

 <p style="text-align: center;">Council Communication Office of the City Manager</p>	Date: February 28, 2011
	Agenda Item No. 57 Roll Call No. <u>11-0363</u> Communication No. <u>11-140</u> Submitted by: Phil Delafield, Community Development Director

AGENDA HEADING:

Public hearing regarding request from Heather Carpenter-Hutchcroft, et al, (owners) for an amendment to the Carman Estates PUD Conceptual Plan on property located at 2421 through 2458 East Porter Avenue, to allow removal of a 30-foot wide conservation easement allowing structures and fences to be located within portions of the rear yard area currently restricted by the easement.

SYNOPSIS:

The subject conservation easement was approved by the City Council as part of the Carman Estates PUD Conceptual Plan on June 18, 2001 and the Carman Estates Plat 4 on January 23, 2006. Aerial photography clearly indicates that some tree canopy that previously existed within the conservation easements has been removed. In addition, structures have been constructed within the easements without prior written consent of the Community Development Director in violation of the recorded conservation easement (i.e. numerous fences, a swimming pool, shed, etc.). Staff recommends that the conservation easements be retained; that a total of 25 trees be planted within the easements on various lots as mitigation for prior tree removal; that all existing encroachments be allowed to remain (subject to any specified mitigation plantings); and that a notice be mailed to all current property owners within the Planned Unit Development who are subject to the conservation easements with a copy of the recorded easement and a reminder that no structures are permitted within the conservation easement without prior written consent of the Community Development Director. Any future encroachment will be reviewed on a case by case basis pursuant to the terms of the conservation easement.

FISCAL IMPACT: NONE

Amount: N/A

Funding Source: N/A

ADDITIONAL INFORMATION:

The subject conservation easement was approved by the City Council as part of the Carman Estates PUD Conceptual Plan on June 18, 2001 and the Carman Estates Plat 4 on January 23, 2006. No survey information of the diameters or species of trees within the easement areas was provided at the time the PUD Conceptual Plan or at the time the subdivision was approved. However, a tree canopy boundary was shown on the PUD Conceptual Plan.

Subparagraph 2 of the conservation easement that was signed by the developer (Jerry's Homes) and

recorded as part of Carman Estates Plat 4 states: “Change of Grade Prohibited. Grantor shall not change the grade, elevation or contour of any part of the Easement area without obtaining prior written consent of the Community Development Director of the City.” No additional information was submitted by the developer for review by the Community Development Director regarding diameter, species or condition of trees within conservation easement areas where grading was proposed or occurred. No prior written consent was issued by the Community Development Director authorizing changes of grade within the easement areas.

Subparagraph 3 of the conservation easement that was signed by the developer (Jerry’s Homes) and recorded as part of Carman Estates Plat 4 clearly states: “No tree within the easement area larger than 4-inches in diameter measured 1.5 feet above the base, and no tree planted in replacement of any such tree, shall be removed or materially pruned without the prior written consent of the City Forester of the City. Upon the removal of any such tree, regardless of cause, Grantor shall cause such tree to be replaced in close proximity within the Easement Area with a tree of an overstory species approved by the City for placement within the public rights-of-way of at least 2.0 inch diameter measured 1.5 feet above the base.” No additional information was submitted by the developer for review by the City Forester regarding diameter, species or condition of trees within conservation easement areas where tree removal has occurred. No prior written consent was issued by the City Forester authorizing tree removal within the easement areas.

Aerial photography from the Polk County Assessors website from 2000 through 2010 clearly indicates that some tree canopy that previously existed within the easements has been removed. The aerial photography also clearly shows that a majority of the tree removal in and/or around the conservation easements occurred prior to construction of residential dwellings on the subject lots. At the Plan and Commission meeting on January 20, 2011 numerous homeowners testified that either no trees existed on their lot when it was purchased or that any removals were conducted by Jerry’s Homes. Representatives of Jerry’s Homes have denied that they removed any trees in violation of the terms of the conservation easement or PUD Concept Plan and subdivision plat. Representatives of Jerry’s Homes have also indicated that they voluntarily planted 2 street trees in the front yard of every lot in the subdivision (exceeding the one tree per lot requirement) and believe that no mitigation should be required. Staff has countered that argument with the terms of Subparagraph 3 of the recorded conservation easement which states that mitigation trees are to be planted in close proximity within the conservation easement.

City staff has inspected each of the conservation easement areas within the Carman Estates Planned Unit Development. The conservation easement area per lot is approximately 2,400 square feet (generally 80 feet wide and 30 feet deep). Staff proposes that a maximum mitigation ratio 1 tree per 2,000 square feet of conservation area, or portion thereof, be required per lot which would result in planting a maximum of 2 mitigation trees per lot within the conservation easement. After taking into consideration any existing (remaining) trees within the easement on each lot, staff recommends that a total of 25 trees be planted as mitigation within the conservation easements as follows:

- 2421 E. Porter Avenue (2 mitigation trees)
- 2455 E. Porter Avenue (2 mitigation trees)
- 2501 E. Porter Avenue (2 mitigation trees)
- 2505 E. Porter Avenue (2 mitigation trees)
- 2509 E. Porter Avenue (2 mitigation trees)
- 2513 E. Porter Avenue (2 mitigation trees)
- 2426 E. Porter Avenue (2 mitigation trees)
- 2430 E. Porter Avenue (2 mitigation trees)

2434 E. Porter Avenue (2 mitigation trees)
2446 E. Porter Avenue (2 mitigation trees)
2450 E. Porter Avenue (1 mitigation tree)
2462 E. Porter Avenue (2 mitigation trees)
2508 E. Porter Avenue (2 mitigation trees)

Subparagraph 5 of the recorded easement states: “This easement shall be deemed to run with the land and shall be binding on Grantor and on Grantor’s successors and assigns.” Therefore, unless there is a voluntary agreement by the developer (Jerry’s Homes) or individual lot owners to plant identified mitigation trees within the easement, the City will be forced to file district court actions against both Jerry’s Homes and the individual homeowners to enforce the easement.

Subparagraph 1 of the recorded conservation easement states: “Grantor shall not excavate within or erect structures or maintain any structure, including but not limited to garages, accessory buildings or fences, on the easement area without obtaining the prior written consent of the Community Development Director of the City.” While wood fences require a fence permit, chain link fences under 4 feet in height do not require a fence permit. However, no fence (wood or chainlink) is allowed in the conservation easement without the prior written consent of the Community Development Director. Structures have been constructed within the conservation easement at the following addresses:

2434 E. Porter Avenue (five-foot chainlink fence and above ground pool installed in violation of permit)
2438 E. Porter Avenue (opaque wood fence installed with permit)
2446 E. Porter Avenue (four-foot chainlink fence installed and shed partially constructed in easement)
2454 E. Porter Avenue (four-foot chainlink fence installed)
2508 E. Porter Avenue (four foot chainlink fence installed)

On January 20, 2011 the Plan and Zoning Commission voted 7-4 to approve a recommendation to City Council that staff review the erection of any structures within the stated conservation easement and that those improvements that were, through no fault of the homeowner, placed properly with permit be allowed to stay. In addition, the Commission recommended that no further encroachment into the conservation easement area be allowed in this development.

Staff recommends that all existing encroachments be allowed to remain (subject to any specified mitigation plantings). To avoid additional issues in the future, staff recommends that a notice be mailed to all current property owners within the Planned Unit Development who are subject to the conservation easements with a copy of the recorded easement and a reminder that no structures are permitted within the conservation easement without prior written consent of the Community Development Director. Any future encroachment will be reviewed on a case by case basis pursuant to the terms of the recorded conservation easement.

PREVIOUS COUNCIL ACTION(S):

Date: February 14, 2011

Roll Call Number: 11-0212

Action: [On](#) request from Heather Carpenter-Hutchcroft, et al for an amendment to the Carman Estates PUD Conceptual Plan on property at 2421–2458 E. Porter Avenue to allow removal of a 30-foot wide

conservation easement allowing structures and fences to be located within portions of the rear yard area currently restricted by the easement, (2-28-11). **Moved by Hensley to adopt. Motion Carried 7-0.**

Date: January 23, 2006

Roll Call Number: 06-148

Action: Approving final plat for Carman Estates Plat 4 located east of SE 24th Street and on either side of E. Porter Avenue. ([Council Communication No. 06-028](#)) **Moved by Brooks to adopt. Motion Carried 7-0.**

Date: June 18, 2001

Roll Call Number: 01-1956

Action: Second consideration of ordinance rezoning 5405 E. Indianola Avenue, from "R1-80" (One Family Residential) and "R1-90" (Large Lot One Family Residential) to "PUD" (Planned Unit Development). Moved by Brooks that this ordinance be considered and given second vote for passage, with amended provisions 1 through 11, and to adopt the portfolios of home plans submitted as the only home style that will be permitted in this development. Motion Carried 6-1. Absent: Flag.

Final consideration of ordinance above. Moved by Brooks that the rule requiring that ordinances must be considered, and voted on for passage at two council meetings prior to the meeting at which it is to be finally passed be suspended, that the ordinance be placed upon its final passage with amended provisions 1 through 11, and that the ordinance do now pass, #13,963. Motion Carried 6-1. Absent: Flag.

BOARD/COMMISSION ACTION(S):

Board: Plan and Zoning Commission

Date: January 20, 2011

Resolution Number: ZON2010-00225

Action: The Commission voted 7-4 to approve a recommendation to City Council that staff review the erection of any facilities, within the stated conservation easement and that those improvements that were, through no fault of the homeowner, placed properly with permit be allowed to stay. That no further encroachment into the conservation easement area be allowed in this development.

ANTICIPATED ACTIONS AND FUTURE COMMITMENTS: NONE

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