deviation on the RP4 from what's allowed by the LDO and what is asked for by the deviation?

Ms. Binckley: While he's calculating, may I address you and provide comment?

Chair Rohlf: Yes.

Ms. Binckley: Where the zoning line lies currently, we can lower that line. We can take more land out of the RP3 and add that into the RP4 in a number of areas. The line was set upon a certain design, and we did not want to adjust it based on legal notices. The legal descriptions were provided to the city, and everything was included. My point is that overall, the density on this project is 8.58. We can adjust that line, and we can drop the apartments. Without a deviation, I don't believe we can get all the way down, but we can get in close proximity to what we've looked at before by relocating that line and not adjusting the land.

Comm. Williams: Could you stay to answer the question I raised about the percentage difference. We're looking at a 30% increase in the density as the plan currently exists. Diane, could you address the comment Mr. Bowers made about the number of deviations building to building? He said there were 29 deviations, and I think you addressed not more than a half dozen.

Ms. Binckley: I haven't counted them, so I can't verify if that's accurate or not.

Comm. Williams: So we don't know the accurate number.

Ms. Binckley: I'm sorry.

Comm. Williams: That's fine.

Comm. Heiman: Madame Chair, I'll provide my comments here. This is quite a quandary, difficult to sort out. I won't be as eloquent as my neighbor here, but the Oddo plan appears to me to have been in place for a long time. There have been several modifications in an effort to work with the city guidelines per the stated stipulations. They seem to have a very good handle on all these issues that were brought up tonight, including the traffic, the drainage, the gradient elevations, parking, etc. as compared to the plan that was presented tonight. I'm also uncertain of the policy issues surrounding this case. Personally I will always tend to side with the individual property owners, and I'm a little uncomfortable with this notion of telling someone how they can develop their own property, especially if it falls within the guidelines that we've outlined in our LDO. Something has to go there. I think the plan presented tonight has too many questions about it to approve it. I'm really not in favor of the plan that's been presented tonight.

Comm. Williams: I'll follow up on a comment that was just made. Given the fact that we have zoning and LDO regulations, we are telling people what they can do with their land; but when we are telling property owners that, they participate in that process. In this

case, we have a property owner who knew what the zoning originally was and worked to rezone it. The zoning has been in place, and now we're looking at shifting lines around in opposition to what they've been using as an approved plan. When the city had the opportunity the first time ten years ago, why didn't it address the proper (a term used by professionals several times tonight) buffering and several other times we've seen this? As my colleague said, we're supposed to be looking at this plan, but we almost can't help but look at the plan we have reviewed and approved, that has been approved by Council. What's changed? The neighboring property hasn't changed. We're asking these people to now suddenly change. Even in testimony that was presented here tonight, they've made an effort to make a change to address some of those issues. I guess it's falling on deaf ears. I would like to have an opportunity, instead of voting on just this plan as if it were the only option, to have the opportunity to look at a revised plan by the property owner that he can live with as well and see what the conditions, setbacks and screening would be to address what seems to be the biggest concern, which is the residents on the Tuscany side of this property.

Chair Rohlf: Does anyone else have a comment? I think we have a pretty good sense of the direction we are headed on this.

Comm. Munson: So what I think I heard just now was that it might be beneficial for the developer and Staff to get together and iron out some of these differences, as opposed to going further with the rezoning. Is this what I heard?

Comm. Williams: That could be a good step, sure.

Chair Rohlf: I think it would be, but I think the problem here is we're not privy to what's going on at the various levels of litigation. I think that I see this plan tonight as a vehicle to accomplish something else. We have seen this plan a number of times, and we can continue to ask the developer to move buildings around. It's obvious from the plan presented tonight that it's a possibility, but I really think this needs to get resolved at the trial court level. I don't think it's fair to continue to ask us to look at these plans when we don't know how legitimate they are and where things stand. It's very wearing to look at these plans and try to keep everyone's interest at heart. I think this is at least the third time we have seen a plan when there's been litigation pending. I don't know what else the trial court needs to make its decision, but it needs to make a decision whether this needs to go to mediation or arbitration or one of these plans gets accepted. You all know the state statutes and implications of those kinds of things. I think we are being asked to go beyond our purview here. I don't know if this can be resolved. If I could get a sense on the plan, I would guess the motion is going to be to deny this plan. I don't think a continuance is going to do anyone any good because I would think if the original applicant, the developer of this project, had any intent to take this plan further; he would have already made that representation to the court. I really think this should be the last time we see this.

Stuart Stein, attorney for the city, appeared before the Planning Commission and made the following comments:

Mr. Stein: The difficulty is that we are in litigation, and we have to abide by the rules that are established in the litigation process. A lawsuit was filed, the city responded to that lawsuit, the parties attempted to get together and agreed on mediation. The mediation judge suggested that the Applicant/Plaintiff/Landowner present a mediation plan to the

city, and the City Council ultimately did not accept that mediation plan; so it went back to the court. The city decided that since they had rejected the mediation plan, maybe the better way to go forward would be for the city to present a plan that they felt better accommodated the wishes the City Council had attempted to articulate. So the city asked Staff to prepare a plan. The Oddos asked the court to deny the city the right to do that. I believe, as you know, the court would not enjoin that action. The judge told the city they could go forward with the plan, which is the plan presented here tonight. You're not being asked to compare the plans. You're not being asked to pick which plan is better. The only issue that is before you tonight is the plan the city has put forward. I'm not telling you how to vote on the city plan. What I'm suggesting to you is the direction the trial judge gave us was that it is not wrong for the city to present a city-sponsored plan to you. Ultimately you're going to vote on it, and I assume the City Council is going to vote on it. We, of course, will advise the judge of the outcome – pass or fail. The results of the city's plan would be presented to the court, and the judge ultimately will make a decision and/or the parties will maybe reach some type of a compromise. It would be great if you could serve as judge and jury and tell the Oddos and the city what they should do, but those aren't the rules of the game. I know it's been most difficult. I've been with you through all of these, and I truly feel your pain because you're being asked to watch a movie, but you're only able to see one section. All that I can tell you is the judge said the city could go forward and present a plan, and that's what you've got to vote on.

Chair Rohlf: We have Mr. Bowers there shaking his head, and I think it would only be fair to listen to one more comment.

Mr. Bowers: Thank you, Madame Chair. I know you don't want to hear lawyers argue, and I don't intend to argue with Mr. Stein. Basically everything he said except that provision that the judge said you could go forward with the plan is true. The judge did not say that. What the judge said was, "I'm not going to issue an injunction to prevent the city from moving forward with its application."

Mr. Stein: We will stand corrected on that.

Mr. Bowers: Yes, and then the judge went on to say that, "it may well be that you'll have an additional cause of action, which you may bring in front of the court as a result of what happens here." That's a very different statement than saying, "You may proceed." The judge did not say that. Thank you.

Chair Rohlf: All right, then I think we have the record clear on this particular plan and some of the pluses and minuses. Hopefully we're prepared to have a motion on this plan.

**Motion to deny Case 59-08 – SIENNA II – CITY PROJECT – Request for approval of a rezoning and preliminary site plan, located on the southeast corner of 137<sup>th</sup> Street and Mission Road was made by Jackson; seconded by Heiman.**

Comm. Williams: Madame Chair, do we need to add reasons for denial?

Chair Rohlf: I think we've covered that in our discussion.

Comm. Williams: Madame Chair, one part of this process that I think has been overlooked is the Golden Criteria. The City Staff had written up their interpretation of the Golden Criteria and how it addresses this plan. I want to speak just for a moment on the item, "To the extent to which removal of restrictions will detrimentally affect nearby property." I think though they addressed the nearby property, in this particular case we also have an issue with the property owner - which was presented by the property owner and his representatives - that by granting rezoning here, it would have a detrimental impact on their financial position on this property. No further comment.

**Motion passed with a vote of 5-1. For: Shaw, Jackson, Munson, Williams, and Heiman. Opposed: Elkins.**

*MEETING ADJOURNED*