

RESOLUTION NO. 1082

A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BROKEN ARROW AUTHORIZING INITIATION OF AN ACTION FOR DECLARATORY JUDGEMENT AGAINST HENRY AND VESTINA HANEWINKEL, BROWN AND PERKINS, LLC, AND ALL OTHER NECESSARY AND APPROPRIATE DEFENDANTS REGARDING WHAT ZONING CLASSIFICATION SHOULD BE APPLIED TO A TRACT OF LAND CONSISTING OF 19.64 ACRES OF LAND LOCATED EAST OF NORTH ELM AVENUE, AND ONE-QUARTER MILE SOUTH OF OMAHA STREET IN BROKEN ARROW, TULSA COUNTY, STATE OF OKLAHOMA, AND POTENTIALLY CHALLENGING THE REQUIREMENTS OF OKLA. STAT. TIT. 11 § 14-102

WHEREAS, on September 15, 2015, the Broken Arrow City Council approved a change the Comprehensive Plan designation on 19.64 acres of undeveloped real property located east of North Elm Avenue, one-quarter mile south of Omaha Street within the City of Broken Arrow, Tulsa County, State of Oklahoma; and

WHEREAS, following approval of the Comprehensive Plan change, Brown and Perkins, LLC, filed an application requesting that the zoning be changed from A-1 (Agricultural) to PUD 266/RM (multi-family residential); and

WHEREAS, in their meeting of October 12, 2017, the Planning Commission recommended approval of PUD-266 and BAZ-1986 (the rezoning application), subject to the property being platted; and

WHEREAS, PUD-266 and BAZ-1986 were initially placed on the November 7, 2017 City Council meeting agenda for consideration, but were continued to the Council meeting of November 21, 2017; and

WHEREAS, on November 21, 2017, at that meeting, two of the five Council Members left the meeting and did not participate in the discussion or the vote; and

WHEREAS, following discussion and consideration of PUD-266 and BAZ-1986, two of the remaining three Council Members voted in favor of the project and one voted against it; and

WHEREAS, following the vote, it was announced that applications had failed due to the lack of a three-fifths favorable vote; and

WHEREAS, following the meeting City Staff evaluated the law and the process involved in this matter, and further, on November, 29, 2017, the Developer requested that the City review the decision; and

WHEREAS, following review, Staff determined that a three-fifths vote was not required for conditional approval of BAZ-1986 and PUD-266, but to maximize transparency and to avoid

the appearance of action outside of the public view, reconsideration was recommended for January 16, 2018, and notice was mailed to all residents within a 300-foot radius; and

WHEREAS, on December 13, 2017, the City Attorney received a letter from Scott Hathaway, an attorney with the firm of Conner & Winters, LLP., representing a number of the residents that are protesting rezoning of this area; and

WHEREAS, Mr. Hathaway took the position that at the November 21st Council Meeting, that the two (2) Council Members who left the meeting before discussion of and vote on the application abstained and therefore the measures should have been denied because the abstentions counted as “no” votes; and

WHEREAS, on January 2, 2018, on behalf of Henry and Vestina Hanewinkel, Mr. Hathaway filed suit against the City of Broken Arrow and the developers Brown and Perkins, L.L.C., service having been accomplished and a Motion to Dismiss filed on behalf of the City on January 28, 2018; and

WHEREAS, in addition to the allegations set forth above, Mr. and Mrs. Hanewinkel took the position that the matter should not have been reconsidered by the Council for a full year according to the Broken Arrow Zoning Code; and

WHEREAS, on January 11, 2018, Concerned Residents of Broken Arrow submitted a “Letter in Protest” of this development which included a cover letter and the signature of 36 individuals and letters to the Planning Commission and a Protest with numerous signatures that were presented in 2015 during the process to change the Comprehensive Plan; and

WHEREAS, at the City Council Meeting on January 16, 2018, Mr. Hathaway and Laurence Pinkerton, attorney for Brown and Perkins, LLC, appeared and set forth their positions regarding consideration of these rezoning matters; and

WHEREAS, Brown and Perkins takes the position that the rezoning and the PUD were approved on November 21, 2017, so there is no need for reconsideration and that denial of the applications would be arbitrary and capricious resulting in district court action if the re-zoning and the PUD are not granted; and

WHEREAS, in the City of Broken Arrow, rezoning applications and requests for PUD’s receive conditional approval by the City Council and once the requirements of re-zoning have been met, formal approval is presented to the Council in ordinance form;

WHEREAS, Brown and Perkins would be required to plat the property before BAZ-1986 and PUD-266 would be finally approved; and

WHEREAS, at the Council Meeting on January 16, 2018, PUD-266 and BAZ-1986 were reconsidered; and

WHEREAS, at the meeting, two of the Council Members once again left the meeting and did not participate in the discussion or the vote; and

WHEREAS, two of the remaining Council Members voted in favor of PUD-266 and BAZ-1986 and one voted against it, resulting in conditional approval of the items; and

WHEREAS, pursuant to Okla. Stat. tit. 11, § 14-102, a majority vote of all the members of the City Council is required to adopt an ordinance; and

WHEREAS, even though PUD-266 and BAZ-1986 were conditionally approved on January 16, 2018, final rezoning would not be approved if fewer than three (3) Council Members voted to adopt the ordinance; and

WHEREAS, further complicating this situation is Section 6.3.D of the Broken Arrow Zoning Code which addresses platting and the subsequent adoption of zoning ordinances and provides in pertinent part:

“(A) All land that has been rezoned shall be platted in accordance with the requirements of the Broken Arrow Subdivision Ordinance in order to provide for the proper arrangement of streets, assure the adequacy of open space for traffic, provide for utilities, and allow access of emergency vehicles. No map amendment for a zoning change, nor the ordinance proclaiming this change, may be approved by the City Council until the property has been platted in accordance with the Subdivision Ordinance. However, the City Council may waive the platting requirement in those instances in which nothing would be accomplished through enforcement of the platting requirement, such as in those instances in which the land is included within the existing plat of record that adequately provides for the necessary public features, or where these public features have been previously provided by other instruments.”; and

WHEREAS, failure to adopt the ordinance at some time in the future could place the City at risk of substantial damages if Brown and Perkins or a subsequent landowner moves forward with engineering, design, platting, and possible site work, in anticipation of an ordinance granting final PUD and re-zoning; and

WHEREAS, Brown and Perkins or a subsequent landowner could claim that the City had deprived them of the use of their property by failing to adopt the ordinance and rezoning the property; and

WHEREAS, due to the potential risk to the City and also due to the pending litigation, the Council finds that it is reasonable and proper and also in the health, safety, and welfare of the citizens of Broken Arrow to approve this resolution and authorize an action for declaratory relief to determine the zoning on this real property; and

WHEREAS, the requirements of Okla. Stat. tit. 11, § 14-102 that “a vote of a majority of all the members of the council or board of trustees shall be required for the final passage of an

ordinance” poses an unreasonable restriction on the Council’s ability to pass ordinances, whether related to zoning and real property matters or other matters necessary to the proper and lawful operation of the City.

NOW, THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BROKEN ARROW, OKLAHOMA, THAT the filing of an action seeking Declaratory Judgment against Henry and Vestina Hanewinkel, Brown and Perkins, L.L.C., and other necessary and appropriate defendants seeking a determination of what zoning classification should be applied to a tract of land consisting of 19.64 acres of land located east of North Elm Avenue, and one-quarter mile south of Omaha Street in Broken Arrow, Tulsa County, State of Oklahoma (the “subject property”) and potentially challenging the requirements of Okla. Stat. tit. 11, § 14-102.

NOW, THEREFORE, BE IT FURTHER RESOLVED, THAT an actual controversy exists between Henry and Vestina Hanewinkel, Brown and Perkins, L.L.C., and the City of Broken Arrow regarding the proper zoning classification of the subject property and the actions taken by the Broken Arrow City Council related thereto..

NOW, THEREFORE, BE IT FURTHER RESOLVED, THAT the City Attorney is authorized to initiate an action for declaratory relief against these parties identified above and further requesting that the Court determine what zoning classification should be applied to the subject property and determine if the provisions of Okla. Stat. tit. 11 § 14-102 are proper as they relate to all business and votes of the Council.

This Resolution is approved in open meeting by the City Council of the City of Broken Arrow on this 20th day of February, 2018

ATTEST:

(seal) CITY CLERK

APPROVED AS TO FORM:

ASSISTANT CITY ATTORNEY