

FAIRBANKS NORTH STAR BOROUGH
Planning Commission
November 9, 2021
6:51 p.m.

A regular meeting of the Planning Commission was held Tuesday, November 9, 2021, in the Mona Lisa Drexler Assembly Chambers of the Juanita Helms Administration Center, 907 Terminal Street, Fairbanks, Alaska.

ROLL CALL

There were present appearing telephonically and in person:

Sandra Mota	Kerynn Fisher
Kevin McKinley	Chris Guinn
Jason McComas-Roe	Doug Sims
Shane Koester	Mike Kenna
Eric Muehling, Vice-Chair	John Perreault, Chair

Comprising a quorum of the Commission, and

Sharon Wittenkeller, Administrative Assistant III, Clerk
April Trickey, CMC, Borough Clerk
Kellen Spillman, Acting Community Planning Director
Melissa Kellner, Acting Community Planning Deputy Director
Annmarie Billingsley, Assistant Borough Attorney
Jim Williams, Borough Chief of Staff
David Bredlie, Borough Public Works Director

MESSAGES

C.1 Communications to the Planning Commission

Kellen Spillman, Acting Community Planning Director, thanked Clerk Wittenkeller for her service, reminded the Commission this was her last meeting, and to direct any correspondence to April Trickey, Borough Clerk, or Adena Benn, Deputy Clerk. Mr. Spillman reminded the Commission of upcoming Planning Commission vacancies, the deadline to submit applications for appointment, and welcomed new Commissioner, Kevin McKinley. Mr. Spillman provided updates on Ordinance No. 2021-27, the GARS project going before the Borough Assembly, virtual data events, and upcoming agenda items for December and January.

MESSAGES – continued

C.2.a. Citizen’s Comments on agenda items not scheduled for public hearing.

NONE

C.2.b. Citizen’s Comments on items other than those appearing on the agenda.

NONE

C.3. Disclosure & Statement of Conflict of Interest

NONE

APPROVAL OF AGENDA AND CONSENT AGENDA

KENNA,
Seconded by FISHER

moved to approve the agenda and consent
agenda as read.

VOTE ON MOTION TO APPROVE THE AGENDA AND CONSENT AGENDA AS READ.

Yeses:

Fisher, Koester, Mota, Muehling, Kenna,
McKinley, McComas-Roe, Sims, Guinn,
Perreault

Noes:

None

MOTION CARRIED

10 Yeses, 0 Noes

APPROVAL OF MINUTES

1. *Planning Commission Meeting Minutes from October 12, 2021.

Without objection this measure was read by title and approved under the consent agenda.

APPEALS

1. Appeal of GR2021-193

An Appeal by Markus Gerlitz for denial of a request for affirmative recognition of legal nonconforming structure status (grandfather rights) for an existing single-family home located 0.6' +/- from the front lot line instead of the required 35' in the Rural Estates-2 (RE-2) zoning district for a single-family home on Lot 1, Block 1 Carter First Addition, located at 1770 Gilmore Trail. **(Staff Contact: Melissa Kellner and Jim Williams)**

Melissa Kellner, Acting Community Planning Deputy Director, stated the incorrect section of FNSB Code pertaining to procedural rules of the appeal were provided to the appellant's representative Steve Lowry, 3-Tier Alaska. Therefore, the appellant, Markus Gerlitz and his representative Mr. Lowry were not informed of FNSB Code 4.04.150 (B), which allows the opportunity for the Appellant to submit additional materials at least 5 days prior to the hearing.

As such, the Department of Community Planning had no objection with the appellant's representative, Mr. Lowry, introducing new evidence at the hearing which was electronically distributed to all Commissioners.

Ms. Kellner and Jim Williams, Borough Administrative Hearing Officer, presented the staff report. Kellen Spillman, Acting Community Planning Director, and George Stefan, Community Planning Platting Officer IV were also present and provided technical information and answered questions. Based on the staff analysis, the Department of Community Planning recommended denial of the appeal and to uphold the FNSB Administrative Hearing Officer's decision.

Commissioners questioned and discussed with staff the following:

- Clarification on how the Administrative Hearing Officer (Hearing Officer) determined there was a 100-foot right-of-way on Gilmore Trail and what he based his determination off of; it was answered, they relied on Alaska Department of Transportation and Public Facilities (DOT&PF) advisors to help understand Revised Statue 2477 (RS2477) trail easement, established by BLM around 1914, which, during that time, the rights-of-way easements were 100-feet wide.
- Clarification on the Hearing Officer's determination, that at the time of construction the building was not within the zoning conformance of 35 feet; it was answered, he reviewed the application packet and staff report and could not definitively decide if the building was outside the 35 feet setback so he determined it was not compliant.

APPEALS – continued

- Whether the property line moves if the right-of-way is considered anything other than 100 feet or is static regardless of the width of the right-of-way; it was answered, this is more a matter of limits of the right-of-way easement, rather than the lot line. Yes, the lot line would be static. It was the understanding of Mr. Stefan, that front-yard setbacks in Title 18 are measured from the edge of the right-of-way easement.
- Regarding RS2477 and PLO601, if the property were homesteaded prior to 1949, the federal government's Public Land Order (PLO) of 100 feet would not holdup. If it were homesteaded after 1949, it would holdup.
- Whether the property was conveyed out of federal ownership by patent in 1965, after the 1949 PLO; staff did not have the information immediately available. It was added by Commissioner Mota, that it is Patent No. 50660057, dated September 15, 1965, meaning the PLO601 of 1949 was in place for the road and the width is 100 feet.
- Clarification of the property noted on the assessor's card showing all the setbacks were 35 feet; it was answered, the assessor's card notes a zoning permit application submitted by the owner in 1975. The property owner indicated in the area where a site plan would typically go on the zoning permit application, a note that said, "35 feet from all lot lines". It was not a verification from assessing that it was constructed 35 feet from all lot lines, it was a proposal as part of a zoning permit application that was issued to Tax Lots 302 and 306, which was a 50-acre parcel. There is not a specific site plan showing the exact location of where the house was to be constructed. Staff does not know whether the zoning permit was issued for the specific house.
- Whether Tax Lots 302 and 306 were subdivided; it was answered, yes.
- Whether there was an address on the zoning permit; it was answered, there was no address, it only identified Tax Lots 302 and 306.
- Whether the houses within Carter Subdivision, formerly located on Tax Lots 302 and 306 were all built at the same time or after 1976; it was answered, staff did not research the construction history of the houses on lots within Carter Subdivision.
- Whether when staff reviews specific site plans which depict structures and setbacks in a zoning permit site plan, do they verify the setbacks after construction is complete; it was answered, they do not, they rely on the site plan.
- Whether the house was built in 1975, it was answered; that was their understanding.
- Whether DOT&PF did not have the right-of-way surveyed in 1975; staff was not able to answer.
- Whether it is a possibility that the road was in a different location at the time the house was built, and the determination of the distance of the house from the right-of-way would likely have been made by the physical location of the edge of the road; it was answered, it is a possibility that they may have been aware of what was required and where to measure from.

APPEALS – continued

- In regard to the zoning permit application, and the unknown status of whether the zoning permit was for the property in question, and if it was not for the property in question, who would it belong to, and were there any code complaints about the property in question; it was answered, there have been no complaints. It was explained, the zoning permit that was issued to the previous property owner of Tax Lots 302 and 306, was for an area equal to 50-acres. At the time, Carter Subdivision did not exist, and the property was divided into two Tax Lots. Since there is not a specific site plan, the zoning permit was issued for a single-family home somewhere within the 50 acres. Since that time, the two Tax Lots have been subdivided into Carter Subdivision. They do not know if the specific house for the zoning permit was constructed, it could be a house located on any of the modern-day lots.
- Whether anyone researched the RS2477 on the parcel; it was answered, staff did not research the RS2477 determination. Staff relied on the registered right-of-way professionals, through DOT&PF.
- Whether staff is relying on DOT&PF's representation that the right-of-way is 50 feet, and not 33 feet; it was answered, that is correct.

Steve Lowry, 3-Tier Alaska, Appellant's Representative inquired of Mr. Williams the following:

- How much Mr. Williams consulted with staff prior to making his determination; Mr. Williams answered, he relied on staff to help interpret some of the information and data.
- Whether Mr. Williams was the person who made the determination that the property did not have Grandfather Rights; Mr. Williams answered, correct, he made the decision.
- Since Mr. Williams is not a member of Community Planning, what mechanism within borough code or title allows him to be the administrative hearing officer; Mr. Williams answered, it was his understanding he could be appointed as a Hearing Officer by the Administration, through the Mayor's Office.
- Whether Mr. Williams has a background in Planning, Mr. Williams answered, no he does not.
- Whether Mr. Williams is a member of the American Planning Association or a Certified Planner; Mr. Williams answered, no, he is not.
- From the aerial photos provided by Mr. Lowry, whether Mr. Williams had any reason to believe the distances and dimensions shown on the aerials were incorrect; Mr. Williams stated he could not make a determination whether or not the dimensions were accurate.

APPEALS – continued

Mr. Lowry inquired of Ms. Kellner the following:

- After the aerial photos were provided, did any borough staff take the opportunity to download the aerial photos and try come up with where they thought the house was; it was answered, they passed the information onto the Hearing Officer for his determination. Mr. Spillman added, he received the link from Mr. Lowry, and used the resources the from the website provided the day he submitted it to him. Mr. Spillman noted he could not find any information that proved or disproved, that the structure was or was not located a respectable distance from the front lot line. He made the best attempt to compare the aerial photos with the existing property maps and existing aerial photos they had.
- Whether on the preliminary map for Carter Subdivision, there is a residence labeled as the Lebert residence; it was answered, that is correct.
- Whether Ms. Kellner concurred the Lebert's are the individuals who completed the zoning permit; it was answered, the applicant was an individual named Elder Lebert, who at the time owned Tax Lots 302 and 306, an approximately 50-acre parcel, that includes what is now Lot 1.
- Whether there was any research conducted to depict if there were any other structures built within that time period on that lot; it was answered, that is correct, there was no research conducted. The zoning permit was the one permit on record.
- How often does a property that has a zoning permit come up later and request Grandfather Rights or a variance from a setback; it was answered, it does happen sometimes, less than a dozen times that Ms. Kellner could note during her employment with the borough.
- Whether after receiving an email noting Gilmore Trail and PLO601, did anyone reach out to DOT&PF for clarification on whether Gilmore Trail was done under PLO601; it was answered, subsequent to the Administrative Hearing, no. The conversation and exchange of information with DOT&PF occurred up until the Administrative Hearing, and no further exchange of information or communication was done after the Administrative Hearing.

Markus Gerlitz, appellant, presented the following information:

- He is the property owner of 1770 Gilmore Trail.
- He received the decision letter of the denial of Grandfather Rights on August 18, 2021.
- He purchased the property in 2006 from the original owner, Jerry Carter.
- Jerry Carter inherited all the properties, which used to be homesteads, from his father-in-law, Elder Leberman.

APPEALS – continued

- When he bought the property in 2006, it was financed through Wells Fargo Bank. They refinanced the property in 2010, with Alaska USA Federal Credit Union. There were no objections or issues with regard to title insurance and setbacks. Title insurance was issued.
- The structure setback issue came up last year, when they left Fairbanks and tried to sell the property.
- He hired Steve Lowry with 3-Tier Alaska to conduct a survey and help them address the setback issue.
- He contacted Golden Valley Electric Association (GVEA) because, according to DOT&PF, the right-of-way was established and then the public utility easement (PUE) and GVEA is the only utility company currently using the PUE.
- The property line, as previously stated, is static. The property line itself never changed once it was originally established.
- DOT&PF realigned Gilmore Trail, which used to be a gravel mining exit road.
- Subsequently, in 1985, Gilmore Trail was paved.
- In conversation with neighbors, he was informed, they were in the same situation, that during DOT&PF's realignment process, the center of the road was shifted to the east, which is how this issue came about.
- The issue was due to, supposedly, the house being too close to the road and doesn't follow the required setback.
- The power lines that GVEA installed, according to DOT&PF PUE, were too close to the house and did not meet FNSB Code.
- Months ago, GVEA sent an application to DOT&PF, and DOT&PF approved the application. GVEA physically moved the power poles at their own cost.

Steve Lowry, 3-Tier Alaska, Appellant's Representative presented the following information:

- The neighbors indicating that the road shifted in surveying, is called parole evidence; which is evidence that is gathered in the course of a land investigation about land corners or section corners. It is very valuable and admissible in court.
- They conducted a record of survey for Mr. Gerlitz.
- In 2004, 3-Tier Alaska conducted a mortgage location survey or a plot plan on the property.
- Based on the lot lines of the Carter Subdivision, the house encroached into the right-of-way by about 10 feet.
- The first thing he was asked to do, was review the plot plan to see if there was a mistake in the plot plan.
- He located the coordinate files, replotted the plot plan, and in review of the Carter Subdivision lot lines and right-of-way maps, the house encroached in feet.
- He noted something did not look right and furthered his investigation.
- He reviewed DOT&PF right-of-way maps, which showed the house inside the lot line.

APPEALS – continued

- Subsequent investigation revealed that Carter Subdivision plat had incorrectly aligned Gilmore Trail.
- Mr. Lowry or 3-Tier Alaska do not hold any financial interest in the outcome of the decision.
- The DOT&PF right-of-way maps and one other plat showed all right-of-ways on Gilmore Trail, in every platting action, a right-of-way width of less than 66 feet, in one case it was 50 feet. But, the majority of the subdivision plats showed Gilmore Trail at 66 feet.
- There was a plat that was done approximately 1/8 of a mile north of the property, and another plat that was done about 1/8 or 1/4 of a mile to the south of the property; they all showed Gilmore Trail as 66 feet.
- Documents submitted at the hearing, a DOT&PF review of one of those plats. That plat was engineered pre-Highlands Subdivision in 1978, three years after the property was built.
- Also submitted non-objection letter from the State of Alaska, not asking for any additional right-of-way, not stating the right-of-way is 100 feet. The State signed off on the 66-foot right-of-way, as they had done on a couple of other plats.
- Every plat on Gilmore Trail from the beginning of time, until 1980, showed Gilmore Trail as 66 feet wide.
- In 1980, on Plat No. 80-178, is the first time DOT&PF requests an additional 17 feet of right-of-way. On Plat No. 80-178, the right-of-way is listed as 66 feet. In regard to the plat, DOT&PF said, "DOT expresses no objection, but requested that the Gilmore Trail right-of-way be widened to 50 feet."
- The idea that Gilmore Trail has always been 100 feet wide is completely incorrect, there is no evidence to support that claim. It went through several borough plats that were reviewed by Herb Mann, Laurie Ann Frankenbush and DOT&PF. Until 1980, no one came up with a width wider than 66 feet.
- The owners of the property had to agree that the right-of-way was 66 feet.
- If DOT&PF and the borough doesn't know the road is 100 feet wide, how can a landowner know it is 100 feet wide. It has been platted at 66 feet, consistently, until 1980, five years after the house was built.
- Read from an email he received from DOT&PF that stated: "There is a handwritten note here that it is a local road from PLO601 that we are trying to verify."
- Referenced a document from John Bennet, former State of Alaska Right-of-Way Specialist, which references determining a PLO and went into the evaluation of information of the document, that noted; "if you're homestead date of entry was after August 10, 1949, and after the date of construction of the road, there will be a PLO right-of-way easement." Mr. Lowry stated, this is exactly what we have, it was patented in 1965, the application was done in 1962, and the road existed, according to this criteria, therefore Gilmore Trail is a PLO601 versus a RS2477.
- DOT&PF, until 1980, has signed off on plats that showed Gilmore Trail as 66 feet wide.

APPEALS – continued

- Aerial Photography; in the course of conducting the record of survey, Mr. Lowry found aerial photos from 1974, 1979, and 1985. He noted a spatial relationship between the trailer house, which was on the property, and the subject structure, the single-family home. Using the three aerial photos along with the spatial relationship, he was able to precisely overlay the house from the 1974 aerial which showed the trailer house, noting in comparison to the subject house, to the center line of the existing road, was 78 feet. If you're using the 33-foot easement and they are 78 feet from the center line of the road, it puts the corner of the house 45 feet away from the edge of the easement.
- The 1979 aerial photo shows the house and the road shifted 78 feet away from the corner of the house, they are roughly 57-58 feet from the corner of the house, which shows the road shifting over time to the east.
- The 1985 aerial photo shows after Gilmore Trail is constructed and asphalted, it shifted from the center line of the road to the corner of the house. The trailer house is about 72 feet away from the corner of the house and the house is now 41 feet from the edge of the easement.
- All the aerial photos show the road shifting over time.
- When the structure was built it met the zoning setbacks. Using the data of the time, which is the 66-foot right-of-way, which no one claimed was greater than 66 feet until five years after the house was built, that includes DOT&PF signing off on a 66-foot right-of-way.
- There is parole evidence from the neighbors, saying the road has shifted and the aerial imagery backs that up.
- Based on the data the road was moving roughly five feet a year. It would have put the house, when it was constructed in 1975, within the setback at 72 feet, which is within the setback requirements.
- They have sufficient evidence the zoning permit that was issued was for the subject property, because it shows up on the preliminary plat as the Leberman property, who was the applicant on the zoning permit. At the time of construction, it met the zoning setbacks.

Commissioners questioned and discussed with Mr. Gerlitz and Mr. Lowry the following:

- Whether the same information Mr. Lowry presented, was provided to the Hearing Officer; it was answered, yes, except for one plat.
- PLO establishment and history on Gilmore Trail.
- In reference to the 1974 aerial, how many houses were in the area, whether Mr. Lowry researched when the houses were built, and if they were built in the timeframe of the zoning permit card; it was answered, the only house that constructed in the area was across the street and was constructed in 1975. There were no other structures on the south of the property line.

APPEALS – continued

- Whether when Mr. Lowry reviewed the 1974 aerial, was he able to see the surrounding area and not just the subject house and trailer; it was answered, that is correct.
- Whether Mr. Lowry submitted the 1974 aerial to show that as the only zoning permit it could have been; it was answered, he did not know or understand at the time, until this appeal hearing, that was going to be a question. He has a subdivision preliminary plat that says the Lebert residence, it is signed by Mr. Lebert, and it is a very good chance that it was that structure.
- Whether there has been no survey plat found anywhere at the time of construction of the residence, showing the alignment of Gilmore Trail regardless of the width, the actual alignment of the location of the centerline adjacent to the residence; it was answered, that is correct.
- In regard to PLO601, it applies to land that was in federal possession at the time, and the land was in federal possession at the time. It breaks down the widths according to road types, through roads are a certain width, feeder roads are certain width, and local roads or all other roads not classified as through roads or feeder roads are 50 feet on each side of the center. Even though the PLO states that, and that is what the federal government reserved for the public when they owned the land, and how DOT&PF sees that later changes what was actually reserved for the public under that PLO; what Mr. Lowry's position was in regard to this; it was answered, 1975, there was a lot of misinformation, there was a lot of misinterpretation. There have been PLOs that are not always 100 feet, there are some 66 feet wide, some less. His contention, was if DOT&PF thought Gilmore Trail was 100 feet wide, why were they not requiring it to be platted 100 feet wide. How could a landowner in 1975, when every plat that was available, showed a 66-foot right-of-way, that DOT&PF signed off on, and that width was supposed to be 100 feet. He feels DOT&PF did not do the right thing in this case.
- When was PLO601 applied to this right-of-way; it was answered, sometime around the late 1970's or early 1980's was when DOT&PF did their first right-of-way map.
- The PLO does not create a 100-foot right-of-way, and whether the PLO is subject to property rights and in any case predate that; it was answered, that is correct.
- The date of patent; it was answered, 1965 is the date of patent and the application was filed in 1962.
- Whether any rights under that patent date back to the date of the application; it was answered, that is correct.
- Is it fair to say that this is quite ambiguous; it was answered, that is correct.
- Whether it appears that the builder of the house made every effort to comply with the criteria at the time of construction; it was answered, I believe it was 100 percent certain. In 1975, FNSB zoning had only been in effect for a few years.
- Whether this situation puts the property owner, at no fault of his own, in a predicament; it was answered, the combination of events has placed Mr. Gerlitz in a tough situation.

APPEALS – continued

- Whether the applicant has the burden of proof; it was answered, yes.
- What do you have to prove to win the case; it was answered, that the right-of-way was 66 feet in 1975 and the house met the setback requirement.
- Whether 66 feet is the important number for this case; it was answered, absolutely.
- When all the information was presented at the Administrative Hearing, is the shift in the right-of-way towards the house encroaching on the property; it was answered, absolutely, and they have a considerable amount of evidence that was the case, including parole evidence from neighbors.
- Whether the parole evidence was presented to the Hearing Officer; it was answered, it was not, and it was not known at the time.
- Whether the only parole evidence they have on the neighbors is the word of the appellant, as the neighbors are not testifying; it was answered, other than the fact that the Appellant is under oath.
- Whether the parole evidence was not given to the borough until this hearing; it was answered, that is correct.
- Whether they were provided with the names of DOT&PF experts that the borough relied on; it was answered, he believed it was Paula Hicks and Tim Sprout.
- Whether Ms. Hicks or Mr. Sprout testified at the Administrative Hearing; it was answered, neither of them testified at the Administrative Hearing. Ms. Hicks is also the same person who emailed Mr. Lowry about the handwritten note, stating, the road is a local road under PLO601.
- Whether the appellant's testimony about the moving of power lines is relevant to the appeal; it was answered, it is another piece of evidence that something is not right.
- Whether the 1974, 1979, and 1985 aerial photos showing the road shifting towards the subject's house mean the right-of-way centerline is shifting toward the subject's house, or is the road moving around within its own right-of-way; it was answered, until DOT&PF came along and defined the right-of-way, there is no way of knowing.
- Whether Mr. Lowry's measurements on all three aerial photos are to the center of the road and not to the center of the right-of-way; it was answered, that is correct, because the right-of-way had not been defined through that section of road.
- Whether when the house was built, there was no existing survey control; it was answered, that is correct.
- Whether if at the time the house was built, the property owner had hired a surveyor to tell him precisely where the right-of-way for Gilmore Trail was located, would that surveyor been able to tell him that; it was answered, yes, in surveying, the physical location of something, the road is the biggest monument of all.
- Whether it would have been the centerline of the road at that time; it was answered, absolutely, 100 percent.
- Whether DOT&PF signed off on plats that have 66 foot right-of-way; it was answered, there is no DOT&PF signature on any plat, now or in the past, they would have reviewed the preliminary plat, but did not ask for or claim any additional right-of-way.

APPEALS – continued

- Whether Gilmore Trail was a right-of-way not an easement and the source of the 66-foot easement; it was answered, that DOT&PF considers all easements, including those under PLO601 and RS2477, as rights-of-way. The public does not own the property they have an easement on the property, not a fee simple right-of-way.
- Where the parcel originally ended versus the property line; it was answered, that the property could still be considered to extend to the original edge of the parcel and not the stated property line.
- Whether the surveyor was able to find any documentation that the house was located 35 feet or more from the boundary of the right-of-way; it was answered, that aerial photography shows the house is 78 feet from the center line of the road with a 45-foot offset from the edge of the easement.
- How narrow would the right of way have to be to meet present day setback requirements; it was answered, it would have to be 15 feet.
- Is 15-feet historically a typical right-of-way width: it was answered, that it was not.
- Would the house in its current location, meet setbacks if the right-of-way was 66-feet in width; it was answered, using the existing right-of-way in 1975 it would.
- If the right-of-way in its current location was 66-feet in width would the house meet setback requirements; it was answered, no, but that is the function of grandfather rights, to be relative to regulations when the property was originally developed.
- Referencing attachment 5 of the appeal, whether it is a PLO road or a RS2477 with their relative widths is the e-mail stating it is a 100-foot easement; it was answered, that he was referring to a different section and many PLO and RS2477 are not 100 feet wide.
- Is section 34 north of this property and is presumably referring to the section of Gilmore Trail this property is located; it was answered, without a township and range it would be difficult to tell.
- Is there another section 34 adjoining Gilmore Trail, it was answered it was possible but the surveyor did not remember the section township range map.
- Whether the appeal is relying on two key assertions that the width of the right-of-way at that time was asserted as 66 feet in width and that the 1974 aerial demonstrates this; it was answered, that all aerials demonstrate this in addition to several plats which state it is a 66-foot right-of-way.
- Whether most of this evidence was submitted as part of the original grandfather rights application; it was answered, it was not.
- Whether the evidence unequivocally demonstrates that the house met set-back requirements at the time of construction; it was answered, that the evidence presented by the appellant at this hearing definitively shows the house met those set-back requirements in 1975.

APPEALS – continued

Clerk's Note: The Planning Commission took a ten-minute recess.

The roll was called again and a quorum was established.

Chair Perreault reiterated the guidelines of a de novo hearing.

During the Administrative Hearing no interested persons provided testimony therefore Chair Perreault opened and closed interested persons testimony.

MUEHLING,
Seconded by MOTA

moved to deny the appeal and uphold the Administrative Hearing Officer's decision denying affirmative recognition of legal nonconforming status (grandfather rights) for an existing single-family home with a west front-yard setback of 0.6' instead of the required 35 feet in the RE-2 zone and adopting the appeal staff report dated November 9, 2021 and six (6) Findings of Fact in support of this decision.

Commissioner Muehling spoke on the amount of evidence presented and the movement of Gilmore Trail. Commissioner Muehling felt the burden of proof was not met by the appellant as it only created ambiguity and was not clearly demonstrated, thus he supported the original ruling.

Commissioner Mota stated it was unfortunate for the present owner but stated there was too much ambiguity to overturn the previous ruling.

APPEALS – continued

VOTE ON MOTION TO DENY THE APPEAL AND UPHOLD THE ADMINISTRATIVE HEARING OFFICER'S DECISION DENYING AFFIRMATIVE RECOGNITION OF LEGAL NONCONFORMING STATUS (GRANDFATHER RIGHTS) FOR AN EXISTING SINGLE-FAMILY HOME WITH A WEST FRONT-YARD SETBACK OF 0.6' INSTEAD OF THE REQUIRED 35 FEET IN THE RE-2 ZONE AND ADOPTING THE APPEAL STAFF REPORT DATED NOVEMBER 9, 2021 AND SIX (6) FINDINGS OF FACT IN SUPPORT OF THIS DECISION.

Yeses: Guinn, Mota, Muehling, Perreault

Noes: McComas-Roe, Sims, McKinley, Fisher, Koester, Kenna

MOTION FAILED 4 Yeses, 6 Noes

Commissioner Kenna called a point-of-order and asked if all motions needed to be supported by findings of fact. Chair Perrault stated they did, and Commissioner Kenna asked for a ten-minute recess. Chair Perreault called for a ten-minute recess.

Clerk's Note: The Planning Commission took a ten-minute recess.

APPEALS – continued

Chair Perreault asked the clerk to call the roll.

KENNA,
Seconded by KOESTER

moved to grant the Appellant's appeal and overturn the administrative officer's decision denying grandfather rights (file GR2021-193). Findings: 1. On July 13, 1972, the SW ¼ Sec 3, T.1N. R.1E., which includes the subject property, was zoned Rural Estate-I with the adoption of Ord 1971-34. The front yard setback requirement of the RE-I zone was 35'. 2. The applicants have stated, and the Assessing field card confirms, that the single-family home was built in 1975. 3. On April 19, 1988, Ordinance No. 88-010 was adopted, revising the zoning code. RE-I became Rural Estate-2. The front yard setback requirement of 35' remained the same. 4. Appellant has provided substantial evidence that the subject property met the zoning requirements when it was originally constructed in 1975. 5. The subject property was constructed approximately 45' feet from the right of way at the time of construction. 6. Appellant's application is supported by the zoning permit dated July 21, 1976, the 1985 Carter subdivision plot identifying the Leberman property, and the 1974, 1979, and 1985 aerial photographs conclusively showing Gilmore Trail's encroachment on appellant's property.

APPEALS – continued

Commissioner Kenna stated he believed the standard of evidence was met and is substantial, but not conclusive, and points directly to the conditions in 1975. Commissioner Kenna added that ancillary evidence was required as there was a vacuum of information to determine what happened in 1975. Commissioner Kenna felt the appellant provided ample evidence that in 1975 the setback was in compliance with the requirements. Commissioner Kenna also noted the lack of contradictory evidence which he believed to be easily available to Community Planning if it existed.

Commissioner Koester spoke to the measurements and his faith in the measurement process demonstrated by the appellant.

MUEHLING,
DIED LACK OF SECOND

moved to amend Commissioner Kenna's motion to include Finding of Fact #1 from the previous motion.

Commissioner Fisher asked if grandfather rights would be granted if the motion failed. Chair Perreault did not think so but deferred to Ms. Billingsley. Ms. Billingsley stated that the if the motion failed another motion would need to be agreed upon as the Commission would not have reached a conclusion on the matter.

Commissioner Guinn offered that in his opinion PLO601 established the right-of-way and although it was not surveyed it could have been.

VOTE ON MOTION TO GRANT THE APPELLANT'S APPEAL AND OVERTURN THE ADMINISTRATIVE OFFICER'S DECISION DENYING GRANDFATHER RIGHTS (FILE GR2021-193). FINDINGS: 1. ON JULY 13, 1972, THE SW ¼ SEC 3, T.1N. R.1E., WHICH INCLUDES THE SUBJECT PROPERTY, WAS ZONED RURAL ESTATE-I WITH THE ADOPTION OF ORD 1971-34. THE FRONT YARD SETBACK REQUIREMENT OF THE RE-I ZONE WAS 35'. 2. THE APPLICANTS HAVE STATED, AND THE ASSESSING FIELD CARD CONFIRMS, THAT THE SINGLE-FAMILY HOME WAS BUILT IN 1975. 3. ON APRIL 19, 1988, ORDINANCE NO. 88-010 WAS ADOPTED, REVISING THE ZONING CODE. RE-I BECAME RURAL ESTATE-2. THE FRONT YARD SETBACK REQUIREMENT OF 35' REMAINED THE SAME. 4. APPELLANT HAS PROVIDED SUBSTANTIAL EVIDENCE THAT THE SUBJECT PROPERTY MET THE ZONING REQUIREMENTS WHEN IT WAS ORIGINALLY CONSTRUCTED IN 1975. 5. THE SUBJECT PROPERTY WAS CONSTRUCTED APPROXIMATELY 45' FEET FROM THE RIGHT OF WAY AT THE TIME OF CONSTRUCTION. 6. APPELLANT'S APPLICATION IS SUPPORTED BY THE ZONING PERMIT DATED JULY 21, 1976, THE 1985 CARTER SUBDIVISION PLOT IDENTIFYING THE LEBERMAN PROPERTY, AND THE 1974, 1979, AND 1985 AERIAL PHOTOGRAPHS CONCLUSIVELY SHOWING GILMORE TRAIL'S ENCROACHMENT ON APPELLANT'S PROPERTY.

APPEALS – continued

Yeses: Koester, Kenna, McKinley, McComas-Roe,
Sims, Perreault

Noes: Fisher, Mota, Muehling, Guinn

MOTION CARRIED 6 Yeses, 4 Noes

FINDINGS OF FACT IN SUPPORT OF THE APPROVAL OF GRANDFATHER RIGHTS

1. On July 13, 1972, the SW ¼ Sec 3, T.1N. R.1E., which includes the subject property, was zoned Rural Estate-I with the adoption of Ord 1971-34. The front yard setback requirement of the RE-I zone was 35’.
2. The applicants have stated, and the Assessing field card confirms, that the single-family home was built in 1975.
3. On April 19, 1988, Ordinance No. 88-010 was adopted, revising the zoning code. RE-I became Rural Estate-2. The front yard setback requirement of 35' remained the same.
4. Appellant has provided substantial evidence that the subject property met the zoning requirements when it was originally constructed in 1975.
5. The subject property was constructed approximately 45’ feet from the right of way at the time of construction.
6. Appellant's application is supported by the zoning permit dated July 21, 1976, the 1985 Carter subdivision plot identifying the Leberman property, and the 1974, 1979, and 1985 aerial photographs conclusively showing Gilmore Trail’s encroachment on appellant’s property.

NEW BUSINESS

1. Review and approval of proposed changes to the Planning Commission Rules presented by Chair Perreault.

Chair Perreault passed the gavel to Vice-Chair Muehling.

NEW BUSINESS - continued

Chair Perreault provided an overview of the proposed changes to the Planning Commission rules, including comparison of the old and new versions, along with the separation of FNSB Code and Planning Commission rules.

Commissioners questioned and discussed the following:

- New Rule #8 and the allowable excuses for missing a meeting.
- Rule #14 and the chair's discretion to call on or not call on a commissioner.

KENNA,
Seconded by PERREAULT

moved to adopt the Planning Commission rules.

PERREAULT,
Seconded by KENNA

moved to amend Planning Commission Rule #14 to add "to maintain order and not to limit debate."

VOTE ON AMENDMENT TO PLANNING COMMISSION RULE #14 TO ADD "TO MAINTAIN ORDER AND NOT TO LIMIT DEBATE."

Yeses:

Mota, Guinn, McKinley, Koester, McComas-Roe, Sims, Kenna, Muehling, Perreault

Noes:

Fisher

MOTION CARRIED

9 Yeses, 1 Noes

FISHER,
Seconded by PERREAULT

moved to amend Planning Commission Rule #3, under Order of Business, add a new item "K" to read "Reports from Committees."

VOTE TO AMEND PLANNING COMMISSION RULE #3, UNDER ORDER OF BUSINESS, ADD A NEW ITEM "K" TO READ "REPORTS FROM COMMITTEES."

Yeses:

Sims, Kenna, Koester, Fisher, Muehling, Mota, McKinley, Guinn, McComas-Roe, Perreault

Noes:

None

MOTION CARRIED

10 Yeses, 0 Noes

NEW BUSINESS - continued

VOTE ON MOTION TO ADOPT THE PLANNING COMMISSION RULES, AS AMENDED.

Yeses: Guinn, McComas-Roe, Sims, McKinley,
Mota, Fisher, Muehling, Koester, Kenna,
Perreault

Noes: None

MOTION CARRIED 10 Yeses, 0 Noes

Vice-Chair Muehling returned gavel to Chair Perreault.

EXCUSE FUTURE ABSENCES

NONE

COMMISSIONER'S COMMENTS/COMMUNICATIONS

Commissioner Koester welcomed Commissioner McKinley to the Commission.

Commissioner Sims also welcomed Commissioner McKinley to the Commission.

Commissioner Fisher echoed the others' statements.

Commissioner Guinn asked for the December 14 meeting to start at 6:00 p.m.

Commissioner Muehling welcomed Commissioner McKinley.

Commissioner McKinley thanked everyone for their welcome.

Commissioner Perreault welcomed Commissioner McKinley and thanked Clerk Wittenkeller for her service.

Commissioner Kenna also thanked Clerk Wittenkeller.

ADJOURNMENT

There being no further business to come before the Planning Commission, the meeting was adjourned at 10:47 p.m.