



## Request for City Council Committee Action from the Department of Community Planning & Economic Development—Planning Division

Date: August 6, 2009

To: Council Member Gary Schiff, Chair, Zoning & Planning Committee and Members of the Committee

Referral to: Zoning & Planning Committee

**Subject:** Appeal of the decision of the City Planning Commission regarding increasing the height of a freestanding sign located at the property of 5937 Nicollet Avenue South.

**Recommendation:** The following action was taken by the Planning Commission on July 13, 2009 (BZZ-4430):

- A. Nonconforming Use Expansion:** Application by Tom Thueson, on behalf of Jerry's Enterprises, Inc., for an expansion of nonconforming use to increase the height of an existing freestanding sign adjacent to I-35W from 35 feet to 50 feet located at the property of 5937 Nicollet Ave.

**Action:** The City Planning Commission adopted the findings and **denied** the application for an expansion of a legal nonconforming use to increase the height of a freestanding sign from 35 feet to 50 feet located at the property of 5937 Nicollet Ave.

**Ward:** 11

Prepared by: Janelle Widmeier, Senior Planner (612-673-3156)

Approved by: Jason Wittenberg, Planning Supervisor

Presenters in Committee: Janelle Widmeier, Senior Planner

### Financial Impact

- No financial impact

### Community Impact

- Neighborhood Notification: The neighborhood group, Windom Community Council, was notified of the application.
- City Goals: See staff report
- Comprehensive Plan: See staff report
- Zoning Code: See staff report
- End of 60/120-day decision period: On July 23, 2009, staff sent a letter to the applicant extending the 60 day decision period to no later than September 26, 2009.

**Supporting Information**

Tom Thueson, on behalf of Jerry's Foods, has filed an appeal of the decision of the City Planning Commission to deny the expansion of nonconforming use application to allow an increase the height of an existing freestanding sign from 35 feet to 50 feet located at the property of 5937 Nicollet Avenue. At its meeting of July 13, 2009, the City Planning Commission voted 7-1 to deny the application. The appeal (attached) was filed on July 21, 2009.

**Community Planning and Economic Development Planning Division Report**  
Expansion of a Legal Nonconforming Use  
BZZ-4430

**Date:** July 13, 2009

**Applicant:** Jerry's Enterprises, Inc.

**Address of Property:** 5937 Nicollet Avenue

**Contact Person and Phone:** Tom Thueson, (952) 928-1656

**Planning Staff and Phone:** Janelle Widmeier, (612) 673-3156

**Date Application Deemed Complete:** May 29, 2009

**End of 60 Day Decision Period:** July 28, 2009

**Ward:** 11      **Neighborhood Organization:** Windom Community Council

**Existing Zoning:** C3S Community Shopping Center District, R1 Single-Family District, TP Transitional Parking Overlay District, and AP Airport Overlay District

**Proposed Zoning:** Not applicable for this application

**Zoning Plate Number:** 37

**Legal Description:** Not applicable for this application

**Existing Use:** Grocery store and an accessory parking lot for the grocery store with a freestanding sign

**Concurrent Review:** Expansion of a nonconforming sign to increase the height from 35 feet to 50 feet.

**Applicable Zoning Code Provisions:** Chapter 531, Nonconforming Uses and Structures, Section 531.50(b).

**Background:** The applicant is proposing to increase the height of a freestanding sign from 35 feet to 50 feet located at the property of 5937 Nicollet Avenue. The sign is a back lighted pole sign for the Cub Foods grocery store also located on the property. The sign is located on the part of the property adjacent to I-35W zoned R1 with a TP overlay. These districts do not allow signage for nonresidential uses that are not allowed in an R1 district, including a grocery store. When the sign was installed, the portion of the site where it is located was zoned B3SP Community Service Parking District. The purpose of this district was to provide off-street parking areas for nearby commercial districts. The district also allowed business signs up to 35 feet in height. In 1999, the zoning code was updated and the zoning on this site was changed to R1 with the TP overlay, which does not allow signage for

CPED Planning Division Report  
BZZ-4430

commercial uses. Therefore the existing sign is a nonconforming use. Increasing the height is an expansion of a nonconforming use under Section 531.50(b) of the zoning code and therefore requires authorization from the City Planning Commission. Regardless of the outcome of the expansion of nonconforming use application, the applicant is required to provide landscaping designed to screen the base of all on-site freestanding signs and any light fixtures as required by section 543.240 of the zoning code. These landscape materials are required to be capable of screening all year and be well maintained.

As of writing this staff report, staff has not received any correspondence from the neighborhood group. Staff will forward comments, if any are received, at the City Planning Commission meeting.

**EXPANSION OF A NONCONFORMING USE:**

**Findings as Required by the Minneapolis Zoning Code for the Expansion of a Legal Nonconforming Use:**

**(1) A rezoning of the property would be inappropriate.**

The site is zoned C3S and R1. The portion of the site zoned R1 also has the TP overlay. The building is located in the portion of the site zoned C3S. The accessory parking lot located on the R1 portion of the site is allowed by the TP overlay. Only the sign is a nonconforming use. The site is located in a commercial node designated by *The Minneapolis Plan*. The plan also designates Nicollet Avenue as a community corridor. (In the update of the comprehensive plan, *The Minneapolis Plan for Sustainable Growth*, Nicollet Avenue will be designated as a commercial corridor, the area around the intersection of Nicollet Avenue and 60<sup>th</sup> Street will be designated as a major retail center, and the future land use designation of the entire subject site will be mixed use.) Although it could be appropriate to rezone the R1 portion of the site to another commercial district to allow future development, a rezoning of the property to allow a taller sign would not be appropriate because no other zoning districts exist that would allow a taller sign as-of-right.

**(2) The enlargement, expansion, relocation, structural alteration or intensification will be compatible with adjacent property and the neighborhood.**

The sign is located adjacent to I-35W and a multiple-family dwelling. In the blocks surrounding the site and west of I-35W, there is a mix of nonresidential and residential uses. Cub Foods is the largest commercial establishment in the immediate area. There are several pole signs along Nicollet Avenue for other commercial businesses, but none are adjacent to the highway. There is also a second Cub Foods sign adjacent to Nicollet Avenue. It appears that the pole signs along Nicollet Avenue are not more than 30 feet in height. The maximum allowed height of a freestanding sign allowed as-of-right in the commercial districts ranges from 20 to 30 feet. The purpose of regulations governing on-premise signs are to allow effective signage appropriate to the planned character of each zoning district, to promote an attractive environment by minimizing visual clutter and confusion, to minimize adverse effects on nearby property, and to protect the public health, safety and welfare. The increase in height would not be compatible with adjacent property or the neighborhood and could set a precedent for allowing taller signs and result in visual clutter.

- (3) **The enlargement, expansion, relocation, structural alteration or intensification will not result in significant increases of adverse, off-site impacts such as traffic, noise, dust, odors, and parking congestion.**

The sign area and lighting type would not change. The increase in height should not have an impact on traffic, noise, dust, odors, and parking congestion.

- (4) **The enlargement, expansion, relocation, structural alteration or intensification, because of improvements to the property, will improve the appearance or stability of the neighborhood.**

The increase in sign height is the only change proposed for the property. Although the increase in height would make the sign more visible from the highway over the sound barrier wall, it would not improve the appearance or stability of the neighborhood.

- (5) **In districts in which residential uses are allowed, the enlargement, expansion, relocation, structural alteration or intensification will not result in the creation or presence of more dwelling units on the subject property than is allowed by the regulations of the district in which the property is located.**

No dwelling units are proposed.

- (6) **The enlargement, expansion, relocation, structural alteration or intensification will not be located in the Floodway District.**

The property is not located in the Floodway District.

**RECOMMENDATION:**

**Recommendation of the Community Planning and Economic Development Department—  
Planning Division:**

The Community Planning and Economic Development Department—Planning Division recommends that the City Planning Commission adopt the above findings and **deny** the application for an expansion of a legal nonconforming use to increase the height of a freestanding sign from 35 feet to 50 feet located at the property of 5937 Nicollet Avenue.

**Attachments:**

- 1) Applicant statement of use
- 2) Applicant findings
- 3) Zoning map
- 4) Plans
- 5) Photos

**Excerpt from the  
CITY PLANNING COMMISSION MINUTES  
Minneapolis Community Planning & Economic Development (CPED)  
Planning Division**

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**MEMORANDUM**

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DATE: July 24, 2009

TO: Steve Poor, Planning Supervisor – Zoning Administrator, Community Planning & Economic Development - Planning Division

FROM: Jason Wittenberg, Supervisor, Community Planning & Economic Development - Planning Division, Development Services

CC: Barbara Sporlein, Director, Community Planning & Economic Development Planning Division

SUBJECT: Planning Commission decisions of July 13, 2009

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The following actions were taken by the Planning Commission on July 13, 2009. As you know, the Planning Commission's decisions on items other than rezonings, text amendments, vacations, 40 Acre studies and comprehensive plan amendments are final subject to a ten calendar day appeal period before permits can be issued:

Commissioners present: President Motzenbecker, Bates, Cohen, Gorecki, Huynh, Luepke-Pier, Norkus-Crampton, Schiff and Tucker – 9

Not present: Nordyke

Committee Clerk: Lisa Baldwin (612) 673-3710

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**5. Tom Thueson (BZZ-4430, Ward: 11), 5937 Nicollet Ave ([Janelle Widmeier](#)).**

[Staff report](#)

**A. Nonconforming Use Expansion:** Application by Tom Thueson, on behalf of Jerry's Enterprises, Inc., for an expansion of nonconforming use to increase the height of an existing freestanding sign adjacent to I-35W from 35 feet to 50 feet located at the property of 5937 Nicollet Ave.

**Recommended Motion:** The Community Planning and Economic Development Department—Planning Division recommends that the City Planning Commission adopt the findings and deny the application for an expansion of a legal nonconforming use to increase the height of a freestanding sign from 35 feet to 50 feet located at the property of 5937 Nicollet Ave.

Staff Widmeier presented the report.

Commissioner Schiff: Usually we see increases for heights and larger signs in the context of a variance, but this application is an expansion of a nonconforming use. In the first finding that we're supposed to have is whether or not a rezoning would be appropriate in lieu of this application. Would a rezoning even make a difference for this size of a sign?

Staff Widmeier: It wouldn't because there aren't any other zoning districts that exist that allow a taller sign. Even if you rezoned you'd still need the variance so it wouldn't get you to a place where they would be allowed to have a taller sign as of right.

President Motzenbecker opened the public hearing.

Tom Thueson (610 N Main St, Stillwater) [not on sign-in sheet]: I'm here in my capacity as Vice President of store development for Jerry's Enterprises which is at 5101 Vernon Ave S in Edina. We're the franchisee of a number of Cub stores in the Twin Cities including one on north Broadway, one on E Lake St and the store that you're considering today with our request at 60<sup>th</sup> and Nicollet. I would like to go through in very short order some of the concerns that we have that led us to bring this request in for consideration.

President Motzenbecker: If you can relate them to the findings that we're deciding on for this expansion that would help us out.

Tom Thueson: One of the items you have in your materials is what we call a customer spotting study. This shows the location of the store with respect to Highway 35W and 94 in downtown Minneapolis. This is a result of customer questions that we posed to shoppers and asked them where they lived. Those who responded for a seven day period in September 2008 were plotted on a map. We do this from time to time just to understand where our shoppers come from. In this case you can see, with the store being here at 60<sup>th</sup> and Nicollet, the prominent number of shoppers come from the north to the south, relying on 35W [tape ended]...ramp was closed in May 2008 and the sound barrier wall was constructed that created a definite change in our business; a negative change. This graph, this shows our weekly sales. The dotted line shows the year prior to the exit ramp and sound barrier wall were closed and constructed, respectively. The blue solid line below that shows the sales afterwards. There was a definite loss of sales and in a grocery store business, this is a significant difference.

President Motzenbecker: Is that directly related to this sign. Can you please focus on that for us?

Tom Thueson: In the grocery business, shopping is basically a matter of value perception and convenience. Beyond that it becomes a habit. The shoppers that I alluded to north of the store were basically dislodged from their prior habit of going to the 60<sup>th</sup> and Nicollet store. The reason this is germane to the sign itself is that the sound barrier wall now prevents shoppers from seeing that sign. We were in the process of trying to recapture the sales that we lost. We would like to

have that sign visible so that the shoppers can be reminded once again that the store is there and the exit ramp is open despite the fact that they can see now neither the store nor the sign from their driving south on 35W. We believe that this is consistent with the city's plan for sustainable growth. This area, 60<sup>th</sup> and Nicollet, has been designated as a major retail center. That befits or makes it entirely appropriate to have a pylon sign that's visible from the freeway. Just to summarize, we think that our request is consistent with the city's plan for sustainable growth. We think that our request is consistent with the city's treatment of nonconforming uses. We think we've demonstrated a quantifiable loss in terms of sales and customer traffic to that store. This is an external change that was imposed and unrelated to anything we did. The sound barrier wall, freeway closure were both items that were beyond our control. The last item that I would mention, in the staff report one of the reasons for denial was the fact that a precedent might be created. We've driven this area extensively. There are no other signs that are directly adjacent to the freeway nor are there any other signs that are obscured now by the sound barrier wall. There is no rational for another business owner, say someone on Nicollet, to come in and say they would like a 50 foot pylon sign too. There are no other conditions identical to the one that we're facing right here. We don't believe that there is any reason to expect a request on the basis of a precedent being set here.

Commissioner Gorecki: I'm trying to get an idea of the placement of your sign. I'm wondering, what if you move the sign down to the southeast corner with the existing height? It seems like because of where the wall intersects where your sign is going up, obviously it's blocking your sign, but if you moved it down as the wall is decreasing, wouldn't that not get what you want and that's a view of cars seeing the Cub sign as they're driving by and it wouldn't be hidden by the wall itself?

Tom Thueson: Do mean moving it but not changing the height?

Commissioner Gorecki: Let's first talk about moving it and then we can talk about the height.

Tom Thueson: If we were to simply move the 35 foot pylon that's there now, it still would not be visible. It is visible if you're on the exit ramp driving down the exit ramp but what we want to establish is visibility from about 600-700 feet prior to that exit ramp that's on the freeway there. In that circumstance, no, it would not be visible.

Commissioner Gorecki: I'd like to see that superimposed on one of your photos and I we are probably not going to get there today. I'm not exactly sure I agree with you. Maybe there is where we start splitting the height. If you do move it down to that corner, I don't think you need to go quite as high as you're asking for. I'm very sympathetic to the fact that you have a sign that's covered up by the wall. You're right, when you put the sign up originally you weren't expecting to have a sound barrier wall. The sound barrier wall there makes sense, but we also want to support the businesses that are important to our neighborhoods. I don't know how we could proceed with taking another look at this. I think there is some creative ways we might be able to get around this.

Commissioner Huynh: I have a question for you in terms of how you're able to assess the decrease in patronship to the store. I live a mile away from here. Sound barriers have went up along 35W as you cross 62. My first question is how were you able to distinguish what was the lack of patrons to your store due to the sound barrier versus the construction. You said you did an assessment of where people live, but was there any more information gathering in terms of how

you're able to distinguish the two? What was caused from construction and what was caused from sound barriers?

Tom Thueson: When we did the customer spotting? That's strictly a voluntary operation. As customers are checking out, during that time period we ask them for their home address. Many respond, many don't. It's simply a sampling that we take.

Commissioner Huynh: The issue that the application proposes is that I feel it would set a precedent and I think this is a discussion we will have later on. I would question relocating just because it is on the west hand side is in single family development neighborhood and there are some commercial uses to the north, but you do have a church right across the street to the east and also a restaurant directly south of the site. A sound barrier isn't too much of a justified issue with the reasoning for your application.

Commissioner Schiff: You said you didn't think it would create a precedent, but can you name any other store on the 35W corridor that you can read 600-700 feet before the appropriate exit ramp?

Tom Thueson: I don't think there is any sign that I've been able to find with the same parameters that we have where there is a sign directly adjacent to the freeway and is now obscured by the sound barrier wall. There are many other signs up and down Nicollet Ave, but if an exception were to be made from this one for this sign, my point was, this is the only sign that fits those particular parameters.

Commissioner Schiff: The sound wall is blocking visibility of a sign but sound walls are supposed to protect residential neighborhoods from sound so why, when you inquired, did MnDot construct a sound wall in front of a commercial property?

Tom Thueson: I don't know. I couldn't tell you that.

President Motzenbecker: It's close. There's residential right behind it and it's stepping down, but that's a good question.

President Motzenbecker closed the public hearing.

Commissioner Cohen: You go up and down the highways and under the exit sign they have these little boxes that say McDonald's, Shell Oil, etc. Why can't they have a sign like that rather than a 50 foot sign on a pylon?

Staff Widmeier: I know there is a contact noted on MnDot's website and they also have a person who works on that. I can give that information to the applicant, but that is controlled by other entities outside of the city.

Commissioner Cohen: Wouldn't that be a way of dealing with this particular problem?

Staff Widmeier: If they're allowed I know they have regulations affecting that.

Commissioner Cohen: Is that something that staff could look into on our behalf, on behalf of the applicant, behalf of the city as a solution?

Staff Widmeier: That's really something the applicant should look into.

President Motzenbecker: We can offer that up as a recommendation that the applicant work with MnDot to find out if that's feasible.

Commissioner Cohen: I will move staff recommendation (Tucker seconded).

Commissioner Schiff: The applicant made a really good point about hardship in this instance. Unfortunately, hardship is not something we're voting on. Typically we see these sign increases as a variance and a traditional legal finding for a variance is a hardship, but with an expansion of a legal nonconforming use, we're supposed to be debating whether or not a rezoning would be appropriate or inappropriate. It simply just is not even a started here today to be debating a rezoning for this property. I feel for the applicant because I have no doubt with the sales that you're showing that in a couple years we're going to be looking at a closed store and then CPED is going to be looking at a vacant big box to redevelop. I don't think you're making an unnecessary request here. You've been severely affected by this MnDot sound wall and anything the city can do to help you with contact to legislators or contact with MnDot, we ought to do to find a solution. I'm not comfortable with just denying this today. I think there is something else we have to do to help you out otherwise we're going to look at a loss of jobs and loss of a neighborhood grocery store. I don't want you to take this denial today as defeat but rather just that we can't even entertain a hardship argument today because hardship doesn't enter into the legal findings of fact that we need for an expansion of nonconforming use. I do think a sign on the freeway is going to be appropriate and anything we can do with either our Department of Transportation and Public Works or with our Intergovernmental Relations office I certainly will offer to help lend a helping hand towards helping you find that resolution because, clearly, the impact of the sound wall is not good for your customers or your employees. I will vote for the motion before us today, but let's keep working together to see what else we can do to address your issue.

President Motzenbecker: If that continues, the applicant would need some serious proof. I think Commissioner Huynh's point was well taken that we really don't have any information for you that the sign height is directly related. I think the construction played a huge role in the drop of customers to your store. I'm not as convinced that relates directly to the signs. Spotting study reinforces the point that almost all of your customers are right in that area and probably know where your store is and don't need the sign to find it. I lived there at 42<sup>nd</sup> and Nicollet for nine years and I knew exactly where it was. I understand what Commissioner Schiff is saying and we don't want to harm a productive business but I would need to see more information to make your point.

Commissioner Gorecki: I think Commissioner Schiff made an excellent point, however, I don't want to wait so I would encourage my colleagues to vote down the denial and then we should take a look at thinking about some sort of a compromise in the way of height of the sign and I would propose at this point, an additional five feet. It looks like that would get a portion of it above the wall. It's not everything they're looking for, but I think we need to try to think outside the box.

President Motzenbecker: Is that a substitute motion? We have a second?

Commissioner Schiff seconded the motion.

President Motzenbecker: The substitute motion is to approve the nonconforming use expansion with the condition that the sign is five feet higher, so 35 to 40 feet.

Commissioner Luepke-Pier: I agree with what Commissioner Schiff was saying in terms of the fact that I wish this had come to us a variance instead of this because I definitely do see the hardship. To me, wanting to see it from such a distance away only makes sense because if you're on the highway travelling at about 50 miles per hour, you're going to want to know what's coming up before you get to the exit and not when you're at it or past it. I find that to be a completely legitimate reason, especially since you didn't create the situation that made your sign not visible in the first place. I'm entertaining Commissioner Gorecki's motion because at least it's something. I almost wish somebody could explain to me why this isn't coming to us as a variance because...to me, if they first thought they needed ten feet and then they had to revise it to be 15 feet based on the letters we read in the packet, that tells me there was some study done that indicated that 15 feet was a required height. I don't think they would just be adding height for no reason. I'm not sure five feet would even be enough to make a difference.

Commissioner Norkus-Crampton: I like the idea of coming down to some compromise. I'm not sure exactly whether five feet would do it and I also am very interested of exploring...if we are going to be having sound walls along major highways which seems reasonable if they're going to be going through residential neighborhoods, we're going to have to figure out some ways that can accommodate the business uses along there that won't create more of an eyesore and a nuisance for the surrounding neighborhoods and I'm not sure that the extra five feet is the best we could get. Maybe we do something along the lines of somewhere low-key signs at the street level that will let people know what's coming. I hate to come up with a compromise using this particular solution when there might be other solutions available to us that might create more of a win-win for the surrounding communities as well as the business. For that reason, I guess I will be voting against this proposal.

Commissioner Schiff: Can I ask Ms. Widmeier to show us...the photos in our packet are not labeled and I'm having a hard time figuring out which ones are computer generated futuristic proposals and which ones are current photographs of the site.

Staff Widmeier: This one is existing and this one has been modified.

Commissioner Schiff: There are about seven other photos in our packet.

Staff Widmeier: Those are all existing.

Commissioner Bates: I think it's important that we figure out some way that the building of the wall...well that they still have the same visibility of their sign that they had prior to the building of the wall. I'm not sure how that is going to be accomplished, but I think that that would be an ok thing for us to achieve. I do not think it's appropriate though to set a precedent in terms of a rezoning position so I would not want to do it under that guise. I think we should deny it today and ask staff to work with the applicants to find a different way to make this possible. If that means something different in terms of how the sign is designed I'm less concerned about that; I just don't want a precedent to be set. Thank you.

Commissioner Cohen: I agree with Commissioner Bates. I don't think increasing the sign is the way to go with this. I think we should start all over and try to get it right.

President Motzenbecker: Ok. The motion before us is to substitute and approve the height from 35 to 40 feet. All those in favor? Opposed?

The motion failed 2-6

President Motzenbecker: We're back to our initial motion which is staff recommendation of denying the height of the sign increase from 35 to 50 feet. Further discussion?

Commissioner Bates: Would it be appropriate to put the rejoinder on that then they go back to work with staff and revise the application?

President Motzenbecker: By matter of course they probably will have to as they bring forth the new application.

Commissioner Tucker: I don't think five feet would have made much difference. What we're really talking is do we have a city policy to identify stores from the freeway or not. I don't think we do. It could be desirable, we haven't worked through that. There are certainly some places in the city where topography allows you to see businesses. This is just happenstance I think. I'm sorry that they're losing this visibility that they've had over the years and it's something worth thinking about, but I don't think now is the time to change it.

President Motzenbecker: All those in favor? Opposed?

The motion carried 7-1.