

**Minutes**

DVD No. 281

The City Council of the City of Leawood, Kansas, met in regular session in the Council Chambers, 4800 Town Center Drive, at 7:30 P.M., on Monday, June 4, 2012. Mayor Peggy Dunn presided.

**Councilmembers present:** Debra Filla, Carrie Rezac, Jim Rawlings, Julie Cain, James Azeltine, Andrew Osman, Gary Bussing, and Lou Rasmussen

**Mayor/Councilmembers absent:** None

<b>Staff present:</b> Scott Lambers, City Administrator	Patty Bennett, City Attorney
Chief John Meier, Police Dept	Chris Claxton, P&R Director
Interim Chief Steve Duncan, Fire Dept	Joe Johnson, PW Director
Mark Andrasik, Info Systems Director	Lovina Freeman, HR Director
Richard Coleman, Comm Dev Director	Dawn Long, Finance Director
Mark Klein, Planning Official	Deb Harper, City Clerk
Dawn Long, Finance Director	Pam Gregory, Assistant City Clerk

**1. PLEDGE OF ALLEGIANCE**

**2. APPROVAL OF AGENDA**

A motion to approve the agenda was made by Councilmember Rawlings; seconded by Councilmember Azeltine. The motion carried following a unanimous vote of 8-0.

**3. CITIZEN COMMENTS**

Members of the public are welcome to use this time to make comments about City matters that do not appear on the agenda, or about items that will be considered as part of the consent agenda. It is not appropriate to comment on pending litigation, municipal court matters or personnel issues. Comments about items that appear on the action agenda will be taken as each item is considered. **CITIZENS ARE REQUESTED TO KEEP THEIR COMMENTS UNDER 5 MINUTES.**

**4. PROCLAMATIONS - None**

**5. PRESENTATIONS/RECOGNITIONS - None**

**6. SPECIAL BUSINESS - None**

7. **CONSENT AGENDA**

Consent agenda items have been studied by the Governing Body and determined to be routine enough to be acted on in a single motion. If a Councilmember requests a separate discussion on an item, it can be removed from the consent agenda for further consideration.

- A. Accept Appropriation Ordinance Nos. 2012-20
- B. Accept minutes of the May 21, 2012 Governing Body meeting
- C. Accept minutes of the April 24, 2012 Leawood Arts Council meeting
- D. Accept minutes of the February 23, 2012 Ironhorse Advisory Board meeting
- E. Approve expenditure in the amount of \$25,000 to Western Enterprises, Inc., pertaining to the fireworks display for 4<sup>th</sup> of July 2012 celebration
- F. Approve Change Order No. 3 in the amount of \$21,385.77, to C.V. Anderson, Inc., pertaining to repairs to City facilities [Project # 74045]
- G. **Resolution No. 3814** approving and authorizing the Mayor to renew a Maintenance Agreement between the City and Intergraph Public Safety, Inc., in the amount of \$26,849.28, pertaining to the Intergraph Software System, which includes the computer-aided dispatch [CAD] system, records management and mobile operating systems
- H. **Resolution No. 3815** approving request for a Byrne Justice Assistance Grant to provide funding for an Automated License Plate Reader
- I. **Resolution No. 3816** establishing a Policy relating to Community Improvement Districts [CID] in the City of Leawood, Kansas
- J. **Resolution No. 3817** approving a Final Sign Plan for Nall Valley Shops – XL Martial Arts, located at the northeast corner of Nall Avenue and 151<sup>st</sup> Street. (PC Case #53-12) *[from the May 22, 2012 Planning Commission meeting]*
- K. **Resolution No. 3818** approving a Final Sign Plan for Market Square – Wipe and Restore Computer Repair, located at the northwest corner of 135<sup>th</sup> Street and Pawnee Street. (PC Case #55-12) *[from the May 22, 2012 Planning Commission meeting]*
- L. **Resolution No. 3819** approving a Final Sign Plan for Bi-State – Centennial Park – Evan Talan Homes, located at 1920 W. 143<sup>rd</sup> Street. (PC Case #59-12) *[from the May 22, 2012 Planning Commission meeting]*
- M. **Resolution No. 3820** approving a Revised Final Plan for Ironhorse Centre – Revised Design Criteria, located at the southeast corner of 151<sup>st</sup> Street and Nall Avenue. (PC Case #63-12) *[from the May 22, 2012 Planning Commission meeting]*

Councilmember Cain requested to pull Item No. 7H and Councilmember Filla pulled Item No. 7I for discussion.

A motion to approve the remainder of the Consent Agenda was made by Councilmember Rezac; seconded by Councilmember Rawlings. The motion carried following a unanimous vote of 8-0.

- 7H. **Resolution No. 3815** approving request for a Byrne Justice Assistance Grant to provide funding for an Automated License Plate Reader

Councilmember Cain asked how widespread this will be among the City's fleet. Police Chief John Meier replied they will begin testing the system on one vehicle and will more than likely not be installed on more than two.

A motion to approve Item No. 7H was made by Councilmember Cain; seconded by Councilmember Bussing. The motion carried following a unanimous vote of 8-0.

- 7I. **Resolution No. 3816** establishing a Policy relating to Community Improvement Districts [CID] in the City of Leawood, Kansas

Councilmember Filla envisioned a CID Policy allowing them to provide financing for public improvements to older business establishments for amenities that would be beneficial to the community. She referred to the first item under Section 7: Consideration of each CID Petition on its merits, which may include but not be limited to “The petitioner’s history of timely payment of property taxes.” She wanted to ensure this extends to all matters being in good standing with the City.

A motion to approve Item No. 7I was made by Councilmember Filla; seconded by Councilmember Osman.

Mayor Dunn noted three work sessions were held regarding this with a considerable amount of discussion.

The motion carried following a unanimous vote of 7-1. Nay: Councilmember Bussing. He felt there was not a viable use for a CID Policy in the City and expenditure of public funds in private developments would not be appropriate.

Mayor Dunn commented as these petitions come forth and as stated in the policy, they will be reviewed on a case-by-case basis.

## **8. MAYOR’S REPORT**

- A. Attended the Leawood Woman’s Club May luncheon with Police Chief John Meier and Interim Fire Chief Steve Duncan. The Woman’s Club once again presented generous monetary donations to both departments in recognition of their outstanding service. Mayor Dunn expressed her appreciation to the Woman’s Club for their generosity and a special thanks to President Nancy Maderia and Philanthropic Chairman Betty Jean Smith.
- B. Thanks to Leawood Police Officer Rod Laubenstein who served as this year’s Johnson County coordinator for the 31<sup>st</sup> Annual Kansas Law Enforcement Torch Run, which benefits the Kansas Special Olympics. This run started in Olathe and ran to Kansas City, Kansas. There were 12 officers that participated from the City of Leawood. Sergeant Tim Anderson ran over 23 miles. Their final destination ended in Wichita. Congratulations to everyone involved.
- C. Congratulations are in order for Leawood resident and University of Missouri Kansas City [UMKC] Chancellor Leo Morton, who will be the 2012 recipient of the Henry W. Bloch Human Relations award, sponsored by the Jewish Community Relations Bureau/American Jewish Committee. Mr. Morton also serves on the Ironhorse Golf Course Advisory Board as a volunteer for the City.

## **9. COUNCILMEMBERS’ REPORT - None**

10. STAFF REPORT - None

**COMMITTEE RECOMMENDATIONS**

11. PLANNING COMMISSION

[From the April 24, 2012 Planning Commission meeting]

Ordinance approving zoning to SD-CR [Planned General Retail], Preliminary Plan and Final Plan for a portion of Ranchmart North, Lot 3, located north of 95<sup>th</sup> Street and east of Mission Road. [PC-52-12] [Roll Call Vote] – **CONTINUED FROM THE MAY 21, 2012 GOVERNING BODY MEETING [A Protest Petition was received on May 8, 2012, and has been determined to be valid.] AND From the January 24, 2012 Planning Commission meeting** A Resolution approving a Final Plan for Ranchmart – Slab N Pickle, located north of 95<sup>th</sup> Street and east of Mission Road (PC Case # 109-11) –**Continued From the February 20, 2012, March 5, 2012, and March 19, 2012 Governing Body Meetings - CONTINUED FROM THE MAY 21, 2012 GOVERNING BODY MEETING –**

**Staff Comment:** *A separate vote on the zoning ordinance and final plan resolution is necessary and it is recommended that the zoning ordinance be voted upon first.*

Mayor Dunn: For delineation for the order of events this evening for the zoning of Ranchmart North and the Final Plan, there will be an overview by City Attorney Patty Bennett, followed by Governing Body questions. Staff will then make presentation by Community Development Director Richard Coleman and Planning Official Mark Klein, followed by Governing Body questions for planning staff. The applicant will give a presentation, followed by Governing Body questions for the applicant. Then all those citizens who have signed in to speak will have the opportunity to share comments, to which the applicant will have time to respond. Finally, Governing Body will discuss and possibly take action.

Ms. Bennett: This agenda item covers two topics. The first is the matter continued from the last meeting pertaining to zoning what is now known as Lot 3 at Ranchmart North. As we discussed two weeks ago, there is no evidence that a specific zoning ordinance was ever passed by this City to zone this land. The most recent references to zoning on this land have been via zoning maps going back some 30 years and indicating commercial zoning. This application is brought by City staff to formalize the zoning to match the map and the Comprehensive Plan. As you noted, the zoning application is on the agenda also with the Final Plan application for the barbecue restaurant, and they can be discussed at the same time. The valid Protest Petition would require that the zoning be passed by a 7 member majority of this body, but because it would be an override of the Planning Commission's recommendation of approval of the zoning, you would need 6 votes to deny it. The Final Plan application comes to you in a different posture, and that is with a recommendation of denial from the Planning Commission. To approve the Final Plan application or to change the recommendation in any way would require 6 votes.

Mayor Dunn: Does anyone have questions for Ms. Bennett? Then we will have the staff presentation.

**STAFF PRESENTATION:**

Mr. Coleman: Case 52-12 was heard by the Governing Body on May 21<sup>st</sup>. At that meeting, the following were approved:

- Preliminary Plat and Final Plat for all of Ranchmart North with the exception of the cemetery, which was exempted from the plat.
- The main portion of Ranchmart North, located on Lot 1 and existing bank, located on Lot 2, a McDonald's with a drive-through, located on Lot 4.
- Zoning to R-1 [Single-Family, Low-Density Residential], Preliminary Plan and Final Plan for the existing cemetery; no changes to the existing site or uses were proposed or approved.
- Zoning to SD-CR [Planned General Retail], Preliminary Plan and Final Plan for Lots 1, 2 and 4; no changes to the current site or uses were proposed or approved.

The Planning Commission recommended approval of the zoning 5-2 in Case 52-12 – Ranchmart North. In approval of the zoning, the Preliminary Plan and Final Plan, subject to the following stipulations:

1. Zoning is for the purpose of reestablishing and reconfirming the commercial retail uses of Ranchmart North Shopping Center. Nothing in this zoning is intended or shall be construed to create any new rights or benefits beyond the zoning and the use of the property for commercial retail use.
2. The zoning does not express any position as to the approval or denial of the pending application for the Final Plan approval for the building located at the southeast corner of the property otherwise known as the restaurant Slab N Pickle.
3. The applicant must obtain all permits and approvals from the Public Works department per the Public Works memo on file with the City of Leawood prior to recording of the Final Plat.
4. The landowner agrees to execute a statement acknowledging in writing that they agree to stipulations 1-3.

The Final Plan did not require an Interact Meeting, as we had one with the Preliminary Plan. I'll turn it over to Mark Klein.

Mr. Klein: As Richard and Patty said, you heard about the zoning for the remainder of Ranchmart. This is Lot 3 where the post office was located. Additionally, the Slab N Pickle application is being heard tonight for that location. A question has arisen with regard to what was required in terms of an Interact Meeting. It was required and held for the Rezoning and Preliminary Plan. Minutes are included. Questions have also arisen regarding IHOP in that location, which did have an Interact Meeting. The reason it was required for that application was a request to increase the building by more than 5%, which no longer meets the substantial compliance with the Preliminary Plan. Slab N Pickle is not looking to increase the building to that extent, and because it is a legal, non-conforming structure, an Interact Meeting was not required.

Mayor Dunn: Thank you for that clarification. Are there other questions for the planning staff?

Councilmember Rezac: We received several emails about the fact that this should be brought back to residential zoning. Has the City ever formally zoned this area as residential?

Ms. Bennett: The City has not. It may have been zoned commercial by the Mission Urban Township before coming into the City before 1960. We do not know if it was zoned that way or what the residential zoning restrictions would have been prior to 1960.

Councilmember Filla: What changes, if any, to the term "Commercial Retail" have been made over time? Are the authorized uses we see in the table in the LDO [Leawood Development Ordinance] today similar to or different than what was designated for Commercial Retail? In other words, are we comparing apples to apples when we say that it was or wasn't and now it is or isn't?

Mr. Coleman: It really depends on the time period. In about 1960, there were only about four designations for land use in the City: Business, Light Industrial, Residential and Heavy Industrial. From there, it starts to expand, and the uses associated with each of those start to change. The ordinance in the LDO was changed over the last 40-50 years.

Councilmember Filla: Thank you for sharing the evolutionary history. In some ways, it almost sounds like things were done on a case-by-case basis as the City was growing.

Mr. Coleman: Each case was handled similarly to today.

Councilmember Rawlings: In our packets were statements about no conclusive evidence that it was ever zoned Commercial or Retail. Did I read that correctly?

Mr. Coleman: That is correct. We have anecdotal evidence that it was intended to be zoned, but we have no conclusive evidence.

Councilmember Rawlings: Is it the Planning Department's position that it is Commercial because it is on a map that is 20-30 years old?

Mr. Coleman: It has been shown as a commercial use, which would generally be people's expectations of how that property was to be used. This is why we are before you tonight asking for the zoning: it has been seen as retail use for the last 40-50 years.

Councilmember Rasmussen: What is the date on the map Mr. Rawlings refers to? It is the one that is referred to in the minutes as the crosshatch.

Mr. Coleman: There is a crosshatch map that shows land uses.

Councilmember Rasmussen: On that map, is the area that was occupied in 1960, which is this lot, a cemetery?

Mr. Coleman: The cemetery, up until the '80s, was always shown as residential.

Councilmember Rasmussen: The cemetery that existed on the Mission Urban Township that was brought into the City in the early part of 1960 was still a cemetery, was it not?

Mr. Coleman: It was.

Councilmember Rasmussen: Therefore, it was Residential.

Mr. Coleman: I don't know from the Mission Urban Township zoning, but how we show it later on some of the maps is residential. Those maps don't include the post office site because it also changes.

Councilmember Rasmussen: Is the crosshatching in this area of the original cemetery plot?

Mr. Coleman: No.

Councilmember Azeltine: Ms. Bennett, you said we will consider the zoning first and then the application. Should we deny the zoning, will we still need to hear the application?

Ms. Bennett: You could consider it and deny it because of improper zoning.

Mayor Dunn: The intent is to hear presentation on both topics before action, but the action needs to be separated. The zoning will be decided first. I thought that was the intent of your motion two weeks ago.

Councilmember Azeltine: It was; absolutely.

Councilmember Cain: If we deny the zoning, isn't it undeniable that everything should be zoned something? If we deny the zoning, are we denying that it is Planned General Retail? One way or the other, aren't we supposed to establish a zone tonight?

Ms. Bennett: Staff's recommendation is for SD-CR. Short of that, staff would like the City to, perhaps, remand and look at other options or to look at something else from the dais if Council is comfortable doing so this evening.

Councilmember Cain: When the time is appropriate, I would like to have a conversation about that very thing. It is my opinion that it shouldn't be zoned SD-CR.

Mayor Dunn: After the application presentation, there will be ample time for consideration before any possible action.

Councilmember Osman: In the Table of Uses, we have Ag, Residential, Office, SD-NCR and SD-CR (both what I would classify commercial) and then BP (which I would classify a Light Industrial). If we don't approve the commercial and I'm a general retailer, would I be able to go in under that category if the zoning is denied tonight? There are general retail uses such as a clothing store or salon spa that are in the commercial area. Do we have a separate designation, or are they all lumped into SD-CR and SD-NCR?

Mr. Coleman: We only have two retail designations: SD-NCR [Planned Neighborhood Retail] and SD-CR.

Councilmember Osman: If we reject this tonight and an applicant comes forward later on to go into that building, would I be able to do so under one of these two categories?

Mr. Coleman: It could open under SD-NCR or SD-CR.

Councilmember Osman: Those two and those two only. Would I be able to open a drycleaner?

Mr. Coleman: It is the same.

Councilmember Osman: What about a furniture store?

Mr. Coleman: Yes, it would be retail.

Councilmember Filla: As a point of order, if we want to deny Commercial Retail and want to approve Office or Neighborhood Commercial Retail, could we do that tonight?

Mr. Coleman: You could because it is a lesser use.

Councilmember Cain: We have these zoning uses. We cannot create something that does not exist. We are limited to the choices in the Table of Uses.

Mr. Coleman: That is correct.

Councilmember Rasmussen: The Table of Uses for the lots that we approved under this zoning last time came specifically from what existed in late 1959 and early 1960. For example, Prairie Village, Overland Park and Leawood had gasoline stations on every corner. On the corner of 95<sup>th</sup> and Mission Road, we had the old Amoco station and a car wash. Looking at that list of uses, you see that it was a reflection of what existed at the time. We had things like motorcycle sales and service, dog kennels and rotating signs with cats. It was not something created from a planning point of view. We accepted it as the list. However, what existed at that time did not exist on the lot we are talking about tonight.

Mayor Dunn: Are there any other questions for planning staff before moving on to the applicant?

**Applicant Presentation:**

John Peterson, Polsinelli Shughart Law Firm, 6201 College Blvd., Overland Park, KS, appeared before the Governing Body and made the following presentation:

Mr. Peterson: I am appearing on behalf of Ranchmart North, LLC and the Regnier family. I also have Mr. Otto Westerfield, Director of Real Estate for Johnson County Management, LLC and Scott O'Meara, managing partner of Slab N Pickle, who is the proposed tenant for the portion of the Ranchmart shopping center we are considering this evening. Madame Mayor, I understand why the Governing Body made the decision to combine the staff-initiated rezoning for this property and our Final Plan. I look forward to proving to the Governing Body that we brought an application that meets or exceeds all of the standards of development currently on the books for the City of Leawood in terms of preventing real or perceived impacts.

As we've moved through the process, we have attempted to refine the application to the best we could in the context of your rules and regulations. This would bring an application forward that works for the person who owns the property and not negatively impact those surrounding the property.

I'd like to discuss the zoning. To propose, after 30 years, to change the zoning from what the property has been assumed to have been causes me to take a striking position. I cite the statements of your City attorney: tonight's process is to "formalize" the zoning on Lot 3 of the Ranchmart Shopping Center. The director of planning stated that the process is to confirm the zoning of Lot 3. They also stated that no specific zoning ordinance exists. With all due respect, that is not the law. Many cities go back 50 years and cannot find zoning documentation or the exact process. The law allows a property owner, with due respect to property rights, reasonable reliance. I will state that when you look at the documentation as a whole over 50 years and particularly over the last 30, you will see a systematic documentation by this City for three decades that this property is entitled to be utilized for retail use. We also have relied on this in terms of the property taxes we pay and in terms of bank financing we have secured. Looking at the history and not just one map from 1960, I will respectfully submit that this property, by matter of law, is zoned and entitled for retail use. Yes, this process is to formalize and confirm. It is the very reason your staff and attorney are recommending approval. It is the very reason your Planning Commission also recommends that this property's zoning be confirmed and formalized. I do not say that we automatically get to put a restaurant there. I have a duty to show you that we can meet the requirements put in place to ensure the use will not adversely impact the public at large or the surrounding neighbors.

You have regulations because to determine harm and impact is subjective. We understand the burden and the perception. When talking about barbecue restaurants, Gates at 103<sup>rd</sup> and State Line comes to mind with wafting smoke and alcohol sales. We have worked diligently with your staff to attempt to move past those perceptions and to the reality of what this restaurant is all about. Every time staff puts forth a requirement, we do it. We went to the Board of Zoning Appeals [BZA] to hash out deviations and received approval from that board. I know you have read the volumes of information provided. I do not intend to demean the neighbors' concerns, but I do respectfully request that you keep this application in context. Councilman Rasmussen, for the past 25 years, this property wasn't used for residential purposes. This particular piece of property was utilized for the US Post Office. It seems quiet, but five semi trucks a day backed into that loading dock from 6:00 a.m. to 6:00 p.m. Eighteen postal trucks came in and out during the same hours. Estimates show that 300 customers a day came through. It had minimal landscaping with unscreened dumpsters that were accessed with no restrictions. An open dock system had no buffer.

We had 28 specific stipulations in terms of hours of operation, additional landscaping and noise abatement. Since then, we have offered an additional six stipulations in an effort to speak to our desire to be part of the neighborhood. They are as follows:

29: No outdoor seating and/or service of food or beverages allowed. Any modification to this prohibition shall be subject to an application for Revised Final Plan, approved by the Governing Body.

30: Food sales shall constitute no less than 80% of the total sales generated by the establishment.

31: The restaurant operator shall establish and maintain a "last call for alcohol" beverage service one hour before closing daily.

32: The smoker may not be operated between the hours of 5:00 p.m. and 10:00 p.m. seven days a week.

33: The restaurant operator shall restrict employees from congregating on the east side of the building during shift breaks.

34: The establishment's hours of operation may be between 11:00 a.m. and 10:00 p.m. Sunday through Tuesday and 11:00 a.m. to 11:p.m. on Fridays and Saturdays.

We are happy to talk about all the elements, but the record is very thorough. I would like to touch on landscaping to the east as the building interfaces with the neighbors. We have followed and exceeded every staff recommendation with a row of pine trees. Noise is another issue. We have a couple stipulations that directly address noise. We have selected equipment with the specifications to aid in reducing sound. We also had an acoustical expert evaluate the decibel levels at the property line. This is documentation by a professional. We checked the noise level today at different points and different times. The levels range between 60-80 decibels along the property line due to normal traffic. Adding in the noise generated by our additional equipment, factoring in fences and screening, the acoustical engineer's opinion is that the highest generation of sound will be 46 decibels. The point is the building is closer than what would be allowed today. It is entitled for retail use. It is not allowed to exceed the code in terms of noise. This is the only evidence in the record by someone qualified to determine sound impact. We understand if we do not meet the requirement, we are shut down.

I would like to talk about smoke next. I understand the situation around 103<sup>rd</sup> and State Line, but this is not Gates, which is a wood-fire cooking operation. Slab N Pickle is a self-contained, gas-powered smoker. It uses 1-2 wood logs every eight hours of cooking for flavor. The Southern Pride smoker has been evaluated by staff and meets every emission guideline of the State of California, which is much more stringent than Kansas is. The exhaust goes directly into the kitchen hood exhaust filter, which brings the emanation of smoke and odor to almost nothing. The tenant agreed to an even more sophisticated, expensive filtration system called The Smog Hog. It is used throughout the US, particularly in areas in close proximity to those who may not enjoy the smell of barbecue smoke or other cooking odors. Brobeck's uses the same system, and we asked staff to go down and see that it works.

We come to you with a recommendation from staff on the Final Plan. We have met each regulation of the City of Leawood with a reliable process to adhere to the ordinances. This staff does not just take our word for it; they make us prove our case. We did just that. The Planning Commission recommended denial after recommending approval of the zoning application. They cited the close proximity of the restaurant to single-family residential homes. It is there, and I believe it is entitled to be there. The potential impacts of odor from smoke were mentioned. There will not be an impact. If there is, we lose our right to operate. The potential impact of noise from the outdoor patio was an issue; we have removed the outdoor patio. With that, I'll ask Scott to come and speak to the steps he has taken to try to be a good neighbor.

Scott O'Meara, 6521 Flint, Shawnee, KS, 66203, appeared before the Governing Body and made the following comments:

Mr. O'Meara: Smoking is what I've been doing for the last 25 years. The Southern Pride smoker, which we are going to use, is state of the art. It uses less wood than any of the neighbors would use in their fireplaces over an eight-hour period of time. It is self-filtering. Losing smoke out of a smokestack is a bad thing for a barbecue because the smoke flavors it. Southern Pride rotates the smoke back in. The first handout I've given you talks about Big Cedar Lodge in southern Missouri.

They use two outside mobile units to cook for their restaurants. These mobile units are much closer than the property line here. They use them all the time, and they have never had any complaints. Everybody knows about barbecue in Kansas City and the different processes. Mr. Peterson talked about Gates, and they are totally different in their cooking. They need the wood for heat, while we use it for flavor. We can set the temperature, and the smoke goes in when it needs to, and then it shuts down.

We talked to the Smog Hog people to try to address the neighbors' concerns, and we wanted a way to filter the smoke even more. We couldn't find a good example here in Kansas City because most places don't want to filter the smoke. The example in Greenwich Village is next to high-rise buildings. They cook even more extreme than Gates with wood-fire grills that create a massive amount of smoke. The Smog Hog people did a case study on them, and they were about to be shut down. After bringing in Smog Hog, the neighbors are not calling to complain; they are calling to make reservations. New York City has said they are suitable. We are also offering this: virtually no smoke after the process. This will not have any smoke stack at all; it will have an exhaust vent like you would see on any building. The Smog Hog people created this to vent manufacturing facilities. We realized if we're going to make this work, we needed to do this. I'm a restaurant guy; I don't want to alienate my entire customer base. We want to be a part of the neighborhood. What we need to do to make it work for everyone, we will do. That is why we are not smoking between 5:00 and 10:00. I appreciate your time.

Mr. Peterson: We have reviewed Stipulations 1-28 and have added six and agree to them. With that, I would state that, with the utmost respect for this body and the City of Leawood, I stand on our rights in terms of the zoning of the property and the allowed use. I hope that you recognize we have earned the approval through our efforts to meet or exceed all of your development standards. We would be happy to answer any questions.

Councilmember Bussing: Mr. O'Meara, I recall you had a restaurant called The Board Room at 95<sup>th</sup> and Antioch, and it had not outdoor seating there, either. Do you envision the same type of environment for this location?

Mr. O'Meara: I hope so.

Councilmember Bussing: Did you use the same smoking process at The Board Room as what you are doing here?

Mr. O'Meara: No, that unit was already there. That was where Hayward's originally started, so we did not have to put anything in.

Mr. Peterson: I stated that Brobeck's has the Smog Hog; they don't, but they do have the same cooking system.

Councilmember Cain: I have lots of questions, but my first is for Mr. O'Meara. Did you consider other parts of Ranchmart, given the level of anxiety with the neighbors?

Mr. O'Meara: We looked at a lot of different locations before we found this one. The building is perfect. The architecture is great. We didn't anticipate any kind of problem in the beginning. I hoped to be open by now. We felt this location had all the things we are looking for.

Councilmember Cain: Now that you have stated there will be no outdoor seating, what is your intent for that dock area?

Mr. O'Meara: We're not really certain. We just decided that the neighbors were really worried about the patio, so we are not going to do one unless we earn the right from the neighbors and reapply. We will do something to make sure it is aesthetically pleasing and fits with the building. This has come up in the last week, so we haven't had a chance to get with the architects.

Councilmember Cain: I believe I heard Mr. Peterson say that we've had these proposed stipulations, but did you indeed give these stipulations to the neighbors? Who was it and how was it given to them? Have they had time to review them?

Mr. O'Meara: I met with Seth Barry last week. It had been January since anybody had heard anything from our side. Things had changed so much from the original ideas that we wanted to make sure he knew what we were all about. We gave him a copy of what you received so he was aware of what we are looking to do.

Mr. Peterson: I spoke with Mr. Patrick and talked about additional provisions. I attempted to send those Friday afternoon, but I noticed the email was rejected. I also made a phone call to Mr. Starr because I knew he was a primary spokesman. We told him we sent it to staff, and he could check with them or us to get a copy. I cannot say whether they have had time to fully comprehend those.

Councilmember Cain: I would like some clarification. I wasn't clear with your Landscaping Plan; I saw Stipulation 5 called for a solid row of evergreen trees along the east property line. If I read this correctly, it is 363 feet. Is your intention to plant a row of evergreens or something acceptable to staff for 363 feet?

Mr. Peterson: Staff felt our landscaping screens the building and pedestrians entering the building. It is a solid wall.

Councilmember Cain: For the record, if this is passed, it will go the whole length of that property line.

Mr. Peterson: I would like staff to give me the right specification, but 363 feet goes past the building about halfway to the north property line.

Mr. Coleman: The east property line is the 363 feet, so it is about 150 feet short of what the applicant proposed.

Mr. Peterson: Where we have proposed it and what the stipulation requires stops about 150 feet short of the north property line of Ranchmart.

Councilmember Cain: I'm reading the site length of the east property line. Are we short or not?

Mr. Klein: The intention is to have a solid screen going along the entire east property line. The plan would have to have a bit more to meet the stipulation.

Mr. Peterson: Then that is what we will do.

Councilmember Cain: This also talks about a fence. Is it a wall plus evergreens or a wall plus this "acousti-fence"?

Mr. Peterson: There are Acousti-blok sound absorbing panels mounted to the inside face of a 4-foot tall screen wall for the mechanical units.

Councilmember Cain: Some parts of the narrative talk about screening or an additional wall along that property line. Is there anything additional along the property line other than the evergreens?

Mr. Peterson: No, but the wall is designed higher than the units themselves. It is a masonry wall with acoustical treatment both inside that wall and the face of the building, eliminating the bouncing. The landscaping immediately adjacent to the 4-foot wall screens the mechanical equipment, and the landscaping at the property line separates our property from the neighbors to the east.

Councilmember Cain: It does not state what type of evergreen trees. Are you willing to work with staff and the neighbors to plant what they would like to see if this gets passed?

Mr. Peterson: Absolutely.

Councilmember Cain: Thank you. My next issue is the noise. I read of all the mechanical equipment and, for example, the ten-ton condensers have 85 decibels, but this wall reduces them to 57. You said you had an expert measure that, but it seems to me there may be some cumulative effect of all that equipment; maybe I'm wrong, but does this indeed work? I also understand the expert came out, but what is on paper and what actually happens can be different. I was hoping that, if you get that far, one of the stipulations would be that it would be re-measured before the Occupancy Certificate is issued. We would prefer to be proactive.

Mr. Peterson: We would welcome a confirming measure before occupancy. Our engineer is here to respond to that question.

Brian Kubicki, Acoustical Design Group, appeared before the Governing Body and made the following comments:

Mr. Kubicki: We have been operating since 1986 in Kansas City, designing various buildings, including this room. You asked about the cumulative effect. Yes, when multiple sound sources in any one space all generate sound at one time, they do produce a combining effect which results in an overall higher sound level. For example, if I have two 85-decibel sound sources operating relatively close, the total sound level would be three decibels higher.

It is a logarithmic combination of sound and energy. All of the combination effects of all the sound sources analyzed were taken into account when we made the estimation of the noise levels at the property line.

Councilmember Cain: Thank you for clarifying that. I am not crazy at all about the mechanicals being added to the east side. We are already too close to those neighbors, in my mind. Is there any opportunity for discussion, especially given that the patio has gone away, of moving that equipment to the north side so that we are not encroaching one foot closer to the neighbors? Is it even possible that the mechanicals could be put in the loading dock area so that it could be further screened?

Mr. Peterson: At first blush, you would think you could move those around, but given their internal function, it is difficult to say we could move everything to the dock. I'm not saying we couldn't move some of them. I understand it is closer to the property line. I would prefer not to say we can do something if we can't.

Councilmember Cain: Somehow when we get there, perhaps we can craft a stipulation that says you will work with staff to see if it is an option. I don't recall the footprint of the units on the east side. Do you recall?

Mr. Peterson: (*Refers to plan on the overhead*) I am going to guess it is 5 feet, but we will confirm.

Councilmember Cain: I certainly would like to look at that. Lastly, it seems like your sign is huge on that building. I know it falls in the 5% rule at 4.8%, but it just seems giant based on the drawing.

Mr. Peterson: We could look at that.

Mr. Klein: This is a Final Plan, so signage is included. Also, Stipulation 7 speaks to verifying decibel levels at the property line.

Mr. Peterson: From the back wall of the restaurant to the outside of the screening wall is 8 feet, 4 inches.

Councilmember Cain: So to the property line, 8 feet of the 50 feet would be the mechanical units, and then landscaping is past that on the outside of the building. I would like to see that equipment moved to the north side. I also would like to ask about the stipulation that food sales shall constitute no less than 80% of the total sales generated by the establishes. What is the reporting process?

Mr. Coleman: That is reported by the Alcohol Beverage Control and the state. We probably get it through the sales tax records.

Councilmember Rasmussen: Are you the applicant that is requesting approval of the zoning to SD-CR?

Mr. Peterson: No, the City is the applicant.

Councilmember Rasmussen: Richard, do you recall our conversation the other day about who the applicant was?

Mr. Coleman: Yes, and my response was that the property owner also signed the application for the zoning; it is required. The City brought it forward, but we have to have the permission of the property owner for the application.

Mr. Peterson: We were asked to sign the application by your city attorney.

Councilmember Rasmussen: Once that zoning becomes SD-CR, it goes with the land, does it not?

Mr. Coleman: Yes, it does.

Councilmember Filla: You mentioned that the smoker would not run between the hours of 5:00 and 10:00. When would you start the smoker?

Mr. O'Meara: The reason we set those hours is that is normal dinnertime, when everything is pretty much already cooked. We would start the smoker at 10:00 because most everything would be cooked overnight.

Councilmember Filla: So you will start cooking at the end of the day, and then you will still be cooking until 5:00?

Mr. O'Meara: It depends; certain things have different time frames. Most of the time, it would be used overnight. The nice thing about a Southern Pride smoker is you can leave it alone, and it is so well sealed that it holds everything in, and you don't have to worry about it burning. That is where the rating of one or two logs comes from because you load two logs when you load everything up. It opens and closes through the night as it needs more smoke.

Councilmember Filla: If you had a rush on ribs at noon, you could fire it up and have them made for dinner.

Mr. O'Meara: Pretty much; it would be beautiful to say that you're pulling everything straight out of the smoker, but in almost no barbecue operation does that happen. We figured the time frame would appease the neighbors because they might be outside, but it is also the time we would need the smoker the least.

Councilmember Filla: You alluded that staff went to Brobeck's, and there really is no smell.

Mr. Coleman: I've been there, and I can't smell any barbecue.

Councilmember Filla: The Smog Hog would be on top of that, so would it be fair to say we're talking zero smell?

Mr. O'Meara: Yes, that is what the Smog Hog people have told us. To be very honest, they think it's amazing we're doing it because of what we're using it with because they know the kind of smoke the Southern Pride would put out.

Councilmember Filla: Given that you talked about looking at another Ranchmart location and are no longer going to pursue outdoor seating, would it not be better to look at the other location that does allow outdoor seating?

Mr. O'Meara: No, this location wouldn't have allowed outdoor seating, either. Plus, it turned out that it wasn't the right size and wouldn't really work.

Councilmember Rezac: I have a question on the parking. It spans Lot 2 and Lot 3. Is there any kind of agreement since it is over two different lots?

Mr. Peterson: The landlord of the building Slab N Pickle would occupy is the owner of Lot 2. There is an agreement for cross-parking opportunities. Staff is diligent to support all the uses that are there. It is a typical leasing agreement.

Councilmember Rezac: One of the images shows the entryway. Is it to show the door material, external material or both?

Mr. O'Meara: We are looking at using that for the front door. It is wood.

Councilmember Rezac: What about the exterior siding? Is that the cedar siding being proposed?

Mr. O'Meara: Yes, it would be the same stain color.

Councilmember Rawlings: I've read several times that the average expectancy of a restaurant is 7-10 years. How long do you envision your restaurant lasting?

Mr. O'Meara: Being in the restaurant business for quite some time, I understand that there are challenges. I have been in it myself and have also helped the largest restaurant company in the world grow a barbecue concept. The demographics are great, and the neighborhood is tremendous. I see it to be ongoing for quite some time, well past the 7-10 years you were citing.

Councilmember Rawlings: If this restaurant would close for whatever reason, would the zoning run with the land and could we anticipate a restaurant there again?

Mr. Coleman: It would be whatever use was allowed in the zoning district. If it is zoned SD-CR, it could be any of the uses allowed in SD-CR. It could be an auto parts store, a dry cleaner, etc.

Councilmember Rawlings: If another restaurant came in to make application, would we have the capability of looking at that application as it relates to the type of restaurant, such as an IHOP or Applebees?

Mr. Coleman: If they weren't changing anything other than the sign, another restaurant could move in and open. If they change the exterior or expand, they would have to make an application.

Councilmember Rawlings: If a sports bar wanted to come in and adhere to the ratio of 70/30 as it relates to food and alcohol and didn't change the outside of the footing, we would not have the capability of denying the application.

Mr. Coleman: That is correct.

Mr. Peterson: That is a good point because we have been working very diligently to build trust and to put conditions in place that we know we can operate in that would give the neighbors a system to where it could be confirmed. I have spoken to the owner of the building. We would be open to a stipulation that would indicate, if this restaurant would cease operation, prior to any other retail use, we would have to bring another Final Plan through.

Mayor Dunn: Does that offer have the same conditions as a Special Use permit?

Mr. Peterson: It serves the same kind of purpose. It is a sign of good faith.

Councilmember Cain: I think it's a fine idea that whatever else comes through would have to get a Special Use Permit. If we go back to the '60s, we see some of the narrative that everybody said about not knowing the zoning. I think everybody can agree that the parcel has always had a special designation. It is one more level of protection for the homeowners.

Mr. Peterson: We are actually agreeing to a Final Plan, but it serves the same purpose as a Special Use Permit.

Mayor Dunn: If the restaurant ceases to operate in the future, any use of the building would have to come before us with a Final Plan.

Councilmember Cain: That leads to the zoning. I'm not a fan of the SD-CR; I am personally leaning more toward the SD-NCR [Neighborhood Commercial Retail]. The bar/tavern under SD-NCR requires a Special Use Permit; under SD-CR, it is a permitted use.

Councilmember Filla: I and many of the citizens have been going through the education process, and it seems that the stipulations are almost the reverse of the Special Use Permit. In our zoning today, we don't have a Special Use Permit, but the function is the stipulation process. I thought it was a fine suggestion that you put in there that I wanted to ask the staff if they would consider, for all legal, non-conforming buildings, putting that in our LDO. That specific designation is why I would be supportive of a Neighborhood Commercial Retail over straight Commercial Retail.

Councilmember Rawlings: I have a question about the Smog Hog. I frequent Ranchmart North, so driving around that shopping center, I can smell hamburgers coming out of O'Neill's. This morning at 119<sup>th</sup> and Roe, I could smell food. Is it my understanding that the Smog Hog would take care of any kind of odor coming out of the exhaust fans?

Mr. O'Meara: Our exhaust hood that any restaurant would have to take grease and everything out is going to be tied in to the Smog Hog.

Mayor Dunn: If there are no other questions for the applicant, I will call on the residents in the order they have signed in to speak.

Christi Pitts, 9428 Wenonga, deferred to Kerry Patrick.

Ellen Berry, 9419 Wenonga, deferred to Lynn Ellingsworth.

Tom Kennard, 9428 Wenonga, deferred to Kerry Patrick.

Sally Reicher, 3322 W. 95<sup>th</sup>, deferred to Lynn Ellingsworth.

Dick Reicher, 3322 W. 95<sup>th</sup>, deferred to Lynn Ellingsworth.

Kerry Phillips, 14616 Chadwick, deferred to Lynn Ellingsworth.

Jackie Overman, 3425 W. 92<sup>nd</sup> Terrace, left the meeting.

Barbara Slankard, 9416 Wenonga, appeared before the Governing Body and made the following comments:

Ms. Slankard: I would like to thank each and every one of you for the very fine questions you have spoken of tonight because I had some of the same questions. Thank you for the work you have done. I may be out of order because I've been told that before, but we're talking about the future here. We're not just talking about whether the Slab N Pickle comes in to the proposed site. If it were zoned commercial, we could have this whole scenario all over again. As residents and homeowners nearby, we have offered to you and to the people that want the restaurant other options. We have also asked for it to be zoned retail. In my mind, if you zone it retail, it is a win-win. The Ranchmart shopping center thrives, and the residents have won. It would make us extremely content that the City of Leawood has taken our quest and at least given us something to be hopeful about in the future. We live in Leawood; we aren't a subdivision of Ranchmart. We are owners of the City of Leawood. I don't cast stones, but many restaurant owners have not succeeded, and if this succeeds, it is great; if it doesn't, as many don't, how in the world are they going to change that back to retail or to a commercial special zoning? It is built for a restaurant, and once the restaurant is there, nothing else can go in there. Another restaurant will go in, and the neighborhood will be upset one more time. I don't understand why we can't just zone it retail so everybody can be happy. Surely, Mr. Regnier can live with that; we certainly can live with it. There are many other options it could be. I'm hoping you will choose that.

Frank Vigliaturo, 9415 Wenonga, appeared before the Governing Body and made the following comments:

Mr. Vigliaturo: After listening to everyone speak today about the life of a restaurant as 7-10 years, my problem is that I'm here for the community itself. I moved into Leawood for one reason.

I never assumed we would have a restaurant that close to us. O'Neill's and every other place that has been in Ranchmart have never affected any of us; we have never had to deal with any of this. There are other options that Ranchmart can bring to us. I don't want to come back here in two years or have my family come back and listen to this same thing all over again. The best example is that a sports bar could go in there in three years. I would rather keep it to where it couldn't be a restaurant and could be a retail operation of any other kind. Thank you.

J. Edward Slankard, 9416 Wenonga, deferred to Lynn Ellingsworth.

Lynn Ellingsworth, 9424 Wenonga, appeared before the Governing Body with a PowerPoint presentation and made the following comments:

Ms. Ellingsworth: We appreciate the opportunity to address the Council tonight. We have two items to address. The first is the rezoning application. As a reminder, at the last meeting, City staff acknowledged that they cannot dispute there is no evidence of previous commercial zoning of Lot 3. The best evidence indicates the land to be residential. We refer you to the 1969 City Zoning Map Ordinance 346. "At a minimum, if no zoning ordinance can be provided, the most restrictive zoning should be assumed." If the zoning of Lot 3 is changed from Residential to Commercial, the Golden Criteria need to be fully evaluated. We have provided you with an analysis of the Golden Criteria. I'd like to highlight 7 and 9, which essentially says that based on the size of the lot and the current LDO requiring 125-foot setback and the size of the current footprint of the non-conforming building, there is no way to place a commercial building in that lot. With regard to the abandonment issue, whether you look at it under the 1960 ordinances or the current LDO, it basically says the same thing. I'm going to quote the current LDO. "If any lawful, non-conforming use of a structure is discontinued for any reason for a period of 180 days, such structure shall only therefore be used in conformity with the terms of this ordinance." The post office left in 2009, which is greater than 180 days. It is time for the use to conform to the current LDO.

Take-home messages: per the City staff comments, in any existing historical meeting minutes, ordinances and City zoning maps nowhere is there any evidence that Lot 3 was ever previously zoned for general retail use. The lot size is too small for commercial zoning within the current LDO standards; 45 feet versus 125 feet required setback from residential. The old post office building's non-conforming setback is not in the spirit of the current LDO with regard to full commercial use. Due to the current LDO commercial building setback guidelines, the developer will never be able to build a practical building on this site. Changing the zoning to Commercial places an increased hardship on the surrounding residential property owners. Less restrictive zoning of the post office must deal with more nuisances than the post office, especially the non-conforming structure. There is no hardship to the property owner. With the expiration of the Special Use Permit, the property reverts back to the original zoned use, vacant or residential, per abandonment definition in the LDO. While the US Postal Service occupied the post office, the owner would be responsible for property taxes most likely on par with those of commercial use or office property. Our recommended actions are to override the Planning Commission's recommendation with respect to Lot 3 and vote against the rezoning to Commercial. As a concession, while the facts and logic from 1960 to today show that it must now be zoned as nothing but residential, in all fairness to the property owner, since the property has been used as office purposes, it could be zoned as SD-O [Office] with restricted hours, meaning no Kinkos or FedEx that is open 24 hours a day.

This causes no financial burden on the property owner. In conclusion, we all want Ranchmart North to prosper but not at the cost of the surrounding property owners.

The second item we would like to address is the Slab N Pickle application. There is no other bar or restaurant in Leawood with this short of a residential setback, and nor will there ever be under the current LDO. For comparable setbacks, we have a picture of Ranchmart restaurants and bars. You can see Slab N Pickle's 45-foot setback compared to O'Neill's, which has a 388-foot setback. As well, when you compare other barbecue restaurants in the area, Gates Barbecue has a 400-foot setback. Brobeck's has a 1,009-foot setback. With regard to the barbecue restaurant bar and nuisances, we persuaded Bob Regnier to meet with neighbors in early February to discuss the issues that the residents had. Interestingly enough, it was this last Thursday that the proprietors reached out to the neighbors with some compromises. With regard to the outdoor patio, even though they are taking it now, they want to revisit it. No accessory use for patio and commercial property per the LDO; all other restaurant patios in Leawood are covered, within a roofline or have been granted variances. Covering the patio would exceed limits on remodeling non-conforming structures. With regard to sound, the neighbors had a sound test in early January. We had fifteen normal speaking adults with no TVs, and it measured 60 feet from the property line. We consistently exceeded the 60-decibel points. Another nuisance is the late-night hours; 11:00 p.m. is too late for 45 feet from residents. Regarding the smoke and odor, the proposed plan captures up to 90% but still releases 10%. It might be okay with the proper setback; however, at 45 feet, it is not. I talked to the owner of Brobeck's personally. He said that no barbecue equipment is 100% smokeless. I interviewed people at Suburban Lawn and Garden, and as far away as it is, they can smell the cooking in the morning. Who will police this? What kind of infrastructure does the City have in place today to measure that before they were to prove this? The operator's statement in the Kansas City Star on the 16<sup>th</sup> of January was, "If you go to a barbecue restaurant and you don't see a woodpile and you don't see smoke, there is a problem." Regarding fire and safety, the Leawood fire marshal has significant concerns. Burning wood displaces embers into the air. Many nearby homes have wood shake shingles. There is insufficient parking lot lighting, and it is too close to the property line. The wood should not be stored on the site as it attracts animals and pets. Regarding trash, it attracts animals and pests. I have to tell you with regard to noise and trash, while there was still a demolition dumpster on the site, close to 9:00, I could not turn up the volume of a very loud sporting event loud enough to drown out the trash being thrown into the dumpster. Bottles, cans, etc. are a noise issue in the dumpsters.

Our take-home message is that the applicant's approach to addressing the nuisance issues might be acceptable at a proper 125-foot setback in the current LDO, but they are not acceptable at a 45-foot setback. If you approve this zoning, this will be the only restaurant in the entire City of Leawood with a bar, restaurant and patio 45 feet from residential property lines. Why should this be the only part of Leawood where this is acceptable now and in the future? There are over 235 neighbors in the immediate area that have signed a petition opposed to a bar/restaurant application in the old post office. Our recommended action is to vote against the Slab N Pickle application. Again, we all want Ranchmart North to prosper but not at the cost of the surrounding neighborhood.

Kerry Patrick, 3408 W. 93<sup>rd</sup> Street, appeared before the Governing Body with a PowerPoint presentation and made the following comments:

Mr. Patrick: Good evening. It was my privilege to serve twelve years in the legislature as Leawood State Representative. I am a non-practicing attorney in State court since '97.

I decided to go non-active in federal district court in January of this year. Before this meeting, I personally apologized to Patty Bennett and Richard Coleman for the tone of some of my comments. What I have said has been factually correct and truthful, but in retrospect, I should have said them in a less harsh and kinder manner. I would like to state that publicly before the Council.

I would like to make a brief response to Mr. Peterson. We are not here tonight because of the recommendations of the planning staff; we are here for one reason and one reason only: Mr. Peterson and his clients, exercising their rights under Golden, decided to appeal the Planning Commission's decision to reject the Slab N Pickle application for a variety of reasons. We are here not because of recommendations of the staff, but because Mr. Peterson decided to bypass the Planning Commission and take this matter directly to the City Council. He keeps stressing what the staff has recommended, but all first-class cities in the State of Kansas are required to have a Planning Commission to take up these kinds of matters. They recommended to you that this matter not be taken up. We learned late Friday afternoon of 30-some additional stipulations that the City has accepted. I haven't had a chance to look at them, and now we've learned tonight of another five. With what Mr. Peterson has offered as a new stipulation that Councilwomen Cain and Filla indicated they liked, he is totally rewriting the LDO. In effect, what he has done is created a whole new zoning classification, which is not permitted. If you do want to commit the kind of stipulation to zoning, be it SD-CR or SD-NCR, the City needs to go through the entire LDO process again. Something like this has never been done in the City. Finally, he said he gets to offer a rebuttal. We're here tonight because of the protest decision, and we're here tonight because of his appeal to the rejection. If he is allowed to make a rebuttal, I believe we should be given the chance to make a rebuttal.

Before the Planning Commission and this Council, there have been twelve facts that I have presented that neither the City staff, City attorney or Mr. Peterson has rejected. The zoning for the post office was passed in April, 1960 as it was then defined as Light Industrial for the purposes of a post office only. Light Industrial was a special classification which permitted the gas station and various other things. Regarding that classification, we can find nowhere in the City records that it has been repealed. Prior to the passage of the post office zoning, Vic Regnier requested that it be zoned SD-CR, and that application, according to the City minutes, was turned down by the City Council. With the many changes to the Ranchmart shopping center, no one who is opposed to this Slab N Pickle application has disputed that this center is zoned today in what we call SD-CR, and it meets all the standards of the current LDO, which was formulated back in 2002.

A review of the 1969 and 1982 maps shows two important legal points. I'll skip A and C; I have not reviewed them like Dr. Barry has, but since he had to be out of town on a business trip, I am commenting on what I can. Both Patty and Pete conceded the point that the 1982 map in and of itself does not set aside or confer the repeal of any lawfully enacted City zoning ordinance or City map drawn up pursuant to that zoning ordinance; it is merely a map from 1982. Who drafted it? We have no idea. How did it get into City records? We have no idea. So far, this is the sole legal basis of the City and the developer to show that Lot 3 in the Ranchmart shopping center was zoned as what we call today SD-CR. In 1977, a Special Use Permit was granted for the construction of Pooch's Coffee House. It was used in the mid-'80s and was sold or transferred to be operated as Waid's Coffee House. The restaurant went out of business. The Special Use Permit expired, and Lot 3 went back to the original zoning status in 1960. That is an uncontroverted fact from the City minutes. A zoning variance was granted, most likely in 1985, for the post office to add additional parking lots, a sidewalk and a place to spot various kinds of post office boxes from local mail to overnight delivery so you no longer had to walk into the post office to put mail in.

In that very same year, there is a letter written by counsel requesting for a second time that Lot 3 be zoned as Retail, and the City rejected that request. That was in the City document. I submitted that to the Planning Commission, and no one has objected to the fact that the document exists in the City records. If that is the case and this 1982 map is the controlling document, then why did Mr. Regnier send this letter to the Leawood City Council in 1982? From the time period of 1985 to late 2011, Mr. Vic Regnier and later his son Bob, who inherited the property, made no application or requested any change to Lot 3's original 1960 zoning as he did for Lots 1 and 2 as it applies to McDonald's because under Leawood's City ordinances, any drive-through requires a Special Use Permit. In the original 1960 minutes that pertain to the zoning application, Vic Regnier stated that the post office had a 10-year primary lease with 5-year renewals to it to be made all at the option of the post office. They continued to exercise those options until 2005, when the lease expired, and they decided to do it for one more 5-year period. This explains why, in 2010, the post office ceased to function in Ranchmart and was abandoned by the USPS, which is a separate entity from the federal government. No one can honestly say that the post office would ever not be in existence in Lot 3; who would have thought it? I have been a resident 40 years in the City of Leawood. I've seen restaurants come and go; I've seen supermarkets go out of business. Nobody ever thought the post office would ever be gone. For this reason, the application you have before you tonight is a new zoning application, which is a separate vote you have to take and requires  $\frac{3}{4}$  because of Protest Petition and then a  $\frac{2}{3}$  under the Golden decision. It wasn't until the time that Mr. Regnier found the Slab N Pickle to build a commercial restaurant there that we have before you now the application to renew it as SD-CR. It has always been Lot 3, and it was zoned for post office use only. Again, under the LDO of 2002, I must stress, this post office building use has been abandoned for over 180 days. Under the LDO adopted by the City in 2002, the post office building in Lot 3 is required to be changed to the most restrictive zoning available, which is SD-R. If you look at the City minutes in 1959 and 1960, you will see that the City took this land in as R-1. When Lot 3 was changed in the zoning, it was changed from R-1 to this Light Industrial for post office purposes only. Under the Golden rule, the City Council is sitting as a quasi-judicial body. It must follow rules of law, acting something like a court. There is something the courts follow called the Best Evidence Rule, which relates to disputes based on something that happened a long time ago and we don't have all the documents for. What we have is looking at City records and City minutes adopting the post office as Light Industrial, post office only. We find no repeal of it. Today, it should be rezoned as SD-R. Any restaurant or any commercial activity must be zoned, or the entire City's LDO must be changed. As to not act as a burden upon Mr. Regnier, since it's always been used as an office building operating as a post office, a very fair compromise, I believe, has been presented for you for it to be zoned SD-R.

Finally, I'd like to comment to you about Mr. Peterson's suggestion about this new stipulation. There have been so many added since the Planning Commission rejected the original Slab N Pickle application, it is difficult to keep up. If we permit and pass this to be SD-CR or SD-NCR with this special stipulation, if Slab N Pickle, this restriction that he is talking about is applicable only to the Slab N Pickle restaurant and now, Lot 3 is gone. It is now zoned SD-CR, no matter what you call it. Under the LDO, under state law, under established court precedent, he has the absolute legal right to have it be used in any kind of activity that is permitted under SD-CR, which is the staff's recommendation before you tonight. Please do not allow them to fly by the seat of their pants. Mr. Peterson is asking for a whole new zoning district, and I don't think this Council is really ready to do that. It will just end up costing the City much more in litigation. A lawsuit is pending with the City currently, but I am not the plaintiff.

In conclusion, a Special Use Permit was applied for in 1977. Pooch's Coffee House did not have a drive-through window. Under the existing codes, it did not need a Special Use Permit like McDonald's. It went out of business. The Special Use Permit expired, and it went back to the original zoning in 1960. Secondly, nothing has changed. What we are hearing tonight is that you are to approve this without fully understanding the legal ramifications. That is why we have a Planning Commission. If you do pass this over the Protest Petition and allow this to be zoned SD-CR, this application should be sent back to the Planning Commission to consider and review all these stipulations that were added that were not shown on the website, many of which I would consider significant. Let the Planning Commission do its job. I would carefully ask you to consider these things before you make any final decision. If you care to ask any questions, it is fine. I think the appropriate classification which is permitted by the LDO is for it to be an office use only. That gives no burden to Mr. Regnier at all. That is what it has been for 62 years, and that is what the neighborhood has relied on it to be. Thank you.

Mayor Dunn: Thank you. That concludes our list of citizens who have signed in to speak. Before the applicant responds, I would like to clarify two things. There is no appeal to us from a decision by the Board of Zoning Appeals. The Planning Commission simply makes a recommendation. They are not the decision-making body; we are. This is the accurate process.

Mr. Peterson: Thank you, Madame Mayor. In terms of the rezoning, everyone has made their statements. I will stand with your City attorney, your planning department and Planning Commission in terms of their consideration and recommendations that this is an appropriate confirming and formalizing process. When you want to theoretically accuse somebody of rewriting history and you want to rewrite it to be an office use, it is interesting. Enough said on that. I did have an opportunity to look at the other zoning category. There are a couple uses in there that would be prohibited that we just don't have the authority to agree to tonight. The commentary that we cannot willfully and voluntarily condition an approval with a stipulation and that it is somehow creating a new zoning category or is illegal is patently wrong. It is done routinely in every City and county that I have practiced in over the last 30 years. Thank you.

Councilmember Bussing: Mr. Peterson, could you give me your take on the abandonment issue raised by Ms. Ellingsworth?

Mr. Peterson: There is some real confusion here. The City attorney has attempted to rectify the perception. I'm not being critical. It is the difference between legal, non-conforming use and a legal, non-conforming building. We have a legal, non-conforming building. This is not a unique situation. If you have a use that is a legal, non-conforming use and you abandon it, you can't come back with that use.

Councilmember Filla: The barbecue and O'Neill's aside, what other restaurants are within 45 or 50 feet in Leawood?

Mr. Coleman: The closest one would be Bogey's Bar and Grill at 130<sup>th</sup> and State Line. It is about 50 feet from Pembroke. Minsky's Pizza is located in that same shopping center.

Councilmember Filla: If nothing is voted on tonight, what is Lot 3? Is that the whole question we have to answer?

Mr. Coleman: I believe so.

Councilmember Rasmussen: I think the correct answer is what is in the record, and that is a portion of Lot 3. Isn't the cemetery part of Lot 3?

Mr. Coleman: It is not.

Mayor Dunn: It was zoned R-1 two weeks ago.

Mr. Coleman: That is correct; it is an un-platted lot.

Councilmember Rawlings: The restaurants at 130<sup>th</sup> and State Line are in a strip mall. Is the entire length of that strip mall about 50 feet from the residential property, and it just happens to have two restaurants in it?

Mr. Coleman: It does angle from the property on the south side.

Councilmember Rawlings: Do you know when that shopping center was built?

Mr. Coleman: I think it was built in the late '70s or '80s.

Councilmember Rawlings: Was there any discussion about it being so close to a residential property?

Mr. Coleman: I haven't researched the minutes on that zoning.

Councilmember Cain: If a post office went in today, how would the post office be zoned?

Mr. Coleman: It depends on the cooperation of the federal government. They take preemptive right at times to be what they want to be. We would direct them to a commercial use location because of the sales, deliveries, trucks and general operation of a post office.

Councilmember Cain: You would direct them to come in as SD-CR or SD-NCR and not Office.

Mr. Coleman: We would, but they generally can go wherever they wish to go.

Councilmember Rezac: I had always seen the post office more as a retail use than an office use. How would a planning expert see that?

Mr. Coleman: Post offices are governmental entities and have a number of different practices that fall under different uses. It is retail because it does sell packaging and supplies. It is also a trucking business because it ships freight.

Councilmember Rezac: The 1982 map keeps getting referred to. When I asked the planning staff to give me the most current zoning map for this area, the one I received was dated 1986.

Mr. Coleman: It had some earlier revisions. What you have is the Comprehensive Plan with the coloring on it.

Councilmember Rezac: So the map that is being referred to in the PowerPoint is more current?

Mr. Coleman: The 1982 map has a graphic on it. The original was dated 1978 and got updated. It shows the center as CP-2 Commercial except for the cemetery. At one point, it showed the post office as Light Industrial.

Councilmember Filla: I've heard 45 and 50 feet for the setback. Which is it?

Mr. Coleman: The current setback from the building to the property line is 50 feet.

Councilmember Filla: Then 8 feet would be taken out for HVAC, so it would be 42 feet.

Mr. Coleman: The screen wall would be 42 feet.

Councilmember Filla: Which is even less than you're talking about at Bogey's. Could you describe the housing that is adjoining those two restaurants?

Mr. Coleman: It is a newer planned cluster development.

Mayor Dunn: It is Leawood South Condominiums.

Councilmember Filla: That is a considerable difference to property owners, I would think.

Councilmember Bussing: They are probably more like villas with maintenance provided.

Councilmember Cain: They are pretty high-end residences. They can sell in the \$200s and \$300s, depending on where they are. They're very nice.

Councilmember Rasmussen: Getting back to where post offices can be located, can't they be located on R-1 or agricultural land?

Mr. Coleman: They could be.

Councilmember Rasmussen: It is a public use, so when the post office, in the early '60s because of a critical nature of federal budgeting, decided not to buy land but to lease buildings, they could have gone on to this land in 1960 and built the post office there without any change in zoning.

Mr. Coleman: I'm not sure what the ordinance would have allowed. I do know there was discussion at the time of where to locate the post office.

Councilmember Rasmussen: I suspect it could have been because my grandparents ran a post office out of their home on an old route.

Councilmember Cain: If I understand this correctly, we cannot invent anything tonight, so we have to stick with one of the zoning districts. Obviously, there is an SD-Office, but there is also a designation Mr. Patrick mentioned that is Neighborhood Commercial Retail. I would like to open it up for discussion. There are 26 uses allowed under SD-Commercial, which is what the rest of Ranchmart was already approved for that would not be allowed for Lot 3. There would be an additional five that would require a Special Use Permit. There are 109 uses allowed under straight SD-CR according to our current Table of Uses. According to that, it is about 30% more restrictive. As Ms. Ellingsworth was saying, I am all about the most restrictive zoning, and I am all about taking as much care of the neighbors as we can. The way it reads, we are looking at a request for approval of zoning to SD-CR. Do I deny how it's written, or do I make a motion for how I would like it written?

Ms. Bennett: The statutes allow the Council to approve less restrictive zoning on the application in front of you. Since there is a Protest Petition pending, anything you approve would still be subject to the seven-vote rule.

Mayor Dunn: Does she have to have a motion to deny the request, or can she make a motion for a different zoning category?

Ms. Bennett: You can make the motion without a denial first.

Councilmember Cain: In that case, I would like to have some discussion about the best zoning for this area to protect our neighbors.

Councilmember Filla: My first choice would be to make a motion to zone it SD-Office, and then if there is a retail application such as a florist or something like that, they could come back with that application and ask to be rezoned to SD-CR. I appreciate there are a few exceptions of restaurants within 50 feet, but I think any restaurant this close would not be my first choice and what I think is best for the neighborhood. I appreciate all the work you have done to make this work, Scott. In my mind, there is never a scenario with outdoor seating in that area.

Councilmember Rezac: To Julie's point, can I ask staff why your zoning preference was SD-CR versus SD-NCR?

Mr. Coleman: It is based on the history of the zoning that was indicated in our files, which was SD-CR.

Mayor Dunn: Ms. Bennett, there are significant differences in SD-CR and SD-NCR; although, a restaurant is still a permitted use. The comment I heard from Mr. Peterson that gave him some heartburn was medical outpatient care. Is that something that could be allowed under a Special Use permit in the SD-NCR zoning?

Ms. Bennett: If the zoning ordinance changed to all it in the district, yes. A doctor office is allowed, just not outpatient as in surgery.

Mayor Dunn: Medical outpatient care sounds like a doctor's office to me.

Ms. Bennett: Later, it says office medical is allowed. Office dental and dental labs are allowed, but outpatient care, which I think of as requiring anesthetics, would not be.

Mayor Dunn: There are certainly a number of things not allowed in SD-NCR, such as delivery service, general kennel, recreational entertainment, auto parts sales and service, boat sales and service, trucks, motorcycle sales and bowling alley.

Councilmember Cain: On the top of Page 2, it says office, medical is a permitted use. Mr. Peterson quickly glanced at this.

**A motion to zone Lot 3 of Ranchmart North to SD-NCR [Neighborhood Commercial Retail] was made by Councilmember Cain; seconded by Councilmember Bussing.**

Mayor Dunn: You are not suggesting a remand to Planning Commission to do that; are you making a motion to do that here tonight?

Councilmember Cain: Yes, I am.

Councilmember Rasmussen: I understand the consternation of my fellow council people in terms of zoning here, but the issue before us tonight and the issue that was published is whether it should be SD-CR. That is the one that the Protest Petition addressed. I think the vote should be on that. If the Council decides that particular lot should have a different zoning classification, we should remand it back to the Planning Commission to give us a suggestion of what the zoning and uses should be.

Mayor Dunn: I don't believe this motion invalidates the Protest Petition.

Ms. Bennett: It does not; this vote will still require seven votes.

Councilmember Filla: I like your suggestions, Lou.

Councilmember Azeltine: I do, too; not necessarily the remand, but I think it would be much cleaner if we had a vote on whether or not to affirm what the Planning Commission has done and then to discuss any alternative zoning after that.

Mayor Dunn: The Planning Commission recommended approval.

Councilmember Azeltine: Yes, and I would be for an override of that, but I think it would be much easier to understand if we dealt with the subsequent zoning in a subsequent motion.

Mayor Dunn: We do have a motion and a second.

**Councilmember Cain rescinded her motion to zone Lot 3 of Ranchmart North to SD-NCR [Neighborhood Commercial Retail]; Councilmember Bussing rescinded his second.**

**A motion to deny approval of zoning to SD-CR [Commercial Retail] on Lot 3 of Ranchmart North was made by Councilmember Cain; seconded by Councilmember Azeltine.**

Mayor Dunn: Do we have discussion?

Councilmember Osman: I would just like clarification. If we vote on this denial for SD-CR, are we then taking up a new resolution for SD-NCR, or are we planning on remanding this back?

Mayor Dunn: We are having discussions, but I would recommend that, before we leave here tonight, we have a zoning or a recommendation of zoning for the Planning Commission.

Councilmember Osman: From my point of view, I'm not willing to leave here without deciding on a zoning tonight one way or the other.

Mayor Dunn: If there is no other discussion, we will take a vote on the motion to deny the request for approval of a zoning to SD-CR for Lot 3 of Ranchmart.

**The motion to deny approval of zoning to SD-CR [Commercial Retail] on Lot 3 of Ranchmart North carried with a unanimous vote of 8-0. Yay: Councilmembers Osman, Cain, Bussing, Rawlings, Rasmussen, Azeltine, Filla and Rezac. Nay: None.**

Councilmember Cain: Given all the information, choices and uses of that land, in my mind, the most restrictive zoning we can do at this time is SD-NCR [Neighborhood Commercial Retail].

**A motion to zone Lot 3 of Ranchmart North to SD-NCR [Neighborhood Commercial Retail] was made by Councilmember Cain; seconded by Councilmember Bussing.**

Councilmember Azeltine: This would preclude any kind of restaurant?

Mr. Coleman: No, it would still permit restaurants, but it would require a Special Use Permit for a carry-out restaurant or for a sports bar. Restaurants are more restricted in SD-NCR.

Councilmember Osman: I've had an opportunity to review this for many weeks. You can use revisionist history and use the whole gamut over what has happened over 50 years, but what is best for the neighborhood, for the developer and for the City? That is the issue at hand. Ranchmart shopping center has retail users in it and might have office users. If you were to go in and want to open up a coffee shop, a dry cleaner, a clothing boutique, you could not do so unless it was zone SD-NCR. Unfortunately or fortunately, we have two retail categories: SD-CR and SD-NCR. Everything else is Residential, Agricultural, BP or Office. We then have to separate ourselves from the restaurant, which is a totally separate application that happens to be here tonight coinciding with this to determine the zoning for the lot and the uses that can end up there. Earlier tonight, people said that once it's a restaurant, it's always a restaurant.

I like to look at what happens in the City, and just within a one-mile radius of that location, I came up with opportunities in which there were restaurants that were then not restaurants and vice versa. Tippin's at Corinth Shopping Center at 85<sup>th</sup> and Mission went out, and if it was an ideal restaurant, another restaurant would have gone in there. It sat vacant for years before CVS came in. O'Neill's at 95<sup>th</sup> and Mission was in a strip shopping center adjacent to an apartment complex. Although they were doing well, Walgreen's bought them out. On the Prairie Village side at 95<sup>th</sup> and Mission was a Jack in the Box that turned into Burger King, then a water softener place, then Blockbuster; and now it's Peachwave and Planet Sub. The Dragon Inn Chinese restaurant at 83<sup>rd</sup> and Mission is now turning into a Tide dry cleaner. Finally, off 89<sup>th</sup> and State Line was Lobster Pot that then turned into Verizon Wireless and a strip center. The market dictates what can and cannot be restaurants or retail. I lived on Wenonga, so I know what the citizens are going through. I frequented the development every day, and I know how useful the shopping center is for those residents. To deny strictly retail, we then limit what could or could not go in there. The issue at hand, as Gary mentioned earlier, is the setback. This was built before a time that we had rules for setbacks from residential areas. We understand that, but now, we have to realize that there are properties that don't meet that guideline; 103<sup>rd</sup> and State Line is a prime example. Those retailers do not fit the setbacks of the current LDO, so we have to decide if it's a conforming use. That is what the Board of Zoning Appeals, the Planning Commission and City Council are for. My vote is strictly for Neighborhood Retail for this property.

Councilmember Filla: To my earlier comments about SD-O and then if there's a retail application, it can come back for rezoning to NC-R or perhaps ask staff to come up with another category that delineates restaurants, my concern is not against Slab N Pickle; it is against any restaurant in that building with food, trash, rodents, slamming of glass. It is too close to the residents, period. I agree about the other uses; I would love to have that capability of other retail, so I don't think we close the door on that tonight by making it Office. My concern is with an NC-R zoning, there are many inappropriate uses, the first of which is a restaurant within 42 feet of residents.

Councilmember Osman: I want to address the point of restaurants and zoning. If we vote on this tonight, does City Council have the right to determine, on a separate application, whether it fits the intent or zoning of what we see fit within the zoning districts?

Mayor Dunn: The motion for SD-NCR is one piece of what we'll vote on this evening. The second would be the Slab N Pickle application.

Councilmember Osman: As City Council, do we have the choice to look at the application, see if it falls within the guidelines?

Ms. Bennett: The City Council does not; normally, it is a staff determination. If it is a Final Plan application, it will come to you. In the case of this particular building, Mr. Peterson did make the offer of any other use to be that.

Councilmember Osman: Take that building and put a Chili's in, for example, but they can't utilize that building. If they have to tear it down and build a new building, would they be able to use the same setbacks, or would they have to conform to the new LDO?

Mr. Coleman: They would have to conform to the zoning in place.

Councilmember Osman: First, we are looking at the restaurant and deciding if it falls in the guidelines, and second, if someone determines that building would need to be modifying, that applicant would have to come up to code. I would hate to limit the restrictions under the SD-NCR because this decision moves forward to a new application.

Councilmember Filla: But there is no way to restrict with a vote tonight on NCR for a restaurant going in that building as long as the building stands. There is no grey area we can vote on. I'm suggesting you do the most restrictive until we have a change to our LDO or we have a new application come in and we would change it to NCR because we want that business. The market does influence what we do. We would not have Crate & Barrel without the fact that it was a desired retail.

Councilmember Osman: Every time an applicant comes before use, we're going to have to determine if it is something we want and if it is SD-O or SD-NCR.

Councilmember Filla: It doesn't have to be either/or; tonight is only either/or. It doesn't say that we could ask for another designation of something called Neighborhood Retail / No Restaurants, or you can have it as long as it is legal and conforming but not if it was illegal. How would that work?

Mr. Coleman: We would have to go back and modify the LDO.

Councilmember Rezac: I have driven by this location three times. I also lived on Wenonga, and I can tell you, there was and is a clear demarcation going west from Wenonga that it becomes a commercial area. Even when the post office was there, it was what I viewed as retail sales more than office use. SD-CR or SD-NCR are the two choices in my mind because it is clearly a commercial area, and if we go to an SD-O or limited commercial zoning, we limit the opportunities for the community as a whole as to what services can be provided. To Andrew's point, the market does determine uses over a period of time, so I would be supportive of moving to an SD-NCR because I think we move some of the albatross that is there right now, but I don't think it would serve the community as a whole to be more restrictive than that.

Councilmember Filla: If we zone it SD-NCR and we don't want a restaurant, what would be the reason to turn down any application for a restaurant?

Councilmember Rezac: I don't want to restrict restaurants going into that location, and as we've done all along, Council reviews applications for restaurants or any other commercial business on a case-by-case basis. I always look at it that we have that stipulation authority that we can use if things are coming to that location that we want to restrict.

Mayor Dunn: We have a motion and a second for zoning this to SD-NCR. Are you ready for the question?

**The motion to zone Lot 3 of Ranchmart North to SD-NCR failed with a 4-4 vote. Yay: Councilmembers Cain, Bussing, Rezac and Osman. Nay: Councilmembers Azeltine, Rasmussen, Rawlings and Filla.**

Mayor Dunn: At this point, I wonder if it might be appropriate to remand to the Planning Commission for further review.

Councilmember Cain: That is what I said at the last meeting. At this point in time, I don't see other recourse. They were not able to consider these issues separately as we were.

Mayor Dunn: They will have the opportunity to review our minutes, but with a remand, we generally give some direction and suggestions on the zoning.

Councilmember Azeltine: Are we telling them to come up with a new zoning specification? I'm not sure I understand the point of a remand because eventually, we're going to have to make a decision.

Councilmember Rasmussen: We are not remanding anything; we are requesting them to come up with a new zoning. We already voted to turn down the zoning.

Mayor Dunn: Mr. Rasmussen, you missed the last meeting, and I don't know if you heard the discussion around the motion, which was to have them consider simply Lot 3, as they did not have the opportunity. They were reviewing all of Ranchmart together. This would be an opportunity for them to have some due diligence and discussion around the zoning of Lot 3.

Councilmember Filla: What would be the harm in designating it SD-O and then directing the staff to work with Planning Commission to come up with the modification that we want to see, we can come back and modify it, too. This allows the developer to go forward with office in the interim, but right now, they're still in the grey area.

Ms. Bennett: I believe the owner of the property would want a chance to speak to you, if not the Planning Commission, on changing the designation to Office. Mr. Peterson had a chance to talk with you a little about NCR but did not have a chance to address the SD-O. The harm would be that.

Mayor Dunn: I'd be happy to have him do that. I've only heard Ms. Filla talking about SD-O.

Councilmember Azeltine: I am in agreement with Ms. Filla.

Councilmember Filla: I am fine with retail but not restaurants. I am not willing to support NCR unless it has no restaurants unless they become legal, conforming buildings with the proper setback.

Councilmember Osman: We have that right as City Council.

Councilmember Filla: If we zone this NCR, they will be able to come back and say they can do a restaurant if it is in the Table of Uses. I think we will set ourselves up for a legal problem if we deny them that.

Mayor Dunn: We need a motion to extend the meeting 30 minutes.

**A motion to extend the meeting for a period of 30 minutes was made by Councilmember Bussing; seconded by Councilmember Azeltine. The motion carried following a unanimous vote of 8-0. Yay: Councilmembers Osman, Cain, Bussing, Rawlings, Rasmussen, Azeltine, Filla and Rezac. Nay: None.**

Ms. Bennett: Generally, you want the uses that you are permitting listed in the table.

Mayor Dunn: Mr. Peterson, did you have any comments you wanted to make about SD-O?

Mr. Peterson: Of course, we are not going to agree to SD-O. We stood here and made a record that we think it should be zoned for retail uses. Nothing that happened here tonight changes that. Unfortunately, now we have to appeal to district court because we were denied. I'm not going to agree. It is a significant devaluation of our property after 30 years on your map to say that it should be office use. If you want to restrict a restaurant out of it, it is a whole different process, and I offered up that opportunity. I can't agree to SD-O. We think we have a legal standing that we have a retail use. We will continue to work with the City and Ranchmart.

Mayor Dunn: Right now, the motion was to remand but not the SD-O. Mr. Azeltine and Ms. Filla said they would consider nothing but Office.

Councilmember Azeltine: I didn't say that; I said I would be in favor of Office.

Mr. Peterson: We would love the opportunity to talk about other retail uses because I assume we are not going to get the plan approved. What you've done is you've denied your application to confirm a zoning to retail, and the clock is ticking for a 30-day appeal to court. That is the practicality of it.

Councilmember Filla: Would the Council be open to affirming that we would like to have NCR for Lot 3 with the exception of restaurant and then ask about the right protocol to get us there?

Scott Lambers: Mr. Peterson is correct; he has 30 days to file litigation against the City because of your denial. For any attempt to amend the LDO, you are talking at least four months. Whatever the intent would be will be irrelevant. You need to be aware of that. You don't seem to have seven votes to do anything tonight, which is obviously required by the Protest Petition. We need to acknowledge where we are and recognize there will be repercussions because of the denial. A remand to Planning Commission to consider existing zoning categories would be the most expeditious manner in which to proceed rather than coming up with a new zoning category to accommodate what we don't know that a majority supports.

Mayor Dunn: So we should consider existing zoning categories with a remand to the Planning Commission.

**A motion to remand the zoning of Lot 3 to the Planning Commission to consider existing zoning categories was made by Councilmember Cain. No second.**

Scott Lambers: If you open up the other way, it is a 4-6 month process.

Councilmember Cain: That building is already 50 years old. Isn't it true that this is an allowable use because they are doing no major changes to the building? How many restaurants will come in without wanting to make modifications, which will throw it into a Special Use Permit category?

Scott Lambers: I can't answer your question because you have not established a zoning to which we would apply City criteria to.

Councilmember Cain: In CR or NCR, restaurants and general restaurants are allowable uses. I thought that because of the setbacks, if there was any major deviation to the building, it would throw the parcel into an automatic special consideration category.

Scott Lambers: You won't see that happen because the improvement costs won't be justified by having to move the building to comply with the setbacks. Anyone that goes in there will do absolutely nothing to trigger the existing LDO requirements to come into play; it is just a reality. The building has value to the property owner. If Walgreen's is going in there, they do it all the time, but it will not be the case.

Mayor Dunn: Did I have a motion for a remand from Ms. Cain?

Councilmember Cain: I did, but I was not suggesting a new zoning district. I was asking them to consider, given the current code, existing categories for only Lot 3 because they were not allowed to consider it separately. Now, they will get the opportunity to consider it NCR.

Mr. Peterson: I hear what you are saying about the restaurant, but please revoke the denial so I don't have to get to court and then remand it.

Councilman Rasmussen: No way.

Mr. Peterson: You are not losing anything other than saving your City's and your citizens' money.

Councilmember Rasmussen: We have a procedure to follow.

Mayor Dunn: Yes, and I have invited him to comment.

Mr. Peterson: I am respectfully suggesting that you give us an opportunity to look at some form of retail that would be acceptable to a super majority of the Council.

We will do that in good faith. Do it through a remand or a continuance, but you have denied us, and the state law says that 30 days from the denial, I have to be in court. I know my client doesn't want to sue you; I don't think we want to get diverted into lawsuits.

Mayor Dunn: What is the calendar for the Planning Commission? Are they meeting next week?

Mr. Klein: June 26<sup>th</sup> is the meeting. We have a Work Session on the 12<sup>th</sup>, so we could meet then.

Mayor Dunn: Sometimes you combine a Work Session and a Planning Commission meeting, especially if there is just one item.

Deb Harper, City Clerk: We don't know that the minutes would be ready for the packet for a June 12<sup>th</sup> meeting.

Mayor Dunn: We might have to hire someone to do that.

Councilmember Filla: Can we undo the vote procedurally?

Ms. Bennett: If it was a unanimous denial, any of you can move to reconsider the denial and have it be a remand with specific instructions.

Mayor Dunn: Doesn't our remand allow SD-CR? It would be any existing zoning categories. Or does that denial negate the ability to consider SD-CR?

Ms. Bennett: If it says "any existing zoning categories" it would not. The motion to reconsider would make it a cleaner remand of this application under your normal choices.

Mayor Dunn: We probably need to remove the current motion on the table.

Councilmember Cain: When I made my original motion for NC-R, I was not denying a restaurant. I had no way of knowing how the vote was going to take place.

**A motion to reconsider denial of zoning of Lot 3 of Ranchmart North to SD-CR was made by Councilmember Cain; seconded by Councilmember Bussing.**

Councilmember Azeltine: Ms. Bennett, if we are unable to reach an agreement on this motion on how to zone this, the minute we overrode the Planning Commission, didn't it revert to some zoning? What is it now?

Ms. Bennett: I'm sure Mr. Peterson will ask the court to find that it is Commercial. According to our current zoning map, it is Commercial.

Councilmember Azeltine: I'm talking procedurally.

Ms. Bennett: It is probably whatever Mission Urban Township had it.

Councilmember Azeltine: We don't know that.

Ms. Bennett: There are indications in the minutes that it was residential.

Scott Lambers: The staff's position is and has been that we cannot prove that there was ever an initial zoning when the property came into the City. The only action we have is from the City Council approving a zoning map, which does not constitute zoning, in the early 1980's. That was the basis from which the decision was made to continue that, as it was done by a formal Council action with a vote and minutes.

It can be argued that because there was never any initial zoning, anything subsequent that was based on the premise of zoning is null and void. The reason we are here tonight with the zoning is to put the first zoning back in.

Councilmember Azeltine: What if we are not successful in doing that? What is this lot?

Scott Lambers: It is a lot that is not zoned.

Councilmember Azeltine: Is that akin to Agriculture?

Scott Lambers: No, there is no zoning on it at all, and as Patty said, a judge would have to rule that there is no zoning and direct you to zone it, you rule that the approved zoning map from 1982 constitutes zoning or something between. We have nothing to present to you of an ordinance where the Council formally zoned it.

Councilmember Azeltine: If we cannot reach an agreement, it will be decided by the court.

Scott Lambers: Absolutely.

Councilmember Rezac: I have a clarification request. A comment was made that because we denied SD-CR that it automatically denied the Slab N Pickle.

Scott Lambers: No.

Councilmember Rezac: With the motion that was made for SD-NCR, Slab N Pickle is still viable as a case that can be brought before us.

Scott Lambers: Once you approve a zoning that would approve restaurants, yes, the application remains viable, but you have not done that tonight. If you go with the SD-O which specifically precludes it, the application would go away.

Councilmember Rezac: Could someone reread the first motion? It sounded like we denied the SD-NCR.

Mayor Dunn: We needed seven votes and only had four.

Scott Lambers: There has been no action.

Mayor Dunn: The motion on the table now is to reconsider the denial of the SD-CR zoning. As discussion, I will say there will be a subsequent motion to remand this to Planning Commission for a meeting next week to expedite this so they can consider existing zoning categories for Lot 3 of Ranchmart North.

Councilmember Filla: And also to allow the developer to consider other options.

Mayor Dunn: That is not a part of it, but he is saying it is true, so we will add that to the record.

**The motion to reconsider denial of SD-CR zoning carried following a vote of 7-1. Yay: Councilmembers Osman, Cain, Bussing, Rawlings, Azeltine, Filla and Rezac. Nay: Councilmember Rasmussen.**

**A motion to remand consideration of existing zoning categories for Lot 3 of Ranchmart North to the Planning Commission was made by Councilmember Cain; seconded by Councilmember Bussing.**

Councilmember Filla: Why do we have to limit it to existing? We don't have a clock running. Why can't we take four months and come up with something that is right? The reason we were hot on what was existing is we wanted something before the 30-day window, and we just took that away.

Mayor Dunn: Mr. Lambers, do you have any comment?

Scott Lambers: The timing is also an issue not necessarily because of litigation. This application has been going on since January, and I think we need to bring it to closure for everybody's benefit one way or the other. We can take this to the Planning Commission on Tuesday and bring it back to you on the 18<sup>th</sup> and at least exhaust that possibility. If it doesn't work and we don't get the seven votes, it would be fine. Give us the next two weeks to run it through and exhaust the avenue in fairness to everybody.

Mayor Dunn: That is a good suggestion.

Councilmember Rasmussen: Are you saying the petition is still valid?

Scott Lambers: Yes.

Mayor Dunn: I think for fairness for all involved and when we talk about our citizenry, we need to think about the entire City of Leawood. Certainly the people who live near here are important, but we need to think of the entire City with this. Is there any more discussion on this motion?

**The motion to remand to the Planning Commission carried following a vote of 6-2. Yay: Councilmembers Cain, Bussing, Rawlings, Azeltine, Filla and Rezac. Nay: Osman and Rasmussen.**

Mayor Dunn: This passes, but do you want to state your reasoning on the record?

Councilmember Rasmussen: I think the basic issue here is the existing zoning for the land. I would just like to say that 20 years of experience have shown that if the subject area was zoned anything but residential, the City clerk or other staff would have found it. My experience is our staff has been exemplary; if it is there, they find it. The owner of the property, the joint applicant in this case 52-12, has not been able to present any documentation showing a change in zoning from residential. The area in question was part of a cemetery, and cemeteries have been zoned residential. Said designation carried over when the political jurisdiction changed from township to City. There are people in this audience who have lived here as long as I have and know the facts of that situation. The use of the tract as a post office would not have required a change, since public use in residential areas has been a given. For example, public use includes fire stations, police stations and post offices.

The uses permitted under SD-CR include uses which have been thoroughly discussed tonight, which would never have been considered by any council that I have ever been associated with if this was bare land. That is why I am voting the way I am tonight.

Councilmember Osman: I am just voting no.

Mayor Dunn: The motion carried, and I want to thank all the residents for staying tonight and for your participation. Thank you to the applicant as well and certainly to the staff, who worked very hard on this.

**A motion to continue the Slab N Pickle application to the June 18, 2012, Governing Body meeting was made by Councilmember Filla; seconded by Councilmember Bussing. The motion carried following a unanimous vote of 8-0. Yay: Councilmembers Osman, Cain, Bussing, Rawlings, Rasmussen, Azeltine, Filla and Rezac. Nay: None.**

12. **OLD BUSINESS** - None

13. **OTHER BUSINESS** - None

14. **NEW BUSINESS** - None

#### **ADJOURN**

There being no further business, the meeting was adjourned at 11:30 P.M.

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Debra Harper, CMC, City Clerk

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Pam Gregory  
Recording Assistant City Clerk