

Request for Council Action

Originator Community Development	Item Rezone from B-2, General Commercial and B-1, Neighborhood Office to B-4, Neighborhood Commercial Center		#
Agenda Hearings/Public Input Ordinances	By EAS	Approved	Date January 22, 2009

Description

Case 10819A-08

Item 3

GENERAL INFORMATION

Applicant: City of Bloomington

Location: 90th St. and Penn Avenue S.: 2111, 2119, 2325 W. 90th Street; and 8901, 9000, 9001, 9015, 9031, 9056 Penn Avenue S.

Request: Rezone eight parcels from B-2, General Commercial to B-4, Neighborhood Commercial Center; and one parcel from B-1, Neighborhood Office to B-4, Neighborhood Commercial Center

Existing Land Use: Mixed Retail, Restaurants, Vacant Gas Station

Surrounding Land Use and Zoning:

- North: Single Family Residential, zoned R-1; Single-Family Residential, with Planned Development Overlay, zoned R-1 (PD); Single-Family Residential, with Flood Hazard Overlay, zoned R-1 (FH); and Neighborhood Office, zoned B-1
- South: Multi-Family Residential, zoned R-4; and Single Family Residential, zoned R-1
- East: Single Family Residential, zoned R-1; Single-Family Residential, with Planned Development Overlay, zoned R-1 (PD); Single-Family Residential, with Flood Hazard Overlay, zoned R-1 (FH); and Multi-Family Residential, zoned R-4
- West: Single Family Residential, zoned R-1; Multi-Family Residential, zoned R-4; and Neighborhood Office, zoned B-1

Comprehensive Plan: The Comprehensive Plan guides the properties to the General Business land use designation.



Motion by _____ Second by _____ to _____

QUALITY SERVICES - AFFORDABLE PRICE

PROPOSAL

The purpose of this action is to consider rezoning the nine named parcels at 90th Street and Penn Avenue South from the (B-1) Neighborhood Office and (B-2) General Commercial Zoning Districts to the Neighborhood Commercial Center (B-4) Zoning District designation.

The City of Bloomington established new commercial zoning districts in September of 2006 and has been undertaking an effort to apply the new commercial zoning districts where appropriate. The new commercial zoning districts include the B-4 Neighborhood Commercial Center Zoning District, which is intended to promote a pedestrian orientation and attractive streetscape at selected neighborhood commercial nodes within Bloomington. The B-4 District focus includes non-auto-oriented uses, and buildings close to the street with parking to the rear and side of buildings. Multi-family residential and townhouses are allowed as accessory uses. The B-4 District rezoning would ensure that any future redevelopment of the nine named parcels at 90th Street and Penn Avenue South would promote a pedestrian orientation and an attractive streetscape with non-auto-oriented uses, and buildings close to the street with parking to the rear and side of buildings.

APPLICABLE REGULATIONS

Applicable City Code sections include the following:

Sections 21.204.01 (B-1 zoning); 21.204.02 (B-2 zoning); and 21.204.03 (B-4 zoning).

HISTORY

City Council Discussion:	11/24/08- City Council Study Meeting
City Council Action:	12/15/08- City Council Meeting, Approved Resolution Initiating Rezoning
Planning Commission Update:	12/18/08- Planning Commission Meeting

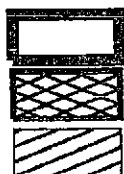
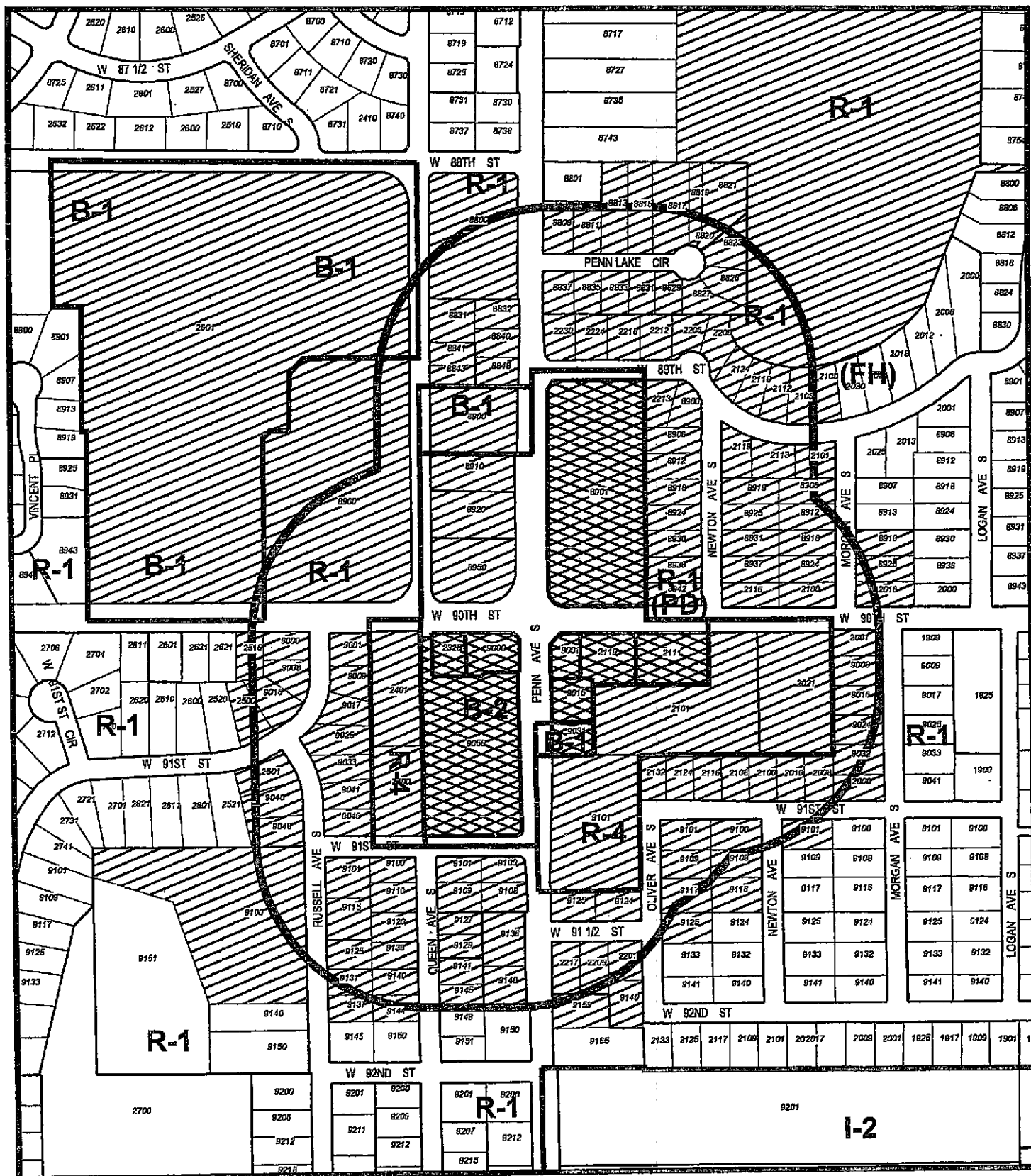
CHRONOLOGY

Administrative Agenda:	01/07/09- Administrative Hearings scheduled
Planning Commission Agenda:	01/22/09- Planning Commission Hearing scheduled
City Council Agenda:	02/23/09- City Council Hearing scheduled (projected date)

DEADLINE FOR AGENCY ACTION

Application Date:	12/17/08
60 days:	02/14/09
Extension Letter Mailed:	No
120 days:	04/15/09

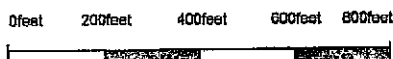
City of Bloomington Notification Map



Notification Boundary
Applicant Property
Notified Properties

Zoning District Boundary
(Labels Refer to Zoning District)

CASE
10819A-08



(A notice of this application was sent to the registered owner of these properties)

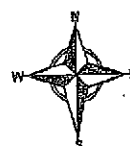
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Parcels Under Consideration For Rezoning

Zoning District Boundary
(Labels Refer to Zoning District)

CASE
10819A-08



Scale: 1:3600

Print time: 12/19/2008 17:13:23

Item 3

GENERAL INFORMATION

Applicant: City of Bloomington

Location: 2111, 2119 and 2325 West 90th Street; and 8901, 9000, 9001, 9015, 9031 and 9056 Penn Avenue

Request: Rezone from B-1, Neighborhood Office and B-2, General Commercial to B-4, Neighborhood Commercial Center

PROPOSAL

The City Council has initiated the consideration of a rezoning of 2111, 2119 and 2325 West 90th Street; and 8901, 9000, 9001, 9015, 9031 and 9056 Penn Avenue. The nine named parcels at West 90th Street and Penn Avenue South are currently under the B-1, Neighborhood Office and B-2, General Commercial zoning districts designations in the City of Bloomington. The purpose of this action is to consider rezoning the nine named parcels at West 90th Street and Penn Avenue South to the B-4, Neighborhood Commercial Center zoning district designation. (See attached: City of Bloomington Site Map, where the named parcels at 90th and Penn Avenue are indicated.)

BACKGROUND

The City of Bloomington established many of its commercial zoning districts in the 1950's. In September of 2006, the City Council updated its commercial zoning with a number of new commercial zoning districts and has been undertaking an effort to apply the new districts where appropriate. The new commercial zoning districts include the B-4, Neighborhood Commercial Center zoning district, which is intended to promote a pedestrian orientation and attractive streetscape at selected neighborhood commercial nodes within Bloomington. The B-4 zoning district focus includes non-auto-oriented uses, and buildings close to the street with parking to the rear and side of buildings. Multi-family residential and townhouses are allowed as accessory uses.

Most of Bloomington's existing neighborhood commercial areas are zoned B-2, General Commercial. A comparison of the key differences of the B-2 vs. the B-4 zoning district features is provided in the attached table. (See: Key Differences: B-2 vs. B-4.) B-4 zoning would provide opportunities for more intense redevelopment than does the current B-2 zoning, including allowing additional building size and height, and reduced setbacks along streets. A summary of key features and benefits of the B-4 zoning is provided in the attached table. (See: B-4 Features and Benefits.)

In determining where the new B-4 zoning could be applied in the City, a number of factors were considered such as: existing uses; surrounding uses; street design and traffic levels; how the existing area relates to the surrounding residential area; the need for auto oriented uses in the area; the appropriateness of the site to potentially accommodate residential uses; and the potential for area streets to accommodate future on-street parking and enhanced pedestrian crossings. A summary of how these factors apply to various commercial areas in Bloomington is attached with the staff report for item #2, Case 10818A-08. (See: Considering Whether to Apply the B-4 Zoning District-Key Factors.)

ANALYSIS

The nine named parcels at West 90th Street and Penn Avenue have been identified by the Council as areas of interest to apply the new B-4, Neighborhood Commercial Center zoning district designation. In recommending the application of the B-4 District at this location, staff considered a variety of factors:

1) The Commercial Node Itself

- a) Would the placement of buildings close to the street work with existing lot configurations?
 - i) Yes. The lots are configured in a manner that would be compatible with a B-4 style development pattern should redevelopment occur in the future.
- b) Is there a precedent within the area for buildings close to the street with parking to the side or rear?
 - i) No.
- c) Is there an oversupply of retail in the area (based on vacancies or market studies) that would suggest benefits in replacing some existing retail use with residential use?
 - i) Staff has observed high commercial vacancy rates in the 90th and Penn area.
- d) Is there a need for auto-oriented uses (gas stations, auto-service) within the node based on proximity to other auto service uses nearby?
 - i) Yes. The nearest auto service and gas station uses outside of this node are one mile east at Lyndale Avenue. Retaining the northwest corner of 90th and Penn (where there are two existing gas stations) as B-2 (as proposed) addresses the need for gas stations/auto service uses in this area.
- e) Is there adequate land area within the district to create a "B-4 experience" (sense of place, a more visually attractive street experience)?
 - i) Yes. B-4 is proposed on three of the four quadrants on 90th and Penn.
- f) What level of use nonconformity would be created by application of the B-4 Zoning District?
 - i) The vacant gas station use would become legally nonconforming as would the drive-through component of the Burger King restaurant.
- g) Has a District Plan or Neighborhood Study been prepared that recommends a B-4 style experience?
 - i) No.

2) Relationship with Surrounding Uses

- a) How large is the residential base within walking distance that would benefit from increased pedestrian orientation and more attractive streetscapes?
 - i) There is a mix of single family and multi-family uses in close proximity to the site.
- b) How many living units are within one quarter mile?
 - i) 522
- c) Does the commercial area relate to surrounding residential uses in a manner that would cause the surrounding uses to be negatively impacted by redevelopment to auto oriented uses (gas stations, auto-service)?
 - i) Yes. The immediate adjacency of several of the commercial lots in the area to single family residential uses would create negative impacts for those uses if redevelopment of this area to auto service or gas station uses were to occur.
- d) Would accessory multi-family housing or townhomes fit well with surrounding uses?

- i) Yes. If such redevelopment were to occur, multi-family or townhome use would likely be more compatible with surrounding single family residential uses than the existing commercial uses. There are already several multi-family developments near this node.

3) Street Design and Traffic Levels

- a) Does transit currently serve the area?
 - i) The site is served by Metro Transit Route #539 (the BE Line).
- b) Does the level of auto traffic work against pedestrian orientation? (Average Daily Trips over 20,000)
 - i) Penn Ave. carries an average of approximately 13,000 daily trips north of 90th and 11,000 daily trips south of 90th.
 - ii) 90th Street carries an average of approximately 11,000 daily trips west of Penn and 14,000 daily trips east of Penn.
- c) What is the potential for accommodating on-street parking?
 - i) Trip levels are compatible with on-street parking. There have been preliminary conversations with Hennepin County on preparing a study for Penn Ave.
- d) To what extent are streets conducive to pedestrian crossing (presence of "free rights", number of through lanes, left turn lanes, right turn lanes)?
 - i) A stoplight is present at the 90th and Penn intersection. Free rights are present at one of the four intersection quadrants (NW). Left turn lanes are present on all four quadrants. There are no right turn lanes outside of the "free right" on the NW quadrant.
- e) Does adjacency to a freeway work against creation of a "B-4 experience"?
 - i) Not applicable.

While there are no redevelopment proposals currently before the City at this location, the B-4 rezoning would ensure that any future redevelopment of the nine named parcels at West 90th Street and Penn Avenue South would promote a pedestrian orientation and an attractive streetscape with non-auto-oriented uses, and buildings close to the street with parking to the rear and side of buildings.

In considering what impact the proposed rezoning would have on existing development, two uses (the vacant gas station and the drive-through component of the Burger King restaurant) and multiple other characteristics (such as lot size, lot width, building setbacks, etc.) in the area would become legally nonconforming if rezoned to B-4. Nonconformities are protected under State and City laws, where they may continue as is and be repaired, replaced, restored, maintained, but not expanded. Most site characteristics such as landscaping, screening, lighting, trash, and parking lot islands, are not related to the zoning district, and are generally triggered by redevelopment of the property that goes beyond general property maintenance and upkeep.

Rezoning of the northwest quadrant of 90th and Penn to the B-4 zoning district was not initiated for the following reasons:

- Based on the lack of gas station uses to the north, south and west, there appears to be a need for gas station uses in the 90th and Penn area;
- The northwest quadrant already has two gas station uses in place, which are the only occupied gas station uses in the 90th and Penn area;
- The northwest quadrant does not border any residential uses as do the other three quadrants; and
- The existing B-2 zoning district would allow for gas station uses in the future through continuation of the existing gas station uses or through redevelopment to new gas station uses.

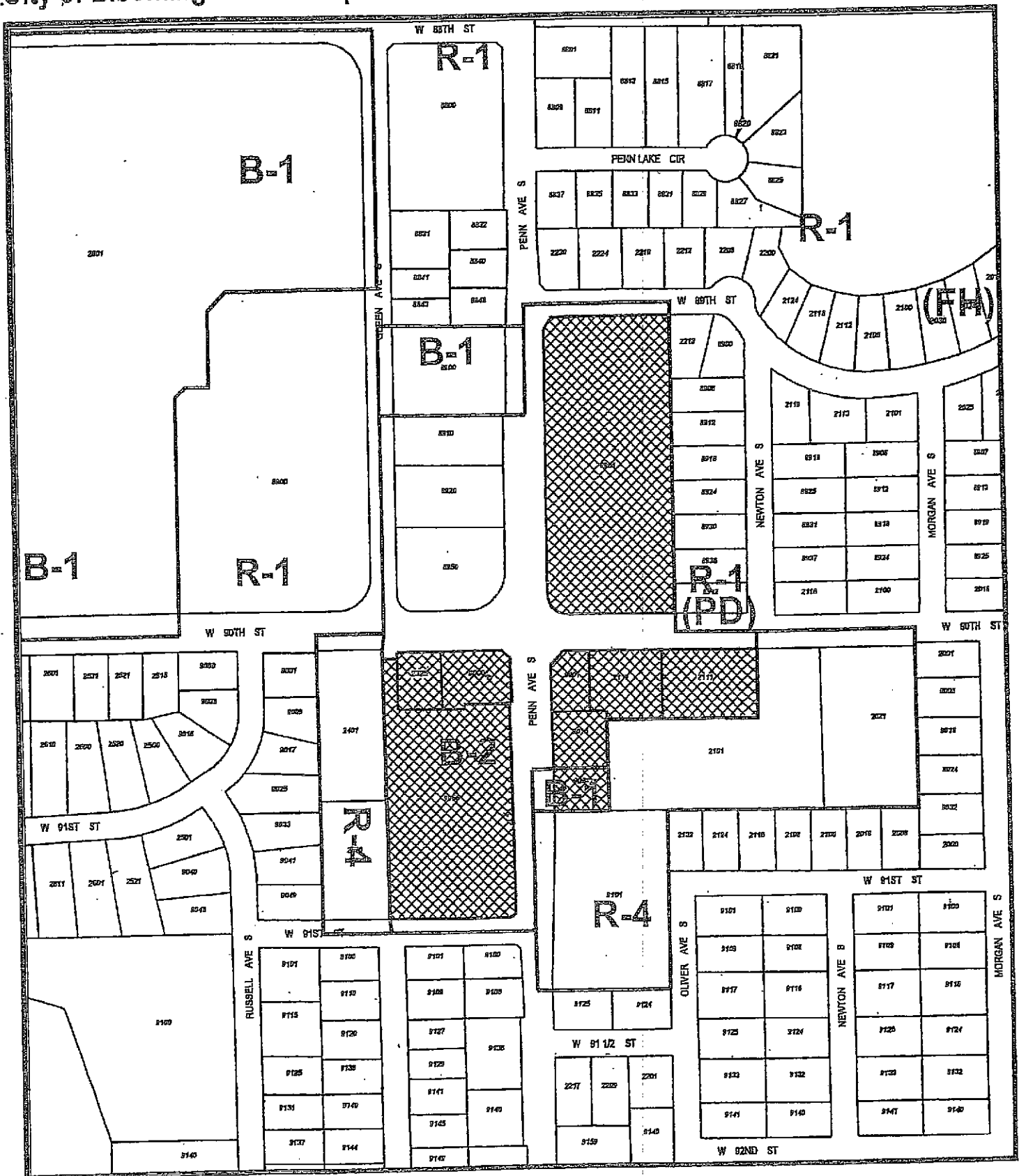
On January 7, 2009, staff conducted two Administrative Hearings on this matter, in conjunction with proposed rezonings to the B-4 zoning district designation at 84th and Lyndale Avenue South and France Avenue and West Old Shakopee Road. A summary of the Administrative Hearings is attached for reference. (See: Proposed Rezoning to B-4, Neighborhood Commercial Center, Administrative Hearings Summary, January 7, 2009.) Public comment letters and correspondence related to the rezoning of the nine named parcels have also been attached. (See: Proposed B-4 Rezoning Correspondence from the Public, 90th Street and Penn Avenue.)

RECOMMENDATION

In case 10819A-08, staff recommends approval of a rezoning from B-1, Neighborhood Office and B-2, General Commercial to B-4, Neighborhood Commercial Center at 2111, 2119 and 2325 West 90th Street; and 8901, 9000, 9001, 9015, 9031 and 9056 Penn Avenue.

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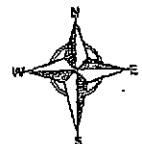
City of Bloomington Site Map



Parcels Under
Consideration
For Rezoning

Zoning District Boundary
(Labels Refer to Zoning District)

CASE
10819A-08



Scale: 1:3600

Plot time: 12/19/2008 17:13:22

Key Differences: B-2 vs. B-4

Issue	B-2	B-4
Building/Parking Placement	• Parking generally in front of building • 35 foot minimum setback	• Building near street, parking to side or rear • 40 foot maximum setback
Uses	• Residential prohibited • Drive-through restaurants allowed • Gas stations and auto service allowed	• Residential allowed • Drive-through restaurants prohibited • Gas stations and auto service prohibited
Intensity	• No minimum FAR • Maximum FAR of 0.5	• Minimum FAR of 0.2 • Maximum FAR of 2.0 (with residential, 0.5 without residential)
Design		• Streetside entrance requirements • Window requirements
Height	• Two story height limit	• Six story height limit within 200 feet of a street. • Twelve stories beyond 200 feet.

Key B-4 Features and Benefits

Issue	B-4 Features	Owner Benefits B-4 vs B-2
Building/Parking Placement	• Building near street, parking to side or rear • 40 foot maximum setback	• Lower setbacks required allowing for more efficient use of site
Uses	• Residential allowed • Drive-through restaurants prohibited • Gas stations and auto service prohibited	• Residential uses allowed
Intensity	• Minimum FAR-0.2 • Maximum FAR-2.0 w/residential, 0.5 no residential	• More development allowed
Design	• Streetside entrance requirements • Window requirements	• Advanced street presence • More impervious surface allowed
Height	• Six story height limit within 200 feet of a street. • Twelve stories beyond 200 feet.	• Higher building heights allowed

**Proposed Rezoning to B-4,
Neighborhood Commercial Center
Administrative Hearings Summary
January 7, 2009**

**Council Chambers, City of Bloomington
2:00 p.m. and 5:30 p.m.**

Staff conducted two Administrative Hearings on 1/7/09 concerning the proposed rezoning of three commercial districts in the City to the recently adopted Neighborhood Commercial Center (B-4) zoning district designation, at 90th Street and Penn Avenue; 84th and Lyndale Avenue; and France Avenue and West Old Shakopee Avenue. The hearings provided an opportunity for staff to present background on the three proposed rezonings and an opportunity for landowners and other citizens to ask questions and express their comments and concerns.

Staff presented information on the following:

- Background on commercial zoning, and newly created zones
- Hearing process and schedule
- B-4 District features and benefits of B-4 to neighbors and property owners
- B-4 vs. B-2 district comparison of standards
- What rezoning to B-4 means to existing development and nonconformity
- Where B-4 District rezonings are recommended by the Council and why locations were selected

Twelve people in total attended the hearings, primarily with an interest in the 90th Street and Penn Avenue area. Property owners and representatives of some of the affected parcels and adjacent residents were both present. Key questions, comments and concerns expressed are as follows:

- Why was the proposed rezoning initiated, who initiated it, and why at these locations? Are there imminent proposals to redevelop at these locations?
- What impact will there be on the properties once they are rezoned and become nonconforming?
- The key concern expressed by the adjacent residents (at 90th and Penn Avenue) was about the possible multi-family component and related concerns about the height of structures blocking sunlight and views; noise from car doors and alarms; and possible subsidized housing concerns. While these concerns were expressed, there was also recognition that something needed to be done to stimulate the current development situation. The adjacent residents were also relieved to learn they would have the opportunity for input in the future if actual proposals for redevelopment were being considered. Numerous comments were also made by adjacent residents about continuing noise problems with trash handling and truck parking, and lack of upkeep at the Penn Lake Shopping Center.

Administrative Hearing Summary

January 7, 2009

Page 2

- Representatives of the Penn Lake Shopping Center at 90th and Penn Avenue were present and expressed opposition to the proposed rezoning of the property. The key comments and concerns stated were that if the property became nonconforming due to the rezoning they feared they would be required to make improvements to meet the B-4 requirements; it was unfair to impose this on a handful of property owners in the City; and rezoning would downgrade the property value and the ability of the property owner to market the property in the future. They questioned the City's process in selecting the areas being considered for B-4 zoning.

**Proposed B-4 Rezoning
Correspondence from the Public
90th Street and Penn Avenue**

- **Corey and Melody Shilson, resident of 8924 Newton Avenue South (email)**
- **Nancy Espena, resident of 2106 W 89th Street (email)**
- **Howard Groff, representative of Tealwood Care Centers at 9031 Penn Avenue South (email)**
- **Norman Baer, legal representative of Penn Lake Shopping Center at 8901 Penn Avenue South (2 letters)**

Elizabeth Shevi - Case 10819A-08

From: COREY SHILSON <cmshilson@msn.com>
To: <planning@ci.bloomington.mn.us>, <eshevi@ci.bloomington.mn.us>
Date: 01/06/2009 7:49 PM
Subject: Case 10819A-08

We have some major concerns regarding the proposal to rezone the strip mall on 89th and Penn from a B-1, B-2 to a B-4 designations - Case 10819A-08. Our house sits directly behind the current businesses. Our back yard butts right up to the Snyder's Drug and currently vacant building (the old grocery store). We already are awakened by 5AM delivery and garbage trucks (including Saturdays!). With the proposed rezoning, we fear that our privacy and solitude will further be dismantled and interrupted. We are not just thinking about the months of construction that will be going on to create the new structure. We are looking to the future. With the new businesses and housing (can you promise it won't be section 8?) that will be going in, the noise from the parking lot (which will be in our backyard!), and the increased vehicle traffic from businesses and tenants will most assuredly increase the noise and air pollution. There is no possible way for us to raise a family (we have a five year old and three year old boy) in the location that we fell in love with a little over six years ago after moving from very busy and noisy south Mpls.

We don't want to raise our young children in a busy, overcrowded, noisy, neighborhood.

Here are a few additional questions to answer. Will a tall building be replaced by the current one level building? Will we lose the view of the night sky? We love sitting in our backyard listening to the high school football games. Will we be able to hear them anymore? Will we have a big eyesore as we gaze through our backyard fence? Can you guarantee us that the life in our home and time our family enjoys in our private backyard won't be interrupted? Will neighbors be able to look out their window from their condo or townhome and be able to see us in our backyard? How about the property value of our home continuing to spiral downward because of the now lack of privacy due to the re-development? Is this what Bloomington deems as a positive addition? Multi-level intrusive buildings within a residential neighborhood? Maybe south Mpls. wasn't so bad afterall. I hope you take these concerns into consideration when determining the rezoning proposal.

Corey and Melody Shilson
8924 Newton Ave S.

Elizabeth Shevi - Fwd: file 10819A-08

From: Cyndi Osberg
To: Shevi, Elizabeth
Date: 01/12/2009 8:32 AM
Subject: Fwd: file 10819A-08

>>> nancy espena <nespena@yahoo.com> 01/10/2009 6:02 PM >>>
hi,

we recieved a letter from you about file 10819A-08. it told times of meetings but said we could go to the bloomington web site or email for more information. we tried to find info on the bloomington web site but couldnt find any. could you tell us what this is about. what are they planning for property on W 90th and penn?

thank you ,
nespena@yahoo.com

Elizabeth Shevi - Fwd: Case #10819A-08

From: Cyndi Osberg
To: Shevi, Elizabeth
Date: 01/14/2009 8:02 AM
Subject: Fwd: Case #10819A-08

>>> Howie Groff <howie.groff@tealwoodcc.com> 01/13/2009 4:53 PM >>>
Could you please tell me if existing properties are grandfather in under these proposed changes? Our address is
9031 Penn Avenue South.

I thanks you in advance,

Howard Groff
Tealwood care Centers
9031 Penn Avenue South
Bloomington, MN

ANTHONY OSTLUND BAER
LOUWAGIE & ROSS P.A.

BUSINESS LITIGATORS

NORMAN J. BAER

Email: nbaer@aobl.com

January 5, 2009

VIA FACSIMILE and U.S. MAIL

Planning Division
City of Bloomington
1800 W. Old Shakopee Road
Bloomington, MN 55431-3027

Re: Case #10819A-08
Proposed B-4 Rezoning

Commissioners and Staff Members:

I am writing on behalf of the owner of the Penn Lake Shopping Center (90th Street and Penn Avenue) to object to the proposal to rezone that property from B-2 to B-4. The proposed rezoning is arbitrary and capricious. If the proposed rezoning were to become effective, it would have a dramatic, negative impact on the value of my client's real estate – it would constitute a partial taking for which my client would be entitled to compensation.

As stated in the Notice of Public Meetings, the City is proposing to impose the far more onerous B-4 zoning restrictions only at "selected neighborhood commercial nodes." However, neither the zoning ordinances nor the Notice of Public Meetings disclose how those "selected neighborhood commercial nodes" should be or have been selected. The effect is that some owners of B-2 zoned real estate within the City will be required to bear the new B-4 restrictions while others will not be required to do so – and there are no objective criteria for deciding which properties will fall into each category. Rather, the decision to impose the new B-4 designation is apparently left to the unfettered discretion of the City. That degree of discretion invariably leads to decisions that are arbitrary. In the instant case, the arbitrary and capricious nature of the City's proposal is apparent from the fact that the "selected neighborhood commercial nodes" include only one intersection in the entire City and, even at that intersection, the City is inexplicably proposing that the properties on three of the corners be rezoned to B-4, while the fourth corner remains under the B-2 zoning.

Undoubtedly, the City's initial response will be to offer assurances that my client's legal nonconforming site characteristics are protected as a matter of state law and Section 21.504 of the Bloomington City Code. There are, however, significant limitations on the protection afforded to legal nonconforming site characteristics; and those limitations are subject to the

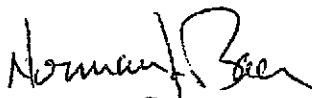
City's exercise of discretion, which again is not limited by any objective criteria. For example, Section 21.504(c)(1) allows the legal nonconformance to continue but only "with any necessary approvals," an undefined term. Similarly, Section 21.504(c)(4) requires that the property be brought into conformance upon the "issuance of a permit for a related site characteristic, if conformance is stipulated as a condition for permit approval." No great imagination is needed to conclude that the City is highly likely to make conformance a condition for permit approval. Once again, there are no criteria for when such a condition for permit approval would be appropriate. Even more egregious is the catch all that ends Section 21.504(c)(4)(D): Conformity will be required upon "A determination by the issuing Authority that the site characteristic must be brought into conformance to protect the public health, safety and welfare." Presumably, the B-4 zoning district would not have been created but for the fact that the City believes that it promotes the public health, safety and welfare. Thus, Section 21.504(c)(4)(D)(vi) renders illusory the protections purportedly afforded legally nonconforming uses.

The cost of making my client's property conform to the B-4 zoning restrictions would be enormous. Indeed, the only way to come into compliance would be to raze the existing buildings, reconfigure the entire site, and rebuild. This reality very significantly devalues the property in the context of any future sale. Similarly, given that any material expansion of the shopping center would, pursuant to the Code, require conformance with the new zoning restrictions, rezoning this property to B-4 would have the effect of making it impossible to expand the shopping center. Thus, a current tenant with a desire for more space will be forced to move out. Prospective tenants who foresee the possibility of growth will be reluctant to move in. The inevitable result is a downward pressure on rents, making the property less valuable today, without regard to any future sale. These economic realities would, of course, be substantially mitigated if all of the B-2 zoned property in the City were rezoned B-4 – which brings us full circle back to the City's arbitrary and capricious selection of only "selected neighborhood commercial nodes" (and only a portion of such a node in this instance) to bear the burden of the new B-4 zoning restrictions.

We look forward to hearing the City's response to these issues at the public hearing on January 7, 2008.

Very truly yours,

ANTHONY OSTLUND BAER
LOUWAGIE & ROSS P.A.



Norman J. Baer

NJB/jmb

cc: Robert Levine

RECEIVED
DIVISION OF CITY PLANNING

JAN 07 2009

CITY OF BLOOMINGTON
MINNESOTA

ANTHONY OSTLUND BAER
LOUWAGIE & ROSS P.A.

BUSINESS LITIGATORS

NORMAN J. BAER
Email: nbaer@aobl.com

January 8, 2009

VIA FACSIMILE and U.S. MAIL

Planning Division
City of Bloomington
1800 W. Old Shakopee Road
Bloomington, MN 55431-3027

Re: Case #10819A-08
Objection to B-4 Rezoning of Penn Lake Shopping Center

Commissioners and Staff Members:

This letter provides comments resulting from the Administrative Public Hearing conducted on January 7 at 2:00 p.m. I attended that Hearing as counsel to Penn Lake Shopping Center, LLC. Robert Levine also attended as a representative of the owner. After carefully listening to the staff explanations and responses to the questions posed, and doing some follow-up investigation, it is clear that there is no sound basis for the proposed rezoning of the Penn Lake Shopping Center. Please make this objection to the proposed rezoning a part of the City's record with respect to this issue and provide it to the Planning Commission and City Council in connection with any further consideration of this proposal.

One of the issues that was of particular interest to Penn Lake Shopping Center is how it came to be one of the very small handful of sites in the entire City to be selected for rezoning to B-4. The Administrative Public Hearing did nothing to answer that question. Rather, the information provided at the Hearing made it even more clear that the selection of Penn Lake Shopping Center was entirely arbitrary and capricious and, therefore, entirely improper. To be sure, the planning staff distributed a list of "Factors Considered for B-4 Area Selection." However, the staff was unable to describe with any clarity or specificity how that list of factors resulted in the selection of Penn Lake Shopping Center or, conversely, the exclusion of any of the other similarly situated shopping centers in the City. Reviewing the identified criteria specifically:

- Existing uses – This factor obviously applies equally to all shopping centers and thus provides no basis for singling out Penn Lake. Moreover, as the staff was quick to point out, the rezoning does not require any immediate change in use of property, so there is no reason that the B-4 rezoning should be inapplicable to gas/service stations (such as on the northwest corner of Penn Avenue and 90th Street). In short, given that the stated purpose

of the B-4 rezoning is limited to future redevelopment of property, focusing of "existing uses" is meaningless.

- Surrounding uses – Two sides of the Penn Lake Shopping Center (south and west) border on busy streets with commercial businesses on the other side of the streets. To the north, Penn Lake borders on another street with residential properties on the other side of the street. To the east, Penn Lake directly abuts residential properties. Ironically, compliance with the B-4 zoning requirements would result in the Penn Lake parking lot being moved closer to the abutting residential properties to the east. The staff suggested that this factor favored the rezoning of the Penn Lake Shopping Center but, again, these surrounding uses do not distinguish this property from numerous others throughout the City. In fact, these surrounding uses do not even distinguish Penn Lake from the property immediately across Penn that has somehow been exempted from the rezoning proposal.
- Street design and traffic levels – As explained by the staff, this factor has to do with the availability of on street parking and the recognition that some parts of the City have such high traffic volumes that they are very unlikely to ever be pedestrian friendly. That explanation makes sense until one tries to apply it to this site. Indeed, that explanation would seem to disqualify the Penn Lake site from consideration for rezoning to B-4.

To begin, there plainly is no on-street parking available currently at the intersection of Penn and 90th – and reality tells us there will never be on-street parking at or near that busy intersection. At the Hearing, staff stated that Penn Avenue (Hennepin County Road 32) is being studied (or is being considered for study) by Hennepin County. However, a review of the Hennepin County web site, and the "2030 Hennepin County Transportation Systems Plan" reveals that there is no current study of Penn Avenue; no future study (between now and 2030) is included in the County's plan; and Penn is projected to remain a "minor reliever" with no safety improvement plans (funded or unfunded) and no plans for bicycle use. In short, there is absolutely no reason to believe that the County is going to provide for on-street parking at this intersection anytime in the next 20+ years. Likewise, the staff conceded that there are no plans for the City to allow on-street parking along 90th Street near the Penn Lake Shopping Center.

As to traffic volumes, the County has forecast that traffic counts along Penn will stay virtually unchanged from now until 2030 assuming that transit ridership meets the Met Council goal of doubling during the same period. Thus, past challenges with increasing the use of mass transit (much less doubling such use) suggest that, in fact, the traffic counts at the Penn and 90th intersection will increase and this area will become even less pedestrian friendly than it is already. In addition to the high volume of traffic, it should be noted that there is no sidewalk abutting the Penn Lake Shopping Center property (and no plans by the City to construct a sidewalk). Finally, the elevation of the entire shopping center is several feet below the roadway which, absent very significant cutting or filling, also makes this property particularly ill-suited for use by pedestrians.

- Extent existing commercial area relates to surrounding residential area – Which way does this cut? If the shopping center currently draws more from the surrounding residential area does that make it more or less suitable for B-4 zoning? Why? More importantly, how was this factor applied in the decision to include Penn Lake in the proposed rezoning? Did someone determine the “extent [Penn Lake] relates to surrounding residential areas? Who made that determination and how? How did the same factor work against including other shopping centers? How did this factor work to exempt the commercial developments directly across the street (gas/service stations)? None of these issues were addressed at the Administrative Public Hearing and the staff made it clear that it was unable to address these issues.
- Need for auto oriented uses in the area – The reason for this factor and its application to the Penn Lake Shopping Center also was not explained. Staff did suggest that this factor was a significant consideration in the decision to exempt the fourth corner at Penn and 90th from the proposed rezoning. But, at the same time, staff made it clear that the proposed rezoning would not have any impact whatsoever unless and until a property was redeveloped. In other words, according to the staff, applying the B-4 zoning designation to a gas/service station would have absolutely no impact on “auto oriented uses” unless at some point in the future the property owner decided to change the use of the property. As with the other factors, there was no explanation at the Hearing or in the materials distributed before and at the Hearing as to how this factor made Penn Lake different (and more deserving of B-4 rezoning) than any other shopping center in the City.
- Appropriateness of sites to potentially accommodate residential uses – If this means that someone has concluded that the corner of 90th and Penn would make a good residential site, it is a questionable conclusion in light of the comments above regarding surrounding uses, street design and traffic volume. More importantly, if 90th and Penn would be a good site for residential development, then there are numerous other shopping centers and other commercial developments throughout the City that would also satisfy this criterion. Why was Penn Lake singled out?
- Potential for area streets to accommodate future on-street parking and enhanced pedestrian crossings – Please see the comments above with respect to “street design and traffic levels.” According to the staff comments at the Hearing, this factor is redundant to that earlier one.

In short, the factors for selection of sites for B-4 rezoning as identified at the Administrative Public Hearing cannot justify the decision to include Penn Lake Shopping Center; cannot justify the decision to exclude the northwest quadrant of the Penn and 90th intersection; and cannot justify the decision to burden only a handful of properties with the B-4 zoning when any number of other sites in the City would fare the same or better in the application of these factors.

Staff said that a total of approximately 10 sites were considered for this rezoning proposal. On behalf of my client I request that those sites be identified. We would also like to know the means by which those sites (and not others) were put on a list for consideration. And, we would like to see any documentation by which the City Council, the Planning Commission and/or the planning staff applied the factors identified at the Administrative Public Hearing to each of the considered sites.

The second issue that was addressed at some length at the Hearing was the impact of the proposed rezoning on what would become legal nonconformities. The staff insisted that the proposed rezoning would have absolutely no effect except in three specific circumstances: (1) any request to expand an existing building; (2) any redevelopment of a rezoned site; and (3) a request to add a use that does not already exist and does not conform to the B-4 requirements. That explanation is certainly significantly narrower than the discretion afforded the City by Section 21.504 of the Ordinances. Is it truly the City's intention in this instance to give up the enforcement rights reserved to the City under Section 21.504(d)(iii) and (vi)?

If this rezoning is truly based upon long term visions of a more pedestrian friendly environment, why not make the public improvements (sidewalks, on-street parking, enhanced pedestrian crossings, etc.) that are necessary to such an environment before the burdens of this rezoning are put on the property owners? If the proposed rezoning is in anticipation of some future (as yet unplanned) redevelopment but not applicable until then, why not make the rezoning conditioned upon the submission of a redevelopment plan rather than burden the property owners now? With all due respect, imposing the rezoning now is a serious case of putting the cart before the horse -- it will impose burdens on a few unfairly selected property owners but will not advance any public interest whatsoever.

My client understands the value of municipal planning when it is done right. Accordingly, if the City is intent on establishing one or more B-4 zoning districts, we offer these suggestions:

- Establish some meaningful criteria for determining where such districts are most suitable and an objective means for applying those criteria to more than a handful of properties.
- Study, approve, and fund the public improvements that are necessary to promotion of the goals of the B-4 zoning districts before imposing the burdens of rezoning on any property owner.
- Consider creating an incentive for property owners to volunteer for the perceived benefits of B-4 zoning rather than imposing the zoning where it is not desired. If no one volunteers, reexamine the perceived benefits to see if they are real.
- If the rezoning is to have the very limited effect that staff described at the Hearing, then, in connection with the rezoning, formally disclaim the discretionary rights afforded the City by Section 21.504 of the Ordinances.

I have not, in this letter, discussed the impact that the proposed rezoning would have on the use of the Penn Lake site in the future. However, I note that one of the B-4 requirements is a 20,000 square foot "no parking" zone adjacent to intersections. Penn Lake is adjacent to two intersections, thus this requirement alone would burden 40,000 square feet (more than 20%) of my client's property. Other economic impacts were addressed in my letter of January 5, 2008, which is incorporated herein by reference.

On behalf of my client, I urge the City to reject the proposed rezoning of the Penn Lake Shopping Center. The process used to single out this property for the burdens of this rezoning were not reasonable and objective. The factors cited by staff cannot explain why Penn Lake was selected while dozens of other shopping centers were excluded. Either there were undisclosed factors considered, or the process was totally arbitrary and capricious. In either case, the process was fatally flawed and any resulting rezoning would be improper.

Very truly yours,

ANTHONY OSTLUND BAER
LOUWAGIE & ROSS P.A.



Norman J. Baer

NJB/jmb

cc: Robert Levine