



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

Date: February 15 2007

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

Referral to: Zoning and Planning Committee

Subject: Appeal of the Board of Adjustment action denying an appeal of the Decision of the Zoning Administrator that that CBS Outdoor can obtain a permit for the off-premise advertising sign at 2711 Broadway Street Northeast.

Recommendation: The Board of Adjustment adopted the staff recommendation and **denied** the appeal of the Decision of the Zoning Administrator filed by John Bodger.

Previous Directives: N/A

Prepared or Submitted by: Molly McCartney, Senior Planner, 612-673-5811

Approved by: Jack Byers, Planning Supervisor, 612-673-2634

Presenters in Committee: Molly McCartney, Senior Planner

Financial Impact (Check those that apply)

- No financial impact (If checked, go directly to Background/Supporting Information).
- Action requires an appropriation increase to the _____ Capital Budget or _____ Operating Budget.
- Action provides increased revenue for appropriation increase.
- Action requires use of contingency or reserves.
- Business Plan: _____ Action is within the plan. _____ Action requires a change to plan.
- Other financial impact (Explain):
- Request provided to department's finance contact when provided to the Committee Coordinator.

Community Impact (use any categories that apply)

Ward: 1

Neighborhood Notification: The subject site is in the Mid-City Industrial Area, which does not have a NRP-recognized neighborhood group

City Goals: See staff report.

Comprehensive Plan: See staff report.

Zoning Code: See staff report.

Living Wage/Job Linkage: Not applicable.

End of 60/120-day Decision Period: On November 17, 2006, the applicant was sent a letter by Planning staff extending the decision period to no later than February 8, 2007. The applicant has submitted a written statement extending the City's decision making period until March 15, 2007.

Other: Not applicable.

Background/Supporting Information Attached: John Bodger has filed an appeal of the decision of the Zoning Board of Adjustment denying an appeal of the Decision of the Zoning Administrator that that CBS Outdoor can obtain a permit for the off-premise advertising sign at 2711 Broadway Street Northeast. The Zoning Board of Adjustment voted 6-2 to deny the appeal at the December 21, 2006, meeting. The applicant filed an appeal on December 22. The applicant's statement is included in the staff report.

Department of Community Planning and Economic Development – Planning Division Report

Variance Request
BZZ-3269

Date: November 2, 2006

Applicant: John Bodger, on behalf of CBS Outdoor

Address of Property: 2711 Broadway Street Northeast

Contact Person and Phone: Richard Pratt, 952-936-9567

Planning Staff and Phone: Molly McCartney, 612-673-5811

Date Application Deemed Complete: October 11, 2006

Public Hearing Date: November 2, 2006

Appeal Period Expiration: November 13, 2006

End of 60 Day Decision Period: December 10, 2006

Ward: 1 Neighborhood Organization: Mid-City Industrial Area

Existing Zoning: I2 Medium Industrial District

Appeal of the decision of the Zoning Administrator: John Bodger, on behalf of CBS Outdoor, is appealing of the decision of the Zoning Administrator that CBS Outdoor can obtain a permit for the off-premise advertising sign at 2711 Broadway Street Northeast.

525.170. Appeals of decisions of the zoning administrator. All findings and decisions of the zoning administrator, planning director or other official involved in the administration or the enforcement of this zoning ordinance shall be final subject to appeal to the board of adjustment, except as otherwise provided by this zoning ordinance. Appeals may be initiated by any affected person by filing the appeal with the zoning administrator on a form approved by the zoning administrator. All appeals shall be filed within ten (10) calendar days of the date of the decision. Timely filing of an appeal shall stay all proceedings in the action appealed, unless the zoning administrator certifies to the board of adjustment, with service of a copy to the applicant, that a stay would cause imminent peril to life or property, in which case the proceedings shall not be stayed. The board of adjustment shall hold a public hearing on each complete application for an appeal as provided in section 525.150. All findings and decisions of the board of adjustment concerning appeals shall be final, subject to appeal to the city council as specified in section 525.180.

Background and Analysis:

This item has been continued from the November 16, 2006, Board of Adjustment meeting.

The Zoning Administrator has determined that the nonconforming rights to the off-premise advertising billboard reside with the billboard owner, in this case Clear Channel, and not the property owner of where the billboard is located. CBS Outdoor, with permission from the property owner, Aaron Pinkus, applied for a new sign permits for a nonconforming off-premise advertising sign. The Zoning Administrator determined that the current billboard owner, Clear Channel, is the entity that can replace the billboard.

The existing billboard at 2711 Broadway Street Northeast is a nonconforming off-premise advertising sign because it does not adhere to the current distance requirements from other billboards and the sign design. Billboards are required to be 1,000 ft. from all other billboards and in this case, the sign is 925 ft. from the nearest billboard. In addition, the sign 'vee' is 110 degrees which exceeds the 35 degree permitted.

A permit to replace the billboard structure was granted on July 13, 2006 to CBS Outdoor. In the application materials, CBS Outdoor included a letter from the property owner in regards to termination of the current lease with Clear Channel Outdoor Advertising Company on December 31, 2006. The applicant, CBS Outdoor, was to assume the billboard lease beginning on January 1, 2007. Upon inspection after the permit issuance, staff determined that the replacement sign exceeded the height of the original sign. The new sign was installed at 50 ft. in height and not the original 42 ft 9 in. height. The Zoning Administrator cancelled the permit on August 25, 2006. The original sign applicant, CBS Outdoor, applied for a new permit within the allowed height on September 5, 2006. Upon further evaluation, the Zoning Administrator determined that because the billboard was currently being leased by Clear Channel, CBS Outdoor could not apply for a sign permit until CBS Outdoors was the current billboard tenant. CBS Outdoor is appealing that determination.

The Zoning Administrator has determined that the nonconforming rights to the off-premise advertising billboard reside with the billboard owner, in this case Clear Channel, and not the property owner of where the billboard is located.

Recommendation of the CPED Department Planning Division:

The Department of Community Planning and Economic Development Planning Division recommends **denial** of the appeal of the Decision of the Zoning Administrator that CBS Outdoor can obtain a permit for the off-premise advertising sign at 2711 Broadway Street Northeast

Board of Adjustment Hearing Testimony and Actions

Thursday, December 21, 2006
2:00 p.m., Room 317 City Hall

Board Membership: Mr. Matt Ditzler, Mr. David Fields, Mr. John Finlayson, Mr. Paul Gates, Ms. Marissa Lasky, Ms. Alissa Luepke Pier, Mr. Matt Perry, and Mr. Peter Rand

The Board of Adjustment of the City of Minneapolis will meet to consider requests for the following:

2. **2711 Broadway Street Northeast; (BZZ-3269, Ward 1)**

Continued from the Board of Adjustment Public Hearing held on November 16, 2006.

John Bodger, on behalf of CBS Outdoor, is appealing of the decision of the Zoning Administrator that CBS Outdoor can obtain a permit for the off-premise advertising sign at 2711 Broadway Street Northeast

Mr. Rand moved and Mr. Perry seconded the motion to **deny** the appeal of the Decision of the Zoning Administrator that CBS Outdoor can obtain a permit for the off-premise advertising sign at 2711 Broadway Street Northeast

Roll Call Vote:

Yeas: Ditzler, Fields, Gates, Luepke Pier, Perry and Rand

Nays: Finlayson and Lasky

Recused: None

Absent: None

TESTIMONY

Finlayson: Mr. Poor, welcome.

Steve Poor (Zoning Administrator): Good afternoon. Just a slight clarification from Molly's presentation. The sign that is out on the site is existing and the lease was coming due, the lease was about to expire with the current property owner, Mr. Pinkus, and so, he was interested in soliciting a more attractive lease than signing on another lease with Clear Channel, but the clarification from Molly's point is, the new sign was never erected. There was a billboard permit applied for and it was approved, but the sign that was approved was actually somewhat higher than the existing sign so the permit was rescinded. In other words it was issued in error. The sign that is out there I believe is at 42 feet 9 inches and the sign application came in at 50 feet. Between that permit being rescinded and during that there was further examination of the non-conforming rules. The non-conforming rules that we are talking about today, however, are based on State Statute, they're not strictly speaking based on the Minneapolis Zoning Code. Some of you may be aware that the state recently amended its non-conforming Statutes, which is under 462.357 subd. 1e. What that did was, that change strengthened the rights of people who owned a non-conforming use, or a non-conforming property. Typically in the zoning code, we look at the property owner, to be the person where the non-conforming rights reside. Billboards are a somewhat unique development and a unique piece of property. I think this Board has heard some things on billboards before and may recognize we have special rules for billboards. In this case, which is not untypical of many situations where you have a property owner that leases the land with the billboard on it, the billboard structure is often owned by the advertising company itself, and not owned by the property owner. I think this Board remembers that we had an issue with 903 Hennepin Avenue not long ago which was the camera store. In that case, if we recall, the record demonstrated

that the billboard ownership, the actual structure of the signage had transferred ownership from the former, General Outdoor Advertising at the time, but it came into possession of the building owner. So in that case, the building owner owned the sign as well, and therefore the non-conforming rights that he was seeking resided with the property owner. In this case, however, Mr. Pinkus, who is the property owner, does not own the structure. The structure is owned by Clear Channel Outdoor Advertising, that's been demonstrated through legal documents, which is part of the requirement when you apply for a billboard permit. Now, I made the wrong call the first time, to put it bluntly. So, the first time the permit came in from the applicant, which was applied in good faith, the Zoning Office determined that no, we are used to the billboard rights reside with the property owner. Then we had the permit being issued incorrectly, we rescinded it, but in between that period, upon further consultation with the City Attorney's Office, in this case, we determined that the billboard is the property and therefore, the billboard is what is non-conforming, it is not the forklift business located on the site, it is not the land itself, but it is the billboard itself that is non-conforming. Therefore, the non-conforming rights reside with the billboard not the property owner. The changes in state law are rather recent. There is not a long case log to look to this. This is also an issue that is being visited upon other municipalities with regards to billboards, so our position, the Zoning Offices position today would be that in this case, with regards to the billboard itself, which is a form of real property, the rights to the non-conformity reside with the billboard. So what that really means in this case, is Clear Channel decides in effect, obviously in a legal agreement with the property owner, but they really have the first right about what happens to this billboard, not the property owner. Here's why that matters, Mr. Pinkus has solicited another lease. His time is coming up with Clear Channel. He thought he might be able to gain, I suspect, a more attractive lease with another company. That is how CBS Outdoor got involved with it. However, if the Zoning Offices' position is that the rights reside with the billboard the company, and they choose not to relocate that sign there, Mr. Pinkus may be able to replace that billboard, but it has to be in conformance with all the standards of Chapter 544. Now complicating this matter is that Clear Channel has applied for a building permit for a billboard up the street. There is a spacing requirement on billboards. We can't act on that permit as long as the existing sign is in place. But should Clear Channel choose to remove this sign, they then would have a right, because they have a permit pending the outcome of this appeal to execute the permit on the new site up the street and in effect would preclude Mr. Pinkus from locating a sign on his lot because of the spacing requirement. This is a complicated matter, but I've tried to distill it to make it understandable. There is not a lot of case law on this that guided the City Attorney. There is some past case law that you may hear about from the appellants' attorney, but in consultation with the City Attorneys we do believe this is the correct interpretation of this Ordinance. So with that I'll leave it to Mr. Finlayson, if he wants to entertain questions for me to clarify it before you hear from the appellants' side or not?

Finlayson: My first question would be where is the indication that the owner of the property does not own the billboard? Maybe I perhaps missed it in the packet.

Steve Poor (Zoning Administrator): Sure, generally speaking, when we've approved building permits for off premise advertising signs, we have to verify that the land owner has given permission to the billboard company. Generally what happens is that we get a redacted lease, so it talks about leaser and lessee. In this case we were provided with documents that demonstrated that the billboard company or Clear Channel did own the sign and that Mr. Pinkus was merely leasing his land for them to erect the sign on. So we were given subsequent documents that demonstrated that. You can ask the appellant, but I don't think that it is in question as to who actually owns the structure or not. I believe that's a settled question. So we were given a copy of the lease to answer your question directly Chair Finlayson.

Finlayson: So how is the owner of the property leasing something that they don't own?

Steve Poor (Zoning Administrator): Well, what Mr. Pinkus is doing in fact with his land, he is leasing the land. It's like when people have telecommunication antennae's on their land, they own the land, but they are leasing it for someone to put another permitted use on it. Billboards are unique in that unlike most signs they are not an accessory use they are actually their own permitted use. The council for the appellant can speak to this but Mr. Pinkus in affect leases his land to allow a billboard to reside on it, but does not own the steel, did not make the capital investment for it, nor did he obtain the original building permit for it. It was actually obtained through Clear Channel, so that is a further indication to who actually owned the sign and controlled it, because to issue that permit we have to know which sign company is getting it and who owns it.

Finlayson: Anyone else have any questions? Mr. Gates.

Gates: Mr. Poor, you mentioned that the owner, property owner, Mr. Pinkus, would have some right to construct his own sign if Clear Channel chose for what ever reason... the lease with Clear Channel was not extended. Could you expand on that?

Steve Poor (Zoning Administrator): Sure. What I would suggest is that this part of the City of Minneapolis is in what is called a Freeway Opportunity District. So all the land owners, subject to complying to Chapter 544, would be eligible to erect a billboard along that stretch, in other words it has more than 1320 consecutive and contiguous feet of commercial/industrial zoning, meets the proper spacing from residential zoning districts. So it's not so much that it is a unique characteristic of Mr. Pinkus' land as much as that general area allows for billboards, and subject to meeting the requirements of Chapter 544, which is the spacing requirement in this case, he would be eligible to erect that sign - all things being satisfied. Now one of the questions it comes into is that the non-conformity as best we have determined does not meet the spacing, but Mr. Pinkus on his land, if he was to mount a new billboard, could maybe move the billboard a few feet to the east that would meet the spacing from another sign to the west. So, Mr. Pinkus, absent another billboard application, his site would likely be able to accommodate a billboard if it meets all the requirements of Chapter 544.

Gates: Okay, but given that Clear Channel has a permit pending, and this lease is supposed to expire in 10 days, right? Does their pending permit trump Mr. Pinkus' right to erect his own sign?

Steve Poor (Zoning Administrator): I would prefer to answer it to say that that permit would be reviewed prior to any subsequent permit that would come in in the area. In other words, in effect, probably yes. But the reason being that Clear Channel has made an application and that application would have to be reviewed, if it was approvable, it would be approved and then any subsequent application in the area would still have to comply with the requirements of Chapter 544. In other words meet the spacing. So yes, in affect, the application pending is a poison pill if you will, blocking the ability for Mr. Pinkus to relocate the sign at that location.

Gates: Okay, thank you.

Finlayson: Ms. Lasky:

Lasky: Inaudible.

Steve Poor (Zoning Administrator): Ms. Lasky in the Zoning Offices' estimation that question was not completely settled. Your own experience notwithstanding, and Mr. Gates may have had some awareness of that as well, what I would suggest is that in my experience with the Zoning Office, the question has not been addressed to us in this fashion. I think that there was probably a general perception that with regard to non-conforming rights in most cases they reside with the property owner,

but again there is a unique characteristic and quality about billboards which frankly goes past the matter before you today. How they are dealt with in takings and other matters in the courts and how they are treated as a particular type of property distinct and different than some other properties and yet very similar to land. This question has not been before us before, we didn't have the same billboard ordinance that talked about cap and replace, so in other words, non-conforming board that was removed actually gained some credits and could be relocated somewhere else. It is the case though that generally speaking, the billboard companies have historically owned the structures and we know this for a number of reasons. Even when Nagle Outdoor Advertising Company settled an anti-trust suit with the State of Minnesota and there was a divestiture that took place, there were certain signs where they owned the property and the billboard. Those were split off, distinct and separate from the company that had leases where they owned the structure but leased the land to place the billboard on. To answer your question I don't think we have had to answer this question in the way that it's been framed.

Lasky: I will argue the point that just because the permit was pulled by a company does not prove ownership.

Steve Poor (Zoning Administrator): No, but with regards to billboards though, we ask for a lease. We want to know that people actually have a lease to place a sign on someone's land. There're other permits that are often required, often there's a State of Minnesota Highway Advertising Permit required, even on roads that aren't highways because of state aid. But generally speaking we're able to establish who owns the land and who owns the sign, who's applying for the permit. But you're right, not in all cases is the billboard company, the owner of the sign, that applies for the permit.

Lasky: Inaudible.

Steve Poor (Zoning Administrator): Oh yeah, but let me add this. In this case, if Mr. Pinkus owned the structure, then we would be saying the owner of the structure who happens to also be the land owner is the holder of the non-conforming right. But in this case, it is the structure itself, that's non-conforming. It's not the land, it's not the business that also resides on the property, it is the billboard itself, the structure. So in this case if Mr. Pinkus owned the structure he would also have control over the non-conforming rights, but it's our position that he in fact doesn't in this case.

Lasky: Air space is what is owned by the property owner and the lease holder decided what he wanted to build on the air space for his particular use and he took a permit to build what he needed to put on the air space for that particular moment and he could have changed that configuration of that air space to be different configurations of different types of uses over time and that in fact does happen. It's not a building. I'll disagree with you.

Finlayson: Mr. Ditzler.

Ditzler: Just for the clarification on my part, so it sounds like the agreement that is between Mr. Pinkus the land owner and the entity that owns the billboard, which I am assuming is the same entity that paid for the construction of the billboard, it sounds like it is Clear Channel Communication, the agreement between those two people would be a leased easement almost. The land owner is receiving money and allowing somebody else to use a piece of that property, in this case to erect a billboard. So I guess the way that I look at it is, and please correct me if I'm wrong, that this lease/agreement between these two people, is set to come to an end and if it comes to an end then the entity that owns the billboard no longer has the right or the permission to locate that billboard on the property. I guess if that happens, I don't know if that means ...

Steve Poor (Zoning Administrator): Without renewing the lease.

Ditzler: Yes, without renewing the lease. In less the lease automatically self renews, or whatever the details of the lease are, which doesn't sound like that's the case. So if the lease terminates between the current property owners, then the entity that owns the billboard, which no longer has the right to have that property on the land, I guess, similar to a commercial lease would have to remove it, or whatever. But in this case it sounds like to me, just in layman's terms, the company that owns the billboard says our lease is coming due, we would like to renew it for this amount and the person who owns the land said no, I don't want to do that, I would like a little bit more and Clear Channel said well, since we have applied for the permit down the street, if you don't agree to our lease, it is going to terminate, we are going to get that one and then you aren't going to have any billboard. You can take our lease agreement or you can have no billboard. We will be happy to come and take it down right before we put the new one up. That's what it sounds like to me. Please correct me if I'm wrong.

Steve Poor (Zoning Administrator): Sure, let me offer it to you this way. That's where it ends up, but I don't think it would be a fair characterization and unfortunately Mr. Pinkus isn't here, but I'll leave it for others to speak for him ,, I don't think that the negotiations went that way. I can tell you what happened is that Mr. Pinkus inquired with the Zoning Office about what he thought his options were. Quite frankly he asked staff, which would be me in this case, who else does billboards, so trying to be the helpful public servant that we all try to be in the Zoning Office, I informed him about what other companies are in the off-premises advertising business and he went out and solicited others. Subsequent to that, Clear Channel obviously became apprised that Mr. Pinkus was soliciting other leases and then they took their own actions and at the end of the day they did make an application up the road with another property owner, but I don't think it is fair to characterize it, that it was that blunt.

Ditzler: If the lease terminates would Clear Channel be required by law to remove that billboard since they own that billboard on land that they no longer have a lease on?

Steve Poor (Zoning Administrator): Well, if the city was appraised of that fact, yes. Generally these are private matters, but because of the interests, the property interests here we would find out about it. But I would hazard to guess that there are certain properties that are being used for certain purposes that don't have valid leases in place and the city isn't aware of it. But when we know about it, we would have some interest in it.

Finlayson: No further questions at this time. Thank you

Perry: Mr. Chair, I do have...

Finlayson: Mr. Perry.

Perry: I'd like to bring this back. We have gone through a lot of details. If we could just bring it back as clear as possible. What is it that you are denying specifically?

Steve Poor (Zoning Administration): Mr. Perry, Chair Finlayson, to distill it down for you, the question before you is this – if you endorse the notion that the Zoning Administrator in consultation with the City Attorney has reviewed the State Statutes for non-conformities and made a call that said that in this case, the billboard is the non-conformity. It's the property if you will. The billboard is the property, the structure is the property. The non-conforming rights reside with the property owner. The property owner is the billboard company. The property resides on another piece of property, but it is of separate ownership. So the real question before you is, and I recognize this is to be sure an infrequent question the board answers when we are dealing with State Statutes and interpretation, but that's the charge the Zoning Office has. Do you think we got the call right. The appellant has legal council here that will tell

you why the Zoning Office did not get it right and that's what you'll hear in a minute. But to put it before you, the question is, is the Zoning Administrator correct in saying that the property rights are residing with the billboard company because they own the property that is the billboard, and the billboard is what is non-conforming.

Perry: And that is why the permit is being denied, because the permit is not for the property, it's for the billboard.

Steve Poor (Zoning Administrator): Yes, that is correct.

Perry: Okay, thank you.

Finlayson: Okay, before we move on I want to remind everyone involved that this is not something that deals with hardship. I don't want anyone arguing hardship. I don't want to hear the word. Please do not use hardship. This is just as Mr. Poor said right now. Did he fairly call it? It's that simple. We don't need to get more complicated than that. Also somewhere in this paperwork I saw precedence listed that were outside of the City of Minneapolis. If it's outside of the City it's not a precedent of Minneapolis. I don't want to hear any of that either. Please I would like everyone to be as concise as possible. Is the applicant present? Name and address for the record please.

Applicant: Members of the Board, John Bodger, CBS Outdoor, 477 Shady Oak Road, Minnetonka. We just got involved with this application to protect Mr. Pinkus' property rights. Mr. Pinkus contacted me in the spring of this year and said that he had a lease coming up with a non-conforming billboard and wanted to know if we would be interested in being the new tenant. I said well, I think under State and City law a non-conforming sign can be replaced, so we proceeded in turning in a sign application with Mr. Poor and here is where the problem arises. On July 13th, Mr. Pinkus and I went up to Mr. Poor's office and he issued us the building permit to replace that sign. Mr. Pinkus relied on that and then when he had the permit he called up Clear Channel and said please remove your sign when your lease expires, I have a permit to replace your sign at the end of the year. Six weeks later, Steve Poor cancelled his permit and he said you got the height wrong, which normally you would just correct, but I think he went a little extreme canceling the permit. He said just reapply again. So we did and then he denied that permit saying now he has a different interpretation in replacing the non-conforming sign. If we wouldn't have had the permit on the front end, he wouldn't have cancelled Clear Channel; he probably would have renegotiated his lease. But Mr. Poor issued the permit, he cancelled his lease with Clear Channel so he was out if we didn't have a permit to replace it. Under State Statute and City Ordinance it does say a non-conforming use can be replaced, Statute 462.37 State and the City Ordinance. I believe our attorney has a comment.

Finlayson: Does anyone have any questions at this point? No, please continue.

Attorney: Members of the Board, my name is Paul Hanna, my address is 5341 Bryant in South Minneapolis. I don't have cases to cite to you, because as Mr. Poor says, the few cases that involve the question – whose rights are at issue here - really don't deal with this question at all. There are parties here that have rights, but they are all defined by the agreements the parties entered into and by the law. So Mr. Pinkus has the right to do with his property what he will, but of course he has to get the proper permits from the City to do that. He's got the right to lease the air space over his property for a billboard, which he has done. He entered into a lease with Clear Channel to do that and he received money for it. When it came to time to look at a re-negotiation of the lease, Mr. Pinkus was not satisfied with the number that was placed before him by Clear Channel, so he did what he can do, and that is, he agreed/contracted with another party, CBS Outdoor, as of January 1 when all of the property rights of Clear Channel under the lease were extinguished, to replace the non-conforming use, which is his

right under the Statute. Now that doesn't mean to say that Clear Channel has no rights. During the course of the lease if the Board of the City took some action which affected their rights as holders of that billboard, they could proceed and that's what Minnesota case law says. But Minnesota case law and the Statute doesn't say that once Clear Channel and Mr. Pinkus enter into a lease that Clear Channel is the only property owner that can put a billboard up on Mr. Pinkus' property. Otherwise, it's as if a land owner decided to lease his property to somebody for a parking lot and when the lease is up says you know I would like you to move now, because I'd like to do something else with this property as in build a building, and the parking lot owner says you can't. This property is leased, I have rights here and I want to continue to be a leesee with respect to this property. That's just not how it works. So, what Mr. Pinkus and CBS Outdoor are trying to do is this: there is a use of this property which has been approved by the City for a billboard on Mr. Pinkus' property, the air space. He has the ability and the right to lease that use to anyone he wishes and had done so with Clear Channel and up till next week, the 31st of December, that right is Clear Channels. Once that lease extinguishes, Clear Channel doesn't have a right to replace a non-conforming use, meaning a billboard on Mr. Pinkus' property. If it had that right it now owns the property or at least that air space. So, as of January 1, Mr. Pinkus is simply asking to replace the non-conforming use which is actually the language in the Statue. He doesn't want to change the billboard. He doesn't want to expand it. He simply wants the same billboard, but it will now be a billboard that is erected by CBS Outdoor. So at the end of the day, or on January 1st, Mr. Pinkus will own his property. He will be able to use it as he wishes. He'll be able to have a billboard on it for which he will receive rent. Now if you go along with the Zoning Administrator, this is how it will end. Mr. Pinkus has a valuable right that he has been paid for over several years and since he's not agreed to whatever Clear Channel said in terms of a leasing arrangement after January 1st, that right is gone. And, in addition, now Clear Channel comes forward and puts an application before this Board, or the Zoning Administrator, to say now I'm going to build another billboard, one piece of property away, so as of January 1, the only person who has their rights ultimately denied, would be Mr. Pinkus. It is not a question of hardship; it's simply a question as far as I'm concerned of his ability to do with his land what he wishes. If you look at this from a priority stage, Mr. Pinkus and CBS Outdoor didn't try to affect Clear Channels' rights to that air space up until December 31. But now, since Clear Channel has filed an application for another billboard, if that application is accepted, Mr. Pinkus won't be able to build one on his property because of the difference in the zoning requirements with respect to space. So, he doesn't get to use his property if he comes forward and tries to ask to apply for a non-conforming use as of January 1. He doesn't get the right to be considered the first party, because he can't do anything because he's leased the property until December 31st. Clear Channel, which as of 12:01 on January 1 has no rights will end up with a piece of property it may use as a billboard. Now this is a Board of Adjustment and I just don't think that's fair. It's not a question of hardship; it's a question of fairness.

Finlayson: Any questions? I see none.

Gates: I do have one.

Finlayson: Mr. Gates, please

Gates: Thank you and I'm not sure if this is for the speaker or perhaps for staff, but can someone please tell me the date of the application for permit made by Clear Channel to put another billboard up?

Paul Hanna: I don't know that, I'd have to defer to Mr. Poor. My understanding is that it was after both the first and second applications filed by CBS, but I don't know that for a fact.

Mr. Poor (Zoning Administrator): Mr. Gates, Chairman Finlayson, the application was made I believe in some point in September. My understanding is that the billboard application came subsequent to a meeting that Mr. Pinkus had with Clear Channel after we had issued the initial building permit with

conditions. So it was probably sometime in September. I'm in an awkward position here to describe events and negotiations between two parties, but my understanding is – there was an initial meeting with Mr. Pinkus and Clear Channel when he found out about some conditions of a new lease. Mr. Pinkus then inquires of the City about what the status of his billboard is. He then asked staff if there were other billboard companies. I gave him the names of companies that have done business with the City. They make an application for a billboard to replace the existing sign. In good faith the Zoning Office issued that permit with the condition that you can't put it on there until the existing one is removed. You can't have two signs on the same zoning lot. So Subsequent to that issuance of the permit there was another meeting with Clear Channel and subsequent to that meeting, Clear Channel later came in and requested a permit up the street. If I may, two things, one – that practice is very common. As many of you know, I have done the billboards for about 18 years for the City and since the day I started, every time a lease came renewed, the same scenario you have heard took place. People negotiated with the existing lease, billboard company said we'll move the sign up the block and you won't get anything. That is a very typical negotiating strategy. It is not unique to any type of land use that has a spacing requirement, because there is a spacing requirement imposes some type of monopoly in a geographic area. Secondly, the City actually has a policy that says, if you have a non-conforming billboard and you remove it, we don't ever want it to come back. If you are actually in a district that is a residential district or non-conforming in some other way, we will give you an added incentive to remove and never put it back there, we'll let you build it on the freeway. It is the State Statute and the State Legislature that took the initiative to further enhance and solidify property owner rights. It is not the City. The City, if it had its way, before this amendment to the State Statute took place, said that Mr. Pinkus, once you remove that sign it is gone forever unless you can meet all the requirements of Chapter 544. So, just to remind you, it is not the City's policy that we want Mr. Pinkus to be able to take his sign down and renegotiate with another company. If the City had its way, he would maintain the lease with the existing company, buy the structure outright, or keep it in some other fashion, but we would not let him take it down and rebuild it. It is the State Statute that does that. The State Statute as has been said by the appellant's attorney, and as staff has said, is not well tested in case law. So, we are all taking our best stab at what it means. So the way the City Attorney, in consultation with the Zoning Office reads this statute is – the rights reside with the property and in this case, the property is the sign. I understand that reasonable people can disagree with this, and that is why we are here today, but that is the determination that the Zoning Administrator made.

Finlayson: Mr. Ditzler.

Ditzler: Mr. Poor, is the minimum distance that is between billboard signs something that a variance can be applied for to apply for a non-conforming use?

Steve Poor (Zoning Administrator): In a limited opportunity freeway district, it is not. In downtown it can be actually bought down with sign credits from the 500 feet, but on the freeway, the 500 foot spacing is iron clad. It can not be varied away or lessened.

Ditzler: That would apply to this site?

Steve Poor (Zoning Administrator): It would in fact.

Ditzler: Thank you.

Finlayson: Mr. Fields.

Fields: Just one clarification if possible. It has to do with what we are defining as the property. We keep talking about the billboard as the property. A billboard is a use. It has to be somewhere. It has to exist

on a parcel, even if it is levitating above the land there's air rights and so, here is an example – is the property parcel zoned for non-conforming use of a billboard? The property, not the billboard. The land on which the billboard's footings are – even if it is 18 inches wide, that's Mr. Pinkus' property. It's footed somewhere in a land parcel that either allows for this non-conforming use or doesn't. That to me trumps whether a billboard goes up there or a ferris-wheel. Is the land allowable for the non-conforming use of a billboard? Is that how it is zoned?

Steve Poor (Zoning Administrator): The property is zoned to allow a billboard. It is literally the other conditions that have to be satisfied to erect a sign there, so it's the spacing. The land itself is properly zoned to allow a billboard. One of the unique characteristics of this sign is that it's wider than is otherwise normally seen on billboards. It's a very wide sign. I think it is 110 degrees, which in effect is almost like two faces reading the freeway. Now days we don't allow them to go more than 35 degrees. That's one area in which it is non-conforming. The spacing is always, frankly, it's challenging, because it is curvilinear road how we establish that. I get the point that Mr. Fields you're making, yes, the sign has to reside somewhere, absolutely. Again I recognize this is not the typical subject matter this Board reviews, but there is a fair amount of law, not relating to non-conformities, but to how billboards are treated as property, that helps inform the City Attorney about how we're looking at the billboard. This is a rather rarified notion to be sure and probably not one that's been visited upon this Board, but be that as it may, that's our determination. But your points well taken, yes, a sign absolutely has to reside somewhere

Finlayson: Is there anyone to give further testimony in favor? Is there anyone against? Name and address please.

Opposition: Tom McCarver, 3225 Spring Street, Northeast Minneapolis, representing Clear Channel Outdoor. A few points of clarification if I could and not to get into details how things were negotiated or in this particular case how it came to be, but we were in negotiations with Mr. Pinkus. CBS, unbenounced to us also was in negotiations, which certainly can happen. The application that was referred to as the one that we had made subsequent to this happening was made after a deal was made, after the fact. So we didn't know that CBS was involved. We didn't know until a permit application was made and certainly we have an interest in protecting our rights in the area, so I just want to make sure it is understood it wasn't one of these things saying if you don't do this we're doing this. That was not part of the deal. It is true that non-conforming rights can be replaced by a property owner. In this case it is a unique piece of property; it is a billboard structure and the permits that go with it. The permits and the structure are the property in this case. Clear Channel has always owned those permits and the structure. That I don't think is in question by anybody. There is a credit program in Minneapolis, some or all of you may be aware of that, where for any new billboard to be constructed, signs must be taken down in areas that are non-conforming rights, which give the billboard company the credits then to place a new sign. So if Clear Channel wants to build a new sign, say the sign that was applied for, we're going to have to take down in essence of about 9 faces to rebuild the two faces we would choose to on the freeway. If this were to be allowed, this practice, you essentially have no credit program anymore. In other words, I can replace any sign anywhere whether it is my sign or somebody else's sign without credits. Not only is that a problem, but the credits that have been removed that are in non-conforming areas, non-conforming residential areas, could be replaced as well. The goal when the whole code was put together was to remove billboards from areas that were considered redevelopment or areas for whatever reason signs have been there for a long time and things change. You know areas that were once industrial change to residential and vise-versa. So the goal was to remove a number of signs and replace them in areas that the City felt was a better or more suitable area and that goal has been achieved in large part and over 300 faces have been removed over the history of eight or ten years. So the program works, but if this is allowed to go forward, that program is dead. There is no more program, so, it – I don't know if that is the intent or not, but I just

wanted to make clear how we are articulating this right. In the State Statute it does say replacement or improvement is allowed now. That was part of the redefined Statute, but if you read below that, it also says – that any subsequent use or occupancy must be conforming and that's important. This is a subsequent use or occupancy. The use or occupancy of a lease-hold interest can change over time that is certainly the case and this is a change, from what is completely non-conforming now due to the width of the sign, to, if you allow this, that would be replacing a new non-conforming sign with an entirely new property owner. In this case it is CBS Outdoor.

Lasky: I have a question for you.

Tom McCarver: Yes.

Lasky: You negotiated this lease with the property owner, correct?

Tom McCarver: Yes.

Lasky: Okay, so we're not dealing with whether or not your lease could have been negotiated or not, we're dealing with the rights of the property owner, correct?

Tom McCarver: We're dealing with...in my view, when you say property owner, we're dealing with the rights of the billboard...

Lasky: As a Board whether or not the interpretation of the Zoning Code Administrator, we're not dealing with whether or not you could have negotiated a lease with the property owner or CBS negotiated a lease with the property owner, that's irrelevant to us, correct?

Tom McCarver: I think that's correct.

Lasky: Okay, so I personally don't want to hear about the lease whether it's with you or not.

Finlayson: Okay,

Lasky: It's not really relevant.

Finlayson: Okay, do you have more?

Tom McCarver: No

Finlayson: Does anyone have any questions?

Steve Poor (Zoning Administrator): Chair Finlayson, if I may just for a point of clarification, very briefly. I believe the matter before you is do you think the Zoning Administrator made the right determination on is the billboard property that is controlled by the billboard company or the land owner. But now that it has been raised, let me say that that is in fact correct. If the property owner is able to replace a non-conforming billboard, it virtually eliminates the cap and replace ordinance. I did not bring that up because I didn't want to taint your judgments on the matter before you, but it's been raised and it is the case that we would have to ... I'm not sure how that would play out. It would be very challenging, because how would we ever be able to say to somebody, you get credits to take a sign down and the property owners going to replace it right back. But I would add, should that happen, the City has had a great success in that Ordinance removing billboards from residential areas and most of the policy objectives that Ordinance sought to achieve have been achieved.

Finlayson: Is there anyone else to speak in this matter?

Paul Hanna: I know the board was interested in some of the timing of the negotiations. I just... Mr. Pinkus has a letter dated July 17th from him to Mr. Olson of Clear Channel Outdoor indicating that I've decided to lease the sign location to someone else, CBS Outdoor has indicated they would be interested in purchasing your sign if that would assist you in removing it. So the date that he made them aware of that fact was July 17. Which was prior to ... or about the same time as the application.

Finlayson: Thank you.

Paul Hanna: The Statute simply talks about a non-conformity and a continuation of the use. By whom, it does not mention.

Finlayson: Let's close the public portion of this hearing. Mr. Rand

Rand: I move approval of the staff recommendation.

Perry: I'll second that motion.

Mr. Fields: I'm not going to say I'm just trusting the complete and thorough research that Mr. Poor and the City Attorney had to put in to this to make what I think now was the right call. The reason that I think that Mr. Poor made the right call is the overall policy that the City wants to remove billboards from inappropriate regions. I have a goal; I'd like to see all billboards removed. It will never happen. I do know that property owners for years have benefited from income from the billboards on their property, that's good for them. Here we have a property owner who in all possibility, no longer will benefit from this lease and the income. So I kind of like to say because I don't like billboards period, I'm sorry, but that's too bad. I'm stuck here because I don't like billboards and I don't like billboard companies. I see them as vultures perching on otherwise wonderfully used land, but in the overall strategy of trying to get billboards into more appropriate areas and maybe ultimately removing a lot of billboards, I'm going to have to agree that the Zoning Administrator made a smart call. So I support the motion.

Finlayson: I must say I completely disagree. I do not believe that you can craft a lease and give away your property rights. I do not believe that when you lease somebody's property you are giving an ownership interest in it, which is apparently the way this interpretation is going. So despite the lofty goal of billboard removal or management of the credit program, if the City wants to manage something like that I think they have to go back to the State and revisit this particular law, which is fairly specific, and it does allow someone to replace. It's that simple. Ms. Lasky.

Lasky: I'm going to try to sway David to get past wanting to get rid of the billboards. I think the City can craft some way to give points for something to get rid of them. You can't give away people's property rights, their air space rights, their land rights to a billboard company. Being a property owner who leases to Clear Channel and to billboards, I would be remised in giving up those rights. I thinks it is absolutely a poor interpretation of the law and rights. You can not have a tenant to lease-hold improvements pull a permit then consider those lease-hold improvements his property. I would have my tenants and all kinds of commercial buildings owning my buildings. It is common sense, I've been in the courts before, and this is just plain common sense David. I know your intentions are good, but this is clear property ownership and we can't loose sight of it. The State did not make a mistake.

Fields: A quick response to that. I understand and I sympathize. My point of view is coming from, and I think some people know here, I'm not as automatically as sympathetic with property rights as most

people. People benefit from how they use their property for years, and my neighborhood is full of parking lots of billboards that people are getting income from, and we can't get rid of them. So property rights ... I don't believe absolutely in them. I think it is unfortunate that some of the billboards are being defined as a property, but in this case I simply see it as a conflict. I'll put it very bluntly, a conflict of two people who want to make a profit and greed, and right now, as much as I hate to admit it, Clear Channel, seems to be within the correct interpretation. I think it is crazy myself, and I think billboards and this use of land is crazy. To get this kind of arcane interpretation, so I can't be swayed.

Finlayson: I do believe if this is supported it will just result in it being sued out. Mr. Ditzler.

Ditzler: I'm going to support the motion. A law suite here is probably the best arena to get this solved. It appears to me that the due diligence that Mr. Poor and City staff have taken in this particular case, I think that they have made the right interpretation, I think the complicity with this lot is that it is non-conforming and while the city is not forcing the property owner to lease that land to somebody a specific entity usually comes up with the non-conformity and when that lease is expired, you take other applications, that person then would be limited to what they can do with their property and I think that has to do with the non-conforming aspect of the property. I think it's going to end up in court and I think that's where it should end up and I think Mr. Poor did his due diligence and he made the right call and I will be supporting the motion.

Finlayson: Well lease-hold improvements have always been looked at very simply. If someone leases space for a butcher shop, and they bring in some coolers, sit upon the floor, but are not bolted to the floor, and are hooked up and use electricity and at the same time there is a desire to change the display in the front window, so new windows are put in. Those new windows are a lease-hold improvement, the tenant does not own them, when the lease expires he may take the cooler with, but the windows stay. It is fairly straight forward as far as I'm concerned. Let's call a roll. Mr. Perry.

Perry: I would like to add something here because people have talked about ... I think a number of emotional issues as well as legal issues. Mr. Chair as you have pointed out earlier and as you pointed out anytime we are looking at an appeal of the Zoning Administrator's ruling, we need to focus only on that, whether the implications are non-sensical or may be irrational, in the end, I think if we focus specifically on what the Zoning Administrator was asked to interpret. I think his interpretation was correct. The implications of that, as I've heard before, the speakers and the Board are kind of crazy, but that's not what we're really looking at in our decision here. Thank you Mr. Chair.

Finlayson: Please call the roll.

Ditzler: Yes

Fields: Yes

Finlayson: No

Gates: Yes

Lasky: No

Luepke Pier: Yes

Perry: Yes

Rand: Yes

Motion passed