CITY OF ELKO
Planning Department

Website: www.elkocitynv.gov
Email: planning@elkocitynv.gov

1751 College Avenue · Elko, Nevada 89801 · (775) 777-7160 · Fax (775) 777-7219

PUBLIC MEETING NOTICE

The City of Elko Planning Commission will meet in a regular session on Tuesday, January 4, 2022 beginning at 5:30 P.M., P.S.T. in the Council Chambers at Elko City Hall, 1751 College Avenue, Elko, Nevada, and by utilizing **GoToMeeting.com.**

The public can view or participate in the virtual meeting on a computer, laptop, tablet or smart phone at: https://global.gotomeeting.com/join/653767821. You can also dial in using your phone at **+1 (872) 240-3311.** The **Access Code** for this meeting is **653-767-821.** Comments can also be emailed to planning@elkocitynv.gov.

Attached with this notice is the agenda for said meeting of the Commission. In accordance with NRS 241.020, the public notice and agenda were posted on the City of Elko Website at http://www.elkocitynv.gov/, the State of Nevada's Public Notice Website at https://notice.nv.gov, and in the following locations:

ELKO CITY HALL – 1751 College Avenue, Elko, NV 89801
Date/Time Posted: December 28, 2021 2:00 p.m.

Posted by: Shelby Knopp, Administrative Assistant
Name Title Signature

The public may contact Shelby Knopp by phone at (775) 777-7160 or by email at sknopp@elkocitynv.gov to request supporting material for the meeting described herein. The agenda and supporting material is also available at Elko City Hall, 1751 College Avenue, Elko, NV, or on the City website at www.elkocity.com.

Dated this 28th day of December, 2021.

NOTICE TO PERSONS WITH DISABILITIES

Members of the public who are disabled and require special accommodations or assistance at the meeting are requested to notify the City of Elko Planning Department, 1751 College Avenue, Elko, Nevada, 89801 or by calling (775) 777-7160.

Cathy Laughlin, City Planner

CITY OF ELKO
PLANNING COMMISSION
REGULAR MEETING AGENDA
5:30 P.M., P.S.T., TUESDAY, JANUARY 4, 2022
ELKO CITY HALL, COUNCIL CHAMBERS,
1751 COLLEGE AVENUE, ELKO, NEVADA
HTTPS://GLOBAL.GOTOMEETING.COM/JOIN/653767821

CALL TO ORDER

The Agenda for this meeting of the Elko City Planning Commission has been properly posted for this date and time in accordance with NRS requirements.

ROLL CALL

PLEDGE OF ALLEGIANCE

COMMENTS BY THE GENERAL PUBLIC

Pursuant to N.R.S. 241, this time is devoted to comments by the public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item on the agenda until the matter itself has been specifically included on a successive agenda and identified as an item for possible action. **ACTION WILL NOT BE TAKEN**

APPROVAL OF MINUTES

December 7, 2021 – Regular Meeting **FOR POSSIBLE ACTION**

I. NEW BUSINESS

A. MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS

1. Review and consideration of Parcel Map 7-21, filed by Lynn and Penny Forsberg for the proposed division of approximately 0.988 acres of property into 2 lots for residential development within the R (Single-Family and Multiple-Family Residential) Zoning District, and matters related thereto. **FOR POSSIBLE ACTION**

   Subject property is located on the south side of Fairway Drive between Hannah Drive and Keppler Drive. (APN 001-553-009) The Parcel Map includes a Modification of Standards for the width of Parcel 2, requiring Planning Commission and, ultimately, City Council approval.

2. Review, consideration, and possible action to develop the Calendar Year 2022 Planning Commission Annual Work Program, and matters related thereto. **FOR POSSIBLE ACTION**

Each year the Planning Commission reviews the Annual Work Program. The work program gives the Planning Commission direction on various issues to address throughout the year.

3. Election of officers, and matters related thereto. **FOR POSSIBLE ACTION**

   Pursuant to Section 3-4-3 A. of the City Code, the Planning Commission shall elect a Chairperson, Vice-Chairperson and Secretary in January every year.

II. REPORTS

A. Summary of City Council Actions.

B. Summary of Redevelopment Agency Actions.

C. Professional articles, publications, etc.

   1. Zoning Bulletin

D. Miscellaneous Elko County

E. Training

COMMENTS BY THE GENERAL PUBLIC

Pursuant to N.R.S. 241, this time is devoted to comments by the public, if any, and discussion of those comments. No action may be taken upon a matter raised under this item on the agenda until the matter itself has been specifically included on a successive agenda and identified as an item for possible action. **ACTION WILL NOT BE TAKEN**

NOTE: The Chairman or Vice Chairman reserves the right to change the order of the agenda and if the agenda is not completed, to recess the meeting and continue on another specified date and time. Additionally, the Planning Commission reserves the right to combine two or more agenda items, and/or remove an item from the agenda, or delay discussion relating to an item on the agenda at any time.

ADJOURNMENT

Respectfully submitted,

Cathy Laughlin
City Planner

CITY OF ELKO
PLANNING COMMISSION
REGULAR MEETING MINUTES
5:30 P.M., P.S.T., TUESDAY, DECEMBER 7, 2021
ELKO CITY HALL, COUNCIL CHAMBERS,
1751 COLLEGE AVENUE, ELKO, NEVADA
HTTPS://GLOBAL.GOTOMEETING.COM/JOIN/303168685

NOTE: The order of the minutes reflects the order business was conducted.

CALL TO ORDER

Jeff Dalling, Chairman of the City of Elko Planning Commission, called the meeting to order at 5:30 p.m.

ROLL CALL

Present: **Jeff Dalling**
Mercedes Mendive
Tera Hooiman
Stefan Beck
Gratton Miller

Excused: **John Lemich**

Absent: **John Anderson**

City Staff Present: **Scott Wilkinson, Assistant City Manager**
Cathy Laughlin, City Planner
Michele Rambo, Development Manager
Bob Thibault, Civil Engineer
Jamie Winrod, Fire Marshal
Shelby Knopp, Administrative Assistant

PLEDGE OF ALLEGIANCE

COMMENTS BY THE GENERAL PUBLIC

There were no public comments made at this time.

APPROVAL OF MINUTES

November 2, 2021 – Regular Meeting **FOR POSSIBLE ACTION**

*****Motion: Approve the November 2, 2021 Minutes as presented.**

Moved by Commissioner Tera Hooiman, seconded by Commissioner Gratton Miller.

Motion passed unanimously. (5-0)

II. NEW BUSINESS

A. PUBLIC HEARING

1. Review, consideration and possible recommendation to City Council for Rezone No. 1-21, filed by Dominion Engineering on behalf of McDonald's USA, Inc., for a change in zoning from R (Single Family and Multiple Family Residential) to C (General Commercial) Zoning District, approximately 8,812 square feet of property, to allow for a proposed redevelopment of the property, and matters related thereto. **FOR POSSIBLE ACTION**

   The existing parcel is currently two different zoning districts. This application is requesting to create one zoning district on the parcel consistent with the proposed redevelopment of the parcel.

Cathy Laughlin, City Planner, went over the City of Elko Staff Report dated November 18, 2021. Staff recommended approval with the findings listed in the Staff Report.

Michele Rambo, Development Manager, had no additional comments or concerns.

Bob Thibault, Civil Engineer, recommended approval with no additional comments.

Jamie Winrod, Fire Marshal, had no comments or concerns.

Scott Wilkinson, Assistant City Manager, had no comments or concerns.

*****Motion: Forward a recommendation to the City Council to adopt an Ordinance, which approves Rezone No. 1-21.**

Commissioner Gratton Miller's findings to support the motion were the proposed rezone is in conformance with the Master Plan Land Use Component. The proposed rezone is compatible with the Master Plan Transportation Component and is consistent with the existing transportation infrastructure. The proposed rezone is consistent with City of Elko Wellhead Protection Plan. The proposed rezone is consistent with Elko City Code 3-2-4(B) & (C). The proposed rezone is in conformance with Section 3-2-10(B) C- General Commercial Zoning District. The proposed rezone is consistent with Elko City Code 3-2-17. Development under the proposed rezone will not adversely impact natural systems, or public/federal lands such as waterways, wetlands, drainages, floodplains etc. or pose a danger to human health and safety.

Moved by Commissioner Gratton Miller, seconded by Commissioner Tera Hooiman.

Motion passed unanimously. (5-0)

I. PRESENTATIONS

A. Presentation of a Plaque of Appreciation to Tera Hooiman for her service on the Elko City Planning Commission. **INFORMATION ONLY – NON ACTION ITEM**

Mayor Reece Keener presented Commissioner Tera Hooiman with a Plaque of Appreciation for her service on the Elko City Planning Commission.

II. NEW BUSINESS

A. PUBLIC HEARING

2. Review, consideration and possible recommendation to City Council for Rezone No. 2-21, filed by Walsh Properties LLC., for a change in zoning from GI (General Industrial) to C (General Commercial) Zoning District, approximately 18,015 square feet, to allow for a proposed commercial retail land use of the property, and matters related thereto. **FOR POSSIBLE ACTION**

   The property has recently changed ownership and the new owner is proposing a commercial land use.

Lana Carter, Carter Engineering, explained that the property is currently zoned General Industrial, like much of the properties in the area. The new owners would like to utilize the property for a retail use, so the new use would fit much better in the Commercial Zone.

Ms. Laughlin went over the City of Elko Staff Report dated November 19, 2021. Staff recommended approval with the findings listed in the Staff Report.

Ms. Rambo had no additional comments or concerns.

Mr. Thibault had no additional comments or concerns.

Ms. Winrod had no comments or concerns.

Mr. Wilkinson had no concerns.

*****Motion: Forward a recommendation to City Council to adopt an ordinance, which approves Rezone No. 2-21.**

Commissioner Gratton Miller's findings the support the motion were the proposed rezone is in conformance with the Master Plan Land Use Component. The proposed rezone is compatible with the Master Plan Transportation Component and is consistent with the existing transportation infrastructure. The proposed rezone is consistent with City of Elko Wellhead Protection Plan. The proposed rezone is consistent with Elko City Code 3-2-4(B) & (C). The proposed rezone is in conformance with Section 3-2-10(B) C- General Commercial Zoning District. The proposed rezone is consistent with Elko City Code 3-2-17. The property is located in a Floodzone and therefore compliance with Section 3-8 Floodplain Management is required for any new construction or substantial improvements.

Moved by Commissioner Gratton Miller, Seconded by Commissioner Mercedes Mendive.

Motion passed unanimously. (5-0)

B. MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS

2. Review, consideration and possible recommendation to City Council for Revocable Permit No. 5-21, filed by Walsh Properties LLC, to occupy a portion of Silver Street right-of-way to accommodate existing off-street parking, landscaping and sign, located generally south of the intersection of Silver Street and 2nd Street, and matters related thereto. **FOR POSSIBLE ACTION**

   The applicant is requesting a change of use for the parcel which will require the property be brought from legal non-conforming to conforming. A revocable license agreement to occupy the right-of-way for the existing parking and sign is required.

Ms. Carter explained that they inherited, with the property, some parking and a sign that are all located in the right-of-way. As the agenda item said, to bring this into a conforming use they are asking for a Revocable Permit for the existing improvements.

Ms. Laughlin went over the City of Elko Staff Report dated November 19, 2021. Staff recommended approval with the findings listed in the Staff Report.

Ms. Rambo had no additional comments or concerns.

Mr. Thibault had no additional comments or concerns.

Ms. Winrod had no comments or concerns.

Mr. Wilkinson had no concerns.

*****Motion: Forward a recommendation to City Council to approve Revocable Permit No. 5-21.**

Commissioner Mercedes Mendive's findings to support the motion were the proposed revocable permit is in conformance with the Master Plan Land Use Component. The proposed revocable permit is compatible with the Master Plan Transportation Component and is consistent with the existing transportation infrastructure. The property is not located in the Redevelopment Area. The proposed revocable permit brings the property into conformance with Section 3-2-17 for off street parking requirement. The property is located in a Floodzone and therefore compliance with Section 3-8 Floodplain Management is required for any new construction of substantial improvements. The proposed revocable permit brings the property into conformance with Section 3-9 for the existing sign.

Moved by Commissioner Mercedes Mendive, Seconded by Commissioner Tera Hooiman.

Motion passed unanimously. (5-0)

1. Review, consideration and possible approval of Final Map No. 5-21, filed by Bailey and Associates, LLC for the development of a subdivision entitled Cedar Estates Phase 3 involving the proposed division of approximately 7.31 acres of property into 34 lots for residential development within the RMH (Residential Mobile Home) Zoning District, and matters related thereto. **FOR POSSIBLE ACTION**

   Subject property is located at the northern terminus of both Primrose Lane and Daisy Drive. (APN 001-926-111)

Sheldon Hetzel, Bailey & Associates, 780 W. Silver Street, Suite 104, thanked staff for all their hard work.

Ms. Rambo went through the City of Elko Staff Report dated November 10, 2021. Staff recommended conditional approval with the findings and conditions listed in the Staff Report.

Ms. Laughlin had no further comments or concerns.

Mr. Thibault had no additional comments or concerns.

Ms. Winrod had no comments or concerns.

Mr. Wilkinson had no comments or concerns.

*****Motion: Forward a recommendation that the City Council accept, on behalf of the public, the parcels of land offered for dedication for public use in conformity with the terms of the offer of dedication; that the final map substantially complies with the tentative map; that the City Council approve the agreement to install improvements in accordance with the approved construction plans that satisfies the requirements of Title 2, Chapter 3, and conditionally approve Final Map 5-21 with conditions listed in the Staff Report dated November 10, 2021, listed as follows:**

Development Department:

1. **The Developer shall execute a Performance and Maintenance Agreement in accordance with Section 3-3-21 of City code. The Performance Agreement shall be secured in accordance with Section 3-3-22 of City code. In conformance with Section 3-3-21 of City code, the public improvements shall be completed within a time of no later than two (2) years of the date of Final Map approval by the City Council unless extended as stipulated in City code.**
2. **The Performance and Maintenance Agreement shall be approved by the City Council.**
3. **The Developer shall enter into the Performance and Maintenance Agreement within 30 days of approval of the Final Map by the City Council.**
4. **The Final Map for Cedar Estates Phase 3 is approved for 34 residential lots.**
5. **The Utility Department will issue a Will Serve Letter for the subdivision upon approval of the Final Map by the City Council.**
6. **Site disturbance shall not commence prior to approval of the project's construction plans by the Nevada Department of Environmental Protection.**
7. **Site disturbance, including clearing and grubbing, shall not commence prior to the issuance of a grading permit by the City of Elko.**
8. **Construction shall not commence prior to Final Map approval by the City Council**

and issuance of a will-serve letter by the City of Elko.

9. **Conformance with the conditions of approval of the Tentative Map is required.**
10. **The Owner/Developer is to provide the appropriate contact information for the qualified engineer and engineering firm contracted to oversee the project along with the required inspection and testing necessary to produce an As-Built for submittal to the City of Elko. The Engineer of Record is to ensure all materials meet the latest edition of the Standard Specifications for Public Works. The Engineer of Record is to certify that the project was completed in conformance with the approved plans and specifications.**
11. **Any/All slopes greater than 3:1 shall be permanently stabilized prior to acceptance of any public improvements by the City Council.**

Public Works Department:

12. **All public improvements to be constructed per City of Elko code at time of development.**

Commissioner Gratton Miller's findings to support the recommendation were the Final Map for Cedar Estates Phase 3 has been presented before expiration of the subdivision proceedings in accordance with NRS 278.360(1)(a)(2) and City Code. The Final Map is in conformance with the Tentative Map. The proposed subdivision is in conformance with the Land Use and Transportation Components of the Master Plan. The proposed development conforms with Sections 3-3-9 through 3-3-16 (inclusive). The Subdivider shall be responsible for all required improvements in conformance with Section 3-3-17 of City Code. The Subdivider has submitted construction plans in conformance with Section 3-3-18 of City Code. The Subdivider has submitted plans to the city and state agencies for review to receive all required permits in accordance with the requirements of Section 3-3-19 of City Code. The Subdivider has submitted construction plans which, having been found to be in conformance with Section 3-3-21 of City Code, have been approved by City Staff. The Subdivider will be required to enter into a Performance Agreement to conform to Section 3-3-21 of City Code. The Subdivider will be required to provide a Performance and Maintenance Guarantee as stipulated in the Performance Agreement in conformance with Section 3-3-22 of City Code. The proposed development conforms to Sections 3-2-3, 3-2-4, 3-5-4, 3-2-17 and 3-8 of City Code.

Moved by Commissioner Gratton Miller, Seconded by Commissioner Mercedes Mendive.

Motion passed unanimously. (5-0)

2. Special election of Vice Chairperson for the remainder of 2021, and matters related thereto. **FOR POSSIBLE ACTION**

   Pursuant to Section 3-4-1 (E) of the City Code, vacancies occurring otherwise than through the expiration of term shall be filled for the unexpired term. The planning commission appointed Ms. Tera Hooiman Vice Chairman of the Planning Commission at their special election October 5, 2021 and received her letter of resignation on November 17, 2021.

***Chairman Jeff Dalling nominated Commissioner Stefan Beck for Vice-Chairman, a vote was taken and passed.**

3. REPORTS

A. Summary of City Council Actions.

Ms. Laughlin, reported that there hadn't been too many items on the City Council agendas. On November 9th the City Council approved an amendment to a Revocable Permit for Mr. Ygoa at the Star Hotel. They also approved a revocable permit for Dale Johnson to occupy a portion Jennings Way with some landscaping and an existing fence. On November 23rd the City Council accepted the resignation of Tera Hooiman from the Planning Commission and we are currently advertising for that open position. It will be open until December 17th.

B. Summary of Redevelopment Agency Actions.

C. Professional articles, publications, etc.

1. Zoning Bulletin

D. Miscellaneous Elko County

E. Training

COMMENTS BY THE GENERAL PUBLIC

There were no public comments made at this time.

NOTE: The Chairman or Vice Chairman reserves the right to change the order of the agenda and if the agenda is not completed, to recess the meeting and continue on another specified date and time. Additionally, the Planning Commission reserves the right to combine two or more agenda items, and/or remove an item from the agenda, or delay discussion relating to an item on the agenda at any time.

ADJOURNMENT

There being no further business, the meeting was adjourned.

Jeff Dalling, Chairman

Gratton Miller, Secretary

Agenda Item # I.A.1.

Elko City Planning Commission
Agenda Action Sheet

1. Title: **Review and consideration of Parcel Map 7-21, filed by Lynn and Penny Forsberg for the proposed division of approximately 0.988 acres of property into 2 lots for residential development within the R (Single-Family and Multiple-Family Residential) Zoning District, and matters related thereto. FOR POSSIBLE ACTION**

2. Meeting Date: **January 4, 2022**

3. Agenda Category: ***MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS***

4. Time Required: **15 Minutes**

5. Background Information: **Subject property is located on the south side of Fairway Drive between Hannah Drive and Keppler Drive. (APN 001-553-009) The Parcel Map includes a Modification of Standards for the width of Parcel 2, requiring Planning Commission and, ultimately, City Council approval.**

6. Business Impact Statement: **Not Required**

7. Supplemental Agenda Information: **Application and Staff Report**

8. Recommended Motion: **Recommend that the City Council conditionally approve Parcel Map 7-21 and associated Modification of Standards based on facts, findings, and conditions as presented in the Staff Report dated December 9, 2021.**

9. Findings: **See Staff Report dated December 9, 2021**

10. Prepared By: **Michele Rambo, AICP, Development Manager**

11. Agenda Distribution: **Lynn and Penny Forsberg**
461 North Canyon Road #10
Spring Creek, NV 89815

High Desert Engineering, LLC
Attn: Tom Ballew
640 Idaho Street
Elko, NV 89801

STAFF COMMENT FLOW SHEET
PLANNING COMMISSION AGENDA DATE: 1/4
Do not use pencil or red pen, they do not reproduce

Title: Parcel Map No. 7-21

Applicant(s): Lynn + Penny Forsberg

Site Location: 1300 Fairway Dr. - APN 001-553-009

Current Zoning: R Date Received: 11/10/21 Date Public Notice: N/A

COMMENT: This is for the proposed division of ≈ 0.988 ac into 2 lots for Residential Development

If additional space is needed please provide a separate memorandum

Assistant City Manager: Date: 12/27/21

Recommend approval as presented by staff and approval of a modification of standards for the lot width of Parcel 2 of 30 feet vs. the required 60 feet on the street front

SAW

Initial

City Manager: Date: 12/22/2021

Concur w/Staff's recommendation For conditional approval.

Initial

CITY OF ELKO
DEVELOPMENT DEPARTMENT
1755 COLLEGE AVENUE
ELKO, NEVADA 89801
(775)777-7210
(775)777-7219 FAX

CITY OF ELKO STAFF REPORT

REPORT DATE:	**December 9, 2021**
PLANNING COMMISSION DATE:	**January 4, 2022**
AGENDA ITEM NUMBER:	
APPLICATION NUMBER:	**Parcel Map 7-21**
APPLICANT:	**Lynn & Penny Forsberg**
PROJECT DESCRIPTION:	**1300 Fairway Drive**

A Parcel Map for the division of approximately 0.988 acres into 2 lots for residential development within an R (Single-Family and Multiple-Family Residential) zoning district. A Modification of Standards is required for a substandard lot width on proposed Parcel 2.

The City of Elko Development Department finds the parcel map is in general compliance with the above referenced Master Plan Components and Sections of City Code. The parcel map was evaluated based on the existing conditions and current development of the property.

The City of Elko, Development Department has reviewed the proposed parcel map under existing conditions. Applicable Master Plan Sections, Coordinating Plans, and City Code Sections are:

- City of Elko Master Plan – Land Use Component
- City of Elko Master Plan – Transportation Component
- City of Elko Redevelopment Plan
- City of Elko Wellhead Protection Plan
- City of Elko Code – Section 2-13-3 Sidewalk, Curb and Gutter Construction
- City of Elko Code – Section 3-2-4 Establishment of Zoning Districts
- City of Elko Code – Section 3-2-5 (E) Single-Family and Multiple-Family Residential District
- City of Elko Code – Section 3-8 Flood Plain Management
- City of Elko Code – Section 3-3-25 Modification of Standards
- City of Elko Code – Section 3-3-24 Parcel Maps
- City of Elko Code – Section 3-3-28 Mergers and Resubdivision of Land

BACKGROUND INFORMATION

1. The proposed map is the division of one parcel (APN 001-553-009) into two new parcels.
2. The proposed parcels consist of:
    a. Parcel 1: 0.493 acres
    b. Parcel 2: 0.496 acres
3. The area is zoned (R) Single-Family and Multiple-Family Residential
4. The property is currently vacant. The property owner is applying for this Parcel Map with the intention of building a single-family dwelling on Parcel 1.
5. The parcel lies on the south side of Fairway Drive between Hannah Drive and Keppler Drive.
6. Public improvements are not in place along the street frontage of the property. Curb and gutter will need to be installed along the frontage of both parcels. A sidewalk waiver was approved by the City Council at the time the subdivision was annexed into the City of Elko.

MASTER PLAN:

Land Use:

- The land use is currently identified as Public. Single-Family and Multiple-Family Residential is not a corresponding zoning to this land use designation. This parcel was originally dedicated as a park back when the subdivision was created. However, at some point the property was sold into private hands, but still maintains the park land use designation. Therefore, a Master Plan Amendment will be required to bring this parcel into conformance with the Master Plan. Staff will be bringing a Master Plan Amendment forward in the next few months and plans to include this needed change.
- Objective 1: Promote a diverse mix of housing options to meet the needs of a variety of lifestyles, incomes, and age groups. The project complies with this objective of the Master Plan.

Transportation:

- The proposed parcels have direct access to Fairway Drive.
- This portion of Fairway Drive is categorized as a residential local road.

ELKO REDEVELOPMENT PLAN:

- The property is not located within the Redevelopment Area.

ELKO WELLHEAD PROTECTION PLAN:

- The property is located within the 30-year capture zone of many different City of Elko wells. Future development of the parcels will require connection to the City of Elko wastewater infrastructure.

SECTION 8-21-3 SIDEWALK, CURB AND GUTTER CONSTRUCTION

- This section of code states sidewalks, curbs and gutters shall be required on all vacant lots or parcels of land which are hereafter … merged or divided.
- Sidewalks were waived by the City Council when the subdivision was annexed into the City of Elko.
- Curb and gutter improvements are required. A condition of approval has been added requiring that curb and gutter to be installed with future development of the parcels.

SECTION 3-2-4 ESTABLISHMENT OF ZONING DISTRICTS

- Section 3-2-4 ESTABLISHMENT OF ZONING DISTRICTS states that no yard or lot area can be reduced below the minimum requirements set forth in Title 3 (zoning).
- In addition to requirements found in Section 3-2-4, the subdivision CC&Rs require a minimum lot size of 10,000 square feet.
- Both new parcels are larger than the minimum required in both Section 3-2-4 of the City Code and the subdivision CC&Rs.

Section 3-2-5 (E) SINGLE-FAMILY AND MULTIPLE-FAMILY RESIDENTIAL DISTRICT

- Compliance with this section of code is required.
- Proposed Parcel 2 does not comply with the required lot width of 60 feet. A Modification of Standards is required to be approved by the City Council. (See Modification of Standards section below for more information.)

SECTION 3-8 FLOODPLAIN MANAGEMENT:

- The site is located outside of any flood hazard area.
- This Parcel Map and any future development of the project site will not increase the potential of flooding above what already exists.

SECTION 3-3-25 MODIFICATION OF STANDARDS

- Section 3-3-2 defines lot width as "…the distance between side lot lines measured parallel to the street or to the street chord and measured on the street chord". In other words, lot width is measured at the street.
- Parcel 2 is proposed as a flag lot with a lot width of only 30 feet at the street. As mentioned above, the minimum required lot width for the Single-Family and Multiple-Family residential zoning district is 60 feet.
- Section 3-3-25 allows for modifications of development standards such as lot width through the mapping process. Modifications of standards must ultimately be approved by the City Council.
- Staff feels that the proposed modification is justified because of the topography of the existing lot. The front half of the lot (proposed Parcel 1 is at a significantly higher elevation than the back half of the lot (proposed Parcel 2).
- Dividing the lot down the middle would create some signification grading difficulties, so creating

the proposed flag lot makes the two proposed lots more developable.

SECTION 3-3-24 PARCEL MAPS

Parcel Maps (A) – The proposed Parcel Map has been submitted as required.

Parcel Maps (B) – Public improvements have not been shown on the Parcel Map as required. Sidewalks were waived for the subdivision when it was annexed into the City of Elko. Curb and gutter are required. Any new improvements done at the time of development will be required to comply with current City of Elko standards.

Parcel Maps (C) – The required condition of approval has been added.

Parcel Maps (D) – The map does not include any offers for dedication of Rights of Way.

Parcel Maps (E) – The map complies with all zoning requirements with the exception of lot width for Parcel 2. A Modification of Standards is required to be approved by the City Council.

Parcel Maps (F) – Construction plans have not been submitted and approved for site improvements. Any future site improvements are required to conform with the applicable sections of City Code.

Parcel Maps (G) – This section does not apply because this is not a subsequent Parcel Map.

Parcel Maps (H) – Application has been made through the Planning Department to be processed as required by this section.

Parcel Maps (I) – No exceptions apply to this site. A Parcel Map is required.

Parcel Maps (J) – A survey was done as part of the Parcel Map preparation.

Parcel Maps (K) – The required filing fee was paid to the Planning Department.

Parcel Maps (L) – All required information has been shown on the Parcel Map.

Parcel Maps (M) – The applicant is responsible for recording the Parcel Map within the required timeframe. A condition of approval has been included.

Parcel Maps (N) – None of the listed prohibitions apply to the proposed Parcel Map.

SECTION 3-3-28 MERGERS AND RESUBDIVISIONS OF LAND

Mergers (A) – All lots are owned by the applicant.

Mergers (B) – The map shall be recorded in accordance with NRS 278.320 - .4725

Mergers (C) – A 20-foot utility and drainage easement is shown along the eastern property line of proposed Parcel 2. Additional easements may need to be established as the lots are developed depending on grading and utility needs.

Mergers (D) – No security is being held by the city.

RECOMMENDATION

The City of Elko recommends conditional approval of the parcel map with the following conditions.

Development Department:

1. Any required public improvements installed at the time of development (including any off-site improvements) must be designed and constructed per current City of Elko code requirements in place at that time.

2. The Parcel Map shall be recorded by Elko County within two (2) years of this approval.

3. Curb and gutter to be installed prior to the issuance of a Certificate of Occupancy of any future development. Add a note to the Parcel Map.

4. No dirt may be moved (including import or export) without the approval of a grading plan.

5. Revise the street name in the southeast corner of the map from Fairway Drive to Skyline Drive.

Engineering Department:

6. The bearings along Fairway Drive for the frontage of each parcel differs between what is shown on the map and in the closure calculations. Please correct either the map or the calculations so they agree.

7. Additional water and sewer services to be constructed for the additional parcel prior to recordation of the map.

CITY OF ELKO
Planning Department

Website: www.elkocity.com
Email: planning@elkocitynv.gov

1751 College Avenue • Elko, Nevada 89801 • (775) 777-7160 • Fax (775) 777-7219

December 28, 2021

Lynn and Penny Forsberg
461 North Canyon Road #10
Spring Creek, NV 89815
forsberg.const@gmail.com

Re: Parcel Map No. 7-21

Dear Applicant/Agent:

Enclosed is a copy of the agenda for an upcoming Planning Commission meeting. Highlighted on the agenda is the item or items that you have requested to be acted on at the meeting. Also enclosed is pertinent information pertaining to your request. Please review this information before the meeting.

The Planning Commission requests that you, or a duly appointed representative, be in attendance at this meeting to address the Planning Commission. If you will not be able to attend the meeting but wish to have a representative present, please submit a letter to the Planning Commission authorizing this person to represent you at the meeting.

To participate in the virtual meeting on a computer, laptop, tablet, or smart phone go to: https://global.gotomeeting.com/join/653767821. You can also dial in using your phone at **+1 (872) 240-3311** The **Access Code** for this meeting is **653-767-821.**

If you have any questions regarding this meeting, the information you received, or if you will not be able to attend this meeting, please call me at your earliest convenience at (775) 777-7160.

Sincerely,

Shelby Knopp

Shelby Knopp
Administrative Assistant

Enclosures

CC: High Desert Engineering, Attn: Tom Ballew, 640 Idaho Street, Elko, NV 89801
tcballew@frontiernet.net

CITY OF ELKO PLANNING DEPARTMENT
1751 College Avenue * Elko * Nevada * 89801
(775) 777-7160 * (775) 777-7119 fax

APPLICATION FOR PARCEL MAP APPROVAL

APPLICANT(s): Lynn & Penny Forsberg
MAILING ADDRESS: 1300 Fairway Drive, Elko, NV 89801
PHONE NO (Home) (775) 934-1175 **(Business)**
NAME OF PROPERTY OWNER (If different): same
(Property owner's consent in writing must be provided.)
MAILING ADDRESS: 461 North Canyon Road #10, Spring Creek, NV 89815
LEGAL DESCRIPTION AND LOCATION OF PROPERTY INVOLVED (Attach if necessary):
ASSESSOR'S PARCEL NO.: 001-553-009 **Address** 1300 Fairway Drive
Lot(s), Block(s), &Subdivision Lot 3, Block A, Ruby View Heights Subdivision
Or Parcel(s) & File No. File Number 17686
APPLICANT'S REPRESENTATIVE OR ENGINEER: High Desert Engineering, LLC

FILING REQUIREMENTS:

Complete Application Form: In order to begin processing the application, an application form must be complete and signed. A complete application must include the following:

1. One .pdf of the entire application, and one (1) copy of a 24" x 36" sized parcel map provided by a properly licensed surveyor as well as one (1) set of reproducible plans 8 ½" x 11" in size of the site drawn to scale showing proposed division of property prepared in accordance with Section 3-3-60 of the Elko City Code along with any supporting data to include:
    a. Name, address and telephone number of the person who prepared the parcel map.
    b. Proposed use of each parcel.
    c. A certificate of execution (signature block) for the Elko City Planning Commission or duly authorized representative.
    d. Source of water supply and proposed method of sewage disposal for each parcel.
    e. A copy of all survey computations
    f. A vicinity map.
2. If the property is improved, a plot plan depicting the existing conditions drawn to scale showing proposed property lines, existing buildings, building setbacks, parking and loading areas and any other pertinent information.

Fee: $400.00 + $25.00 per lot for Planning Commission and City Council Review; dedication of street right of way or modification of subdivision ordinance standards or regulations.
$200.00 + $25.00 per lot for administrative review only; no dedications or modifications.
Fees are non-refundable.

Other Information: The applicant is encouraged to submit other information and documentation to support this Parcel Map application.

RECEIVED
NOV 10 2021

1. Identify the existing zoning of the property: R – Single & Multi Family Residence

2. Explain in detail the type and nature of the use proposed on each parcel:

   Each parcel will be used for a single family residence.

3. Explain the source of water supply and proposed method of sewerage disposal for each parcel:

   Water – City of Elko municipal system
   Sewer – City of Elko municipal system

This area intentionally left blank

By My Signature below:

☒ I consent to having the City of Elko Staff enter on my property for the sole purpose of inspection of said property as part of this application process.

☐ I object to having the City of Elko Staff enter onto my property as a part of their review of this application. (Your objection will not affect the recommendation made by the staff or the final determination made by the City Planning Commission or the City Council.)

☒ I acknowledge that submission of this application does not imply approval of this request by the City Planning Department, the City Planning Commission and the City Council, nor does it in and of itself guarantee issuance of any other required permits and/or licenses.

☒ I acknowledge that this application may be tabled until a later meeting if either I or my designated representative or agent is not present at the meeting for which this application is scheduled.

☒ I acknowledge that, if approved, I must provide an AutoCAD file containing the final lot layout on NAD 83 NV East Zone Coordinate System to the City Engineering Department when requesting final map signatures for recording.

☒ I have carefully read and completed all questions contained within this application to the best of my ability.

Applicant / Agent: Lynn & Penny Forsberg
(Please print or type)

Mailing Address: 461 North Canyon Road #10
Street Address or P.O. Box

Spring Creek, NV 89815
City, State, Zip Code

Phone Number: (775) 934-1175

Email address: forsberg.const@gmail.com

SIGNATURE: Penny Forsberg

FOR OFFICE USE ONLY

File No.: 7-21 **Date Filed:** 11/10/21 **Fee Paid:** $250 CK# 3097

Thomas C. Ballew, P.E., P.L.S.
Robert E. Morley, P.L.S.
Duane V. Merrill, P.L.S.

HIGH DESERT ENGINEERING LLC

Consulting Civil Engineering
Land Surveying
Water Rights

November 9, 2021

Cathy Laughlin, City Planner
City of Elko
1751 College Avenue
Elko, NV 89801

Re: Lynn & Penny Forsberg Parcel Map
1300 Fairway Drive

Dear Cathy,

Enclosed please find the following items regarding the above referenced project:

- Application for Parcel Map Approval.
- One (1) 24"x36" copy of the proposed Parcel Map.
- One (1) copy of the Parcel Map lot calculations.
- Check in the amount of $ 250.00 for the Parcel Map review fee.

Pdf copies of the documents listed above have been transmitted to you.

Please feel free to contact me if you have any questions regarding this matter.

Sincerely,
HIGH DESERT Engineering, LLC

Thomas C. Ballew, P.E., P.L.S.

enclosures

cc Lynn & Penny Forsberg (via email)

RECEIVED
NOV 10 2021

*640 Idaho Street * Elko, Nevada, 89801 * (775) 738-4053 * Fax (775) 753-7693*
hdeng@frontiernet.net

LOT CALCULATIONS

FOR

LYNN & PENNY FORSBERG

PARCEL MAP – 1300 FAIRWAY DRIVE
ELKO, NEVADA

PREPARED FOR:

Lynn & Penny Forsberg
461 Norht Canyon Road #10
Spring Creek, Nevada 89815

Contact:
Lynn Forsberg
(775) 934-1175

HIGH DESERT ENGINEERING LLC

PREPARED BY

HIGH DESERT Engineering
640 Idaho Street
Elko, Nevada

November, 2021

Parcel name: PARCEL 1

```
   North: 28477038.068        East : 605160.819
Line  Course: N 67-21-09 E  Length: 145.00
        North: 28477093.902         East : 605294.639
Line  Course: S 22-22-17 E  Length: 140.37
        North: 28476964.096         East : 605348.065
Line  Course: S 67-23-59 W  Length: 160.94
        North: 28476902.247         East : 605199.484
Line  Course: N 15-53-27 W  Length: 141.21
        North: 28477038.061         East : 605160.820

   Perimeter: 587.52   Area: 21,462 S.F. 0.493 ACRES

Mapcheck Closure - (Uses listed courses, radii, and deltas)
Error Closure: 0.007                Course: S 00-34-31 E
  Error North: -0.0070               East : 0.0001
Precision  1: 83,931.43
```

Parcel name: PARCEL 2

```
   North: 28477093.902        East : 605294.639
Line  Course: N 67-37-43 E  Length: 30.00
        North: 28477105.320         East : 605322.381
Line  Course: S 22-22-17 E  Length: 268.67
        North: 28476856.871         East : 605424.639
Line  Course: S 89-12-59 W  Length: 211.43
        North: 28476853.980         East : 605213.229
Line  Course: N 15-53-27 W  Length: 50.19
        North: 28476902.252         East : 605199.487
Line  Course: N 67-23-59 E  Length: 160.94
        North: 28476964.101         East : 605348.068
Line  Course: N 22-22-17 W  Length: 140.37
        North: 28477093.906         East : 605294.642

   Perimeter: 861.61   Area: 21,593 S.F. 0.496 ACRES

Mapcheck Closure - (Uses listed courses, radii, and deltas)
Error Closure: 0.005                Course: N 33-26-41 E
  Error North: 0.0043               East : 0.0028
Precision  1: 172,320.00
```

Parcel name: TOTAL

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   North: 28477038.068        East : 605160.819
Line  Course: N 67-23-59 E  Length: 175.00
        North: 28477105.320         East : 605322.381
Line  Course: S 22-22-17 E  Length: 268.67
        North: 28476856.871         East : 605424.639
Line  Course: S 89-12-59 W  Length: 211.43
        North: 28476853.980         East : 605213.229
Line  Course: N 15-53-27 W  Length: 191.41
        North: 28477038.075         East : 605160.820

   Perimeter: 846.51   Area: 43,044 S.F. 0.988 ACRES

Mapcheck Closure - (Uses listed courses, radii, and deltas)
Error Closure: 0.007                Course: N 02-11-12 E
  Error North: 0.0073                East : 0.0003
Precision  1: 120,930.00
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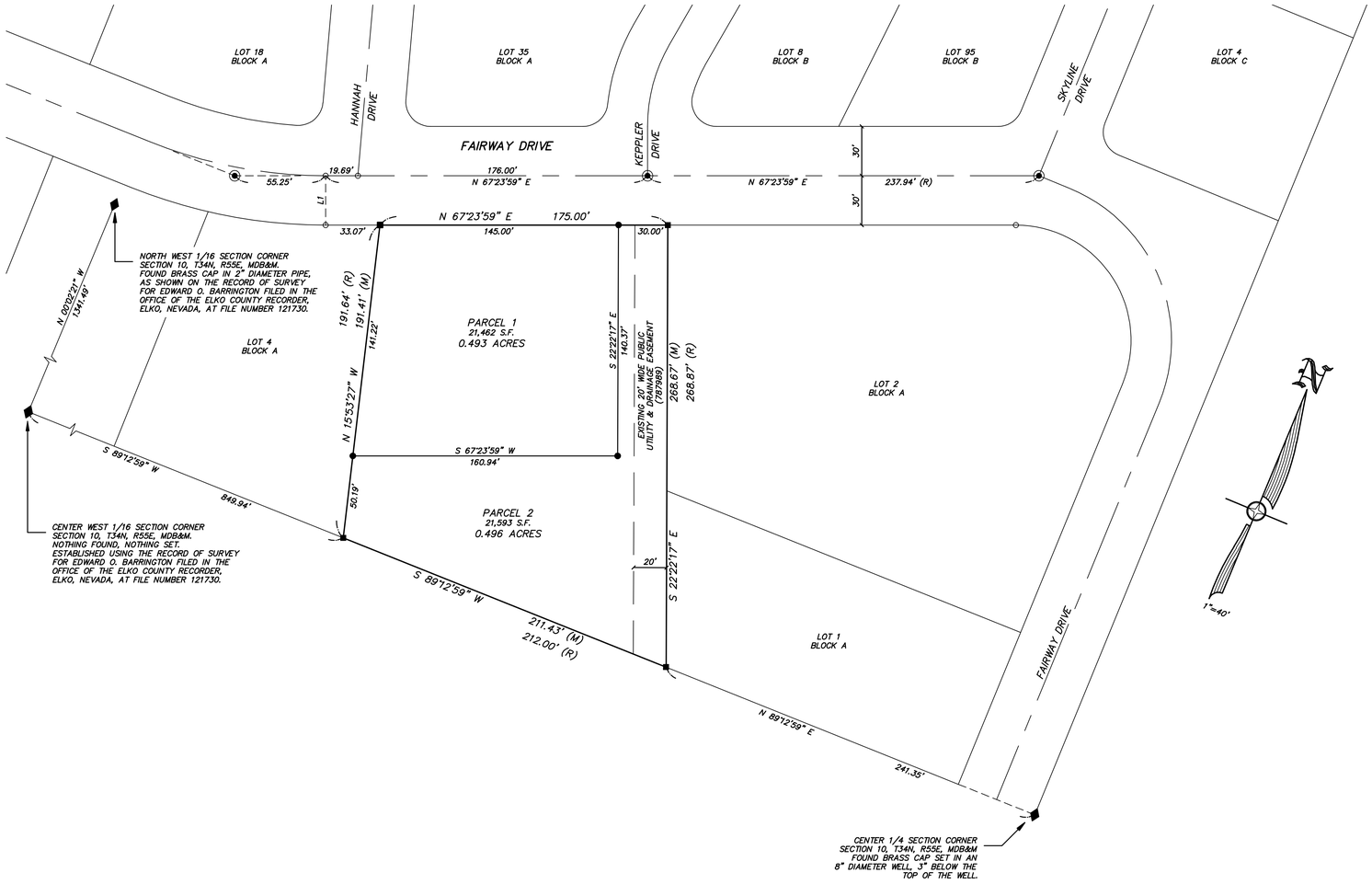


OWNER'S CERTIFICATE:

KNOWN OF ALL MEN BY THESE PRESENTS THAT THE UNDERSIGNED, LYNN R. FORSBERG AND PENNY K. FORSBERG, THE OWNERS OF THOSE PARCELS AS SHOWN ON THIS MAP, DO HEREBY CONSENT TO THE PREPARATION AND RECORDATION OF THIS MAP AND OFFER FOR DEDICATION ALL OF THE EASEMENTS FOR PUBLIC UTILITY AND PUBLIC DRAINAGE PURPOSES AS DESIGNATED HEREON. IN WITNESS WE, LYNN R. FORSBERG AND PENNY K FORSBERG SET OUR HANDS ON THE DATES SHOWN.

LYNN R. FORSBERG _____ DATE _____

PENNY K. FORSBERG _____ DATE _____

STATE OF NEVADA)
) S.S.
COUNTY OF ELKO)

THIS INSTRUMENT WAS ACKNOWLEDGED TO ME ON THE _____ DAY OF _____, 20____, BY LYNN R. FORSBERG AND PENNY K. FORSBERG.

_____
NOTARY PUBLIC IN AND FOR ELKO COUNTY, NEVADA

LAND SURVEYOR'S CERTIFICATE:

I, ROBERT E. MORLEY, A PROFESSIONAL LAND SURVEYOR REGISTERED IN THE STATE OF NEVADA, CERTIFY THAT:

1. THIS PLAT REPRESENTS THE RESULTS OF A SURVEY CONDUCTED UNDER MY SUPERVISION AT THE INSTANCE OF LYNN R. FORSBERG AND PENNY K. FORSBERG.
2. THE LANDS SURVEYED LIE WITHIN SECTION 10, TOWNSHIP 34 NORTH, RANGE 55 EAST, M.D.B.& M., AND THE SURVEY WAS COMPLETED ON _____, 20____.
3. THIS PLAT COMPLIES WITH THE APPLICABLE STATE STATUTES AND ANY LOCAL ORDINANCES IN EFFECT ON THE DATE THAT THE GOVERNING BODY GAVE ITS FINAL APPROVAL.
4. THE MONUMENTS DEPICTED ON THE PLAT ARE OF THE CHARACTER SHOWN, OCCUPY THE POSITIONS INDICATED AND ARE OF SUFFICIENT NUMBER AND DURABILITY.

_____
ROBERT E. MORLEY, P.L.S. No. 6203

PROFESSIONAL LAND SURVEYOR STATE OF NEVADA
ROBERT E. MORLEY
Exp.12-31-21
No. 6203

APPROVAL – CITY OF ELKO

ON THE _____ DAY OF _____, 20____, THIS MAP WAS APPROVED FOR SUBDIVISION PURPOSES PURSUANT TO N.R.S. 278.461 THROUGH 278.469, INCLUSIVE, AND ALL APPLICABLE LOCAL ORDINANCES. ALL OFFERS OF DEDICATION AS SHOWN HEREON WERE ACCEPTED FOR PUBLIC USE.

CITY ENGINEER OR ENGINEERING REPRESENTATIVE _____ DATE _____

CITY PLANNER OR PLANNER REPRESENTATIVE _____ DATE _____

COUNTY TREASURER'S CERTIFICATE:

I, CHERYL PAUL, CERTIFY THAT ALL PROPERTY TAXES ON PARCEL NO. 001-553-009 HAVE BEEN PAID FOR THIS FISCAL YEAR.

ELKO COUNTY TREASURER _____ DATE _____

COUNTY ASSESSOR'S CERTIFICATE:

I, JANET IRIBARNE, CERTIFY THAT THE ASSESSOR'S PARCEL NUMBER SHOWN ON THIS PLAT IS CORRECT AND THAT THE PROPOSED PARCELS ARE A DIVISION OF SAID ASSESSOR'S PARCEL NO. 001-553-009.

ELKO COUNTY TREASURER _____ DATE _____

APPROVAL – PUBLIC UTILITY EASEMENTS

THE PUBLIC UTILITY EASEMENTS, AS DESIGNATED HEREON, ARE APPROVED BY THE RESPECTIVE PUBLIC UTILITIES EXECUTING BELOW.

FRONTIER COMMUNICATIONS _____ DATE _____

SIERRA PACIFIC POWER COMPANY D/B/A NV ENERGY _____ DATE _____

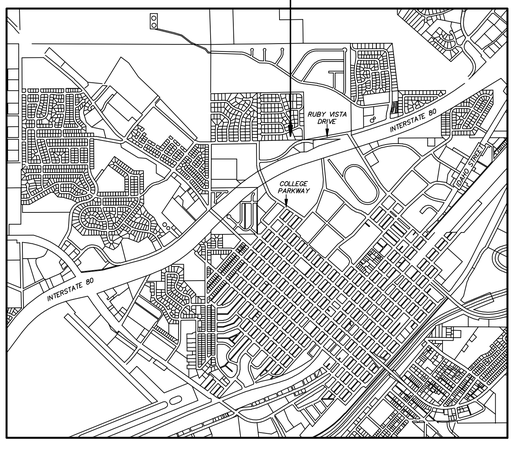
SOUTHWEST GAS CORPORATION _____ DATE _____

ZITO MEDIA _____ DATE _____

40' 0 40' 80' 120' 160'

SCALE: 1"=40'

PARCEL MAP LOCATION



VICINITY MAP
NTS

NOTES:

1. THIS MAP IS A SUBDIVISION OF LOT 3, BLOCK A, OF RUBY VIEW HEIGHTS SUBDIVISION OF THE SE 1/4 NW 1/4, SECTION 10, T34N, R55E, MDB&M, FILED IN THE OFFICE OF THE ELKO COUNTY RECORDER, ELKO, NEVADA, AT FILE NO. 17686.
2. THE BASIS OF BEARINGS FOR THIS MAP IS THE CITY OF ELKO GLOBAL POSITIONING SYSTEM CONTROL NETWORK BASED ON THE NAD 83 NEVADA EAST ZONE COORDINATE SYSTEM
3. THE TOTAL SUBDIVIDED AREA OF THIS MAP EQUALS 43,044 S.F. (0.988 ACRES).
4. A PUBLIC UTILITY EASEMENT IS HEREBY GRANTED SPECIFICALLY TO NV ENERGY WITHIN EACH PARCEL FOR THE EXCLUSIVE PURPOSE OF INSTALLING AND MAINTAINING UTILITY SERVICE FACILITIES TO THAT PARCEL, WITH THE RIGHT TO EXIT THAT PARCEL WITH SAID UTILITY FACILITIES FOR THE PURPOSE OF SERVING ADJACENT PARCELS, AT LOCATIONS MUTUALLY AGREED UPON BY THE OWNER OF RECORD AT THE TIME OF INSTALLATION AND THE UTILITY COMPANY.
5. A PUBLIC UTILITY EASEMENT IS HEREBY GRANTED SPECIFICALLY TO SOUTHWEST GAS CORP. WITHIN EACH PARCEL FOR THE EXCLUSIVE PURPOSE OF INGRESS/EGRESS, INSTALLING, MAINTAINING, INSPECTING AND REPAIRING UTILITY FACILITIES WHICH PROVIDE SERVICE TO THAT PARCEL, WITH THE RIGHT TO EXIT THAT PARCEL WITH ADDITIONAL UTILITY FACILITIES FOR THE PURPOSE OF SERVING ADJACENT PARCELS. RIGHTS ARE ALSO GRANTED TO USE EXISTING PUBLIC RIGHTS-OF-WAY FOR THE PURPOSE OF MAINTAINING, INSTALLING, INSPECTING AND REPAIRING SAID UTILITY FACILITIES.
6. IN ADDITION TO THE EASEMENTS SHOWN, A 7.5' PUBLIC UTILITY & DRAINAGE EASEMENT IS HEREBY GRANTED ALONG ALL FRONT LOT LINES AND A 5' PUBLIC UTILITY & DRAINAGE EASEMENT IS HEREBY GRANTED ALONG ALL SIDE AND REAR LOT LINES.

LEGEND:

♦	FOUND SECTION CORNER AS NOTED
◉	FOUND MONUMENT IN STREET WELL
■	FOUND 5/8" REBAR W/ PLASTIC CAP MARKED P.L.S. 6203
●	SET 5/8" REBAR W/ PLASTIC CAP MARKED P.L.S. 6203
○	CALCULATED POINT, NOTHING SET
(787989)	DOCUMENT NUMBER 787989 RECORDED IN OFFICIAL RECORDS OF ELKO COUNTY
(M)	MEASURED
(R)	RECORD

LINE TABLE

LINE	BEARING	LENGTH
L1	N 22°36'01" W	30.00'

FILE NUMBER: _____

FILED AT THE REQUEST OF: _____

_____

DATE: _____

TIME: _____

_____
D. MIKE SMALES, ELKO COUNTY RECORDER

PARCEL MAP

FOR

LYNN R. & PENNY K. FORSBERG

IN

SECTION 10, T.34 N., R.55 E., M.D.B.& M.
ELKO ELKO COUNTY NEVADA

HIGH DESERT ENGINEERING LLC
640 IDAHO STREET
ELKO, NEVADA 89801
(775) 738-4053

221069

D:\! Tom's Work Files\Land Projects 2009\Forsberg Ruby View Heights Topo\dwg\Parcel Map.dwg 11/8/2021 11:52:39 AM PST

Agenda Item # I.A.2.

Elko City Planning Commission
Agenda Action Sheet

1. **Review, consideration, and possible action to develop the Calendar Year 2022 Planning Commission Annual Work Program, and matters related thereto. FOR POSSIBLE ACTION**

2. Meeting Date: **January 4, 2022**

3. Agenda Category: *MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS*

4. Time Required: **10 Minutes**

5. Background Information: **Each year the Planning Commission reviews the Annual Work Program. The work program gives the Planning Commission direction on various issues to address throughout the year.**

6. Business Impact Statement: **Not Required**

7. Supplemental Agenda Information: **2022 Work Program**

8. Recommended Motion: **Pleasure of the Planning Commission**

9. Findings:

10. Prepared By: **Cathy Laughlin, City Planner**

11. Agenda Distribution:

Elko Planning Commission 2022 Work Program

		ITEM	START DATE		PROJECTED COMPLETION		ACTUAL COMPLETION
	*	Repeal and Replace Sign Ordinance	ongoing		Feb-23		
	*	Review Zoning for RMH districts, revise map	ongoing		Sep-23		
	*	Revise P & Z applications / Zoning Code Amendment to reflect changes	ongoing		Aug-22		
	*	Master Plan Amendment for misc. revisions	Feb-22		May-22		
	*	Revisions to 3-3,Divisions of Land; clarifications needed	May-22		Dec-22		
	*	Clean up existing zoning districts	Aug-22		Feb-22		
		ONGOING PROJECTS					
		Planning Commission training (General conduct, Ethics, NRS, Open meeting law)					

Agenda Item # I.A.3.

Elko City Planning Commission
Agenda Action Sheet

1. Title: **Election of officers, and matters related thereto. FOR POSSIBLE ACTION**
2. Meeting Date: **January 4, 2022**
3. Agenda Category: *MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS*
4. Time Required: **10 Minutes**
5. Background Information: **Pursuant to Section 3-4-3 A. of the City Code, the Planning Commission shall elect a Chairperson, Vice-Chairperson and Secretary in January every year.**
6. Business Impact Statement: **Not Required**
7. Supplemental Agenda Information:
8. Recommended Motion:
9. Findings:
10. Prepared By: **Cathy Laughlin, City Planner**
11. Agenda Distribution:

Election Procedures

1. Current Chairman asks for nominations for the Chairman Position. A vote will be taken after all nominations are done. Those that decline nomination will not be considered.

2. Chairman asks for votes. If two or more people are nominated the votes are taken in order of nomination.

    a. Remember to only vote aye for **ONE** person per position. It would also be helpful for everyone to hold their hand up and pause so the votes can be recorded.

    Example: If Jane Doe is nominated and then John Doe is nominated, Chairman would ask for those in favor of Jane Doe for Chair say aye … nay… If there was a majority vote for Jane Doe then the election process for Chairman is done.

    If a majority did not vote for Jane Doe then the Current Chairman would continue for John Doe.

3. Current Chairman moves on to nominations for the other positions (Vice-Chairman & Secretary).

    a. A person can be nominated for more than one position, but can't hold more than one position.

*The Current Chairman will conduct the entire meeting, and then the New Chairman will take over at the next meeting.

* A motion does **NOT** need to be made, only a nomination.

QUINLAN™

October 25, 2021 | Volume 15 | Issue 20

Zoning Bulletin

in this issue:

Special Permit

Court rules on whether planning board erred in granting marijuana dispensary special permit after it converted to for-profit status

Citation: *West Street Associates LLC v. Planning Board of Mansfield, 488 Mass. 319, 173 N.E.3d 329 (2021)*

In 2016, the town of Mansfield, Massachusetts' planning board granted Ellen Rosenfeld a special permit to construct a medical marijuana dispensary on West Street. She bought the site as trustee of the Ellen Realty Trust (ERT), and the proposed operator of the dispensary was CommCan Inc. (CommCan), a non-profit entity of which Rosenfeld was president.

West Street Associates LLC (WSA), an abutting landowner, challenged the issuance of the permit. WSA argued that the board failed properly to consider the decisional criteria for such permits as required by the town's bylaws.

According to the town's bylaws, an applicant seeking a permit to operate a medical marijuana dispensary had to be a nonprofit entity.

At some point, voters approved the legalization of recreational marijuana use, and comprehensive legislation was enacted to govern the distribution and sale of both medical and recreational marijuana. That act was later repealed and replaced with an act in 2017.

Under the 2017 act, being a nonprofit entity was no longer a condition precedent to operating a medical marijuana dispensary. The 2017 also contained a provision that expressly allowed a nonprofit dispensary to convert to a for-profit entity.

At that point, CommCan converted from nonprofit to for-profit status.

At a bench trial to examine the merit of WSA's claim, the judge determined that the planning board had not erred in granting Rosenfeld's request for a special permit and that 2017 act preempted the bylaw requiring medical marijuana dispensaries to be operated by nonprofit entities.

WSA appealed, challenging the preemption decision, and the Supreme Judicial Court of Massachusetts (SJC), the state's highest court, reviewed the matter.

DECISION: Affirmed.

The town's bylaw requiring medical marijuana dispensaries be a nonprofit " 'frustrate[d] [one of] the purpose[s]' of the 2017 act."

State lawmakers had "replac[ed] [the 2012 act] with a provision permitting for-profit entities to operate marijuana treatment centers, [and] the Legislature

evinced its clear intent to allow for-profit entities to distribute medical marijuana. This legislative purpose cannot 'be achieved in the face of [the town's] . . . by-law on the same subject," the SJC ruled.

The key takeaway from the court's ruling: When a local bylaw restricted a facility in a way the state Legislature had "explicitly determined . . . should not be limited," it was preempted by state law "to the extent it require[d] all medical marijuana dispensaries to be nonprofit organizations."

Case Note:

The planning board couldn't be "forced to revoke the special permit at issue because CommCan appropriately exercised its statutory right to convert to a for-profit entity," the SJC wrote.

Contributors

Laura Scott, Esq.

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Signage

Stadium challenge's ZBA's denial of request to have interior sign on select number of stadium seats spell out 'Heinz Field'

Citation: *PSSI Stadium LLC v. City of Pittsburgh Zoning Board of Adjustment, 2021 WL 3355011 (Pa. Commw. Ct. 2021)*

A court reversed the City of Pittsburgh Zoning Board of Adjustment's (ZBA) determination that proposed signage at Heinz Field wasn't a permitted interior sign under the city's zoning code, so it wasn't permitted of right. The City of Pittsburgh Zoning Board of Adjustment (ZBA) and City of Pittsburgh (collectively, the city) appealed that order.

DECISION: Affirmed.

The ZBA erred as a matter of law in denying the interior sign at the stadium, the Commonwealth Court of Pennsylvania ruled.

THE SIGN AT ISSUE

Heinz Field, a 68,400-seat football stadium located in the city's North Shore at 900 Art Rooney Avenue, was defined in the city's zoning code as a "Major Public Destination Facility." The open-air stadium had two seating decks on the north, east, and west sides with a scoreboard and a single deck of seating on the south side, where the main entrances were located.

The stadium had four exterior facades, with overhangs over a portion of the seats on the east and west sides, and Heinz Field had frontage on Art Rooney Avenue, Reedsdale Street, and North Shore Drive.

PSSI Stadium LLC (PSSI) sought to add signage involving stadium seats that were visible from many locations and buildings in the downtown area of the city and from the opposite side of the river, as well as from Mount Washington. The seats could also be seen from the air.

The seats were generally printed yellow, and PSSI wanted to paint some of the seats on the lower deck of the northern side of the stadium in an unspecified contrasting color and pattern depicting "words." These words "would be oriented toward the southern, open end of the stadium and would be visible from locations outside the stadium and from above the stadium." The bottom line: The proposed signage would spell out the name of the stadium—Heinz Field.

The city's zoning administrator (ZA) concluded the proposed interior alterations to the seats didn't constitute a non-advertising sign on the inside of a structure that was designed not to be seen from the exterior of the structure. The ZA then determined that the proposed signage was analogous to a roof sign because it "was designed to face the sky and would be seen from that perspective" and

would "be visible in the same way that a prohibited roof sign [wa]s designed to be visible."

PSSI appealed the decision to the ZBA without seeking any type of a variance. PSSI contended its proposed signage was a permitted interior sign, disagreeing with the ZA's conclusion that the proposed sign was a roof sign.

PSSI also argued the ZBA should be bound by its 2012 decision involving the Highmark Stadium whereby it permitted the "HOUNDS" sign in the seating area of the open-air stadium home to the Riverhounds Soccer Club. Following a hearing, the ZBA denied PSSI's appeal.

The lower court reversed the ZBA's finding. The city then appealed.

BACK TO THE COURT'S RULING

In the Highmark case, the applicant had sought a variance to arrange colored seating in such a way that the unoccupied seats would spell out "HOUNDS." In that case, the ZBA determined that the proposed signage for the soccer stadium was an interior sign under the Zoning Code and didn't need a variance even though the signage "would be visible along the Monongahela River in front of the stadium," the court explained.

The ZBA found in that case the applicant had "presented adequate evidence that other stadiums in the [c]ity had interior facing signs that were minimally visible from the outside."

Thus, the ZBA found the " 'the inward-facing sign exception [was] pertinent to the proposed development and negate[d] the need for a drastic variance' such that the applicant's request for that relief was unnecessary."

Here, the ZBA tried to "distinguish the Highmark Stadium case, citing different evidence, sign design, location, zoning district, and the absence of any analysis of the evidence presented in the context of the [z]oning [c]ode provisions," the court explained. This case was "essentially analogous" to the Highmark case because they "both involve[d] stadium seats depicting words that would be obstructed from view when occupied but incidentally visible from the exterior of the respective stadiums."

THE BOTTOM LINE

There were three zoning code sign definitions relevant to the court's analysis:

- **signs inside buildings**—which were categorized as non-advertising signs and defined as "[s]igns on the inside of the buildings or other structures, designed not to be seen from the exterior of such buildings or structures shall be permitted in any district with unlimited size and interior location";
- **roof signs**—these were barred in all zoning districts and were defined as "[a]ny roof sign or sign that extend[ed] above the roof line or parapet wall"; and
- **an identification sign**—which was "a sign used to identify . . . the name of a public destination facility" and was used for public destination facilities regulated in the Zoning Code and pertained to exterior locations.

The city contended the ZBA had properly determined that the proposed signage was an exterior sign requiring a variance from the zoning code's dimensional limitations. It argued PSSI's proposed signage hadn't met the definition of interior sign because it would be plainly visible from the exterior consistent with the ZBA's finding that it "would be oriented toward the southern, open end of the stadium and would be visible from locations outside the stadium and from above the stadium."

This position was "without merit," the court ruled. "The proposed signage is plainly not an exterior sign; it lies entirely inside the structure. Moreover, even if the [c]ity is correct that the painted seats would not qualify as an interior sign which is specifically permitted, we cannot agree that the signage is prohibited under the [z]oning [c]ode. To the extent that the ZBA concluded that the proposed signage was either a roof sign or 'analogous thereto,' we reject its determination."

KEY TAKEAWAYS

The stadium seats at issue:

- were located on the lower deck of the northern side of the stadium; and
- didn't extend above the roof line or the exterior façade of the open-air stadium.

The city conceded that "logos located on the playing field for the Steelers, the University of Pittsburgh, and the National Football League [we]re permissible even though they c[ould] be viewed from the exterior of the stadium." Therefore, "the proposed signage spelling out 'Heinz Field' [wa]s tantamount to a logo on or near the playing field. The only difference [wa]s that the proposed signage would spell out the name of the stadium, consistent with an identification sign depicting the name of the public destination facility but located in the stadium's interior," the court concluded.

So, even if the court was to agree with the city for argument's sake that a proposed use could be rejected on the basis that it was "analogous to" one that wash prohibited, it determined that "the proposed painted seats [were] far more analogous to the field signage discussed above than to a roof sign as defined in the [z]oning [c]ode"; therefore, it affirmed the lower court's finding.

CASE NOTE

The court explained that "a prior zoning board decision d[id] not constitute binding precedent, . . . and that the failure to uniformly enforce an ordinance provision d[id] not necessarily bar subsequent enforcement." But that didn't mean that a zoning board should be able "to justify whimsical and arbitrary applications of ordinances." "Applicants for zoning relief and/or interpretation of zoning provisions should be able to rely on a reasonably consistent application of a zoning ordinance, especially where

the pertinent provisions have remained unchanged," the court wrote.

Practically Speaking:

PSSI maintained that the information conveyed on the painted seats should be considered a non-advertising, interior sign within the stadium structure permitted by right under the zoning code and exempt from dimensional limitations. The ZBA, the lower court, and the appeals court disagreed.

Second Amendment

Third Circuit issues precedential ruling concerning zoning and Second Amendment constitutional challenges

Citation: *Drummond v. Robinson Township, 9 F.4th 217 (3d Cir. 2021)*

The Third U.S. Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the Virgin Islands.

A gun rights organization, a gun club, and the would-be operator of that club (collectively, the gun club) filed a section 1983 lawsuit against Robinson Township, Pennsylvania and its zoning officer. They claimed the zoning officer had stalled the club operator's zoning application, which effectively zoned the gun club out of existence, in violation of the gun club's Second Amendment rights.

The lower court granted the township's request for dismissal of the lawsuit. The gun club appealed.

DECISION: Affirmed in part; vacated in part and case sent back for further proceedings.

A zoning ordinance with the effect of depriving a "would-be gun owner of the firearms and skills commonly used for lawful purposes like self-defense in their homes" was likely unconstitutional; it would only be valid if when examined under "intermediate scrutiny" it:

- served a "significant, substantial, or important" government interest; and
- was reasonable and didn't "burden more conduct than [wa]s reasonably necessary."

The Third U.S. Circuit Court of Appeals noted that this was a case of first impression, and that, due to the Supreme Court's landmark ruling in *District of Columbia v. Heller*, courts nationwide had been "called upon to define the Second Amendment's boundaries."

WHAT LED TO THE LAWSUIT

For around 100 years, a 265-acre tract of land in the township hosted a gun range where more than 800 dues-paying members participated in the Greater Pittsburgh Gun Club. National Guard units also used the land for practice.

The club, however, faced many challenges during its existence. For example, in 1993, the Township initiated a nuisance action against the club. And while a court eventually dismissed the lawsuit, in 2008, the gun range's then-owner pleaded guilty to possessing weapons as a convicted felon and received a three-year prison term as a result.

With its owner behind bars, the club closed its door and didn't reopen for about 10 years.

William Drummond leased the property and consistent with the club's prior use intended to sell firearms and operate a shooting range there. Drummond stated the intent was for people to be able to shoot "ordinary firearms of the kind in common use for traditional lawful purposes, including pistols, shotguns, and center-fire rifles up to .50 caliber."

When Drummond finalized his lease of the land, the township permitted gun ranges in three types of districts:

- industrial;
- special conservation (both which could host shooting ranges); and
- interchange business (called an IBD district for short—which could host sportsman's clubs).

Although shooting ranges and sportsman's clubs had different names, the township held them to the same standards, safety practices, and noise restrictions, and barred the serving of alcohol during shooting events.

When township residents learned about how Drummond wanted to use the property, they complained that renewed "use of high power rifles" at the club would pose a "nuisance" and a "danger." So, they asked the township's board of supervisors (the board) to "control the [c]lub 'through stricter zoning.' "

Drummond opposed the re-zoning attempt, but the board voted to amend the rules governing sportsman's clubs in IBD districts, the type of district that covered the leased land.

The old ordinance allowed sportsman's clubs to organize center-fire rifle practice (as did Drummond's lease). But the new version limited clubs to "pistol range, skeet shoot, trap and skeet, and rim-fire rifle" practice.

In addition, while the prior rules did not distinguish between for-profit and non-profit entities, the new ordinance defined a "Sportsman's Club" as a "nonprofit entity formed for conservation of wildlife or game, and to provide members with opportunities for hunting, fishing or shooting."

While the changes placed limited on gun ranges in IBD districts, it did not disturb the rules governing gun ranges in Industrial and Special Conservation districts.

THE BOTTOM LINE

In sending the case back to the lower court, the Third Circuit explained that "at the pleading stage, the [t]ownship ha[d] failed to 'establish a close fit between the challenged zoning regulations and the actual public benefits they serve—and to do so with actual evidence, not just

assertions.' " "We leave it to the District Court to analyze whatever evidence the [t]ownship presents in light of these governing principles," it added.

In the end, the court wasn't "confident that the ordinance inflict[ed] only a *de minimis* burden on the right to bear arms." While "the challenged rules stop[ped] short of an absolute ban on firearms purchase and practice" it did "not follow . . . that the burden they produce [wa]s not significant," the Third Circuit found.

For instance, "[t]he non-profit ownership rule, in particular, ha[d] already forced the Greater Pittsburgh Gun Club out of business and may have the same effect on other Sportsman's Clubs." It was "plausible that those closures impair[ed] residents' access to the weapons and skills commonly used to lawfully defend their homes," so "whether the challenged rules impose[d] a slight burden or a substantial one [wa]s not a question [the court could] decide at the pleading stage."

A CLOSER LOOK

This precedential ruling examined whether zoning restrictions on where individuals could buy or practice with guns interfered with the right to bear arms under the Second Amendment of the Constitution. This ruling also "open[s] the door" to anti-firearm zoning challenges, Attorney Christopher Adams of Greenbaum Rowe Smith & David LLP wrote in an article entitled "Third Circuit Breaks New Ground for the Second Amendment in New Jersey," which can be found at greenbaumlaw.com/insights-publications-Third-Circuit-Breaks-New-Ground-Second-Amendment-NJ.

Attorney Adams noted that while this ruling is only binding on federal courts in the Third Circuit's jurisdiction, the ruling "serves as a guide for the remaining eleven circuits" nationwide. That's because the decision calls attention to restrictive zoning laws that may be "commonplace" across many cities and towns.

The case District of Columbia v. Heller cited is District of Columbia v. Heller, 554 U.S. 570, 128 S. Ct. 2783, 171 L. Ed. 2d 637 (2008).

Fair Housing Discrimination

Sober living facilities claim disparate treatment and impact resulted from amendment related to local R-1 (residential) zone

Citation: *Yellowstone Womens First Step House, Inc. v. City of Costa Mesa, 2021 WL 4077001 (9th Cir. 2021)*

The Ninth U.S. Circuit has jurisdiction over Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington.

California Women's Recovery, Inc. (Lynn House), and Sober Living Network Inc. (SLN) appealed a lower court's final judgment in favor of Costa Mesa, California on claims their ordinances were discriminatory against their sober living facilities.

DECISION: Affirmed.

The lower court didn't err in denying Lynn House and SLN's request for judgment as a matter of law on their disparate impact and disparate treatment claims.

A CLOSER LOOK AT THE ORDINANCE AT ISSUE

The city enacted Ordinance 14-13 in 2014 as an amendment to Title 13 of the Costa Mesa Municipal Code (CMMC), which governed planning, zoning, and development in the city. The CMMC also established geographic districts for land use and prescribed permissible land uses within each district.

For residences, the CMMC established several types of residential districts, including single-family (R-1), multiple-family medium density (R-2MD), multiple-family high density (R-2HD), and highest density multiple-family (R-3). Ordinance 14-13 amended the former definition of "single housekeeping unit," imposed special use permit (SUP) restrictions on group homes and changed zoning provisions concerning reasonable accommodations.

The CMMC also barred the operation of large boarding houses in R-1 areas but excepted certain housing facilities that might otherwise be banned. It didn't subject licensed residential care facilities and single housekeeping units to additional limitations.

In addition, group homes that weren't single housekeeping units could operate in R-1 zones if they obtained a SUP and complied with several applicable regulations—and perhaps most notably that they do not have more than six occupants, not including a house manager.

Assuming a group home complied with these conditions, it would be granted a "ministerial matter" permit. All group homes in R-1 zones had to file a permit application within 90 days of the ordinance's effective date. And group homes had at least one year to comply with its provisions.

Ordinance 14-13 also addressed reasonable accommodation—meaning a group home could file a written application and receive a written decision within 60 days, and they could appeal a decision to the planning commission if:

- the requested accommodation was requested by or on the behalf of one or more individuals with a disability protected under the fair housing laws;
- it was needed to provide one or more individuals with a disability an equal opportunity to use and enjoy a dwelling;
- it wouldn't impose an undue financial or administrative burden on the city, as "undue financial or administrative burden" was defined in fair housing laws and interpretive case law;

- it was consistent with "whether or not the residents would constitute a single housekeeping unit"; and
- it wouldn't result in a direct threat to the health or safety of other individuals or substantial physical damage to the property of others.

Other factors to consider included whether:

- the requested accommodation was necessary to make facilities of a similar nature or operation economically viable in light of the particularities of the relevant market and market participants;
- the existing supply of facilities of a similar nature and operation in the community was sufficient to provide individuals with a disability an equal opportunity to live in a residential setting; and
- the requested accommodation would not result in a fundamental alteration in the nature of the city's zoning program.

Sober living homes (SLHs) were a subset of group homes that had to meet additional conditions to obtain a special use permit. For instance, a SLH wouldn't receive a permit if it was within 650 feet of another SLH or a state-licensed substance treatment facility or it didn't first reduce its occupancy to six or fewer residents.

In addition, an SLH had to require residents' participation in a recovery programs, bar the use of alcohol and non-prescription drugs, and exclude any visitors under the influence of alcohol or drugs.

BACK TO THE COURT'S RULING

The court had to review the evidence in a light most favorable to the nonmoving party—which in this case meant the city—and draw all "reasonable inferences" in its favor.

Here, a "reasonable jury could conclude that the substantial, legitimate, nondiscriminatory interests supporting Ordinance 14-13 would not be served by another practice that has a less discriminatory effect," the Ninth U.S. Circuit Court of Appeals found.

Further, a "reasonable jury could also conclude that passage of Ordinance 14-13 was not more likely than not motivated by a discriminatory reason."

Therefore, "under the substantial evidence standard, there was adequate evidence to support the jury's verdict that Lynn House and SLN failed to establish their disparate impact and disparate treatment claims by a preponderance of the evidence."

Practically Speaking:

This case raised challenges based on the Fair Housing Act and the Americans with Disabilities Act.

Zoning News From Around The Nation

Colorado

Zoning of homeless encampments the subject of lawsuit filed against Denver

In Denver there are several places designated as "Safe Outdoor Spaces." These managed campsites for homeless individuals are being put to the legal test, though, now that a nonprofit called Denver Deserves Better, which takes issue with the way the city has managed the issue of homelessness, has filed suit against the city, *Colorado Politics* reported. The lawsuit alleges that the zoning administrator (ZA) overstepped by allowing the encampments without soliciting the public's input—or that of the city's zoning board or the city council for that matter—the news outlet reported.

The lawsuit alleges that Tina Axelrad, Denver's ZA found in November 2020 that the temporary managed campsites for homeless people were permitted under the zoning ordinance in response to the COVID-19 pandemic, the news outlet reported. In May 2021, the ZA upheld her initial determination and extended it through the end of 2023 or until local and state public health orders related to COVID are rescinded, it reported.

The lawsuit came after the city's zoning board denied appeals of the ZA's finding and the issuance of the most recent temporary encampment permit.

To learn more about Safe Outdoor Space-related initiatives in Denver, visit coloradovillagecollaborative.org/safe-outdoor-space.

Source: *coloradopolitics.com*

Indiana

Clarksville's planning commission recommends approval of zoning code changes, which could impact adult businesses

In Clarksville, Indiana, the planning commission recently recommended that the town council should approve changes to the existing zoning code so that adult businesses including place called Theatair X, can operated in the town, the *News and Tribune* reported recently.

The theater is the subject of a lawsuit between the town and Midwest Entertainment Ventures Inc. (MEV), which had opened and operated it, the news outlet reported. MEV filed suit against Clarksville following the town council's decision to revoke the theater's business license for multiple zoning code violations, including illegal sex on the property.

To date, Theatair X has operated under a provisional license, the news outlet reported.

According to the town's current zoning order, a 500-foot buffer is required between this type of business and other development types. If the town council approves the change, that will be extended to 750 feet from any planned urban developments with residential use, the news outlet

reported. This includes rental apartments, child-care centers, and religious institutions, it noted,

Source: *news.yahoo.com*

Michigan

A look at how short-term rental regulation has become a local zoning issue; local township takes steps to prevent unlawful growing of marijuana

In the state of Michigan, short-term rentals (STRs) are largely governed by local ordinances, Attorney Robert Pollock of Fausone Bohn LLP explained in an article for *Michigan Lawyers Weekly*. Attorney Pollock noted several various parties have an interest in how Michigan regulates STRs. He identified several stakeholders, including the owners of single-family dwellings, condominium and homeowners' associations, and cities and towns.

Attorney Pollock explained that in the case of *Reaume v. Township of Spring Lake* an appeals court ruled that a short-term rental was barred from a local residential zoning district since a STR constitutes a commercial use of the property. On further review, the Michigan Supreme Court upheld that finding, he noted, adding that the STR in that case fit the definition of a motel and not a dwelling under the applicable zoning code.

But in another case—*Pigeon v. Ashkay Island LLC*, a state court ruled that a STR couldn't operate but for a different reason: It fit the definition of being a tourist home, which wasn't allowed in the applicable zoning district in that case.

Attorney Pollock explained that confusion concerning the definition and regulation of STRs may be a reason why the state's legislature is working toward passing legislation that would address STRs for Michigan as a whole. For instance, House Bill 4722 and Senate Bill 446, he stated, would permit STRs as a permitted residential use without the need for a special-use or conditional permit. The bills would leave some regulations to local municipalities, though, concerning issues related to advertising, noise, and traffic, he noted.

In other news, Brandon Township's Board of Trustees passed a second reading of C-4 Mixed Business and the Generalized Industrial districts zoning amendments, *The Citizen* reported recently. The township's Board of Trustees also passed, with a 6-1 vote, a second reading of the Marijuana Caregiver Ordinance. This is a starting point, the news outlet stated, for preventing the unlawful growing of marijuana in the township.

The full article, which details current rules under which caregivers may grow marijuana, can be found at thecitizenonline.com/township-takes-aim-at-illegal-marijuana-grow-operations/.

Sources: *milawyersweekly.com*; *thecitizenonline.com*

New York

Building permit for controversial 200 Amsterdam survives judicial scrutiny

A nearly 670-foot tall residential building on Manhattan's Upper West Side can be completed without the city retroactively enforcing its interpretation of building permits for the tower, *New York Yimby* reported recently. The property, located at 200 Amsterdam, became the subject of controversy after a lower court sought to impose a retroactive draft zoning interpretation on it, the news outlet reported. The practical impact would have been the removal of several stories from the tower so that its height would need to be reduced.

Following that ruling, an appeals court reversed, and ruled in favor of the developer on the project, SJP Properties and Mitsui Fudosan American, the news outlet reported.

And, now, the New York Court of Appeals—the state's highest court—has affirmed that ruling, putting an end to legal challenges to the building's construction at its current height.

Source: *newyorkyimby.com*

Pennsylvania

Court discusses implications of 'spot zoning' with respect to request to construct convenience store on a property housing businesses and residences

Provco Pineville Fayette L.P. (Provco) owned property at 1109 and 1119 Fayette Street and 1201 Fayette Street—a four-lane highway—in the Borough of Conshohocken, Pennsylvania. The property included several one- and two-story buildings, and the lot was adjacent to a cemetery and was close by to a sports stadium and playing fields.

The various buildings on the property, which was located in the "RO" zoning district, included residential dwellings, a real estate office, a dry-cleaning business, and a physical therapy business.

In April 2014, Provco applied to the Conshohocken Zoning Hearing Board (ZHB) for a special exemption or, in the alternative, a variance to build a retail convenience store with gas pumps on the property.

The ZHB denied Provco's application for a special exemption or a variance, so in August 2017, Provco sought an amendment to the zoning ordinance to provide for additional permitted new uses, standards, and special regulations for the RO zoning district, including the permitted use of convenience retail stores that included fuel sales.

The Borough Council enacted the zoning amendment, which amended Part 12 of the township's zoning ordinance and added the permitted use of a "convenience retail food store" including the sale of fuel, an ATM, and lottery sales.

On the night the Borough Council approved Land Development Resolution 2017-24—the final land development plan for Provco to build a convenience store with fuel pumps on the property in the newly revised RO zoning district—neighbors filed a substantive validity challenge to the zoning amendment.

The ZHB heard testimony from the neighbors, a land-

planning expert, and nearby property owners. Provco also presented testimony from experts in civil engineering and municipal and developer planning. With a 3-2 vote, the ZHB sustained the neighbors' substantive validity challenge and declared the zoning amendment void in its entirety.

The Borough and Provco appealed the ZHB's decision in court. The court reversed the ZHB's decision, concluding that the neighbors didn't meet the "heavy burden" of showing that the zoning amendment wasn't constitutionally valid. In the court's view, the neighbors failed to present evidence that clearly established the zoning amendment was "spot zoning."

On the neighbors' appeal, they contended the lower court erred as a matter of law in finding that the zoning amendment didn't constitute spot zoning.

The reviewing court reversed the lower court's ruling because the ZHB:

- had "acted within its power as the sole judge of the credibility of the witnesses and the weight afforded to their testimony";
- hadn't abuse its discretion in affording more weight to testimony by one of the experts the neighbors presented;
- was within its right to afford more weight to the testimony of one of the experts the neighbors presented; and
- hadn't erred in considering the neighbors' testimony about how a convenience store, with the sale of gasoline would affect the Borough's public health, safety, morals, and general welfare.

Ultimately, the court found, that the "ZHB's conclusion that the [z]oning [a]mendment constituted arbitrary spot zoning rest[ed] on the solid foundation of the substantial evidence in its findings of fact." As a result, the ZHB didn't err or engage in "a manifest abuse of discretion in reaching its decision that the [p]roperty was spot zoned."

A closer look at spot zoning

There was presumption that "all zoning ordinances [we]re presumed constitutional and valid." It was the burden of whomever was challenging the ordinance to prove otherwise.

But, spot zoning by its nature was "unconstitutional and invalid," the court noted, explaining that it defined spot zoning like this—"a singling out of one lot or a small area";

- "for different treatment from that accorded to similar surrounding land indistinguishable from it in character"; and
- "for the economic benefit or detriment of the owner of that lot."

"The most determinative factor in an analysis of spot zoning is whether the parcel in question is being treated unjustifiably different from similar surrounding land, thus creating an 'island' having no relevant differences from its neighbors," the court stated.

To show that improper spot zoning had occurred, the challenger (in this case the neighbors) had to show that "the provisions at issue [we]re arbitrary and unreasonable and ha[d] no relation to the public health, safety, morals and general welfare. If the validity of a zoning ordinance [wa]s debatable, it must be permitted to stand," the court explained, adding that "[s]pot zoning cases should be decided on the facts, guided by case law; there [wa]s no precise formula for determining whether a rezoning of property constitutes spot zoning."

The bottom line

The neighbors demonstrated that the "rezoning reflect[ed] a difference in treatment of a tract of land from surrounding land similar in character," so the lower court erred in finding otherwise.

The case cited is Conshohocken Borough v. Conshohocken Borough Zoning Hearing Board, 2021 WL 3610110 (Pa. Commw. Ct. 2021).

Rhode Island

Building of family compound in Smithfield currently a no-go

That's because a 2002 Smithfield, Rhode Island Zoning Board of Review (ZOR) decision stated that the low-density zoning status of 169 Whipple Road prevented the construction of a family compound, the *Valley Breeze & Observer* reported recently.

While the ZOR's decision is close to 20 years old, in August 2021, Smithfield Solicitor told the Smithfield Planning Board that this decision means the issue developing a family compound on the parcel is a "non-starter," the news outlet reported.

It was proposed that the 14.46-acre parcel be divided into two with four-lot subdivisions and one three-lot subdivision, the news outlet reported, noting that the family that owns the lot would like to have three homes built on the parcel thereby requiring a three-lot subdivision. One town official was quoted as saying the parcel is good spot for a family compound, but that zoning may be the family's biggest obstacle to moving forward with their plans.

Source: *valleybreeze.com*

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Zoning Bulletin

in this issue:

Zoning Code Amendments

State's highest court denies request for ballot referendum concerning Liberty Township's zoning decision

Citation: *State ex rel. Donaldson v. Delaware County Board of Elections, 2021-Ohio-2943, 2021 WL 3821901 (Ohio 2021)*

A resident of Liberty township wanted to place a referendum on the November 2021 ballot asking voters to approve or disapprove an amendment to the Liberty Township Zoning Resolution. The Delaware County Board of Elections (DCBOE) sustained a protest to the referendum petition because the petition did not include an adequate summary of the zoning amendment as required under the applicable code.

THE ZONING AMENDMENT AT ISSUE

The zoning amendment in question would have allowed a planned development on 17 parcels of land, totaling approximately 190 acres, in Liberty Township on parcels currently zoned as either planned-residence or farm-residence districts.

Owners of those 17 parcels wanted to establish a "planned overlay district" known as "POD 18(D)" and to amend the township's zoning resolution accordingly. The affected property would be rezoned for a planned-unit development.

Between October 2020 and January 2021, the Liberty Township Zoning Commission considered the proposed amendment and held at least two public hearings on the proposal. On January 27, 2021, the zoning commission adopted a resolution recommending that the proposed amendment be denied.

The township subsequently held public hearings in February and March 2021 to consider the proposed zoning amendment. At that point, the proposed zoning amendment was amended in response to some residents' concerns and submitted the modified version to the township on March 12, 2021. The modifications created five subareas with varying permitted uses in the proposed POD 18(D). The four largest subareas would be rezoned for residential and/or certain commercial uses, and the fifth subarea would be rezoned to permit hospital or certain healthcare use.

The township approved the revised version of the zoning amendment. Then, the residents circulated a petition to subject the POD 18(D) zoning amendment to a referendum in the November 2021 election.

After the DCBOE initially approved the referendum, a protest hearing took place at which residents argued the board didn't have jurisdiction over the protest because the zoning amendment at issue was not properly initiated under the state

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code and was therefore void. The DCBOE denied the request and following testimony and the submission of evidence, voted to sustain the protest and decertify the petition from the November ballot.

THE LAWSUIT

The residents launched a lawsuit to compel a writ of mandamus ordering the DCBOE to place the referendum petition on the November ballot.

DECISION: Request for writ of mandamus denied.

The DCBOE didn't "abuse its discretion or disregard clearly applicable law in sustaining the protest."

To obtain the writ, the residents had to show by "clear and convincing evidence":

- "a clear legal right to the requested relief";
- "a clear legal duty on the part of the respondent to provide it"; and
- "the lack of an adequate remedy in the ordinary course of the law."

"Given the proximity of the November election, [the residents] Donaldson lack[ed] an adequate remedy in the ordinary course of the law," the court found. "As to the remaining elements, [they had to] show that the [DCBOE] engaged in fraud or corruption, abused its discretion, or clearly disregarded applicable law in invalidating the referendum petition."

But, the residents didn't "claim fraud or corruption on the part of the [DCBOE]; therefore, the relevant inquiry [wa]s whether the board abused its discretion or clearly disregarded applicable law," the court explained.

"Given the proximity of the November election, [the residents] Donaldson lack[ed] an adequate remedy in the ordinary course of the law," the court found.

THE BOTTOM LINE

"[A]lleged defects in a township's enactment of a zoning amendment [we]re not a proper basis for granting mandamus relief against a board of elections that ha[d] sustained a protest to a referendum petition," the court ruled. "While a board of elections' authority to determine the validity of a referendum petition may include the power to determine whether a ballot measure is a proper subject of a referendum, boards do not sit as arbiters of the legality of the underlying local legislation that is the subject of the referendum," it added.

A CLOSER LOOK

The proposed revision would "create the planned overlay district as a planned unit development under Ohio [code] and which would include sections detailing: the purpose and establishment of the overlay; requirements for the overlay, including development tract sizes, permitted uses, open space, and prohibited uses; establishment of a review process and procedure; process for modification or extension of development plan; basis of approval; an approval period; process for modification or extension of development plan; provisions for design standards and minimum development standards including, but not limited to, access, setbacks, yard areas, signage, landscaping, parking, loading, and open space; and provisions for divergences from minimum development standards." It also would add the POD 18D as a zoning district in the Zoning Resolution and revising the Zoning Map to designate the POD 18D area.

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Taking

Landowners squabble over plan approval requiring public to traverse their private roads to get to and from park entrance

Citation: *Golf Village North, LLC v. City of Powell, Ohio, 2021 WL 4314621 (6th Cir. 2021)*

The Sixth U.S. Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

Landowners asked for injunctive relief against the City of Powell, Ohio, its zoning administrator, and their agents (collectively, the defendants). They claimed the defendants entered and used their property to access the city's park without authorization. They asserted claims for trespass and claimed their procedural due process rights had been violated, along with their Fourth Amendment right under the Constitution to be free from unreasonable seizure.

The lower court granted in part the landowners' request for preliminary injunction. Then, the landowners filed an amended complaint, within which they asserted takings and additional procedural due process claims, as well as a trespass claim under state law.

The lower court granted the defendants' request to dismiss the amended complaint for failure to state a claim. The landowners appealed.

DECISION: Affirmed.

The temporary invasion of the landowners' property to build the park entrance wasn't a taking.

A CLOSER LOOK AT THE FACTS

Golf Village claimed the city took its property without just compensation or due process by building an entrance to a new municipal park on its private street system and refusing to appropriate certain private streets that the city intended the public to use to access the park.

The plaintiffs claimed the city also converted the private streets into public roads and that the resulting vast amounts of traffic would make it impossible for them to limit use of their still-private streets and cause wear-and-tear damage to the roads. Golf Village claimed the defendants actions diminished its right to exclude and its right to use and enjoy its property.

The area at the center of the controversy concerned "Subarea G," the portion of the Golf Village Community—a commercial development divided into 11 separate parcels, one of which Golf Village directly owned.

In a December 2003 document entitled "Supplemental Declaration of Private Roads, Related Maintenance Obligations, and Common Area Maintenance Obligations," the company that constructed the roads noted in a "supplemental declaration" that it would be "beneficial for the prospective owners of all [11] parcels to be able to have use of the private roads." This declaration also stated the construction company "declare[d] that each owner of the [11] parcels . . ., and the employees, customers, and invitees of any of the businesses to be located on any of the parcels" had "a non-exclusive permanent easement to use said private roads for pedestrian and automotive ingress and egress to and from Sawmill Parkway."

While the construction company constructed the roads, "[t]he maintenance (including snow removal), repair and replacement of the private roads" would be the "sole obligation and expense of the owners of the parcels" including Golf Village.

In September 2004, the city approved a final plat for the commercial development. The plat stated the private roads would remain a private responsibility, but it also stated a lot would be dedicated to the city at a later time to be used as a park.

In May 2010, the construction company transferred that lot—approximately 23 acres of property—to the city for a municipal park.

The city approved "The Park at Seldom Seen" construction plan. The plan showed the plaintiffs' private roads—Market, Moreland, and Sheridan Streets. It also showed the entrance to the park as being located slightly to the east of the intersection between Moreland and Sheridan Streets and the city's construction plans stated that "[a]pproval of these plans is contingent upon the city securing an access easement to the park from Seldom Road . . . along Sheridan Street from the property owner."

The city also contacted Golf Village to obtain an ingress/egress easement from Seldom Seen Road over Sheridan Street. Golf Village refused, and despite the fact that the plan had been approved by the development securing an easement along Sheridan Road, the city finalized the park construction plan without the easement in February 2018.

In March 2018, the city told the construction contractor that "[t]he City of Powell has made arrangements for access . . . from Sheridan Street." By April 2018, the city began using Market, Moreland, and Sheridan Streets without Golf Village's permission, physically removed a concrete curb on the east side of Sheridan Street and built a large construction entrance.

BACK TO THE COURT'S RULING

The plaintiffs did not allege in their complaint "either direct or inferential allegations respecting all material elements to sustain a recovery under some viable legal theory." In other words, "Golf Village failed to plead factual content that the [c]ity appropriated a right of access for the public to Market and Moreland Streets," the court concluded.

There was "no dispute that a property owner's right to exclude [wa]s 'one of the most essential sticks in the bundle of rights that are commonly characterized as property,' " the court explained. But, under a recent ruling by the U.S. Supreme Court—in *Cedar Point Nursery v. Hassid*-Golf Village had to "allege that the [c]ity authorized and licensed the public's use of Market and Moreland Streets and deprived it of its right to exclude in order to plead a taking."

Cedar Point Nursery involved a challenge to a regula-

tion granting labor organizations a "right to take access" to the premises of an agricultural employer to solicit support for unionization. "The Court concluded that the access regulation at issue in that case did constitute a taking, and its analysis demonstrates why Golf Village has not adequately alleged that it was deprived of its right to exclude in this case," the court noted.

THE BOTTOM LINE

In *Cedar Point Nursery*, when a physical takings claim was based on the right to exclude, "[t]he access regulation appropriate[d] a right to invade the growers' property and therefore constitute[d] a *per se* physical taking. The regulation gran[ed] union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriate[d] for the enjoyment of third parties the owners' right to exclude."

The bottom line in Cedar Point Nursery: when a physical takings claim was based on the right to exclude, "[t]he access regulation appropriate[d] a right to invade the growers' property and therefore constitute[d] a per se physical taking."

Also, in that case, the Court found that "a taking requires that the government 'appropriates a right' for itself or a third party." There, the Court found "the California 'take access' regulation [at issue] constituted a physical *per se* taking," the court here noted.

Based on the Court's analysis, "Golf Village has failed to state a takings claim based on the right to exclude," the court concluded. " '[T]he government here has [not] appropriated a right of access' to the still-private portions of Market and Moreland Streets. Golf Village does not allege that members of the public have 'a right to physically invade' its property. Instead, Golf Village's only relevant allegation in the amended complaint is that '[t]he [c]ity's appropriation will leave Plaintiffs without the means to limit use of Moreland and Market Streets while simultaneously causing damage—ultimately placing a great financial burden on them.' "

Practically Speaking:

The plaintiffs failed to "allege that they [we]re no longer able to exclude the public from accessing the property or how [the d]efendants' construction of the park diminishe[d] that right." Golf Village still had "the right to exclude individuals from [its] property by erecting barriers or otherwise enforcing [its] property rights." And since the city didn't require Golf Village to permit members of the public on Market and Moreland Streets, there wasn't any "government-authorized physical invasion . . . requiring just compensation."

The case cited is *Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 210 L. Ed. 2d 369, 2021 L.R.R.M. (BNA) 234010 (2021).*

Conditional Use Permit

Property owners claim they were denied the right to operate a wedding facility out of a barn, but did they exhaust their remedies before heading to court?

Citation: *Willan v. County, 2021 WL 4269922 (7th Cir. 2021)*

The Seventh U.S. Circuit has jurisdiction over Illinois, Indiana, and Wisconsin.

Thomas and Julia Willan ran a small business out of their barn for nearly a decade. That is until Dane County, Wisconsin decided to rezone the property for residential use.

The Willans filed suit against the county and its officials (collectively, the defendants) claiming they infringed on their constitutional rights under the Takings, Due Process, and Equal Protection Clauses of the Constitution.

The lower court entered judgment on the pleadings for the defendants, ruling that the claims were not ripe for review since the Willans hadn't requested a conditional-use permit to operate a business in their barn. The Willans appealed.

DECISION: Affirmed.

The Willans' lawsuit was premature.

WILLAN'S TRY TO BYPASS CONDITIONAL USE PERMITTING PROCESS

The Willans had bought the land in question in 2011, which included a house and a dairy barn in the Town of Cottage Grove, in Dane County, Wisconsin. They spent more than $75,000 restoring the barn into a space for their small business and sold and contracted to build barns and other agricultural buildings around the Midwest.

Willans ran their business over the next eight years, but the business declined, and the Willan's considered renting out the barn to host group gatherings, such as weddings.

In 2019, the Dane County Board of Supervisors revised a rezoning ordinance that effectively confined the Willans to using their property for residential purposes. Then, the Town of Cottage Grove adopted the ordinance.

The Willans objected to the new zoning ordinance. They emailed members of Dane County's Planning and Development Department (PDD) to ask that their property be classified in a business zone, since they wanted to "start renting [their] barn out for private events."

When the Willans didn't hear back from anyone, they told the PPD they wanted to obtain permits to make repairs on the barn. The county's zoning administrator responded that Willans' property was zoned as residential and that

they would need a conditional-use permit to rent the barn for events; he also specified how they could apply for the permit.

Rather than pursuing a conditional use permit, the Willans asked for a construction permit to improve the barn. They explained that their first wedding was booked for a date that was fast approaching and that they needed to get ready for it.

The zoning administrator reiterated that the property was in a residential zone and the Willans needed a conditional-use permit to use their barn as an events venue. He referred the Willans to his previous letter for directions on how to obtain a permit.

The zoning administrator and the PDD director then denied the construction permit request. They explained in their respective letters to the Willans that they understood the proposed renovations were part of a plan to rent the barn for events, and the Willans had yet to obtain permission to do so. They also told the Willans how to appeal that decision to the County Board of Adjustment, but the Willans didn't appeal.

The Willans wrote back to the PDD director, clarifying that they sought a construction permit to make general repairs to the barn. Several officials from the PDD then met with the Willans to discuss the matter and ultimately rejected their request to be in a business zone and denied them a permit to repair the barn.

BACK TO THE COURT'S RULING

The lower court correctly found the Willans' claims weren't ripe for review since "the [c]ounty had not reached a final decision on how the zoning regulation would be applied to the Willans' barn." The allegations the Willans' made didn't "suggest that they took any of the directed steps to obtain a zoning variance or a conditional-use permit, or that anyone at the [c]ounty ever reached a final decision on whether a variance or permit would be approved if properly sought."

"The only permit the Willans allege to have sought was one to make repairs on their barn, but [c]ounty officials denied that request—informing the Willans that they needed a conditional-use permit to run a business out of their barn," the court added. The Willans didn't "allege taking any steps toward obtaining that permit." "Because 'avenues still remain[ed] for [Dane County] to clarify or change its decision,' the Willans' challenges to the ordinance [we]re premature."

Practically Speaking:

The Willans didn't allege anything to "suggest that they took any of the directed steps to obtain a zoning variance or a conditional-use permit."

Permits

Sidewalk protesters never applied for permit and never let up for years at Ann Arbor synagogue, but were the congregants' constitutional rights violated due to city's inaction?

Citation: *Gerber v. Herskovitz, 2021 WL 4187844 (6th Cir. 2021)*

The Sixth U.S. Circuit has jurisdiction over Kentucky, Michigan, Ohio, and Tennessee.

Anti-Israel protesters began picketing services at the Beth Israel Synagogue (BIS) in Ann Arbor, Michigan in 2003. Every week for a total of 935 weeks, they did this.

The members of the BIS congregation filed suit against the protesters and the city of Ann Arbor.

The lower court granted the defendants' request for dismissal for lack of standing. The congregants appealed.

DECISION: Affirmed.

The congregants had standing to bring their lawsuit, but the First Amendment's "robust protections" afforded nonviolent protesters the right to protest on matters of public concern.

DID THE PROTESTERS HAVE A PERMIT?

No, the court explained. They never applied or obtained a permit to engage their activities. City officials asserted that, despite this, there wasn't anything they could do to curtail their conduct due to the protections afforded under the First Amendment.

Regarding standing, the congregants had to allege an injury in fact, that was traceable to the defendants' conduct and that the courts could redress. "The standing inquiry is not a merits inquiry. A merits defect deprives a court of subject matter jurisdiction only if the claim is utterly frivolous," the court explained.

Here, the congregants "readily satisfy[ied] the second and third prongs of the standing inquiry. As to traceability, a defendant's actions must have a 'causal connection' to the[ir] injury" the congregants met that burden: They "alleged that the protesters' conduct and their conspiracy with city employees not to enforce the city's ordinances foreseeably caused members of the congregation extreme emotional distress. That creates the requisite causal link."

"As to redressability, it must be 'likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision,' " the court noted. And if the lower court awarded damages or enjoined the protests from happening, such relief would redress the alleged injuries.

Did the alleged injuries cause the congregants extreme emotional distress? That was a key question central to the court's analysis as well for establishing "a cognizable injury in fact." The court found the protests affected the congregants in a "personal and individual way," the court explained.

THE BOTTOM LINE

"The congregants' allegations in the end come comfortably within the scope of this traditional harm. They have alleged that the protesters' relentless and targeted picketing of their services has caused them extreme emotional distress. Permitting the federal courts to handle injuries of this sort parallels causes of action permitted in other areas."

But that wasn't the end of the court's analysis. The defendants were still entitled to dismissal, the Sixth Circuit found because the sidewalk protests in this case were legally permissible. "Sidewalks are traditional public fora, meaning they 'occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate,' " the court explained.

Speech on matters of public concern was entitled to special protection under the Constitution, and "[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt," the court wrote. In examining the "content and form" of the protests, the court concluded they "concern[ed] public matters: American-Israeli relations."

Speech on matters of public concern was entitled to special protection under the Constitution, and "[s]uch speech cannot be restricted simply because it is upsetting or arouses contempt," the court wrote.

In the end, the court rejected the congregants' argument that the First Amendment protections did not apply. They contended this was a novel case because of the protests' proximity to a house of worship, their location in a residential area, the congregants were a captive audience, the protests happened every week for several years, and the congregants' children were exposed to the protesters' signs. "[E]ach of these factors is old hat under the First Amendment," the court noted.

Case Note:

At one point, an attorney contacted city employees, stating that the protesters had violated municipal code provisions concerning the placement of objects in public thoroughfares. But, those communications didn't "go anywhere," the court explained, in reciting the facts of this case.

Signs

Billboard company claims zoning department violated its rights in denying permit

Citation: *Outdoor One Communications, LLC v. Charter Township of Genoa, Michigan, 2021 WL 4480165 (E.D. Mich. 2021)*

Genoa Township, Michigan denied Outdoor One Communications LLC's (OON) request to put up a sign after concluding it didn't comply with its sign ordinance's size requirements.

OON challenged the ordinance on constitutional grounds, claiming it constituted the township's unconstitutional regulation of content-based speech.

The township asked the court to dismiss on the basis that OON didn't have standing to bring the lawsuit and that the complaint didn't state a claim on which relief could be granted.

DECISION: Request for dismissal granted in part.

OON's claims weren't moot, but it lacked standing to challenge the allegedly content-based provisions of the sign ordinance that did not cause it injury.

The township contended the claims had to be dismissed because the proposed sign had been rejected for violating content-neutral restrictions on sign height and size. In its view, even if the court concluded the challenged provisions were unconstitutional as content-based restrictions, OON still would have been barred from putting up its sign because it violated the size restrictions—which did not discriminate based on content.

OON hadn't "identif[ied] any injury flowing from the allegedly unconstitutional content-based restrictions," the court concluded. While it alerted the township that it wanted to erect an off-premises sign—after its permit request had already been refused—the township denied OON a permit " '[r]egardless' of whether the sign would have displayed on or off-premises content." The zoning official said it wouldn't be approved because of its "height, size and [because] it exceed[ed] the number of monument signs allowed." So, OON's "injury [wa]s traceable only to the provisions Genoa cited in denying it a permit."

Further, the court wasn't persuaded that OON had alleged an injury from any other allegedly content-based restrictions. OON claimed it allowed customers to display noncommercial, political, and religious messages on its signs and that the township prohibited or disfavored such content. But OON's "application d[id] not indicate, nor [did it] allege, that this sign would display any such message or any other type of content that the [t]ownship allegedly ban[ned] or disfavor[ed." Therefore, OON couldn't "plausibly dispute" that it was denied a permit "because the sign did not meet height, area, and numerosity provisions." The township had "noted the sign was prohibited for those reasons regardless of the content the sign displayed," and OON didn't suffer "an injury under any other provision because it sometimes or may have displayed content the [t]ownship generally prohibit[ed] or disfavor[ed]."

A CLOSER LOOK

OON, a billboard-advertising company, made its money by building and maintaining billboards on properties it leased. It would charge clients to display messages on the

signs it erected. But it ran into a snag when the township enforced its signage law, which was found in the local zoning ordinance and regulated the size, placement, and quantity of signs that may be erected within its borders.

Under the applicable ordinance, OON had to obtain a permit before erecting the sign. There were instances when a permit for a sign was not required, but even permit-exempt signs, were subject to all other provisions of the ordinance, including specified height, area, and numerosity limits.

Here, ordinance prohibited "monument signs" larger than six feet tall and 60 total square feet, and any monument signs that exceeded the limit of only one per lot in an "industrial district." The ordinance also "categorically prohibited certain kinds of signs, including any 'off-premises' signs, that is, signs unrelated to the lot they occupied."

OON applied for a permit to erect a sign in an industrial district that would stand 14 feet tall and measure 672 square feet. The proposed sign exceeded the six-foot height and 60 square-foot area size limitation and violated the restriction on more than one monument sign per lot in an industrial district.

A zoning official, therefore, told OON that the township couldn't grant its permit application because of the proposed sign's height and area and because it would be the second monument sign on the property.

Then, OON clarified on its permit application that it was applying for an "off-premises sign." The zoning official responded that while the sign ordinance prohibited off-premises signs, regardless of whether OON had proposed an on-premises or off-premises sign, she could not approve the application because the proposed sign exceeded height, area, and numerosity limitations.

Around this time, the township considered making changes to its sign ordinance. It was concerned that the bar against off-premises signs might not conform with the U.S. Supreme Court's 2015 ruling in *Reed v. Town of Gilbert*, where the Court found that any content-based speech regulation was presumptively unconstitutional.

The township's planning commission then considered amendments to the ordinance, but discussions to finalize the amendments were tabled. OON filed its lawsuit in 2020, before the last set of amendments had been proposed or enacted. Its complaint challenged the sign ordinance's constitutional on the grounds that it was a content-based speech regulation, which could not survive "strict scrutiny," it constituted "an unconstitutional prior restraint," and was a "an unconstitutionally vague restriction on First Amendment rights."

The case cited is *Reed v. Town of Gilbert, Ariz., 576 U.S. 155, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015).*

Zoning News From Around The Nation

California

Gov. Newsom signs 'historic' legislation addressing housing supply in the Golden State

Gov. Gavin Newsom has signed into law bipartisan legislation that will expand housing production, streamline housing permitting, and increase density for more inclusive neighborhoods statewide, his office stated in a press release.

"The suite of bills also will help address the interrelated problems of climate change and housing affordability by promoting denser housing closer to major employment hubs-a critical element in limiting California's greenhouse gas emissions," the press release noted.

Dubbed the "California Comeback Plan," this legislation leads the way to the development of more than 84,000 new housing units in the state. In addition, $1.75 billion in affordable housing funding will be allocated for the new California Housing Accelerator.

Specifically:

- SB 8 extends the Housing Crisis Act of 2919 to green light more housing production;
- SB 9 will provide homeowners with adding ways to and new housing—"the HOME Act will allow homeowners to build a duplex or split their current residential lot to expand housing options for people of all incomes that will create more opportunities for homeowners to add units on their existing properties," his office stated, adding that the law is designed to "prevent the displacement of existing renters and protect historic districts, fire-prone areas and environmental quality"; and
- SB 10 overhauls zoning with a multi-unit housing authorization by "creat[ing] a voluntary process for local governments to access a streamlined zoning process for new multi-unit housing near transit or in urban infill areas, with up to 10 units per parcel" and "simpli[fying] . . . requirements for upzoning, giving local leaders another tool to voluntarily increase density and provide affordable rental opportunities to more Californians."

"California's severe housing shortage is badly damaging our state, and we need many approaches to tackle it," said Sen. Scott Wiener (D-San Francisco). "SB 10 provides one important approach: making it dramatically easier and faster for cities to zone for more housing. It shouldn't take five or 10 years for cities to re-zone, and SB 10 gives cities a powerful new tool to get the job done quickly," Wiener said.

The laws take effect in January 2022.

Source: gov.ca.gov

Connecticut

Drive-through zoning ordinance gets an update in West Hartford

The Town of West Hartford unanimously approved a

change to the zoning code that will allow for drive throughs at restaurants in its business districts, the *West Hartford News* reported recently. The change came after the town council's Community Planning & Development Committee proposed the change for the "BG" (general business district) zone, which excludes West Hartford's Center or Blue Back Square, the news outlet reported.

A city official told the news outlet the ordinance accounts for concerns over the impact the change could have on residences. Specifically, it requires a residential setback and only permits operation of the drive throughs for limited hours. Also, there are landscaping requirements in place.

As a result of the COVID-19 pandemic, local restaurants had to devise creative ways to serve their customers, which, in many cases, meant shifting to curbside pick-up. The city official said this underscores the need to do more in way of researching how new business models of fast casual dining can be addressed.

Source: *we-ha.com*

Colorado

Will zoning change in Denver lead to a new residential high rise?

A Denver-based development firm would like to build a 3-story residential tower now that a city zoning code change has gone into effect, the *Denver Post* reported recently. The proposed site, located on North Acoma Street, would house 275 apartment-rental units, the news outlet noted.

The development proposal came after a zoning-code change allowing for taller buildings in the city's "Golden Triangle," it added.

The zoning code now permits "point towers" at a maximum height of 325-feet to ensure neighborhood diversification, which was currently residential, the news outlet reported. The idea is to increase the number of income-restricted housing units, too.

Source: *denverpost.com*

Massachusetts

After Carver's ZBA revokes permit, solar company files appeal

Smart TPD 1 LLC (Smart TPD), which is part of Valta Solar, is appealing the Carver Zoning Board of Appeals' (ZBA) decision to revoke a permit to develop a solar project on land of a local cranberry bog owner, *Wicked Local* reported recently.

The news outlet reported the bog owner didn't initially think the solar project would transition away from the original plan Smart TPD had submitted to Carver's planning board but that Smart TPD deviated in how it built the solar array. While he asked the zoning board to do a site visit, the ZBA revoked the permit.

The news outlet reported an attorney contended the planning board's original vote should have stood, and revoking the special permit based on duly approved plans constitutes an unreasonable regulation on solar.

A hearing was set for the end of October 2021.

Source: *wickedlocal.com*

New Jersey

Age-restricted housing will be permitted in Paramus thanks to zoning code change

The Paramus New Jersey Council has approved a redevelopment zone change that will give the green light to assisted-living and age-restricted housing projects at the city's Joy's Farm & Garden Center, *northjersey.com* reported recently.

The news outlet reported the mayor had previously said the owner of the property, located on Paramus' Pascack Road requested a zoning change to allow for greater density regarding the development.

The proposed project proposal now heads to the planning board for consideration.

Source: *northjersey.com*

Washington

Seattle City Council passes resolution to do away with the label of 'single family zoning'

In October, the Seattle City Council passed legislation to make the city "more inclusive," said Councilmember Teresa Mosqueda (Position 8, Citywide). "Today, we recognize neighborhoods across our city are home to diverse housing built before increasingly restrictive zoning went into place. This includes small businesses, parks, schools, and services, as well as diverse households that expand beyond the *'single-family'* designation-that was a misnomer," Mosqueda said.

Councilmember Dan Strauss (District 6, Northwest Seattle) said changing the name of single-family zones to "Neighborhood Residential Zones . . . more accurately identifies existing zoning, as some of the most vibrant places in 'single family' zones have legacy duplexes, triplexes, and corner-stores, all of which are not currently allowed. This proposal is in response to the Seattle Planning Commission's Neighborhoods for All report which recommended this name change. This legislation does not change zoning, it only changes the name that we call these areas."

The legislation's effective date is November 13, 2021.

Sources: *mynorthwest.com*; *seattle.legistar.com*; *council.seattle.gov*

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Zoning Bulletin

in this issue:

Zoning Changes

Development company claims city should have granted request to rezone to allow for light manufacturing/ warehouse

Citation: *Schnitzer West, LLC v. City of Puyallup, 2021 WL 4739224 (Wash. Ct. App. Div. 2 2021)*

Schnitzer West LLC (SW) appealed a lower court's decision to grant the City of Puyallup, Washington judgment without a trial alleging tortious interference and an equal protection violation concerning the city council's passage of Ordinance 3067 in 2014, which applied a zoning overlay only to property that SW had contracted to purchase.

DECISION: Affirmed.

A legislative immunity doctrine precluded SW's tortious interference claim and under a three-year statute of limitations, the equal protection claim was barred.

A CLOSER LOOK

In 2009, the city created the Shaw-East Pioneer Overlay Zone (SPO Zone). At the time, the property that SW had contracted to buy was outside the city's boundaries.

The city annexed the property in 2012, which was zoned for industrial and business park uses, and it did not extend the SPO to the property at that time.

In 2013, SW contracted to purchase the property with plans to develop it. It submitted a comprehensive plan amendment and rezone request to the city to change the zoning to a light manufacturing/warehouse zone (ML). The city council approved the rezone, and the new zoning designation allowed construction of a warehouse on the property.

But, in 2014, the city council adopted a 120-day emergency development moratorium that applied to the area annexed in 2012, including the property. Before its enactment, SW had submitted a short plat application to construct a 470,000 square foot warehouse on the property. The application vested the proposed project under existing land-use regulations.

Several city council members then drafted the ordinance, which extended the SPO zone to the property. The ordinance, enacted in May 2014, amended certain sections of the Puyallup Municipal Code, added new sections to the code, and amended the city's zoning map.

The ordinance created and applied a new overlay zone for limited manufacturing uses, but the overlay zone only applied to the property—it didn't apply to sur-

rounding properties even though those properties had similar characteristics and zoning. And SW was significantly restricted in how it could develop the property due a limitation on the size of buildings constructed on the property to 125,000 square feet.

SW challenged the ordinance under the Land Use Petition Act (LUPA). The court found the ordinance constituted an unlawful site-specific rezone and, therefore, was invalid as a matter of law.

Following that ruling, SW bought the property for more than $1.5 million.

The city appealed the court's decision to invalidate the ordinance to the Court of Appeals of Washington. The city then superseded the court's judgment, so the ordinance stayed in effect.

The appeals court acknowledged that a site-specific rezone was a land use decision subject to LUPA review. But it explained that one requirement of a site-specific rezone was an application by a specific party. Then it found the ordinance was not a site-specific rezone because it did not result from an application by a specific party—instead the city council had initiated it, so it wasn't a land use decision subject to review under LUPA.

On those grounds, the appeals court reversed and sent the case back for the lower court to dismiss SW's LUPA petition.

While the appeal was pending, SW sold the property to Viking JV LLC dba Running Bear Development Partners LLC (Viking) for $9.25 million. Viking built a large warehouse on the property, which the city approved without regard to the ordinance and relying on the short plat application SW had filed before the ordinance was enacted.

SW appealed the court's decision dismissing the LUPA petition to the Washington Supreme Court. The court ruled the city could be a specific requesting party, and therefore the ordinance was a site-specific rezone and subject to LUPA review. In addition, the court found that the ordinance was not a legislative approval subject to the LUPA exclusion—the LUPA exclusion was for "applications for legislative approvals such as area-wide rezones and annexations." Then, the high court sent the case back to the appeals court to address the merits of the city's appeal of the lower court's decision under LUPA.

BACK TO THE COURT'S RULING

SW's equal protection claim had accrued in May 2014. That was when the city council had enacted the ordinance.

SW's "LUPA appeal did not toll the statute of limitations, and the continuing violation theory is inapplicable," the court found. Since SW filed the equal protection claim in April 2020, this was "long after the statute of limitations had expired," so the statute of limitations barred that claim.

SW claimed that while the adoption of the ordinance may have appeared to be legislative, the "legislative immunity doctrine" didn't apply because:

1) in the LUPA action, the state's highest court had ruled the ordinance wasn't a legislative action;
2) the city council didn't have the authority to enact the ordinance; and
3) the character and effect of the ordinance was quasi-judicial, not legislative and under the Puyallup Municipal Code, the rezone *should have been* handled by the hearings examiner in a quasi-judicial proceeding.

The court rejected SW's arguments, noting that it had "misinterpret[ed] the [high] court's ruling. The court's opinion did contain the heading 'Ordinance 3067 is not a legislative action.' " The court had ruled "only that the [o]rdinance was not the type of legislative action that was *excluded by LUPA*." It hadn't addressed "whether enacting the Ordinance was a legislative action for purposes of legislative immunity."

Also, previous case law had indicated that "whether the

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city council 'had legal authority to pass the ordinances ha[d] no effect on the government's immunity for passing the laws.' "

Previous case law had indicated that "whether the city council 'had legal authority to pass the ordinances ha[d] no effect on the government's immunity for passing the laws.' "

And, SW's contention didn't "mean that the city council's unlawful attempt to handle the matter legislatively somehow was a quasi-judicial action."

THE BOTTOM LINE

"The city council's enactment of the [o]rdinance was a legislative act. We hold that the doctrine of legislative immunity precludes [the] tortious interference claim," the appeals court wrote.

Case Note:

SW claimed the lower court erred in granting the city judgment because it had presented sufficient evidence to create genuine issues of material fact concerning its tortious interference and equal protection claims.

Residential Zoning

Request to build four-story multifamily building the subject of legal controversy in California's San Mateo

Citation: *California Renters Legal Advocacy and Education Fund v. City of San Mateo, 68 Cal. App. 5th 820, 283 Cal. Rptr. 3d 877 (1st Dist. 2021)*

Tony Gundogdu submitted an application to build a four-story, 10-unit multifamily residential building in San Mateo in 2015. The plan was for the building to stretch the length of a block on North El Camino Real, bounded by El Camino Real on the east, West Santa Inez Avenue at the south, and Engle Road at the north.

West Santa Inez Avenue and Engle Road were both in residential neighborhoods of single-family houses. A two-story house on West Santa Inez Avenue and a single-story house on Engle Road were immediately to the west of the project, which was designated in the city's general plan—and zoned—for high-density multifamily dwellings, "R4" zoning.

The city planning commission's (PC) staff reviewed Gundogdu's application and concluded it was consistent with the city's general plan and its Multi-Family Design Guidelines (MFD guidelines).

The PC staff recommended the planning commission should approve the project, and they reported that "[v]ariations in the roof forms help to create a transition" between the building and the single-family homes to the north and west, and that "[p]roposed landscaping helps to soften the structure and provide buffers to the adjacent single-family residences." The staff also recommended adding trellises to facades "to create more articulation and add horizontal elements," thus "reduc[ing] the appearance of height."

At a hearing to discuss the application, several residents opposed the project. They argued it was out of scale with the adjacent single-family residential area. The PC continued the hearing, and before the next hearing, the PC staff again recommended approval, subject to revised conditions.

At that point, the PC staff again proposed the PC should find the project was "in scale and harmonious with the character of the neighborhood" and "me[t] all applicable standards," including that it complied with the MFD guidelines.

In September 2017, the planning commissioners expressed concern that the proposed building was out of scale with the houses in the neighborhood, and the PC voted to disapprove the project, directing PC staff to prepare findings for denial.

The PC staff proposed findings that the project was "not in scale and . . . not harmonious with the character of the neighborhood" and that the building was "too tall," "too large and bulky for the subject site due to [its] four-story height," and "not in keeping with the smaller one and two story dwellings in the area."

The PC staff's proposed findings noted that on the Engle Road side there was a two-story differential between the project and adjacent single-family dwellings (ignoring the fourth story, which was stepped back). Thus, "[t]he project [wa]s not in substantial compliance with" the MFD guidelines' limitations on building scale, which directed that if there was more than a one-story variation in height between adjacent buildings, "a transition or step in height [wa]s necessary," including that a project should "step back upper floors to ease the transition."

The PC adopted those proposed findings and denied the project without prejudice. The city council upheld that decision and denied the application without prejudice.

The California Renters Legal Advocacy and Education Fund and other parties filed an appeal on the ground that the denial violated the Housing Accountability Act (HAA). The lower court denied their petition, finding the project did not satisfy the city's design guidelines for multifamily homes and that, to the extent the HAA required the city to ignore its own guidelines, it was an unconstitutional infringement on the city's right to home rule and an unconstitutional delegation of municipal powers.

That decision then went up for appeal.

DECISION: Reversed.

"The design guideline the [c]ity invoked as part of its reason for rejecting this housing development [wa]s not 'objective' for purposes of the HAA"; therefore, it couldn't "support the [c]ity's decision to reject the project."

Also, since the HAA "check[ed] municipal authority only as necessary to further the statewide interest in new housing development, the HAA d[id] not infringe on the [c]ity's right to home rule."

A CLOSER LOOK

The court noted the parties hadn't made any "showing that [California's] insufficient supply of housing derive[d] substantially from bad faith actions by cities and counties." It refused to "presume that municipalities routinely proceed[ed] in bad faith when they appl[ied] their development laws and standards."

THE BOTTOM LINE

"Individual jurisdictions [could] make decisions in good faith that nevertheless contribute[d] to the collective shortfall in housing," the court found. "It [wa]s to this collective action problem that the HAA [wa]s addressed, and it [wa]s because the Legislature concluded that earlier versions of the statute were not having a sufficient impact that it amended the statute repeatedly." Finally, "[g]iven the extent and intractability of the housing shortfall, we see nothing improper in the Legislature addressing it on a statewide basis, without limiting the statute to local agencies that act in bad faith. We reject the trial court's proposed limitation."

Special Permit

Plan to change number of parking spaces in self-park garage at new hotel leads to lawsuit

Citation: *Murrow v. Zoning Board of Appeals of Somerville, 100 Mass. App. Ct. 1109, 2021 WL 4561380 (2021)*

The Zoning Board of Appeals (ZBA) for Somerville, Massachusetts granted a special permit to YEM Somerville Ave. LLC (YEM) to build a hotel. Its original proposal, which the ZBA approved, included 80 parking spaces in a self-park garage.

But in 2019, to reduce costs, YEM sought to replace the 80 parking spaces with 58 (smaller) self-park spaces and add valet service for an additional 22 spaces, which the ZBA approved.

An abutter, Claudia Murrow, challenged this ZBA 2019 decision by filing a complaint in land court. YEM then elected to abandon its rights under the 2019 decision and constructed the hotel and parking garage in accordance with the ZBA's initial decision.

YEM asked the land court for judgment and asked for the ZBA's 2019 decision to be annulled. The judge found the initial ZBA decision was not before the court and entered judgment sending the matter back to the ZBA so that it could consider the effect of YEM's election.

The ZBA then annulled its 2019 decision, and Murrow appealed the land court's judgment.

DECISION: Affirmed.

The 2019 decision was no longer in effect given YEM's election to abandon its rights under that decision.

"Murrow had the right to challenge the 2019 decision within [20] days of it being filed in the office of the city clerk," the court explained. "Murrow did so through the complaint she filed in the [l]and [c]ourt," it added. But after Murrow filed the complaint, "YEM abandoned its rights under the 2019 decision and elected instead to proceed in accordance with the 2018 decision. Because YEM irrevocably abandoned its rights under the 2019 decision, an abandonment that was 'binding upon [YEM's] successors and assigns," so "the 2019 decision no longer was of any effect," the court explained.

Murrow's lawsuit became moot when she received the relief sought in her complaint.

Murrow's lawsuit became moot when she received the relief sought in her complaint. Her suit was aimed at "prevent[ing] YEM, or any successor or assignee, from building a parking garage in accordance with the specifications of the 2019 decision" and since YEM backed off that proposal in favor of the originally approved ZBA decision, "her suit challenging the 2019 decision became moot."

A CLOSER LOOK

Murrow argued:

- YEM had failed to meet its burden of proof in the initial and 2019 applications for a variance;
- the land court had erred in treating the 2018 decision as a separate and final decision apart from the 2019 decision; and
- its order to send the matter back to the ZBA didn't serve the interests of justice or equity.

Conditional Use Permit

Lawsuit ensues after ZBA determines historical society must obtain conditional use variance

Citation: *Florida Historical Society v. Zoning Board of Appeals of Village of Florida, 197 A.D.3d 1313, 151 N.Y.S.3d 898 (2d Dep't 2021)*

The Florida Historical Society (FHS) owned a 14.3-acre parcel of land in the Village of Florida, New York. The property, which had been the residence of Raymond Green until his death in 2012, was devised to FHS.

After taking possession of the property, FHS sought to use the existing building, among other things, as a headquarters and meeting space for its members, as well as a museum, and to use the undeveloped portions of the property by creating a walking path with educational markers.

FHS asked the Village of Florida Planning Board (PB) to find that its proposed use of the property was a permitted conditional use and did not require a variance. At a regular meeting held in October 2014, the PB determined that FHS' proposed use was not a permitted conditional use.

FHS then asked the Zoning Board of Appeals for the Village of Florida (ZBA) to review the decision by examining the relevant zoning requirements. Alternatively, it applied for a conditional use variance.

In 2015, the ZBA determined that a conditional use variance was required. It then granted the variance, but only as to a small part of the property on which the residential building was located. The ZBA denied the variance as to the remaining undeveloped acreage "without prejudice with the right . . . to re-apply with a more detailed plan at a future time."

In 2016, the ZBA found that a conditional use variance was required. It then granted the variance for the remaining undeveloped acreage, subject to authorization and plan approval by the PB.

The PB conditioned the approval of FHS' site plan on the submission of a survey for the entire property.

In 2017, after FHS refused to submit the required documents, the PB denied its application, so it filed a lawsuit seeking review of the ZBA's 2015 and 2016 resolutions. It sought injunctive relief against the Village, the ZBA, the PB, and others (collectively, the defendants).

The defendants asked for the lawsuit to be dismissed. The lower court granted their request, and FHS appealed.

DECISION: Affirmed.

The PB's determination "had a rational basis, was not illegal, and was neither arbitrary nor capricious," the appeals court found.

"Where a planning board's decision ha[d] a rational basis in the record, a court may not substitute its own judgment, even where the evidence could support a different conclusion, and judicial review is limited to determining whether the action taken by the planning board was illegal, arbitrary, or an abuse of discretion," the court added.

RLUIPA

Religious organization challenges county's denial of permit to build church, seeks preliminary injunction

Citation: *Church at Jackson v. Hinds County, Mississippi, 2021 WL 4344886 (S.D. Miss. 2021)*

The Church at Jackson (Jackson), a religious organization, sought injunctive relief that would permit it to build and use a facility for worship in an area of Hinds County, Mississippi, zoned as an "Agricultural District." Jackson claimed certain provisions of the Hinds County zoning ordinance—namely Sections 501 and Section 502—prevented or inhibited its ability to have a church or to engage in church activities on the property that it owned.

Further, Jackson alleged it had applied for a special use permit, which the County Zoning Commission and the Hinds County Board of Supervisors had denied.

Jackson then asked the court for injunctive and declaratory relief. It sought to enjoin the county from enforcing the zoning ordinance, which barred building of church facilities on the church's land zoned as an agricultural district, against it. Jackson claimed the applicable sections of the zoning ordinance violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), which barred county and municipal governments from imposing land use regulations that unequally treated religious assemblies or institutions.

DECISION: Jackson's request for an injunction granted.

Hinds County was preliminarily enjoined from enforcing the zoning ordinance to prevent, or attempt to prevent, Jackson from using and converting its property for religious assembly.

To determine whether to grant the injunction, the court addressed whether:

- Jackson had a substantial likelihood of success on the merits;
- there was a substantial threat of irreparable harm if the injunction was not granted;
- the threatened injury outweighed any harm that the injunction might cause to Hind County; and
- the injunction would not disserve the public interest.

The court found Jackson made a "prima facie" showing. So, Hind County had to "affirmatively satisfy [a] . . . test . . . to bear its burden of persuasion on this element of [Jackson's] . . . claim." It had to prove why the treatment should be deemed unequal, the court explained.

But the county didn't meet this burden. It couldn't "provide [an] explanation for the regulatory purpose for the zoning criterion behind the regulation, beyond what was stated in Section 500 of the ordinance itself."

In addition, Hind County didn't "show that religious institutions (and . . . Jackson in particular), [we]re treated as well as every other nonreligious assembly or institution that [wa]s 'similarly situated' with respect to the stated purpose or criterion." And, it hadn't "explained why excluding religious institutions [wa]s related to the objectives of the zoning ordinance or how the existence of religious institutions in the agricultural district [wa]s more detrimental to the objectives of the ordinance than recreational facilities."

When the court asked why recreational facilities were permitted as of right in the agricultural district, but churches were not, the county responded that the difference was found in the zoning ordinance's language.

The county hadn't explained how religious facilities "promote[d] urban development more than recreational facilities or

contribute[d] to urban and agricultural land use conflict[ed] more than recreational facilities."

"The purpose of establishing agricultural districts, as stated in the ordinance is to conserve land for agricultural use, prevent premature development of land, and prevent urban and agricultural use conflicts, the County said." "The intent of the ordinance, the County stated, was that the agricultural district be located in rural areas of the county that are not served by the public school system. Recreational facilities, the County maintained, do not necessarily lend themselves to premature development of land and do not necessarily contribute to urban and agricultural land use conflicts. Churches, according to the County, arguably, can promote development of the land and tend to promote urban development, contrary to the purpose of the agricultural district, which is to keep it agricultural," the court explained.

But, the court wasn't persuaded.

THE BOTTOM LINE

The county hadn't explained how religious facilities "promote[d] urban development more than recreational facilities or contribute[d] to urban and agricultural land use conflict[ed] more than recreational facilities." Thus, the county fell "far short of meeting its burden of persuasion" and Jackson showed a substantial likelihood of success on the merits and was entitled to the relief it sought since the other criteria for granting a preliminary injunction had also been met.

A CLOSER LOOK

The section of the ordinance which included definitions listed "churches and other religious institutions" under the definition of "Facilities and Utilities, Public/Quasi Public." Under section 501(e), "public/quasi-public facilities, including churches, [we]re excluded from the list of permitted uses within the agricultural district. Section 502(a) confirm[ed] that public and quasi-public facilities, including churches, [we]re not permitted in the Agricultural District unless they obtain[ed] a conditional use permit in accordance with . . . the ordinance," the court noted.

Zoning News From Around The Nation

California

New Podcast explains that zoning policy is health policy

In a recent podcast, Michael Lens, an associate professor of urban planning and public policy and associate faculty director of the Lewis Center for Regional Policy Studies at the University of California Los Angeles, recently discussed how zoning policy is health policy during a *Health Affairs This Week* podcast. Lens discussed the relationship between low-density zoning and health and health equity.

To listen to Lens discuss his research on this topic during the podcast, visit healthaffairs.org/do/10.1377/hp20211014.744177/full/. Also, you can visit healthaffairs.org/do/10.1377/hpb20210907.22134/full/ to read a "Health Policy Brief" Lens authored for *Health Affairs*. The brief contains Lens' discussion of:

- housing stability, housing safety and quality, neighborhood characteristics, and affordability;
- how low-density zoning drives housing costs up and leads to higher costs for low-income individuals;
- the link between restrictive zoning and neighborhood safety and health; and
- why increasing allowable density in more neighborhoods is a necessary step to address affordability, health, and a sustainable future.

Source: healthaffairs.org

Connecticut

Heavy industrial sites may be significantly reduced in Norwalk

The Norwalk, Connecticut Planning and Zoning Department is proposing a reduction in the number of heavy industrial sites in around the municipality, *News 12 Connecticut* reported recently. The recommendation is based on an Industrial Zones Study it recently released in draft report form, the news outlet explained.

According to Norwalk Tomorrow, the study "takes a closer look at these zones as key resources for allowing further economic diversification and creating job growth."

The study answers several questions and offers guidance on a number of issues, such as:

- whether rezoning for some areas currently zoned as industrial would be more appropriate for a given neighborhood;
- which factors could deter future industrial growth in the city;
- how the city may be able to take advantage of its harbor to increase commercial activity while also ensuring that residents can also use and enjoy it;
- what infrastructure constraints and limitations on roadways, sanitation, and energy may be preventing the desired commercial expansion;
- how the city can foster "craft industry growth" and ensure "that thriving business expand and remain in Norwalk"; and
- how other communities in the Northeast that are comparable to Norwalk are attracting commercial, manufacturing, new technology, and green companies.

The report, "Norwalk Industrial Zones Study September 2021," is available for download at tomorrow.norwalkct.org/wp-content/uploads/2021/10/2021-09-30-NIZ-Study-Final-Report-email.pdf.

In other news out of Norwalk, the city has a new historic

district. Norwalk Tomorrow explained on its website that 84-acres in the South Norwalk train station area, traditionally known as "Springwood and Whistleville" is now part of the National Register of Historic Places.

"The South Norwalk train station area has been a busy commercial center since Norwalk became a stop on the New York to New Haven line in the mid-1800s. The neighborhoods around the station were largely made up of immigrants, mainly from Hungary and Italy, who worked in Norwalk's factories. Through the early 1900s, Norwalk, Connecticut had a thriving textile industry, producing hats, corsets, and shirts, in addition to manufacturing locks. It was also the largest producer of oysters in the country. This commerce was fueled by the railroad," it explained.

One of the objectives of designating Whistleville as a National Historic District "is to preserve the historic character and buildings of the area by supporting and encouraging renovations and rehabilitation, as well as to enhance the quality of life for residents and businesses," Norwalk Tomorrow noted. "Once an area is an official historic district, property owners are eligible for tax incentives and financial assistance programs from the State and the Norwalk Redevelopment Agency to help finance historic preservation projects and property improvements," it added.

The area is dotted with single-family, wood-framed homes built in the late 19th and early 20th centuries—generally between 1880 and 1920. "Some of the architectural styles found among them are Gable-front Vernacular, Wing Vernacular, Queen Ann, Italianate, and Colonial Revival styles. The exception is a commercial section along Ely Avenue with three-story brick commercial buildings from the same era. There are also two churches, one in the Gothic Revival style and one in the Romanesque style," it added.

For more information on the National Register of Historic Places, visit *nps.gov/subjects/nationalregister/index.htm*.

Sources: *tomorrow.norwalkct.org*; *connecticut.news12.com*

Illinois

Farm owners' request to go from residential recreational to residential zoning denied

Douglas County, Illinois has denied the request of the owners of the Wascott hobby farm to be zoned residential, the *Superior Telegram* reported recently. The switch would have allowed the owners to proceed with their plan to have as many as four horses and up to 10 hens on their five-acre parcel of land, the news outlet reported.

The owners also intended to breed the mare and sell foul (so that they would only have four hens permanently living on the farm at any given time). But, because the property is zoned residential recreational, their plan isn't permitted.

The Douglas County Zoning Committee denied their request to rezone the property as residential after neighbors objected to the plan, the news outlet reported. One of the abutting property, who owns 10 cabins next to the farm, told the news outlet the smell of manure would be a nuisance to anyone visiting his property. A landowner across the street from the farm told the *Superior Telegram* he wasn't notified by the planning commission about the issue, and instead learned of it through a friend, and that he would not recommend rezoning.

Another resident owning property on Crystal Lake commented that the owners knew what the property zoning was when they purchased the farm and their request to change it would affect the nature of the community and the neighborhood.

Source: *superiortelegram.com*

Iowa

Food pantry needs to relocate following complaints about loud music coming from 'community fridge'

Des Moines, Iowa's Sweet Tooth Community fridge is seeking a new home now that complaints about loud music coming from the food pantry have been lodged, *KCCI* reported recently.

The news outlet reported that city zoning doesn't permit the fridge to operate on the land where it's now located. A representative for Sweet Tooth Farms told the news outlet the organization wished the person who complained about the food pantry would have reached out to it directly to address their concerns. A representative from Eat Greater Des Moines also told the news outlet that it's a really bad time to be taking away access to food for those who need it.

Source: *kcci.com*

Maine

Cape Elizabeth Town Council approves affordable housing project

Amid controversy, the Cape Elizabeth Town Council (with a 5-2 vote) has approved a plan to build a 46-unit affordable housing complex, *The Portland Press Herald* reported recently.

Developer the Szanton Co. (Szanton) submitted a proposal to construct the units, known as Dunham Court, next to the town's historic town hall and village green, the news outlet reported.

This represents the first approval for affordable housing in Cape Elizabeth in five decades, it added.

The project proposal, estimated to cost around $13.5 million, now heads to the planning board for approval. Also, a tax increment financing (TIF) agreement with the town is outstanding. The agreement would provide Szanton with close to $800,000 in tax breaks over a 15-year period, the news outlet reported. Renewed discussion about the TIF was expected to take place in November 2021.

If the plan goes through, the town will have 35 new one-bedroom units, eight two-bedroom units, and three three-bedroom units available for rent. Szanton said the housing would accommodate local workers, empty nesters, and other individuals who otherwise could not afford to live in Cape Elizabeth, which is situated on the ocean.

The development project has faced some opposition. The *Press Herald* reported some residents believe the location, size, and financing of the project aren't desirable for the town.

Source: *pressherald.com*

Montana

Kalispell's city council votes to limit where marijuana dispensaries can operate

The Kalispell City Council (with a 5-2 vote) has voted marijuana dispensaries may only operate in the municipality's light and heavy industrial zones, *NBC Montana* reported recently.

The news outlet reported some city council members said industrial-only zoning for such facilities is too restrictive. And, Ryan Hunter, a Ward 3 City Council member, said his hope is that marijuana dispensaries will have the opportunity to expand into business zones; otherwise they may be too clustered in one area.

Source: *nbcmontana.com*

New Hampshire

Study examines local housing rules' impact on housing costs statewide

A recently released study indicates that local residential regulations are to blame for increasing housing costs in the Granite State. The study, which Jason Sorens—the director of the Center for Ethics in Society at St. Anselm College—conducted points to local zoning and subdivision rules, as well as local building code regulations have contributed to a lack of housing affordability and housing scarcity.

"Why have house prices and rents increased so much in New Hampshire?" Sorens posits in the study's executive summary. A "major cause" is "residential building regulations, mostly at the local level," he wrote.

"Examples of local regulations that prevent people from building homes include: minimum lot sizes, frontages and setbacks, single-family-only requirements, bureaucratic requirements for accessory dwelling units, maximum heights and densities, minimum parking requirements, historic and village district requirements, municipal land ownership, subdivision regulations, impact fees, and simply the unwillingness of zoning boards to issue variances," the executive summary states. Sorens added that the state is "one of the most restrictive" nationwide for residential development and that by "suppressing building, land-use regulations" housing prices are driven up as demand increases. "Removing or relaxing these regulations would allow prices to rise more gradually," he noted.

Sorens discussed the relationship between residential building regulations "with growing socioeconomic segregation and slowing population growth." "As housing becomes more expensive, fewer people are moving to New Hampshire, especially to those towns that are most expensive. Those who stay are disproportionately wealthy and college-educated, while middle- and lower-income families leave because they cannot find affordable housing. Costly housing in towns with better schools also limits families' access to educational opportunity. Finally, the sprawl caused by anti-density policies such as minimum lot sizes increases drive times and road maintenance costs and worsens air and water quality," he added.

Sorens pointed to several reasons for New Hampshire's restrictions on growth. For instance:

- "a widespread perception that allowing homebuilding would increase the number of children in local schools";
- some homeowners—in towns with the biggest housing demand—that zoning is a way to boost their wealth "by artificially limiting the supply of housing"; and
- "towns that lie nearby other towns that increased their restrictions on housing were themselves more likely to enact new restrictions on housing."

For more information on the study, Residential Building Regulations in New Hampshire: Causes and Consequences, visit *jbartlett.org/wp-content/uploads/Residential-Building-Regulations-in-New-Hampshire-Report.pdf*.

Source: *concordmonitor.com*

South Carolina

Deadline looms for local steel company to avoid zoning change that could prevent reopening

Georgetown, South Carolina's Liberty Steel mill, which was once the city's largest employer, stood idle during the COVID-19 pandemic. But the town had concluded that if it sits idle for more than 365 days, it could lose the ability to continue operations, the *Georgetown Times* reported recently. That's because the town found that, based on an Urban Land Institute (ULI) study released in 2017, that the property, which consists of more than 50 acres of waterfront land, is a prime location for rezoning from heavy industrial to mixed use. This means that there's a chance the steel mill could make way for housing, restaurants, and shops, the news outlet explained.

The news outlet also reported that in 2019, mill representatives asked the city to rezone a portion of the property so it remains industrial, but their efforts failed.

To read the ULI study, Transforming Georgetown Economically, Physically, and Socially, visit *uli.org/wp-content/uploads/ULI-Documents/GeorgetownSC_PanelReport_F_web.pdf*.

Source: postandcourier.com