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 6:00 p.m. by Mindy O’Neall, Chair.

Commissioners Present: Chris Guinn  Mike Stepovich
                      Robert Peterson  Charles Whitaker
                      David Brandt  Eric Muehling

Commissioners Absent: Wendy Presler  Patricia Thayer

Commissioners Excused: John Perreault  Doug Sims

Others Present: Christine Nelson, Director of Community Planning
                Kellen Spillman, Deputy Director of Community Planning
                Manish Singh, Planner
                Ben Jaffa, Asst. Borough Attorney
                Wendy Dau, Asst. Borough Attorney
                Michelle Gutierrez, Administrative Assistant

A. **ROLL CALL**

B. **MESSAGES**

1. Chairperson’s Comments

None

2. Commissioner’s Comments

None

3. Communications to the Planning Commission

Ms. Nelson reminded the commission of the APA conference in January and reminded the commission of the three positions that are terming out at the end of December which are Thayer, Presler and Perreault, letters for re-up will be sent out in October.

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

   a. Agenda items not scheduled for public hearing
   b. Items other than those appearing on the agenda

5. Disclosure & Statement of Conflict of Interest
Commissioner Muehling stated his potential conflict of interest on item AM2018-007, he is good friends with the general contractor that is building on the nonstandard lot and requested he be recused.

Chair O’Neall stated Commissioner Muehling will be excused from hearing the amnesty appeal.

Commissioner Stepovich clarified the DPO’s mailed out were sent to his father who has the same name as him and not to himself.

C. * APPROVAL OF 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.

MOTION: To approve the Agenda and Consent Agenda by Commissioner Peterson, seconded by Commissioner Muehling.

CARRIED WITHOUT OBJECTION

D. MINUTES

1. *Minutes from September 11, 2018 PC Meeting

E. QUASI-JUDICIAL HEARING

CU2019-002: A request by Shannon Stover DBA The Woof Pack Kennel for conditional use approval of an animal boarding facility in the General Commercial (GC) zone on Lot 7, Kasalek Subdivision (located at 689 Whitney Drive, on the west side of Steese Highway, north of Chena Hot Springs Road). (Staff Contact: Manish Singh)

OATH ADMINISTERED

Mr. Manish Singh provided a presentation of his staff report and recommendations on behalf of the Borough’s Planning Department, and recommended approval with two (2) conditions and three (3) findings of fact as listed in the Staff Report.

Questions by Commissioners

Commissioner Peterson questioned if they are actually running the facility incorrectly.

Mr. Singh clarified that the building is there and almost finished but not open for business and does not have any dogs and after the conditional use is approved and the applicant goes
through all of the agency reviews such as the Fire Marshall and DEC, if those agencies give a go ahead then this facility could be opened for business.

Commissioner Peterson asked if the complaints that were referred to were on the main residence.

Mr. Singh said yes and clarified that when a complaint is received, it is generally about the property and the complaint was for both properties but there are no dogs on lot 7; the four dogs the owner has are on lot 5.

Commissioner Peterson asked if they can board other animals in addition to dogs.

Mr. Singh stated by definition they could board any type of animals that could be boarded but the application is specifically for 20 dogs.

Commissioner Muehling questioned what direction the outdoor kennels face in respect to noise concerns.

Mr. Singh clarified that outdoor kennels is the outdoor area in which up to five dogs are proposed at any one time and explained the fence areas are facing the west direction. Mr. Singh stated the dogs will be maintained inside the building for most of the time and be taken to the fenced areas only for potty and exercise time.

Commissioner Peterson asked if the fenced areas were on the east side would mitigate the noise that would travel towards the neighbors to the west and stated that the building itself may provide somewhat of a sound barrier.

Mr. Singh stated the nearest house on the west side is 450ft away and the adjacent lot is currently vacant and that general use lot could potentially be developed with an impactful commercial use that is open for debate but that he does not see much of a difference at that distance.

Commissioner Guinn asked if there are any barriers in the fenced areas to prevent the dogs from digging out to get loose.

Mr. Singh stated the applicant has addressed dogs digging under the fence in her application that the fences are rebar and will have wood shavings but the applicant can talk more about it in her testimony.

Commissioner Whitaker asked if there will also be dog breeding at this facility and if a breeding facility and boarding facility are one in the same.

Mr. Singh stated that in GC zone both breeding and boarding facilities are conditional uses but that this conditional use application is only for boarding, not for breeding.

Commissioner Peterson asked if there were complaints or 25 dogs there if the FNSB would be allowed to send someone to check on that.

Mr. Singh said if the facility is operated in a way that is not debated or expected in the meeting that would be a misrepresentation on behalf of the applicant and there are procedures in code to revoke the conditional use.
Commissioner Muehling mentioned the proposal to handle the disposal of dog feces and questioned about dog urine and if it is a health issue since it cannot be picked up as easily as poop.

Mr. Singh stated the applicant has proposed in the summer time that it will be absorbed into the ground and DEC doesn’t have specific requirements about dog urine, they only have concerns about the septic which he recommended to have a plan review and for the winter time, the applicant proposed she will keep the area clean and stated the applicant can further explain how she plans to achieve that.

Commissioner Whitaker asked if feeding times were considered for the conditions to certain times of the day to mitigate barking.

Mr. Singh said the feeding will happen inside the building and the applicant proposed 8:30am to 7pm which is consistent with other activities in the neighborhood which is why a condition has not been proposed although if the applicant decides to feed at a different time, as long as it happens inside the building, there are no potential concerns because the noise will be contained by the building.

**Applicant’s Testimony**

Applicant, Shannon Stover testified as follows:

- The facility will be a high end dog boarding
- Constructed for indoor use and keeping with some outside time allowed
- No dogs will be kept outside at night or all day
- Indoor feeding only
- Artic engineering tested the septic and prepared a report for the ADEC
- DEC might require the septic to be treated for the urine or small amounts of feces that could get in but most will get disposed of otherwise
- Hired Greg Lebal to prepare documentation for the plan review for the Fire Marshall
- The facility will operate under normal working hours
- No intention to board other animals other than dogs
- The near highway is noisy
- She has cleaned up the property since purchasing it
- Spent $180,000 of personal savings to build the kennel
- The business will allow her to support her young daughter and take care of her elderly mother
- She understands her neighbors concerns
- She did lower her personal outdoor dogs down to four on Lot 5
- She has built the facility to not be noisy

**Questions by Commissioners**

Commissioner Guinn questioned the dogs ability to get out of the fenced areas.

Ms. Stover stated that along the base of all fencing will be heavy railroad ties that are rebarred into the ground to secure the dogs from getting out but the dogs are not going to be outside long enough to dig out. Stover stated if that does not work, she will cement the ground next year if she has to but it is not the best footing for dogs in the cold weather.
**Commissioner Guinn** asked if it was not her intent to put the dogs out in the potty area to leave them out there for hours.

Ms. Stover said no and explained the proposed dog routine and how they won’t be outside very long and reiterated that no dogs will be left outside all night or all day.

**Commissioner Muehling** asked about the reduction of her personal dogs outside down to four and asked if there are any dogs inside.

Ms. Stover said four outside in the pen during the day and one older dog inside.

**Chair O’Neall** reminded the commission that they are to speak of the specific property interest of the conditional use and not the adjacent property.

**Commissioner Peterson** asked if a conditional was imposed that would limit the kennel to only four dogs being outside at a time and if that would affect the business.

Ms. Stover said that it would not affect the business and she understands that maintaining the dogs means they are supposed to be inside at night and feed inside. She stated she will do what she has to do.

Discussion ensued between Commissioner Peterson and Ms. Stover in regards to the number of dogs allowed outside in the surrounding area.

**Commissioner Muehling** asked if an engineer had been consulted in regards to air filtration system so odor’s inside do not affect the neighbors.

Ms. Stover said that it is not a large enough building to need its own air system and the building would have to be dirty for the neighbors to smell the odor which would cause the business to shut down. She stated she has fans, humidistats in the ceiling to cause air flow through the kennel and she does not see that as a problem but she can look into it more if need be.

**Interested Person Testimony Opened**

Alicia Andrus, lives off of Farmers Loop and did not receive a DPO. Ms. Andrus stated she house sits for Ms. Stover.

**Commissioner Muehling** stated he did not hear why her property interest is any different than the general public’s property interest.

**Chair O’Neal** stated she heard that she maintains the building and structures that is on the property.

**Commissioner Guinn** stated he did not hear any property interest.

**Chair O’Neal** informed Ms. Andrus that the Commission will not be able to hear her testimony.

Chris Plowman, lives off of Farmers Loop and did not receive a DPO. Mr. Plowman stated he also house sits for Ms. Stover.
Chair O’Neall stated that based on the previous decision, the Commission will not be able to hear his testimony because he does not have a property interest that is different than the general public.

Chair O’Neall called up Michael Friborg and informed him that the commission received a testimony by affidavit that he submitted and that he cannot do both.

Mr. Friborg requested his affidavit to be retracted from the record.

Chair O’Neall stated Mr. Friborg’s affidavit will be retracted from the record and from the decision making of the commission.

Michael Friborg, 291 Aggravation Aly, testified as follows:
- Initially was opposed to the kennel due to the noise
- He lives on the other side of the hill
- The decision will not impact him that much
- His concern was for closer neighbors
- Seems that the facility is smart
- He learned a lot from the meeting that he did not know before
- He has a noise concern
- His neighbor’s dog across the way talks with her dogs and it doesn’t end
- As long as they take care of the animals and keep them from driving neighbors crazy, he doesn’t have a big problem with it

Questions by Commissioners

Commissioner Guinn asked where Aggravation Aly is located.

Mr. Friborg stated it is across the freeway and up on the hill.

Chair O’Neall asked if he received a dear property owner letter.

Mr. Friborg said yes.

Interested Person Testimony Closed

Rebuttal by Applicant

Ms. Stover responded that she will look into if her dogs are talking to the dogs that live across from Mr. Friborg as he previously stated and she will take care of it.

MOTION: To approve CU2019-002 for an animal boarding facility on lot 7 with two (2) conditions, adopting the staff report, as amended and three (3) findings of fact in support of the approval by Commissioner Guinn, seconded by Commissioner Muehling.

CONDITIONS
1. The applicant or holder of this conditional use permit shall comply with all applicable land use related laws. Applicable permits and approvals may include but are not limited to:

   a. The applicant or holder of this conditional use permit shall obtain a formal plan review by the State of Alaska Department of Public Safety (Division of Fire and Life Safety, Plan Review Bureau) and shall comply with all recommendations and/or requirements resulting from the plan review.

   b. The applicant or holder of this conditional use permit shall obtain a formal plan review by the State of Alaska Department of Environmental Conservation for the use of a septic system for non-domestic wastewater discharge; and shall comply with all recommendations and/or requirements resulting from the plan review.

2. If any modifications are made to the site plan, floor plan, maximum number of dogs or other FNSB required documents, the applicant or holder of this conditional use permit shall submit revised documents to the FNSB Community Planning Department. If modifications are made to the conditional use, an amendment to the Conditional Use Permit may be required pursuant to FNSBC 18.104.050(D).

FINDINGS OF FACT

1. With the conditions imposed, the proposed conditional use will conform to the intent and purpose of Title 18 and of other ordinances and state statutes:

   a. The purpose of Title 18 will be met because the proposed conditional use is consistent with ‘Perimeter Area’ and ‘Preferred Residential Land’ comprehensive plan land use designations because the conditional use is compatible with the surrounding community. The Comprehensive Plan Land Use Goal 1 and Goal 3 are enhanced by the conditional use.

   b. The intent of Title 18 will be met because with the conditions imposed, the conditional use will both protect private property rights and promote public health, safety, and welfare.

   c. With the conditions imposed, the conditional use will meet the intent of Alaska State Statute and other ordinances because the septic system will meet the ADEC regulations.

2. With the conditions imposed, there are adequate existing energy and transportation facilities serving the site and other public services are available to serve the proposed conditional use.

   a. The animal boarding facility has adequate water capacity because it will have a 1,000 gallon water tank and a contract with a water delivery service.

   b. With the conditions imposed, the septic system will meet ADEC requirements and provide adequate sewage capacity to the animal boarding facility.

   c. The animal boarding facility is served by the Steese Volunteer Fire Department for emergency fire response.
d. The animal boarding facility has adequate power supply because it is served by the GVEA grid.

e. The animal boarding facility will have adequate heating because the facility has radiant floor heat, a 300 gal. fuel tank and the applicant will have a contract with a fuel delivery service.

f. The animal boarding facility is served by the Alaska State Troopers for law enforcement.

g. The animal boarding facility has access from Whitney Drive which is a local type roadway. Whitney Drive can accommodate the trips generated from the facility.

h. The existing 12-foot wide gravel driveway is adequate for the animal boarding facility.

i. The site plan shows five parking spaces whereas only two parking spaces are required by the FNSB parking standards.

3. With the conditions imposed, the proposed conditional use will protect public health, safety, and welfare because the animal boarding facility will comply with Title 18 standards for the GC zone (FNSBC 18.64) as well as with other applicable land use related laws.

a. With the conditions imposed, the septic system for the animal boarding facility will meet the ADEC regulations.

b. With the conditions imposed, the animal boarding facility will have a plan review from the State Fire Marshal office.

c. The dogs will be boarded inside a building to minimize noise impacts to the surrounding neighbors. The dogs will be fed inside the building and will be individually taken to outdoor fenced potty and exercise areas. The applicant will have no more than five dogs outside the building in the potty and exercise areas at any time.

d. The hours of operation for the animal boarding facility do not negatively impact the surrounding neighbors because there are other commercial operations in the area that have comparable business hours.

e. The property has adjacent GU-1 and RA-5 zones that allow for dog kennels and animal boarding facilities as permitted uses without any conditional use permit requirement.

f. The dogs inside the kennels will not have access to outdoors. The existing fences for the potty and exercise areas mitigate any concerns for loose dogs.

g. The animal boarding facility will have a business security system which includes security cameras on the property.

h. The indoor facility and the outside area will be cleaned daily. The dog waste will be bagged and stored in a dumpster on the property. The applicant will contract Alaska Waste which will haul the waste weekly to the borough landfill.
i. The outdoor lights on the animal boarding building will not be pointed in a manner to negatively impact the neighbors.

j. The noise and lighting impacts to the surrounding neighbors will be reduced because the animal boarding facility building is located at least 250 feet from the nearest residence to the northwest and is located at least 450 feet from the nearest residence to the west.

Discussion on the Motion

Commissioner Guinn stated that the case seemed like a pretty decent operation and the zoning is GC and per his recollection when the area was zoned by the assembly they wanted commercial development in that area. He also stated that just next door to this property they could have a boarding facility without a conditional use permit which seemed unfair and he was in support of the motion.

Commissioner Brandt mentioned most of the concerns read from the affidavits revolved around noise and the applicant has stated the dogs will be inside at night and no outdoor boarding with only 4 to 5 dogs outside at any given time and not for very long so he felt the neighbors will not be able to hear the noise inside the building which addressed the affidavit concerns.

Commissioner Muehling stated the intent of Title 18 has been met with the imposed conditions and the CU will project private property rights and promote the public health, safety and welfare. He also stated his concerns of the daily removal of dog feces and the issues of urine have been addressed sufficiently by the applicant and the noise concerns are adequately addressed which supported his move to approve the motion.

ROLL CALL

Seven (7) in Favor: Brandt, Guinn, Whitaker, Peterson, Stepovich, Muehling and O’Neall

Zero (0) Opposed:

MOTION PASSED

[Recessed for a brief at ease]

[Commissioner Muehling left the dais]

F. APPEALS

AM2018-007: An appeal by Travis Naibert of the denial of a request for amnesty relief for an existing lot with a lot size of 54,450 sq.ft. instead of the required 200,000 sq.ft. in the Rural and Agricultural (RA-5) zone for the property on E ½ NE ¼ NE ¼ SW ¼ SE ¼ Sec 30, T1N R1E F.M. (located at 333 Rainbow Ridge Road). (Staff Contact: Manish Singh)

Mr. Kellen Spillman provided a presentation of his Staff Report and findings of fact on behalf of the Borough’s Planning Department and recommended denial of the appeal with eight (8) findings of fact.
FINDINGS OF FACT

1. The lot size violation does not qualify for legal nonconforming lot status (grandfather rights). On June 12, 2018, the FNSB Community Planning Department did not affirm (denied) legal nonconforming lot status because Tax Lot 3017 was created with 54,450 square feet area on October 29, 1982 after Ord. 73-42 established a minimum lot size requirement of 200,000 sq.ft. on September 27, 1973 (GR2018-135).

2. The lot size violation existed as of July 21, 2010 as evidenced by the Warranty Deed recording the description of Tax Lot 3017 on October 29, 1982.

3. A previous owner created Tax Lot 3017 on October 29, 1982 by recording a Warranty Deed. The FNSB Assessor Field Card shows that the ownership of the lot has changed at least three times since 1982 with subsequent Warranty Deeds and therefore, the violation was not intentional or willful on the part of the current owner.

4. The lot size violation does not pose a danger to the public health, safety and welfare of borough residents because the lot has an area of 54,450 sq.ft. which is more than an acre and could potentially support a septic system. A plot plan dated October 20, 1983 shows that the lot is 165.16’ wide which is adequate for constructing a residence and other accessory structures.

5. The lot size violation of 145,550 sq.ft., or approximately 72.78% of the required 200,000 sq.ft., is less than 75% of the required lot area.

6. A lot requesting lot size amnesty, must meet the FNSBC Title 18 definition of “lot” because FNSBC 18.116.020(A) states “…any… lot that is in violation of this title with respect to the numerical regulations pertaining to… lot area, and which has received affirmative recognition of amnesty relief under this chapter, may continue…”

7. The lot does not comply with all other FNSBC platting requirements because it was not legally created under the FNSB Title 17 subdivision regulations in effect when the description of the lot was recorded with a Warranty Deed on October 29, 1982.

8. FNSB Title 18 defines a “lot” as being legally created. Therefore, if a property was not legally subdivided or otherwise legally created, it is not a “lot” as defined by FNSBC Title 18 and cannot qualify for amnesty relief.

Questions by Commissioners

Commissioner Whitaker asked why not a variance rather than amnesty and if a variance would work in this case.

Mr. Spillman stated that option was discussed particularly with Mr. Singh when the applicant was looking at all of the options to get his lot legal which seemed to be the biggest concern of the applicant and it still is an option particularly with the lot next door receiving a variance for the exact same circumstance.

Commissioner Brandt asked for clarification on the lot next door having a variance.
Mr. Spillman stated the lot next door has a variance; in 1982 when the two parcels were deeded apart, creating two different parcels, TL3028 approached the planning commission in 1993 and received a variance.

Mr. Jaffa reminded the commission that it was not appropriate to consider potential alternatives given the de novo hearing of the case and the finding of facts really need to be not withstanding any potential other relief that could be available and it should not influence the decision of whether or not to approve the prior decision.

Commissioner Brandt asked for the last 36 years since the lot was created if the FNSB was aware that the lot is substandard in size and it has been taxed at the size and rate and why hasn’t the issue been addressed beforehand.

Mr. Spillman stated he cannot speak to the past and stated the FNSB in the past has identified subdivisions by deed and sent letters to the property owners and attorneys that drafted the deeds and he cannot speak to whether that was done or not in this case and to his knowledge this lot has been recognized by assessing and taxed for a number of years.

Commissioner Peterson asked Mr. Spillman, as the hearing officer if he discussed his interpretation of the code with the legal department and did the legal department agree with his interpretation.

Mr. Spillman stated the legal department did advise him and he was not comfortable talking about that under attorney client privilege.

Mr. Jaffa stated if there are questions that the commission has with respect to the definitions he could answer directly and that it would not be appropriate for Mr. Spillman to discuss attorney client communications.

Commissioner Peterson asked the legal department if they agreed with Mr. Spillman’s interpretations.

Mr. Jaffa stated he would rather discuss the review of the code and the definition of lot in Title 18 requires that it be lawfully created and that is a determination that was made at the time of the subdivision in 1982 and in the meeting packet a part of Title 17 was included that refers to the process a subdivided lot could be a legal lot going through the platting process.

Commissioner Peterson asked if any legal use be had on TL3017 at this time.

Mr. Spillman said yes and stated the amnesty is not applied for use; there is no question that the use is legal, the use is a single family home and an accessory structure. Mr. Spillman stated the question is the size of the lot.

Commissioner Peterson asked to clarify that what is being said is he can build his house and live there but they cannot make it legal in regards to FNSB code which would make it hard to sell in the future.

Mr. Spillman stated his understanding was a lot was tied up and has to do with bank financing which was the reason for the application and reiterated that the single family structure and the accessory structure are legal uses that are not being questioned and the applicant received a zoning permit for that.
Commissioner Brandt asked if this did meet the definition of lot in 1982 when the lot was created and the definition of lot has changed now with the amnesty laws.

Mr. Spillman said yes that is correct and stated the definition of a lot at the time of October 29, 1982 which can be found on page 89 of the meeting packet and when amnesty was adopted it referenced the new definition of lot.

Commissioner Brandt asked if when the lot was created if it was created legally under the definitions at that time.

Mr. Spillman stated it was met under the zoning code and not under the subdivision code.

Commissioner Whitaker asked legal if there was a disagreement between legal and the planning department.

Mr. Jaffa said he could not speak to that and it is not relevant to the decision making process. Mr. Jaffa stated the amnesty section was not enacted until well after the lot was subdivided and the legal position is that the current definition of lot is what applies under the amnesty code and within that definition of lot it contemplates a lawfully created lot and in 1982 the description as to how a lot could be created under Title 17 was not followed in this case.

Discussion ensued between Commissioner Whitaker and Mr. Jaffa in regards to confidentially of communications between legal and staff and how it predated Mr. Jaffa’s time.

[Recessed for a brief at ease]

Mr. Jaffa stated the advice given to the community planning department and to the commission were the same which is that the current definition of lot is what has to be met for a property to be eligible for amnesty.

Commissioner Guinn asked legal if the issue was the fact of when the definition of a lot was created when the amnesty ordinance was passed.

Mr. Jaffa called for a point of clarification and stated the amnesty ordinance was passed subsequent to the enactment of the current definition of lot.

Discussion ensued between Commissioner Guinn and Mr. Jaffa in regards to the definitions of a lot in the zoning and platting code in 1982.

Commissioner Peterson asked legal if hypothetical amnesty was given could legal help draft findings of fact that would hold up in the case.

Mr. Jaffa stated there would need to be evidence to support the finding of fact that at the time the lots were subdivided it resulted in a legal lot at the time and not in the position to comment on what the facts are.

Commissioner Whitaker asked what year the lot was made into a 1¼ acre lot and if the recording documents were in the packet.

Mr. Spillman said in October 29, 1982 and referenced page 117, Exhibit G for the recording documents.
Chair O’Neall asked if it is it fair to say that the lot initially met the definition of lot but the way it was created was unlawful and that is what is being reviewed at the time.

Mr. Spillman stated the question was not completely clear and based on staff’s research it met the definition of lot in both terms of Title 17 and Title 18 when it was created in 1982 and to his knowledge that was the last time the lot has been altered. Mr. Spillman stated when the amnesty provision was created and inserted into code it referenced the new definition of lot which was created at or after the 1988 zoning code was adopted.

Commissioner Brandt asked if it specifically referenced a new definition or just stated “lot.”

Mr. Spillman said it says “lot” which applies the most current definition.

Commissioner Brandt asked if it did meet the definition of lot when it was created but it does not meet the new definition of lot.

Mr. Spillman stated in their research, yes.

Commissioner Stepovich asked when the new definition of lot was created.

Mr. Spillman stated to the best of his knowledge; it was the definition that was there when the big rewrite was done in 1988.

Questions by Applicant

Mr. Naibert asked staff what they thought attorney client privilege was and stated his concern with a public attorney not wanting to share information to the public and asked how staff is a client to the attorney.

Mr. Spillman stated that staff did receive legal advice from the department of law on the case and legal would be better suited to describe attorney client privilege.

Mr. Jaffa responded that the legal department advises all FNSB departments and the advisors need to rely on the confidentially of their communications with the policy makers in providing advice which can be confidential for a number of reasons and when giving legal advice to a public entity makes no difference and it is subject to the same confidentially privilege the advice would be subject to if it was given to a private citizen.

Applicant’s Testimony

Applicant, Travis Naibert testified as follows:

- Amnesty relief ordinance was written to assist property owners who are having difficulty obtaining traditional mortgage financing.
- Ordinance has intent to not hinder the alien ability of private property within the FNSB.
- Quoted ordinance 2016-09.
- Property is 1 ¼ acres in area zoned for 5 acre lots.
- Prevented construction loan.
- Inability to get a conventional mortgage and affects potential future sells.
- Property meets 5 out of 6 amnesty criteria.
- Zoning violation not willful on his part.
Ownership has changed 3 times since 1982.
Lot was permitted by law at the time.
Granting amnesty relief for his property is what the ordinance intended.
The lack of review and policing of his lot after it was divided means the FNSB allowed the lot size violation to exist.
The property tax assessor was aware of the property subdivision as early as 1984 as shown in Exhibit H.
Gave a brief history of the property
Referenced a 1975 easement that was recorded between GVEA and Mr. Gilbrith.

Questions by Commissioners

Commissioner Guinn asked if the amnesty request is successful, according to Mr. Spillman the amnesty is not a legal use it is just so the FNSB doesn’t go after him and asked Mr. Niebert why he did not go the variance route.

Mr. Niebert said if the amnesty were to be granted then he would be able to get a conventional mortgage and he did not know who had GF rights or variances in his neighborhood and he did not know enough about it to know to ask.

Commissioner Guinn asked if it was brought to his attention earlier if he would have gone that route.

Mr. Niebert said he does not know if having the variance route available should affect the amnesty hearing since it has a different process but he did discuss with the planning department prior to his appeal about the variance option.

Commissioner Peterson asked if Mr. Niebert knew about the problems when he was buying the property and if he used a title company.

Mr. Niebert stated he used a title company when he purchased the lot and it did not come up at all in the title search and he also knew the size of the lot in the zone and assumed it would be grandfathered in.

PUBLIC TESTIMONY OPENED

Jason Fails, 285 Rainbow Ridge Road received a DPO letter, testified as followed:
- Neighbor and contractor for Mr. Niebert
- Stated Mr. Niebert has a fair amount of equity in the property
- Mentioned the adjacent property was resolved without much conflict
- Reiterated that the original parties that split TL3028 and TL3017 did so well before Title 17 was created and informally built their homes on the land
- Stated his respect for the Commission and thanked them for their hard work

OATH ADMINISTERED TO MR. HALDERMAN

Chair O’Neall determined Mr. Halderman could testify.

Ray Halderman, resides at 325 Rainbow Ridge Road, testified as follows:
- Referenced a variance that was issued to TL3018, TL3019, TL3026 and TL3027
Commissioner Peterson reminded Mr. Halderman that the topic of discussion is not on variances and his testimony was not pertinent and the testimony time would be better spent talking about the issue before the commission.

Mr. Halderman testified continued as follows:
- Stated Mr. Niebert just wants to get a loan on his house
- Things happen differently now than 30 years ago
- Testified because he is his neighbor

REBUTTAL

Mr. Niebert stated he did not have anything to rebut.

MOTION: To deny the amnesty relief request (AM2018-007) for E ½ NE ¼ NE ¼ SW ¼ SE ¼ Sec 30, T1N R1E F.M. (also known by FNSB as Tax Lot 3017) for the existing 54,450 sq.ft. lot size in the Rural and Agricultural (RA-5) zone adopting the staff report and eight (8) Findings of Fact in support of the denial by Commissioner Peterson, seconded by Commissioner Guinn.

Discussion on the Motion

Commissioner Guinn stated it was not a strong case for amnesty and under existing ordinances the case does not qualify for amnesty.

Commissioner Brandt disagreed with Mr. Guinn and stated that this case is exactly why the amnesty law was created for and it met every criteria except for the definition of lot which is in question and stated that when the lot was created it was created legally and the definition changed after that and the definition does include the words “or otherwise permitted by law” which to him referenced the fact that it was legally created and it meets the spirit of the law and amnesty should be approved.

Mr. Jaffa stated it is important to create a clear record on the following subjects.
- Talk briefly about the purposes of the amnesty ordinance and how it was not aimed at forgiving subdivision violations.
- The elements of amnesty which are laid out in the code with respect to zoning violation not be intentional or willful and there does not appear to be sufficient evidence that at the time the property was subdivided that there was good faith.

Chair O’Neall clarified that the purpose of amnesty and a distinction between a subdivision violation and a zoning violation and a presence of evidence that the property was divided in good faith, is needed.

Mr. Jaffa stated the record needs to be clear if the motion is to pass.

Commissioner Stepovich asked if the case is a subdivision violation or a zoning violation.

Mr. Jaffa stated at the moment there was no violation and the applicant is seeking amnesty to prevent enforcement of a zoning violation and the zoning violation is based on a substandard lot size and referenced Title 18.16.030 eligibility requirements and based on the facts that were
presented at the time of subdivision by deed that did not create two legal lots. He stated the
definition of a lot is not what creates a lot.

**Commissioner Brandt** stated he based his opinion off the testimony given that the lot was
legally created at the time in 1982.

**Mr. Jaffa** stated the evidence heard indicated the lot definition in 1982 would have included the
property and he did not hear that the subdivision by deed created a legal lot.

**Commissioner Stepovich** asked legal if hypothetical amnesty is granted could the applicant
come back and also apply for a variance.

**Mr. Jaffa** stated regardless of the decision of the commission on the current application the
applicant would be free to seek other remedies to include a variance and reminded the
commission to be clear that should not be factored into the decision on the current application;
the decision has to be based on the evidence presented.

**Commissioner Peterson** stated as much as he would like to grant amnesty in the case he
agreed that under eligibility amnesty can only be granted under certain conditions and it is
apparent that the lot does not comply with platting and zoning requirements including use and
he was in favor of the current motion.

**Mr. Jaffa** reminded the commission that there is a need to amend the language of proposed
finding of fact #3 which reflects the question of intentional violation and based on the evidence
heard which included a statement by the applicant that he did not know if it was intentional or
willful at the time; there is not sufficient evidence of that and adopting FF #3 unless amended
would be arbitrary and problematic in the event of an appeal.

**Commissioner Brandt** stated that he did not hear anything in the amnesty law that stated it
had to be intentional or willful by the originator and that he interpreted is that it is not intentional
or willful by the current owner that is applying for the amnesty. He stated there is no way for the
current owner to know what happened 30 years ago and why or how it was done.

**Mr. Jaffa** stated he just wanted to clarify to the commission and that perhaps the code is not
being clearly understood and stated what has to be shown by the applicant to be not intentional
or willful was the violation so the commission would need to decide when there is a violation and
at that point is that violation intentional or willful.

**MOTION TO AMEND:**  
To change Finding of Fact #3 and delete everything after the word
“warranty deeds” by **Commissioner Peterson**.

**FAILED FOR A LACK OF A SECOND**

**ROLL CALL (MAIN MOTION)**

Three (3) in Favor:  **Peterson, Guinn & O’Neall**

Three (3) Opposed:  **Stepovich, Brandt & Whitaker**

**MOTION FAILED**
Questions by Commissioners Reopened

**Commissioner Peterson** asked when the property was subdivided was it subdivided legally.

**Mr. Spillman** stated according to the definition of lots it was a lot that was legal at the time but the lot did not go through the subdivision process, it went through deeds so in that sense it did not go through the legal process to subdivide it in 1982.

**Mr. Jaffa** stated it was important to clarify the definition is not what makes a "lot" a legal "lot" and suggested the commission inquire if it was under Title 17 as a legally subdivided parcel at the time it was created.

**Mr. Spillman** asked legal to repeat the question.

**Mr. Jaffa** asked if at the time the two parcels were lawfully created.

**Mr. Spillman** explained in 1982 and according to the research done, it was his opinion that they were not legally created because they did not go through the subdivision process.

**Commissioner Whitaker** asked how many lots are subdivided by deed and how many existed in 1982 and how many still exist now.

**Mr. Spillman** stated it is in the thousands.

**Commissioner Guinn** stated that one of the major points is that it did not get FNSB approval as a subdivided parcel that made it not an approved lot.

**Mr. Spillman** clearly stated that pg.115 of the staff report is his summary of the criteria, not in full which is available in code.

**Mr. Jaffa** suggested the commission refer to the actual code because there was another section that was relevant to the discussion of whether or not it was intentional or willful that is not in the staff report.

**Commissioner Guinn** stated 36 years have passed and asked why it was important to him.

**Mr. Jaffa** stated it is important because it is a section of the requirement and if the commission is going to follow the code then it is an essential element for finding amnesty and stated the petitioner has a burden to establish by evidence a preponderance of the evidence that the element is met which he stated he doesn't know and questioned if the commission is going to disregard that requirement simply because it may have happened a long time ago and if that is the case, then a potential thousands of properties that would be eligible for amnesty.

Discussion ensued between **Commissioner Guinn**, **Commissioner Brandt** and **Mr. Jaffa** in regards to the distance in time referring to it being willful or intentional.
Ms. Dau chimed in and gave the commission an example of previous grandfather rights appeals that the commission has seen in the past to assist with the current discussion of time.

Commissioner Brandt stated that it would be impossible if the person that created the problem died and then amnesty would never be an option.

Ms. Dau clarified that you don’t need to have someone from 1980 who created a violation to testify as to their mindset at the time and that intent can be shown from other types of evidence.

Commissioner Peterson asked if that was the norm for the FNSB at the time for subdivisions to be handled in that way and stated if so then it was not done with willfulness or intent.

Mr. Spillman stated that the thousands of tax lots that were created for different purposes with quite a few mechanisms, one of which being subdivision by deed. Mr. Spillman stated he cannot speak to why they were created and the FNSB has taken efforts to cut down on that and it has cut down in the last 20 years.

Commissioner Peterson asked if Mr. Spillman had an opinion if people were doing it that way to try and get around the FNSB code or regulations.

Mr. Spillman mentioned property owner discussions at the community planning counter that they did not know about it and Mr. Spillman mentioned someone testified in front of the Platting Board some years ago that was trying to subvert the regulations. Mr. Spillman expanded on the finding of fact #3 that was adopted in his decision at the administrative hearing.

Commissioner Peterson asked legal if the questions that were presented were sufficient for the record.

Mr. Jaffa stated he cannot tell the commission if the evidence that was presented by Mr. Spillman meets the ‘preponderance of the evidence’ standard but it did constitute some evidence and pointed out that the proposed factual finding does specifically state “intentional or willful on the part of the current owner” and suggested that if any version of that factual finding is adopted, that language be omitted stating that it is part of the current owner which is not what the ordinance requires.

Chair O’Neill asked Mr. Jaffa to confirm that the two considerations the commission has to look at which both involve the term lot; one being the platting requirement and one being the zoning requirement and stated the zoning requirement is what the commission is used to dealing with and the platting requirement, after hearing the evidence, is not being met; that the subdivision was not legally created and although the land use is operating but because the way the subdivision was created was in fact illegal is the hang-up when looking at the purpose of amnesty.

Mr. Jaffa stated the purpose of amnesty has been discussed and is clearly in efforts to make properties marketable and sellable and ensuring neighborhood preservation, continuity and stability is achieved and when the eligibility is looked at, it has to be a lot and needs to be in compliance with all other FNSB platting requirements.

Chair O’Neill asked in 1982 when the lot met the definition at the time and that it was not that the definition has changed but that the amnesty put in more provisions on that definition.
Mr. Jaffa asked for the question to be repeated and stated it is important to note that if the commission does grant amnesty, that grants amnesty with respect to zoning violations only it does not cure the defective platting in this particular case.

Chair O’Neall asked by definition, it has not met the definition of a lot.

Mr. Jaffa stated it does not meet the current definition of lot under Title 18.

Chair O’Neall stated because that amnesty provision happened after, which superseded the previous what would be definition of a lot.

Mr. Jaffa referenced Mr. Spillman’s statement that the definition of lot as it is currently in the code was enacted in 1988 and the amnesty provision was enacted within the last couple of years and stated he understands the commission’s frustrations but he was stating the legal requirements for eligibility are for amnesty relief.

Questions by the applicant

Mr. Niebert asked staff if there was a way he could plat the lot at this point, 36 years after it was created.

Mr. Spillman stated he would have to think more about that but at this time he did not see a possible way.

Mr. Niebert asked if that was the same answer given to him when he asked that question at his administrative hearing.

Mr. Spillman stated to the best of his recollection that is what he said.

Mr. Niebert asked if there was any other way to have platting violations either removed through variance or a program similar to amnesty.

Mr. Spillman stated it would take quite a bit of research but the only possible way to get that a legal platted lot would be with multiple variances through the platting process.

Mr. Jaffa reminded the commission to not get too far into other potential options but that a rezone would be another potential option.

Commissioner Brandt stated a rezone would not work in that case due to the size of lot.

Ms. Dau stated there are criteria for a rezone that the applicant would have to meet which is not to say that he could not get his neighbors involved to do an area wide rezone and the next step after in compliance with lot size would be a platting action.

Commissioner Brandt asked legal if the commission can go by what they believe the spirit of the law is which is in his opinion was written just for a case like this and they were getting into the weeds on the definition of lot and he believes if this were to go before the assembly to pass as a lot that it is exactly what they were referring to.

Mr. Jaffa said with respect to the enacting language discussed earlier talked about the passage of the Dodd-Frank Act and talked about zoning violations being a general impediment property
development and it is very clear that the eligibility distinguishes platting and zoning requirements.

Ms. Dau stated she was involved in the process of developing the ordinance and stated that it was discussed at the time about platting and whether a similar provision or this particular ordinance could be developed in order to do a platting type of amnesty, a forgiveness of platting violations and it was determined to not proceed with that because it requires a whole different set of statutory compliance and it was not clear they could do an amnesty provision to forgive platting type violations but the distinction between this amnesty being just for zoning violation forgiveness and not addressing the platting violations was clear at the time the ordinance was drafted and enacted and to the extent that this stems from a platting violation that is why there can't be forgiveness of that.

Commissioner Brandt asked if that was ever explained to the applicant prior to starting this process.

Mr. Spillman stated to his knowledge, no and the department of community planning knowledge and further clarification about amnesty has evolved due to this process as well.

Mr. Niebert asked if the thousands of lots that were created by deeds would not be able to get amnesty for their lot size violation if the commission decides to deny.

Mr. Spillman said he had a hard time answering that question because each case would need to be evaluated and stated that if the determination is that you have to be a "lot" to qualify for amnesty, that determination would continue forward.

Mr. Niebert asked if during the time the amnesty law was drafted if the department of community planning had input.

Mr. Spillman stated he was personally around and the department did make recommendations to this body to include several amendments.

Mr. Niebert asked if the assembly had the intent to exclude thousands of lot size violations from amnesty.

Mr. Spillman stated at the time that was not his understanding.

Rebuttal

Mr. Niebert stated the way he read the ordinance even after reading the assembly minutes on the ordinance, his understanding was that they intended for lots that had long standing zoning violations and not because of the intention of the current owner and that those lots would be able to received amnesty, specifically because there was problems getting conventional mortgages on houses. Mr. Niebert stated he is not asking to say he doesn't have a violation on the lot but he does understand that it is not possible to plat the lot at that point and argued that the platting requirements are met and stated the lot has the amount of frontage that the platting requirements ask for and is sufficient for a septic system. Mr. Niebert stated he read the spirit of the law is that his zoning violation could get amnesty relieve and he did not bring the platting violation into it because he understood there is not a way to get amnesty for the platting violation.
MOTION: To deny the amnesty relief request (AM2018-007) for E ½ NE ¼ NE ¼ SW ¼ SE ¼ Sec 30, T1N R1E F.M. (also known by FNSB as Tax Lot 3017) for the existing 54,450 sq.ft. lot size in the Rural and Agricultural (RA-5) zone adopting the staff report and eight (8) Findings of Fact in support of the denial by Commissioner Guinn, seconded by Commissioner Peterson.

Discussion on the Motion

Commissioner Guinn stated it was supposed to meet the eight criteria to include meeting both platting and zoning requirements which it did not.

Commissioner O’Neall stated it was a difficult decision and there is a way to interpret the law but they have to look at is what the legal definition is and how they maintain the character and the intention of the zoning and what sort of precedent is set if they were to make an exception based on the interpretation of the people who sat there and that is why the commission has legal counsel and code to help take out those interpretations and agreed with Mr. Guinn that was clear that it did not meet the purpose of the amnesty clause.

Commissioner Stepovich stated his belief of the amnesty ordinance being set up in place for these kinds of issues similar to the one in front of the commission and the intent was to aide in these and he cannot support the denial based on that solely.

Commissioner Whitaker stated that he believed that Mr. Beach in 1982 was not trying to go around the law and filed a legitimate deed with the state.

ROLL CALL

Three (3) in Favor: Guinn, Peterson & O’Neall
Three (3) Opposed: Brandt, Whitaker & Stepovich

MOTION FAILED

Commissioner Brandt stated a new motion wouldn’t do any good and asked what the next step is.

Chair O’Neall stated a motion is needed for discussion; either a motion to change the findings of fact or a motion to postpone which is allowed and the commissioners that were not present would have to review the testimonies and the discussion of the meeting.

Commissioner Peterson stated there are members of the commission that felt strongly on the matter and encouraged them to make a new motion in the opposite direction to try to come up with some sort of findings that would support their decisions so the applicant isn’t left waiting and the commission owes it to the applicant to come up with a decision in a timely manner.

Commissioner Brandt stated without any further testimony he would not change his vote and that another motion was not going to change the testimony.

Commissioner Guinn stated there are other commissioners not in present of the meeting and if presentence was to be set they should consider a postponement.
MOTION: To postpone the decision to the October 9, 2018 Planning Commission Meeting by Commissioner Guinn, seconded by Commissioner Stepovich.

Discussion on the motion

None

ROLL CALL

Five (5) in Favor: Brandt, Guinn, Whitaker, Stepovich & O’Neall
One (1) Opposed: Peterson

MOTION PASSED

G. EXCUSE FUTURE ABSENCES

Chair O’Neall excused Commissioner Thayer for the October 9, October 23, and November 13, 2018 Planning Commission Meetings.

H. COMMISSIONER’S COMMENTS

Commissioner Muehling stated he did not attend the FMATS meeting and that Mr. Perreault attended for him.

Commissioner O’Neall commented that the decisions can be difficult and frustrating and thanked the commission for trying to do the best thing for the community.

I. ADJOURNMENT

There being no further business, the meeting was adjourned at 9:41 p.m.