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MEMORANDUM

DATE: May 8, 2003

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

FROM: Hilary Watson, City Planner

SUBJECT: Appeal of the decision of the Zoning Board of Adjustment by the Burger King Corporation

Marcus Mollison, on behalf of the Burger King Corporation, has filed an appeal of the decision of the Zoning Board of Adjustment. The appeal is associated with the decision of the Zoning Board of Adjustment to deny the nonconforming use certificate to establish legal nonconforming rights for a fast-food restaurant with a drive through facility located in the Pedestrian Oriented Overlay District located at 2104 East Lake Street. The actions from the April 9, 2003 Zoning Board of Adjustment meeting are attached.

The appellant is appealing the decision of the Zoning Board of Adjustment to deny the requested nonconforming use certificate. The appellant has indicated that this action is being appealed because the Burger King Corporation believes that the Board's decision to deny the nonconforming use certificate was flawed. The appellant indicates that the staff report questions the relevance of the City of Minneapolis directing Burger King to demolish the partially damaged restaurant. This direction, however, which has not been disputed by the City, is central to the understanding of why issuance of a nonconforming use certificate is warranted.

The appellant has also indicated that Burger King's rights to a nonconforming use were lost because the City ordered the removal of the building. The appellant believes that it is fundamentally inconsistent for the City to deny the Burger King its rights to rebuild the restaurant and drive-through based on the claim that upon demolition of the building, the use was abandoned when the City ordered such demolition.

Lastly, the appellant indicates that the City has no objective basis by which to advise Burger King that the building was damaged beyond the allowable threshold under the City Code.

At the April 9, 2003 Zoning Board of Adjustment meeting, six Board members were present. All six of the Board members voted to deny the nonconforming use certificate application.

HEARING AGENDA

Actions

Minneapolis Board of Adjustment:

Ms. Debra Bloom - Absent
Mr. David Fields
Mr. John Finlayson
Mr. Paul Gates - Absent
Ms. Marissa Lasky
Mr. Barry Morgan
Mr. Peter Rand
Ms. Gail Von Bargaen
Mr. Richard White - Absent

The meeting was called to order at 2:05 p.m.

The Minutes of March 26, 2003 were approved.

The Consent Agenda was approved for the following items: 6, 7 and 8

No Items were withdrawn.

HEARING

1. 2104 East Lake Street (BZZ – 1087, 9th Ward)

Paul S. Moe has applied for a nonconforming use certificate to establish legal nonconforming rights for a fast-food restaurant with a drive through facility located in the Pedestrian Oriented Overlay District located at 2104 East Lake Street.

Testimony:

Marcus Mollison, 90 S. 7th Street. Attorney for Faegre and Benson LLP. On behalf of Paul Moe and Burger King. Stressed the meetings most notable of which was the October 3rd meeting referenced in the affidavit and in the staff recommendation. There were other meetings that occurred throughout 2001. The key is that at these meetings there was a determination by the city without any factual evidence that the damage exceeded 50 % and also that the building needed to be demolished. Burger King still believes that it continues to have nonconforming rights despite the fact that 2 ½ years have passed. Do not downplay the significance of the city direction that the building needed to be demolished and the city conclusion without any factual basis that the building was damaged beyond 50% of the value. Staff advised the city that damage exceeded 50 % and directed Burger King to demolish the building which supports the conclusion that the costs to restore the building was greater than 50%. Do not believe that is accurate. The fact that the affidavit states that the city made those determinations and gave those directions shows that the resulting action that is the loss of the grandfather rights because of the demolition was at the city direction. Does not think that this has any bearing on whether or not the building was actually destroyed to the extent of more than 50%. Does it matter in the grand scheme of things that the city did direct that the building be demolished? Not only does it matter. It matters because Burger King's rights to the nonconforming use were forfeited directly because of that direction. The inconsistency of the city denying those rights now. Based on a decision made by the city. There is no exemption in the ordinance for city directed demolition. There is the

statement that if the discontinuance is due to circumstances beyond the owners control that is an exception. Maintain that this is the circumstance here. They were advised by the city that the building needed to be taken down immediately. Statement by staff that the use was abandoned and that nothing has happened with it in the last 2 ½ years. The reason why nothing has happened for 2 ½ years was because the city directed that it be torn down We are here to reinstate our rights. It is not accurate that it is irrelevant that the city made that direction. Not accurate that the use was abandoned notwithstanding the city's direction. The city's direction to tear the building down is why this has all occurred. Our recommendation would be that the application be approved on the condition that Burger King brings forward evidence that the building was not destroyed beyond 50 %. And there will have to be some reconstruction in order to come to that conclusion and we recognize that we need to prove that in order to have our application approved.

Public hearing was closed.

Board of Adjustment Members comments:

Ms. Lasky spoke of needing more supporting data.

Mr. Rand supports staff recommendations.

Mr. Fields stated that it has been 2 ½ years since the fire and questions why they are coming forward now. Mr. Fields also notes that a fast-food restaurant with a drive-through facility is contrary to the Corcoran Neighborhood Plan for this area.

BOARD OF ADJUSTMENT ACTION:

Mr. Morgan motioned to **deny** the nonconforming use certificate to establish legal nonconforming rights for a fast-food restaurant with a drive through facility located in the Pedestrian Oriented Overlay District. Mr. Fields seconded the motion.

ROLL CALL VOTE:

Yeas: Fields, Finlayson, Lasky, Morgan, Rand, Von Bargaen

Nays: None

Absent: Bloom, Gates, White

The Board of Adjustment **DENIED** the nonconforming use certificate application.