# Request for City Council Committee Action from the Department of Community Planning and Economic Development – Planning Division

Date: October 14, 2010
To: Council Member Gary Schiff, Chair, Zoning & Planning Committee and Members of the Committee
Referral to: Zoning and Planning Committee

**Subject:** Appeal of the decision of the City Planning Commission associated with the approval of the amendment of the conditional use permit to allow a 360 square foot addition to the existing Merwin Liquors located at 700 West Broadway.

**Recommendation:** The following actions were taken by the Planning Commission on September 20, 2010 (BZZ-4924):

**Conditional Use Permit:** Application by U.B. Properties, LLC, on behalf of Merwin Liquors, to amend their conditional use permit for a liquor store in order to construct a 360 square foot addition to the existing building in the C3S (Community Shopping Center) district on the property located at 700 West Broadway.

**Action:** The City Planning Commission adopted the findings and **approved** the application to amend an existing conditional use permit for a liquor store in order to allow a 360 square foot addition to the building on the property located at 700 West Broadway subject to the following condition:

1. The conditional use permit shall be recorded with Hennepin County as required by Minn. Stat. 462.3595, subd. 4 before building permits may be issued or before the use or activity requiring a conditional use permit may commence. Unless extended by the zoning administrator, the conditional use permit shall expire if it is not recorded within one year of approval.

**Ward:** 3 & 5

Prepared by: Becca Farrar, Senior Planner, 612-673-3594
Approved by: Jason Wittenberg, Planning Manager
Presenters in Committee: Becca Farrar, Senior Planner

**Community Impact**

Neighborhood Notification: Notice of the Planning Commission hearing was mailed on August 27, 2010, and notice of the appeal was mailed on October 4, 2010.

- City Goals: See staff report
- Comprehensive Plan: See staff report
- Zoning Code: See staff report
- End of 120-day decision period: December 9, 2010
- Other: Not applicable

**Background/Supporting Information:** Land Ho, LLC, has filed an appeal of the decision of the City Planning Commission. The appeal is regarding the decision of the City Planning Commission on September 20, 2010, to approve an amendment to the Conditional Use Permit for a liquor store in order to construct a 360 square foot addition to the existing building. The minutes from the September 20, 2010, City Planning Commission meeting are attached. The Planning Commission voted 4-3 to approve the conditional use permit request.

The appellant's statement outlines various reasons why the appeal should be granted and the conditional use permit denied. The appellant's complete statement of the action being appealed and reasons for the appeal are attached.

**Department of Community Planning and Economic Development – Planning Division**

Conditional Use Permit

BZZ-4924

**Date:** September 20, 2010

**Applicant:** U. B. Properties, 727 Hennepin Avenue, Minneapolis, MN 55403, (612) 238-3970

**Addresses of Property:** 700 West Broadway

**Project Name:** Merwin's Addition

**Contact Person and Phone:** U. B. Properties, LLC, Attn: Louis Dachis, 700 West Broadway, Minneapolis, MN 55411, (612) 387-7875

**Planning Staff and Phone:** Becca Farrar, (612)673-3594

**Date Application Deemed Complete:** August 12, 2010

**End of 60-Day Decision Period:** October 10, 2010

**End of 120-Day Decision Period:** Not applicable for this application

**Ward:** 3 **Neighborhood Organization:** Hawthorne Area Community Council & Northside Residents Redevelopment Council (NRRC)

**Existing Zoning:** C3S (Community Shopping Center) District, WB (West Broadway Overlay District)

**Proposed Zoning:** Not applicable for this application

**Zoning Plate Number**: 8

**Lot area:** 37,400 square feet or approximately .85 acres

**Legal Description:** Not applicable for this application

**Proposed Use:** Expand the existing liquor store on the premises.

**Concurrent Review:**

- U.B. Properties, LLC, on behalf of Merwin Liquors, has submitted an application to amend their conditional use permit for a liquor store in order to construct a 360 square foot addition to the existing building in the C3S (Community Shopping Center) district on the property located at 700 West Broadway.

**Applicable zoning code provisions:** Article VII, Conditional Use Permits.

**Background:** The applicant proposes to construct a 360 square foot single-story addition to Merwins which is approximately 10,766 square feet in size and is located on the property at 700 West Broadway. The property is zoned C3S (Community Shopping Center District) and is located in the WB Overlay District. The WB Overlay District was established to preserve and encourage a high-density, transit-supportive and pedestrian oriented environment in the West Broadway commercial core, to attract destination goods and services, and to promote street life and activity by regulating building orientation and design and accessory parking facilities, and by prohibiting certain high impact and automobile-oriented uses. Merwins is technically defined as a shopping center and includes a liquor store, convenience store/pharmacy and financial services center/currency exchange. The proposal to expand the use requires that the conditional use permit for a liquor store be amended; the other components/uses are permitted in the C3S district although under the umbrella of a shopping center use which is a conditional use. While the determination has been made that the proposed expansion of the existing liquor store use necessitates an amendment to the conditional use permit for the liquor store, Staff has determined that the changes to the overall approved plan are minor in nature and that requiring an amendment to the conditional use permit for a shopping center would be duplicative.

Merwins has operated on the premises since the early 1950s. The property has been owned by U.B. Properties for the past five years. The proposed expansion accompanies a façade redesign which would improve the exterior of the storefront elevation facing West Broadway. The interior of the store has already been remodeled. In addition to the proposed building expansion, the applicant proposes to add a landscape planter, provide lighting upgrades and new bike racks.

The site received approvals in 2005 (BZZ-2296) for an amendment to their conditional use permit for a shopping center. The approval was contingent on the applicant submitted site, landscaping and signage plans to City Staff. The site is in conformance.

Staff has not received any official correspondence from the Hawthorne Area Community Council or the Northside Residents Redevelopment Council (NRRC) prior to the printing of this report. Any correspondence received prior to the Planning Commission meeting will be forwarded on for consideration.

**CONDITIONAL USE PERMIT –**to expand an existing liquor store

**Findings as required by the Minneapolis Zoning Code for a Conditional Use Permit:**

The Minneapolis Department of Community Planning and Development, Planning Division, has analyzed the application and from the findings above concludes that the establishment, maintenance, or operation of the proposed conditional use:

1. **Will not be detrimental to or endanger the public health, safety, comfort or general welfare.**

   The construction of a small single-story addition to the existing structure on the premises would not be expected to have any negative impacts on the area. As previously mentioned, the use has operated on the site since the 1950s and allowing a 360 square foot addition to the front façade of the building would not be expected to have any additional adverse impacts. Staff does not believe that the proposal would prove detrimental to public safety, comfort or general welfare.

**2. Will not be injurious to the use and enjoyment of other property in the vicinity and will not impede the normal or orderly development and improvement of surrounding property for uses permitted in the district.**

The proposal to add an approximately 360 square foot addition to the building as part of a façade redesign would prove compatible with the surrounding uses and should not impede normal and orderly development of the area. The use has occupied the site since the 1950s and allowing a relatively small addition would not be expected to have any additional adverse impacts.

**3. Adequate utilities, access roads, drainage, necessary facilities or other measures, have been or will be provided.**

The site would continue to be accessed in the same manner via two access points; one off of West Broadway and one off of Lyndale Avenue North. A total of 54 surface parking stalls are located on the site which exceeds the minimum parking requirement. The proposed addition would not have any impact on the existing utilities, access roads, drainage or other necessary facilities.

**4. Adequate measures have been or will be provided to minimize traffic congestion in the public streets.**

Typically, Chapter 541 of the zoning code would require 1 space per 500 square feet of gross floor area for a liquor store. Based on the gross floor area of the liquor store which is approximately 8,000 square feet, a total of 16 off-street parking spaces would be necessary for this use. The convenience store/pharmacy totals 1,500 square feet. This use is subject to the general retail sales and services minimum parking requirement which is 1 space per 500 square feet of gross floor area in excess of 4,000 square feet. Due to the fact that the gross floor area is less than 4,000 square feet but greater than 1,000 square feet, a total of 4 spaces would be required for this use. The financial services center/currency exchange also totals approximately 1,500 square feet. This use also has a minimum parking requirement which is 1 space per 500 square feet of gross floor area in excess of 4,000 square feet; a total of 4 spaces would be required for this use. Therefore, when looking at the combined parking requirement, a total of 24 off-street parking spaces would be necessary; a total of 54 currently exist on the premises. Staff believes that adequate measures exist to minimize traffic congestion in the public streets.

**5. Is consistent with the applicable policies of the comprehensive plan.**

According to *The Minneapolis Plan for Sustainable Growth*, the subject parcel is located at the northwest intersection of West Broadway, which is a designated Commercial Corridor in this location, and Lyndale Avenue North, which is a designated Community Corridor in this location. The area is primarily mixed-use and is also a designated Major Retail Center as well. The proposal to expand the existing liquor store on the property is consistent with the relevant provisions of *The Minneapolis Plan for Sustainable Growth*, as follows:

Land Use Policy 1.1 of *The Minneapolis Plan for Sustainable Growth* states, "Establish land use regulations to achieve the highest possible development standards, enhance the

environment, protect public health, support a vital mix of land uses, and promote flexible approaches to carry out the comprehensive plan."

Land Use Policy 1.10 of *The Minneapolis Plan for Sustainable Growth* states, "Support development along Commercial Corridors that enhances the street's character, fosters pedestrian movement, expands the range of goods and services available, and improves the ability to accommodate automobile traffic."

**6. And, does in all other respects conform to the applicable regulations of the district in which it is located upon approval of this conditional use permit, the rezoning request, relevant variances, and site plan review.**

If all land use/zoning applications are approved, including the application to amend the conditional use permit, the proposal would appear to comply with all applicable provisions of the C3S District and WB Overlay District. The proposed elevation of the new addition provides window openings that are the same as those that are being removed. The storefront windows are merely being bumped out. The elevation does not appear to meet the 40% window requirement in the WB Overlay; however, the elevation is not becoming more nonconforming than what currently exists. Additionally, the minimum floor area ratio provision doesn't apply as expansions to existing buildings are not subject to this provision.

Any new signage proposed for the site would require a separate permit from the Zoning Office and would further be required to comply with all applicable standards outlined in Chapter 543 of the Zoning Code. Backlit signs are prohibited. Any/all window signage would need to comply with Section 543.480 of the Zoning Code.

## RECOMMENDATIONS:

**Recommendation of the Department of Community Planning and Economic Development – Planning Division for the conditional use permit:**

The Department of Community Planning and Economic Development – Planning Division recommends that the City Planning Commission adopt the above findings and **approve** the application to amend an existing conditional use permit for a liquor store in order to allow a 360 square foot addition to the building on the property located at 700 West Broadway subject to the following condition:

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Attachments:

1. Statement of use/description/CUP findings
2. Correspondence
3. Zoning map
4. Plans – site/survey/landscape, floor plans, elevations
5. Pictures of the existing conditions

# Excerpt from the
# CITY PLANNING COMMISSION MINUTES
# Minneapolis Community Planning & Economic Development (CPED)
# Planning Division

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## MEMORANDUM

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DATE: September 30, 2010

TO: Steve Poor, Planning Supervisor – Zoning Administrator, Community Planning & Economic Development - Planning Division

FROM: Jason Wittenberg, Supervisor, Community Planning & Economic Development - Planning Division, Development Services

CC: Barbara Sporlein, Director, Community Planning & Economic Development Planning Division

SUBJECT: Planning Commission decisions of September 20, 2010

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The following actions were taken by the Planning Commission on September 20, 2010. As you know, the Planning Commission's decisions on items other than rezonings, text amendments, vacations, 40 Acre studies and comprehensive plan amendments are final subject to a ten calendar day appeal period before permits can be issued.

Commissioners present: President Motzenbecker, Bates, Carter, Cohen, Gorecki, Huynh, Luepke-Pier, Schiff and Tucker – 9

Not present: Bourn

Committee Clerk: Lisa Baldwin (612) 673-3710

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**4. Merwin's Addition (BZZ-4924, Ward: 3 and 5), 700 West Broadway (Becca Farrar).**

**A. Conditional Use Permit:** Application by U.B. Properties, LLC, on behalf of Merwin Liquors, to amend their conditional use permit for a liquor store in order to construct a 360 square foot addition to the existing building in the C3S (Community Shopping Center) district on the property located at 700 West Broadway.

**Action:** The City Planning Commission adopted the findings and **approved** the application to amend an existing conditional use permit for a liquor store in order to allow a 360 square foot addition to the building on the property located at 700 West Broadway subject to the following condition:

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Staff Farrar presented the staff report.

President Motzenbecker opened the public hearing.

**Dennis Johnson:** I'm here representing Land Ho who is a developer of the property you dealt with a couple weeks ago which is the proposed liquor store down on Washington and Broadway. I'm sure you're probably all aware of at least some of the issues going around about this. I want to explain that we're not here because we don't like their expansion or what they're going to do to the front of the building. It's as it directly relates to our application for a liquor license and our development of the property with the distances that are required under the regulatory agencies. The timing of this is such that they've been in existence for about five years. They indicated that they've been there for 50 years at the location and I would like to correct the record. I went and looked at the liquor license applications and Skelly's was located at 324 Broadway since about 1959. Merwin's opened up in 1983 at the current location so they've been there for about 17 years, not 50 years. I only mention that because the staff report mentions it about three times and I don't know if they were relying on that fact because it's been there for so long as to why it wasn't injurious to the public or that it's for the public welfare. In 1983 they were granted the application to move where they are from 324, where Skelly's was, to 700. It was from 1983, which is 27 years, not 17. What we're concerned about in the application is they're going to move the door 12 feet. I'm sure the commission is well aware that it's not appropriate for someone to use zoning to limit competition. We have been approved for our liquor store, we have a CUP which has been registered which indicates that we have complied with the 2000 foot rule. By you allowing them to move their door 12 ½ feet today, that will effectively make our CUP for the liquor store meaningless or have no value. It will stop our development of that project which has had hundreds of thousands of dollars put into it. The letter they submitted doesn't talk about the door but if you look at the plans they are taking the inside door and they're moving it about 12 ½ feet towards Washington and Broadway. We simply feel that this was in response to our approval. They've been there five years and it's kind of coincidental that at a time that we've been approved for the CUP for a liquor license they have now made applications to move their door 12 feet towards the location that we're trying to develop. I know that there's been a lot of talk about the 2000 foot rule and how it is a regulatory issue and not a zoning issue. I will indicate that when we were before you for our CUP we got a memo from Kimberly and she indicated specifically that we needed to address our 2000 foot rule at the Planning Commission.

The findings of the staff for this particular project does not address the 2000 foot rule at all. They do not have it in there under health and welfare and they do not have it in there under the injurious to other people section. We're concerned that that's an issue that was not looked at properly as it relates to where they're going to move their door on this particular CUP. Merwin's, by way of background, is no stranger to the 2000 foot rule. Just by way of background, when Merwin's was in existence back in 1982, in looking at the liquor license file, they approached the city in July of 1982 in order to move their store to the current location. They were told by the city that that would be within 1660 feet of Jug Liquors which is no longer in existence and therefore they couldn't move to that location. As a direct result of that request, I spoke with some liquor license inspectors, including Ken Ziegler, the city modified the ordinance to create an exemption for this move and they added Subsection D to 362.40 which allowed any license in existence who was within the 2000 feet of another store to move anywhere within that 2000 feet so long as it wasn't any closer than they already were. That's how Merwin's got to where they are today to be within 1660 feet of Jug's who has been out of business now for a couple years.

**President Motzenbecker:** Ok, 2000 foot, I think we're getting clear on it. I don't want to go through a whole trial packet for this. If you can bring it back to the findings that we need to meet for this, I don't think we need to harp on 2000. I think we understand your position and we respect that.

**Dennis Johnson:** I've raised it, I understand it, I'll get off of that. My comment is that in regards to the findings, I do think that the granting of the CUP would be injurious to Land Ho who is attempting to develop the property on Washington and Broadway. If you grant this CUP, just by timing alone…because what's happened is you have approved our CUP and our site plan and that has been appealed by Merwin's which has pushed off our ability to get a building permit and get our liquor license, as a result of that, by granting this today if they should get a building permit and get in the ground, they will effectively stop us from getting our liquor license at that location which we have a right to get based upon everything as it exists today and based upon where their door is today. We feel that the staff should go back and look further at the 2000 foot rule and they have to look at it in light of how it will affect Land Ho which would be injured by this project as a result of granting this CUP. We would ask that you do one of three things; either table this matter until such time as we complete our process, that should be completed by October 8th. Once we complete our process, if they want to make their application, that's fine, but we should be allowed to continue with our application in the normal process and go through the appeal period and then address whether or not they should be able to move their door. I would like to point out, in speaking with the liquor license deputy director and looking at the ordinance, I think that it may be clear that the 2000 foot rule does not apply to Merwin's but it will apply to us. It specifically talks about pre-1994 liquor licenses not being subject to that rule. In essence, if you allow us to go through our process and get what we're entitled to as far as the site plan final approval and building permit, Merwin's will not be prejudiced because based upon the age of their license, they can come in and make an application to come in and move their door at that point and I think that that's acceptable under the rules of the ordinance. We ask that you table this matter until such time as our process is complete and I thank you for your time.

**Bruce Rasmussen (2116 2nd Ave S):** I represent Gopher 94, LLC. They're under contract with Land Ho to be the owner of the liquor store under discussion. I don't have much to add, just a couple of points. We share the concern that the movement of the door will deprive my client and Land Ho of the right to develop their property. I wanted to point out that I believe that the granting of the amendment would violate 525.340 in that that section says the conditional use will

not impede the normal and orderly development and improvement of surrounding property for uses permitted in the district. Our use is permitted in the district. Land Ho has been granted a conditional use permit, my client has invested hundreds of thousands of dollars in reliance on that CUP so I believe there is a vested right here. To grant this application would violate the provisions of the CUP ordinance. I would suggest that the Planning Commission intercede in this and perhaps make a suggestion that would solve this dispute. This should be a dispute that is able to be resolved with both parties continuing to have their own liquor store operation. I know there are cases where the Planning Commission has made suggestions, perhaps they'd be willing to use their offices to get the two parties together otherwise I'm afraid we're going to end up with a terrible, confusing situation which will probably end up in the courts and I don't think that's to anybody's advantage. I would say I think there is cause under the ordinance to deny the application. We would be open to continuing it so that the situation can be resolved.

**Commission Cohen:** You read us an ordinance that applied surrounding properties. Tell me why this is a surrounding property.

**Bruce Rasmussen:** It's because of the 2000 foot ordinance. The 2000 foot ordinance must be considered in the application before you because it has the effect of making our application illegal so it is, in that sense…

**Commissioner Cohen:** It applies to surrounding properties.

**Bruce Rasmussen:** I think this qualifies.

**Commissioner Cohen:** Jason, is this a surrounding property?

**Staff Wittenberg:** In my opinion, that's a very expansive view of the question before you in finding number two. I think the intent of the particular finding is really whether the operation of the use will off-site impacts that have a negative effect on area property owners. The gentleman is arguing for a more expansive view of finding number two than we would typically have.

**Louis Dachis [not on sign-in sheet]:** Skelly's was the legal name of the company that we bought five years ago so they simply moved from up the street. I'm not sure what happened in 1982, we weren't involved with it then. As for the 2000 foot issue, the CUP was issued on a premise that the store was 2000 feet from our store, or 2000 feet from any other liquor store. The basis of that CUP is being appealed right now. I don't think anybody would disagree today that the plan that was submitted originally and the CUP was granted on had an entrance that was outside of the 2000 feet. So it was violative when it was issued. They've had three chances to go around and modify their plans, they're still, in our opinion, violative of that ordinance and we are appealing it. I think that's really all I have. The 2000 foot issue is certainly one of the issues, but we are also looking at a major façade improvement at this property. We've done a significant amount of work and invested millions of dollars on our interior. We've dramatically changed the area and we've worked with the neighborhood groups to make that property a much better property. This is bringing the exterior of the store inline with what we've done on the interior to bring a more positive role to that site.

**Don Gerberding [not on sign-in sheet]:** Master owns the property to the east and contiguous to the North Loop Gateway proposed development. We seem to keep sliding back to this 2000 foot issue. The application by Merwin's is a non-hypothetical site plan, it's an addition to an existing

building. The CUP that was granted for the North Loop Gateway development is a hypothetical site plan. Because the City Planning Commission reviewed all this, this non-hypothetical site plan is protected by the CUP for up to one year so that a new site plan that meets all the requirements can be approved. We did that. The site plan was approved and we still have that protection. I just want to make this real brief, I think after all the comments we've heard today that this issue begs two questions, the first of which is, is Merwin's CUP injurious to the rights that Gopher 94 has under their CUP and under the approvals that they've received today? They've been awarded a valid CUP, they've met all the requirements for an approved development by the Planning Commission and we believe that granting the CUP, the amended CUP, that Merwin's is looking for is injurious because Gopher 94 is no longer outside of 2000 feet. Here's the interesting part, the CUP was granted, Merwin's did not appeal it during the ten day appeal period. Only after the NLG project was granted it's CUP outside of the appeal period and they got their site plan approved did Merwin's decide to submit a plan to remodel the front of their building, subsequent to our approvals they came up with a plan. Second question, what are our options today? If Merwin's intent is simply to remodel and improve their building and business, then Merwin's should be permitted to remodel and continue to operate within the 2000 foot radius just as they've been doing since 1982 with two different owners. Here's an interesting question, they want to put an addition on the front of their building with an exit and entrance. Right now, coincidentally, the entrance happens to be at the far extreme east side and they're claiming that that renders the North Loop Gateway by 2.3 feet, not able to do business. Here's a suggestion, flip the doors, put the entrance at one end and the exit at the other and both companies can do business. If Merwin's intent is not simply to remodel, rather if their underlying intent is to render the North Loop Gateway not able to do business, then I think the CUP should not be granted and it should be continued. In conclusion, what are they really trying to do? Are they using the building addition as a ruse or are they deliberately using the 2000 foot radius regulations to attempt to eliminate competition? I think we can both win here. Thank you.

**Mark Dziuk (2209 Lyndale Ave S) [not on sign-in sheet]:** I'm with Land Ho. Before you is a packet of evidence that I think would help support the arguments you've already heard. Merwin's is using city regulations to stop their competition. It's more obvious with the timing of it, it's two weeks on our heels and they appealed ours. In fact, their appeal is located in your packet as exhibit 11, in there it mentions the 2000 foot rule no less than 13 times. That's how significant it is to them that we're not within their 2000 feet, yet they can be within ours because our regulations are coming up today. The hypothetical and non-hypothetical, Don misspoke, he said the non-hypothetical CUP is covered but it's actually the hypothetical CUP that's covered. There was no site plan approved, it was denied because the variances we were asking for and we went back to CPED and CPED approved it on the 7th, it came before you and was approved here and now Merwin's is the only appeal against it and it's got a whole bunch of reasonings, primarily the 2000 foot thing, which they're causing. Their site plan before you moves their door 2.6 feet east. It puts us one foot outside of our property line. What's the intention? Put your door on the other side and find a different solution, but it's obvious. It's detrimental, the project will fold and not go forward if this is approved. Findings, our conditional use permit I put in here as exhibit two, it just shows that it was registered and is a bonafide and firm CUP. Exhibit three is a nice visual graph of where the dotted line lands on our project. It's magnified so you can see the dotted line where the 2000 foot distance is, which we've had three surveyors go out and confirm. There's no question where this 2000 foot thing is. We know that we have 11.7 feet to the east of our building …the 2000 foot line on our property, from Merwin's center of their entrance door, is 11.7 feet…leaves 11.7 feet left to the east of our doors.

**President Motzenbecker:** It's unimportant. I think we get it. We've talked about 2000 feet ad nauseam here. I know it's an issue and we're aware of all the details that cause an issue.

**Mark Dziuk:** In the staff report, it mentions that staff primarily used the 1950 as the reasoning to say it wasn't detrimental or that it wasn't injurious. In our staff report, which is exhibit five, page two, it clearly states that the 2000 foot rule that Kimberly Holien considered is there. It says that that liquor store is no longer operating and therefore the proposed use would concurrently meet the required 2000 foot radius for licensing of off-sale liquor. It says right above that in bold, "findings as required by the Minneapolis Zoning Code." We were subject to this finding and in their staff report, they're not. In addition to that, I have an email from Kimberly Holien dated July 26. We asked if these are the issues we have left to consider before we submit our second round of site plan, for site plan consideration. It says we need to meet the 2000 foot spacing requirement based on the approved licensing department measurement. Kimberly responds, "yes, all of those issues must be addressed." We were subject to the 2000 foot regulation twice and I don't see anywhere where their amendment to the conditional use permit had ever had that consideration. I don't think we can have it both ways. For your review, and what's interesting historically, is exhibit 10. December 22, 1992, the owner of Skelly's and then the proposed owner of Merwin's got together and realized this 2000 foot issue would be there and it's very detailed. I talked personally with Ken Ziegler and looked at these regulations and I can tell you without a doubt that the regulation under 362.40 subsection D was written as follows to cover this change, "a relocation of an existing off-sale liquor establishment currently with 2000 feet of an second existing off-sale location to a new location within the same 2000 foot radius and no closer to that second off-sale location provided that on the date of the application for the new location the applicant is the holder of the off-sale license that the location is to be discontinued at." Our lawyer reviewed that, but was specifically in benefit for them. Merwin's has operated up until Jugs went out of business in 2009 to the benefit of this amendment to the 2000 foot and now they stand here with 13 references to tell us that we're going to push our door out and two weeks after we get our approvals they're going to come up with this new design that's part of a phase 2? I think it's an inappropriate use of the commission and of city regulations to stop development in fair competition. We've spent a lot of time and resources and have been very genuine in our approach, we encourage the competition, we'd like to see them advance their façade, it'd be great for the boulevard and so would our project. Our project is a 6.5 million dollar project and it will be killed if this approved. We ask you deny this or at least send it back for further consideration until the time that our appeal, which is September 30, is heard before you and full council and the mayor has a chance to consider this and either give it their endorsement or not.

President Motzenbecker closed the public hearing.

**President Motzenbecker:** We have a CUP for a liquor store. The understanding that we have right now is this is a mess in a lot of ways. It's a licensing issue that has woven its way into a conditional use permit, it's unfortunate. The city attorney's say that the CUP notwithstanding, the liquor license issues will be handled in a separate forum. Unfortunately, I think there are some people that are saying otherwise. I'm not sure where to go. I think that we have a duty to uphold and steward the code, as fortunate or unfortunate as that may be for either party. I'd like to hear thoughts on this one way or the other.

**Commissioner Cohen:** My understanding is that if we continue this matter, the Merwin's device here to kill the 200 Broadway property will go away, it will not survive a continuance. My

tendency right now is to approve a continuance of some kind so it makes it possible for the project on Washington and Broadway to go forward so I'd like to continue this matter.

**Commissioner Schiff:** I'm going to move staff recommendation (Huynh seconded). I think it is fairly straightforward what's before us which is just a conditional use permit about moving of an entrance. There are complicated what if's attached to this, but that's not before us today. The competitive issues that have been raised in the public hearing are not issues that we can consider when reviewing this conditional use permit. It's an interesting argument that the first group that came through thinks that they have durable permits from the previously approved conditional use permit, that's an interesting argument and that will be settled when the license is actually applied for. We had licensing code read to us during the public hearing and the city attorney's office will consider whether or not those permits were durable and whether or not a license for a new liquor store will be granted at the time the license is actually applied for, that's not what's in front of us today, just a conditional use permit. When considering the factors about whether or not the use will be injurious to others around, again, competitiveness is not a factor that we have ever been told we've been able to use. We've had the competitive argument thrown before us several times in the past, even when a coffee shop opens up across the street from another coffee shop, but again, under the way that the courts have defined the findings of a conditional use permit, whether or not a use is injurious to the use and enjoyment of another property, we cannot consider competitiveness and we cannot consider profitability either. We have to consider a different definition of whether or not the use and enjoyment of a property would impede the normal and orderly development of a surrounding property and I haven't heard any other types of concerns that would rise to that standard in the public hearing so far. I think we should just do our job under this conditional use permit and let the licensing issues play themselves out at a later date.

**Commissioner Cohen:** I'm respectful of the chairman of the Zoning and Planning Committee because I think you do really have a thorough understanding of the legal issues involved here, but I'm not really basing this so much on competitiveness as I am on the archaic nature of this 2000 foot requirement which is in effect a barrier to the creation of what I think will be a very useful, helpful, expansive, attractive development at Broadway and Washington and I think it's too narrow a view to take of it to let this thing go through and as a result if you take a larger view we will see these parties engaged in endless litigation of one kind or another to the detriment to all of us. I think it would be helpful and useful and a minimal expectation if all we did was simply continue this matter for a brief period of time until the rights of the development at Broadway and Washington are more secured.

**President Motzenbecker:** The motion on the floor is to approve the CUP for the liquor store. All those in favor? Opposed?

The motion carried 4-3