MEMORANDUM

September 24, 2013

TO: Doug Krieger; Allison Laff

FROM: Bob Fischer, President, Naperville Area Homeowners Confederation

RE: Proposed Amendments to the Municipal Code

This memorandum is intended to summarize the points, comments and suggestions offered by Bob Fischer, Mike Reilly, Dr. Bob Buckman, Rick Strawbridge and Thom Higgins during our meeting with both of you and Councilman McElroy on September 12, 2013. These changes were reviewed with other members of our Board of Directors as well as with the Confederation general membership during our September 21st meeting. However, in the interests of preparing and submitting this response prior to the first Council meeting on October, we were unable to provide the necessary notifications and vetting to make this document a public stand of the Confederation or position of the Board of Directors. Accordingly, please take this memo as discussion and suggestions on the topic at hand, and not as a formal position of the NAHC.

I would like to applaud the City, at the outset, for taking the initiative for this very substantial undertaking of wholesale Code amendments. The pertinent sections of the Code were in need of updating and verbal streamlining; the amendments largely serve to clarify many matters and also remove unnecessary terms and redundancies. However, in giving effect to that part of the Confederation's mission that requires it to advocate for the interests of homeowners in the Naperville area, I am presenting the comments, concerns and recommendations herein. These comments should not be taken as a reflection upon staff, serving commission or council members, all of whom are applauded for their service to the community. Rather, what is being addressed are processes and safeguards within the processes. Decision makers sitting at the dais, as well as staff members reviewing and preparing recommendations can and will change. The underlying ordinances will remain and the goal is to ensure that these remain as a fair and equitable roadmap and guide both for petitioners and for the neighbors impacted by any changes.

Our comments are as follows:

1. Requirement for Staff Evaluation of Petitions under the Applicable Factors Set Forth in the Code: It has been the practice for Staff to evaluate petitions under the zoning ordinance for the compliance of a given proposal with the factors for decision specified in several key sections of the Code. These sections include: 6-3-6.2 (Variances); 6-3-7 (formerly entitled "Amendments," now to be entitled "Rezonings;" 6-3-8.2 (Conditional Uses); and 6-4-7.1 – conditional uses or major or minor changes to a PUD. What each of these sections have in common is the mandatory language that states:

Current Code: "Plan Commission shall not recommend nor shall the City Council grant [a variance, and amendment, etc.] unless it shall make findings based on the evidence presented to it …"
Proposed Code: "Any recommendation by the Planning and Zoning Commission and any decision by the City Council shall be predicated on evidence and finding that …"

This means the deciding bodies must base their decisions on evidence presented for each of the enumerated factors. Since this can be very complicated, Staff's evaluations on each factor of a given Petition ought to be of great service to the Commission and to the Council. Further, such evaluations would make clear to a petitioner where exactly the proposal is failing to meet requirements, adding to the transparency of the entire process. **Therefore, it is recommended that (Staff's evaluations on each factor of a given Petition) be an enumerated duty of the Zoning Administrator.**

2. Appeals from Zoning Administrator's Code Interpretations and Recommendations (6-3-3; 6-3-3.2.1.1): The new section empowers Planning and Zoning Commission to review "interpretations" of the comprehensive master plan, by taking into consideration "such" factors to include contextual appropriateness, consistency with the City's general policies, and community benefit. It is not clear when an "interpretation" is to be made by the Zoning Administrator, nor are mandatory factors called out. This leaves the Zoning Administrator with wide discretion, and decisions difficult to review. Moreover, the almost exclusively subjective nature of the decision making here does not promote transparency because of its vagueness, leading to the potential for allegations of fairness (or unfairness). **Therefore, this section should specify mandatory criteria to the extent practicable.**

   NOTE re Master Plans, Etc.: Nowhere in the new provisions do we find an express empowerment of anyone or body to create master or other land use plans. The Zoning Administrator is to administer the comprehensive master plan, but we find no express empowerment of Planning & Zoning Commission or Council to develop, approve or modify that (or any other) land use plan. **These changes should explicitly recognize Planning & Zoning Commission's responsibility to recommend and Council's responsibility to approve as per existing practice.**

   Further, should there be any provision, in any section of the Code, that expressly states that the provisions of a master plan should generally be followed unless "persuasive," or "clear and convincing" or "sound and practical" reasons, based on evidence adduced at hearing, be found? In the past there have been numerous instances where a proposal for development conflicted with a master plan that was developed after extensive study and endorsed by a "blue ribbon" panel of citizens. Subsequently, and generally at the request of developers, Planning and Zoning, Council or both have found the Master Plan

"impractical," "out of date," or just inconvenient when reviewing the situation at hand. **While master plans should not be straightjackets or unreasonable obstructions to genuine and beneficial progress, shouldn't they generally be followed except in special circumstances for objective reasons** that can be articulated in a fully transparent manner? Otherwise, why go to the time and expense of devising these? This is an area of confusion for citizens and more clearly linking plans to explanations for deviations to such would therefore provide significant benefit/understanding to citizens that would continue to encourage them to participate in the process.

3. <u>"Majorities" to Act and Make Decisions</u>: Section 6-3-3 calls for a "simple majority" of the Planning and Zoning Commission when making recommendations to Council. Does this mean a majority of then-serving commissioners, or a majority of those present when a quorum is available to act on a matter? While this may be splitting hairs, it is better to err on the side of greater rather than less detail, particularly when decisions are made by a smaller group due to absences, vacancies, or recusals.

   Section 6-3-3.2.1 requires a vote of 5 councilmen to overturn a Plan Commission recommendation, although only a simple majority of a quorum is needed to approve such a recommendation. This higher standard may well be prudent, given the high stakes involved in some zoning matters, but this indirectly places a significant power of decision in non-elected officials (with all due respect to the volunteers who serve on the Planning and Zoning Commission). There is a different standard being applied, in effect.

   There is a concern that all of these possible discrepancies could open the City to Due Process challenges and while "Robert's Rules of Order" may provide appropriate underlying definitions, our preference is to see greater detail within the City Code..

4. <u>Requirement for Express Findings as Bases of Decisions</u>: The proposed change to the foregoing sections eliminates the requirement that the Commission and Council <u>make</u> "findings," which is a very specific term invoking an affirmation of an evaluative conclusion. This requirement assists (or should assist) the Commission and Council on focusing their evaluations on the factors mandated by the Code – thus creating a level <u>and predictable</u> field of contest for all concerned. The proposed amendments, conversely, make no such requirement, but rather adopt the far more ambiguous language that decisions of the Commission and Council "shall be <u>predicated on</u> evidence and findings." This appears to remove any requirement for the Commission or Council to affirmatively set forth the bases of their decisions in terms of the objective enumerated factors. Consequently, parties having an interest in the matter will not be told why a decision went against them. Moreover, Council will not be able to determine which specific factor or factors the Commission found wanting in a petition the Commission recommends be denied. Instead, either of these bodies can simply declare words to the effect that "we

find the petition failed to meet the required criteria." **Therefore, the old language, with its requirement for the Commission and Council to affirmatively make findings based on the evidence presented should be retained.**

5. Requirements for Financial Disclosures re Rezonings: One of the enumerated factors in 6-3-7 and 6-4-7 is: "The property cannot yield a reasonable return if permitted to be used only under the conditions allowed under the existing zoning classification." Since this is an enumerated and mandatory factor for decision by PC or Council, the petitioner must offer affirmative evidence of this. However, a perception of what has happened in some past matters is that Staff, P&Z and Council accept a petitioner's bald assertion that s/he or it cannot make a reasonable profit unless they get what they are requesting. Therefore, this mandatory factor is rendered utterly meaningless. **It should either be deleted or enforced with substance.**

   An illustration is when a developer seeks to add a fourth floor of high-end rental units to a proposed new building where this would require a variance or other change to the zoning. To justify this, he claims he cannot make a reasonable profit – maybe cannot even afford do the project in the first place (!) – without the requested variance, etc. to add the extra floor. Per 6-3-7, the petitioner is required to offer a showing of his projected profits with or without the extra floor; otherwise Staff, PC and Council have only the petitioner's assurance this is true. That is hardly evidence. However, in practice, this requirement has been essentially ignored (with possible exceptions when TIF's or tax rebates have been requested).

   Admittedly there could be many opinions as to what a "reasonable" profit would be in the illustration above, or any real-life situation. But weighing factors like that is exactly what the Council is elected to do. If the finances or a given petitioner are "sensitive" where public knowledge of them would cause a genuine hardship to the petitioner, upon some proof of that sensitivity the financial information could be submitted (and handled) confidentially, perhaps to Council only, and then handled as the City and Council handles matters affecting litigation, personnel decisions, etc. This of course must be weighed against the requirements of the Illinois Open Meetings Act.

6. Right of Cross Examination in Public Hearings: The amendments remove the old versions' invocation of the Illinois Municipal Code as one of its foundational authorities. However, the appellate courts in Illinois have relied on that Code (among other bases) to hold in favor of a limited right of cross-examination in land use public hearings. While certainly it can be argued that this right also derives from the concepts of Constitutional due process, there should be no ambiguity on this critical and fundamental right – a right that can effectively be used by either side in a land use dispute. Allison stated that provisions for cross examination are set forth in rules outside of the Code, and as to the details of application, this is completely appropriate. **However, because of the**

importance of this right, the Code, itself, should expressly refer to it in some brief fashion, such as adding to an appropriate section: "A public hearing shall offer participants having an interest in the Petition or other matter to be decided a right to cross exam witnesses in accordance with rules the Council shall establish. The phrase "having an interest in the matter" shall mean the Petitioner(s) and the owners of property within the area encompassed by the requirements for notice of hearing as provided in this Code."

7. Notice for "Minor" Changes to Variances, PUD's and Especially Conditional Uses: This is a question of notice. "Minor" changes to a conditional use do not require publication or a sign - only a written notice (which could be hand delivered) only to property owners within 300 feet inclusive of right of way. Eventually these will show up on a P&Z or City Council Agenda - but this may only be within the agenda deadlines imposed nby the Illinois Open Meetings Act, and thus not provide a great deal of time for nearby residents or other stakeholders to evaluate the issue and formulate a principled and organized response.

   By revising "minor change" from 5% to less than 20%, an extra story can conceivably be added to a proposed building and passed upon by P&Z after a hearing where no one appears to oppose the proposal. This almost seems like a "stealth" tactic for a developer or other petitioner to gain approval for extra height, FAR, or diminished set- backs, and then say to Council: "No one complained about this during the public hearing at Planning & Zoning Commission." Similarly any changes made in this manner have the potential to become a precedent for subsequent change.

   Therefore, **the usual signage should be required even for "minor changes," or the definition of "minor changes" should be reduced in dimension** (or expressly exclude proposed types of changes such as those mentioned above), the latter being preferred. While perhaps less than 10% could qualify as minor, 20% leaves significant leeway.

Thank you for the opportunity to provide this input into the process. The Confederation values our relationship with City Staff and we hope to continue working together for the common good of those calling Naperville their home.

Sincerely,

Robert A. Fischer
President – Naperville Area Homeowners Confederation