SUPPLEMENTAL PACKET

PC 12-4-17

To: Afton City Council Members

Afton Planning Commission Members

City Administrator

City of Afton, MN

From: Neighborhood Group

RE: Carlson PLCD-Comments on Concept 1A and 1B Maps dated November 19, 2017

Date: November 30, 2017

SUMMARY

We submit these comments on behalf of the Neighborhood Group on the two new concepts 1A and 1B dated November 29, 2017 proposed by Joe Bush. We are disappointed that the developer does not listen to the community. There are reasonable alternatives that can be explored that would allow for a conservation easement, address many of the concerns about density and road safety, and still give the developer a reasonable return on this investment.

In general, both of the concepts have unacceptable adverse effects on the environment and adjacent properties. While the plan may meet basic acreage guidelines for a PLCD, all land is not created equal. Much of the site is in the Afton Shoreland and Conservation Overlay District. The site is unique being adjacent to Trout Brook and the tributaries of Trout Brook, a DNR-proposed designated trout stream. The site contains many steep slopes and highly erodible soils and a good portion of it is not developable at all. Erosion and storm water drainage from the PLCD acreage is an existing problem for existing adjacent homeowners. In addition, the area is rated "High" for its rare features potential in the Afton Natural Resources Inventory. While the addition of a conservation easement and a native cover crop is a positive with the development, the analysis cannot stop there. Given the unique and sensitive features of this parcel and road safety concerns, the developer has proposed too many lots of insufficient size. A developer is not guaranteed the maximum densities potentially allowed under the ordinance based on acreage. He has the burden to show the particular land in question is suitable for the proposed densities and he can not do so. In fact in this instance, to go forward as currently proposed he needs numerous variances and rezonings and a City that looks the other way on safety.

We also point out that Criteria #3 for approval of a PLCD in Sec. 12-2375 requires "The preservation and land conservation development can be planned and developed to harmonize with any existing or proposed development in the areas surrounding the project site". Paragraph B.1 of Sec.12-2379 requires that "The proposed PLCD is in conformance with the comprehensive plan." Paragraph B 2 of Sec. 12-2379 further requires that "The uses proposed will not have an undue and adverse impact on the reasonable enjoyment of neighboring property and will not be detrimental to potential surrounding uses." Paragraph B.4 of Sec. 12-2379 requires that "The PLCD will not create an excessive burden on parks, schools, streets, and other public facilities and utilities that serve or are proposed to serve the district."

Concept 1-B Cul-de-sac Road Access—16 homes with 2 in reserve for total of 18

This access is largely the same concept proposed in the Preliminary Plat application other than he now proposes 16 lots on the eastern portion of the PLCD instead of 19 but reserves two lots on 60th street for future development for a total of 18 lots in total instead of 20 lots in total. We have provided extensive comments on this proposal in the past and will not repeat them all here in any detail. This proposal requires a variance for cul-de-sac length, a variance for number of homes on a cul-de-sac for almost double that allowed (the ordnance says variances may not be allowed to exceed more than 9 homes on a cul-de-sac so we don't think one could be granted at all), a rezoning, a variance from the prohibition from joining already subdivided lots to the PLCD, and removal of shoreland from the PLCD.

Concept 1-A—Odell Loop Road Access-18 homes with 2 in reserve for total of 20

This access concept was originally proposed in the Fall of 2016 but abandoned by the developer because of several violations of Afton ordinances and the need for variances. He is now resubmitting this alternative as a way to avoid another variance that is required for the number of homes on a cul-de-sac. By constructing the proposed loop road, he can shorten his cul-de-sac and limit the number of homes on it to the maximum of 9 homes allowed. After construction, he also intends to donate the parcel to the City of Afton and construct a public trailhead for public walking trail that extends west through the PLCD development. This concept fails to comply with Afton ordinances and will cause an undue adverse impact and an excessive burden on the local road, Odell Avenue, and the surrounding community by breaking up an existing neighborhood.

Concept 1A--Breaks Up Existing Subdivision. To gain access to the proposed development, the developer/owner proposes to force a 60 foot right of way access road onto Odell through an existing 5-acre rural residential lot/home at 5550 Odell to provide access to the 16 homes he wants to build behind it. 5550 Odell is part of an existing platted subdivision, St. Croix Valley Estates. This subdivision was extensively reviewed, platted and recorded with the County over 20 years ago. If a developer is allowed to break up an existing subdivision merely by buying lots in it to provide access to lands behind it, there is no such thing as a "Final" plat in Afton. Residents have the right to rely upon a final plats to protect their neighborhood and to have some assurances before they invest in a property that there will not be roads and public parks right next door to their properties. It would be a shocking precedent if the City allowed developers to gain access to property in such a way in disregard for established cohesive neighborhoods in the City. A developer should not be allowed to negatively change the character of an existing subdivision/neighborhood or nature of the road of an existing subdivision just to serve his economic interests

Concept 1A--Odell Designed as Local Street-Not Suitable for Intersection of Higher Volumes. Odell Avenue was designed and currently functions as a local street. A local street as defined at Sec. 12-55pg. 21 is "intended to primarily serve as an access for abutting properties." Odell Avenue currently serves as an access for 13 driveways all of which are abutting properties. The proposed Carlson PLCD access road would require a new intersection on Odell would convert Odell into a Collector Street as defined at Sec. 12-55 pg. 21: a "street which serves or is designed to serve as a trafficway for a neighborhood or as

a feeder to a major road." It would add at least 200 more car trips per day going into and out of this intersection onto Odell. Odell Avenue was designed as a local road and never designed as a collector street that would add over 200 more car trips per day. Odell Avenue has steep hills, steep grades, several tight curves and reduced sightlines. With its variable geometry it was not designed to accept higher volumes of traffic or intersecting roads. Any proposed access on Odell would require a traffic study conducted by a qualified independent traffic engineer.

Concept 1A--Public Taking of Dickes Property. The roadway thru 5550 Odell is right on the property line at its southwest corner and does not meet setback requirements. It also creates additional setback and vegetation control requirements on the adjacent property owner to the south, William Dickes. When Mr. Dickes acquired the property, it was in the middle of a subdivision and part of a cohesive neighborhood. He bought the property relying on the recorded plat of the subdivision that has been in place for decades. Under the new concept, Mr. Dickes' property now will become a corner lot subject to the requirements of Sec. 12-198 and 12-132 subsection (a)(6) when he develops his property. Instead of being in the middle of a neighborhood with 5-acre parcels on either side of him, he will be next to a public road on his north side with 200 car trips per day and be next to a park with a hiking trail.

Concept 1A--Donation of Land to City to Avoid Ordinances. The City has avoided taking ownership of lots in the middle of areas that have no context to the overall City plan for parks or open space. It would be hard to understand the City now wanting to take a parcel in the middle of a cohesive neighborhood to break up a 20 plus year old subdivision just to advance the economic interests of the developer. It would establish a terrible precedent for all future development in Afton and encourage other developers to "game" our ordinances. The City Council must approve any gift or donation to the City, and by statute must do so with a two-thirds majority. See Minn. Stat. 465.03.

Concept 1A and 1B--Parcels Cannot be Joined. Sec. 12-2377, paragraph C, states "Parcels which contain their maximum permitted density or have been previously subdivided to their permitted density may not be joined to a PLCD". The lot at 5550 Odell is zoned Rural Residential and is currently at its maximum permitted density. The developer does not show the lot on his concept map as joined or part of the PLCD but shows it being donated to the City after construction. **This is merely game playing**. The lot will provide access to his PLCD; the lot will provide access to the public hiking trail he intends to take credit for in lieu of paying a park dedication fee. But for this lot at 5550 he would not have access to the PLCD to build the 18 proposed homes under ordinances so it is clearly "joined" to the PLCD for all purposes.

Lastly, this prohibition about joining previously subdivided lots to the PLCD is also applicable to the old Schuster lot at 14220 60th St. (near PLCD Lot 1) that the developer proposes to join to the PLDC to complete his loop road. The City Planner in the past has suggested that this joinder prohibition should pose no barrier to joining if including the lot would not increase the number of units that can be built in the PLCD. That argument fails on two fronts. First, the argument is based on the supposed purpose and intent of the ordinance, but under Minnesota law the purpose and intent of the ordinance can not be considered unless that ordinance is ambiguous. Here, there is no ambiguity. Second, including the lot would increase the number of units that can be built in the PLCD. Without a loop road provided by the Odell access and old Schuster lot, the developer would be limited to 9 lots on a long cul-de-sac instead of the 16 he proposes under this concept. The ordinance at 12-1379.B does not allow a variance to exceed 9 lots.

Concept 1A--City Planner Identified Negative Impacts of Odell Access. The City Planner evaluated the Odell access on page 5 of his May 22, 2017 memo where he stated that: "Such a street connection could have negative impacts upon natural resources in the area," and "A second access to the subdivision via Odell Avenue may introduce negative traffic impacts on residents located east of the subject site along Trading Post Trail and Odell Avenue."

Concept 1A--Public Hiking Trail Cuts Down Large Old Trees on 18 Percent Slopes. The newly proposed hiking trail along the northern border of the PLCD will require cutting trees down in area of 18 percent slopes. Portions of this area are heavily wooded and identified as are identified as Oak Woodland Community with "medium to large-size oak (up to 30 inches in diameter)" in the Afton Natural Resources Inventory page V-107 completed in 2001 . Further, this area runs along the southern boundary lines of existing homes presenting access to their properties to the public that was never accessible before.

Comments Applicable to Both Concepts 1A and 1B

Both Concepts 1A and 1B Require Rezoning. Lot 1 under Concept 1B would require a rezoning of Lot 1 to agricultural from rural residential because a PLCD is not allowed in a rural residential zoning. We have provided extensive comments before objecting to this rezoning and have attached our previous memo. See Attachment 1. We will not repeat our comments here other than to emphasize that the sole purpose of the rezoning is for the convenience and economic interests of Mr. Bush so he can reconfigure the subject parcel with other lots on his proposed PLCD so that the parcel can be used to build a road access. Overall, the rezoning will allow Mr. Bush to maximize the number of homes in the PLCD and allow him to use his preferred road access location to the development even though there is a safer alternative farther down 60th.

Under Concept 1A, the parcel at 5550 Odell that will be used for a road access is rural residential but now will be used to support the PLCD as a road access and for park dedication. As discussed above, the parcel is essentially joined to the PLCD because but for the parcel the PLCD could not be approved as proposed and thus the parcel will need to be rezoned from rural residential to agricultural to be part of the PLCD.

The same rezoning objections expressed over Lot 1 would apply here as well. When interpreting state law, the courts have found "[W]hen an application is made for reclassification from one zone to another, there is a presumption that the original zoning was well planned and was intended to be more or less permanent. Before a zoning board rezones property there should be proof either that there was some mistake in the original zoning or that the character of the neighborhood had changed to such an extent that reclassification ought to be made. The burden of proof is upon the proponents of the change." Hardesty v. Zoning Board, 211 Md. 172, 177, 126 A.2d 621, 623 (1956). The courts have also found in reviewing rezonings that "The general welfare of the public is paramount in importance to the pecuniary stake of the individual." Beck v. City of St. Paul, 304 Minn. 438, 449, 231 N.W.2d 919, 925 (1975).

Both Concept 1A or 1B Do not Meet the Three Factor Test to Qualify for a Variance. To qualify for a variance the developer must show "practical difficulties." One of the factors he must show is that "the plight of the landowner is due to circumstances unique to the property not created by the landowner."

Sec. 12-1266.A.2. Here, the "plight" of the developer is a result of his desire to maximize his density for economic considerations. For, example under the cul-de-sac ordinance he wants to increase the number of homes to 16 versus the 9 that are allowed under the ordinance. Further, the ordinance prohibits granting a variance for more than nine homes yet he continues to propose them. In another example, he will need an exception to the ordinance prohibition of joining already subdivided lots to the PLCD by joining the 5550 to the PLCD. The ordinance makes clear that "economic considerations alone shall not constitute a practical difficulty if reasonable use of the property exists under the terms of this article." Sec. 12-1266.B. In the case of the cul-de-sac ordinance, 9 homes on a cul-de-sac is reasonable use.

Both Concept 1A or 1B-Shoreland Can not be Included in a PLCD. Large portions of the proposed PLCD including parts of lots 1, 2 and 3 are contained within the designated Shoreland Management Area as identified on the Afton Zoning Map. However, PLCDs are not allowed in areas designated as shoreland under Sec. 12-2372. This section in the Shoreland Management Ordinance states that a "Planned unit development is not permitted in any zoning district." In other words if a Planned unit development such as a PLCD includes Shoreland, the PLCD can not be approved regardless of the underlying zoning. In this case, the PLCD could go forward but must remove the areas designated as Shoreland from inclusion in the PLCD boundaries.

Both Concepts 1A and 1B Increase Negative Effects on the Turner/Rhode Horse Sanctuary.

Under previous concepts three PLCD lots abutted the horse sanctuary. Under Concepts 1A and 1B the number of lots abutting the horse sanctuary has increased to 4. This farm has operated continuously for decades and for many years has been operated as a horse sanctuary for special needs horses. The PLCD homes surround the farm on 3 sides and abut the farm's pastures. The development will have a significant negative affect on the farm from the human activity around pastures that are home to these horses. In addition, the maintenance of the prairie planting by periodic burning will have a significant effect on the operation of the farm during these periods given the sensitivity to horses to smoke and fire particularly animals that have special needs. The prairie plantings are proposed to surround the entire farm and its pastures so there is no escaping this impact.

Both Concepts 1A and 1B Ignore Comments by the Afton Natural Resources and Groundwater Committee (NRGC). As summarized in the City Planner's memo dated May 22, 2017, the NRGC suggested that the subdivision design be modified to better preserve environmentally sensitive lands. The NRGC recommended that Lots 13 and 14 and Lots 3 and 4 be consolidated. The Minnesota Department of Natural Resources in its letter dated May 24, 2016 also suggested that Lots 3 and 4 be eliminated. These lot changes correspond to current Lots 1 and 2 and 12 and 13 on Concept 1B and Lots 1 and 2 and 11 and 12 on Concept 1A.

ATTACHMENT 1

October 11, 2017

To: Afton City Council and Planning Commission
From: Neighborhood Group
RE: Rezoning Request by Joe Bush regarding Carlson PLCD/Afton Creek Preserve

SUMMARY

We are opposed to the application by Joe Bush to rezone a 5-acre parcel from rural residential (RR) to agricultural in conjunction with the proposed Carlson PLCD/Afton Creek Preserve. The subject parcel is not used for agricultural purposes, nor is there any proposal for it to be used for agricultural purposes in the future. A rezoning under these circumstances would be a shocking precedent in Afton that will have long term implications. Not only does it not meet the legal hurdles for a rezoning, but it would be strictly for the convenience of a developer and to promote his economic interests at the expense of the public safety and welfare.

DETAILED REASONS FOR OBJECTION

Purpose of the Rezoning. Joe Bush has asked to rezone a 5-acre parcel from rural residential (RR) to agricultural in conjunction with the proposed Carlson PLCD/Afton Creek Preserve. The existing parcel has an existing home on it (the old Schuster home) that has been used as a residential property for many years and would continue to be used for residential purposes if rezoned.

The sole purpose of the rezoning this parcel is for the convenience of Mr. Bush so he can: (1) reconfigure the subject parcel with other lots on his proposed PLCD so that the parcel can be used to build a road access from/to the PLCD from 60th Street just west of Trading Post and (2) to add this parcel to his proposed PLCD development which would not otherwise be allowed because the RR zone does not allow a PLCD. Overall, the rezoning will allow Mr. Bush to maximize the number of homes in the PLCD and allow him to use his preferred road access location to the development even though there is a safer alternative farther down 60th Street.

Legal Standards for Reviewing Rezoning. Minnesota law and Afton ordinances govern the standards by which rezoning applications must be judged. The Municipal Planning Act at Minn. Stat. 462.357, subd. 1, allows municipalities to approve zonings and rezonings that promote the "public health, safety, morals and general welfare." Afton Ordinance 12.81.J states that "in granting or recommending any rezoning the Council shall find that the proposed development conforms substantially to the policies, goals and standards of the Comprehensive Plan."

When interpreting state law, the courts have found "[W]hen an application is made for reclassification from one zone to another, there is a presumption that the original zoning was well planned and was intended to be more or less permanent. Before a zoning board rezones

property there should be proof either that there was some mistake in the original zoning or that the character of the neighborhood had changed to such an extent that reclassification ought to be made. The burden of proof is upon the proponents of the change." Hardesty v. Zoning Board, 211 Md. 172, 177, 126 A.2d 621, 623 (1956). The courts have also found in reviewing rezonings that "The general welfare of the public is paramount in importance to the pecuniary stake of the individual." Beck v. City of St. Paul, 304 Minn. 438, 449, 231 N.W.2d 919, 925 (1975).

The League of Minnesota Cities also provides guidance on the review of a rezoning. The League's Information Memo: Zoning Guide for Cities dated July 6, 2017 at page 34 states: "The law presumes an existing zoning ordinance constitutional, and an applicant only is entitled to a change if they can demonstrate that the existing zoning is unsupported by any rational basis related to the public health, safety and welfare."
https://www.lmc.org/media/document/1/zoning_guide.pdf?inline=true

Public health, safety, and welfare. There is no provision in the law or ordinance that allows approvals for rezoning requests like the one Mr. Bush makes here—one that is merely for convenience purposes and for the economic interests of the developer at the expense of the public. The character of the neighborhood surrounding the subject parcel hasn't changed requiring a rezoning. Nor does the rezoning of this parcel promote the public health, safety, morals and general welfare as required. In fact, the rezoning would allow the developer to pursue his preferred road access location that will add potentially 200 more car trips onto a section of Trading Post that has significant safety problems related to substandard road width (only 18 feet in spots), steep grade, blind curve, and reduced site lines.

While Bush's economic interests or "pecuniary stake" may be promoted with a rezoning, it comes at a substantial cost to the general welfare and safety of the public inconsistent with law that requires the public interest to be paramount as discussed above. Even if the rezoning were denied, Mr. Bush has feasible alternatives. He is not precluded from reconfiguring his lot design to meet the conditions of the ordinances or moving the entrance to the PLCD to the safer alternative farther down 60th Street. He has publicly stated on several occasions that an entrance farther down 60th Street would be about the same cost to him.

In addition to the public safety problems, the rezoning would also have a negative impact on the general public in the surrounding area by allowing the developer to increase development density by reconfiguring lots to increase the number of homes built. Of the 13 existing neighborhood parcels abutting the proposed PLDC, only 3 are 5 acres and most are much larger. For example, to the east the abutting parcel acreages are as follows: Dawson/Lewandowski 6.5, Graham 9.2, McConnell 5.45, Rickard 5, Dickes 5. To the south the abutting parcel acreage is: Rhode/Turner 23.5. To the west the abutting parcel is: Wallace 160 acres plus. To the north the abutting parcel acreages are: Swanson 78, Forbes 19.8, Berggren 68.4, Belz 14, and Brannan 5.96. Yet all but one of the lots in the Carlson PLCD will be 5 acres. By using the PLCD ordinance the developer is increasing the housing density in the area to a greater degree than if the development was restricted to one home per ten acres as allowed under the underlying agricultural zoning district. This is particularly true on this acreage because much of it is not

developable at all because of steep slopes and limited access so there would never be one home per ten acres actually constructed.

As noted at the Planning Commission meeting on October 2, 2017, there is a high bar for rezoning from agricultural to RR. Some may interpret rezoning from RR to agricultural as a lesser bar because it may be a less intense use. But here, there will be no change to a less intense use. It is residential now and will continue to be in the future. So, the rezoning is in name only merely to avoid the restrictions in the RR district.

Afton Comprehensive Plan. Finally, the rezoning does not conform substantially to the policies, goals and standards of the Afton Comprehensive Plan as required.

- Page 22, paragraph 3 of the Comprehensive Plan, states that PLCDs should have "minimum impact to the character of the community." As discussed above, the Carlson PLCD maximizes density and has a substantial impact on the overall density in the immediately surrounding community.
- On page 26, the top 3 Comprehensive Plan Landuse Goals, Policies and Strategies are listed as: 1. Maintain the city's overall low density; 2. Preserve the rural character of Afton; 3. Encourage agricultural uses. The rezoning will facilitate results that are contrary to these principles.

o The Carlson PLCD will actually result in a net gain of density because the City is intending to allow the developer to take credit for already undevelopable land when determining how many acres must be set aside in a conservation easement under the PLCD. These undevelopable wetlands, streams, steep slopes are already "preserved" and only the developer gains by taking credit for these to reduce the amount of land he has to put in a conservation easement so he can maximize density on the remaining land.

o The development does not preserve the rural character or encourage agricultural uses. It converts over 100 acres of existing farmland to 5-acre housing parcels in a surrounding community made up of primarily very large multiacre parcels contributing to the rural character of southwest Afton.

- Page 27, paragraph 8 of the Comprehensive Plan states the Afton states: "8. Discourage residential development on lands suitable for agricultural use and adhere to Planning practices that will allow farms to operate without external pressures." The rezoning will facilitate the conversion of agricultural land to residential by allowing the developer to reconfigure land parcels to maximize 5-acre housing density in the proposed PLCD.

- Page 21 of the Comprehensive Plan states: "The residents of tl1e City of Afton value the agricultural economy and rural character that an agricultural environment provides. This Plan intends to preserve agricultural land for permanent agricultural use, and does not accept the belief held by some that agricultural use is merely a temporary use or that agricultural lands are merely a holding area for future residential or other development. Moreover, the community values agricultural land as open space in an increasingly urban environment, a sanctuary for a rural lifestyle that Afton residents have consistently desired to maintain." The rezoning will further facilitate the conversion of agricultural land to residential development.

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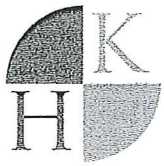

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November 30, 2017

Mr. Ron Moorse
Afton City Administrator
3033 St. Croix Trail South
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RE: Legal Opinion re Afton Creek Preserve Subdivision

Dear Mr. Moorse:

In your correspondence of November 13, 2017, you raised a number of questions that have come up regarding a proposal from a developer to utilize the City's Preservation and Land Conservation Development section of the Afton City Code as the basis of a new residential development. You have requested a formal opinion regarding the following:

1. The city's subdivision ordinance, in Sec. 12-1379 B., indicates "No variance may be granted which would allow more than nine lots to be created on a cul-de-sac street." Can the City Council approve a variance to allow more than nine lots on a cul-de-sac?

> *Sec. 12-1379 B.*
> *B. A cul-de-sac street shall not exceed 1,320 feet in length and shall serve no more than nine lots. Every lot platted on a cul-de-sac street shall have frontage and access on the cul-de-sac street and shall be included in the nine lot limit. A variance may be granted on the length limitation only when it is clearly demonstrated that the length greater than 1,320 feet is necessary for reasons of unfavorable land topography.* ***No variance shall be granted which would allow more than nine lots to be created on a cul-de-sac street.***

Opinion: While it is not a little ironic that one of the provisions that would require a variance would be the prohibition against allowing variances, Minnesota law makes it clear that the City could, if it chose to, grant a variance to the requirements

of its subdivision ordinance.

Minn. Stat. Section 462.358, subd. 6, says:

> "Subdivision regulations may provide for a procedure for varying the regulations as they apply to specific properties where an unusual hardship on the land exists, but variances may be granted only upon the specific grounds set forth in the regulations."

Minnesota statutory law is controlling over the provisions of any local ordinance that conflicts with it in any way. Mangold Midwest Co. v. Village of Richfield, 274 Minn. 347, 143 N.W. 2d 813 (Minn. 1966); City of Birchwood Village v. Simes, 576 N.W. 2d 458 (Minn.App. 1998). In this instance, this would mean the prohibition against variances. Afton's Code does address the question of variances to its subdivision standards in Afton Code §12-1266, which would be the "regulations" referenced in the state statute. That ordinance provision provides:

> Variances. 345 A. The City Council may grant a variance in any particular case where the subdivider can show that by reason of the unfavorable topography or other physical conditions the strict compliance to these regulations could cause practical difficulties. "Practical difficulties" as used in connection with the granting of a variance includes a three-factor test, all three of which must be met in order for a variance to be granted.
>
> 1. Reasonableness: The property owner proposes to use the property in a reasonable manner not permitted by the zoning ordinance.
>
> 2. Uniqueness: The plight of the landowners is due to circumstances unique to the property not created by the landowner.
>
> 3. Essential Character: The variance, if granted, will not alter the essential character of the locality.

Any variance that is granted must go through this process and be based on these criteria. In this instance, this has raised a couple of additional issues.

An argument can be made, for example, that the "practical difficulties" required for the finding of a variance for this development were created by the developer and are not inherent to the land proposed for development.

This is a valid concern. At first blush, it would certainly appear that any hardship exists only because the applicant is asking for higher densities (or longer and more cul-de-sacs) than would otherwise be permitted and it is not something essential to development of

any kind on the site, nor is it a pre-existing condition of the property. If the Council were to choose to do so, case law does exist that would serve as authority for turning down a development based on "self-imposed hardship" essentially caused by the developer (*See*: VanLandschoot v. City of Mendota Heights, 336 N.W.2d 503 (Minn. 1983)

But it would seem to beg the question of the purpose of the PLCD provision if an applicant created their own hardship by simply applying for a subdivision using that provision. An applicant can make an argument, which the Council *could* accept, that the large portion of the development dedicated to open space around the environmentally sensitive trout stream (in furtherance of city policy) limits the remaining land volume available for development in the parcel and creates the practical necessity for the variance requested, both as to density and the road configuration.

This interpretation is not compelled by the PLCD provision and such a determination would be in the discretion of the Council. Yet, it would appear an approval of such a request could meet the stated purpose of greater "flexibility" in the Preservation and Land Conservation Development, which is intended to:

> "encourage a more creative and efficient development of land and its improvements.... than is possible under the more restrictive application of zoning requirements, while at the same time meeting the standard and purposes of the comprehensive plan and preserving the health, safety and welfare of the citizens of the City." Afton City Code§12-2373

A lawyer representing landowners in the City that are opposed to the development suggested in a letter to the planning commission that the greater flexibility provided for in the above language only applies to variances granted "under the more restrictive application of ***zoning*** requirements" and not to variances under the City's subdivision regulations. The idea in this argument is that while the allowed flexibility could be applied to such things as setbacks, it could not be applied to such things as cul-de-sac limitations.

While it is true that the code language expressly points to the issue of restrictive zoning requirements, there is nothing in that language that limits the encouragement of "more creative and efficient development of land and its improvements" solely to zoning matters. Judicial authority in Minnesota has made it clear that a city council has the same broad authority and discretion in granting or denying variances under the subdivision statute as it exercises under the zoning statute. (See: VanLandschoot, *supra*).
The bottom line is that the City Council has the authority to allow variances to its subdivision procedures if it can find the existence of practical difficulties caused by the application of its own ordinances on a particular development.

2. *Can a road serving a subdivision be constructed to provide access to the subdivision from an existing minor street? Specifically, can a loop road be constructed to Odell to serve the proposed Afton Creek Preserve PLCD subdivision?*

Opinion. As a rule, there is nothing that would prohibit the access to a development by way of a pre-existing roadway proximate to the development. In this case, the issue of the use of Odell would center on an analysis of what hazards any increase in use caused by the development might have to the health, safety and welfare of the adjoining property owners and the City as a whole. Description of Odell as a "minor street" implies limitations on its capacity to handle added traffic volumes, possibly creating hazards. This requires a traffic analysis by the City engineer. If it can be demonstrated that the use of Odell creates a hazard to the public based upon these studies, it would not be appropriate to access the development by that route. Conversely, if such a traffic analysis determined there would be no meaningful decrease in public safety, Odell presumably could be used for that purpose.

3. *Is there any local ordinance or State Statute that would prohibit the construction of a road through the 5-acre parcel fronting on Odell to serve the Afton Creek Preserve PLCD, particularly if a 60-foot-wide right-of-way is dedicated for the road and the remainder is dedicated as parkland?*

Opinion. The use of an existing residential lot to provide access to adjoining property via a road easement is unusual, to say the least. Since roads are clearly allowed in residential areas, and in the RR zone (where it is located) in particular, the actual use would not be prohibited and, while the lot used would remain platted in the original development, there does not appear to be any authority that would prohibit the creation of an easement for this purpose. One issue that might be presented is whether, by creating, in effect, at least one corner lot in the adjoining lot or lots, the creation of a new road would restrict the use of those lots in any way because of road setbacks or similar restrictions. This could have the potential of creating a taking from those parcels of existing rights of use that might be compensable.

4. *If the right-of-way for a loop road is put through the 5-acre parcel fronting on Odell, does this parcel need to be a part of the subdivision and a part of the PLCD? If so, does this parcel need to be rezoned, and is it being "joined" to the PLCD? Bob Kirmis has advised that, from a planning standpoint, the parcel needs to be part of the subdivision because access to the subdivision is proposed to run through it. But it is not part of the PLCD and does not need to be joined to the PLCD or rezoned from RR to Ag. The lot does not need to be part of the PLCD because it is not going to be used as a buildable lot in the PLCD, it is only going to be used as a road right-of-way and a park, and it will have no effect on the number of lots or the density of the PLCD. Both the road right-of-way and park uses are allowed in the Rural Residential zone.*

Opinion. Your preliminary assessment of this issue is correct. Access by an adjoining roadway does not require the adjoining roadway to become part of the development ***if it is a pre-existing roadway***. Mr. Kirmis would be correct if the existence of the access is to be created contemporaneously with the plat itself. The critical point is that the easement must be in place before final plat approval. If this is the case, there would be no reason to include it.

5. *The PLCD ordinance includes the following language:*

Sec. 12-2377. Coordination with subdivision regulations.

C. Parcels which contain their maximum permitted density or have been previously subdivided to their permitted density may not be joined to a PLCD.

Does this language prohibit the 5-acre parcel in the southeast corner of the PLCD from being included in the PLCD?

Opinion. Yes. While inclusion of the parcel would not affect the number of allowed lots or the permitted density of the proposed development, the language of the code clearly does not authorize the inclusion of a previously subdivided parcel if that was part of a subdivision at its permitted density. Its inclusion in the plat would require a variance.

6. *Is there any local ordinance or State Statute that prohibits a road from being located adjacent to an adjacent property, particularly if it would place an additional setback requirement on the adjacent property beyond the current setbacks on the property?*

Opinion. No. But, as noted above, it may create a situation where the City may be creating compensable damages for any reduction in property values as a result of adding new setback requirements to adjoining lots.

7. *Can the City approve a subdivision that has one or more irregularly-shaped lots? If so, does this approval require a variance?*

(Sec. 12-1387. Lot requirements.

A. Side lot lines shall be substantially at right angles to straight street lines or radial to curved street lines or radial to lake or stream shores unless topographic conditions necessitate a different arrangement.

I. All remnants of lots below minimum size remaining after subdividing of a larger tract must be added to adjacent lots.)

Opinion. The answer to both questions, referencing the provision of the code you have provided with the question, is "yes."

8. *Can the City approve a subdivision that requires variances?*

Opinion. For the reasons noted earlier, "yes."

In addition to these questions, in subsequent correspondence, you have raised an additional, significant concern:

9. *You forwarded to me correspondence from an attorney representing landowners near the development who has raised the specific question of whether this development runs afoul of the ordinance language of Afton Code § 12-363 which indicates a PUD is not allowed in a Shoreland Overlay District.*

Opinion. It is correct that a PUD (Planned Unit Development) is not allowed in the Shoreland Overlay District. A substantial amount of the land in the proposed development in this instance does, in fact, appear to be located within the Shoreland Overlay District.

The issue of whether a PUD can be allowed in a Shoreland Overlay District is covered under the Minnesota Rules governing the implementation of Shoreland Overlay restrictions. That Rule, MN Rule §6120.3200, subd. 3, provides:

> PLANNED UNIT DEVELOPMENT. Scope of Planned Unit Development Provisions. Local Governments must consider incorporating, with approval of the commissioner, provisions into Shoreland management controls to allow planned unit developments.

The requirement of the state rule that cities consider incorporating PUD provisions in their Shoreland Overlay Ordinances would appear to directly contradict the strict prohibition of the City Code against such developments in the Shoreland Overlay District in Afton. The State Rule does not require the allowance of a PUD by the City, however, only that the consider incorporating such provisions.

Neither the Code, state statute, the rules or judicial opinions offer any direct guidance on whether the provisions of the Code related to PLCD developments are "PUDs" under the City Code. The term remains largely undefined in Minnesota law, although you correctly note, in Minnesota, it is usually described in terms of higher density developments in more urban environments.

The term "PUD" is widely used, however, in real estate and development.

> "The Planned Unit Development (PUD) is a recent and innovative approach to land use development. Its parentage is a union of cluster zoning and

> subdivision platting. The definition of a PUD which is most frequently encounter is:
>
> 'Planned unit development' means an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units.....the plan for which does not correspond in lot size, bulk or type of dwelling.....density, lot coverage and required open space to the regulations established in any one or more (zoning) districts created, from time to time, under the provisions of a municipal zoning ordinance enacted pursuant to the conventional zoning enabling act of the state." *Jurgensmeyer & Roberts*, ***Land Use Planning and Development Regulation Law***, 2nd Ed., Thompson-West, §7.17, p.431, fn.2, citing U.S. Advisory Commission on Intergovermental Relations.

The key elements in PUDs, as noted above, are the control of the entire area to be developed by a single owner in a single development utilizing a plan that would not be allowed under "standard" zoning requirements. This would seem to fit, in a general way, what is occurring in the current proposal. In a seminal case, the goals of planned unit developments were expressly listed by the Supreme Court of Oregon as, in part, "to achieve flexibility; ...to encourage developers to use a more creative approach in their development of land; to encourage a more efficient and more desirable use of open land...." Frankland v. City of Lake Oswego, 267 Or. 452, 577 P.2d 1042, 1047 (1973). This language almost directly parallels the stated purpose of the Afton PLCD Code provisions.

While the provisions of the Afton PLCD focusing on preservation of natural resources and undeveloped land appear quite unique in this region, these techniques are not new and appear to be gaining currency elsewhere.

> "Cluster development and planned unit development are sometimes viewed as the same thing. It is more accurate to define cluster development as a device for grouping dwellings to increase dwelling densities on some portions of the development area in order to have other portions free of buildings. Many planned unit developments use cluster development as a technique but the planned unit development concept typically encompasses more. However,***..the increasing popularity of conservation subdivisions, often called cluster subdivisions, and new urbanism inspired planned cluster developments, has blurred the lines between the two approaches and the two concepts increasingly overlap.***" *Jurgensmeyer & Roberts*, supra, at p. 433. (Emphasis added)

While the above authority is not definitive, it nevertheless is strongly suggestive that the various elements present in the PLCD provisions of the City Code are indicative of a

"PUD" within the meaning of the term as it is understood in the real estate development field. If so, this would prevent this development from occurring as a PLCD in that area.

In the end, however, this, too, is a matter within the City Council's powers to interpret the meaning and reach of the particular provisions of Shoreland Overlay District to various uses and underlying Code restrictions. As noted in Afton Code §12-364, "When an interpretation question arises about whether a specific land use fits within a given "use" category (under the Shoreland Overly District), the interpretation shall be made by the City Council after a public hearing and a recommendation of the Planning Commission." It would appear that both the issue of the applicability of the Shoreland Overly District restrictions to developments under the category of PLCD, as well as the State mandate to expand the use of PUDs in such districts, would both be matters for the Council to decide.

Please let me know if we can provide further clarification of these matters or if additional items need be reviewed prior to the Planning Commission and City Council actions on the proposed development.

Sincerely,

Frederic W. Knaak
Afton City Attorney

The following is an outline of comments/advice/information regarding the Afton Creek Preserve PLCD from Steve Grittman, a principal at Northwest Associated Consultants, the City's planning consultant firm.

1. Regarding the stage of the review process we are currently in, which is the review of two conceptual plans: The Planning Commission and Council just need to decide if they want to approve the project or not, as a general idea. If so, there appear to be pretty easy ways to ensure that the project meets the requirements of the code. If they don't want to approve the project, it seems that PLCD approval is really discretionary – they could just decide to stop at any time if they don't think it meets their development goals. The objections being raised are technicalities, and the Council has enough authority through variance, or the subdivision/dedication review, or other land use authority, to avoid the technical problems.

2. The prohibition against joining existing "max density" lots to a new PLCD: I'm going to guess that this prohibition was written to avoid just joining existing parcels to a new PLCD development plan. Not sure what the purpose of that would be, but it seems odd that it would be intended to try and impede the "redevelopment" of an existing parcel into a different parcel. In any case, I think the attorney's reading sounds technically correct – the existing parcel at 14220 Odell can't be joined to a new PLCD. However, it seems to me that the owner of all the property could simply join the current 5 acre parcel with the surrounding parcel in a minor subdivision action, and it would no longer be subdivided to its "maximum permitted density", and could then be joined to a new PLCD.

3. The same principal applies to the access lot that provides street access to Trading Post Trail. So, it can't be included in the PLCD because it's an existing lot subdivided to its maximum density. However, the applicant could simply take a separate action to dedicate the roadway and the remainder parkland, thereby creating a street access that abuts his PLCD development property. Then, get approval of the PLCD plat which would then be connecting to an "existing" right of way. It seems to me that the access lot along Trading Post Trail does not have to be part of the PLCD.

4. In summary, I think the attorney is correct that the specific language of the ordinance doesn't allow this to be one big PLCD. But there is no way to prohibit the parts of the project to be done in separate actions to avoid the restrictions of the ordinance language.

5. The ordinance appears to be written with the presumption that somebody would approach the city with a big undivided, unoccupied piece of property and proceed to ask for PLCD approval for a development. It doesn't appear to anticipate an assembly of parcels, resubdividing and redeveloping existing conditions into a single new cohesive project. Which I would tend to ascribe to ordinance drafting issues, since reality is always different than the ideal expectations that the ordinance was written to work from.

6. The applicant would need to take things in order, to get the result he's looking for.

7. PLCD and PUD: I would agree, generally, that the PLCD looks like a PUD in a few ways – most specifically in the purpose statement language. However, I would suggest that the PLCD is much more like a separate zoning district, not a PUD in most other ways. While both a PUD and PLCD are used to achieve a design that is ultimately superior for the site than the underlying zoning, the PUD achieves that by flexibility in use, design, density, performance standards, and whatever else may be in question. A characteristic of PUD is that when an applicant wishes to flex from a standard, it is considered a

fundamental part of the PUD proposal – no variance or separate variance process is necessary. Instead, the applicant asks for flexibility under the burden of proof that the flexibility in the proposed PUD does a superior job of achieving the City's development goals. PUD is a zoning process for achieving an outcome, not a zoning district in the traditional sense.

As noted by the attorney's comment, in the PLCD currently under consideration, flexibility should be considered only by variance. This is because the PLCD has specific standards for development design and approval. The PLCD has its own permitted uses, its own performance standards, its own process for consideration and approval. It's true that the PLCD specifies some of these by reference to other "underlying" districts, but that is a drafting convenience. It could just as easily reference a specific underlying district. These aspects are the characteristics of a separate zoning district. Indeed, your ordinance defines a zoning district:

Zoning district or district means an area or areas within the City in which the regulations and requirements of this article are uniform.

It seems to me this is what is being required of the PLCD proposal – uniform specific standards - not a set of floating or undefined objectives. You only need variances when there are specific requirements to vary from. PUDs do not have such specifics.

In summary, for these reasons, I would argue that the PLCD is a zoning district, not a PUD. Apart from the "purposes" of the two concepts, I do not see much commonality between PLCD and what we typically encounter in PUD ordinances.

Deb Meade

Subject: FW: Carlson PLCD Letter
Attachments: AAA4 (1)R.jpg; AAA2 (1)R.jpg; AAA3 (1)R.jpg; AAA4 (1)R.jpg; Map of plans.docx; Carlson Letter.docx

---------- Forwarded message ----------
From: **David Husebye** <dhusebye@gmail.com>
Date: Thu, Nov 30, 2017 at 1:27 PM
Subject: Carlson PLCD Letter
To: David Husebye <dhusebye@gmail.com>

To : Ronald Moorse, City Administrator for Afton

Please forward the following to the Planning Commission for their consideration for their upcoming meeting. Please also forward to the City Council and other interested parties if that is appropriate. Please respond that you received, and can forward this information.

Thank your for your help.

David G. Husebye

5830 Osgood Ave. Court S.

Afton MN, 55001

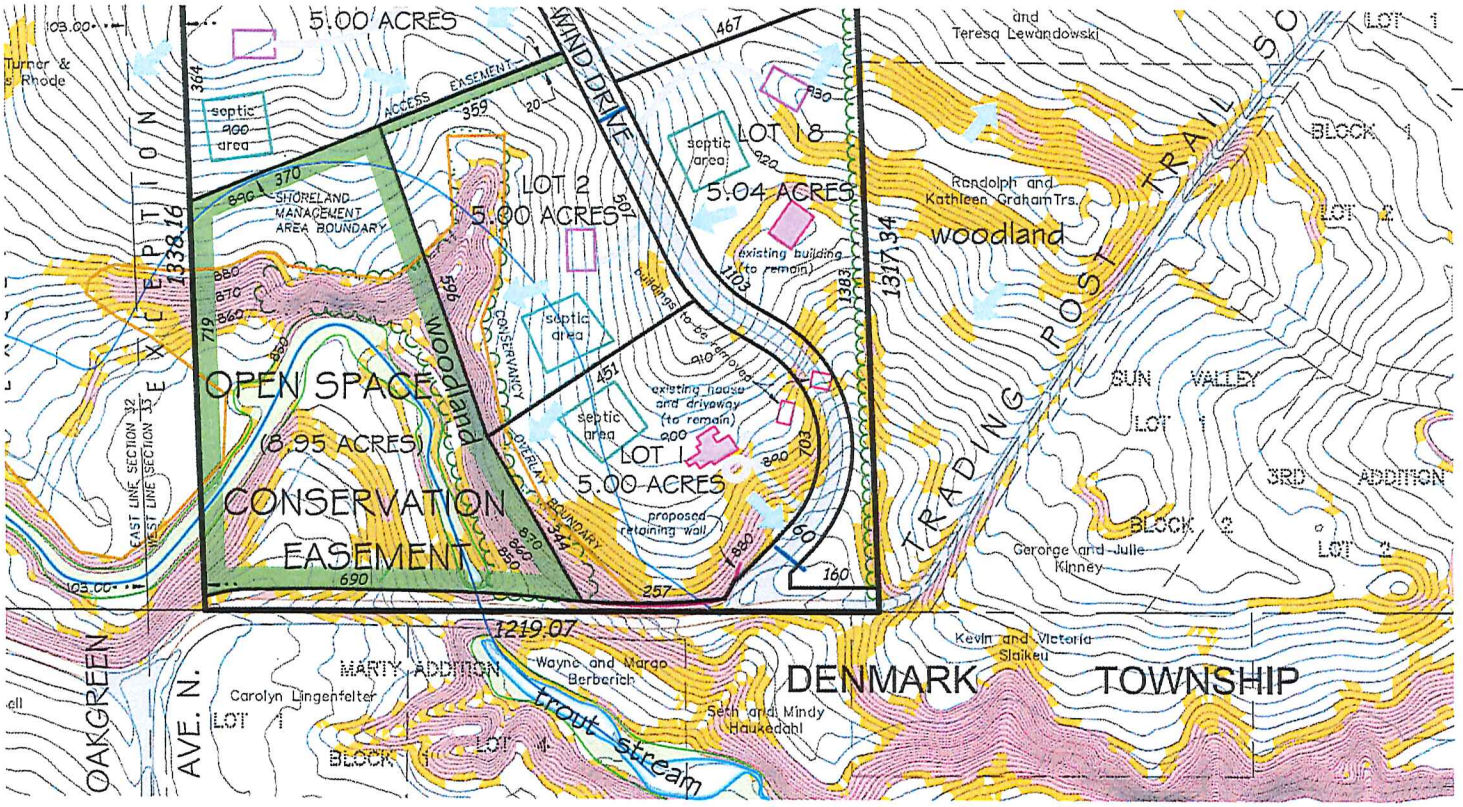
11/30/2017

AAA4(1)

AAA2(1)

AAA3(1)

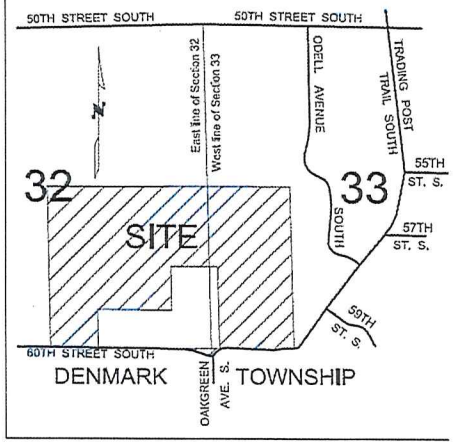
AAA4(1)



Contours are at two foot intervals and are based on data published by the Minnesota Department of Natural Resources.

Vicinity Map

no scale



OFFICIAL COPIES OF THIS MAP ARE CRIMP SEALED

I hereby certify that this survey, plan or report was prepared by me or under my direct supervision and that I am a duly Licensed Land Surveyor under the laws of the State of Minnesota.

Landmark Surveying, Inc.

November 19, 2017

Milo B. Horak, Minnesota License No. 52577 Date

Job No. 2016-c

Map of Plans

I am writing to express my concerns about the creation of a new intersection coming off the Schuster property for the Carlson PLCD. These concerns center on current and future safety issues at that location.

At the City Council meeting on October 17th there was a presentation of information on the safety at the proposed intersection. A study by Spack Consulting had been performed in the summer of 2017. The data and calculations were included in the PC Meeting Packet for 10/2/2017 (and sent by Spack 7/26/2017). Based on the volume and speed data presented, it was felt there were adequate and safe sightlines for a stopping distance for a vehicle of 275 feet based on a speed of 25 MPH. The written report uses AASHTO formula for "Inspection Sight Distance"

= 1.47 x Vehicle Speed (in MPH) x time gap

= 1.47 x 25 MPH x 7.5 seconds = 275 feet

They note a measured sight distance of 280-290 feet, thus more than adequate. In the 10/17 City Council Meeting packet WSB had a report that included more information (pages ~186-188). It stated "Although a small piece of Trading Post Trail was in a reclaimed condition (gravel) we don't believe this condition affected volumes or speeds approaching the curve." It was stated there was a 30 MPH speed sign on Trading Post Trail "just south of Odell Ave for southbound traffic." It stated that there was no road construction taking place during the study period related to the City's pavement management project. WSB also stated that paving of 60th street from Trading Post Trail to Neal Avenue by the applicant was a required "condition of the development." WSB also stated "There is no recorded accident history at this location that signifies any deficiencies in traffic operations." At the 10/17 meeting I had asked if any consideration to the slope of the road had been given. Those who presented the study findings did not directly answer. They further stated at that meeting that it was also safe at 30 MPH, but did not provide that calculation. Mr. Bush insisted the road was flat at the road entrance. Comments were made that this was not a "commuter road" or route. A non-commuter route would likely have less travel. The offered opinion was that the proposed intersection would be safe.

The traffic study was done 6/29-7/5 and included the 4th of July (a Tuesday) and 2 weekend days. During this time I commuted to work on this road in both directions. On July 5th there was a work crew with trucks scattered in the study area as the crew was clearing brush on the north side of the road on the western part of the Schuster property. This was clearly impacting speed, and the data recorded. The brush clearing was not a single day event. At the time of the study there were no posted speed limits on Trading Post Trail south of 50th Street as all signs were missing. This fall, towards the end of the repaving project including Trading Post Trail, signs were placed. The 35 MPH before 55th was placed (replaced is more correct), as was a new 30 MPH sign south of 57th. The road surface on the road in question is bituminous changing to gravel east of the proposed intersection. The gravel is exactly where the intersection is planned. The gravel portion of the road is after the curve coming downhill towards the proposed intersection from the east, not "approaching the curve." The gravel portions of Trading Post Trail have been graded on an intermittent basis this year. From what I have reviewed, the stop distance data is calculated with a paved or hard gravel road as the source of friction. Recently graded gravel is compared to snow in its ability to allow for friction for purpose of stopping. I can find no way to account for any increased distance calculation for loose gravel (as I cannot find any for snow). The 2 new proposals presented for the Carlson PLCD that I reviewed show nicely the elevations around the corner on Trading Post Trail / 60th and the proposed new intersection. At the exact road entrance, it is fairly flat (and gravel). But one needs to start stopping well before this where the slopes are 12%-17.9% or perhaps >18% (yellow or pink on my copy). Enclosed is my copy of the proposal along with a picture of a

Carlson Letter

yard stick on the curb in the foreground (AAA1). The car is in the current Schuster drive. The marked stake is the corner of the property. AASHTO guidelines use a height of 2.5-3.5 feet where each end of the measurement is made. Clearly there is a 3+ foot bank (AAA2) and brush that will interfere with sightlines at this point, if not even closer to the property corner. Moving just a few feet further up the road shows the problem further (AAA3). Around this curve with steep banks, there is currently there is no vegetation to impede vision. Going forward, this will obligate the City of Afton to keep the sight lines clean at this intersection at all times for safety reasons.

WSB may well have concluded that there is a "safe stopping distance." To date there has been no recorded accident, but there never has been more than a driveway at this location (as in the financial world, past performance is no guarantee of future performance). However, if there were to be any accident, this would be reviewed. Was the method of data collection flawed? Why was 30 MPH stated as "OK" but not shown? Using the AASHTO formula, 1.47 x 30 (MPH) x 7.5 seconds = 330 feet which exceeds the measured 270-280 feet listed. What about a truck needing to stop (at times there is fully loaded large truck traffic using this road)? A truck would require 9.5 seconds to stop by AASHTO guidelines, so at 25 MPH the distance needed to stop is 349 feet. Interestingly there is a stake along the road and listed "APPROX 335' SIGHT DISTANCE" right on the stick (AAA4). This is farther up the hill from the other pictures on the straight portion of the approaching road. The road is not flat where a vehicle would need to start their stop, and no increased distance needed to account for this is included at any time. One needs to stop coming down a steep hill into a curve with a changing roadbed. Clearly loose gravel is the roadbed for part of this distance, and likely will increase the stopping distance. Upon more careful review, all these factors could make one conclude this was never a safe intersection when it was originally created.

One might consider paving the rest of the road (to Neal Avenue paid by the developer) to get around the concern of gravel as a surface to create consistent friction needed to stop. But a paved surface would likely increase both speed and volume. This current "non-commuter" road will likely become a commuter road for more people as the metro area grows, further increasing volumes. This will also encourage more "tourist" traffic. Currently motorcycles and older model cars will slowly travel down Trading Post Trail, and frequently turn back and head north (I assume after seeing the gravel part of the road). Once paved, this will only increase traffic further. The sound issue of motorcycle noise has been raised in Afton and an ordinance proposed. As Mayor Bend stated so elegantly in the October Afton Newsletter, we cannot after the fact create an ordinance to control noise. In the future this section of road should never be paved as it will create a clear increase in the volume and speed of traffic at the proposed intersection making it even more unsafe. Paving would also likely increase overall noise. Not paving this section of 60th Street would make it so Afton's citizens would never need to request an ordinance in the future to control sound at this location.

I am concerned that the collected data misrepresents the actual conditions at the proposed intersection. If corrected, the current data appears not to support the position that the proposed road is safe. In addition, the required paving (as stated by WSB) would further increase speeds and volume to make this intersection even less safe. It would in also create the potential new problem (noise) that Mayor Bend points out cannot be dealt with by regulation after the fact.

David G. Husebye

5830 Osgood Avenue Court South

Afton, MN