

**The City of Lake Forest**  
**Plan Commission**  
**Proceedings of the January 10, 2018 Meeting**

A meeting of the Lake Forest Plan Commission was held on Wednesday, January 10, 2018, at 6:30 p.m., at City Hall, 220 E. Deerpath, Lake Forest, Illinois.

Commission members present: Chairman Ley and Commissioners: Monica Ruggles, Michael Freeman, Louis Pickus, and Rosemary Kehr

Commissioners absent: Tim Henry and Guy Berg

Staff present: Catherine Czerniak, Director of Community Development

**1. Introduction of Commissioners and staff and review of meeting procedures.**

Chairman Ley introduced the members of the Commission and staff and reviewed the meeting procedures followed by the Commission.

**2. Consideration of the minutes of the December 13, 2017 meeting.**

The minutes of the December 13, 2017 meeting were approved as submitted.

**3. Public Hearing and Action: Consideration of a request for approval of an amendment to the Special Use Permit which approved the Oak Knoll Woodlands Subdivision to allow the earthen berm to remain as built, at a height taller than the height reflected on the approved development plans. The berm is located in the southeast corner of the Oak Knoll Woodlands Subdivision, west of the railroad tracks, east of Oak Knoll Drive and north of Abington Cambs Drive.**

Property Owner: RREF II-SD Oak, LLC

Representative: Rick Swanson, R.M. Swanson Architects

Chairman Ley introduced the petition noting that there is a procedural matter that must be addressed by the Commission before proceeding to the public hearing. He noted that the objectors have submitted a request for further continuance of the public hearing. He explained that if the Commission does not grant the continuance, then the public hearing will proceed. He noted that Mr. Pickrell, the City Attorney, is in attendance to make sure that due process is afforded to parties on both sides on the matter. He reviewed the procedures the Commission will follow noting that first, the objector will be provided with an opportunity to present the request for continuance; second, the City Attorney will provide guidance to the Commission; third, the petitioner will be given an opportunity to speak to the request for a further continuance, fourth the Commission will have the opportunity

to discuss the request; and fifth, the Commission will vote on the request for a continuance.

Chairman Ley asked the Commission for any conflicts of interest or Ex Parte contacts, hearing none; he swore in all those intending to speak. He invited comments from Mr. Stang in the matter of the request for a continuance.

Mark Stang, attorney, stated that he represents seven residents of Lake Forest who live on Gavin Court, the objectors to the petition. He stated that he will refer to his clients as the Gavin Court neighbors. He explained that the Gavin Court neighbors have been living with the consequences of the berm for more than two years and with the consequences to their well-being and properties. He assured the Commission that no one is more anxious to bring the matter of the berm to a conclusion than his clients. He noted however that it is important that in deciding on this matter, the Commission have the benefit of accurate data and expert analysis and opinions from all parties. He stated that at the time the first and second continuances were requested, his clients were not aware that testing cannot be done effectively when there is snow on the ground. He stated that his clients learned this information upon interviewing experts. He noted that snow on the ground somehow affects sound waves and the monitoring equipment does not operate below ten degrees. He stated that until the weather clears and the snow melts, noise testing cannot be done. He stated that one acoustical expert pursued by his clients, Dr. Thunder, informed Ms. Reich, at the last minute; that he could not assist the residents because he would be interpreting the noise studies for the City. He noted that the developer, Rialto, has never reached out to the Gavin Court neighbors adding that the assertions noted in the developer's cover letter to Chairman Ley is something that will need to be cross examined. He noted flaws in the work done by Wiss, Janney, Elstner Associates, Inc. the engineering firm hired by the developer to conduct a study noting that monitoring was done for two hours, but sounds were recorded from only two freight trains and those trains were not described. He stated that the monitoring was not sufficient. He stated his belief, and that of his clients, that the data is insufficient, commenting "garbage in and garbage out". He noted that the opinions presented cannot be relied upon. He noted a second problem with the report; the monitoring devices were set up in close proximity to the berm. He stated that the monitoring devices should have been set up hundreds of feet from the berm in order to assure an accurate measurement of waves coming from the berm or waves coming from the train to assure readings that are in no way affected by the berm. He stated that the proper protocol was not established. He stated that by April, a consultant hired by the residents will establish a proper protocol. He noted that if the requested continuance is denied by the Plan Commission, it will be the developer's expert, against no expert. He clarified that the developer knew in the summer of 2016 that the berm exceeded the height on the approved plan even if the blame was placed on the grading contractor. He noted that the developer went a year and a half before petitioning the Commission for an amendment to allow the berm to remain as built. He stated that the developer should have taken

action the very next month to acknowledge the mistake instead of waiting for the citizens to raise the issue. He stated that the neighbors are not trying to delay a decision, noting that they do not want to live with the existing conditions for another summer. He requested a continuance of the matter until April.

In response to Mr. Stang's statement, Mr. Pickrell explained that there are two issues for the Commission's consideration relative to the request for a continuance; what is legally required, and what is advisable. He stated that the minimum legal requirement is that the objecting neighbors be provided with due process; notice and an opportunity to be heard. He noted that the neighbors received notice and are present at the meeting. He confirmed that the legal requirements have been met and the Commission can proceed with the hearing. He noted however that the neighbors are not the only entity with rights in this situation. He noted that the Code states that the petitioner has a right to have the petition heard within sixty days and if the continuance is granted, as requested by the neighbors, the sixty day requirement would be exceeded. He noted however that if the petitioner agrees to a further continuance, then a continuance could be granted in conformance with the City Code requirement. He commented on Mr. Stang's statement regarding the inability to conduct adequate sound testing when there is snow on the ground or when temperatures are below 10 degrees. He stated that Mr. Stang advised him of the limiting factors prior to the hearing and as a result, he had time to check with the National Center for Environmental Information and determined that there was no snow on the ground until December 12<sup>th</sup> when it snowed two inches and melted two days later. He continued noting that it snowed again on December 25<sup>th</sup>, an estimated 1.4 inches, and a cold snap followed. He noted that the City provided Mr. Stang and the Gavin Court neighbors with a copy of the report completed by Wiss, Janney, Elstener Associates, Inc. on November 15, 2018. He noted that the neighbors had five weeks, over the course of two continuances of the public hearing, to conduct testing after receiving a copy of the report prepared by the petitioner's consultant. He spoke to the issue of whether or not it is advisable for the Commission to grant a third continuance noting that the Commission can grant a motion to continue the petition now, prior to considering the substantive aspects of the petition, or at the end of the hearing if determined to be appropriate. He reviewed that if the Commission determines that it is appropriate to proceed with the public hearing at this time, the Commission will have three options; recommend denial of the request for an amendment, recommend approval of the request, or continue the public hearing based on the need for additional information. He acknowledged that Mr. Stang stated his clients' interest in obtaining an additional expert report relating to sound and vibrations however, it has not yet been developed and the Commission is without its benefit at the present time. He noted however that the Commission is constrained by City Code to hear the petition within sixty days unless the petitioner agrees to waive that requirement. He noted that it is up to the petitioner whether or not the hearing proceeds at this time knowing that the prospect is that there could be a continuance at the end of the evening if the Commission determines that more

information is required. He suggested that the Commission may want to hear from the developer with respect to the request for the continuance.

In response to the request for a continuance, Rick Swanson, a partner in the project and a Lake Forest resident, stated that he has listened to the testimony presented by Mr. Stang and the comments from the City Attorney. He stated that the developer is prepared and has witnesses from out of town present to offer testimony to back up the information provided. He stated that they have been patient noting that to date, two continuances have been granted at the request of the neighbors. He noted that as the City Attorney pointed out, there has been more than enough time to prepare for the hearing. He noted that he has been advised that measurements can be taken during the winter and noted that an expert witness is available to speak to that question. He stated however, that there is no point in presenting testimony if it is the opinion of the Commission that the neighbors should be given additional time. He stated that although the developer is prepared to present testimony, it does not make sense to present their case if the neighbors are not prepared to do the same. He noted that the neighbors have known about this issue for two years but have not done anything except complain, they have not yet engaged an expert witness. He noted that the developer has worked proactively with the city to address alleged drainage issues. He noted that the berm was built in compliance with engineering standards. He reiterated that if the Commission's position is that the opposing side should be given additional time to gather information, then the developer would prefer not to make a presentation at this time. He clarified that the developer is prepared to proceed, but noted that they respect that there is a process and want to do what is best for the City and have every opportunity to present the facts and let the facts determine how this proceeds.

In response to questions from Chairman Ley, Mr. Swanson stated that he heard the City Attorney say that at the end of the meeting the Commission would have the option to continue the matter. He stated that in his opinion, this is a one meeting issue and stated that if the Commission determines that there is not sufficient information to make a decision, the developer prefers to present when all of the information is available. He noted that he respects that the Commission should have every opportunity to hear both sides, but noted that it is an unfair advantage if the developer presents evidence now and the opposing side then has three months to prepare information.

In response to questions from Commissioner Pickus, Mr. Thunder stated that he prefers not to conduct testing in the snow, but it can be done. He noted that it depends on the considerations noting that the snow between the berm and the residences is a constant factor. He stated that the noise of the trains is not being measured but instead, the measurements are trying to isolate the effect of the berm, so it is a relative effect and that is why there are multiple measurement locations. He noted that snow on the berm itself adds to the absorption and could affect the measurement. He noted however if there is vegetation on the berm,

snow is not going to add much absorption. He added that even when temperatures drop low, equipment will work unless you are working with obsolete equipment. He noted that in the old days, when measurements were taken with real tape recorders, the cold could be a problem. He noted that digital equipment has no moving parts so the cold only affects the battery by shortening its life. He stated that the data collected will still be good if it is calibrated before and after. He confirmed that cold temperatures can affect the density of the air and stated that would matter if the measurements are looking at absolutes. He noted however that the data is not looking at absolutes but instead, relative data. He added that whatever affects measurement position one, will affect the other positions as well. He stated that the question is whether the berm causes a change.

The Commissioners raised some additional questions.

Mr. Pickrell cautioned that in fairness, if the Commission gets too far into asking questions about the substance and merits, the discussion may go beyond the immediate question of whether a continuance should be granted.

Commissioner Freeman questioned whether it would be helpful and appropriate for the City's consultant to offer guidance on how future studies should be conducted.

The Commissioners agreed to focus on the question of the continuance.

In response to questions from Commissioner Freeman, Mr. Swanson stated that he believes that he was alerted by staff that the berm was constructed higher than shown in the plans in early summer, 2017. He stated that normally, that type of issue would be identified in the as-built drawings. He noted that his initial reaction was to have the berm height reduced. He noted however that after learning that the neighbors were alleging damage, as a result of the height of the berm, relating to drainage, acoustical and vibration issues, the developer wanted to study the impacts before making any changes on the site. He stated that the developer hired consultants and met with City staff and determined that the drainage issues were due to maintenance issues with the pond on Gavin Court.

In response to a question from Commissioner Freeman, Ms. Czerniak stated that staff became aware that the height of the berm was an issue in April or May of 2016. She noted however that she cannot speak to date when onsite engineering inspectors might have discussed it with contractors on the site.

Chairman Ley asked for a sense from the Commission on the matter of the request for a continuance.

Commissioner Freeman noted that the Commission's packet includes an explanation from Swanson Development as to how the site was developed with a

non-conforming berm which was constructed by a sub-contractor. He stated that information was helpful, but not determinative. He stated that he was not on the Commission when the development was initially considered. He noted that he was surprised to see that a developer who regularly appears before the Commission and enjoys an excellent reputation in the community is involved in the petition. He noted that as for due process, the notice provided and extensions granted at the last two meetings was proper noting that the petitioner agreed to the continuances. He stated that in his opinion, there is no support for a due process argument. He stated that the City has accommodated the interests of all parties. He noted that the City even lobbied Metra to help resolve a drainage issue. He noted that if the Commission denies the motion for a continuance, the Commission will be tasked with determining if there are off site adverse impacts related to drainage, sound, or vibration based on the available information. He stated that the Commission must consider the request in the context of the Special Use Permit criteria and determine whether the increased height of the berm is detrimental to public health, safety, comfort or general welfare, or is injurious to or diminishes the value of properties along with other considerations. He observed that it has been helpful to the Commission in the past to make determinations about adverse impact by hearing from experts on both sides and having an independent expert provide a review at least with respect to sound. He noted that the neighbors received the report no later than November 17, 2018. He noted that it took the petitioners several months, after learning of the berm issue, to conduct a study and produce a report. He stated that it is reasonable to allow the neighbors additional time to digest the technical information submitted by the petitioner and hire an expert. He noted that there are questions about the report evidenced even by Dr. Thunder's brief comments. He noted that there are technical issues including the impacts of the grade changes, deflection and whether or not sound deadening materials would survive on the berm. He noted that those are all issues that the residents should have the opportunity to contest. He noted that as for vibration, the petitioner's own study demonstrates that there are issues. He stated that from his view, it is undisputed that the berm was knowingly constructed in violation of clear approval; however, there are many disputed facts about drainage, sound and vibration about which additional information would be worth hearing. He noted that although the objectors had the petitioner's information for several weeks, he would not call the developer's actions proactive since the developer waited for the City to bring the berm height issue to their attention. He stated that if the Commission decides to grant the continuance, he would support an extension to the March Plan Commission meeting commenting that would allow a reasonable time frame. He suggested that if in the interim, the developer decides to make the berm conforming to the approved plans, the City and the objectors should be notified to minimize the expenditure of resources.

Chairman Ley expressed concern that if the matter is continued, information will be submitted by the objectors with different measurements that likely will not make the matter any clearer. He stated that there is one key, very important piece of

information that is impossible to collect, measurements of the pre-berm construction conditions at the homes. He stated that in his opinion, the matter should be heard, rather than continued. He stated that based on the available information, the petition should be denied and the dirt removed.

Commissioner Freeman stated that the Commission should fully hear the petition before coming to a decision.

Chairman Ley stated his disagreement.

Commissioner Kehr stated that based on the available information, she can understand the matter from the perspectives of both the petitioner and the Gavin Court neighbors. She noted that the petitioner hired a reputable firm to conduct a sound and vibration study. She reiterated that the report was given to the Gavin Court neighbors around November 15, 2017, allowing ample time to engage an expert of their own. She stated surprise that the City had only recently engaged Dr. Thunder. She expressed appreciation that the City took steps to investigate and address the drainage concerns brought forward by the Gavin Court neighbors. She expressed concern for the petitioner noting that the petitioner has brought experts to the meeting and if the meeting is delayed, the developer will be at a disadvantage for the spring selling season.

Commissioner Ruggles stated that she is inclined to support a continuance rather than proceed with the hearing, but noted merit in Chairman Ley's argument. She agreed that a continuance could result in dueling consultants each providing information. She stated that the studies may not allow the Commission to fully resolve the questions raised. She questioned how the information can explain how the berm, if built as originally approved, would affect the neighbors. She suggested that if the matter is continued, a shorter time frame should be considered noting that April is a long time for the developer to wait. She stated that the developer may want to mitigate the berm in the meantime noting that the simplest resolution would be to reduce the size of the berm.

Commissioner Pickus stated agreement with Commissioner Freeman's comments. He commented that in the interest of fairness, the neighbors should have an opportunity to present their case. He stated that sixty days is a reasonable time frame and stated support for a continuance for that time period.

Mr. Pickrell stated if the Commission is inclined to continue the petition, Mr. Swanson should be asked again whether the developer agrees to a continuance.

In response to questions from the Commission, Mr. Swanson stated that he is hearing that the Commission is inclined to postpone and give the opposing side an opportunity to prepare their argument. He noted that his only argument is that the developer does not want to present their case and then have it continued. He stated that if the Commission's decision is to continue the matter, he would like

to understand that prior to making a presentation. He stated that the developer is prepared to react to whatever the Commission decides.

In response to a question from Mr. Pickrell, Mr. Swanson stated agreement, on behalf of the petitioners, to a continuance until March. He noted however that the development has already been delayed for two years. He stated that there is interest from buyers and they would like to start building houses. He stated that the developer is prepared to do as directed and if necessary, take the berm down. He stated however that it may be best to leave it in its present form. He requested permission to obtain permits and begin construction of the homes in the interim to avoid an unfair delay during a good season.

In response to a request for clarification from Mr. Pickrell, Mr. Swanson confirmed that the developer is agreeable to a continuation of the petition until March.

Chairman Ley asked for a motion to deny the request for continuance noting that if the motion passes, he intends to entertain a motion to deny the request for an amendment to the previously approved plan.

In response to questions from the Commission, Mr. Pickrell confirmed that a motion is needed to continue the petition despite the fact that the petitioner has agreed to the continuance. He stated that the Commission should consider one motion at a time.

Commissioner Freeman made a motion to deny the request for a continuance.

The motion was seconded by Commissioner Ruggles.

Commissioner Freeman pointed out that the petitioner has agreed to the continuance and questioned why the Commission would not support the request for a continuance if all parties are willing.

Chairman Ley predicted that if the matter is delayed to the March meeting, the Commission will receive conflicting information and still will not have information on the preconstruction conditions as they relate to noise and vibrations noting that to get than measurement, the berm would need to be completely removed. He predicted there would likely be a further continuance of the matter.

Commissioner Freeman stated that he is mindful of the cost of further delay to the petitioner but noted that what is relevant is whether the sound, vibrations or drainage are different in this area than in other areas of the subdivision due to the increased height of the berm. He explained that it is a question of relativity, not a certainty of before and after. He pointed out that the developer has an option, noting that the Commission has already approved a berm at a lower height and the height of the berm can be reduced to meet the prior approvals. He stated that in his opinion, the Commission should rely on the expertise of the consultant

who stated that interpretation of the measurements is relative and not an absolute.

Chairman Ley called the question on the motion.

The motion failed by a 2 to 3 vote with Chairman Ley and Commissioner Kehr voting in favor of the motion and Commissioners Friedman, Pickus and Ruggles voting nay.

Commissioner Pickus made a motion to continue the petition until the March Plan Commission meeting.

The motion was seconded by Commissioner Kehr.

Commissioner Freeman stated that because both parties have agreed to the continuance, he is not certain a motion is necessary.

Mr. Pickrell stated that a vote on the motion would make it clear that a continuance was granted.

Chairman Ley suggested to the objectors that if this matter is continued, it will be important for their expert, and the expert for the petitioner, to somehow not make this an inconclusive matter when it returns to the Commission.

Commissioner Pickus suggested that staff and the City's consultant could guide both parties if desired so the results will speak for themselves.

Chairman Ley questioned how data could be developed to represent the noise levels and vibrations before the berm was constructed, at any height.

Commissioner Pickus noted that a berm was approved as part of the overall development noting that only the height of the berm is in question.

Commissioner Kehr asked for clarification on the motion.

Commissioner Freeman stated that the motion on the table is to continue the matter to the March 15<sup>th</sup> Plan Commission meeting.

Chairman Ley asked for a roll call vote.

The motion passed by a vote of 4 to 1 with Chairman Ley voting nay.

Chairman Ley reiterated that presentations from all parties will be heard on this matter at the next meeting which is March 15<sup>th</sup>.

## **5. Additional public comment on non-agenda items**

There was no testimony was presented on non-agenda items.

**6. Additional information from staff.**

Ms. Czerniak asked for Commission consideration of the amended 2018 Plan Commission meeting schedule.

Hearing no comments from the Commission, Chairman Ley invited a motion.

Commissioner Pickus made a motion to approve the 2018 meeting schedule as presented.

The motion was seconded by Commissioner Kehr and was approved by a vote of 6 to 0.

There was no additional information presented by staff.

The meeting was adjourned at 7:25 p.m.

Respectfully submitted,

Catherine Czerniak  
Director of Community Development