



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

Date: March 6, 2008

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

Referral to: Zoning and Planning Committee

Subject: Appeal of the Zoning Board of Adjustment action denying a Certificate of Nonconforming Use to legally establish ten dwelling units at 2400 Dupont Avenue North in the R2B Two-family District

Recommendation: The Zoning Board of Adjustment adopted staff recommendation and denied a Certificate of Nonconforming Use to legally establish ten dwelling units at 2400 Dupont Avenue North in the R2B Two-family District.

Previous Directives: N/A

Prepared or Submitted by: Brian Schaffer, City Planner, 612-673-2670

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

Presenters in Committee: Brian Schaffer, City Planner

Financial Impact (Check those that apply)

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

Community Impact (use any categories that apply)

Ward: 5

Neighborhood Notification: Hawthorne Area Community Council was notified of the appeal on February 25, 2008.

City Goals: See staff report.

Comprehensive Plan: See staff report.

Zoning Code: See staff report.

Living Wage/Job Linkage: Not applicable.

End of 60/120-day Decision Period: The end of the 60 day decision period was February 12, 2008. On February 5, 2008 Staff sent a letter extending the decision period another 60 days. The 120 day decision period expires April 11, 2008.

Other: Not applicable.

Background/Supporting Information Attached: Leroy Smithrud filed an appeal of the Zoning Board of Adjustment decision denying a Certificate of Nonconforming Use to legally establish ten dwelling units at 2400 Dupont Avenue North in the R2B Two-family District

The Zoning Board of Adjustment voted 7-0 to deny the certificate of nonconforming use on February 7, 2008. The appellant filed an appeal on February 15, 2008. The appellant's statement is included in the attached supporting material.

Supporting Material

- A. Appellant statement of appeal
- B. February 7, 2008 ZBOA Meeting Minutes
- C. February 7, 2008 ZBOA Staff Report with attachments
- D. Letter from citizens provided to ZBOA members on February 7, 2008
- E. Letter from Hawthorne Area Community Council provided by the applicant on February 7, 2008
- F. Purchase agreement for 2400 Dupont Avenue North provided on February 7, 2008

Board of Adjustment Hearing Testimony and Actions

Thursday, February 7th, 2008
4:30 p.m., Room 317 City Hall

Board Membership: Mr. Matt Ditzler, Mr. John Finlayson, Mr. Paul Gates, Mr. Chris Koch, Ms. Marissa Lasky, Ms. Alissa Luepke Pier, Mr. Bruce Manning and Mr. Matt Perry

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

3. **2400 Dupont Avenue North (BZZ-3912, Ward 3):**

Leroy Smithrud has applied for a Certificate of Nonconforming Use to legally establish a 10 unit apartment building at 2400 Dupont Avenue North in the R2B Two Family District.

Mr. Ditzler moved and Mr. Finlayson seconded the motion to adopt staff recommendation and **deny** the Certificate of Nonconforming Use to legally establish ten dwelling units at 2400 Dupont Avenue North in the R2B Two-family District.

Roll Call Vote:

Yeas: Ditzler, Finlayson, Koch, Lasky, Luepke Pier, Manning and Perry

Nays: None

Recused: None

Absent: None

TESTIMONY

Mr. Gates: Thank you Mr. Schaffer. Mr. Ditzler.

Mr. Ditzler: Mr. Schaffer, just for clarification, I think you've said it a couple of times, but I just want to make sure that I have the timeline correct. The City considers abandonment to be the day that the rental license is closed. Not the day that the rental license expires. Is that correct? Because it would have expired on September 8th of 2004 but it wasn't revoked or closed until January, is that correct?

Mr. Schaffer (Staff): It would have expired on 2004 and it was revoked in January, so it was revoked nine months prior to when it would have expired. Staff uses recognized rental license as a use of that property and not having rental licenses as a discontinuance of that use. In this situation, the applicant would have had to re-establish and gone through the VBR process to remove the building from that to get those licenses renewed. In either situation, the licenses ... in the least severe situations, the licenses would have expired in September 2004; which still is three-and-a-half years.

Mr. Ditzler: My second questions, I know that there are several letters of condemnation that were sent to the applicant, but in regarding to the first point there, May 9th 2003, the first notice that was sent said it was resolved in 2005 is that to implicate that the owner

did the necessary required repairs and did them legally and that was lifted? I know that it comes up a couple of months later, but is that what that means?

Mr. Schaffer (staff): Chair Gates, Board Member Ditzler, when something has been resolved, it typically means the applicant has paid the fees or gone through the process. We don't have someone here from the Problem Properties Unit that runs that, so I can't tell you exactly what it means. The flags that are put in KIVA, prohibits any other permits from being issued until this is resolved, so at that point, that portion was resolved.

Mr. Manning: Can you tell me what is the level of proof that the applicant is required to meet? I understand that he bears the burden. Is it a 50 plus one, is it bigger than that, is there a position in the code that is taken on this issue anywhere?

Mr. Schaffer (staff): Chair Gates, Board Member Manning, the code does not define what that burden of proof shall be. The way we look at it is the reason for that lapse and abandonment, or in this situation discontinuance of use, staff has felt that Mr. Smithrud has experienced a lot of medical problems that have caused a great burden to him, but that period of time has been a long period of time.

Mr. Byers: Board Members, if it helps, the staff certainly does consider whatever evidence the applicant brings in, but we also recognize that applicants actually have ... property owners have a responsibility that if they are not personally able to handle the matter that they can either have someone else handle it for them for hire or by some agreement. We keep in mind that just because a property owner can't personally handle all the problems because of their own circumstances that that does not release them from their obligations in relation to the property.

Mr. Schaffer (staff): I would just direct you back to the rebuttal of abandonment definition in the code, the first page of that, Mr. Poor is getting a copy of it, but the property has ... I'm just going to re-iterate so everyone is clear exactly what it states ... "A property may rebut the presumption of abandonment only by presenting clear and convincing evidence that the discontinuance of the non-conforming use or structure for a specified period was due to circumstances beyond the property owner's control. The property owner shall bear the burden of proof."

Mr. Manning: That's usually interpreted, as I understand it, to be greater than 50 plus one, 50 plus one is thought of as preponderance, so I think that answers my first question, I thank Mr. Poor for doing that. My second question is, is there a tolling, if we were to find that, circumstances beyond the applicants control caused him to...that he met this requirement. Is he...is there a tolling period that is say, he was falling in and out of bad circumstances beyond his control, does the clock restart at zero, every time you are hit with a 60 day circumstance beyond your control, or is there a cumulative affect, or is it again not determined in the code?

Mr. Poor (Zoning Administrator): Chairman Gates, Board Member Manning, it is the continuous discontinued use, so one event, even one day can re-vest the rights if you will, so in other words, if you go to the 363rd day and you use the property in the way that it had non-conforming rights, you've then re-invigorated the rights and the clock starts over.

Mr. Manning: If I may be permitted to follow up then, if you fail to do that, on the 363rd day because that day, heaven forbid, something bad beyond your control happened to you, does the clock stop while you recover from that event and then you're down to two more days before you lose it?

Mr. Poor (Zoning Administrator): It really doesn't, I would answer that this way, is that you have to use the property in the way that it has non-conforming rights to keep the rights alive. The discontinuance, we really don't get into many of the extenuating circumstances, it's really about the use of the property. Our City Attorney actually has looked at this issue and there was some case law in Minnesota and one of the things that we found out is Minnesota is somewhat unique compared to other states in that the burden is really on the property owners to show that they did not discontinue the property. In particular when it's the use that's non-conforming, I think the item before us is really a non-conforming use in front of us. The building may be conforming, it may meet setbacks, it may meet other building codes...but it is its use has a higher density building that's in question. In that case, the City actually doesn't have as high a burden. Let's see if I can find the line here from our fine City Attorney. When it is non-conforming use, regardless of the marketing of the building for sale or a cancelled rental license, the rights would still lapse, it's because it's the use. The structure's have certain rights that are more durable that may be retained, but when it comes to the use of a property, because we're not saying they can't use the property, they just can't use it in a way that they may want to. So, in Minnesota, based on some case law, the City Attorney has said that even if they are marketing it actively, they're not using it. That can constitute a loss of the non-conforming rights if that period is long enough. This case in particular really comes out as we talked about the Problem Properties Unit and there was some boarding and condemned items, so it really has come to us another way, and I would add that one of the reasons they're here is because we wrote them a letter informing them of this fact, so we didn't sit back in the weeds, we actually proactively notified them that this was an issue and that this was the means to rebut that.

Ms. Luepke Pier: Brian, would having pulled a permit during this one year window countered the discontinuation of use if he had pulled a permit during that time to do work.

Mr. Poor (Zoning Administrator): Chair Gates and Board Member Luepke Pier, it depends on the permit, but we've had this where people pull permits, but they may never even finish the work, it's really about the use of the property. So the short answer is no, in and of itself, the pulling of a building permit may not be enough to rebut that.

Ms. Luepke Pier: Did the applicant pull any permits during that one year window?

Mr. Schaffer (staff): Chair Gates, Board Member Luepke Pier, the applicant did not pull any permits, the work at one point was done we showed that there was a citation for non-permitted work. The work was done without a building permit in 2005 I believe it was. So it was non permitted work and it went through the zoning office. In most situations, to pull any permits on what the property was once it went through VBR, it would have required the property to be taken off the vacant and boarded registration list and go through the proper channels at the Problem Properties Unit prior to the releasing of any authorized work to the property.

Mr. Gates: Mr. Schaffer, a question about the issue of discontinuance. I take it that that term is not really defined any further than what I read in the 531.40.1. Tell me if I'm wrong, staff interprets discontinuance to mean that occupancy has ceased. So the only way for them to maintain continuity here would have been to occupy all 10 units continuously.

Mr. Schaffer (staff): Chair Gates, Board Members, we recognize it as use, so in this case, it's a residential building, so occupancy, or in a situation where we know that if you have, in some markets you have eight units and two units of your building in this situation weren't being rented out because you couldn't find a tenant for that, that would not lose your rights if that lasted for a year, because you would have the rental licenses of 10 units, or a rental license exemption, which is another option for property owners to do if they aren't going to be able to rent out those units at a certain point and time.

Mr. Gates: To me there might be argument that there is a gray area between what staff considers continuous use and what might be considered to be abandonment. If an owner is paying taxes on property, mowing the lawn, shoveling the snow, is that property really abandoned? It certainly is not...if use means occupancy, then it's not being occupied as designed or intended, but is it abandoned?

Mr. Poor (Zoning Administrator): Chairman Gates in this case though, there is a rental license exemption that can be obtained exactly for those purposes to say that is in fact one of the key reasons they created the rental exemption. So that ... say if you're going to redo a building completely and may not rent it for a year-and-a-half, you're not walking away from your rights. We have a fair amount of non-conforming uses in the City.

Mr. Gates: Okay, and understanding that, a person might fail to do that and yet, have they abandoned their property if they are caring for it in a conventional manner? Painting it, mowing the lawn, paying it's taxes?

Mr. Poor (Zoning Administrator): I guess, the way I would answer it is, first, should we even know about that event, should we be asked about it, I'm not sure where we would come down, we would probably dig a little deeper, but if they said, oh no, I haven't used it for two years, I just keep changing the color of the room and can't seem to rent it, I suppose if we were goaded into that position, we would probably say well, maybe you lost the rights to that one unit. But that's really not a question we see very often, we tend to see that the building itself has not been used for some extended duration. So Again, I'm speculating, but I suppose if somebody wanted to insist upon telling us how they haven't used the 10th unit for a few years, we would probably say, well, now you've got nine and you can appeal that decision to the Board of Adjustment, but ... it's just not a question that comes before us.

Mr. Manning: Am I correct Mr. Schaffer, that the issue is not whether there are actually tenants living in the 10 units, but whether there are... there's a valid rental license and attempts to rent and that counts as use for purposes of a non-conforming use and while you may shovel the walks and trim the grass, that's independent from whether or not ... how you're using the building in it's non-conforming fashion?

Mr. Schaffer (staff): Chair Gates, Board Member Manning that is correct in your interpretation. I understand ... back to your question that you were asking Chair Gates, about abandonment versus discontinued use, the semantics again come down to

verbiage verses what the actual intent was. It's pretty clear how that's spelled out after the word abandonment.

Mr. Gates: Is the applicant here? Do you wish to speak?

John Waldron: 1951 Concordia Street, Wayzata, MN, Waldron Law Offices, Ltd., I represent the applicant Leroy Smithrud. First of all I wanted to correct one statement in the staff's report, to the extend that it's relevant; Mr. Smithrud has made efforts to try to sell the property. It sounded like that is one addition that the staff has looked at in terms of whether the property is being actively used or not. He had ... they had mentioned that there is some antidotal evidence of that. I do have a purchase agreement with me, I don't know that the Board has seen it or not. The property has been under contract since September of 2007 and that buyer's representative is in the room today in case the Board has any questions of him, basically at this point, we're dealing with a building that's been a 10 unit building and has been a legal non-conforming use for over 40 years. The applicant at this point is merely seeking to be able to sell the property to this buyer that's waiting in the wings as we speak, and immediately get this building rehabbed and back in presentable condition and rent it. I think from a public policy viewpoint, it seems to me that there should be a bias in terms of allowing this to precede as apposed to saying nope, sorry, it's only going to be a two unit and who knows how long it's going to take before this property becomes a benefit rather than a blight on the neighborhood.

Mr. Gates: I'll just note in the staff report that I do read that a building being listed for sale constitutes use? If you have a purchase agreement we'd like to see that.

Mr. Waldron: If I may approach I can give you that.

Mr. Gates: Give it to the clerk please.

Mr. Waldron: Mr. Smithrud tells me that the efforts of sale actually began, I believe in 2006, and while we don't have any written evidence of that, we can certainly supply it. But otherwise as I mentioned, the purchase agreement I just submitted has been active since September of 2007. The narrow question, as I see it, that's before the Board today is ... were there circumstances beyond the applicant's control that caused this use to be discontinued? That's simply the language of the ordinance. The applicant can rebut the presumption of abandonment as it were, if he can show that the discontinuance was due to circumstances beyond his control, and as you know, he submitted his medical condition primarily as those circumstances being beyond his control. I'll point out that in doing some research on this, there are actually some specific cases from other parts of the country where this very circumstance was found to be something that was beyond a property owners control, illness, has been found specifically by courts in other jurisdictions to be a circumstance that is beyond a property owners control, and this exact type of issue where there was a non-conforming use that was discontinued and the applicant then came back and tried to get it re-instated. So there is definitely legal precedence for this particular circumstance, being one that is beyond an applicant's control, in addition, in the state of Minnesota, we've also got an example in the case of Isanti versus Peterson, the Minnesota Court of appeals, where a citation was made with approval to a decision in another jurisdiction and again I think was very important to this and in that other case that was sited by approval by our court of appeals, there was a circumstance where there was a non-conforming use that was discontinued for longer

than would allow it's continuance and the court found that in this case there was a flood and an inability to find a new tenant, and the court found that the non-conforming use could continue because it was beyond the control of the property owner. Well, I suppose that the municipality could have said well, you could have found a tenant, just reduce the price low enough and you'll find a tenant, if the rent is \$350 a month, just reduce it to \$10, you'll find a tenant. So, I point that out as a circumstance where even in that case, I mean the price could have been reduced, it was just an economic problem that was found to be beyond the land owner's control. Here you've got a severe medical condition, severe injuries that have literally incapacitated Mr. Smithrud during this time frame. I can't see how that could be found to be circumstances not beyond his control. As you might appreciate, someone in the condition, someone like Mr. Smithrud, who's been a vigorous, hardworking man, you believe that you are going to be able to recover, you believe that the therapy, at some point will enable you to get out there and do what you need to do to get this property "rent ready" and get it rented, but it hasn't happened, so time has past, and so this is the situation that he finds himself in. I don't know if the Board is aware of it, but there are a couple of letters that the Board should be aware of, one is allusion has been made to this Problem Properties findings and involvement with this property and actually there were, as you could see from the staff report, some attempts at condemning the property, having it formally condemned. It never has been, but the Problem Properties has been pursuing this. But just recently in a letter of January 28, 2008, that agency, which I think is formally the Emergency Preparedness and Regulatory Services has apparently reversed itself. They are no longer seeking apparently to have the property condemned. I'd like to read the letter if I may to the Board and submit it. It sounds like you probably haven't seen it, but I think it is very relevant to the decision that you are going to be making. May I read the letter?

Mr. Gates: If it's brief go ahead. Yes.

Mr. Waldron: I'll try to read just the pertinent parts, but it's addressed to Mr. Smithrud, January 28, 2008. On December 13th, 2007, there was a nuisance condition process review panel hearing concerning your building at 2400 Dupont Avenue North, as a result of the meeting the NCPRP recommended that your structure be raised. That recommendation was to be sent forward to the Public Safety and Regulatory Services Committee for their consideration. However, subsequent to the hearing it has come to my attention that there were technical discrepancies in the record concerning the condemnation of the structure. Further, it has come to the attention of City staff that you are well into the process of working towards, not only putting forth a plan of rehabilitation of the property, but also that you are working with the City Zoning Office in an effort to insure that your structure will meet zoning requirements. None of this information was made clear at the time of your hearing. Accordingly I'm withdrawing the recommendation of the NCPRP at this time in an effort to address the above noted concerns and related issues so that a plan of rehabilitation can be constructed. Of course that's the sale of the property. In order to ensure that this matter moves forward please contact staff, basically, that's the letter. So, apparently that agency, that arm of the City Government is no longer intent on seeing that Mr. Smithrud is going to be left with just a two occupancy property.

Mr. Gates: What was the date on that?

Mr. Waldron: January 28, 2008, and I can also submit that letter to the clerk if you would like.

Mr. Gates: Yes, please do.

Mr. Waldron: The other letter that I think is pertinent, is a letter that Mr. Smithrud.

Mr. Perry: I need to interrupt, I need a date set here while you're going through the dates of these letters that you're reading, if I could ask the staff a question.

Mr. Waldron: Sure.

Mr. Perry: Could you tell me when, specifically, when the property lost the non-conforming rights, what date was that?

Mr. Schaffer (staff): Chair Gates, Board Member Perry, the rental licenses expired on, I believe 9/8/2004. So, September 8th, 2004.

Mr. Perry: So that's when ... That is the date when the non-conforming rights were lost? 9/8/2004?.

Mr. Schaffer (staff): The permits were closed in January, I believe 25th of 2004. If you want to offer leniency, you could go to September. I'm not sure to tell you the truth, which one staff ...

Mr. Perry: Okay, thank you and I'm sorry for the interruption Mr. Waldron, thank you Mr. Chair.

Mr. Waldron: No problem. The other letter that Mr. Smithrud just received and handed me as we were sitting here, from the Hawthorn Area Community Council, dates January 25, 2008. I'd like to read that letter as well. It's a little briefer than the other one.

Mr. Gates: Okay, go ahead.

Mr. Waldron: To whom it may concern, greetings from the Hawthorn Area Community Council. It has come to our attention that Mr. Leroy Smithrud, the owner of 2400 Dupont Avenue North in Minneapolis, MN is applying for restoration of the residential zoning for this property that had reverted to a single family residential zoning designation in 2007. Mr. Smithrud had significantly injured himself at a critical period and over recent months had been recuperating but was in no condition to effectively apply for the proper zoning designation of his property. The Hawthorn Area Community Council, upon review, recognizes Mr. Smithrud's plight and his continued efforts to approve the quality of life in the Hawthorn Neighborhood and recommends re-zoning appropriate to his property at 2400 Dupont Avenue North. Which I take it to mean is in agreement with his request before the Board today. If there are any questions please feel free to contact us at the phone number given at your convenience. Thank you. So, I think those letters should be taken into consideration.

Mr. Gates: Do you want to submit that letter as well please?

Mr. Waldron: I will, and we need to get a copy of this if we can, it's the only one that I've got. So, we have what is another arm of the City that looks like it is now in agreement that Mr. Smithrud should be able to go forward with his sale, of course, it's not going to

happen. The buyer is interested in buying a building that can be used as a 10 unit building not a two unit building. So, based on the actions taken place so far, if it is upheld, Mr. Smithrud will not be able to sell the property. He will get nothing out of this property and it will, more than likely, just remain blight on the landscape for who knows how long. And the City will probably incur additional costs to raise it and so forth, so, I think what we are looking for is if we can simply allow Mr. Smithrud to go forward and keep the 10 unit designation, then the sale can go forward, my understanding is, very quickly and I think it will be a positive for the neighborhood, a positive for the City. If it is not, and if the decision is upheld, not allowing the use to remain, then unfortunately, I think it is going to be a negative for the City as well as for Mr. Smithrud. So, again, I guess in conclusion with this I think that clearly these severe medical conditions that Mr. Smithrud has suffered should be considered by the Board as being ... circumstances beyond his control, just as other courts have actually found.

Mr. Gates: Thank you Mr. Waldron. Other questions?

Mr. Ditzler: Do you have a signed amendment to that purchase agreement extending the close date, because the closing date on that purchase agreement has expired and therefore would no longer be valid. So, in order for that to be a binding agreement, you would have to have an amendment extending the close date signed by both parties. Do you have that document?

Mr. Waldron: You are correct, no we don't, but as I mentioned, we do have the buyers representative here this evening, so I'm sure he would be glad to respond and confirm the buyers continued willingness, but, technically, you're correct, I mean, there should be an amendment extending the closing date, but if the buyer wasn't still interested his rep wouldn't be here.

Mr. Koch: Did the applicant's health preclude him from applying for an exemption?

Mr. Waldron: I don't know, we could ask Mr. Smithrud. I think there may be some rights that he wasn't aware of in terms of applying for an exemption, I'm sure his health and severe pain has probably clouded his thinking over this period of time as well.

Mr. Manning: Let's assume that (inaudible) beyond the control of the applicant, and let's also assume for purposes of this question that you are required to maintain the non-conforming use as a non-conforming use not merely as property. You don't have to have tenants in the building, but you have to be holding a valid rental license. Let's also assume that the most forgiving date I can offer for the expiration of the rental licenses is September 8th 2004, so under the terms of the code you have 365 days to do something to reinvigorate those rights, i.e.: apply for a rental license or an exemption. Can you tell me what ... how I can get less than 365 days, even giving credit for the injuries. In other words, if I count from September 8th, 2004 to September 8th, 2005, in my hypothetical, the last day Mr. Smithrud could have done something to reinvigorate the right. I can give you some number of days in the hospital, at the end of 04, and maybe in a care facility, but I don't see anything in the record in October, November, December 2005 or anything in 06 that says there was an attempt to reinvigorate the right. You've mentioned that sales effort started in 06, but I've got a clear and convincing standard. I have no documents, I have no sworn statements, and I have no corroborating evidence. Can you help me get to less than 365 days given the assumptions that I've given which I think are the most charitable assumptions I may be able to make on the record in front of me.

Mr. Waldron: Well, I don't...I'm not sure I know how to answer that. Frankly, the ... I think the question is why didn't Mr. Smithrud just renew his license at some point during this time frame.

Mr. Manning: and I've extended the time frame to give you credit for him being hospitalized...or being in a care facility and apparently he didn't need to extend his license, he could have offered the building for sale as a 10 unit building, I may be right or wrong in that, but yes, that essentially is the question.

Mr. Waldron: I don't know, Mr. Smithrud may be able to respond to that, I don't know, but, as I mentioned, I think his ... I think part of what was going on here is that when you're dealing with these injuries and as you can see, successive injuries, it is bound to affect...it does affect your thinking process and so, I don't think he was totally with it mentally to be able to really pursue this and understand what he should be doing or to seek the help to get the advice to tell him what he should be doing during this time frame.

Mr. Manning: I would very much like to hear from the applicant if he would like to speak and the Chair would permit. I will say though, that I think my question is not a matter of missing by days or weeks, but by at least 12 or 14-18 months.

Mr. Waldron: Well, there is no question that a substantial amount of time has past since this property was rented out as a 10 unit building, but I think it is also the case that Mr. Smithrud's injuries and disabilities resulting from that have been on-going as well. They are on-going today. It's been followed, one thing after another, physical injuries followed by cancer diagnoses, followed by cancer surgery. So, would you like to speak any further to that question Mr. Smithrud?

Mr. Gates: Before Mr. Smithrud starts, if I might just step in for a minute with a question for staff related to Mr. Manning's line of questioning. What I thought I heard previously was that on September 8th 2004 that the non-conforming rights were lost; meaning that the discontinuity actually began on September 8th 2003.

Mr. Poor (Zoning Administrator): Chairman Gates, actually, I meant to correct that. I was asking Brian that, it actually, I think Mr. Manning has it correct. It was one year after the last rental license would have expired. I've been just waiting for an artful time to correct that, but it actually would have... Mr. Manning, Board Member Manning has it correct. The last day of the rental license, go one year from that. That's the one year that is easily identified.

Mr. Gates: That would be 9/8 of 2005.

Mr. Poor (Zoning Administrator): That is correct. That's the most easily identifying date. I would also like to come back and make some comments with regards to the letter that has been entered into the record, but I'll give Mr. Smithrud a chance to speak if he would like.

Mr. Gates: Well, I have one more question. That is, the applicant was apparently notified of a number of things throughout this process, intent to condemn, being placed on the

vacant and boarded registry list. Was the applicant notified that they were losing their non-conforming rights?

Mr. Poor: Probably not through that process quite frankly, because that is...those work sections come out of Reg Services and are somewhat disconnected from the day to day zoning. I will say that more recently I believe that's been the case, I think I...that's why they're here today. But no, they aren't typically doing that. We are working more closely now with PPU, Problem Properties Unit, to actually inform people about this so they have the ability to appeal. If I may, with regards to the letter though that's entered in the record, I mean, I would just make a few comments about that. One is that what I heard from the reading of the letter is there may have been some procedural questions been raised about the notification with the intent on that property. The City has had recent litigation regarding process and intent and that maybe there was some error on the side of caution to withdraw that. Secondly, I would characterize the fact that the appellant is working with the Zoning Board of Appeals as a way of saying why don't we see what happens at the Board of Adjustment and then we'll come back and revisit this issue. I don't read that letter or understand from talking to staff, who offered that letter that there was any endorsement of this property being revitalized to a 10 unit. I think rather it was a prudent move that they wanted to make sure that the process was clean if it was going to go to some kind of intent and that there may have been questions around that and that ultimately the Board of Adjustment had to resolve this issue of the non-conforming rights, knowing that they were going to appeal that determination. So I would take that letter on face value, but I wouldn't read a lot into it in terms of endorsing Mr. Smithrud's intent to re-establish this as a 10 unit building. I don't think it's about that at all.

Mr. Gates: All right, thank you Mr. Poor. Mr. Smithrud do you care to speak?

Mr. Smithrud: Thank you, I appreciate you allowing me to speak. The Zoning Commission is worked on this one year theory totally and seems to have jumped the abandonment part where it says that...providing you with the information that we were unable to do anything about it being vacant or otherwise. He kind of simplified the health problems. I fell two-and-a-half stories and landed on my butt on a sidewalk. I broke my legs, my pelvis, from the groin up was all black, I still only can get my shoulder up this high and I'm still in therapy from my back. Walking more than a couple minutes is all I can handle. I've done everything I can do. I don't know what ... I thought I would recover. I thought I could handle anything, but I'm finding I can't. Cancer's going to be the last thing, but all I'm doing here is asking for what's right. I was informed several times by inspections when they would come and board the building without any reason and when you'd call them, all they would say is you've got 60 days to get the boards off or we'll condemn it. The building has never been condemned. We've done everything we can to take care of it. I have tried renting it and I think I can even get somebody to vouch from a building on Lyndale and 24th which is two blocks away that's been a drug heaven, and when we did advertise it all we got is applications for people that were on drugs. Had records of people on drugs or when we checked with the police the buildings had had raids for drugs where they were living. So, all that would do is create more problems for me. So, no, I didn't rent it, but I could of after I got back. I'll even dispute the...I've done everything I can do. I have never been notified that the building was going to lose its classification in zoning. I was told that that was only if the building is condemned and the building has never been condemned. It has been boarded many times; three, four or five times. The last time was when I got a notice from inspections for a house for my brother and they wrote up stuff in his yard that isn't in his yard and they sent it to me. So,

I met with the inspector there, pointed out that the stuff wasn't there and it wasn't my building, it was Roger Smithrud, whose a couple blocks from the building. I used to live three houses from the building. So then later we get a notice, \$200 fee for doing that, and we went and the court said yes, you legally sold it. You have no right to go on the property and then chewed out inspections and two weeks later my building was boarded. Then, my brother ... they called the assessors office and told them it's not homesteaded...make him prove all that again, and that's the way it's been. So, if you're using inspections, you're really supposed to be looking at zoning. Not whatever the inspections have been saying so, I think I've done everything that should be done. I'm just asking you for the privilege of selling the building. The realtor that is handling it is over here and the buyers have been very patient. It's been nine months dragging...since we originally signed the agreement. It would have been sold and rehabbed long ago.

Mr. Gates: Okay, thank you Mr. Smithrud. Other questions for the applicant?

Ms. Lasky: How long have you owned the property?

Mr. Smithrud: At least 20 years.

Ms. Lasky: Inaudible

Mr. Smithrud: No, I do everything myself. I buy the glass bulk, cut it and install it and I install carpet. I was born on a farm.

Mr. Lasky: Inaudible.

Mr. Smithrud: Yes, and when this happened we had just bought a whole bunch of rolls of carpet to re-carpet the whole building and I think they're talking about doing permit work...doing work without a permit and that's because I hired Fridley Roofing to replace the roof. And apparently, I don't know, but he must not have pulled a permit or something, but they are licensed and bonded and I don't believe I should be held responsible for that.

Mr. Gates: Other questions?

Mr. Perry: Just to be clear, one of the things that is being stated in here is that you have a responsibility...we are looking for something that says you were not able to maintain the property, but it sounds like you have been doing a number of things over the last few years, and I just wanted to verify that. You've either been doing the work ... you've been maintaining the property, either yourself or having someone else do it for you. Have you been actually asking the people to do it, or has your brother, or who's...

Mr. Smithrud: Yes, that is my brother who has been gracious enough to take care of the lawn and help me with windows that get broken once in a while or something like that and a friend of his that has a snow blower that volunteered to come over and take care of the snow.

Mr. Perry: Sure, but my point being that you have had ... you've been able to, even with your physical ailments, either ask family or contract people to take care of the property in one way or another over these last few years, is that a correct statement?

Mr. Smithrud: No, there is a big difference between having your brother go do something for you and hiring a stranger and hope he does something that is...

Mr. Perry: Who has been directing people to take care of your property?

Mr. Smithrud: My brother has been taking care of the lawn and stuff and his friend Dave has been taking care of snow removal.

Mr. Perry: At whose direction?

Mr. Smithrud: At their own. When it snows he goes and plows it.

Mr. Perry: You haven't asked them to do that?

Mr. Smithrud: I think I did when I was in the hospital.

Mr. Perry: Oh, okay, so you have given them some direction to take care of the property.

Mr. Smithrud: I guess if that is what you are looking for.

Mr. Perry: Yes.

Mr. Smithrud: Nothing like hiring somebody to go in and do some major work or something.

Mr. Perry: No, I was just curious who was directing them to take care of the snow plowing and the lawn cutting and things like that. Thanks.

Mr. Gates: Further questions for Mr. Smithrud? I see none, thank you very much sir. Is there anyone else here to speak in favor of the application?

Mr. Waldron: Just one closing remark if I may. The...and as I think that Mr. Smithrud alluded to, having the charity of his brother to help maintain the exterior of the building in the summer or the winter which he's done as a responsible property owner is a far different thing than being able to hire and direct people to make all these 10 units rent ready, which he would have to do to have maintained the use.

Mr. Gates: Thank you.

Mr. Koch: I have a question for the staff. What is involved with filing an exemption?

Mr. Poor (Zoning Administrator): An exemption Chairman Gates, Mr. Koch, a rental license exemption is a type of rental license that's applied for. You go down to the building across the street, actually the Public Service Center on the third floor, there's some paperwork that is filled out. It is not an overly involved process. But it is essentially having someone pick up the paperwork and file the rental license exemption. There some staff looks at it to verify the number of units and frankly the nonconforming status if it has any, but, it's not particularly an arduous process.

Mr. Gates: Thank you Mr. Poor.

Rick Gullickson: 7840 Bryant Avenue North, Brooklyn Park. I represent the potential buyer of the property. A couple of things that come to mind for me is the fact that if Mr. Smithrud wasn't informed that not renewing his rental license would result in losing his legal nonconforming rights to the property, I think there would have been a different actions on Mr. Smithrud's part, if he wasn't told, and I don't know if Mr. Poor knows that or not. I haven't seen any letters to that affect, but I think that is a looming question, that if you're not informed that you're going to lose your rights (inaudible) I don't know if that's going to be a valid purchase agreement because of...and if you notice, it's not even on an addendum to make a contingency on the zoning. Because we didn't know, up until, literally the day that the purchase agreement got signed that this was even an issue. I suppose part of that is my fault for not checking zoning, but I assumed a 10 unit that's been there for forty plus years is going to remain a 10 unit, and I guess you've taught me a lesson to check all the zoning before I write a purchase agreement again in the City of Minneapolis. Also, the fact that it is going to get rehabbed is going to put \$100,000 into that building, plus the purchase price which ... you know is going to cover Mr. Smithrud's costs for all the ... all the incurring costs that he has, there are some board up cost in there that needs to be paid off on a tax assessment, there are some other small costs, so, Mr. Smithrud would actually ... he wouldn't be getting a lot of money out of this because of the condition of the building and the fact that it has to be completely rehabbed. So, at \$100,000 into the property may not sound like a ton of money, but it's a heck of a lot better than spending \$78,000 to raise the building and then you've got all the legal fees and everything else to ... you know, once you raise it what are you going to do with it? Those figures came out of the last meeting that we had in here with...I forget which committee it was, but, I think that if...economically it only makes sense to put \$100,000 of private money into a building to make it a viable rental unit again, versus tearing it down for \$78,000 and charging the tax payers to pay for that. To me, it just makes sense. I don't know the current figures on the occupancy rate and the absorption rate of North Minneapolis for rentals, but, I know that most people in Minneapolis would like to see home ownership versus having duplexes everywhere. That's why I think an apartment building will reduce some of that; in a small way, but it's going to help.

Mr. Gates: Other questions for the speaker? I see none. Thank you very much. Is there anyone else to speak in favor of the application? I see no one. Is there anyone here to speak in opposition to the application?

Council Member Hofstede: Thank you very much; I just wanted to share a few things with the members regarding this property. It's really unfortunate that Mr. Smithrud has had ongoing health problems. I would just like to share with you a couple of items I think are important to this. First of all, it has been repeatedly mentioned Mr. Smithrud's responsibility to manage the properties. Since he's owned them for 20 years, there has been a long history that I have in front of me. The most recent was in October of 2007 when the fire department inspected the properties, and the property was so full of debris, lawn mowers and other kinds of debris that that had to be cleared out before the building could be inspected. I would just like to mention that the building no longer has plumbing, heating, has been gutted of its copper, all of the copper has been stripped out and the plumbing has been smashed or removed. I think it is hard for me to imagine that even with a 10 unit building that \$100,000 dollars would go very far to replace all of the items that I just mentioned, plumbing, heating... and bring it up to current code. The building is not a positive to the neighborhood, it has been a recurring issue and I would just like to

read the current orders that are open. I have a very long history of orders and so, we've had a long relationship with Mr. Smithrud. But just to mention the open orders, repair floors, service equipment, repair fixtures, repair fire doors, repair ceilings, repair walls, repair floors, repair doors...and these are ongoing. Repair internal doors, repair face plates, repair leaky faucets, and illegal wiring, repair public order...public area and repair the roof. And we have had practically every several months ongoing inspection violations with this particular property and I will just mention a few of them. Inoperable vehicles, need to cut grass and weeds, removing rubbish, repair more ceilings, repair of hinges, repair roofs, repair of appliances, repair of window, repair of screens, repair of doors, violation of low heat, repair of counter tops, repair of shades, and various plumbing repairs. That at least gives you some history of the lack of management. In terms of the sale of this particular property and to ascertain that \$100,000 would repair this property, I really question whether or not it would be brought up to the kind of standards that we would like to have within the City of Minneapolis within that \$100,000 range.

Mr. Gates: Thank you very much. Are there questions for Council Member Hofstede?

Ms. Lasky: (Inaudible)

Council Member Hofstede: The repairs...the history that I have and I don't have all of it is from 1990 through December 5th of 2007.

Ms. Lasky: (Inaudible)

Council Member Hofstede: I'm not reading all of them, I'm re-reading some of them, but if you were to look at them, they were repeated and inspections needed to be called in for the repairs. Normally if a building is being managed and maintained properly, leaky faucets and doors and hinges are just ongoing management and repairs that are ongoing, but when they reach the level that the City has to come in and site them for violations and the violations go over this length of time and consistently over many, many months and many, many years, it would be an indication of lack of maintenance and lack of management and not consistent management and maintenance.

Ms. Lasky: (Inaudible)

Council Member Hofstede: Yes, Problem Properties has been involved. The building is condemned and it is a vacant building and it is a vacant and boarded building.

Ms. Lasky: (Inaudible)

Mr. Gates: Further questions: I see none, thank you very much.

Mr. Poor (Zoning Administrator): Chairman Gates, I just want to be brief. Without casting aspersions on Mr. Smithrud, but there is also a record as to why it was a mitigating factor. I would just suggest that he says he owned the property 20 years, so we see with the timeline that the letter of intent to condemn is May 9th of 2003. He owned the property for 15 years before that. He has an accident on July 25th of 2003. So, two months before the accident he gets a letter of condemn. For 15 years he had this property he had this property and let it slide into that disposition. Secondly, after Mr. Schaffer's staff report went out, there was some more digging with the City Attorney and there is actually, the case I'll refer to is actually from the Franklin and Fremont property,

on the two houses that I think this Board actually had looked at some years ago and in that the court said that even if you are marketing it or trying to sell it...if you're not using the property for the nonconforming use, I'm back to the use, not the structure, the use, that that is enough for the City that you have abandoned the rights. That information ... that court case was not mentioned to Mr. Schaffer when he drafted the staff reports, so historically, we ... and frankly this is a rather recent court case, it's from September 13th, 2005 is when it was filed...I don't have the published date, forgive me, but my point is that this has strengthened the Cities understanding of what the loss of nonconforming rights means. So again, I would just suggest that many of the problems with the disrepair occurred before the accident. I would also suggest that most people who buy a property, when he went to get his financing, unless he paid for it all out of pocket and maybe did, there is usually a vetting of the nonconforming or conforming rights for the purposes of securing a mortgage and I do think that a home owner or a property owner should understand as much about their property as the bureaucrats downtown. We typically don't write letters to tell people that they've lost their rights, because we typically don't know when they lost their rights. It's when they are seeking something from the City, in this case to bring the property out of being condemned and boarded, that we do a very thorough job of vetting with the disposition of their nonconforming rights may or not be. So it is not unusual that we would not have written a letter to Mr. Smithrud prior. I also find it interesting that with all the dealings with the housing inspections people and with it's robust history of dealing with inspections that he didn't become aware that it was a nonconforming property, but I'm not here to question the veracity of statements, just maybe interpret the facts a little differently than they may.

Mr. Gates: Thank you Mr. Poor,

Mr. Waldron: If it'd please the Chair...

Mr. Gates: It doesn't please the Chair.

Mr. Waldron: If staff gets another bite at the apple, I think I ought to too.

Mr. Gates: I don't think we want to hear anymore right now, I want to hear more about the opposition. If we have more questions we'll call you back up, thanks very much. Are there others here who wish to speak in opposition? I see none. Mr. Poor, one more question, we're about ready to begin discussion here amongst ourselves, and I would like to be able to frame the issue here a bit. Because it is getting to be pretty murky and we're all getting kind of tired here. The issues would seem to be two, whether of not a discontinuity occurred and if it did whether or not that was beyond the property owner's control. Is the maintenance record pertinent then?

Mr. Poor (Zoning Administrator): In terms of the care in which he took care of the property? Is that what you are referring to, in other words, we've heard some testimony about all the orders being cited? Not necessarily, I think where it comes into play is if a property goes into such a state of disrepair that it becomes boarded or there's an intent to condemn it, those are the events that matter, because then there are certain regulatory police actions that prohibit people from inhabiting the property. So it's more the path that gets you there than actually the act itself. It's the thing and some total that leads to it being boarded. A property doesn't fall into disrepair overnight and become boarded unless there's a fire.

Mr. Gates: All right, thanks very much. I'm going to hear one-30-second statement from the applicant's attorney and then we'll be done with the public testimony.

Mr. Waldron: Thank you Mr. Chair, I will be very brief, but I think that the point that was raised is very pertinent, all this history of what went on and repair orders and this and that is completely irrelevant. Whatever happened before, this is not a situation where Mr. Smithrud is seeking to regain the right to use this as a 10 unit so that he can continue to manage it, so anything that Mr. Smithrud has done in the past has no bearing whatsoever.

Mr. Gates: Thank you Mr. Waldron. With that we are going to close the public testimony and take commentary from the Board.

Mr. Ditzler: I'll try to be really brief here, but I wanted to just tell the Board about ... when the City, the way that the City is able to regulate landlords who have buildings that are triplexes and greater, because the truth in housing administration does not govern triplexes and more, they only do single family homes and duplexes, the only way they can regulate those properties is through the rental license department. That's how they do it. I think Mr. Gates, maybe this will answer one of your questions. If a property gets boarded and gets put on the boarded property list, before a rental license will be issued back to that property the repairs that are listed down at the City need to be completed. In order to complete those repairs two things have to happen, you have to pull permits to do it and you have to post a \$2,000 bond with the City to make sure that those repairs are done. What this does, it prevents people from buying condemned properties, holding them, mowing the lawn, shoveling the snow, buying them super cheap, waiting for the real estate market to turn and then selling them for a profit. That is what the City has put laws in place to prevent that very thing from happening. So, I think to answer your question, does mowing the lawn or shoveling the snow constitute continued use, the City says no, it does not and it has put specific things and rules and regulations in place to actually discourage and make that impossible. You can apply for a rental license without having any intent of ever renting out the units, you don't need to have them rented, you don't need to have them vacant, you don't need to have advertised for it, it's almost a separate entity as to the actual goings on daily goings on of the landlord, but what it does, it allows the City to track you. It allows the City to find the landlords of these properties and when problems come up, they can find them and address them. I'm going to move staff recommendation on this because the applicant has been unable for a period ... a three year period, to be able to account for what the City deems continuous use of this property and that is through rental license registration and that is one of the only ways that the City can do that on a property that is three units or more. In addition to that there is a lot of case law through arbitration and in the case ... Minnesota State case law, some of which I have been a part of, that the City is not responsible at all to notify property owners of nonconforming use or zoning. If you buy a property that you thought was a duplex and you get to the closing table and it's not it's a single family, too bad. You signed a purchase agreement, it's not...if the seller ... unless they intentionally covered that up you're not...the buyer's in charge of that information and so is the seller is in charge of getting that information from the City as well. So there are specific examples where the City is not required to do that. If you're the owner of a 10 unit apartment building, you know where City inspections is, so I think you'd be able to find that out.

Mr. Gates: Thank you Mr. Ditzler. We have a motion to approve staff recommendation.

Mr. Finlayson: Second.

Mr. Gates: Thank you. Discussion.

Mr. Manning: I'm gong to support the motion; I want to say that in a situation like this I think it would be encouraging as a matter of City Services to let property owners know which rights they may be losing at some point during the process. Nevertheless, I agree with Mr. Ditzler that there are many too many months here, I don't think we need to make any finding on whether or not medical injury constitutes something beyond the property owners' control, I don't think it is necessary, I think the condition of the property, how he has maintained it is completely irrelevant, I agree with the applicant on that, it has nothing to do with what is in front of the Board. I will support the motion, I certainly wish the best for this neighborhood in development and maybe that's what is on the table here, but that's not what is in front of this Board, so for that reason I will support the motion.

Mr. Gates: Thank you Mr. Manning.

Mr. Finalyson: I just wanted to state that given the balance of the testimony I found no mitigation. None at all.

Mr. Gates: Thank you Mr. Finlayson. Further comments?

Ms. Lasky: You know me to be as liberal as can be on this and I hate to see a 10 unit building zoned R2B, but the applicant had the opportunity to license it each year. I do think the City has some responsibility in the future to make it easier for people to know they are losing their rights, especially if you're sending out condemnation notices every which way. I hope that would change one day. I hate to damn the new maybe buyer for the sins of the prior owner, though that is irrelevant, I will support the motion.

Mr. Gates: Thank you Ms. Lasky. Yes, Mr. Koch.

Mr. Koch: Just a comment that the certificate of nonconforming use is a right granted to the property. Along with that right is the responsibility to maintain that property, and as unfortunate as it is, being a landlord is hard work and a lot of times it means you have to hire someone to do something if you can't, or realize that maybe I'm in over my head here, and unfortunately, I think maybe that's the situation that you find yourself in Mr. Smithrud, and it is unfortunate, but again, it is a right that was granted to this property and when you don't take care of it, whether you are able to or you think you are and you just don't, you lose that right and that's what happened.

Mr. Gates: Thank you Mr. Koch. Any final commentary? We have a motion to approve the staff recommendation and deny the application for certificate for nonconforming use. Please call the roll.

Ditzler: Yes

Finlayson: Yes

Koch: Yes

Lasky: Yes

Luepke Pier: Yes

Manning: Yes

Perry: Yes

Mr. Gates: That motion carries. You can speak with staff Mr. Smithrud about your options from this point on, best of luck to you.

**Department of Community Planning and Economic Development – Planning
Division**

Certificate of Nonconforming Use
BZZ-3912

Applicant: Leroy Smithrud

Address of Property: 2400 Dupont Avenue North

Contact Person and Phone: Leroy Smithrud , (763) 535-0663

Planning Staff and Phone: Brian Schaffer, (612) 673-2670

Date Application Deemed Complete: December 14, 2007

Publication of Staff Report: January 18, 2008

Public Hearing: February 7, 2008

Appeal Period Expiration: February 19, 2008

End of 60 Day Decision Period: February 12, 2008

Ward: 3 Neighborhood Organization: Hawthorne Area Community Council

Existing Zoning: R2B Two-Family District

Proposed Request: Certificate of Nonconforming Use to legally establish 10 dwelling units at 2400 Dupont Avenue North in the R2B Two-family District.

Background and Analysis: The applicant is applying for Certificate of Nonconforming Use in order to rebut the presumption of abandonment of a ten-unit multiple family dwelling.

531.40. Loss of nonconforming rights. (a) Discontinuance.

(1) In general. If a nonconforming use or structure is discontinued for a continuous period of more than one (1) year, it shall be deemed to be abandoned and may not thereafter be reestablished or resumed. Any subsequent use of the land or structure shall conform to the requirements of the district in which it is located.

(2) Rebuttal of abandonment. A property owner may rebut the presumption of abandonment only by presenting clear and convincing evidence that discontinuance of the nonconforming use or structure for the specified period was due to circumstances beyond the property owner's control. The property owner shall bear the burden of proof.

The property is currently zoned R2B and the applicant is trying to re-establish the rights to a ten-unit multiple family dwelling. The property was built in 1963 as a ten-unit multiple family structure (B381766). In August of 1962 a Special Council Permit was issued for a rezoning of the subject site to the Multiple Dwelling E Density 2.5 Story Height District, which allowed for the construction of the ten-unit apartment building. It appears that a year later, when a new zoning ordinance was adopted, that the property was rezoned again, to R2B Two-Family District. This made the ten-unit multiple family structure a nonconforming use as the maximum density allowed is two units. City records indicate that the property was abandoned, or the use of a ten-unit structure, was discontinued for more than one year resulting in the loss of the rights to the ten dwelling units.

The property was placed on the Vacant and Boarded Registry List on January 23, 2004 after it had been vacant for more than 60 days. (RFS 04-0313591). On January 23, 2004 the rental licenses were closed. City records indicate the property owner was sent Letters of Intent to Condemn for being boarded three times since 2004 and the structure has also been boarded by the Minneapolis Police Department in May of 2005 after finding people inside the vacant structure.

The property owner, Mr. Smithrud, has had many unfortunate circumstances regarding his health during his ownership of the building. In July of 2003, Mr. Smithrud fell from a ladder while performing work on the property; he broke his pelvis, legs, back and suffered internal injuries. The applicant is arguing that due to these injuries and other medical complications (listed below) he has not been able to actively use the property. He states that these medical conditions are circumstance beyond his control and are the reasons for not actively renting out the property.

The following is a timeline based on significant City actions on the property and the information Mr. Smithrud provided staff.

Items in **BOLD** indicate information obtained from applicant's hospital records

- 5/9/2003 – Letter of Intent to Condemn from Regulatory Services- Housing Inspections for Lack of Maintenance, Resolved 11/5/2004
- 7/17/2003 – Mr. Smithrud falls off roof.
Breaks legs, pelvis, back and has other internal injuries.
Is required to wear back brace for 3 months**
- 7/25/2003 - Mr. Smithrud is discharged from hospital to care facility**
- 9/8/2003 - Rental License for 10 units is renewed for one year
- 1/23/2004 - Property is placed on Vacant and Boarded Registration List
Rental Licenses closed.
- 8/16/2004 – Non-permitted work violation for plumbing, electrical, mechanical, and building. Permits never issued

- 12/3/2004 – Mr. Smithrud falls, breaks ankle. Admitted to hospital**
12/9/2004 - Mr. Smithrud is discharged from hospital.
- 12/29/2004 – Mr. Smithrud is admitted to hospital for ankle surgery**
12/31/2004 - Mr. Smithrud is discharged from hospital to care facility
- 5/24/2005 – Minneapolis Police Department boards property after finding kids playing in the vacant building
- 8/3/2005 – Letter of Intent to Condemn for being Boarded
10/3/2005 – Boards removed from structure
- 1/5/2007 – Letter of Intent to Condemn for being Boarded
6/5/2007 – Boards removed from structure
- 6/6/2007- Director’s Orders to demolish property sent
- 7/6/2007 – Property found open to trespass due to broken windows
7/18/2007 – Property boarded by City of Minneapolis
- 8/17/2007 – Mr. Smithrud is admitted to hospital for prostate cancer surgery**
8/23/2007 – Mr. Smithrud is discharged from hospital
- 8/29/2007 – Property Inspected by Fire Department- Violation issued regarding
“Dangerous accumulations of rubbish, waste paper, boxes, shavings or other highly combustible materials shall be removed” from basement and first floor

The applicant has provided staff with signed statements by individuals who have maintained the landscaping and exterior of the property and who have removed the snow during the winter. Hennepin County records also indicate that the property taxes are paid on the property. The applicant argues that the acts of property maintenance and paying of taxes constitute the use of the property and not abandonment.

Staff typically identifies the use of a property as being active if the building is occupied, listed for sale or rent, or has active building permits for improvements. The applicant has not provided staff with any information to show when, if ever, the applicant had marketed the units for rent or the property for sale since 2004. The applicant has provided only anecdotal evidence of the property being for sale in 2007. Even in the applicant provided documentation the property would have been vacant for three years.

Staff believes that while the landscaping of the property has been maintained, the use of the property as a ten-unit multiple family dwelling has been discontinued since 2004 and has lost the nonconforming rights to the ten dwelling units.

Findings:

1. A building permit was issued for the construction of a ten unit building in 1963 (B381766) based on a special council permit issued in 1963 rezoning the property to Multiple Dwelling E Density 2.5 Story Height District.
2. The property was rezoned to the R2B Two-Family District with the adoption of the 1963 Zoning Ordinance.
3. The property was recognized as a legal nonconforming ten-unit multiple family dwelling.
4. City records indicate that the property owner ceased renting the property and that abandonment of the property happened in January 23, 2004 when the property was placed on the Vacant and Board Registration and the Rental Licenses closed.
5. The applicant has not provided evidence to show that the use was not operated for a continuous period of less than one year.
6. Mr. Smithrud's medical problems do not justify the discontinued use of the structure for nearly four years.
7. The property taxes are current and paid on the property for a multiple family dwelling.

City records and the information provided by the applicant do not support the continued use of the legal nonconforming ten-unit multiple family dwelling. Staff does not acknowledge that the property has nonconforming rights to a ten-unit multiple family dwelling at 2400 Dupont Avenue North.

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

The Department of Community Planning and Economic Development Planning Division recommends that the Board of Adjustment adopt the above findings and **deny** the Certificate of Nonconforming Use to legally establish ten dwelling units at 2400 Dupont Avenue in the R2B Two-family District.

Attachments

1. Applicant statement
2. Map of Area & Site Plan
3. Chapter 531.30 & 531.40 of the Zoning Ordinance: Certificate of nonconforming use.
4. Pictures of the property
5. Signed statements from property maintainers
6. Statement from applicant's physical therapist
7. Building Permit and Special Council Permit for the construction of the structure
8. May 2003 Letter of Intent to Condemn
9. January 2004 Vacant Building Registration
10. July 2005 Notice of Confirmation of Hearing RE: Boarding of property in May 2005

11. August 2005 Letter of Intent to Condemn for being boarded
12. December 2006 Letter regarding the building being Open to Trespass
13. January 2007 Letter of Intent to Condemn for being boarded
14. July 2007 Letter regarding the building being Open to Trespass
15. August 2007 Minneapolis Fire Department letter regarding Fire Code Violation
16. Letter submitted from Rick Gullickson of Exit Realty