CITY OF ELKO
Planning Department

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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, May 7, 2019 in the Council Chambers at Elko City Hall, 1751 College Avenue, Elko, Nevada, and beginning at 5:30 P.M., P.D.S.T.

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 COUNTY COURTHOUSE – 571 Idaho Street, Street, Elko, NV 89801
Date/Time Posted: May 1, 2019 2:10 p.m.

ELKO COUNTY LIBRARY – 720 Court Street, Elko, NV 89801
Date/Time Posted: May 1, 2019 2:05 p.m.

ELKO POLICE DEPARTMENT – 1448 Silver Street, Elko NV 89801
Date/Time Posted: May 1, 2019 2:15 p.m.

ELKO CITY HALL – 1751 College Avenue, Elko, NV 89801
Date/Time Posted: May 1, 2019 2:00 p.m.

Posted by: Shelby Archuleta, Planning Technician Shelby Archuleta
Name Title Signature

The public may contact Shelby Archuleta by phone at (775) 777-7160 or by email at sarchuleta@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.

Dated this 1st day of May, 2019.

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
Cathy Laughlin, City Planner

CITY OF ELKO
PLANNING COMMISSION
REGULAR MEETING AGENDA
5:30 P.M., P.D.S.T., TUESDAY, MAY 7, 2019
ELKO CITY HALL, COUNCIL CHAMBERS,
1751 COLLEGE AVENUE, ELKO, NEVADA

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

April 2, 2019 – Regular Meeting **FOR POSSIBLE ACTION**

I. NEW BUSINESS

A. PUBLIC HEARING

1. Review, consideration, and possible adoption of Resolution 1-19, containing amendments to the Atlas Map #12 and the Transportation Component of the City of Elko Master Plan, and matters related thereto. **FOR POSSIBLE ACTION**

   Planning Commission reviewed and initiated the amendment to the City of Elko Master Plan at its March 5, 2019 meeting and made additional changes to the amendments at their April 2, 2019 meeting.

B. MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS

1. Review, consideration, and possible action to initiate an amendment to the City Zoning Ordinance, specifically Sections 3-2-3 General Provisions and 3-2-2 Definitions, and matters related thereto. **FOR POSSIBLE ACTION**

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

Cathy Laughlin
City Planner

CITY OF ELKO
PLANNING COMMISSION
REGULAR MEETING MINUTES
5:30 P.M., P.D.S.T., TUESDAY, APRIL 2, 2019
ELKO CITY HALL, COUNCIL CHAMBERS,
1751 COLLEGE AVENUE, ELKO, NEVADA

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: **Evi Buell**
Jeff Dalling
John Anderson
Stefan Beck
Tera Hooiman
Ian Montgomery

Excused: **Gratton Miller**

City Staff: **Scott Wilkinson, Assistant City Manager**
Cathy Laughlin, City Planner,
Michele Rambo, Development Manager
John Holmes, Fire Marshal
Shelby Archuleta, Planning Technician

PLEDGE OF ALLEGIANCE

COMMENTS BY THE GENERAL PUBLIC

Cathy Laughlin, City Planner, introduced Michele Rambo as the Development Manager.

Michele Rambo, Development Manager, told the Commission about herself.

APPROVAL OF MINUTES

March 5, 2019 – Regular Meeting **FOR POSSIBLE ACTION**

*****Motion: Approved the minutes from the March 5th meeting as presented.**

Moved by Tera Hooiman, Seconded by Evi Buell.

Motion passed. (4-0, Commissioners Montgomery and Anderson abstained)

I. NEW BUSINESS

A. PUBLIC HEARING

1. Review and consideration of Tentative Map No. 5-19, filed by Granite Holdings, LLC, for the development of a subdivision entitled Orchard Cove Unit 2 involving the proposed division of approximately 6.947 acres of property into 19 lots and a remainder parcel for residential development within the R (Single-Family and Multiple-Family Residential) Zoning District, and matters related thereto. **FOR POSSIBLE ACTION**

   The subject property is located generally south of the intersection of Colt Drive and Winchester Drive. (APN 001-958-004)

Robert Howard, R&H Construction Services representing Granite Holdings, explained that this was a filler project. They had walked through an extensive process with staff to get everything within Code. There are three notes that they can comply with before City Council consideration, which are to provide the engineer's email address, the legal description, and something else. The one thing that would be a catch 22, was that Lot 8, which is a corner lot, doesn't meet the requirements. Staff recommended that they proceed with that being a corner lot. He strongly encouraged the Commission to go forward with that change to City Council.

Ms. Laughlin went over the City of Elko Staff Report dated March 21, 2019. Staff recommended conditional approval with the findings and conditions listed in the Staff Report.

Ms. Rambo had no comments.

Ms. Laughlin stated that all staff comments and conditions were included in the Staff Report.

John Holmes, Fire Marshal, recommended approval.

Scott Wilkinson, Assistant City Manager, recommended approval as presented by staff.

***Motion: Forward a recommendation to City Council to conditionally approve Tentative Map No. 5-19 with the conditions in the City of Elko Staff Report dated March 21, 2019, listed as follows:**

1. **The subdivider is to comply with all provisions of the NAC and NRS pertaining to the proposed subdivision.**

2. **Tentative map approval constitutes authorization for the sub-divider to proceed with preparation of the final map and associated construction plans.**

3. **Tentative map approval does not constitute authorization to proceed with site improvements, with the exception of authorized grading, prior to approval of the construction plans by the City and the State.**

4. **The applicant submits an application for final map within a period of four (4) years**

in accordance with NRS 278.360(1)(a). Approval of the tentative map will automatically lapse at that time.

5. **A soils report is required with final map submittal.**

6. **A hydrology report is required with final map submittal.**

7. **Final map construction plans improvements are to comply with Chapter 3-3 of City code.**

8. **The subdivision design and construction shall comply with Title 9 Chapter 8 of City code.**

9. **The Utility Department will issue an Intent to serve letter upon approval of the tentative map by the City Council.**

10. **A modification from standards be approved by City Council for Lot 8 to have a reduced minimum lot area for a corner lot.**

11. **Revise the tentative map to include the legal description: Parcel 5 of File No. 504955. The revision is required prior to City Council consideration of the tentative map.**

12. **Revise the tentative map to include a note specifying the side, front and rear lot line easements. The revision is required prior to City Council consideration of the tentative map.**

13. **Revise the tentative map to include the engineer's email address. The revision is required prior to City Council consideration of the tentative map.**

Commissioner Buell's findings to support the motion was the proposed subdivision and development is in conformance with the Land Use Component of the Master Plan. The proposed subdivision and development is in conformance with the Transportation Component of the Master Plan. The proposed subdivision and development does not conflict with the Airport Master Plan. The proposed subdivision does not conflict with the City of Elko Development Feasibility, Land Use, Water Infrastructure, Sanitary Sewer Infrastructure, Transportation Infrastructure and Annexation Potential Report – November 2012. The property is not located within the Redevelopment Area. The proposed subdivision and development are in conformance with the Wellhead Protection Program. The sanitary sewer will be connected to a programed sewer system and all street drainage will report to a storm sewer system. A zoning amendment is not required. In accordance with Section 3-3-5(E)(2) the proposed subdivision and development will not result in undue water or air pollution based on the following: a. There are no obvious considerations or concerns which indicate the proposed subdivision would not be in conformance with all applicable environmental and health laws and regulations. b. There is adequate capacity within the City's water supply to accommodate the proposed subdivision. c. The proposed subdivision and development will not create an unreasonable burden on the existing water supply. d. There is adequate capacity at the Water Reclamation Facility to support the proposed subdivision and development. e. The proposed subdivision and development will be connected to the City's programmed sanitary sewer system, therefore the ability of soils to support waste disposal does not require evaluation prior to Tentative Map approval. f.

Utilities are available in the immediate area and can be extended for the proposed development. g. Schools, Fire and Police and Recreation Services are available throughout the community. h. The proposed subdivision and development is in conformance with applicable zoning ordinances and is in conformance with the Master Plan. i. The proposed subdivision and development will not cause unreasonable traffic congestion or unsafe conditions with respect to existing or proposed streets. j. The area is not located within a designated flood zone. Concentrated storm water runoff has been addressed as shown on the grading plan. k. The proposed subdivision and development is not expected to result in unreasonable erosion or reduction in the water holding capacity of the land thereby creating a dangerous or unhealthy condition. The proposed subdivision submittal is in conformance with Section 3-3-6 of City Code, with the following exception: Legal Description is not shown on the Tentative Map. This is not a significant deficiency. The proposed subdivision is in conformance with Section 3-3-9 of City Code. The proposed subdivision is in conformance with Section 3-3-10 of City Code. The proposed subdivision is in conformance with Section 3-3-11 of City Code. The proposed subdivision is in conformance with Section 3-3-12 of City Code. The proposed subdivision is in conformance with Section 3-3-13 of City Code with the approval of Lot 8 not meeting the minimum area for a corner lot. The proposed subdivision is in conformance with Section 3-3-14 of City Code with the following exception: A not should be added to the Tentative Map stating the front, side and rear lot line easements. This is not a significant deficiency. The proposed subdivision is in conformance with Section 3-3-15 of City Code. The proposed subdivision and development is in conformance with Section 3-2-3 of City Code. The proposed subdivision and development is in conformance with Section 3-2-4 of City Code. The proposed subdivision and development is in conformance with Section 3-2-5(E)(2). Conformance with Section 3-2-5(E) is required as the subdivision develops. The proposed subdivision and development is in conformance with Section 3-2-5(G) of City Code with the approval of the modification of standard for Lot 8 minimum lot area. The proposed subdivision and development is in conformance with Section 3-2-17. Conformance with Section 3-2-17 is required as the subdivision develops. The proposed subdivision and development is not located in a designated special flood hazard area and is in conformance with Section 3-8 of City Code. The proposed subdivision design shall conform to Title 9 Chapter 8 of City Code.

Moved by Evi Buell, Seconded by Tera Hooiman.

Motion passed unanimously. (6-0)

B. MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS

1. Review, consideration, and possible approval of Final Map No. 6-19, filed by Copper Trails, LLC, for the development of a subdivision entitled Copper Trails Phase 2 involving the proposed division of approximately 19.194 acres of property into 29 lots and 1 remainder parcel for residential development within the R (Single Family and Multiple Family Residential) Zoning District, and matters related thereto. **FOR POSSIBLE ACTION**

   The subject property is located at the intersection of Copper Street and Mittry Avenue. (APN 001-610-114)

Ms. Laughlin went over the City of Elko Staff Report dated March 18, 2019. Staff recommended approval with the findings and conditions listed in the Staff Report.

Ms. Rambo had no comments and agreed with the approval recommendation.

Mr. Holmes recommended approval.

Mr. Wilkinson recommended approval as presented by staff.

***Motion: Forward a recommendation to City Council to conditionally approve Final Map No. 6-19 with the conditions in the City of Elko Staff Report dated March 18, 2019, listed as follows:**

1. **Recommend 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.**

2. **The Developer shall execute a Performance 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.**

3. **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 Plat approval by the City Council unless extended as stipulated in City Code.**

4. **The Performance Agreement shall be approved by the City Council at the time of final map approval by the City Council.**

5. **The Developer shall execute the Performance Agreement within 30 days of approval of the final map by City Council.**

6. **The final map is approved for 29 single family residential lots and 1 remainder lot.**

7. **The Utility Department will issue a Will Serve Letter upon City Council approval of the final map.**

8. **State approvals of the construction plans and final map are required.**

9. **Final revision and approval of the construction plans as outlined is staff's letter dated March 21, 2019 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 Standard Specifications for Public Works.**

11. **Construction, with the exception of grading, shall not commence prior to Final plat approval by the City Council, issuance of a will serve letter by the city and approval of the construction plans by the State.**

Commissioner Buell's findings to support the motion were the Final Map for Copper Trails Phase 2 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 Component of the Master Plan. The proposed subdivision is in conformance with the Transportation Component of the Master Plan. Conformance with the Redevelopment Plan is not required. The proposed subdivision submittal is in conformance with 3-3-7 of City Code; Final Map Stage III. The subdivision submittal is in conformance with Section 3-3-8, Content and Format of Final Map submittal. The subdivision is in conformance with 3-3-9 – General Provisions for Subdivision Design: a. Specifically, the subdivision does not appear to be unsuitable for use by reason of flooding, concentrated runoff, inadequate drainage, adverse soil or rock formation, extreme topography, erosion susceptibility or similar conditions which are likely to prove harmful to the health and safety and general welfare of the community or the future property owner. The subdivision is in conformance with 3-3-10 – Street Location and Arrangement. The subdivision is in conformance with 3-3-11 – Street Design. The subdivision is in conformance with 3-3-12 – Block Design. The subdivision is in conformance with 3-3-13 – Lot Planning. The subdivision is in conformance with 3-3-14 – Easement Planning. The subdivision is in conformance with 3-3-15 – Street Naming. The subdivision is in conformance with 3-3-16 – Street Lighting Design Standards. The Developer shall be responsible for all required improvements in conformance with Section 3-3-17 of City Code. The Developer has submitted construction plans in conformance with Section 3-3-18 of City Code. The plans have been conditionally approved by staff as identified in its staff's letter dated March 21, 2019. The Developer is required to conform with all requirements stipulated in Section 3-3-19 of City Code. The Developer has submitted construction plans in conformance with Section 3-3-20 of City Code. The Developer is required to enter into a Performance Agreement to conform to Section 3-3-21 of City Code. The Developer is 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 subdivision is in conformance with Section 3-8, Floodplain Management.

Moved by Evi Buell, Seconded by Tera Hooiman.

Motion passed unanimously. (6-0)

A. PUBLIC HEARING

2. Review, consideration, and possible adoption of Resolution 1-19, containing amendments to the Atlas Map #12 and the Transportation Component of the City of Elko Master Plan, and matters related thereto. **FOR POSSIBLE ACTION**

   Planning Commission reviewed and initiated the amendment to the City of Elko Master Plan at its March 5, 2019 meeting.

Ms. Laughlin explained that the Master Plan, by NRS, allows the City to do four modifications per year. There was one amendment last year to the Transportation Component. As things start to develop thought out the City different things come in to play and staff has to look at the Master Plan, as stated in the staff reports, on every application; specifically the Land Use and Transportation Components. There was an application for a Stage I Subdivision Meeting that was for a property off of El Armuth. With looking at that subdivision, staff started looking at El Armuth Drive, the way El Armuth Drive is from Celtic Way south, and from Mountain City Highway to Sagecrest Drive. When staff is doing an evaluation on a subdivision and they are

looking at the Transportation Component they are looking at all aspects of it. The area was developed in very large parcels. The area between parcels was called out as a parcel on the original map with owner ship of the original map producer. It was not called out as a dedicated roadway at that time. El Armuth is shown to have continuation all the way to Mountain City Highway. In the written portion of the Transportation Component it specifies El Armuth Drive is from Mountain City Highway down to the I-80 frontage. Two of the abutting property owners did a quiet claim deed on the parcel and took over ownership of that half of the road. There was no way for the City to have connectivity from Mountain City Highway down to the I-80 frontage with El Armuth Drive. There is also a large drainage that would make it unfeasible for the City to do a continuation of the roadway. The Transportation Component calls out El Armuth Drive as a residential roadway. Staff is proposing to add Mountain City Highway to Sagecrest Drive and Celtic Way to Hondo Lane. El Armuth is already a developed road from Mountain City Highway to Sagecrest Drive, which staff is proposing to keep. Staff is proposing to eliminate El Armuth Drive in the Master Plan from Sagecrest to Celtic. From Celtic, El Armuth would continue to Hondo Lane. The reason that it cannot continue to tie it into a future roadway is because there is a residence in the way, and there is no way that the City would purchase it to continue El Armuth Drive to tie it into a future road along I-80. When we look at a Master Plan and we look at the Transportation Component we have several things we look at. We look at long range planning, what is within the city limits, what is not in the city limits, etc. The long range planning here is for Cattle Drive connectivity between Exit 298 and Mountain City Highway. We have that right-of-way and are working on acquiring the final piece and that will be the major way through the connectivity of Exit 298 to Mountain City Highway. The City has property that has potential for annexation. If that property were to develop and they were required to have a secondary access, how would they gain it? They could come back to Cattle Drive, or they could tie into Sundance. Ms. Laughlin pointed out a large portion of property that was in the County. We are not proposing to build any road in the County. We are simply looking at a long range plan on the future development of the area that is in the City limits. The major road is proposed as Cattle Drive. There are properties north of I-80 that are listed for potential annexation. What is being proposed, since eliminating the connectivity of El Armuth to the frontage road, is adding connectivity of Sundance Drive to the frontage road.

Ed Lamb, 2270 Chism Drive, asked how many of the audience members were in attendance because they were concerned with traffic on Sundance. (Everyone raised their hand) He then asked how many were opposed to the traffic and the connectivity of Sundance. (Most people raised their hands) Mr. Lamb said they liked the closure they have on Sundance. It is nice for their kids to run around and ride their bikes, because they don't have through traffic. If Sundance was hooked to the Interstate on the west side, that would expose them to the traffic coming off of the Interstate, more traffic, people coming through, and a possibility of more crime. There are a lot things that they don't like. He understood that El Armuth was locked off, but the City has never maintained El Armuth, which was supposed to be their safety valve if something happened to Sundance. He didn't remember ever seeing a blade on that road. He asked if the City were to develop that area how they would tie onto Sundance. He didn't think anyone would vote for it. He asked if the City would declare eminent domain. He asked if that would be something the City was willing to do. He was worried about trucks going on Cattle Drive to Mountain City Highway. The minute that is opened up for exposure it would devalue their property. He thought that was going to be a problem. If the City comes in and ties in, even with eminent domain, they are in the County. They have no voter representation, they are not City residents. He asked how that played in. Overall Mr. Lamb was opposed to the tie on Sundance.

Ms. Laughlin explained that all the vacant properties north of I-80 are in private hands. They don't belong to the City of Elko and they don't belong Elko County. If a private property owner wanted to annex into the City, staff looks at a variety of things based on Nevada Revised Statutes on annexing in property to the City of Elko. If they want to develop the property they would be responsible for any roadway development throughout their development. The City of Elko has no intentions of building any roadway. We have no intention of building Sundance or El Armuth connectivity. We don't have any intention of annexing in any of that property at this point as the City, or eminent domain. The Master Plan is a long range planning document that is showing a future roadway. If a property is going to develop the developer will be responsible for developing the roadway along the frontage of their property. That's how roadways get developed. There has to be a long range plan that shows what the future roadways are going to be. The connectivity of Sundance was just shown as a potential access out of the frontage road connectivity. The City has no intention of doing anything with that, because the properties are in private hands, and the City doesn't have a need for any connectivity. Staff has had conversation in regards to this issue, and they are fine with leaving in the proposed frontage road and eliminating the Hondo to the proposed frontage, and leaving it as that.

Mr. Wilkinson stated that the City has no authorities for eminent domain outside of its incorporated boundaries, so that wouldn't be a concern. There is a lot of concern, because of the way this area was mapped the intent of a lot of the parcels was for roadway purposes. Sundance is a right-of-way that is accepted by the County but not for maintenance purposes, so it is a little bit of a grey area. He thought the Master Plan had always shown some connectivity to El Armuth. Staff had proposed eliminating certain sections of El Armuth, because of ownership difficulties. Any master planning doesn't indicate that a road will get constructed. He gave Errecart Boulevard as an example, which is located on the south side of the community, which is shown as a future roadway. There is no right-of-way. Whether or not it ever becomes a roadway is open to acquisition of right-of-way, which is the same as Cattle Drive. The City had to acquire property from private property owners and the BLM in order for that alignment to be created to allow for the possibility of a roadway. Mr. Wilkinson thought Ms. Laughlin brought up a good point. Everyone raised their hands and expressed concerns about connectivity from Sundance to the frontage road. He thought there were a lot of opportunities. We already have easements of record at the bottom of Sundance that provide access to Cattle Drive. As property develops, they can figure out other roadway issues. The one benefit providing a connectivity would show is providing emergency ingress and egress, and different options. If the Planning Commission determines, based on public testimony, that it's not an appropriate point of connection for Sundance to frontage, Mr. Wilkinson didn't see that as a real issue. He thought they were classified as Residential Collectors, they aren't Arterials, and they aren't intended to move a lot of traffic. Sundance is very complicated at the bottom. The County has approved some realignments that put jogs into the whole roadway, which makes it more complicated to ever have any point of connection. He thought that was something that everyone here thought wasn't appropriate to have included in amendment to the Master Plan. Mr. Wilkinson didn't think it was that critical. He thought the frontage road shown was appropriate, along with the Cattle Drive corridor.

Robert Colon, Royal Crest, said he had a question for staff. He asked if they looked at evaluating the access road connecting with Jennings Way.

Mr. Wilkinson explained that the real issue was that there was a property down below Jennings that had pretty steep topography. The end of Jennings connecting to a frontage road would be ideal, except that there is such a grade differential when you come off the end of Jennings to drop down to the I-80 corridor. It's just not feasible to build a road off of that grade. Because of that issue the City has always had El Armuth as a potential road that would serve that incorporated area. That is the only access to get to that area, if it were to ever develop. If someone were to want to develop that area they would have to come off Celtic Way and improve that road on El Armuth to get into that area. That is why we show El Armuth as having some potential connectivity there, even though there is a piece of private property that complicated that issue. When staff took a look at some more recent activities, where they have had some quiet claims acquire portions of parcels that complicate El Armuth tying all the way to Sagecrest and Mountain City Highway, it just didn't make sense to continue with that.

Mr. Colon asked if the frontage road would access the 298 interchange.

Mr. Wilkinson said eventually. You get into some grade differential there. But, we like to show that frontage road, because that is going to be along the I-80 corridor, and it would be a more intense land use. We would like to see if someone were to propose development there that they figure out how to do that. That is one of the things that is important with a Master Plan document. If you don't show the preference to have that road developed, and someone comes in to develop property they don't have work on that issue. If it's in the Master Plan that that is the goal, then they would need to address that issue. We leave it up to the developers and their engineers to figure out how to resolve the conflicts. There are definitely some grade challenges there.

Mr. Colon said the biggest concern was that it would generate traffic coming off of the 298 interchange. With the interchange directly onto it, it would be like a shortcut through Sundance onto Mountain City Highway. He asked if there was a way of limiting the size of the trucks that would go down it.

Mr. Wilkinson said that could be done by Code, you could have truck routes. Mr. Wilkinson saw Cattle Drive being developed and providing that type of access, rather than a truck being routed up through Sundance. That was definitely a concern if there was a point of connection there.

Mr. Colon was worried about a cattle truck coming off of Mountain City Highway and getting onto I-80.

Mr. Wilkinson said that was definitely a concern. Cattle Drive's intended to be the Arterial that connects up to Mountain City Highway.

Chairman Jeff Dalling didn't think that it was that big of a shortcut.

Mr. Wilkinson mentioned that the last lot on Sundance had a pretty steep hill.

Bill Caughey, 2295 Rio Bravo Road, said he was concerned about this road. He wanted the Committee to consider taking Sundance off, because of the potential dangers of heavy traffic through there, no sidewalks, small streets, and a lot of children playing. He thought it should get moved to Cattle Drive. At the end of Sundance there is a zig-zag in the road, and some properties

that would have to be bought, because there is no width to the road to put any kind of traffic through there.

Chairman Dalling didn't think the City had a big appetite to change Sundance. He thought they should amend and get rid of the El Armuth and get rid of the connectivity down at the frontage way. He thought that would be a win for everyone. He said some of this was cleaning up. The City doesn't touch County property at all, it is just El Armuth should have been a future connector, but it can't because they did the quit claim. That is what triggered all of this. He thought if they took the connectivity from El Armuth to the frontage road, and the connectivity from Sundance to the frontage road, off that everyone would win.

Pat Colon, Royal Crest, asked in the future if that property were to annex in if there would be any protection from changes then. She asked what guarantees they had for the future.

Chairman Dalling explained that development happens over time. If it is private property, they annex into the City, and they develop it they will have to provide their own secondary access. If you still own half of the road, then they can't touch your road.

Mr. Wilkinson explained that the purple line on the Master Plan Atlas 12 shows that Sundance is a Residential Collector. That is pretty significant when the City considers any type of development, or any type of access. What that drives is that it is a road that has to meet a certain right-of-way width. It also has to have curb, gutter, and sidewalk. That is the profile for the road segment. By showing that as a Residential Collector, the City has had prior annexation applications about mid-point on Sundance Drive. One of the things that has come up is if someone wants to annex that property, they would have to develop that road to meet the standard. When the developer is faced with some of those costs and those circumstances they don't do it. Even though we don't show connectivity, the Master Plan will still show it as a purple line, which is a Residential Collector, and developers will still be faced with the upgrades to that road to be in conformance with the Master Plan. The City can't provide any guarantee on how a County road might get utilized in the future. If there are any annexations in the area the adjacent property owners will get notified.

Don Hamilton, 1885 Janie Lane, said one of the questions that came up with Ms. Colon was what protections do they have, as county residents, against someone that wants to annex them into the City. If they don't want to be annexed into the City, how does that happen if everyone around starts putting applications in to be annexed?

Mr. Wilkinson explained that there are two ways that property is annexed into the City. One is where the property owners petition to be brought into the City. The second is a forced annexation, where the City goes out and says we are going to annex you. The City of Elko doesn't practice forced annexations. What discourages that is the existing infrastructure. So, Sundance has very narrow streets that don't meet City standards. There has been a lot of conversation on whether the City should take a look at all of that area that is an island. When you look at all the infrastructure burden that the City would inherit to annex that property. It doesn't make sense for the City to go do that. All those roads were dedicated for public use, but not maintenance by the County of Elko, so Sundance residents have been maintaining those roads. The City doesn't do that. If it annexes property it maintains those roadways. None of them have curb, gutter, and sidewalk, they are narrow roads, and the pavement is probably pretty aged.

Those are things that the City would consider and it just doesn't make sense that the assessed valuation would pay for the infrastructure maintenance costs for the City of Elko. A guarantee would be any type of annexation is either initiated by property owners or initiated by the jurisdiction. You have rights to have a hearing.

Mr. Hamilton asked if it was a possible scenario to have them become a surrounded island. (Yes)

Ms. Laughlin said that with any type of annexation application you would be receiving the public hearing notifications, as you received with the hearing today.

Many people claimed that they didn't received any notification.

Shelby Archuleta, Planning Technician, explained that with an Amendment to the Master Plan notifications are only required to be published in the newspaper and notices to the property owners were not required under NRS.

Jorja Muir, 2157 High Noon Road, explained that they maintain their own streets and Sundance Drive is one of them. She asked if this had anything to do with the big Komatsu thing that just went in.

Mr. Wilkinson said that this was not related to that development. Komatsu's access will be directly onto the freeway.

Ms. Muir said if this was used as a connector, that road would have to be changed. It wouldn't support that kind of traffic and then they would be responsible for Sundance Drive.

Mr. Wilkinson said if this was ever a roadway that was utilized to facilitate traffic movements for the City of Elko, the City of Elko would be maintaining it.

Ms. Muir said the things she was worried about were the aesthetics of their neighborhood would be ruined, the property values would go down, and the safety. She said she was against it and she thought the Commission should shelf the issue and return later down the road.

Chairman Dalling said that was what they were trying to do.

Mr. Wilkinson wanted the public to be aware of what needed to be done. The City of Elko needs to address El Armuth in its Master Plan. Staff is recommending that the Planning Commission, and the City Council, amend the Master Plan to address El Armuth. We need to go forward with the process to address the issues on El Armuth. The question tonight is, as a part of that process, do we show the connectivity to Sundance. Mr. Wilkinson thought the Planning Commission could say that isn't a good idea and we don't want to include that connectivity in this amendment. The Master Plan still needs to be amended to deal with El Armuth.

Chairman Dalling felt that was a good win for everyone.

Ms. Rambo said Community Development was good with leaving Sundance the way it is.

Mr. Holmes had no comments.

Mr. Wilkinson recommended that the Planning Commission consider eliminating the connectivity to Sundance Drive, eliminating the connectivity on El Armuth as proposed by the Planning Department, and he thought the Commission would have to be specific that the exhibits are revised accordingly before this would be presented to the City Council.

Ms. Laughlin agreed with Mr. Wilkinson.

*****Motion: Direct staff to remove the connection from Sundance Drive to frontage road, eliminate the connection of El Armuth to the frontage road, and bring this back at the next meeting.**

Moved by Evi Buell, Seconded by Ian Montgomery.

Motion passed unanimously. (6-0)

II. REPORTS

A. Summary of City Council Actions.

Ms. Laughlin reported that at the City Council meetings on March 12th and March 26th they continued to table the Great Basin Estates Final Map 11-18. It still has a cease and desist. There has been little bit of communication from NDEP on it, with some requested revisions. That will continue to be tabled until there is a resolution. City Council approved the Final Map 14-18 for Tower Hill Phase 2 and the Performance Agreement. They accepted a granting of an easement for a new water line and roadway access to the water line that is associated with Vacation 2-19, which was for the Shippy property. They held the public hearing for the Shippy Vacation and approved Resolution 6-19.

B. Summary of Redevelopment Agency Actions.

Ms. Laughlin said there would be a RAC Meeting on April 25th at 4pm.

C. Professional articles, publications, etc.

1. Zoning Bulletin

D. Miscellaneous Elko County

E. Training

Ms. Laughlin provide a new book for training this month. She was looking for comments back on it. Keep in mind that the webcast is always on YouTube from last month.

Chairman Dalling appreciated any training that they could get.

COMMENTS BY THE GENERAL PUBLIC

There were no public comments 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

Tera Hooiman, Secretary

Agenda Item # I.A.1.

Elko City Planning Commission
Agenda Action Sheet

1. Title: **Review, consideration, and possible adoption of Resolution 1-19, containing amendments to the Atlas Map #12 and Transportation Component of the City of Elko Master Plan, and matters related thereto. FOR POSSIBLE ACTION**

2. Meeting Date: **May 7, 2019**

3. Agenda Category: *PUBLIC HEARINGS*

4. Time Required: **30 Minutes**

5. Background Information: **Planning Commission reviewed and initiated the amendment to the City of Elko Master Plan at its March 5, 2019 meeting and made additional changes to the amendments at their April 2, 2019 meeting.**

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

7. Supplemental Agenda Information: **Transportation document and Atlas map #12.**

8. Recommended Motion: **Move to adopt Resolution 1-19, containing amendments to the Transportation Component and Atlas map #12 of the City of Elko Master Plan; directing that an attested copy of the foregoing parts, amendments, extensions of and/or additions to the Elko City Master Plan be certified to the City Council; further directing that an attested copy of this Commission's report on the proposed changes and additions shall have be filed with the City Council; and recommending to City Council to adopt said amendments by resolution. CL**

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

10. Agenda Distribution:

STAFF COMMENT FLOW SHEET
PLANNING COMMISSION AGENDA DATE: 5/7
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Title: Master Plan Amendment 1-19, PC Resolution 1-19
Applicant(s): City of Elko
Site Location: N/A
Current Zoning: N/A Date Received: N/A Date Public Notice: 4/23
COMMENT: This is for an amendment to Atlas Map #12 and the Transportation Component of the Master Plan.

If additional space is needed please provide a separate memorandum

Assistant City Manager: Date: 4/29/19
Recommend approval as presented by staff

SALC
Initial

City Manager: Date: 4/30/19
No comments/concerns.

CC
Initial

CITY OF ELKO
Planning Department

Website: www.elkocity.com
Email: planning@ci.elko.nv.us

1751 College Avenue · Elko, Nevada 89801 · (775) 777-7160 · Fax (775) 777-7119

Memorandum

To: Planning Commission
From: Cathy Laughlin –City Planner
Date: April 3, 2019
Meeting Date: Tuesday, May 7, 2019

Agenda Item:

1. Review, consideration, and possible adoption of Resolution 1-19, containing amendments to the Atlas Map #12 and the Transportation Component of the City of Elko Master Plan, and matters related thereto. **FOR POSSIBLE ACTION**

Additional Information:

The City of Elko Master Plan Transportation component and Atlas Map #12 show El Armuth Drive extending from Mountain City Highway to a frontage road along I-80. The existing mapped area for El Armuth Drive is not actual dedicated right-of-way but is a parcel (Parcel C) owned by the original property owner or their heirs of the original map recorded with Elko County Recorder as File No. 30415 recorded 5/31/1967. With a recent Stage 1 subdivision meeting, Staff has determined that the extension from Sagecrest Drive to Celtic Way is very unlikely. There have been two property owners on Royal Crest Drive which have done a quiet claim deed on portions of Parcel C adjacent to their property and therefore we would never have a full 60' right-of-way width without those same property owners dedicating it back to the City of Elko. There is also a large drainage between Royal Crest Drive and Celtic Way that would be cost prohibitive to develop the roadway. We are proposing to eliminate the connection of El Armuth from Sagecrest Drive to Celtic Way. El Armuth south of Celtic Way towards I-80, there is a property south of Hondo Lane in which the City of Elko would have to acquire in order to have connectivity to the future I-80 frontage road. We propose to eliminate the extension of El Armuth south of Hondo Lane to the I-80 frontage road.

ELKO CITY PLANNING COMMISSION
RESOLUTION NO. 1-19

A RESOLUTION OF THE ELKO CITY PLANNING COMMISSION AMENDING THE ELKO CITY MASTER PLAN UPDATING THE PROPOSED FUTURE ROADWAY NETWORK MAP ATLAS #12 AND TRANSPORTATION COMPONENT BY ELIMINATING THE CONNECTION OF EL ARMUTH DRIVE BETWEEN SAGECREST DRIVE AND CELTIC WAY AND ELIMINATING THE EXTENTION OF EL ARMUTH TO THE FUTURE I-80 FRONTAGE ROAD

WHEREAS, the Elko City Planning Commission conducted a public hearing in accordance with Nevada Revised Statutes, Section 278.210 and the Elko City Code, Section 3-4-12, and

WHEREAS, the Elko City Planning Commission received public input, and reviewed and examined documents and materials related to amending Proposed Future Roadway Network Atlas Map #12 and the Transportation Component of the Elko City Master Plan.

NOW, THEREFORE, BE IT RESOLVED by the Elko City Planning Commission that amended portions of the Elko City Master Plan within the Proposed Future Roadway Network Map Atlas #12 and the Transportation Component, are attached hereto at Exhibit 1 and 2, and that the amendments to the Elko City Master Plan attached hereto at Exhibit 1 and 2 are hereby adopted.

All previous versions of the amended portions of Elko City Master Plan, and all resolutions or parts of resolutions in conflict herewith are hereby repealed.

An attested copy of the Elko Planning Commission's report on the aforementioned changes and additions to the Elko City Master Plan shall be filed with the Elko City Council within forty (40) days of this Resolution.

The amendment to the Elko City Master Plan attached hereto at Exhibit 1 and 2, or any portion thereof, shall be effective upon adoption by the Elko City Council.

PASSED AND ADOPTED this 2nd day of April 2019 by a vote of not less than two-thirds of the membership of the Planning Commission per NRS 278.210 (3) and Elko City Code Section 3-4-12 (B).

By: _____
Jeff Dalling, Chairman

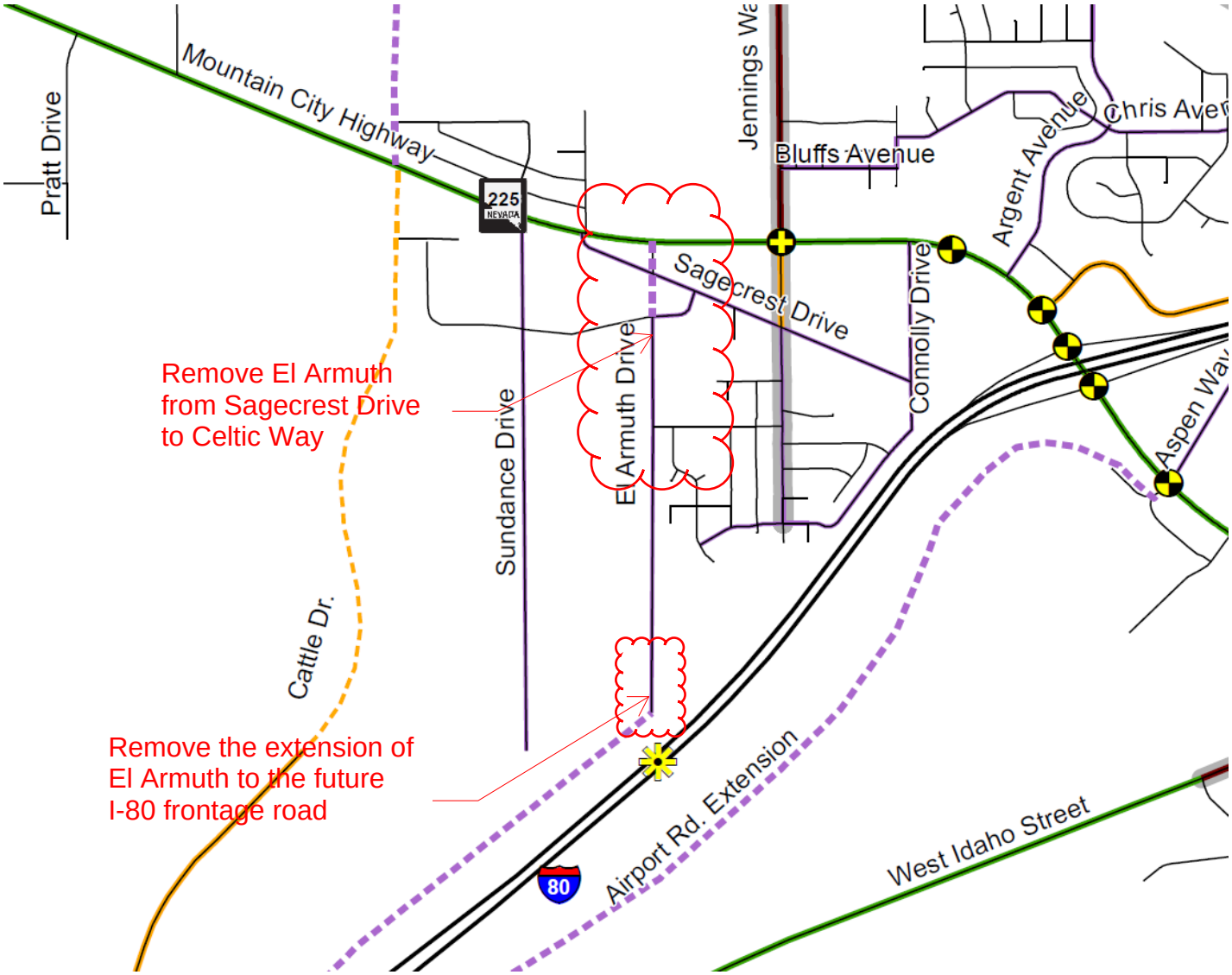
Attest: _____
Tera Hooiman, Secretary

AYES:

NAYS:

ABSENT:

ABSTAIN:


Pratt Drive
Mountain City Highway
225
NEVADA
Jennings Wa
Bluffs Avenue
Argent Avenue
Chris Ave
Sagecrest Drive
Connolly Drive
Aspen Wa
Sundance Drive
El Armuth Drive
Remove El Armuth
from Sagecrest Drive
to Celtic Way
Cattle Dr.
Remove the extension of
El Armuth to the future
I-80 frontage road
Airport Rd. Extension
80
West Idaho Street

- Country Club Drive
- Court Street, Oak Street to 5th Street and 9th Street to 14th Street
- Delaware Street, between Statice Street and Paradise Drive
- El Armuth Drive (Mountain City Highway to Sagecrest Dr. & Celtic Way to Hondo Lane)
- Enfield Avenue
- Fairway Drive, between Skyline Drive and Keppler Drive
- Forest Lane, between Montrose Lane and Enfield Avenue
- Garcia Lane – South 11th Street
- Highland Drive
- Indian View Heights Drive
- Jennings Way, south of Mountain City Highway
- Keppler Drive
- La Nae Drive, between Bluffs Avenue and Cottonwood Drive
- Mittry Avenue (Chris Ave to College Parkway)
- Montrose Lane
- Opal Drive
- Rocky Road (future)
- Ruby View Drive
- Sagecrest Drive
- Sewell Drive
- Spruce Road, between 5th Street and -Jennings Way
- Stitzel Road, between Pinion Road and Liberty Drive
- Sundance Drive

Regional Roadways

Regional Roadways are those collector or arterial streets characterized by moderate to high traffic volumes with significant traffic origins or traffic destinations outside of the corporate boundaries of the City of Elko. The following are considered Regional Roadways:

- Jennings Way Loop
- 5th Street
- Ruby Vista Drive, east of Jennings Way
- Delaware Street
- Idaho Street
- Silver Street
- Manzanita Lane
- 12th Street, south of Idaho Street
- Last Chance Road
- Bullion Road, west of Errecart Boulevard
- Errecart Boulevard

* Note that the Elko City Council approved the above list of Regional Roads; however, at this time Manzanita Lane and Last Chance Road are not recognized by the RTC as regional roads.

Roadway Capacity

Level of service (LOS) is a term used to measure and describe the operational conditions of a roadway network. Letters A through F are used to measure the LOS of a roadway segment or intersection. The following definitions are given for each level of service letter.

Agenda Item # I.B.1.

Elko City Planning Commission
Agenda Action Sheet

1. Title: **Review, consideration, and possible action to initiate an amendment to the City Zoning Ordinance, specifically Sections 3-2-3 General Provisions and 3-2-2 Definitions, and matters related thereto. FOR POSSIBLE ACTION**

2. Meeting Date: **May 7, 2019**

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

4. Time Required: **10 Minutes**

5. Background Information:

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

7. Supplemental Agenda Information:

8. Recommended Motion: **Move to initiate an amendment to the City Zoning Ordinance, specifically Sections 3-2-3 General Provisions and 3-2-2 Definitions and direct staff to bring the item back as a public hearing.**

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

10. Agenda Distribution:

STAFF COMMENT FLOW SHEET
PLANNING COMMISSION AGENDA DATE: _____
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Title: Zoning Ordinance Amendment 1-19 - Ord. 842
Applicant(s): City of Elko
Site Location: N/A
Current Zoning: N/A Date Received: N/A Date Public Notice: N/A
COMMENT: This is to initiate an amendment to Section 3-2-3 - General Provisions of the Elko City Code 3-2-2 Definitions

If additional space is needed please provide a separate memorandum

Assistant City Manager: Date: 4/29/19
Recommend initiation as presented by staff

SAW
Initial

City Manager: Date: 4/30/19
No comments/concerns.

CW
Initial

CITY OF ELKO
ORDINANCE NO. 842

AN ORDINANCE AMENDING TITLE 3, CHAPTER 2, SECTION 3 OF THE ELKO CITY CODE ENTITLED "GENERAL PROVISIONS" AND TITLE 3, CHAPTER 2, SECTION 2 OF THE ELKO CITY CODE ENTITLED "DEFINITIONS" HEREBY ADDING A REFERENCE TO CURB GUTTER AND SIDEWALK REQUIREMENTS SET FORTH IN TITLE 8 PUBLIC WAYS AND PROPERTY

WHEREAS, the City of Elko desires to amend portions of the City Code pertaining to curb, gutter and sidewalks in order to further promote orderly growth and development, and to protect the interest, health, safety and general welfare of the public; and

WHEREAS, the City of Elko has determined that the proposed amendments further those goals; and

WHEREAS, the City of Elko desires to amend Title 3, Chapter 2, Section 3 of the Elko Code, and has followed all procedural requirements and legal noticing required per City Code and N.R.S.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF ELKO, NEVADA

For amendment purposes, words which are bold and underlined are additions to the Code and words which are bold and lined through are deletions from the Code.

SECTION 1. Title 3, Chapter 2, Section 2 of the Elko City Code is hereby amended to read as follows:

3-2-2: DEFINITIONS:

The following terms, whenever used in this chapter, shall have the meanings indicated. Words used in the present tense include the future tense; words in the singular include the plural, and vice versa. The word "shall" is always mandatory, and the word "may" is permissive. The word "persons" includes an association, firm, partnership or corporation, as well as an individual. The word "occupied" and the word "used" shall be considered as meaning the same as the words "intended", "arranged" or "designed to be used or occupied". The word "dwelling" includes the word "residence"; the word "lot" includes the words "plot" or "parcel".

ABUTTING: The condition of two (2) adjoining properties having a common property line or boundary, including cases where two (2) or more lots adjoin only at a corner or corners, but not including cases where adjoining lots are separated by a street or alley.

ADJOINING, ADJACENT: The condition of being near to or close to, but not necessarily having a common dividing line; e.g., two (2) properties which are separated only by a street or alley shall be considered as adjoining one another.

ADULT BOOKSTORE: For the purposes of this chapter, means an establishment which merchandises printed material or movies which are intended to appeal to the prurient interests of the reader.

ADULT CARE FACILITY: An establishment that furnishes food, shelter, assistance and limited supervision only during the day to unrelated person(s) with an intellectual disability or with a physical disability who is aged or infirm.

ADULT MOTION PICTURE THEATER: A motion picture theater whose program, during the time of its operation, contains one (1) or more motion pictures which are rated "X" by the code rating administration of the Motion Picture Association of America or are not rated, and whose program is intended to appeal to the prurient interests of the viewer.

AGRICULTURE: The practice of cultivating the soil, producing crops and raising livestock.

ALLEY: **A passage or way, open to public travel and dedicated to public use, affording generally a secondary means of vehicular access to abutting lots and not intended for the general traffic circulation.**

~~**A. A street or highway within a City block set apart for public use, vehicular traffic and local convenience;**~~

~~**B. A street or highway which primarily furnishes access to the rear entrances of abutting property.**~~

AWNING: An architectural projection that provides weather protection, identity or decoration and is partially or wholly supported by the building to which it is attached. An awning is comprised of a lightweight frame structure over which a covering is attached.

BUILDING: Any structure having a roof supported by columns or walls, and used for the support, shelter or enclosure of persons, animals, personal property or chattels of any kind.

BUILDING, ACCESSORY: A subordinate building on the same lot with a principal building or use, the use of which is customarily accessory and incidental to the main use of the principal building or use. When attached to the principal building, such accessory building shall be considered a part of the principal building for purposes of setback and yard regulations.

BUILDING HEIGHT: The vertical distance measured from grade to the highest point of the building.

BUILDING INSPECTOR: Qualified employee of the City of Elko Building Department delegated to do building inspections and enforce applicable portions of this Code.

BUILDING, PRINCIPAL: A building, or where the context so indicates, a group of buildings, within which is conducted the principal use of the lot on which the building is situated.

CAMPING: The use of real property owned or occupied by another person for living

accommodation purposes outside of a structure that is affixed to the ground, to include uses such as, without limitation, the following when done in connection with outdoor living: a) overnight sleeping activities or making preparations to sleep overnight outside of a motor vehicle, recreational vehicle or trailer, such as the laying down of bedding on the ground for the purpose of sleeping overnight; b) storing personal belongings outside of a structure in connection with overnight sleeping activities; c) cooking outdoors or making a fire for the purpose of cooking food outdoors as approved by the City; or d) using any tent, shelter or other mobile structure for sleeping overnight. "Camping" does not include using a motor vehicle, recreational vehicle or trailer as long-term shelter, for living accommodation purposes or for the purpose of storage of belongings.

CARPORT: An accessory building, attached or detached, having two (2) or more open sides, used by occupants of the principal building for automobile shelter or storage.

CHILDCARE CENTER: A childcare facility providing care for more than twelve (12) children.

CHILDCARE FACILITY: An establishment operated and maintained for the purpose of furnishing care on a temporary or permanent basis during the day or overnight, to five (5) or more children under eighteen (18) years of age, if compensation is received for the care of any of those children and provided that such establishment is licensed by the State and operated in accordance with State requirements.

CHILDCARE FAMILY HOME: A childcare facility providing care for not less than five (5) children and not more than six (6) children.

CHILDCARE GROUP HOME: A childcare facility providing care for not less than seven (7) children and not more than twelve (12) children.

CLINIC: A building, or part thereof, in which ambulatory patients are provided diagnostic, therapeutic or preventative medical, surgical, dental or optical treatment by a group of doctors acting jointly, but not providing for overnight residence of patients.

COMMON OPEN SPACE: A parcel or parcels of land, or an area of water, or a combination of land and water, within the site designated for planned unit residential development which is designed and intended for the use or enjoyment of the residents of the development. Common open space may contain such complementary structures and improvements as are necessary and appropriate for the benefit and enjoyment of such residents.

CONDITIONAL USE: A use permitted in zoning district regulations subject to a finding by the Planning Commission that all special conditions and requirements imposed shall be met.

CONSTRUCTION YARD: An area on, abutting or adjacent to a major construction or demolition site used on a temporary basis for the parking and storage of equipment used in the project, and the storage and preparation of materials and other items used in the project, including construction offices and shops.

CONVALESCENT HOME: See definition of nursing or convalescent home.

DRIVE-IN ESTABLISHMENT: A business enterprise, activity or use of land consisting of sales or services rendered to patrons who normally receive the products or utilize the services while in motor vehicles upon the premises, including, but not limited to, gas service stations, drive-in restaurants, drive-in laundry and dry cleaning pick up, and drive-in bank.

DWELLING, MULTIPLE-FAMILY: A building, or portion thereof, containing two (2) or more dwelling units.

DWELLING, SINGLE-FAMILY: A building containing only one (1) dwelling unit and which is constructed under the Building Code in accordance with title 2 of this Code, and which also includes manufactured homes developed to specific standards in accordance with subsection 3-2-3Q of this chapter.

DWELLING UNIT (DU): A single unit providing complete, independent living facilities for one (1) family, including permanent provisions for living, sleeping, eating, cooking and sanitation.

ERECTED: Built, constructed, altered, reconstructed or moved upon; any physical operations on a premises which are required for construction, excavation, fill, drainage and the like, shall be considered a part of erection.

ESSENTIAL SERVICE: The erection, construction, alteration or maintenance by a public utility of underground, surface or overhead gas, electrical, steam, water transmission or distribution systems, communication, supply or disposal systems, poles, wires, mains, drains, sewers, pipes, cables, fire alarm boxes, police call boxes, traffic signals, hydrants, and other similar equipment and accessories in connection therewith reasonably necessary for the furnishing of adequate service by such public utilities for the public health, safety or general welfare, not including buildings, electric substations and transmission towers.

EXCAVATION: Any breaking of ground, except common gardening and grounds care, and general agriculture.

FAMILY: An individual living alone; or, one (1) or more persons living together who are related by blood, marriage or other legal bond, and their dependents; or, a group of not more than five (5) unrelated persons living together as a single household in a dwelling unit. A "family" includes its domestic employees.

FULL FRONTAGE: All lot lines of any lot, parcel or tract of property adjacent to a road, street, alley or right-of-way, to include lots, parcels or tracts containing multiple borders or edges, such as corner lots.

GAS SERVICE STATION: An establishment retailing motor fuels and lubricants directly to the public on the premises, including incidental sale of minor auto accessories and services.

GRADE: The average elevation of the finished ground surface adjacent to the exterior walls of a building or base of a structure.

HALFWAY HOUSE FOR RECOVERING ALCOHOL AND DRUG ABUSERS: A residence that provides housing and a living environment for recovering alcohol and drug abusers and is operated to facilitate their reintegration into the community, but does not provide treatment for alcohol or drug abuse. The term "halfway house for recovering alcohol and drug abusers" does not include a facility for transitional living for released offenders.

HOME OCCUPATION: A business customarily carried on in a business establishment that is permitted to be carried out in a residence as long as the use as a business is incidental to the primary residential purpose and the residential character of the property is not changed. Every person permitted to carry on a home occupation shall obtain an annual business license.

HOSPITAL: A building, or group of buildings, in which sick or injured persons are given medical or surgical treatment, examination or care, including overnight residence, together with related facilities, e.g., laboratories, training facilities, staff residences, outpatient department and similar facilities which are an integral part of the principal use.

HOTEL, MOTEL: A building, or group of buildings, used primarily for accommodation of transient guests in rooms or suites.

HUMANITARIAN CAMPGROUND: A designated area that serves a humanitarian purpose by allowing people, with permission from the owner or occupier of the land, to engage in camping and that may or may not have toilets, showers and/or other amenities for campers to use.

HUMANITARIAN PURPOSE: A use which is not for profit and which is designed to allow people who are homeless or who cannot occupy their homes due to lack of utilities or other causes, to engage in life sustaining activities, such as eating and sleeping.

JUNKYARD: An open area where waste, used or secondhand materials are bought and sold, exchanged, stored, baled, packed, disassembled or handled, including, but not limited to, scrap iron and other metals, paper, rags, rubber tires, and bottles. A "junkyard" includes automobile wrecking yards and any area of more than one hundred twenty (120) square feet for storage, keeping or abandonment of junk, but does not include uses confined entirely within enclosed buildings.

LANDOWNER: The legal or beneficial owner or owners of all the land proposed to be included in the planned unit development. The holder of an option or contract of purchase, and lessee having a remaining term of not less than thirty (30) years, or another person having an enforceable proprietary interest in such land, is a "landowner" for the purposes of this chapter.

LICENSED HOUSE OF PROSTITUTION: A licensed commercial enterprise maintained for the convenience and resort of persons desiring lawful sexual intercourse.

LOADING SPACE: An off street space provided for the temporary parking of a vehicle while loading or unloading merchandise or materials, situated on the same lot with a building and entirely outside the right-of-way of any public street or alley.

LOT: A distinct part or parcel of land separated from other pieces or parcels by description,

identified as such in a subdivision or on a record survey map, or described as such by metes and bounds, with the intention or for the purposes of sale, lease, or separate use, or for the purpose of building, including the following types of lots:

Corner Lot: A lot abutting two (2) or more intersecting streets.

Double Frontage Lot: A lot abutting two (2) parallel or approximately parallel streets.

Interior Lot: A lot having only one (1) side abutting a street.

Key Lot: An interior lot, one (1) side of which is contiguous to the rear line of a corner lot.

LOT AREA: The total area of a lot within the lot lines as measured on a horizontal plane.

LOT COVERAGE: That part or percentage of a lot occupied by principal and/or accessory buildings.

LOT DEPTH: The shortest distance, measured on a line parallel to the axis of the lot, between points on the front and rear lot lines.

LOT LINE: A line bounding a lot, including the following types of lot lines:

A. Front Lot Line: The lot line coinciding with the street line; or, in the case of a corner lot, the shorter of two (2) lot lines coinciding with street lines; or, in the case of a double frontage lot, both lot lines coinciding with street lines.

B. Rear Lot Line: The lot line opposite and farthest from the front lot line; for a pointed or irregular lot, the rear lot line shall be an imaginary line, parallel to and farthest from the front lot line, not less than ten feet (10') long and wholly within the lot.

C. Side Lot Line: Any lot line other than a front or rear lot line; in the case of a corner lot, the lot line abutting the side street is designated as the exterior side lot line and all other side lot lines are designated as interior side lot lines.

LOT OF RECORD: A lot which is part of a subdivision plat or other type of map used for the purpose of dividing or merging parcels of land, recorded in the Elko County Recorder's Office prior to the effective date hereof; or, a lot or parcel described by metes and bounds and having its description recorded in the Elko County Recorder's Office prior to the effective date hereof.

LOT WIDTH:

A. In case of a rectangular lot or a lot abutting on the outside of a street curve, the distance between side lot lines measured parallel to the street or to the street chord and measured on the street chord.

B. In the case of a lot abutting on the inside of a street curve, the distance between the side lot lines measured parallel to the street or the street chord at the rear line of the dwelling, or, where there is no dwelling, thirty feet (30') behind the minimum front setback line.

MAJOR ELECTRICAL TRANSMISSION LINE: Any electrical line carrying an electrical load of sixty six (66) kV and above.

METALLURGY: The reduction or extraction of metals from their ores by mechanical, physical or chemical methods, including their refinement and preparation for use as raw materials.

MINING: The extraction from the earth of gravel, stone, sand, and metallic or nonmetallic ore, and the crushing, washing, grading, storage and loading for transportation thereof.

MIXED USE: Combination of different uses including residential use within a shared building.

MOBILE HOME: As defined in the City of Elko mobile home ordinance[1].

MOBILE HOME LOT: As defined in the City of Elko mobile home ordinance[2].

MOBILE HOME PARK: As defined in the City of Elko mobile home ordinance[3].

NONCONFORMING USE: Uses existing at the time of adoption of this chapter, but not in accordance with the provisions and requirements contained herein.

NURSING OR CONVALESCENT HOME: An establishment providing bed care, or chronic or convalescent care, for one (1) or more persons, exclusive of relatives, who by reason of illness or physical infirmity are unable to properly care for themselves; excluding, however, institutions for the care of alcoholics, drug addicts, and persons with mental or communicable diseases.

OFF STREET: Land which is not within the right-of-way of any street or alley.

PARK AND RIDE FACILITIES: Parking lots which are intended to allow commuters to park their vehicles and then transfer to some form of mass transportation, such as buses, trains or carpools.

PARKING LOT: An area other than for single-family dwellings used for the off street parking of more than two (2) motor vehicles, including parking spaces, access and maneuvering aisles.

PARKING SPACE: A fully accessible space adequate for the temporary parking of permitted vehicles, situated entirely outside the right-of-way of any public street.

PARTIES IN INTEREST: A term identifying the owners of property within three hundred feet (300') of specific property.

PERSON: Except where otherwise indicated, a natural person, any form of business or social organization and any other nongovernmental legal entity including, but not limited to, a corporation, partnership, association, trust or unincorporated organization, or a government,

governmental agency or political subdivision of a government.

PLANNED SHOPPING CENTER: A business development not divided by a street and characterized by an organized and concentrated grouping of retail and service outlets served by a common circulation and parking system.

PLANNED UNIT DEVELOPMENT: An area of land controlled by a landowner, which is to be developed as a single entity for a number of dwelling units, the plans for which do not correspond in lot size, bulk or type of dwelling, density, lot coverage and required open space to the regulations established in any one (1) residential district created, from time to time, under the provisions of this chapter.

PLANNING COMMISSION: The City of Elko Planning Commission.

PRIVATE GARAGES: An enclosed accessory building, attached or detached, used for storage of motor vehicles used by occupants of the principal building and providing no public shop or services in connection therewith.

PUBLIC IMPROVEMENT: Street work, utilities and other improvements to be installed on land dedicated or to be dedicated for streets and easements as are necessary for local drainage, local traffic and the general use of property owners in the subdivision.

PUBLIC UTILITY: Any person, firm, corporation, municipality or Municipal board duly authorized under State or Municipal regulations, to furnish to the public electricity, gas, steam, communications, water, drainage, flood control, irrigation, garbage or trash disposal, or sewage disposal.

RAILROAD USE: The occupation and use of land, buildings and structures for purposes directly connected with rail transportation of articles, goods and passengers, including such facilities as tracks, sidings, signal devices and structures, shops and yards for maintenance and storage of rail machinery, loading platforms, passenger and freight terminals, but excluding warehouses, stockyards, grain elevators, truck freight terminals and yards, and similar facilities, which are maintained and operated by the owning railroad company or by a lessee for purposes auxiliary to rail transportation.

RECREATION AND SOCIAL CLUBS: Buildings and grounds used for and operated by membership of fraternal organizations primarily not for profit, including golf clubs, tennis clubs, riding clubs, American Legion halls, Elks Club, and similar facilities.

RECREATIONAL VEHICLE: A vehicle self-propelled or otherwise, designed to temporarily shelter persons en route on a recreational or vacation trip. "Recreational vehicle" includes truck mounted campers, and self-propelled travel vans.

RECREATIONAL VEHICLE PARK: A lot, parcel or tract of land, having as its principal use the rental of space of temporary short term, transient occupancy by two (2) or more recreational vehicles, including any accessory buildings, structures and uses customarily incidental thereto.

REPAIR GARAGE: An establishment where these services may be allowed: normal activities of a gas service station, general repair, engine rebuilding, rebuilding or reconditioning of motor vehicles; collision services such as body, frame or fender straightening and repair; general painting and undercoating of automobiles; high speed washing; auto, boat or trailer rental; and general sales of auto parts or accessories.

RESIDENTIAL ESTABLISHMENT: A halfway house for recovering alcohol and drug abusers or a residential facility for groups.

RESIDENTIAL FACILITY FOR GROUPS: An establishment that furnishes food, shelter, assistance and limited supervision to unrelated person(s) with an intellectual disability or with a physical disability who is aged or infirm. The term does not include an establishment which provides care only during the day, a natural person who provides care for no more than two (2) persons in his own home, a natural person who provides care for one (1) or more persons related to him within the third degree of consanguinity or affinity, a halfway house for recovering alcohol and drug abusers, or a facility funded by a division or program of the Nevada Department of Health and Human Services.

RETAIL USE: A commercial establishment selling goods at retail; however, a home occupation shall not be considered as a retail use.

RIGHTS-OF-WAY: All public and private rights-of-way and all areas required for public use in accordance with any master plan or parts thereof.

ROADWAY CLASSIFICATION: All roadway classifications shall be determined in accordance with the Transportation Component of the City of Elko Master Plan.

ROOMING HOUSE: A building other than a hotel or motel where, for compensation and by prearrangement for definite periods of time, lodging is provided for individuals who are not members of a resident family.

SCHOOL: A public or private building, or group of buildings, used for purposes of primary or secondary education, meeting all requirements of the Compulsory Education Laws of the State of Nevada.

SCREEN WALL: A masonry wall or opaque fence so constructed as to prevent the view of enclosed activities or uses from without.

SERVANT QUARTERS: An attached or detached building, or part thereof, housing persons employed on the premises.

SERVICE CLUBS: Buildings and grounds used for and operated by nonprofit organizations whose membership is open to any resident of the community, including YMCA, YWCA, Boy Scouts, Girl Scouts, Boys Club and any similar organizations having as its primary objective the improvement of the district, neighborhood or community and its social welfare.

SETBACK: The minimum horizontal distance between a lot line and the nearest point of a building, structure or use, as the context indicates, located on a lot. "Setback" shall not include eaves of the building.

STORY: That portion of a building included between the surface of any floor and the surface of the next floor above, or if there is no floor above, the space between the topmost floor and the roof having a usable floor area at least one-half ($^1/_2$) that of the floor area of the floor immediately below. A basement shall be considered a story when fifty percent (50%) or more of its cubic content is above grade.

STREET: **Any existing or proposed street, avenue, boulevard, road, lane, parkway, place, bridge, viaduct or easement for public vehicular access; or, a street shown in a map heretofore approved pursuant to law; or, a street in a map duly filed and recorded in the county recorder's office. A street includes all land within the street right of way, whether improved or unimproved, and includes such improvements as pavement, shoulder, curbs, gutters, sidewalks, parking space, bridges, viaducts, lawns and trees. For purposes of this Chapter, the following definitions apply to specific types of streets:**

A. Alley: A public way providing secondary vehicular access and service to properties which also abut a street.

B. Arterial And Minor Arterial Streets: A general term describing large major streets, including freeways, expressways and interstate roadways, and state and/or county highways having city and regional continuity.

C. Collector Residential And Local Residential Streets: City streets serving the primary function of providing access to abutting property:

1. Cul-De-Sac Street: A short collector residential and local residential street having one end permanently terminating in and including a vehicular turning area.

2. Marginal Access Street: A collector residential and local residential street parallel to and abutting an arterial street which provides access to abutting property, intercepts other collector residential and local residential streets, and controls access to the arterial street.

D. Collector Street: A street generally with limited continuity serving the primary function of moving traffic between arterial streets and local residential streets, and the secondary function of providing access to abutting properties.

~~**A dedicated public way which affords the principal means of vehicular access to abutting property**~~.

STREET LINE: A line demarcating the limits of a street right-of-way.

STREET, PRIVATE: A nondedicated, privately owned right-of-way or limited public way that affords the principal means of emergency and limited vehicular access and connection from the

public street system to properties created through the division or subdivision of land.

STREET, PUBLIC: A dedicated public right-of-way that is part of the public street system and which affords the principal means of emergency and general vehicular access to abutting property.

STRUCTURE: Any constructed or erected material or combination of materials, the use of which requires location on the ground or attachment to something located on the ground and which requires a permit as defined and regulated by the Building Code, including buildings, stadiums, radio towers, sheds, storage bins, fences and signs.

SWIMMING POOL: Any constructed pool, used for swimming, bathing or wading, whether above or below the ground surface and regardless of depth or water surface area.

TEMPORARY USE OR BUILDING: A use or structure permitted under the terms of this chapter to exist for a limited period of time.

TOWNHOUSE OR ROW HOUSE: A single-dwelling unit arranged side by side with other such units in a multi-family dwelling, completely independent of all other such units in the building by reason of separation therefrom by unpierced party walls.

USABLE FLOOR AREA: A term used in computing parking requirements, meaning the aggregate area of a building measured to the interior area, similarly measured, or each additional story which is connected to the first story by a fixed stairway, escalator, ramp or elevator, and the floor area of all accessory buildings, measured similarly, but excluding that part of any floor area which is occupied by heating, ventilating, or other permanently installed equipment required for operation of the building, and by unenclosed porches, light shafts, public corridors and public toilets. For uses not enclosed within a building, the area for sales, display or service shall be measured to determine equivalent usable floor area.

USE: The purpose for which land or a building is arranged, designed or intended, or for which land or a building is or may be occupied. The principal use is the main use to which the premises are devoted and the main purpose for which the premises exist. An accessory use is a use subordinate to the principal use on a lot and used for purposes clearly incidental to those of the principal use.

VARIANCE: A modification of the literal enforcement of the technical provisions and requirements of this chapter. The applicant for variance shall present adequate evidence to support the granting of a variance in accordance with section 3-2-22 of this chapter.

YARD: An open space located between any portion of a building and the nearest lot line, or the nearest adjacent building or group of buildings, as the context indicates, unoccupied and unobstructed from the ground upward, except as otherwise provided in this chapter.

YARD, FRONT: A yard extending across the full width of the lot and having a depth equal to the horizontal distance between the nearest point of the principal building and the front lot line, measured at right angles to the front lot line.

YARD, NONREQUIRED: Any yard with dimensions exceeding those required herein.

YARD, REAR: A yard extending across the full width of a lot and having a depth equal to the horizontal distance between the nearest point of the principal building and the rear lot line, measured at right angles to the rear lot line.

YARD, REQUIRED: A yard having the minimum dimensions required herein.

YARD, SIDE: A yard extending from the front lot line to the rear lot line between a side lot line and the principal building, and having a width equal to the horizontal distance between the nearest point of the principal building and the side lot line, measured at right angles to the side lot line. (Ord. 818, 4-25-2017)

SECTION 2. Title 3, Chapter 2, Section 3 of the Elko City Code is hereby amended to read as follows:

3-2-3: GENERAL PROVISIONS:

A. Interpretation: In their interpretation and application, the provisions of this chapter shall be held to be minimum requirements, shall be liberally construed in favor of the city, and shall not be deemed a limitation or repeal of any other power granted by the Nevada Revised Statutes.

B. Street**,** ~~**And**~~ Utility **and Other Public Improvement** Requirements: The following restrictions shall apply:

1. Generally, all lots shall abut and access a public street connecting with the public street system in order to provide for orderly growth, vehicular circulation and to ensure accessibility to utilities and emergency services. A condominium **or townhome** project shall be considered one lot for purposes of this specific requirement.

2. Lots may abut and access a private street connecting with the public street system in the following circumstances:

a. Within a PC (planned commercial) district in conformance with an approved concept development plan.

b. Within an IBP (industrial business park) district in conformance with an approved concept development plan.

c. Within a PUD (planned unit development) district in conformance with an approved site development plan.

d. Within an RMH (residential mobile home) district in conformance with an approved site development plan.

e. For residential, commercial or industrial developments involving four (4) or fewer lots and where the length of the private street, from the nearest public street to the lot being accessed, does not exceed six hundred eighty feet (680').

3. Building permits may be issued for lots which abut undedicated portions of a partly dedicated public street.

4. A building permit shall not be issued for any lot for which city public sewerage and water supply is not available, unless the city council grants a waiver of the mandatory connection to public sewer requirement pursuant to subsection 9-5-61B of this code.

5. All utilities shall be placed underground, except for lots of record.

6. Public street and utility construction and installation is required across the full frontage of property at time of development.

7. Developed lots or parcels of land involving a change in building occupancy, change in use of land, or upon which any building is expanded upon or new construction shall be subject to curb, gutter and sidewalk provisions set forth in Elko City Code 8-21-3.

C. Use Restrictions: The following use restrictions shall apply:

1. Principal Uses: Only those uses and groups of uses specifically designated as "principal uses permitted" in zoning district regulations shall be permitted as principal uses; all other uses shall be prohibited as principal uses.

2. Conditional Uses: Certain specified uses designated as "conditional uses permitted" may be permitted as principal uses subject to special conditions of location, design, construction, operation and maintenance hereinafter specified in this chapter or imposed by the planning commission or city council.

3. Accessory Uses: Uses normally accessory and incidental to permitted principal or conditional uses may be permitted as hereinafter specified.

4. Unspecified Uses: The listing of groups of permitted uses is intended to establish the character of uses to be permitted, but not to include each and every use which may be permitted. Unspecified uses may be imposed by the planning commission upon evidence and determination that such uses are closely similar in character to and not typically more objectionable than other uses actually listed as permitted.

5. Temporary Uses: Certain temporary uses such as interim administrative and sales offices, sales offices for mobile and manufactured homes, model home sales complex for residential subdivisions, materials storage, mixing, assembly, manufacturing of a portable nature and similar uses determined to be functionally comparable, and, as specified in this paragraph, temporary emergency shelters, temporary camping and

temporary campgrounds may be permitted by temporary use permit.

a. "Temporary emergency shelters" are defined as enclosed and unenclosed locations, to include structures and portions of structures, used for temporary occupancy by individuals and families who are homeless or who cannot occupy their homes due to lack of utilities or other causes. Temporary emergency shelters may be permitted, but only within C (General Commercial), LI (Light Industrial) and GI (General Industrial) Zoning Districts.

b. "Temporary Camping" means to use real property owned or occupied by another person for living accommodation purposes for a limited period of time outside of a structure that is affixed to the ground, to include uses such as, without limitation, the following when done in connection with outdoor living: (1) overnight sleeping activities or making preparations to sleep overnight outside of a motor vehicle, recreational vehicle or trailer, such as the laying down of bedding on the ground for the purpose of sleeping overnight; (2) storing personal belongings outside of a structure in connection with overnight sleeping activities; (3) cooking outdoors or making a fire for the purpose of cooking food outdoors as approved by the city in the temporary use permit; or (4) using any tent, shelter or other mobile structure for sleeping overnight. "Camping" does not include using a motor vehicle, recreational vehicle or trailer as long-term shelter, for living accommodation purposes, or for the purpose of storage of belongings.

c. "Temporary Campground" means a designated area where people may, with permission from the owner or occupier of the land, engage in camping for a limited period of time and that may or may not have toilets, showers and/or other amenities for campers to use.

d. Temporary Camping and Temporary Campgrounds may be permitted as temporary uses, but only within LI (Light Industrial) and GI (General Industrial) Zoning Districts.

e. For purposes of this section, "overnight" is defined as the period from one-half hour after sunset to sunrise.

f. For purposes of this section, "living accommodation purposes" is defined as uses and activities needed for or directly connected with the use of land for engaging in life-sustaining activities.

g. The temporary use permit process for camping and campgrounds shall be subject to the following public hearing process: the city shall set a time and place for the public hearing before the planning commission on the application and the city shall send, by mail, notice of the time and place and purpose of the planning commission hearing, at least ten (10) days before the hearing, to the owners of property within three hundred feet (300') of the

exterior limits of the property involved, as shown by the latest assessment rolls of the city. Notice by mail to the last known address of the real property owners, as shown by the Assessor's records, shall be sufficient. Legal notice shall be placed in a newspaper of general circulation within the city at least ten (10) days prior to the date of the public hearing. Applications for temporary use permits must be filed at least twenty-one (21) days before the planning commission hearing.

h. Temporary use permits may be subject to such special conditions as may be imposed by the planning commission related to time frame, location, nature and character of the use and extent of on site improvements. Application for a temporary use permit shall be filed with the planning department on a form provided for such purpose and shall include payment of a filing fee in an amount established by resolution of the city council.

6. Site Plan Review: Certain uses, structures, activities or uses requiring planning commission review or determination, inclusive of public buildings, public structures or other public developments such as parks, except those submitted as part of an application for a conditional use permit or temporary use permit, may be permitted upon formal review by the planning commission. The scope of the planning commission's review shall be limited to location, character and extent of improvements thereof, and shall be subject to such special conditions, relative to the defined scope of review, as may be imposed by the planning commission. Application for site plan review shall be filed with the planning department on a form provided for such purpose and shall include payment of a filing fee in an amount established by resolution of the city council.

D. Site Unsuitability: No land may be used or structure erected where the land is held by the planning commission to be unsuitable for such use or structure by reason of flooding, concentrated runoff, inadequate drainage, adverse soil or rock formation, extreme topography, low bearing strength, erosion susceptibility, or any other features likely to be harmful to the health, safety and general welfare of the community. The planning commission, in applying the provisions of this section, shall state in writing the particular facts upon which its conclusions are based. The applicant shall have the right to present evidence contesting such determination to the city council if he or she so desires, whereupon the city council may affirm, modify or withdraw the determination of unsuitability.

E. Reduction Or Joint Use: No lot, yard, parking or loading area, building area, or other space, nor any part thereof, hereinafter required about or in connection with any building, shall be included as part of a yard area or space required for any other building, nor shall any yard or lot existing on the effective date hereof be reduced in dimension or area below the minimum requirements set forth in this title.

F. Building Height Regulations: No building shall exceed the heights allowed in the current city of Elko airport master plan.

G. Projections Into Required Yards; Residential Districts:

1. Awnings, open fire balconies, fire escape stairs, window type refrigeration units not exceeding one and one-half (11/2) tons or one and one-half (11/2) horsepower rating, suspended or roof evaporative coolers, and forced air furnaces, may project not more than five feet (5') over any required yard; provided, that they shall be no closer than two feet (2') to any lot line.

2. Cornices and eaves may project over any required yard, provided, that they shall be no closer than two feet (2') to any lot line.

3. Sills, belt courses and similar ornamental features may project not more than six inches (6") over or into any required yard.

4. Unroofed terraces, patios, steps or similar features may project into any required yard; provided, that projections into required front yards shall not exceed ten feet (10'). Roofed or covered terraces, patios, steps or similar features may project into the required rear yard no closer than ten feet (10') to the rear lot line, provided two (2) sides of the covered feature remain open.

5. Fireplaces may be allowed to encroach into required yards no closer than two feet (2') to any lot line.

6. Carports may be allowed to encroach into required side yards; provided, that two (2) sides of the carport remain open, that no portion of the carport structure be closer than three feet (3') to any side lot line, and all drainage from the roof of the structure shall be onto the property itself.

H. Exterior Lighting: All lighting for advertising off street parking or loading areas, or for the external illumination of buildings, shall be directed away from and shielded from any adjacent residential district and shall not detract from driver visibility on adjacent streets or highways, interfere with or cause driver confusion regarding traffic control devices, interfere with driver vision or create other traffic hazards.

I. Essential Services Permitted: Nothing in this chapter shall prevent the location, erection, construction, alteration or maintenance by a public utility of any "essential services", as herein defined.

J. Required Screen Walls: Under certain conditions, the planning commission may recommend that the city council require screen walls to separate incompatible uses; e.g., separation of abutting or industrial uses and residential uses. Such wall shall be constructed by the developer and approved by the city engineer or planning commission.

K. Nonrequired Fences, Walls And Hedges:

1. No fence, wall, tree, shrub or hedge may be allowed which would obstruct vision at street intersections in any residential district.

2. No fence or wall shall contain barbed wire, concertina razor wire, electrical current or charge of electricity, broken glass, or similar hazardous materials or devices; provided, however, that fences enclosing storage areas in industrial or commercial districts may use barbed wire extension arms on chainlink fences six feet (6') or higher, or may use concertina razor wire extension arms on chainlink fences seven feet (7') or higher. In addition, fences enclosing storage areas in industrial or commercial districts may use concertina razor wire extension arms on chainlink fences between six feet (6') and seven feet (7') in height so long as the concertina razor wire extension arm does not protrude more than six inches (6") out from the exterior vertical extension of the chainlink fence.

3. No nonbuilding wall or fence in any residential district shall exceed six feet (6') in height without a building permit.

L. Trash Enclosures: A permanent enclosure for temporary storage of garbage, refuse and other waste materials shall be provided for every use other than single-family dwellings in every zoning district, except where an approved mechanically loaded steel bin is used for the purpose, or where a property is entirely surrounded by screen walls or buildings. Trash enclosures shall be so constructed that contents are not visible from a height of five feet (5') above grade on any abutting street or property.

M. Swimming Pools: Swimming pools, whether private, public or commercial, shall comply with the laws, rules and regulations of the city and state.

N. Signs: The provisions of the sign code as set forth in chapter 9 of this title shall apply.

O. Building And Electrical Codes: In all construction hereafter made within the city, the same shall be in accordance with title 2, chapters 2 and 6 of this code, and all other applicable provisions of this code.

P. Mobile Homes: Mobile homes are hereby expressly prohibited for living purposes outside the RMH district, except as stated in other chapters of this title. All requirements of chapter 5 of this title and all other applicable provisions of this code shall be adhered to with respect to standards for the RMH district.

Q. Manufactured Homes: Notwithstanding any other provisions in this code, manufactured homes are hereby recognized as a "principal permitted use" in all zoning districts which recognize single-family dwellings as a "principal permitted use", provided all of the following standards are complied with:

1. The manufactured home shall be placed on a foundation permanently affixed to the residential lot and qualify and constitute real property, as established by Nevada Revised Statutes chapter 361.

2. The manufactured home shall be manufactured within the five (5) years immediately preceding the date on which it is affixed to the residential lot.

3. The manufactured home shall utilize exterior siding consisting of or giving the appearance of stucco, masonry, wood, metal or vinyl and affixed to the dwelling unit in a continuous horizontal or vertical pattern similar in color, material and appearance to the exterior siding used on other single-family dwellings in the immediate vicinity.

4. The manufactured home shall utilize roofing materials consisting of asphalt shingles or equivalent roofing materials of comparable quality, similar in color, material and appearance to the roofing used on other single-family dwellings in the immediate vicinity. The manufactured home shall utilize a full height roof element with a minimum pitch of three to twelve (3:12). The roof element shall include a minimum overhang or projecting eave of twelve inches (12").

5. The manufactured home shall be multisectioned (doublewide or larger) with a minimum width or minimum depth of twenty four feet (24').

6. The manufactured home shall consist of at least one thousand two hundred (1,200) square feet of living area. A waiver can be filed and may be granted for a reduction of the living area based on the size or configuration of the lot or the square footage of single-family residential dwellings in the immediate vicinity, in accordance with site plan review procedures pursuant to subsection C6 of this section.

7. Any elevated foundations shall be masked architecturally in a manner to blend and harmonize with exterior siding materials utilized on the manufactured home.

8. As provided in Nevada Revised Statutes, the provisions of this section do not abrogate recorded restrictive covenants prohibiting manufactured homes, nor do the provisions apply within the boundaries of a historic district established pursuant to Nevada Revised Statutes section 384.005 or 384.100. An application to place a manufactured home on a residential lot pursuant to this section constitutes an attestation by the owner of the lot that the placement complies with all covenants, conditions and restrictions placed on the lot and that the lot is not located within a historic district.

R. Minimum Distance Between Residential Establishments: A minimum distance of at least one thousand three hundred twenty feet (1,320') shall be required between residential establishments. A residential establishment is defined in Nevada Revised Statutes section 278.02384 as:

"Residential establishment means (1) a home for individual residential care in a community whose population is 100,000 or more, (2) a halfway house for recovering alcohol and drug abusers or (3) a residential facility for groups".

1. The definition of "individual residential care" is not applicable as the population of Elko County is less than one hundred thousand (100,000).

2. "Halfway house for recovering alcohol and drug abusers" is defined in Nevada

Revised Statutes section 449.008 as:

"Halfway house for recovering alcohol and drug abusers means a residence that provides housing and a living environment for alcohol and drug abusers and is operated to facilitate their reintegration into the community, but does not provide treatment for alcohol or drug abuse. The term does not include a facility for the treatment of abuse of alcohol or drugs as defined in Nevada Revised Statutes section 449.00455".

3. "Residential facility for groups" is defined in Nevada Revised Statutes section 449.017 as:

   "Except as otherwise provided in subsection 2, residential facility for groups means an establishment that furnishes food, shelter assistance and limited supervision to an aged, infirm, mentally retarded or handicapped person. The term does include:

   a. An establishment which provides care only during the day;

   b. A natural person who provides care for no more than two (2) persons in his own home;

   c. A natural person who provides care for one or more persons related to him within the third degree of consanguinity or affinity;

   d. A halfway house for alcohol and drug abusers; or
   e. A facility funded by a division or program of the department of human resources."

S. As Built Drawing: Except for the new construction of a single-family dwelling, prior to the issuance of a certificate of occupancy for any new construction, the applicant must submit to the city a complete and accurate as built drawing with survey data on the Elko grid (NAD 83 Nevada east zone ground elevation). The as built drawing must be submitted electronically in AutoCAD format and must be accompanied by a wet stamped and signed paper copy by the professional of record for the project. As used herein, the term "as built drawing" means a drawing that accurately depicts the locations of all improvements on the parcel or lot containing the new construction and any associated utilities or other public improvements constructed on other properties, which drawing shall, without limitation, include the structure(s) and all associated utilities and other public improvements.

SECTION 3. All ordinances or parts of ordinances in conflict herewith are hereby repealed, but only to the extent of such conflict.

SECTION 4. If any section, paragraph, clause or provision of this Ordinance shall for any reason be held to be invalid, unenforceable or unconstitutional by any court of competent jurisdiction, the invalidity, unenforceability of such section, paragraph, clause or provision shall not affect any remaining provision of this Ordinance.

SECTION 5. Upon adoption, the City Clerk of the City of Elko is hereby directed to have this ordinance published by title only, together with the Councilpersons voting for or against its passage in a newspaper of general circulation within the time established by law, for at least one publication.

SECTION 6. This ordinance shall be effective upon the publication mentioned, unless otherwise stated.

PASSED AND ADOPTED this --th day of ---, 2019 by the following vote of the Elko City Council.

VOTE:

AYES:

NAYES:

ABSENT:

ABSTAIN: None

CITY OF ELKO

By:_____
REECE KEENER, Mayor

ATTEST:

_____
KELLY WOOLDRIDGE, City Clerk

QUINLAN™

March 10, 2019 | Volume 13 | Issue 5

Zoning Bulletin

in this issue:

Standing—Abutting property owner appeals grant of variance

Variance applicant argues abutter failed to show injury from variance and therefore lacked standing to challenge zoning decision

Citation: *Shemuga v. Brown, 2019 WL 334366 (Mass. Land Ct. 2019), judgment entered, 2019 WL 320408 (Mass. Land Ct. 2019)*

MASSACHUSETTS (01/23/19)—This case addressed the issue of whether an abutting property owner had standing to appeal a zoning board of appeals' decision to grant a variance to a landowner. More specifically, the case addressed whether the abutting property owners had substantiated their allegations of injury caused by the zoning decision they were challenging such that they had standing.

The Background/Facts: Joanne Beksha Brown ("Brown") owned property (the "Property") in the Town of Medway (the "Town"). Brown sought to subdivide the Property. The Town's zoning bylaw required a minimum 44,000 square feet of area per lot. In subdividing Brown's Property, Lot 1 would be conforming, but Lot 2 would have only 43,937 square feet. Thus, Brown sought a variance of 63 square feet from the minimum lot area requirements of the Bylaw. The Town's Zoning Board of Appeals (the "ZBA") granted Brown's variance application.

Susan and Gary Shemuga (the "Shemugas") owned the property abutting Brown's. On their property, they operated a dog kennel pursuant to a special permit obtained from the Town. After the ZBA granted Brown's variance application, the Shemugas appealed it. The Shemugas argued that allowing Brown's variance could result in the construction of a dwelling on the adjacent lot, which would be "incompatible with their dog rescue business" because the new neighbors might complain about the noise from barking dogs. In other words, the Shemugas argued that their dog rescue kennel business would be adversely affected by the variance "due to potential neighbors possibly complaining about barking dogs."

Brown asked the court to dismiss the Shemugas' action for lack of subject matter jurisdiction, arguing that the Shemugas lacked standing (i.e., the legal right to bring the legal action). Brown asserted that in order to have standing, the Shemugas had to show evidence of a "cognizable harm sufficient to support a finding that they [were] aggrieved persons within the meaning of G.L. c. 40A, § 17." And, Brown maintained that the Shemugas failed to produce evidence of any such harm.

DECISION: Motion to Dismiss allowed.

Agreeing with Brown, the Massachusetts Land Court, Department of the Trial

Court, Norfolk County, found that the Shemugas lacked standing to challenge the variance issued to Brown because the Shemugas failed to present "credible evidence of any injury to a protected interest."

In so holding, the court explained that under the Massachusetts Zoning Act, G. L. c. 40A, "only a 'person aggrieved' has standing to challenge a decision of a zoning board of appeals." The court further explained that "a person aggrieved" is "one who 'suffers some infringement of his legal rights.' " The court also explained that abutters to the subject property—such as the Shemugas here—"are entitled to a rebuttable presumption that they are 'aggrieved' persons under the Zoning Act and, therefore, have standing to challenge a decision of a zoning board of appeals." Still, although an abutting property owner has a presumption of standing, the court explained that a defendant—such as Brown here—could rebut that presumption: (1) "by showing that, as a matter of law, the claims of aggrievement raised by an abutter, either in the complaint or during discovery, are not interests that the Zoning Act is to protect"; or (2) "by coming forward with credible affirmative evidence that refutes that presumption." In other words, the presumption of standing can be rebutted by a showing that the plaintiff has no "reasonable expectation of proving a cognizable harm." Further, explained the court, if the defendant successfully rebuts the plaintiff's presumption of standing, the burden then shifts to the plaintiff "to 'prove standing by putting forth credible evidence to substantiate the allegations' "—through "direct facts and not by speculative personal opinion . . . that his injury is special and different from the concerns of the rest of the community."

In evaluating whether the Shemugas had standing here, the court first concluded that, because they were abutting property owners, they were entitled to the benefit of the presumption of aggrievement. Accordingly, the Shemugas were presumed to be persons aggrieved by the ZBA's decision to grant the variance to Brown, with standing to challenge that zoning decision. However, the court also found that Brown successfully rebutted the Shemugas' presumption of standing. The court found that Brown "correctly" argued that the Shemugas' claimed injury to their kennel business of potential complaints about barking dogs was "a speculative concern at best." Even, Ms. Shemuga had testified that it was a "possibility" and "an unknown" in regards to whether the dog rescue business would be harmed if a single-family residence was built on the Brown Property, found that court. Thus, the court concluded that Brown, in showing that this only claim of aggrievement by the Shemugas was speculative, successfully rebutted the Shemugas' presumption of standing.

With the burden then shifted to the Shemugas to prove standing by putting forth credible evidence to substantiate their allegations of injury, the court found that the Shemugas failed to substantiate their allegations. The court said that failure was for three reasons: First, the Shemugas' claimed injury of potential complaints adversely affecting their dog rescue business was purely speculative. Second, the Shemugas claimed no injury to a protected use of their property, "such as a density-related concern." Third, the Shemugas' claimed injury was "not a cognizable injury in that they anticipate[d] no interference with their own use, but anticipate[d] instead that their use [would] interfere with a future abutter who [would] complain."

See also: *81 Spooner Road, LLC v. Zoning Bd. of Appeals of Brookline, 461 Mass. 692, 964 N.E.2d 318 (2012).*

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Due Process/Equal Protection—After being subject to dozens of zoning enforcement actions, property owners sue the township

Property owners contend zoning enforcement actions were discriminatory because actions were based on their race

Citation: *Thorpe v. Upper Makefield Township, 2018 WL 6822301 (3d Cir. 2018)*

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

THIRD CIRCUIT (PENNSYLVANIA) (12/28/18)—This case addressed the issue of whether property owners were discriminated against in zoning enforcement actions on the basis of Native American race.

The Background/Facts: Since 2007, Dale and Renee Thorpe (the "Thorpes") owned property (the "Property") in a CM-Conservation Management zoning district in Upper Makefield Township (the "Township"). The Property was subject to the Joint Municipal Zoning Ordinance ("JMZO") which governed zoning in the Township and two other municipalities. Between 2007 and 2014, the Thorpes' Property was subject to 23 zoning enforcement actions, ranging from denials of permits to issuances of enforcement notices and citations. The Thorpes did not pursue any of the zoning dispute remedial procedures available to them. Instead, they eventually filed suit against the Township, alleging that they were discriminated against on the basis of Dale Thorpe's Native American race, in violation of their due process and equal protection rights under the Fourteenth Amendment of the United States Constitution. The Fourteenth Amendment reads, in part, that no state shall "deprive any person of life, liberty, or property, without due process of law." The Fourteenth Amendment also reads, in part, that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Specifically, the Thorpes argued that the Township's general "unfair" zoning enforcement violated their substantive due process rights because it was motivated by racial animus toward Native Americans. The Thorpes also argued that the Township's adoption of a 150-foot set-back provision in its 2007 Amendment of the JMZO violated their substantive due process rights because the Township had no rational basis to adopt it, and did so only to spite the Thorpes. Finally, the Thorpes argued that the Township violated their equal protection rights because, unlike owners of similarly situated farms, they were subject to increased zoning scrutiny because Dale Thorpe was Native American.

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court issued summary judgment in favor of the Township.

The Thorpes appealed.

DECISION: Judgment of district court affirmed.

Rejecting the Thorpes' arguments, the United States Court of Appeals, Third Circuit, held that the Township's numerous zoning enforcement actions against the Thorpes did not violate the Thorpes' due process or equal protection rights.

In so holding, the court first explained that for the Thorpes to succeed on their substantive due process claim, they would have to prove that they were deprived of a constitutionally protected liberty or property interest by arbitrary government action—i.e., government action that "shocks the conscience." The Thorpes had asserted that the Township had deprived them of their constitutionally protected property interest in land ownership, and that the Township's "unfair" zoning enforcement shocked the conscience because it was motivated by racial animus toward Native Americans. The court, however, found the Thorpes had failed to proffer evidence sufficient to prove their racial animus claim.

The court also rejected the Thorpes' claim that the Township violated their substantive due process rights by adopting the set-back provision to spite the Thorpes and without any rational basis for doing so. The court again found that the evidence did not support these claims.

With regard to the Thorpes' equal protection rights claims, the court explained that to succeed, the Thorpes would have to prove that they were "intentionally treated differently from others similarly situated and that there [was] no rational basis for the difference in treatment." Again, the Thorpes had asserted that they were subject to increased zoning scrutiny—as compared to other similarly situated farms—because of Dale Thorpe's Native American race. Although the court found that the evidence showed that the Thorpes may have had more zoning disputes than the other farm owners, the court held that the "increased frequency of zoning enforcement actions alone [was] not enough to demonstrate that the Township treated the Thorpes less favorably than the similarly situated farm owners." Moreover, the court found that any ultimate difference in zoning treatment—between how the Thorpes were treated and how other farms were treated—was supported by "legitimate, rational reasons, including differences in the activities conducted on the farms, requests for zoning variances, and the outcome of zoning appeals." In sum, the court concluded that the Thorpes failed to show a genuine issue of material fact regarding their equal protection claim.

See also: *United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392 (3d Cir. 2003).*

See also: *Holder v. City of Allentown, 987 F.2d 188, 8 I.E.R. Cas. (BNA) 790 (3d Cir. 1993).*

Disability Discrimination/ Housing—City zoning ordinance requires special permit to operate sober house

Entity seeking to operate sober house contends requirement discriminates disabled persons in violation of state and federal laws

Citation: *Mannai Home, LLC v. City of Fall River, 2019 WL 456163 (D. Mass. 2019)*

MASSACHUSETTS (02/05/19)—This case addressed the issue of whether a city's zoning ordinance governing group-residence uses violated state law prohibiting zoning ordinance discrimination against disabled persons.

The Background/Facts: Mannai Home, LLC ("Mannai") sought to purchase and renovate a three-unit property (the "Property") in the City of Fall River (the "City") for the purpose of establishing a sober recovery home. Representatives of Mannai communicated the plans with the City, effectively requesting that the City allow the intended use as a matter of right. City officials notified Mannai that a sober house could not be operated on the Property because it would be considered a group residence. A City zoning ordinance covering "group residence" specified that "[n]o land or structure within the City, in any district whatsoever, shall be used for a group residence, so-called, in which five or more persons unrelated by blood, marriage or adoption are housed and live together as a family, except those who are members of a religious organization, order, diocese, or religious community." (City of Fall River Zoning Ordinance § 86-253(A).) Thus, the City's zoning ordinance required a special permit for Mannai's proposed group residence.

Mannai, however, never sought a special permit for the group residence. Nor did Mannai apply for a building permit or file an appeal with the City's Zoning Board of Appeals ("ZBA"). Mannai instead alleged that a City official asserted that the City "already had problems with sober homes," and that Mannai's proposed sober house project was "never going to happen."

Mannai eventually sued the City. Among other things, Mannai asserted claims of disability discrimination under the Massachusetts Zoning Act (Mass. Gen. L. c. 40A, § 3), the federal Fair Housing Act (42 U.S.C.A. § 3604), and the American with Disabilities Act (42 U.S.C.A. § 12101).

Section 3 of the Massachusetts Zoning Act provides that local zoning ordinances "shall not discriminate against a disabled person," and that zoning requirements "on congregate living arrangements among non-related persons with disabilities that are not imposed on families and groups of similar size or other unrelated persons shall constitute discrimination." Mannai homes contended that this state law required that unrelated disabled individuals must be treated the same under applicable housing laws as families and groups of similar size. Specifically, Mannai contended that the City discriminated against disabled persons in violation of section 3 of the Massachusetts Zoning Act by requiring Mannai to obtain a special permit, or otherwise failing to exempt it from the special-permit requirement for group residences.

The federal Fair Housing Act ("FHA") and Americans with Disabilities Act ("ADA") also prohibit discrimination in housing against persons with disabilities—including those recovering from drug and alcohol addiction. (See 42 U.S.C.A. § 3604(f)(2), and 42 U.S.C.A. § 12182(b)(2)(A)(i).) Here, Mannai claimed that the City's disparate treatment of sober home residents—through intentional discrimination—violated the FHA and ADA. Mannai also claimed that the City's failure to provide a reasonable accommodation to the zoning ordinance's ban on group homes in order to develop this sober house was a violation of the FHA's required accommodation for persons with disabilities.

Both Mannai and the City asked the court to find that there were no material issues of fact in dispute, and to decide the matter in their favor on the law alone.

DECISION: Mannai Home's motion for summary judgment denied. City of Fall River motion for summary judgment denied in part and granted in part.

The United States District Court, D. Massachusetts, first held that it seemed "clear" that the City zoning ordinance violated section 3 of the Massachusetts Zoning Act because the ordinance treated "families (and religious organizations) with five or more persons differently from group residences for the disabled"—the former which were permitted, and the latter which were prohibited. The court concluded that it therefore followed that the City "could not require Mannai to obtain a special permit, and that doing so would constitute 'discrimination' within the meaning of the Zoning Act."

The City had also argued that Mannai failed to exhaust its administrative remedies, as required by the Zoning Act, because it never applied for a special permit. The court noted that exhaustion requirements play an important role in the "administration of justice," but also noted that they can be waived on the basis of futility—which Mannai seemed to claim was the case here. However, in any event, the court concluded that Mannai's failure to apply for a special permit could be excused here—not on the ground of futility, but "because it was not required to obtain [a special permit]" (given that such a requirement would be discriminatory in violation of the Zoning Act since it was not also required for families or religious organizations). Still, the court acknowledged that even if a special permit was not required, some zoning conditions may be applicable. It seemed doubtful, said the court, that Mannai could simply commence construction without any form of permit or approval from the City.

With regard to the FHA and ADA claims, the court concluded that evidence was not sufficient enough to grant

summary judgment for Mannai on the basis of discriminatory intent (and disparate treatment). Still, the court also found the evidence was so lacking as to be insufficient to warrant summary judgment for the City on the issue either.

Finally, the court determined that it could not agree with Mannai that the City violated the FHA by denying its request for a reasonable accommodation (from the zoning ordinance) to permit the proposed sober house. The court found it unclear what "accommodation" Mannai was seeking. The court reiterated that Mannai was not required to obtain a special permit, but the court also determined that Mannai's request to proceed as a matter of right was also not a request for an "accommodation." In short, the court found Mannai never requested an "accommodation," but rather had simply asserted a right to proceed without a special permit. Accordingly, the court granted the City's request for summary judgment as to Mannai's failure to accommodate claim.

See also: *Brockton Fire Department v. St. Mary Broad Street, LLC, 181 F. Supp. 3d 155 (D. Mass. 2016).*

Variance—Property owners seek dimensional variance to construct carport

They claim hardship in personal disability that made carport necessary

Citation: *Glaberson v. Abington Township Zoning Hearing Board, 2019 WL 178154 (Pa. Commw. Ct. 2019)*

PENNSYLVANIA (01/14/19)—This case addressed the issue of whether a landowner seeking a dimensional variance to construct a carport had established the necessary element of hardship.

The Background/Facts: Doris and Arnold Glaberson (the "Glabersons") owned and resided at property in the R-1 Residential District in the Township of Abington (the "Township"). The Glabersons sought to construct a carport to allow easier access for Mr. Glaberson to access his vehicle in inclement weather. Mr. Glaberson claimed a disability that made it "difficult for him to maintain his balance and climb steps." In order to construct the carport, the Glabersons would need to encroach into three-quarters of the Township zoning ordinance's required side yard setback. Therefore, the Glabersons filed an application with the Township's Zoning Hearing Board (the "Board") requesting a dimensional variance so that they could construct the carport within the side yard setback.

Ultimately, the Board denied the Glabersons' variance request upon finding that the Glabersons failed to establish the necessary element of hardship. Moreover, the Board concluded that the Glabersons already had reasonable use of their property, including a two-car garage that only accommodated one car because a part of the garage had been converted to living space years before.

The Glabersons appealed the variance denial. They argued that they were entitled to a dimensional variance for the carport.

The trial court affirmed the Board's order.

The Glabersons again appealed.

DECISION: Judgment of trial court affirmed.

The Commonwealth Court of Pennsylvania held that the Glabersons failed to establish a hardship entitling them to a variance.

The court explained that, under the Pennsylvania Municipalities Planning Code, a zoning board may grant a variance when all of certain conditions are met, including the existence of an unnecessary hardship due to conditions of the property. The court acknowledged a more relaxed standard for granting a dimensional variance, which allows the court to consider other multiple factors such as the financial hardship or economic detriment to the applicant. Still, the court said that the more relaxed standard for a dimensional variance does not stand for the proposition that "a variance must be granted from a dimensional requirement that prevents or financially burdens a property owner's ability to employ his property exactly as he wishes, so long as the use itself is permitted."

Here, the court concluded that the element of hardship—necessary for the granting of a variance—was absent. The court found that the Glabersons' property was similar to others in the neighborhood, and not unique. The only uniqueness and "hardship" the court found was with regard to Mr. Glaberson's "personal situation." However, the court noted that "where the claimed hardship is personal to the applicant and does not arise from the physical conditions of the property, there is no hardship." In other words, the court said that "[a] variance 'is appropriate only where the property, not the person, is subject to hardship.' "

Moreover, the court agreed with the Board that the Glabersons did not need the variance to construct the carport in order to make reasonable use of the property, as they were already making reasonable use of the property. Thus, because the Glabersons failed to establish the necessary hardship and because they had reasonable use of the property, the court concluded that they failed to sustain their burden to establish that they were entitled to a variance.

See also: *Hertzberg v. Zoning Bd. of Adjustment of City of Pittsburgh, 554 Pa. 249, 721 A.2d 43 (1998).*

Case Note:

On appeal, the Glabersons had also argued that the Americans with Disabilities Act and the Fair Housing Amendments Act of 1988 required the Board to grant the dimensional variance. The Commonwealth Court of Pennsylvania held that the Glabersons had waived that argument because they had not previously raised it.

Civil Rights—Zoning board denies church's second zoning petition as being barred by res judicata and collateral estoppel

Church argues this denial imposed a substantial burden on the church's religious practice in violation of federal law and constitutional rights

Citation: *Jesus Christ Is the Answer Ministries, Inc. v. Baltimore County, Maryland, 2019 WL 469715 (4th Cir. 2019)*

The Fourth Circuit has jurisdiction over Maryland, North Carolina, South Carolina, Virginia, and West Virginia.

FOURTH CIRCUIT (02/07/19)—This case addressed the issue of whether a zoning board's dismissal of a church's second zoning petition imposed a substantial burden on the church's religious practice such that it violated the federal Religious Land Use and Institutionalized Persons Act.

The Background/Facts: Jesus Christ is the Answer Ministries, Inc. (the "Church") is a nondenominational Christian church founded by Reverend Lucy Ware ("Ware"). The Church is associated with churches in Kenya and the Seychelles, and many of the Church's congregants were born in Africa.

In 2012, Ware purchased property (the "Property") on which to operate a house of worship for the Church. The Property was a 1.2-acre parcel of land with a building that was previously used as a dwelling. The Property was zoned "Density Residential 3.5" under the Baltimore County Zoning Regulations (the "BCZR"). In that zone, churches were permitted as of right subject to certain conditions, including setback and buffer distances.

After Ware began using the Property as a Church, Baltimore County (the "County") notified Ware that she could not use the Property as a church unless she complied with applicable zoning regulations. Thereafter, Ware filed a petition with the County to approve use of the Property as a church. The petition proposed a buffer and setback of zero feet, seeking complete relief from zoning requirements.

The County Director of the Department of Planning (the "Director") did not oppose the petition. Neighbors did oppose the petition, including with comments that included references to the African heritage of the Church. Ultimately, the Administrative Law Judge ("ALJ") recommended denying Ware's petition.

Ware appealed the denial to the County Board of Appeals (the "Board"). The Board denied the petition, finding "the proposed Church does not even minimally comply" with the applicable zoning requirements and would not be compatible with the "character or general welfare of the surrounding homes . . . ."

Ware again appealed, and the Board's decision was affirmed by the Circuit Court and the Court of Special Appeals.

Meanwhile, while Ware's petition was pending appeal, Ware filed a second petition with the County to approve use of the Property as a church. The second petition included a modified site plan that included setbacks and buffers that came within three feet of that required under the zoning regulations. The People's Counsel (a County official) initially sought dismissal of the new petition on the ground that is sought essentially the same relief as the first petition. However, the People's Counsel subsequently withdrew his motion based on the differences between the two petitions. The neighbors who had opposed the first petition continued to pursue the dismissal of the second petition on the ground that it sought essentially the same relief as the first petition. The Board granted the motion to dismiss, holding that the new petition was barred by res judicata and collateral estoppel (in that it sought the same relief already adjudicated).

The Church then filed suit in federal district court. The Church alleged that the Board's dismissal of the second petition violated the substantial burden and nondiscrimination provisions of the federal Religious Land Use and Institutionalized Persons Act ("RLUIPA"). The Church also alleged that dismissal of the second petition violated the First Amendment's Free Exercise Clause, the Fourteenth Amendment's Equal Protection Clause, and Article 36 of the Maryland Declaration of Rights, which protects freedom of religion at the state level. In other words, the Church alleged that the dismissal of the second petition imposed a substantial burden on their religious practice in violation of the RLUIPA and their constitutional rights.

The district court dismissed the complaint for failure to state a claim.

The Church appealed.

DECISION: Judgment of district court vacated, and matter remanded.

The United States Court of Appeals, Fourth Circuit, held that the district court's dismissal of the Church's lawsuit was in error. The Fourth Circuit held that the Church had sufficiently alleged that the dismissal of the second petition imposed a substantial burden on their religious practice, in violation of RLUIPA. It also held that the Church sufficiently alleged a prima facie (i.e., on its face) claim of religious discrimination by the Board against the Church in dismissing the second petition. And, the court held that the other constitutional claims were improperly dismissed as well.

With regard to the RLUIPA claims, the court explained that RLUIPA "prohibits land use regulations that impose a 'substantial burden' on religious practice, unless they are the least restrictive means of furthering a compelling governmental interest." (42 U.S.C.A. § 2000cc(a)(1) A substantial burden exists, said the court, where a regulation "puts substantial pressure on [the plaintiff] to modify its

behavior." In other words, as relevant here, the court explained that "land use regulations can substantially burden religious exercise where an organization acquires property expecting to use it for a religious purpose but is prevented from doing so by the application of a zoning ordinance." In such cases, the court said that whether or not RLUIPA has been violated is dependent on the determination of two questions: (1) Is the impediment to the organization's religious practice substantial? (2) Who is responsible for the impediment—the government, or the religious organization?

Here, the court found it clear that the impediment to the Church's religious practice by dismissal of the second petition was clear: The Church was barred from using the Property. The court also found that it was the County, and not Ware, that was responsible for that impediment. The court said this was because Ware's second petition was markedly different than the first, including in addressing zoning compliance deficiencies. In light of those substantial changes, the court could not say that the dismissal of Ware's second petition was "self-imposed." Thus, the court concluded that the Church had sufficiently alleged that the dismissal of the second petition imposed a substantial burden on their religious practice.

The Church had also alleged that the County's dismissal of its petition discriminated against the Church based on its religion. The court explained that RLUIPA prohibits land use regulations that discriminate "on the basis of religion or religious denomination." (42 U.S.C.A. § 2000cc(b)(2).) To prove such discrimination, the plaintiff must demonstrate that the government decision was motivated at least in part by discriminatory intent, said the court. Probative of the decisionmaker's intent is the "specific sequence of events leading up to the challenged decision," said the court. Particularly relevant to this case, the court noted that a government decision influenced by community members' religious bias is unlawful, "even if the government decisionmakers display no bias themselves."

Here, the court found it " 'especially significant' that irregularities in the [Board's] decision-making process followed the neighbors' expressions of animus." The court noted two irregularities in the Board's decisions on Ware's petitions. First, the Board denied Ware's first petition even though the County Director did not oppose it, and did so after hearing the neighbor's discriminatory remarks. Second, contrary to the position of its own legal expert (the People's Counsel), the Board granted the neighbor's motion to dismiss Ware's second petition. The court expressed no opinion as to whether the Board's decision was ultimately swayed by the neighbor's animus, however, the court found the two irregularities added "plausibility to the inference that [the Board] dismissed the second petition based on improper motives." Thus, the Board concluded that the Church's complaint "plausibly allege[d] a prima facie claim of religions discrimination."

The court also vacated the dismissal of the Church's other constitutional claims. The court found that the dismissal of Ware's second petition was not "narrowly tailored" to serve the government interests of finality and economy served by the doctrines of res judicata and collateral estoppel because Ware's second petition did not seek to revisit the Board's decision about the first petition.

See also: *Bethel World Outreach Ministries v. Montgomery County Council, 706 F.3d 548 (4th Cir. 2013).*

See also: *Chabad Lubavitch of Litchfield County, Inc. v. Litchfield Historic Dist. Com'n, 768 F.3d 183 (2d Cir. 2014).*

Zoning News from Around the Nation

CALIFORNIA

The City of Huntington Beach is suing the State of California in a reported "attempt to overturn SB 35," the law which limits a municipality's capacity to limit permitting of new housing. In an effort to meet housing needs, SB 35, which became law in January 2018, grants new housing developments "special fast-track status" and limits local regulation of building permits for such developments. More specifically, in the lawsuit, the City reportedly alleges that "SB 35 violates the California constitution's protections of city authority over zoning matters."

Source: *Curbed San Francisco; https://sf.curbed.com*

MARYLAND

The Maryland Court of Appeals has reportedly agreed to review a lower court's decision addressing the issue of "whether local zoning authority is preempted by state law regarding the approval and location of solar-energy generating systems that can generate more than 2 megawatts." Being appealed is the holding of a Washington County Circuit Court judge that found that the Maryland Public Service Commission has "exclusive jurisdiction" to approve this type of solar farm.

Source: *Herald-Mail Media; www.heraldmailmedia.com*

MINNESOTA

A settlement agreement entered into between the St. Paul City Council and the First Lutheran Church in Dayton's Bluff requires, among other other things, "the city to reconsider how it approaches religious institutions that ask for zoning relief to install homeless shelters and other uses that might otherwise be restricted by city ordinances." Under the settlement agreement, the city will be required to study possible new zoning allowances specific to religious organizations. The settlement agreement was reached in response to a lawsuit brought by the church against the city, which alleged that the city's restrictions on the church's operations—including restrictions on the number of homeless that could be served daily—was violating the federal Religious Land Use and Institutionalized Persons Act.

Source: *Pioneer Press; www.twincities.com*

NEBRASKA

The state Legislature is considering a bill—LB373, which would require counties seeking to host wind energy facilities to have related zoning regulations, including

specific setback distances. Opponents reportedly argue that the bill would "undermine local control and would give Nebraska an anti-wind development label." Proponents of the bill says it will help protect property values by ensuring wind farm development is regulated.

Source: *Beatrice Daily Sun; https://beatricedailysun.com*

UTAH

State Senator Jake Anderegg is sponsoring a bill—SB34—that "would create a new incentive for cities to zone for affordable housing." Under the bill, municipalities are given a "basket" of options from which to choose to "allow moderate-income housing within their communities." Cities that fail to institute a minimum of two of those options will be ineligible for annual state transportation investment funds. The bill recently advanced out of the Senate Economic Development and Workforce Services Committee with unanimous approval. The bill now heads to the full Senate for consideration.

Source: *KSL.com; www.ksl.com*

WYOMING

In late January 2019, the state Senate passed a bill—Senate File 49—"granting private schools the same exemptions from county zoning as public schools." More specifically, Senate File 49 "removes county oversight and zoning authority over private schools, instead requiring them to 'substantially' conform to 134 pages of the Wyoming School Facilities Commission's public school guidelines, which include restrictions on site size, compliance with accessibility for disabled people and design standards for walls and roofs." The bill was next headed to the state House of Representatives for review.

Source: *Jackson Hole News and Guide; www.jhnewsandguide.com*

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Zoning Bulletin

in this issue:

Nonconforming Use/Variance—Town grants special permit for homeowners to increase the preexisting nonconforming nature of the structure through increase of the floor area ratio

Abutting property owners contend a variance is also required under town bylaws, but homeowners maintain a state statute protecting nonconforming uses requires only a special permit

Citation: *Bellalta v. Zoning Board of Appeals of Brookline, 481 Mass. 372, 116 N.E.3d 17 (2019)*

MASSACHUSETTS (02/08/19)—This case addressed the issue of whether under the "second except clause" of the Massachusetts statute governing the modification of nonconforming structures, creating explicit protections for one- and two-family residential structures and allowing for increases in the nonconforming nature of such structures upon a finding of no substantial detriment to the neighborhood, a variance from a local bylaw is not required for modification of a preexisting nonconformity.

The Background/Facts: Jason Jewhurst and Nurit Zuker (the "Homeowners") owned a second-floor condominium unit of a two-family house in the Town of Brookline (the "Town"). The Homeowners' house was legally nonconforming in that the floor area ratio ("FAR") was greater than that allowed under the Town's bylaw. The Town bylaw required a maximum FAR of 1.0 for a two-family house in the zoning district in which the Homeowners' home was located. The Homeowners' house had a FAR of 1.14.

The Homeowners proposed a renovation to their home that would include a roof conversion and the addition of a dormer. The renovation would create 677 square feet of additional living space on the third floor of the building. In total, the renovation project would increase the FAR from 1.14 to 1.38.

Seeking permission to construct the proposed renovation, the Homeowners submitted a request for a special permit to the Town's zoning board of appeals ("ZBA"). The ZBA allowed the Homeowner's request for a special permit. In doing so, the ZBA determined that increasing the preexisting nonconforming nature of the home would "not be substantially more detrimental to the neighborhood

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than the preexisting nonconforming use"—and thus would be in compliance with Town bylaw. The ZBA also found that the Homeowners had satisfied the requirements for issuance of a special permit.

Thereafter, the owners of property abutting the Homeowners' house—Maria Bellalta and Damon Burnard (the "Abutters")—brought a legal action in Land Court, challenging the ZBA's decision to grant the special permit to the Homeowners. The Abutters contended that Massachusetts statutory law—Mass. Gen. L. c. 40A, § 6, which protects preexisting non-conforming structures through specific exemptions, did not exempt the Homeowners from compliance with the Town bylaws. The Abutters maintained that, under the Town bylaws, the Homeowners were required to obtain a variance in addition to the special permit.

Massachusetts General Laws c. 40A, § 6, provides in relevant part:

> "[1] Except as hereinafter provided, a zoning ordinance or by-law shall not apply to structures or uses lawfully in existence or lawfully begun, . . . but shall apply to any change or substantial extension of such use, . . . to any reconstruction, extension or structural change of such structure and . . . to provide for its use for a substantially different purpose or for the same purpose in a substantially different manner or to a substantially greater extent [2] *except where alteration, reconstruction, extension or structural change to a single or two-family residential structure does not increase the nonconforming nature of said structure*. Pre-existing nonconforming structures or uses may be extended or altered, provided, that no such extension or alteration shall be permitted unless there is a finding by the permit granting authority or by the special permit granting authority designated by ordinance or by-law that such change, extension or alteration shall not be substantially more detrimental than the existing nonconforming [structure or] use to the neighborhood" (emphasis added).

The Town's bylaw allowed for nonconforming structures to be "altered, repaired, or enlarged, except that any nonconforming condition may not be increased unless specifically provided for [in the bylaws]." No provision of the Town's bylaws permitted the increase in FAR that the Homeowners sought. Thus, the Abutters argued that a variance was also required, in addition to the required findings under G. L. c. 40A, § 6 to specially permit a modification that would increase the "nonconforming nature" of the two-family structure.

Rejecting the Abutters' argument, a Land Court judge upheld the ZBA's action of approving the Homeowners' proposed renovation with a special permit only (and not requiring a variance).

The Abutters appealed.

DECISION: Judgment of Land Court Department affirmed.

The Supreme Judicial Court of Massachusetts, Suffolk, held that Mass. Gen. L. c. 40A, § 6 "requires an owner of a single- or two-family residential building with a preexisting nonconformity, who proposes a modification that is found to increase the nature of the nonconforming structure, to obtain a finding under G. L. c. 40A, § 6, that 'such change, extension or alteration shall not be substantially more detrimental that the existing nonconforming use to the neighborhood.' " The court held that "[t]he statute does not require the homeowner also to obtain a variance in such circumstances." Accordingly, here, the court concluded that, contrary to the Abutters' argument, the Homeowners weren't required to also obtain a variance under the Town bylaw.

In so holding, the court explained that a preexisting nonconformity is "a use or structure that lawfully existed prior to the enactment of a zoning restriction that otherwise would prohibit the use or structure." The court looked at the language of G. L. c. 40A, § 6, which protects preexisting non-conforming lots and structures. The court found the language "abstruse," and looked at the legislative intent behind the special protections afforded one- and two-family residential structures. Looking at the framework of

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the statute, and prior caselaw interpreting the statute, the court concluded that "a variance from the local bylaw is not required by G. L. c. 40A, § 6." Rather, all that was required by the statute was a finding of "no substantial detriment to the neighborhood."

Importantly, the court found that G. L. c. 40A, § 6 creates a statutory requirement that "sets the floor" for "the appropriate protections from local zoning bylaws to be afforded properties and structures protected under the statu[t]e." In other words, the court concluded that a municipality's bylaws could not afford fewer protections to preexisting structures or uses than the statute does G. L. c. 40A, § 6. Thus, here, because G. L. c. 40A, § 6 did not require a variance, the Town's bylaws could not do so, said the court.

See also: *Gale v. Zoning Bd. of Appeals of Gloucester, 80 Mass. App. Ct. 331, 952 N.E.2d 977 (2011).*

See also: *Bransford v. Zoning Bd. of Appeals of Edgartown, 444 Mass. 852, 832 N.E.2d 639 (2005).*

Case Note:

The court found further support for its interpretation that G. L. c. 40A, § 6 did not require a variance from local bylaw in policy considerations. The court said that "given the difficulties and expense associated with obtaining a variance, as well as in obtaining a finding of no substantial detriment, construing the statute to mandate both well could render illusory the protections the Legislature intended to provide these homeowners."

Proceedings—Abutting property owners sue township, challenging its approval of a neighbor's variance

Township argues the legal action should be dismissed in its entirety on the ground that the neighboring variance applicants were not part of the suit

Citation: *Schulz v. Town of Duluth, 2019 WL 510023 (Minn. Ct. App. 2019)*

MINNESOTA (02/11/19)—This case addressed the issue of whether Rule 19 of the Minnesota rules of civil procedure applies to an action under Minnesota Statutes section 462.361, subdivision 1, for judicial review of a township's decision on an application for a zoning variance.

The Background/Facts: Charles Bille and Carol Danielson-Bille (the "Billes") owned property (the "Property") in Duluth Township (the "Township"). The Billes wanted to build a home on the Property. The Property was 0.31 acres in size and was 75 feet wide. The Township's zoning ordinance required lot sizes for homes be 2 acres and 200 feet wide with required setbacks on all four sides. Since the Billes could not construct their home per the zoning ordinance area and dimensional requirements, they applied to the Township's Planning and Zoning Commission (the "PZC") for a variance. After that variance was ultimately denied by the Township's Board of Supervisors (the "Board"), the Billes submitted a second variance. The PZC approved that variance. However, the abutting property owners (who jointly owned property to the west of the Billes' property)—John Schulz, Rebecca Norine, and Jack Nelson (the "Abutters")—appealed. The Township's Board ultimately granted the Billes' second variance application.

Thereafter, the Abutters commenced an action in district court, appealing the Board's grant of the variance to the Billes. In commencing the action, the Abutters served the Board and the Billes with a summons and complaint. The action with respect to the Billes was eventually dismissed for improper service of the summons and complaint because the summons and complaint had been faxed to sheriff's office, which was ineffective under Minnesota law. The Township then argued that, in light of the dismissal of the Billes, the action should be dismissed in its entirety on the ground that indispensable parties were absent from the suit.

The district court held that although no statute, ordinance, or rule required the Abutters to join the zoning-variance applicants (i.e., here the Billes), such a requirement could be imposed by rule 19 of the Minnesota Rules of Civil Procedures. Rule 19.01 provides, in relevant part:

> "A person who is subject to service of process shall be joined as a party in the action if (a) in the person's absence complete relief cannot be accorded among those already parties, or (b) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may (1) as a practical matter impair or impede the person's ability to protect that interest or (2) leave any one already a party subject to a substantial risk or incurring double, multiple, or otherwise inconsistent obligations by reason of the person's claimed interest. . . ."

Rule 19.02 provides in relevant part: "If a person as described in Rule 19.01 cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed, the absent person being thus regarded as indispensable." Rule 19.02 provides factors to be considered by the court, including:

> "(a) to what extent a judgment rendered in the person's absence might be prejudicial to the person or those already parties;
>
> (b) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided;
>
> (c) whether a judgment rendered in the person's absence will be adequate; and
>
> (d) whether the plaintiff will have an adequate remedy if the action is dismissed for nonjoinder."

(Minn. R. Civ. P. 19.01, 19.02.)

The district court determined that the Billes were both

necessary and indispensable because the action "directly affect[ed] their interest and property" and that, if the action were successful, "the Billes' ability to continue with current construction, or any construction, [would be] severely limited." Accordingly, the district court granted the Township's motion to dismiss the action in its entirety.

The Abutters appealed. They argued that the district court erred in applying Rule 19 here.

DECISION: Judgment of district court affirmed.

The Court of Appeals of Minnesota held that the district court did not err in applying Rule 19. The court held that Rule 19 applies to an action for judicial review of a township's decision on an application for a zoning variance.

In so holding, the court explained that a motion to dismiss an action on the ground that an indispensable person is absent (such as that brought by the Township here) requires a two-step analysis. The court explained that, first, the moving party (e.g., here the Township) had to show that the absent person (e.g., here the Billes) is necessary according to the criteria in Rule 19.01. Second, explained the court, the moving party (e.g., here the Township) must show that the absent person (e.g., here the Billes) is indispensable according to the criteria in Rule 19.02.

Looking at the first step of the analysis (under Rule 19.01), the court noted that the Abutters had argued that because their action sought review only of the Township's zoning-variance decision, the Billes did "not need to be involved in order for the district court to analyze and rule on that issue." But the court rejected that argument. It found that the Billes had incurred over $150,000 in construction expenses and thus "obviously" had a "significant financial investment" in the Property. The court found it clear that the Billes claimed "an interest relating to the subject of the action and [were] so situated that the disposition of the action in [their] absence may . . . as a practical matter impair or impede [their] ability to protect that interest." (See Minn. R. Civ. P. 19.01(b)(1).) Thus, the court concluded that the district court did not abuse its discretion by determining that the Billes' presence was necessary.

Looking at the second step of the analysis (under Rule 19.02), the court noted that the Abutters had not challenged the district court's reasoning but only generally asserted that the district court had erred by concluding that the Billes were indispensable. The court found that the Abutters' ultimate goal of demolition of the Billes' home was "surely" a "severe consequence for a non-party to a judicial proceeding after the non-party had sought and obtained a zoning variance from a municipality and incurred considerable expense in reliance on the variance." Accordingly, the court held that the district court here did not abuse its discretion by determining that the Billes were indispensable and that, " 'in equity and good conscience,' the action should not proceed in their absence and, thus, should be dismissed." (See Minn. R. Civ. P. 19.02.)

See also: *Cox v. Mid-Minnesota Mutual Insurance Company, 909 N.W.2d 540 (Minn. 2018).*

See also: *In re Skyline Materials, Ltd., 835 N.W.2d 472 (Minn. 2013).*

Case Note:

In its decision, the court noted that "appellate courts in at least four other states have concluded in similar circumstances that a property owner who obtained a zoning variance is both necessary and indispensable in a judicial proceeding to challenge the grant of the variance." (See Minton v. State ex rel. Cohen, 169 Ind. App. 584, 349 N.E.2d 741 (1976); Lanaux v. City of New Orleans, Bd. of Zoning Adjustments, 489 So. 2d 329 (La. Ct. App. 4th Cir. 1986); Sturmer v. Readington Tp., Hunterdon County, 90 N.J. Super. 341, 217 A.2d 622 (App. Div. 1966); Feder v. Town of Islip Zoning Bd. of Appeals, 114 A.D.3d 782, 980 N.Y.S.2d 537 (2d Dep't 2014).)

Preemption—Town argues state and federal permits cannot issue for natural gas compressor station construction unless station complies with town's zoning ordinance

Natural gas company contends town zoning ordinance is preempted by federal Natural Gas Act

Citation: *Algonquin Gas Transmission, LLC v. Town of Weymouth, 2019 WL 538192 (D. Mass. 2019)*

MASSACHUSETTS (02/11/19)—This case addressed the issue of whether the federal Natural Gas Act preempted a municipal zoning ordinance such that a town could not rely on the ordinance to deny a natural gas company's efforts to construct and operate a natural gas pipeline compressor facility.

The Background/Facts: Algonquin Gas Transmission, LLC ("Algonquin") is a natural gas company engaged in the transportation of natural gas in interstate commerce. In October 2015, Algonquin and Maritimes & Northeast Pipeline, LLC ("Maritimes") filed an application for a certificate of public convenience and necessity with the Federal Energy Regulatory Commission ("FERC") to construct and operate a natural gas pipeline and related facilities known as the Atlantic Bridge Project ("AB Project"). As part of the AB Project, Algonquin sought to construct a natural gas compressor station (the "Compressor Station") in the Town of Weymouth (the "Town").

In January 2017, FERC issued a certificate (the "Certificate" or the "AB Certificate") granting Algonquin's application for authorization to construct and operate the AB Project subject to certain conditions. As part of those conditions, Algonquin had to obtain a consistency certification

from the Massachusetts Office of Coastal Zone Management ("MCZM") before beginning construction of the Compressor Station. The MCZM implements the Massachusetts Coastal Management Program ("MCMP") and reviews federal licenses and permits to ensure consistency with the federal Coastal Zone Management Act ("CZMA") (16 U.S.C.A. §§ 1451 *et seq.*). The Compressor Station was proposed to be in a "coastal zone" as defined by the CZMA because it would affect land regulated by the MCMP. (See 16 U.S.C.A. § 1455(d).) "In making consistency determinations as authorized by the CZMA, the MCZM reviews whether projects requiring a federal permit are consistent with the 'enforceable policies' contained within the MCMP." (See 16 U.S.C.A. § 1456(c)(3)(A).)

In that regard, an MCZM policy guide (the "Policy Guide") "serve[s] as the official reference for the enforceable policies, listed federal actions, and necessary data and information for the Massachusetts coastal program." The Policy Guide's list of statutes, regulations and other legal authorities "that constitute the legal basis for the enforceable [MCMP] policies" includes the Public Waterfront Act, Mass Gen. L. c. 91 ("Chapter 91") and the Massachusetts Waterways Regulation, 310 C.M.R. § 9.00, which applied to Algonquin's proposed Compressor Station because it would use "private and public tidelands regulated by Chapter 91 and 310 C.M.R. § 9.00." Specifically, the Policy Guide states that an application for consistency certification (such as that required by FERC here as a condition of Algonquin's AB Certificate) must include "complete state licenses or permit applications, including a Chapter 91 Waterways License pursuant to 310 CMR § 9.00" ("Chapter 91 License").

Accordingly, in December 2015, Algonquin applied to the Massachusetts Department of Environmental Protection ("DEP") for a Chapter 91 License, which would authorize Algonquin to use certain filled tidelands to construct the Compressor Station. DEP responded by issuing a "Written Determination" of "its intent to approve [Algonquin's] application subject to [specified] conditions." Among those conditions was a requirement that Algonquin provided final documentation relative to other local approvals that must be obtained or a determination that such approvals are preempted under the Natural Gas Act (15 U.S.C.A. §§ 717 *et seq.*) (the "NGA").

The Town appealed the DEP's Written Determination to the DEP's Office of Appeals and Dispute Resolution ("OADR"). The Town argued that the Written Determination as prematurely issued and a final Chapter 91 License was inappropriate given that Algonquin had not received certain local approvals, including compliance with the Town zoning ordinance (the "Ordinance"). The Ordinance prohibited buildings erected, altered or used "for any purposes injurious, noxious or offensive to a neighborhood by reason of the emission of odor, fumes, dust, smoke, vibration or noise. . . ." The Town contended that the Compressor Station violated the Ordinance because it was "not included in the [Ordinance's] list of exempted purposes, and because it would result in the emission of noxious and offensive noises and odors."

Eventually, the DEP presiding officer ruled, in relevant part, that Algonquin "must obtain a local zoning certificate prior to final license issuance unless [the Ordinance] is preempted by the [NGA]."

Algonquin then commenced a legal action seeking a declaration from the court as to whether the Ordinance, "as applied to Algonquin's efforts to construct and operate the Compressor Station," was preempted by the NGA.

Pursuant to Article VI of the United States Constitution, Congress can preempt state law so that it is "without effect." Preemption can be explicit or implicit—contained in the federal statute's language or structure and purpose, or it can be implied as either conflict preemption or field preemption. Conflict preemption occurs when compliance with both federal and state regulations is "a physical impossibility." Field preemption occurs when Congress has "occupied the field" by creating a "framework of regulation so pervasive . . . that Congress left no room for the States to supplement it" or where the "federal interest [is] so dominant that the federal system will be assumed to preclude enforcement of state laws on the subject."

Here, Algonquin argued that the Ordinance was preempted under conflict preemption. Algonquin asked the court to find that there were no material issues of fact in dispute, and to issue it summary judgment based on the law alone.

DECISION: Algonquin's motion for summary judgment allowed. Town's cross-motion for summary judgment denied.

The United States District Court, D. Massachusetts, held that the Town's Zoning Ordinance was preempted by the NGA.

The court explained that the NGA's savings clause for "rights of states" preserves the rights of states under the CZMA, the Clean Air Act, and the Federal Water Pollution Control Act. (See 15 U.S.C.A. § 717b(d).). Relevant here, the CZMA provided the mechanism by which states could regulate public and private uses of land and water in coastal zones (i.e., federally approved coastal zone management programs, including the MCMP.) Thus, here the NGA's savings clause insulated from preemption the MCMP Policy Guide's list of enforceable policies, said the court.

The court found that the Town Zoning Ordinance did not appear among the MCMP Policy Guide's listed enforceable policies, and was not explicitly cited by any policy on the list. Nevertheless, the Town had argued that its Ordinance was incorporated into the MCMP (and thus insulated from NGA preemption) because certain enforceable authorities, including Mass. Gen. L. c. 91, § 18 and the regulations at 310 C.M.R. § 9.00, required compliance with local zoning ordinances as a matter of state law. The court however, disagreed. It found that the MCMP identified two categories of enforceable polices: "authorities listed in Appendix B to the Policy Guide and authorities 'explicitly cited as an authority within the listed regulations.' " Finding that the Ordinance did not fall within either category, the court held that the Ordinance was "not an enforceable policy protected from preemption [of the NGA] pursuant to the rights granted to states by the CZMA."

Finding that the Ordinance was not immune from preemption, the court next addressed Algonquin's argument that the Ordinance was preempted under conflict preemption. The court concluded that the Ordinance "clearly collides with FERC's delegated authority and is preempted" in its entirety. The court said this was because FERC had already "carefully reviewed the very" proposal the Town was seeking to further regulate (i.e., the emission of noxious and offensive noises and odors from the Compressor Station), and had, "after considering environmental impacts, authorized the [P]roject." Defending its determination, the court said that "subjecting the [P]roject to regulation under the [O]rdinance," including the municipal zoning certification process, "would be tantamount to conferring on [the Town] the power to review and nullify FERC's decision" authorizing the Compressor Station's construction.

See also: *Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission, Util. L. Rep. P 15030, 2017 WL 6757544 (D. Mass. 2017).*

See also: *Algonquin Lng v. Loqa, 79 F. Supp. 2d 49, 147 O.G.R. 128 (D.R.I. 2000).*

See also: *Weaver's Cove Energy, LLC v. Rhode Island Coastal Resources Management Council, 589 F.3d 458, 171 O.G.R. 283 (1st Cir. 2009).*

Case Note:

In a related case, Algonquin Gas Transmission, LLC v. Weymouth Conservation Commission, Util. L. Rep. P 15030, 2017 WL 6757544 (D. Mass. 2017), the United States District Court, D. Massachusetts, also concluded that the Town's wetlands ordinance was preempted by the NGA.

Case Note:

The Town had attempted to dismiss Algonquin's legal action, contending that Algonquin did not have standing (i.e., the legal right) to bring the suit and/or that the declaratory relief Algonquin was seeking was "not ripe for adjudication." The district court concluded that Algonquin had suffered an injury traceable to the Town and readily redressable, and therefore had standing to pursue the claim. The court also concluded that "the issue here [was] concrete, and Algonquin's claim [was] ripe for adjudication." The court denied the Town's motion to dismiss.

Case Note:

In its decision, the court noted that "[s]hould the Commonwealth of Massachusetts seek to amend or modify the MCMP to include the Ordinance, it must do so via the mechanism provided by Congress."

Substantive Due Process—Developer alleges application to it of county zoning ordinance requirement of land dedication violates its substantive due process rights

County argues that application of a land use ordinance is an executive action, which can not give rise to a substantive due process claim.

Citation: *Hillcrest Property, LLP v. Pasco County, 2019 WL 580259 (11th Cir. 2019)*

The Eleventh Circuit has jurisdiction over Alabama, Florida, and Georgia.

ELEVENTH CIRCUIT (FLORIDA) (02/13/19)—This case addressed the issue of whether the application of a zoning ordinance to a developer can give rise to a substantive due process claim. In other words, the case addressed the issue of whether a land use applicant has a substantive due process claim under the Due Process Clause of the Fourteenth Amendment of the United States Constitution when the alleged conduct is the unlawful application of a land-use ordinance.

The Background/Facts: Hillcrest Property, LLP ("Hillcrest") owned 16.5 acres of undeveloped, commercially zoned land (the "Property") in Pasco County (the "County"). In December 2006, Hillcrest applied to the County to develop its Property with a retail shopping center and three commercial spaces. The County later notified Hillcrest that, pursuant to a County zoning ordinance, it would require Hillcrest to dedicate 140 feet of the Property for future development of a state road.

County Ordinance No. 11-15 (the "Ordinance") sought to "preserve, protect, and provide for the dedication and/or acquisition of right-of-way and transportation corridors that are necessary to provide future transportation facilities and facility improvements to meet the needs of [projected] growth." The Ordinance applied to all development of land located on the County's corridor-preservation map. Under the Ordinance, when an entity sought a development permit for land adjoining a transportation corridor (such as Hillcrest here), the County, as a "condition of approval," required a right-of-way dedication by the entity to the County of lands "within the development site or expanded development site which [were] within the transportation corridor." Notably, the Ordinance specified that the land to be dedicated was to be "limited to the amount of land needed for the planned transportation improvements."

Here, the County conditioned approval of Hillcrest's construction plan upon reaching an agreement on the dedication of land under the Ordinance. Hillcrest and the County disagreed on matters related to the dedication. Hillcrest reserved its rights to object to the dedication of any land without compensation, and the County informed Hillcrest that it lacked the ability to compensate Hillcrest the amount that Hillcrest sought in compensation.

Hillcrest ultimately sued the County, alleging violations of state and federal law. Among other things, Hillcrest brought a substantive due process claim against the County. Hillcrest alleged that the County required the dedication of land without having first made a determination or demonstration that the total land required for dedication was reasonably related to the "nature and extent to the traffic impacts of the proposed development." Hillcrest's substantive due process claim was both facial (i.e., on its face, the Ordinance violated substantive due process) and as-applied (i.e., the Ordinance, as applied to Hillcrest, violated substantive due process).

The Due Process Clause of the Fourteenth Amendment provides, "No state shall . . . deprive any person of life, liberty, or property, without due process of law." (U.S. Const. amend. XIV, § 1.) The Clause "command[s] . . . fair procedures" (i.e., due process) and also "protects against deprivation of fundamental rights and . . . against arbitrary legislation" (i.e., substantive due process).

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment for Hillcrest on its facial challenge, but denied summary judgment on its as-applied claim.

The County appealed.

Ultimately, a panel of the United States Court of Appeals, Eleventh Circuit, held that Hillcrest's facial substantive due process claim was barred by the statute of limitations (i.e., not brought within the time period allowed by statutory law). The Eleventh Circuit vacated the district court's order, but expressed no view on the merit's of Hillcrest's pending as-applied substantive due process claim.

The district court eventually granted summary judgment in favor of Hillcrest on its as-applied substantive due process claim.

The County again appealed. The County argued that the application of the Ordinance to Hillcrest (i.e., as-applied) was an executive action—not a legislative action—, which did not infringe on a fundamental right, and therefore could not give rise to a substantive due process claim.

DECISION: Judgment of district court reversed.

Agreeing with the County, the United States Court of Appeals, Eleventh Circuit, held that the application of the Ordinance to Hillcrest was an executive action that did not infringe on a fundamental right, and, therefore, could not give rise to a substantive due process claim. More generally, the court held that "[a] land-use decision is a classic executive, rather than legislative, action—action that at least here, [did] not implicate a fundamental right under the Constitution."

In so holding, the court explained that the Due Process Clause protects "fundamental rights," and that "[a]bsent a 'compelling state interest' and an infringement 'narrowly tailored' to serve that interest, the government may not violate those rights 'at all, no matter what process is provided.' " The court found that, here, Hillcrest did "not allege denial of any fundamental right" because "fundamental rights in the constitutional sense do not included state-created rights," and "land use rights, as property rights generally, are state-created rights." Still, the court acknowledged that, when "state-created rights are infringed by a 'legislative act,' the substantive component of the Due Process Clause generally protects that person from arbitrary and irrational government action." In other words, if property rights are infringed by a legislative act that is arbitrary and irrational, such infringement might be a violation of the landowner's substantive due process rights.

However, cautioned the court, "not all state action is legislative." State action can also be "executive." The court explained the distinction between "legislative" acts and "non-legislative" or "executive" acts: "Whereas legislative acts 'generally apply to a larger segment of—if not all of—society,' executive acts 'characteristically apply to a limited number of persons (and often to only one person).' " Further, explained the court, as-applied violations of substantive due process "are always executive because the executive is responsible for applying, or enforcing, the law."

Thus, here, the court concluded that the deprivation of substantive due process rights claimed by Hillcrest in its as-applied claim was "quintessentially executive action." Hillcrest claimed that the application of the Ordinance to Hillcrest harmed (only) Hillcrest. Moreover, the court noted that the application of the Ordinance here to Hillcrest was "executive" as it was the role of the executive to apply the Ordinance. The court emphasized that it could "not be clearer on this point: regardless of how arbitrarily or irrationally the County has acted with respect to Hillcrest, Hillcrest has no substantive-due-process claim."

Having concluded that the application of the Ordinance to Hillcrest did not give rise to a substantive-due-process claim, the court held that Hillcrest "lack[ed] a viable cause of action." The court concluded that judgment as a matter of law in favor of the County was therefore appropriate.

See also: *McKinney v. Pate, 20 F.3d 1550, 9 I.E.R. Cas. (BNA) 1266 (11th Cir. 1994).*

See also: *DeKalb Stone, Inc. v. County of DeKalb, Ga., 106 F.3d 956 (11th Cir. 1997).*

Zoning News from Around the Nation

MARYLAND

Anne Arundel County is considering a bill—Bill 7-19—which would "loosen[ ] restrictions for incoming medical marijuana businesses in Anne Arundel County." More specifically, the bill would reduce distance requirements near residences, allow medical marijuana facilities in a new commercial district, and repeal a prohibition on variances.

Source: *Capital Gazette; www.capitalgazette.com*

NEVADA

A proposed amendment to pending affordable housing legislation (Senate Bill 103) would reportedly "give local municipalities the option to use inclusionary zoning or rent control as a tool to [incentivize developers to allocate affordable housing to] fight Nevada's housing crises."

Source: *Nevada Current; www.nevadacurrent.com*

NEW YORK

State Assemblyman Brian Barnwell reportedly plans to introduce a bill that would "give community boards the power to . . . stop developers seeking Uniform Land Use Review Procedure (ULURP) applications [from building] above current zoning laws if the affordability of the units do not meet at least 60 percent the area median income (AMI)."

Source: *QNS; https://qns.com*

NORTH DAKOTA

The state Senate is considering Senate Bill 2345 which "would restrict zoning regulations for livestock feedlots in North Dakota." Proponents of the bill say it would "boost the state's livestock industry." Opponents say it "would strip away local authority to protect rural residents from factory farms." Under the bill, among other things, township and county governments would be required "to act within 60 days on a petition to determine whether an animal feeding operation complies with local zoning regulations. Failure to act within that deadline would mean the operation is deemed in compliance." The bill was pending in the Senate Agriculture Committee.

Source: *West Fargo Pioneer; https://westfargopioneer.com*

OREGON

Pending in the state House of Representatives is House Bill 2001, which would essentially "ban[ ] single-family residential zoning in communities of more than 10,000 people." More specifically, the bill would "require cities to allow 'middle housing'—duplexes, triplexes, quadplexes and cottages clustered around a courtyard—in all of its residential zones."

Source: *East Oregonian; www.eastoregonian.com*

SOUTH DAKOTA

The state House Commerce and Energy Committee recently voted against HB 1226, a bill which would have "substantially expanded the setback distances from neighboring properties required for wind turbines in South Dakota." Under current state law, the required setback is "the greater of 500 feet or 1.1 times the height of the tower from the adjoining property line." Under the bill, the setback would have been changed to "1,500 feet or three times the tower height," and would have "added other requirements, such as a setback 12 times the tower height or 1.5 miles from a residence, business or public building, unless there was a written agreement."

Source: *Keloland TV; www.keloland.com*

UTAH

State legislators are considering a bill—HB 288—which would add "sand, gravel, and rock aggregate to the list of 'critical infrastructure materials protection areas' which have certain protections from local interference." In other words, under HB 288, "gravel pits would be protected by the existing 'critical infrastructure' limits on the zoning powers of municipalities."

Source: *KUTV; https://kutv.com*

WASHINGTON

Pending in the state Senate are three bills—SB 5382, SB 5383, and SB 5384—which seek to "overcome obstacles to tiny house developments." The bills would define tiny houses as detached accessory uses (SB 5382), outline building requirements for tiny houses (SB 5383), and "create a process to authorize the creation of tiny house communities outside of urban growth areas or areas of intense rural development when there is a shortage of affordable housing" (SB 5384).

Source: *Bainbridge Island Review; www.bainbridgereview.com*

WYOMING

In mid-February 2019, the state House Corporations, Elections & Political Subdivisions Committee recommended the full House pass SF49, a bill which would essentially remove local zoning authority over private schools. The bill would provide zoning exemptions for nonprofit private schools that are on par with exemptions currently available to public schools.

Source: *Gillette News Record; www.gillettenewsrecord.com*

A state Senate committee has advanced House Bill 196 to the full Senate. The bill's sponsor, Rep. Shelly Duncan, R-Goshen, has reportedly said the bill "prevents 'rogue, over-reaching' counties (like Teton) from abusing a state statute that exempts family homesites from subdivision restrictions." Although the state's family homesite exemption allows subdivision for family homesites, Teton County will not grant a building permit for a parcel smaller than 35 acres. The bill has already passed out of the House of Representatives.

Source: *Jackson Hole Daily; www.jhnewsandguide.com*

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Zoning Bulletin

in this issue:

Use/Special Exception/Validity of Ordinance—Township denies special exception application for proposed for adult oriented facility

Applicant sues arguing zoning ordinance's special requirements for such facilities violate the First Amendment

Citation: *Sutton v. Chanceford Township, 2019 WL 588757 (3d Cir. 2019)*

The Third Circuit has jurisdiction over Delaware, New Jersey, Pennsylvania, and the United States Virgin Island.

THIRD CIRCUIT (PENNSYLVANIA) (02/13/19)—This case addressed the issue of whether a township zoning ordinance's special requirements for adult entertainment facilities violated the First Amendment, both facially and as applied. It also addressed whether a township zoning board's denial of an application for an adult entertainment facility violated the applicant's substantive due process rights.

The Background/Facts: Terry Sutton ("Sutton") owned property in a General Commercial Zone in Chanceford Township (the "Township"). Sutton sought to use part of his property as an adult cabaret featuring nude female dancers. The Township's zoning ordinance allowed for "adult oriented facilities" as a special exception. The zoning ordinance required a permit from the Township's Zoning Hearing Board (the "Board") for uses by special exception with several required findings, including whether the proposed use would comply with certain sewage-disposal and ground-water-recharge requirements. The Township's zoning ordinance also placed several additional requirements on adult oriented facilities.

In March 2013, Sutton applied to the Board for the special exception permit. The Board ultimately denied the application, finding that: (1) the proposed adult facility was in a shopping center that could consist only of "stores," which the cabaret was not; (2) Sutton failed to show that the proposed use would meet the sewage-disposal and ground-water-recharge requirements; and (3) because the cabaret would feature nude dancing while also permitting patrons to bring their own alcohol, the cabaret would violate state law, which prohibits lewd entertainment in a "bottle club," and thus, as unlawful, would constitute a nuisance prohibited under the zoning ordinance.

Sutton sued the Township. Among other things, he claimed that: (1) the Township zoning ordinance's restrictions on adult entertainment facilities facially violated the First Amendment (i.e., the ordinance, on its face, was unconstitutional); (2) that those restrictions were unconstitutional as applied here (i.e., as the ordinance was applied in denying Sutton's special exception application); and

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(3) that the Board, in rejecting his application, violated his right to substantive due process.

The First Amendment to the United States Constitution prohibits, among other things, government laws that abridge freedom of speech. (United States Const., Amend. I.) The Fourteenth Amendment provides in part, that no state shall "deprive any person of life, liberty, or property, without due process of law." (United States Const., Amend. XIV.)

Finding there were no material issues of fact in dispute, and deciding the matter on the law alone, the district court granted summary judgment in favor of the Township.

Sutton appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Third Circuit, determined that none of Sutton's claims had merit.

Starting with Sutton's facial challenge, the court explained that "zoning ordinances designed to combat the undesirable secondary effects of [adult] businesses are to be reviewed under the standards applicable to 'content-neutral' time, place, and manner regulations." Thus, the Township's zoning ordinance regulating adult facilities would be valid if it was "narrowly tailored to serve a significant or substantial government interest" and also "le[ft] open ample alternative channels of communication," said the court.

Here, the court found that the Township ordinance passed constitutional muster because it was "narrowly tailored" and left "open adequate alternative channels of communication." Sutton had not argued to the contrary, but had claimed that the Township failed to identify "with enough precision" the secondary effects of adult-oriented facilities that it sought to protect. The court disagreed. The court found that the Township had identified those effects and interests as being "orderly growth, traffic, health and safety, and crime." The court also found that the Township had produced evidence of studies showing a "direct relationship between the presence of [adult] facilities and increases in crime and decreases in surrounding property values," and of "legislative findings, discussing the negative secondary effects of adult entertainment businesses." Accordingly, the court concluded that Sutton's facial challenge failed.

Next, the court addressed Sutton's First Amendment as-applied claim. Again, Sutton had claimed that the Board denied his application not for content-neutral reasons but because of the content of the use—in violation of the First Amendment. The court also rejected this claim. The court found that the record showed that the Board rejected the application for "legitimate, content-neutral reasons." Specifically, among other things, the court found that there was no genuine dispute that Sutton failed to meet the ordinance's ground-water discharge and sewage-disposal requirements, which the court found was a "legitimate, content-neutral reason" for rejecting Sutton's application.

Finally, the court addressed Sutton's claim that the Township violated his substantive due process rights when it rejected his application. The court explained that executive action violates substantive due process if it "shocks the conscience." Sutton argued that the application denial here met that standard because it was denied "purely out of animus toward nude dancing." The court found that allegation was assumed and unsubstantiated. The court noted that the Board had offered "several permissible reasons" for denying Sutton's application that "had nothing to do with the morality or expressive nature of nude dancing." Accordingly, the court could not conclude that the application denial shocked the conscience in violation of substantive due process.

See also: *Phillips v. Borough of Keyport, 107 F.3d 164 (3d Cir. 1997).*

See also: *United Artists Theatre Circuit, Inc. v. Township of Warrington, PA, 316 F.3d 392 (3d Cir. 2003).*

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Rezoning/Equal Protection—After city denies application for rezoning, applicant alleges denial was based on racial discrimination

Applicant thus alleges city violated her equal protection rights

Citation: *Mensie v. City of Little Rock, 917 F.3d 685 (8th Cir. 2019)*

The Eighth Circuit has jurisdiction over Arkansas, Iowa, Minnesota, Missouri, Nebraska, North Dakota, and South Dakota.

EIGHTH CIRCUIT (ARKANSAS) (02/28/19)—This case addressed the issue of whether a city discriminated against an applicant for rezoning on the basis of race and treated her differently than other similarly situated individuals in violation of the United States Constitution.

The Background/Facts: In 2007, Kimberly Mensie ("Mensie") purchased a house in the City of Little Rock (the "City"). When Mensie purchased the house she intended to use it for her residence and for use as a beauty salon. Mensie later discovered that her property was designated only for "Single Family" use under the City's Land Use Plan and zoning ordinance. So Mensie applied to the City to rezone her house for use as a salon. The City denied Mensie's rezoning request.

Thereafter, Mensie sued the City. Mensie argued that: (1) the City's denial of her rezoning request constituted racial discrimination in violation of her right to equal protection under the law; and (2) the City violated her equal protection rights by discriminating against her as a "class of one" in comparison to other similarly situated salons throughout the City.

The Equal Protection Clause of the United States Constitution provides that no State shall "deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., Amend. XIV.)

Finding there were no material issues of fact in dispute, and deciding the matter based on the law alone, the district court granted summary judgment for the City. The court concluded that Mensie failed to show the City treated her less favorably than other similarly situated salon operators or denied her rezoning application based on race.

Mensie appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Eighth Circuit, held that both of Mensie's equal protection claims were without merit.

Addressing Mensie's race-discrimination claim first, the court explained that "[t]o establish a violation of the Equal Protection Clause under [the theory that the rezoning request constituted racial discrimination in violation of the right to equal protection under the law], Mensie [was] required to show 'proof that a [racially] discriminatory purpose ha[d] been a motivating factor in the decision.' " Mensie had argued that the "historical background and relevant sequence of events" was evidence of racial discrimination here. Specifically, she noted that: the City's Director of Planning and Development opposed the idea "before the process had even begun;" and the City's Planning Commission rejected her applications even after she incorporated recommended changes. The court disagreed. The court found no evidence of racial discrimination on those facts. Rather the court found that the facts showed that Mensie's property was zoned Single Family in a historically single-family neighborhood and that her applications "progressed according to usual procedures." Therefore, the court concluded that Mensie's race-discrimination claim under the Equal Protection Clause must fail.

Addressing Mensie's class-of-one discrimination claim, the court explained that the Equal Protection Clause requires that "the government treat all similarly situated people alike." The court further explained that "cases have recognized successful equal protection claims brought by a 'class of one,' where the plaintiff alleges that she has been intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment." The court said that such plaintiffs—like Mensie here—must "provide a specific and detailed account of the nature of the preferred treatment of the favored class, especially when the state actors [—like the City here—] exercise broad discretion to balance a number of legitimate considerations." But, the court found that Mensie failed to meet that standard. While Mensie identified other salon operators in the City, the court found that she failed to identify how those salon operators were "similarly situated in all material respects, including in time, location, the zoning amendment process, and the City's Land Use Plan." Moreover, the court found that only four salon operators had previously been zoned for residential use, and that each of those four "was a nonconforming use (or in a nonconforming commercial area) in operation (or existence) prior to being annexed to the City." Thus, the court rejected Mensie's argument that other salons in the City were by nature "necessarily similarly situated." Having failed to establish disparate treatment, the court concluded that Mensie's class-of-one discrimination claim under the Equal Protection Clause must also fail.

See also: *Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252, 97 S. Ct. 555, 50 L. Ed. 2d 450 (1977).*

Use/Constitutionality of Ordinance—County ordinance requires permit for roosters

County residents argue ordinance is unconstitutional for various reasons

Citation: *Perez v. County of Monterey, 32 Cal. App. 5th 257, 243 Cal. Rptr. 3d 683 (6th Dist. 2019)*

CALIFORNIA (02/14/19)—This case addressed the issue of whether a municipal ordinance prohibiting more than four roosters on a single property without a permit was unconstitutional.

The Background/Facts: The Count of Monterey (the "County") has an ordinance (the "Ordinance") that provides that no one may keep more than four roosters on a single property without a rooster keeping operation permit. The Ordinance requires, among other things, that permitted rooster keeping operations: have a plan for solid (rooster) waste removal; and comply with certain minimum standards for rooster keeping. The Ordinance also provides exemptions from the permit requirement for large poultry operations, defined "poultry hobbyists," minors who keep roosters for educational purposes, and minors who keep roosters for a Future Farmers of America project or 4-H project.

Heriberto Perez and Miguel Angel Reyes Robles (the "Residents") challenged the County Ordinance as unconstitutional. They argued that the Ordinance: (1) takes property without compensation in violation of the Fifth Amendment to the United States Constitution; (2) infringes on Congress' authority to regulate interstate commerce; (3) violates the Equal Protection clause of the Fourteenth Amendment to the United States Constitution; (4) is a prohibited bill of attainder; and (5) violates the rights to privacy and to possess property guaranteed by the California Constitution.

The Fifth Amendment "prohibits the government from taking private property for public use without paying the owner fair compensation." (U.S. Const., Amend. V.) It applies not only to a "taking" of property but also to situations where a government regulation deprives a property owner of all economically beneficial or productive use of the property. Here, the Residents alleged that the Ordinance was a regulatory taking, depriving them of all beneficial use of their property.

The Commerce Clause "gives Congress the power to regulate commerce between the States." (U.S. Const., art. I, § 8, cl. 3.) A local regulation violates the Commerce Clause if it either discriminates against interstate commerce or "imposes a burden on interstate commerce that is 'clearly excessive in relation to the putative local benefits.' " Here, the Residents asserted that the Ordinance imposed a burden on interstate commerce by "forc[ing] rooster owners to immediately divest themselves [ ] of all but four of their roosters," leaving "[a] major portion of the roosters" to be sold via interstate commerce.

The Equal Protection Clause of the Fourteenth Amendment commands that "no State shall 'deny to any person within its jurisdiction the equal protection of the laws.' " (U.S. Const., Amend. XIV.) Essentially, it directs that "all persons similarly situated should be treated alike." Here, the Residents contended that the Ordinance violated the Equal Protection Clause because it treated minors more favorably than adults under two of the exceptions from the permit requirement.

Bills of attainder are prohibited by the United States Constitution. (U.S. Const., art. I, § 10.) A bill of attainder essentially punishes a designated group of people without trial. Here, the Residents alleged that the Ordinance was a bill of attainder in that it punished only those wanting to keep roosters.

Article I, section 1 of the California Constitution ensures the right to privacy. It states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." Here, the Residents argued that the Ordinance violated both the right to privacy and the right to possess property.

The trial court rejected all of the Residents' arguments, and concluded that the Ordinance did not violate the United States Constitution or California Constitution.

The Residents appealed.

DECISION: Judgment of superior court affirmed.

The Court of Appeal, Sixth District, California, also rejected all of the Residents' arguments, and concluded that the Ordinance did not violate the United States Constitution or California Constitution.

With regard to the Resident's Fifth Amendment taking claim, the court concluded that the Residents' claim failed because such a claim was based on how the Ordinance applied to the Residents, and the Residents had agreed to limit the scope of the issues tried to solely whether the Ordinance was valid on its face (i.e., based solely on the text of the Ordinance, not as it was applied).

The court rejected the Residents' interstate commerce violation claim, finding that the Residents failed to establish that the burden that the Ordinance imposed on interstate commerce outweighed the benefits of the regulation. Specifically, the court found that the Residents "provided no evidence to support their assertion that the [O]rdinance [would] result in roosters being sold, nor ha[d] they provided evidence of how that would affect interstate commerce."

The court also found that the Ordinance's exceptions for minors did not violate the Equal Protection Clause. The court explained "age is not a suspect classification under the Equal Protection Clause," so laws "may discriminate on the basis of age without offending the Fourteenth Amendment if the age classification in question is rationally related to a legitimate state interest." Here, the court found that the Residents failed to articulate how the

Ordinance's different treatment as to the rooster keeping operation permit based on age failed to advance a legitimate government purpose. The court found that the Ordinance's purpose was to "allow the keeping of roosters in a manner that addresses the treatment of roosters and environmental and health and safety impacts of keeping roosters, while discouraging the raising of roosters for illegal purposes[,]" and "recognizes that students legitimately raise roosters for 4-H, Future Farmers of America, and other educational projects[.]" Thus, the court held that the Ordinance therefore "serve[d] the public health, safety and welfare by establishing a comprehensive approach to the keeping of five or more roosters that balances promotion of agriculture and agricultural education with prevention of operations that are unsanitary, inhumane, environmentally damaging, and potentially conducive of illegal conduct." The court determined that those stated objectives were "legitimate" and the exceptions for minors "correspond[ed] rationally to achieving those ends."

The court also concluded that the Ordinance was not a bill of attainder as it did not single out a person or group for punishment based on conduct predating its enactment. Rather, the court found that the Ordinance prospectively regulated the keeping of rooster.

Finally, the court concluded that the Ordinance did not deprive the Residents of the right to privacy and to possess privacy. The court found that the Residents failed to identify a specific privacy interest implicated by the Ordinance, and failed to explain why any privacy invasion was not outweighed by the County's competing interest in "establishing humane and sanitary standards for the keeping of roosters." The court also found that the Ordinance did not deprive the Residents of the right to own property, but rather, regulated their use of property.

See also: *Horne v. Department of Agriculture, 135 S. Ct. 2419, 2426, 192 L. Ed. 2d 388 (2015) (Fifth Amendment Taking).*

See also: *C & A Carbone, Inc. v. Town of Clarkstown, N.Y., 511 U.S. 383, 390, 114 S. Ct. 1677, 128 L. Ed. 2d 399, 38 Env't. Rep. Cas. (BNA) 1529, 24 Envtl. L. Rep. 20815 (1994) (Interstate Commerce).*

See also: *Kimel v. Florida Bd. of Regents, 528 U.S. 62, 83, 120 S. Ct. 631, 145 L. Ed. 2d 522, 23 Employee Benefits Cas. (BNA) 2945, 140 Ed. Law Rep. 825, 81 Fair Empl. Prac. Cas. (BNA) 970, 76 Empl. Prac. Dec. (CCH) P 46190, 187 A.L.R. Fed. 543 (2000) (Equal Protection).*

See also: *Nixon v. Administrator of General Services, 433 U.S. 425, 471, 97 S. Ct. 2777, 53 L. Ed. 2d 867, 2 Media L. Rep. (BNA) 2025 (1977) (Bill of Attainder).*

See also: *People v. Byers, 90 Cal. App. 3d 140, 147, 153 Cal. Rptr. 249 (3d Dist. 1979) (Right to Possess Property).*

Constitutionality of Ordinance—County brings criminal proceedings against homeowner for violating ordinance's short-term rental prohibition

Homeowner argues her short-term rental use is grandfathered under previous and unconstitutionally vague ordinance

Citation: *Morgan County v. May, 2019 WL 654190 (Ga. 2019)*

GEORGIA (02/18/19)—This case addressed the issue of whether a zoning ordinance was unconstitutionally vague in violation of due process as applied to a specific property owner. More specifically, the case addressed the issue of whether a zoning ordinance that did not address house rentals, but which stated that single-family detached dwellings were permitted, and which defined "dwelling" as a structure which was "designed or used exclusively for residential purposes," was unconstitutionally vague in violation of due process as applied to a property owner whose property use was grandfathered under the original ordinance but who was charged with a misdemeanor for violating an amended version of the ordinance that prohibited short-term rental by leasing her vacation home for seven-night rentals.

The Background/Facts: Christine May ("May") built a vacation home in Morgan County (the "County"). In 2008, May began renting her house to others, typically for periods of a week. At that time, the County's zoning ordinance (the "Old Ordinance") did not contain any specific language addressing rentals of any duration for houses in May's zoning district. In practice, the County took the position that fewer-than-30-day rentals were prohibited but rentals for 30 days or longer were permitted. Then, in October 2010, the County amended its the Old Ordinance (the "Amended Ordinance") to explicitly prohibit most "short-term rentals," which were defined as rentals for fewer than 30 consecutive days.

May continued to rent her house. In August 2011, the County issued May a citation for violating the Amended Ordinance. This citation initiated misdemeanor criminal proceedings against May.

May asked the court to dismiss the citation. She argued that: (1) the County's Old Ordinance was "unconstitutionally vague because it did not specifically prohibit seven-night rentals;" (2) her use of her house for such rentals was therefore lawful under the Old Ordinance; and (3) she consequently had "a grandfathered right to continue renting the house in that way that precluded her from being

prosecuted under the short-term rental prohibition in the [A]mended Ordinance."

The trial court denied May's motion to dismiss, and found her guilty of violating the Amended Ordinance. May was sentenced to 30 days in jail, six months on probation, and a $500 fine.

May appealed. Ultimately the appellate courts remanded the case to the trial court for a ruling on May's constitutional vagueness challenge. The trial court then granted May's motion to dismiss her criminal citation, ruling that: (1) the County's Old Ordinance was "unconstitutionally vague as applied to short-term rentals of the sort at issue;" (2) "consequently, there was no zoning ordinance prohibiting such rentals when May began renting her house;" and (3) "her use of her house for such rentals was therefore grandfathered so that the explicit prohibition of that use under the [A]mended [O]rdinance d[id] not apply to her property."

Morgan County appealed the dismissal order.

DECISION: Judgment of superior court affirmed.

The Supreme Court of Georgia held that May's criminal citation for violating the Amended Ordinance was properly dismissed because: (1) the County's Old Ordinance was "unconstitutionally vague as applied to seven-night rentals of May's property;" and (2), "[a]s a result, the [O]ld [O]rdinance [could] not be applied to that use of May's property; (3) "meaning that her use of her house for such a rental was grandfathered and not subject to the short-term rental ban in the [A]mended [O]rdinance."

In so holding, the court explained the Old Ordinance would satisfy due process if it gave "a person of ordinary intelligence fair warning that specific conduct [was] forbidden or mandated and provide[d] sufficient specificity so as not to encourage arbitrary and discriminatory enforcement." The court found that the County's Old Ordinance made no mention of rentals of any duration. The County argued that event though no language in the Old Ordinance specifically addressed rentals of houses in May's district, the Old Ordinance's definition of "single-family detached dwellings" was sufficient to put May on notice that week-long rentals of her house were unlawful. The Old Ordinance listed as permitted "single-family detached dwellings" and defined "dwelling" as "a structure . . . which is designed or used exclusively for residential purposes . . . ," but did not define "residential." Relying on a dictionary definition of "residence," the County asserted that single-family detached dwellings like May's house could be used only as a place where a family "actually lives," rather than as a place where people stay temporarily.

The court found that the County's argument made "no attempt to explain how its selected dictionary definition of residence would put a person of common intelligence on notice that the dividing line for illegal 'temporary' residences would be drawn at 30 days rather than three, seven, 21, or 60." The court found that the County's definitions failed to "provide any sort of practical guidelines to enable a homeowner to determine at what point a structure ceases to be 'residential.' " Accordingly, the court so reached its conclusions.

See also: *Parker v. City of Glennville, 288 Ga. 34, 701 S.E.2d 182 (2010).*

Case Note:

May had also filed a cross-appeal. The court found it did not need to address May's claims on appeal because it affirmed the dismissal of her citation.

Signs/First Amendment Rights—Town requires union to remove inflatable rat balloon from its protest, saying it violates sign ordinance

Union sues, alleging sign ordinance and its application to union's rat violated union's free speech rights under the First Amendment

Citation: *Construction and General Laborers' Union No. 330 v. Town of Grand Chute, 915 F.3d 1120, 2019 L.R.R.M. (BNA) 48809 (7th Cir. 2019)*

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

SEVENTH CIRCUIT (WISCONSIN) (02/14/19)—This case addressed the issue of whether the application of a sign ordinance, which required a labor union to remove a giant inflatable rat from its protest, violated the union's free speech rights under the First Amendment.

The Background/Facts: When Local 330 of the Construction and General Laborers' Union (the "Union") learned that a masonry company working at a car dealership in the Town of Grand Chute (the "Town") was not paying area standard wages and benefits, the Union engaged in informational picketing at the site. As part of its picketing effort, the Union set up Scabby—a giant, inflatable balloon—tethering it to the ground in the median directly across from the dealer. The Town's Code Enforcement Officer ("CEO") told the Union that it would have to deflate Scabby because the rat was a "sign" that violated the Town's Sign Ordinance. The Sign Ordinance generally prohibited all signs, except traffic-related signs, affixed to the ground on public rights-of-way.

The Union ultimately filed a legal action against the Town. The Union asserted that the Town's Sign Ordinance violated the First Amendment to the United States Constitution. The First Amendment prohibits government from making laws that prohibit the exercise of free speech. (See U.S. Const., Amend. I.) The Union argued that the Sign Ordinance violated the First Amendment because it

distinguished among signs on the basis of content. The Union also argued that even if the text of the Sign Ordinance was content-neutral, the Town's selective enforcement of the Sign Ordinance violated the Union's First Amendment rights. In furtherance of that latter argument, the Union contended that the Sign Ordinance "placed no meaningful limits on the [CEO's] discretion, and so the Town's enforcement was necessarily selective." The Union also contended that the CEO was allowing certain signs to that were incompatible with the Sign Ordinance to remain undisturbed, while at the same time insisting "Scabby had to go."

The district court ultimately held that the Town "did not discriminate against the Union in violation of the First Amendment when it banned Scabby under its [ ] Sign Ordinance." The Union appealed.

DECISION: Judgment of district court affirmed.

The United States Court of Appeals, Seventh Circuit, agreed with the district court that the Sign Ordinance and its application to the Union did not discriminate on the basis of content in violation of the First Amendment.

In so holding, the court explained that a law does not violate the First Amendment even if it restricts protected speech in a public forum "if the restriction is content neutral, narrowly tailored to serve a significant governmental interest, and leaves open ample alternative ways to communicate the desired message."

The court acknowledged that there was "no doubt that a union's use of Scabby to protest employer practices is a form of expression protected by the First Amendment." However, the court also noted that a municipality—like the Town here—"is entitled to implement a nondiscriminatory ban of all private signs from the public roads and rights-of-way."

The court found that the Sign Ordinance was, on its face (i.e., looking solely at the text of the ordinance), "comprehensive and content-neutral." And the court found that the Sign Ordinance was narrowly tailored to meet the stated governmental interest of "banning of anything on the public right-of-way that might obstruct vision or distract passing drivers." Moreover, the court found that the Union had enough alternate means of communicating its message.

Addressing the application of the Sign Ordinance to the Union, and the Union's arguments of selective enforcement, the court acknowledged that "even a neutral ordinance can violate the First Amendment if it is enforced selectively, 'permitting messages of which [the Town] approves while enforcing the ordinance against unions and other unpopular speakers.' " Here, however, the court found the evidence showed no such selective enforcement. Rather, the court found that the Sign Ordinance was "not so open-ended and vague as to leave [the CEO] with no guidance whatsoever." Further, the court found "no evidence indicated that [the CEO] was anything but systematic in his enforcement of the [Sign] Ordinance."

See also: *Construction and General Laborers' Local Union No. 330 v. Town of Grand Chute, 297 F. Supp. 3d 850 (E.D. Wis. 2018), aff'd in part, vacated in part, remanded, 915 F.3d 1120, 2019 L.R.R.M. (BNA) 48809 (7th Cir. 2019).*

Case Note:

The Union had also challenged a later version of the Sign Ordinance as unconstitutional. However, the court found that challenge was not ripe for consideration because the court found that the Union's allegations about protests it might have conducted were "too speculative to create a concrete dispute."

Zoning News from Around the Nation

GEORGIA

The Georgia General Assembly is considering two pieces of legislation—House Bill 302 and Senate Bill 172, "which would prohibit local governments from regulating 'building design elements' on single-family or double family dwellings." Reportedly, opponents of the bills include the Georgia Municipal Association and the Association of County Commissions of Georgia.

Source: *Henry Herald; www.henryherald.com*

Companion bills in the Georgia General Assembly—House Bill 184 and Senate Bill 66—seek to "regulate the placement of mini-cell towers in public rights-of-way."

Source: *MDJOnline.com; www.mdjonline.com*

ILLINOIS

The state legislature is considering legislation (House Bill 2988) that would "officially establish that county wind-farm regulations would supersede township rules even in counties that have no zoning regulations." Specifically, the bill provides that county provisions "concerning wind farms and electric-generating wind devices [would be] applicable even if a county has or has not formed a zoning commission and adopted formal zoning." The bill would also clarify that "only a county may establish standards for wind farms, electric-generating wind devices, and commercial wind-energy facilities in unincorporated areas of the county outside of the zoning jurisdiction of a municipality and the 1.5-mile radius surrounding the zoning jurisdiction of a municipality." The bill is currently pending in the House Counties and Townships Committee.

Source: *The News-Gazette; www.news-gazette.com*

MASSACHUSETTS

Leominster City Councilors recently withdrew a proposed zoning amendment which would have limited the number of commercial vehicles that could be stored or parked outdoors on a lot. Opponents of the proposal had reportedly voiced concern that it could "hurt small business owners (such as plumbers, electricians, carpenters and snowplow operators) who bring their work vehicles home at night."

Source: *Leominster Champion; www.leominstercham p.com*

Governor Charlie Baker is reportedly preparing to file legislations aimed at making it "easier for municipalities to waive zoning restrictions in order to facilitate the produc-

tion of new housing units." The bill is expected to be nearly identical to the similar bill introduced last legislative session. That bill "would have lowered the threshold for a local government authority to waive zoning restrictions for a particular project to a majority vote." The goal of the legislation is to increase the housing inventory.

Source: *Worcester Telegram; www.telegram.com*

TENNESEE

Officials of Mt. Juliet have reportedly "amended the city's current zoning laws to block a new health clinic from performing surgical abortions." The zoning ordinance requires clinics that perform surgical abortions to be located in industrial zoning districts. A new health clinic had recently opened in a commercial zoning district in the city.

Source: *The State; www.thestate.com*

TEXAS

State Representative Gina Hinojosa recently filed a bill to overturn Texas' ban on "inclusionary zoning." The bill—HB 3050—would reportedly "allow cities to mandate affordable housing through land-use codes." Specifically, the bill would "allow Texas cities to require developers to build affordable housing as part of new developments." The mandate would come through zoning laws.

Source: *Statesman; www.statesman.com*

WYOMING

The state legislature passed a bill (Senate File 49), which provides private schools across Wyoming the same exemptions from county zoning granted to public schools.

Source: *Jackson Hole News & Guide; www.jhnewsandguide.com*

Elko County Debt Management Commission

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Members
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Michele Merkley

PUBLIC MEETING NOTICE

The Elko County Debt Management Commission, County of Elko, State of Nevada, will meet on Wednesday, April 24, 2019, in The Nannini Administration Building, Suite 102, 540 Court Street, Elko, Nevada 89801 at 1:30 PM. Pacific Time Zone

Attached with this Notice is the Agenda for said meeting of the Board.
This Notice is posted pursuant to NRS 241 as amended by the 2017 Legislature and is to be posted at the following places no later than three full working days before the meeting:

ELKO COUNTY MANAGER'S OFFICE
ELKO COUNTY COURTHOUSE
ELKO COUNTY LIBRARY
ELKO CITY HALL
ELKO COUNTY WEBSITE: www.elkocountynv.net

ROBERT K. STOKES
Elko County Manager

WELCOME TO AN ELKO COUNTY BOARD OR COMMISSION MEETING!

We are pleased you are interested in a meeting of one of Elko County's Boards or Commissions. Below is some basic information about our meetings and procedures for you to participate in your government.

AGENDAS

The agenda is available on the Elko County website at www.elkocountynv.net. Hard copies are made available at the meeting, upon request at the County Manager's Office or posted as per NRS 241. Meetings are broadcast live from our website, under the Meetings tab on the home page of the website and then under Agendas, Videos, etc. You can also click the Watch Our Meetings tab on the right side of the home page. Videos of the meeting are available within 24 hours of the end of the meeting. Minutes, when finalized and approved by the Board/Commission, are also posted to that page.

PUBLIC COMMENT

The public's participation in our meetings is valued and appreciated. The Board/Commission can only take action on items that are listed on an agenda properly posted prior to the meeting. During Comments by the General Public, speakers may address matters not listed on the agenda. The Open Meeting Law does not expressly prohibit responses to public comment by the Commissioners, but no deliberation on a matter can be considered without notice to the public. Public comment will be called for on all agenda items marked For Possible Action.

If you are planning to speak during the meeting, please sign the sign-in-sheet at the back of the meeting room. This helps our recording clerk get the correct spelling of your name. When comments are called for, please approach the podium and state your name and who you represent.

If submitting comments or information on an agenda item, please submit to the County Manager's Office as soon as possible in order to provide opportunity for Board/Commission members to review and to avoid possible delays in a decision if not all information is presented previous to the start of a meeting. If information is presented at the meeting, you need to provide at least 10 copies, making sure to submit a copy to the recording secretary for the official public record. All information submitted becomes part of the public record and is added to the backup information for that agenda item on our website with 24 hours of the adjournment of the meeting.

Another avenue for making comments on agenda items, especially if you can't make a meeting, is called e-Comment. If you open the agenda under the process described above, you will find a link by the agenda called e-Comment. Click on the link and follow the directions to register to comment and you are set to comment on specific agenda items. Please note that the e-comment period for a specific agenda closes 24 hours before the start of the meeting to allow those comments to be transmitted to our Board/Commission members and recording staff. Those reports are also uploaded to our agenda on the website.

CONSENT AGENDA

Items listed under the Consent Agenda are considered to be routine in nature and are normally approved by one motion without extensive discussion. If a Board/Commission member wishes to comment or discuss a particular item, that item can be removed from the consent agenda and considered as a separate action during the meeting.

ELKO COUNTY DEBT MANAGEMENT COMMISSION COUNTY OF ELKO, STATE OF NEVADA MEETING THE NANNINI ADMINISTRATION BUILDING, SUITE 102, 540 COURT STREET, ELKO, NEVADA 89801.

1:30 PM Pacific Time Zone

Wednesday, April 24, 2019

IN ACCORDANCE WITH NRS 241, THE COMMISSION MAY: (I) CHANGE THE ORDER OF THE AGENDA, (II) COMBINE TWO OR MORE AGENDA ITEMS FOR CONSIDERATION, (III) REMOVE AN ITEM FROM THE AGENDA OR DELAY DISCUSSION RELATING TO AN ITEM ON THE AGENDA AT ANY TIME, (IV) AND IF THE AGENDA IS NOT COMPLETED, RECESS THE MEETING AND CONTINUE ON ANOTHER SPECIFIED DATE AND TIME. THE PUBLIC CAN COMMENT ON ANY AGENDA ITEM BY BEING ACKNOWLEDGED BY THE CHAIR WHILE THE COMMISSION CONSIDERS THAT AGENDA ITEM.

POSTING

This agenda is posted pursuant to NRS 241 as amended by the 2017 Legislature and was posted at the following locations no later than April 19, 2019: ELKO COUNTY MANAGER'S OFFICE, ELKO COUNTY COURTHOUSE, ELKO COUNTY LIBRARY, ELKO CITY HALL, ELKO COUNTY SCHOOL DISTRICT, ELKO CONVENTION AND VISITOR'S AUTHORITY, CARLIN CITY HALL, WELLS CITY HALL, WEST WENDOVER CITY HALL, WEST WENDOVER RECREATION BOARD, ANDTHE ELKO COUNTY WEBSITE (www.elkocountynv.net).

PROCEDURE

Please sign in at the back of the hearing room if you plan on speaking during the meeting and remember to state your name for the record at the podium before making your statement.

PLEASE TURN OFF YOUR CELL PHONES OR PLACE IN MANNER MODE

REQUEST FOR AGENDA INFORMATION

The public may acquire this agenda and supporting materials, pursuant to NRS 241 by contacting Michele Merkley, Deputy Clerk, at (775) 753-4600 or via e-mail to mmerkley@elkocountynv.net. Materials are available from the Elko County Clerk's Office, Annex Building, 550 Court Street, Third Floor, Elko, Nevada 89801 or on the Elko County website at www.elkocountynv.net.

A. CALL TO ORDER

B. PLEDGE OF ALLEGIANCE

C. COMMENTS BY THE GENERAL PUBLIC

Pursuant to NRS 241 this time is devoted to comments by the general 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 to be an action item.

NON-ACTION

D. WEST WENDOVER GENERAL OBLIGATION BOND RESOLUTION

D.1. Discussion and considering for approval of Resolution DMC 01-2019, A RESOLUTION CONCERNING THE SUBMISSION TO THE ELKO COUNTY DEBT MANAGEMENT COMMISSION BY THE CITY OF WEST WENDOVER, NEVADA, OF A PROPOSAL TO AUTHORIZE THE ISSUANCE OF GENERAL OBLIGATION WATER REFUNDING BONDS (ADDITIONALLY SECURED BY PLEDGED REVENUES) IN THE MAXIMUM PRINCIPAL AMOUNT OF $2,200,000; CONCERNING ACTION TAKEN THEREON BY THE COMMISSION; AND APPROVING CERTAIN DETAILS IN CONNECTION THEREWITH.

FOR POSSIBLE ACTION

DMC Resolution 01-2019(49723908v2).doc

G-Water Rfg 2019.pdf

Resolution 2019-02 - Refinancing Bonds-Notice to Debt Management.pdf

E. APPROVAL OF MINUTES

E.1. Discussion and consideration for approval of the minutes from the February, 13 2019 meeting.

FOR POSSIBLE ACTION

DRAFT Debt Management Commission 2.13.19.docx

F. COMMENTS BY THE GENERAL PUBLIC

Pursuant to NRS 241 this time is devoted to comments by the general 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 to be an action item.

NON-ACTION

G. ADJOURNMENT

E-COMMENT

POSTING CERTIFICATE

Posting Certificate

Posting Certificate for Debt Mgt 042419.pdf

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 Board of County Commissioners, County of Elko, in writing at 540 Court Street, Suite 101, Elko, Nevada 89801, by e-mail at mpetty@elkocountynv.net or by calling (775) 738-5398.

ELKO COUNTY IS AN EQUAL OPPORTUNITY PROVIDER AND EMPLOYER.

Elko County Planning Commission

540 COURT STREET, SUITE 104, ELKO, NV 89801
PH. (775)738-6816, FAX (775) 738-4581

ELKO COUNTY PLANNING COMMISSION MINUTES

THURSDAY, FEBRUARY 21, 2019

5:15 P.M. CALL TO ORDER:

The meeting of the Elko County Planning Commission was called to order by Chairman Galyen at 5:15 PM on Thursday, February 21, 2019, in suite 102 of the Nannini Administration Building, Elko, Nevada.

ROLL CALL:

Members Present:	Mike Judd David A. Galyen Richard Genseal Mark Wetmore Dena Hartley Jack D. Larason
Absent :	David Hough
Others Present:	Corey L. Rice, PLS, WRS, Senior Planner Peggy Pierce-Fitzgerald, CFM, Planning Tech / GIS Operator Rand Greenburg, District Attorney's Office

PLEDGE OF ALLEGIANCE:

Chairman Galyen led the pledge of allegiance.

APPROVAL OF MINUTES

January 24, 2019 regular meeting minutes.

MOTION: Commissioner Hartley made a motion to approve the minutes of the January 24, 2019 meeting as written, Commissioner Judd seconded. Motion passed.

VOTE:

AYE:	David A. Galyen Mike Judd Dena Hartley Richard Genseal Mark Wetmore Jack D. Larason
NAY:	
ABSENT:	David Hough
ABSTENTIONS:	

COMMENTS BY THE GENERAL PUBLIC

None

PRELIMINARY HEARINGS

None

PUBLIC HEARINGS

A. 18-1500-0004, Elko County School District

Corey Rice stated that the applicant has requested that this be continued until further notice.

Application: An application submitted by Elko County School District requesting an alternate compliance to Elko County Planning Commission Resolution No. 1-2018 (PCR 1-2018). Specific to item (H) in PCR 1-2018 and that portion of relief granted to Item (H) by the Elko County Commission on the 7th day of March 2018 pertaining to Parkchester Way.

Location: APN 050-001-032 and 050-006-001. Parkchester Way between Country Club Parkway and Parkchester Drive located between Blocks 2 and 3 of Spring Creek Tract 106-D, as recorded in the Office of the Elko County Recorder as File No. 72495. Situated in a portion of Section 18, Township 33 North, Range 57 East, M.D.B.& M.

Applicant / Owner: Elko County School District

Chairman Galyen asked Mr. Greenburg if there is a limitation to how many times an applicant can continue before it's vacated.

Rand Greenburg stated that he was not aware of any limitations.

B. 19-6000-0001, Randy Burgess

Application: An application submitted by Randy Burgess requesting a variance to increase an accessory building height from twenty feet (20') to twenty-seven feet six inches (27'6") in a Agricultural Residential (AR) zoning district for equipment and tool storage and maintenance (garage) per ECC 4-9-5.

Location: APN 006-09J-018. Located off of Burgess Lane, 2.13 acres being the SE1/4 NW1/4 SE1/4 NW1/4 of Section 8, T.34N., R.55E., M.D.B.& M., Elko County, Nevada. Physical address is 1150 Burgess Lane, Elko, Nevada.

Applicant: Randy Burgess

Owner: Hal R. & D'Ette L. Burgess.

Corey Rice read the staff report for Application 19-6000-0001, Randy Burgess.

Commissioner Larason commented that this applicant has put the cart in front of the horse. He commented that he's a little confused on how they can go forward on this.

Corey commented that the applicant had come in with an application for a building permit which was required by his insurance company. He stated that at that time, when Thom started reviewing the plans he realized that it was in violation of zoning codes with accessory building height. Corey stated that this is the best way that he can see to accommodate the applicant so he could move forward and get his building permit. He stated that Mr. Ingersoll will not issue a building permit unless this board approves this variance.

Commissioner Larason stated that it seems to be a misnomer here or something, because it says that there will not be any fabrication done out of this building nor will any employees work out of this building. He said that in order to put merchandise or material inside of the building, it causes a person to go inside of the building to do this.

Corey stated that the way he has explained it, is that it will have to be done by the residence of the property, which is Mr. Burgess.

Commissioner Larason commented that he's not any clearer on this item at this time.

Corey stated that this was the best way that he felt that they could accommodate the applicant.

Commissioner Hartley commented that she is disappointed that the designer and Mr. Burgess built this without permits.
Corey stated that he doesn't think that Mr. Burgess engaged the services of Mr. Lattin until after he had already built the shell.

Commissioner Judd asked Corey if they are going to address the height of buildings in the near future.

Corey said yes and this board did vote on passing the height on to 25 feet, and then giving me the administrative authority to go up to 27 ¼ feet. The first step has been approved by the Elko County Commission, but it has not been finalized yet.

Commissioner Judd stated that this would still be 5 ¾ inches high.

Corey stated that this would still be above what he would have the administrative authority to approve without coming before this board.

Commissioner Genseal commented that he's struggling with this a little. He stated that this individual, who is a license contractor, builds a building without a permit, without getting the necessary paperwork, documentation, and inspections to get this building built, comes back to us because he wants to increase the height, and we are supposed to reward him by giving him a variance on this.

Corey stated that he does understand his concern on this, and that is why he put in the staff report that he does not have any recommendations for approval or denial.

Commissioner Genseal said that all he can think of is that when he was building an addition onto his house, and if I would have done this, he would have probably been shut down and it would be an empty shell even today.

Corey stated that he will be penalized in some form or another through Building & Safety Department, because Thom will charge him double the permit fees.

Commissioner Hartley said plus it's being investigated by the State Contractor's Board.

Commissioner Genseal stated that it has been sent to the Stated Contractor's Board for investigation.

Corey commented that he's been told that they are really stepping down on situations like this with this new board that they have.

Commissioner Genseal stated that his problem with this is the fact that he can't see this board rewarding someone until all the other stuff is taken care of, then come back and ask for the variance. And once that is done, then move forward with this application.

Corey stated that we are kind of chasing our tails with that because Thom can't issue a building permit until the variance is granted.

Commissioner Wetmore commented that he understands the frustration, and the cart was before the horse, but he thinks it needs to be split apart though. The issue of the no permit really isn't in our jurisdiction and the height is. The other aspect of this that went off track is being dealt with and is really out of our hands. He stated that we are not the Contractor's Board and we're not the Building Department. What we are dealing with is the additional 7 ½ feet, and really that's it at this level.

Commissioner Judd stated that he agrees with that but as he remembers correctly they had a license contractor come in here, and we had to give him a variance because he built a house in the middle of a road. That was not very long ago and in the same area. He said that he doesn't see where they can stop him because a height doesn't seem as serious as building a house in the middle of the road.

Chairman Galyen said that he thinks it would be better to have a completed building for aesthetics purposes than an empty shell for the neighbors to look at.

Commissioner Larason commented, that by us approaching it as a singular issue of just the building height, I feel that you're asking me to address something that doesn't exist.

Chairman Galyen asked Commissioner Larason to explain his comment.

Commissioner Larason stated that if there was not a building permit, then hence no building should be there. So now you're asking for a variance to increase the height to a building that theoretically doesn't exist. Physically it might be there, but it isn't there.

Commissioner Wetmore stated that they all agree, it's not a great situation, but at this stage, what other options do they have.

Commissioner Judd stated that whether it's there or not there, it's there. And it's either going to sit there as a shell, that doesn't do any good. There's ways to make it really hard, like digging down to show the foundations. He stated that he thinks he got himself in a world of hurt, but I can't see us denying it.

Commissioner Hartley stated that this situation is a lot different than the house in the middle of the road. Especially the fact that this gentleman is a contractor and certainly knows better and if

we grant him his variance before he even has a permit, I think it sets a precedence that says it's ok to build without a permit. She stated that she thinks they should throw it back on Thom Ingersoll and see if he will grant the permit.

Corey stated that a few months ago they had a building height application come in and it came through knowing the proper process without having the shell already built. But the building permit could not be issued until the variance of the building height was granted. He stated that we are kind of in the same situation, here even though the shell of the building already exist. He stated that Planning & Zoning has to sign off on these building permits just as Building & Safety does.

Commission Larason stated that in Clark County they had a procedure where if someone built a structure without a permit, there was a fee that they paid, and the inspectors would come out and do an inspection of it to see if it complied with up to the point of where it was. He asked if they had a procedure like that.

Corey stated that the building department will be checking the structural integrity of the existing shell once the building permit is issued. Corey said that there is not an instrument in place for them to go out and inspect the building, then issue the permit. The permit needs to be issued before there is something for them to inspect. And a professional consultant will have to be required to show structural calculations on the building.

Commissioner Genseal stated that if he had not come in for the variance and this structure would have been built out there for however without anyone ever knowing it, he wouldn't be facing any penalties. If the board approves it, he will be granted his variance, and he gets his building, and moves on happy go lucky. We basically are condoning his actions as a contractor to build a building without a permit and give him a variance on top of this.

Corey stated that Commissioner Genseal is right. If his insurance company wouldn't have told him he had to have a building permit, the county may have never known that the building was ever built. He may have finished it off and everything. Corey commented that his insurance company told him that he needed to have a building permit. That is when he came into Community Development, and that is when all these issues came to.

Chairman Galyen asked what kind of contract work does he do.

Corey stated that he's not 100% sure, but he thinks he does some fencing work and maybe some foundation work for prefab homes.

Commissioner Judd asked Corey if he said that the Contractor's Board was going to investigate it.

Corey said yes, the contractor's board is going to investigate it. He said that Thom has sent a report to them, and Mr. Ingersoll has been told that the new board is stepping down really hard

on situations like these to try to get them to stop. Corey also stated that Building & Safety will be charging them double the permit fees because he started construction prior to having a permit.

Commissioner Wetmore stated that the punishment here is going be coming in the form of additional fees, additional expense for getting a design professional and potentially losing his license from the State Contractor's Board. He stated that he would like to stick to the issue of just the height variance. We need to take a bad situation and try to clean it up the best we can.

Rand Greenburg commented that the ordinance hasn't passed yet so the board is still only working with 20 feet.

MOTION: Commissioner Wetmore made a motion to approve Application 19-6000-0001, Randy Burgess, for a variance to increase an accessory building height from twenty feet (20') to twenty-seven feet six inches (27'6") in an Agricultural Residential (AR) zoning district with staff's recommendations, conditions, and findings, seconded by Commissioner Judd. Motion passed.

VOTE:

AYE:	David A. Galyen Jack D. Larason Mike Judd Mark Wetmore
NAY:	Dena Hartley Richard Genseal
ABSENT:	David Hough
ABSTENTIONS:	

OTHER BUSINESS

Chairman Galyen stated that besides the State Regulations that say they have to have Other Business on the agenda, he's been there 13 years, and he's never seen Other Business, what is it for?

Rand stated that he doesn't know and will find more out about it.

STAFF UPDATE AND COMMISSIONERS COMMENTS

Rand stated that one of the questions asked of him at the last meeting was regarding a surveyor and a client and the possibility of abstaining and coming down to make a comment. Under the

Ethics, it is not permitted for any board member to represent or counsel anybody who would come before this board. So in that situation if any other business you might be doing and you have a client that might come before this board, you couldn't make any comments, you couldn't represent them, or you couldn't counsel them. You would still have to abstain because they were a customer or business client of yours. Rand stated that you could be a representative for yourself. If you are an applicant, you can appear before the board as the applicant. But if you have a client, and that client comes before the board, you couldn't come before the board and make comments for that client.

Chairman Galyen stated that Elko Code 4-1-10, it says that if we are on the board and are abstaining, we must declare that abstention prior to discussing the agenda item and not at the time of voting.

Rand stated, that's generally when there is a conflict of interest, you have to disclose that before discussion occurs. You actually have to disclose it to me and I am the one who determines if you get to abstain or not. The way that the Ethics Law is written, it's not the board member who decides if they abstain or not. It's actually the legal counsel who makes that decision. So if something comes up and you see it on the agenda, it would be nice if you have the opportunity, if you would contact me prior to the meeting. It's extremely helpful, then I can make that determination prior to the meeting.

Corey Rice stated that he has given Raintree Construction a deadline of March 15, 2019 to have a Boundary Line Adjustment into Planning & Zoning.

Rand was asked for the reasons for the board to vote Nay on an item. In general you are trying to avoid anything that is arbitrary. If you are saying Nay because your gut tells you that you should say Nay, that's probably not good enough. He said that it needs to be factually based. Tonight was a good example. You guys did a good job on deliberating on this and really showed some facts on things on why you wanted to say Nay or Aye on the issue of granting this variance. It just needs to be factually based. You guys have a lot of discretion as a board.

Commissioner Wetmore asked, regarding the lot line adjustment for Raintree, I am assuming they are purchasing the property behind them.

Corey stated that they are working on the contract details of it now, so they will be purchasing a portion of that property to ensure that their building isn't within their setbacks. Corey stated that they are purchasing enough land behind their building to make sure that their building is in the envelope that they can be in.

Chairman Galyen stated that this will take care of the setback, but was there ever an issue of them attaching an addition to their structure that was permitted to build.

Corey stated, that's a question for the Building & Safety and that will be addressed.

Commissioner Larason asked legal counsel that if there is something that could be checked to determine if we ought to add a step to the County's building procedure, to where this type of an incident doesn't come up again. If there can be an additional step, that in an event when someone builds a structure or finds a structure that they own, and absent of having to be lawfully done, if there couldn't be an application that they would make with the Building Department for a preliminary safety examination or whatever prior to any request being put in for obtaining a building permit. And that way this board wouldn't be so conflicted on having to grant variance or request on something that really hasn't even made it to that point yet.

Commissioner Genseal stated that it would be nice to have that to fall back to where Building & Safety would have the authority to go back and charge the full permit price before the variance is done.

Rand stated that he would certainly try to draft something up. We do have under our ordinance enforcement which entails fees and citations. Corey and I are working on getting that established so he can do that. I don't know if that would satisfy this board's intent for this, but that may be a good route in taking care of these situations.

Chairman Galyen asked if Commissioner Hough's absence excused. The answer was no.

COMMENTS BY THE GENERAL PUBLIC

None

ADJOURNMENT

Meeting adjourned at 5:58 pm
Minutes Clerk: Peggy Pierce-Fitzgerald
Date Approved: April 18, 2019

(Staff Reports are available on the Elko County website at:
http://www.elkocoutynv.nt/meetings/board_of_commissioners/index.html)