A regular meeting of the Fairbanks North Star Borough Planning Commission was held in the Mona Lisa Drexler Assembly Chambers, Juanita Helms Administration Center, 907 Terminal Street, Fairbanks, Alaska. The meeting was called to order at 7:33 p.m. by Chris Guinn, Acting Chairperson.

MEMBERS PRESENT: Charles Whitaker        Mike Stepovich
                John Perreault          Eric Muehling
                Robert Peterson        Mindy O’Neall
                David Brandt           Chris Guinn

MEMBERS ABSENT: Patricia Thayer          Wendy Presler

OTHERS PRESENT: Christine Nelson, Director of Community Planning
               Kellen Spillman, Deputy Director, Community Planning
               Manish Singh, Planner
               Stacy Wasinger, Planner
               Don Galligan, Transportation Planner
               Wendy Doxey, Assistant Borough Attorney
               Nicole Nordstrand, Administrative Assistant

1. **ROLL CALL**

2. **MESSAGES**

   1. Chairperson’s Comments

      *There were no comments by the Chairperson.*

   2. Commissioner’s Comments

      *There were no comments by Commissioners.*

   3. Communications to the Planning Commission

      **Mr. Gilligan** reported that the Fairbanks Metropolitan Area Transportation System (FMATS) are looking at growth scenarios and how that may impact transportation improvements over the next 25 to 30 years Plan and will be doing an exercise in scenario planning by holding a Planning Charrette on October 2, 2017 from 1:00 – 4:00 p.m. He further invited and encouraged Commissioners to attend the event.

      **Ms. Nelson** communicated that the Downtown Fairbanks Planning Community Meeting will be held Wednesday, September 27, 2017 from 6:00 – 9:00 p.m., at the Westmark Fairbanks Gold Room.
Ms. Nelson asked for any Commissioner interested in attending the Alaska American Planning Association conference in Anchorage on November 12, 2017 to let her know as soon as possible so arrangements can be made.

Ms. Nelson advised of an updated marijuana permit list in their packet.

4. Citizen's Comments – limited to three (3) minutes

*There were no comments by Citizens.*

5. Disclosure & Statement of Conflict of Interest

*There were no disclosures or conflicts of interests.*

C. *APPROVAL OF REVISED AGENDA AND CONSENT AGENDA*

Approval of Consent Agenda passes all routine items indicated by asterisk (*) on agenda. Consent Agenda items are not considered separately unless any Planning Commission member or citizen so requests. In the event of such request, the item is returned to the general agenda.

**PASSED WITHOUT OBJECTION**

D. MINUTES


E. APPEALS

1. GR2017-171: An appeal by Ray Brasier of the denial of a request on behalf of Patricia Anne Cornwall Roth IRA for affirmative recognition of legal nonconforming use status (grandfather rights) for an existing four-plex building in the Two-Family Residential (TF) zone for the property on Lot 2E, Block 99, Fairbanks Townsite (located at 1122 Eighth Avenue, on the north side of Eighth Avenue, northwest of Cowles Street).

Mr. Brasier was present via telephonic participation.

**CHAIR REMINDED EVERYONE OF PREVIOUS OATH TAKEN**

Clerk provides a brief summary on the September 6, 2017 proceedings in this matter, noted the presence of Commission Muehling at this proceeding, and stated for the record that Mr. Muehling had previously listened to the September 6, 2017 proceedings on this matter in its entirety. Mr. Muehling confirmed for the record that he listened to the audio recordings of the September 6, 2017 proceedings.

**MOTION:** To deny the appeal and uphold the Administrative Hearing Officer decision to not affirm recognition of legal nonconforming use statute (grandfather rights) for an existing four-plex building in the Two-Family Residential (TF) zone for the property on Lot 2E, Block 99, Fairbanks Townsite, adopting the staff report and eight (8) findings of fact by Mr. Muehling and seconded by Mr. Guinn.
Discussion on the Motion

Mr. Muehling communicated that in his review of the previous proceedings he noted that there was speculation about whether a building permit could effectuate a change in zoning, whether people knew what they were doing or the permit was issued in error, and stated that no evidence was presented. He continued that the Applicant’s desire is to get grandfather rights is to enable the new owner to get financing which cannot be considered by this Commission. He further talked about the use of the structure as a four-plex having never been properly permitted under the law and noted the general lack of any evidence to the contrary.

Mr. Guinn summarized the evidence presented concerning the history of the property and authority, and noted that the electric and plumbing permits issued by the City of Fairbanks, while noting the dwelling as a four-plex, speculated that may have been done for identifying purposes rather than zoning purposes. He further stated that there may be other options available to the owner in resolving this issue, including Estoppel. He asked Ms. Doxey to explain.

Ms. Doxey read the definition of Estoppel from Black’s Law Dictionary 7th Edition. She communicated the application of applying Estoppel in the present matter before the Commission.

Mr. Guinn asked if an Estoppel judgment was obtained, the City or Borough would be prevented from requiring it be torn down or used as a four-plex.

Ms. Doxey responded there has to be some action against a property to trigger an affirmative defense, and the property owner could go to Court and say that the code cannot be enforced against them because they are estopped from any enforcement action.

Discussion ensued by Mr. Guinn and Ms. Doxey related to a question posed by Mr. Guinn that if at least 50% of the property burnt down, would the property owner be able to rebuild if grandfather rights were granted, and discussed related codes that may apply.

Mr. Muehling asked if the estoppel claim only applies to the original builder.

Ms. Doxey explained that the estoppel claim likely runs with the land.

Mr. Perreault asked if the estoppel could take into account the damage that could or would be done in making it more difficult to secure grandfather rights.

Ms. Doxey explained it would go towards the detrimental reliance.

Mr. Brandt discussed the belief that a “mistake” was made in the issuance of the permit, and stated his disbelief that it was a “mistake”, and stated the builder did everything correct in building the four-plex, and testimony has shown there are other multi-family structures in the immediate area and time period, so there had to be a process that allowed it.

Ms. O’Neall stated her agreement with Mr. Brandt, though noted the action might not be legal.

Mr. Brandt responded that it would be legal if, at the time, the officials issuing the permits also issued the variance, which is not known. He stated that the structure was built in the middle of town as a four-plex, everyone knew it was a four-plex in a two-family zone, and permits were issued. He indicated there is neither proof of it being an error nor any proof a variance was
issued, so logically, since it was known, it had to have been allowed to be built in that zone rather than a mistake having been made.

Mr. Perreault stated he would not support the motion and indicated that the City, on multiple occasions, signed permits wherein it was listed as a multi-dwelling, and the repeated behavior by the City building official demonstrates evidence that it was not a mistake. He noted there is no evidence a variance was issued, but stated that is not evidence of its absence.

Ms. Doxey reminded Commission of the legal standards and findings of fact that would need to be developed in order to support a motion to approve the grandfather rights, and discussed substantial evidence standard, burden of proof, and inadequate evidence.

Ms. O’Neall asked what happens if the evidence does not exist.

Ms. Doxey replied that the Commission has to, by code and legal case law, rest its decision on substantial evidence and it cannot rest its decision on speculation.

Mr. Perreault interjected that the decision to deny also cannot be based on speculation.

Ms. Doxey responded that if there is not substantial evidence to approve the application, the Applicant has not met its burden, so by default, the legal option is to deny. She resumed her answer to Ms. O’Neall’s question, and stated as an example that if a variance had been issued, but there are no documents to present to support one being issued, testimony from a City of Fairbanks employee could have been presented on the historical knowledge on how these types of matters were handled related to variances, zoning, building, etc., all of which are currently lacking from the record.

Mr. Brandt reiterated that it is also not known if the permit was issued in error per finding of fact number 7, and stated that the evidence presented supports that the permits were issued on purpose better than an error having occurred.

Ms. Doxey responded that if there is disagreement with a finding of fact, the wording can be changed, and further stated her understanding of the evidence is that the zoning at the time the structure was built was residential and it did not allow four-plexes. She explained that if a building permit said four-plex and it was allowed, it was not correct, whether purposefully incorrect or a mistakenly incorrect, it was not allowed in that zone.

Mr. Perreault questioned the lack of evidence of it being a mistake or an error, and noted the repeated behavior showing it was known by the building official to be a four-plex and on one permit has a handwritten notation in the zoning space that it is “Multi-Res”. He reiterated that the City knew at the time what it was doing and what it was approving.

Mr. Muehling responded that the question still remains, does the person signing off on the building permit concern themselves with the zoning.

Mr. Perreault interjected with “we must assume the building official knows what the zone is”.

Mr. Muehling resumed his statement, and commented that the Applicant has the burden of substantially proving, and stated that on page 585, the Applicant stated his grounds for the appeal and it lacks an affirmative defense.
Mr. Perreault responded that copies of the permits issued by the City have been entered into evidence which demonstrate what was filled out, specifically the permit on page 555, the same building official listed the zoning as multi-res, listed the use of structure as multi-dwelling, dated it, and described it as new construction.

Ms. Doxey reminded the Commission on what is required to grant grandfather rights and read FNSBC 18.108.020.

Mr. Guinn summarized that it was two-family before and it was two-family after.

Ms. Doxey explained it had to be lawful and then become unlawful due to a code change.

Mr. Brandt reminded everyone of prior testimony that in 1964, the City of Fairbanks issued building permits and was responsible for City zoning at the time. He stated that the repetitive nature of the issuance of permits for this four-plex and the existence of others in the area supports substantial evidence of it not being a mistake and it was allowed at the time.

ROLL CALL

Three (3) in Favor: Mr. Muehling, Mr. Peterson, and Mr. Guinn

Five (5) Opposed: Mr. Whitaker, Ms. O’Neall, Mr. Stepovich, Mr. Perreault, and Mr. Brandt

MOTION FAILED

Mr. Perreault requested a recess to present a new motion and findings of fact.

Mr. Guinn approved the request and instructed those in favor of approval to work with Mr. Perreault.

(Mr. Brasier disconnected from telephonic participation and advised he would be recalled when the meeting resumed.)

(The meeting recessed from 8:24 p.m. to 8:40 p.m. as indicated above)

MOTION: To approve the appeal and affirm recognition of legal nonconforming use status (grandfather rights) for an existing four-plex building in the Two-Family Residential (TF) zone for the property on Lot 2E, Block 99, Fairbanks Townsite, and adopting the following findings of fact:

1. The subject property was issued a building permit and multiple inspection reports clearly identifying it as a multi-family or four-plex building;
2. The City of Fairbanks had zoning and permitting authority at the time of construction;
3. Applicant’s testimony introduced evidence of other multi-family dwellings built around the same time in the immediate area and zone; and
4. This constitutes substantial evidence that the construction was legal and allowed according to the City of Fairbanks.
by Mr. Perreault and seconded by Mr. Brandt.

Discussion on the motion

Mr. Muehling stated the pre-requisite requirement of a code allowing a four-plex was never in existence. He explained that the findings of fact in the first motion, item number 3, should be added to this motion since that is the only way this motion can be granted legally.

Mr. Guinn sought clarification on Mr. Muehling’s intent.

MOTION: To amend the findings of fact to insert the original #3 findings of fact: The subject property has been zoned residentially since 1946. From 1946 to 1988, several Residential and General Residential zones were established by ordinances on the subject property that permitted single-family and two-family dwellings. However, at no time since the establishment of the 1949 Residential zone on the subject property has zoning allowed multiple-family dwellings on the subject parcel by permitted use, conditional use, or "special permit", by Mr. Muehling.

MOTION DIED FOR LACK OF A SECOND

Discussion ensued about the findings of fact and the need for further development of the record that show the four-plex was legal at the time it was built.

Mr. Brandt communicated all the testimony given at the last hearing and this hearing was that the builder did everything right when the four-plex was built.

Ms. Doxey stated the Staff Report and its attachment showed uses that were allowed in the residential zone at the time, and asked if the Commission is rejecting that evidence.

Mr. Perreault and Mr. Brandt both stated they are not rejecting that evidence.

Mr. Brandt stated an error was made in issuing the permit.

Ms. Doxey directed the Commission to page 532 in the September 6th meeting record.

Mr. Perreault pointed to page 514 and read a portion of that code that would offer opportunities for a multi-family dwelling to be constructed in the zone.

Ms. Doxey inquired if there was evidence that those code requirements were met to allow the four-plex use.

Mr. Perreault indicated that the multi-family dwelling box is checked with the general residential zone also noted on the building permits. He stated that constitutes evidence that the City of Fairbanks (zoning authority) was aware of both the zone and purpose of the construction, and signed off on its construction, and the was opportunity in the code, at that time, for a multi-family dwelling “to be permitted in this zone”. He further stated there is no evidence it was built illegally.

Ms. Doxey commented that the Commission needed to develop a finding of fact that demonstrates that, if relying on page 513 of the previous meeting packet, that those criteria
were met and the four-plex was built legally. She further stated the absence of evidence is not substantial evidence for a decision.

**Mr. Perreault** indicated his belief that there is an absence of evidence to support that this (permit issuance) was done in error.

**Ms. Doxey** discussed the legal standard of the burden being on the Applicant.

**Mr. Perreault** stated his conviction that the evidence presented that it was a legal construction.

**Ms. Doxey** requested to be pointed to the evidence (not building permits).

**Mr. Perreault** stated that section 6 indicates that multi-family dwellings are permitted and read from on page 514, Article II, Residential District, Section 3820, Use, Number 6.

**Ms. Doxey** drew attention to page 513, subparagraph II, and read that section.

**Mr. Perreault** indicated there is no evidence that special permission was granted. He further stated there is evidence that the City was approving it subsequently.

**Ms. Doxey** asked if there was evidence that the zoning was actually checked prior to marking it on the permits.

**Mr. Perreault** communicated that there is evidence that the City was aware of what the zoning was at the time.

**Ms. Doxey** communicated that her legal opinion that issuing a building permit, listing the wrong zoning, does not change the zoning law at the time.

**Mr. Perreault** reiterated his belief that there was an opportunity in the zoning law allowing for the construction to occur legally.

**Ms. Doxey** pointed out there is no evidence in the record that that process was complied with and that it was developed legally and the burden is on the Applicant to prove with substantial evidence that it was legal.

**Mr. Perreault** stated he is convinced by the Applicant’s evidence.

**Mr. Guinn** asked if that could be a finding of fact.

**Ms. Doxey** indicated the absence of evidence in the record that supports. She stated she has heard continued reliance on building permits. She stated that if the Commission is not rejecting the evidence that the code, as it is in the record at the time (page 513), the fact that a building permit listed the use or the zoning in error, purposeful or not, conflicts.

**Mr. Guinn** summarized that a few Commissioners disagree with the legal opinion.

**Ms. Doxey** reminded the Commission of the ethic duty under Borough code and serving on the Commission, to apply the facts heard in the record, to the law.
MOTION: To postpone this matter indefinitely by Mr. Peterson and seconded by Mr. Muehling.

Ms. Doxey explained that a quasi-judicial matter cannot be postponed indefinitely, and communicated the basis for that determination.

Mr. Peterson and Mr. Muehling withdraw the motion to postpone.

Mr. Peterson stated there is no legal reason to support the current motion and is not in favor.

ROLL CALL

Five (5) in Favor: Ms. O’Neall, Mr. Stepovich, Mr. Perreault, Mr. Brandt, and Mr. Whitaker

Three (3) Opposed: Mr. Peterson, Mr. Muehling and Mr. Guinn

MOTION PASSED

OATH ADMINISTERED

F. QUASI-JUDICIAL HEARINGS

1. CU2017-023: A request by Aaron Joseph Heath DBA AlasKind LLC on behalf of Charles Edward Workman for conditional use approval of a marijuana cultivation facility, indoor large, in the General Use 1 (GU-1) zone on Tract A, Bias Drive East Subdivision (located at 278 Bias Drive East, on the north side of Bias Drive East, east of Beacon Road).

Mr. Aaron Heath, the Applicant, was present.

Mr. Singh gave a presentation of his staff report and recommendations on behalf of the Borough’s Planning Department.

Questions by the Commissioners

Mr. Brandt asked for clarification on which site plan is accurate. Mr. Singh advised to use the most current plan, and explained the development of the site based upon fire official involvement.

Applicant’s Testimony

Mr. Heath communicated that he is following all rules and regulations, and offered to answer any questions.

Questions by the Commissioners

Mr. Muehling commented that the Staff Report and Application are very clear and well produced. He asked about casting hempcrete. Mr. Heath explained the use of the hemp plant mixed with lime-base process and use.
Mr. Peterson inquired why the compost pile is far out and near the wetlands. Mr. Heath advised that he had not seen the wetlands chart and speculated that DEC and the Corp will require him to move it to a different location out of the wetlands.

Mr. Brandt asked if he could physically see his neighbors. Mr. Heath responded that from the building location he cannot see his neighbors, and his neighbors generally seem to be receptive.

Interested-Person Testimony Opened

No interested person testimony.

Interested-Person Testimony Closed

MOTION: To approve the conditional Use Permit for commercial marijuana cultivation facility, indoor large, with four (4) conditions, and adopting the staff report and three (3) Findings of Fact in support of the approval by Mr. Perreault and seconded by Ms. O'Neall.

Discussion on the Motion

Mr. Perreault stated he supports the application, it meets the standards for approving an application, and there is no reason to oppose it.

Ms. O'Neall commented that it meets the standards, considers the sensitive use areas in regulation for distance which were here only concerns.

Mr. Guinn indicated his support for the same reasons indicated by Mr. Perreault and Ms. O'Neall.

Ms. Doxey asked if the location of the compost would impact the decision points for the Conditional Use Permit; specifically adequate facilities or intent and purpose of Title 18, or public health, safety, and welfare.

Mr. Perreault stated he did take that into consideration. He stated that the health and welfare were addressed by the Applicant who stated he would comply with requirements of ADEC and the Army Corp of Engineers.

Ms. Doxey inquired if the Commission has any concerns of where the compost might end up under the same criteria.

Mr. Brandt stated there would not be a concern if ADEC and/or the Army Corp of Engineers do not have a problem with the location,

Mr. Guinn concurred with Mr. Brandt.

ROLL CALL

Eight (8) in Favor: Mr. Whitaker, Mr. Peterson, Ms. O'Neall, Mr. Stepovich, Mr. Perreault, Mr. Brandt, Mr. Muehling, and Mr. Guinn.
Zero (0) Opposed:

MOTION PASSED

(The meeting recessed from 9:28 p.m. to 9:35 p.m.)

2. **CU2018-002**: A request by William Emery for conditional use approval of a guesthouse in the Rural Residential/Mobile Home Subdivision overlay/Groundwater Damage Protection overlay (RR/MHS/GWP) zone on Lot 1, Block F, Gordon Subdivision, Third Addition (located at 3789 Blessing Avenue, on the south side of Blessing Avenue, east of Nelson Road).

**Mr. William Emery**, the Applicant, was present.

**Ms. Wasinger** gave a presentation of her staff report and recommendations on behalf of the Borough’s Planning Department.

**Questions by Commissioners**

**Mr. Whitaker** inquired how many “Dear Property Owner” letters were sent and how many responses were received. Ms. Wasinger replied that 211 letters were sent out and one inquiry was received.

**Mr. Brandt** questioned the guesthouse being subordinate to the dwelling and inquired if subordinate could be one square foot smaller. Ms. Wasinger confirmed. **Mr. Brandt** commented that the guesthouse structure will be twice the size of the dwelling, and stated the actual guesthouse portion is what is being considered in subordination to the main dwelling. Ms. Wasinger confirmed that the guesthouse use is limited to the second floor and the first floor uses are for the single family residence already existing on the property.

**Mr. Guinn** commented that on page 157 it says in 1999 it became a legal nonconforming with the adoption of ordinance 99-055. Ms. Wasinger replied that that applies to the crawlspace that is greater than 4’ on the existing residence. She further commented that the groundwater protection overlay prohibits the construction below grade of basements. **Mr. Guinn** drew attention to page 159 (diagram), and questions the blue existing house designated “proposed addition”. Ms. Wasinger responded that a zoning permit was issued for that addition.

**Mr. Peterson** asked what the uses are for a guesthouse. Ms. Wasinger reads the definition of guesthouse. Discussion ensued on practical application of how guesthouses have been treated in the past; rentals, mother-in-law apartment, etc.

**Applicant’s Testimony**

**Mr. Emery** testified he has lived in the home since 1986 and is a licensed professional counselor, and stated his desire to increase his garage space and business office for his counseling practice, and a place to allow visitors to stay and potentially rent it out in the future.

**Questions by Commissioners**
Mr. Muehling questioned the manner of access to the second floor. Mr. Emery stated it would be an inside enclosed stairway, blocked off from the garage.

Mr. Muehling inquired if one of the spaces in the garage were offered as part of the guesthouse use, would that change the size of the application.

Ms. Doxey offered her interpretation of the definition of guesthouse as being just what is used as the attached dwelling unit. She advised the Commission not to get too distracted by the fact that the dwelling unit is going to be built above the garage, because the same garage could be built separately, as its own unit, and be legally allowed.

Mr. Brandt commented that if it were a separate building, the building total size, being 2 stories is 2,700 square feet.

Ms. Doxey mentioned that when considering a conditional use, the Commission cannot legally condition a different legal allowed use.

Mr. Muehling noted that the Applicant indicated there would be a separate stairway from the garage.

Mr. Brandt sought confirmation that the floorplan showing that there is an opening from the garage will actually be blocked off. Mr. Emery confirmed there will be no access to the garage from the stairwell.

Interested-Person Testimony Opened

No interested person testimony.

Interested-Person Testimony Closed

MOTION: To approve the Conditional Use Permit for a guesthouse on Lot 1, Block F, in the RR/MHS/GWP zone with two (2) conditions, and adopting the staff report and three (3) Findings of Fact in support of the approval by Mr. Perreault and seconded by Mr. Peterson.

Discussion on the Motion

Mr. Perreault stated that the facts and the application show this is a normal conditional use and within the guidelines for the area in protecting the private property rights and uses, and there are no risks to public health, safety or welfare, and it would improve it.

Mr. Guinn commented there are numerous duplexes in the neighborhood, and stated garages are by building code, separate structures.

ROLL CALL

Eight (8) in Favor: Ms. O’Neill, Mr. Stepovich, Mr. Perreault, Mr. Brandt, Mr. Muehling, Mr. Whitaker, Mr. Peterson, and Mr. Guinn.

Zero (0) Opposed:
MOTION PASSED

G. NEW BUSINESS

1. 2018 Planning Commission Meeting Schedule: consideration of change from 1\textsuperscript{st} and 3\textsuperscript{rd} Tuesday of each month to 2\textsuperscript{nd} and 4\textsuperscript{th} Tuesday of each month.

Ms. Nelson explained that in an attempt to balance workload related to the Planning Commission, Platting Board, and Administrative Hearings, is seeking to change the Planning Commission Meeting Schedule to the 2\textsuperscript{nd} and 4\textsuperscript{th} Tuesdays of each month. Discussion ensued and everyone agreed to the change. Discussion ensued about the January 2018 meeting, and potential conflicts with the January 9\textsuperscript{th} meeting.

Mr. Guinn communicated that beginning in 2018, the January meeting will be held on January 16\textsuperscript{th} and beginning February and thereafter will be the 2\textsuperscript{nd} and 4\textsuperscript{th} Tuesday of each month.

H. EXCUSE ABSENT MEMBERS

Mr. Quinn communicated that Ms. Thayer’s and Ms. Presler’s absences are excused.

I. COMMISSIONER’S COMMENTS

Mr. Muehling commented that there were two (2) unanimous votes.

Mr. Stepovich indicated his willingness to go to the APA conference.

J. ADJOURNMENT

There being no further business, the meeting was adjourned.