



CITY OF ELKO

Planning Department

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

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

PUBLIC MEETING NOTICE

The City of Elko Planning Commission will meet in a regular session on Tuesday, December 1, 2020 beginning at 5:30 P.M., P.S.T. utilizing GoToMeeting.com: <https://global.gotomeeting.com/join/223205901>

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

ELKO CITY HALL – 1751 College Avenue, Elko, NV 89801

Date/Time Posted: November 23, 2020 2:00 p.m.

Posted by: Cathy Laughlin, City Planner

Name

Title

Cathy Laughlin
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, or on the City website at <http://www.elkocity.com>.

The public can view or participate in the virtual meeting on a computer, laptop, tablet or smart phone at: <https://global.gotomeeting.com/join/223205901>. You can also dial in using your phone at **+1 (669) 224-3412**. The **Access Code** for this meeting is **223-205-901**. Members of the public that do not wish to use GoToMeeting may call in at **(775)777-0590**. Comments can also be emailed to cityclerk@elkocitynv.gov

Dated this 23rd day of November, 2020.

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.S.T., TUESDAY, DECEMBER 1, 2020
ELKO CITY HALL, COUNCIL CHAMBERS,
1751 COLLEGE AVENUE, ELKO, NEVADA
<https://global.gotomeeting.com/join/223205901>

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

November 3, 2020 – Regular Meeting **FOR POSSIBLE ACTION**

I. NEW BUSINESS

A. PUBLIC HEARING

1. Review, consideration, and possible adoption of Resolution No. 3-20, a resolution by the Elko City Planning Commission, containing amendments to the City of Elko Master Plan, specifically amending the Proposed Future Land Use Plan Atlas Map 8 on: 1) six parcels of land located in the area of W. Cedar Street and D Street; 2) APN 001-01R-004 located on Front Street adjacent to the 5th Street Bridge; and 3) APN 110-620-058 located at the northeast corner of Ruby Vista Drive and College Parkway, and matters related thereto. **FOR POSSIBLE ACTION**

Planning Commission reviewed and initiated the amendment to the City of Elko Master Plan at its November 3, 2020 meeting.

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

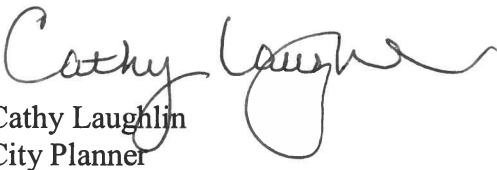
COMMENTS BY THE GENERAL PUBLIC

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

ADJOURNMENT

Respectfully submitted,


Cathy Laughlin
City Planner

CITY OF ELKO
PLANNING COMMISSION
REGULAR MEETING MINUTES
5:30 P.M., P.S.T., TUESDAY, NOVEMBER 3, 2020
ELKO CITY HALL, COUNCIL CHAMBERS,
1751 COLLEGE AVENUE, ELKO, NEVADA
<https://global.gotomeeting.com/join/928163245>

CALL TO ORDER

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

ROLL CALL

Present: **Jeff Dalling**
 Tera Hooiman
 Stefan Beck
 Gratton Miller
 Giovanni Puccinelli
 John Anderson
 Mercedes Mendive

City Staff Present: **Scott Wilkinson, Assistant City Manager**
 Cathy Laughlin, City Planner
 Michele Rambo, Development Manager
 Bob Thibault, Civil Engineer
 Jamie Winrod, Fire Department
 Shelby Archuleta, Planning Technician

PLEDGE OF ALLEGIANCE

COMMENTS BY THE GENERAL PUBLIC

There were no public comments made at this time.

APPROVAL OF MINUTES

October 6, 2020 – Regular Meeting **FOR POSSIBLE ACTION**

*****Motion: Approve minutes for the October 6th Meeting as presented.**

Moved by Tera Hooiman, Seconded by Giovanni Puccinelli

**Motion passed unanimously. (7-0)*

I. NEW BUSINESS

A. MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS

1. Review, consideration and possible approval of Final Map No. 8-20, filed by BDSA, LLC, for the development of a subdivision entitled Tower Hill Unit 4 involving the proposed division of approximately 8.601 acres of property into 5 lots for residential development and 1 remainder lot within the R1 (Single Family Residential) Zoning District, and matters related thereto. **FOR POSSIBLE ACTION**

Subject property is located northeast of Lamoille Highway and south of Stitzel Road. (APN 001-929-125)

Scott MacRitchie, 312 Four Mile Trail, explained that the map was for five additional lots tacked on to Tower Hill Phase 3.

Michele Rambo, Development Manager, went over the City of Elko Staff Report dated October 20, 2020. Staff recommended conditional approval with the findings and conditions in the Staff Report.

Cathy Laughlin, City Planner, had no further comments

Bob Thibault, Civil Engineer, stated that the Engineering Department recommended approval as presented by staff.

Matt Griego, Fire Chief, had no concerns and recommended approval as presented.

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

*****Motion: Recommended that the City Council accept, on behalf of the public, the parcels of land offered for dedication for public use in conformity with the terms of the offer of dedication; that the final map substantially complies with the tentative map; that the City Council approve the agreement to install improvements in accordance with the approved construction plans that satisfies the requirements of Title 2, Chapter 3, and conditionally approve Final Map 8-20 with conditions listed in the Staff Report dated October 20, 2020, listed as follows:**

1. The Developer shall execute a Performance and Maintenance Agreement in accordance with Section 3-3-21 of City code. The Performance Agreement shall be secured in accordance with Section 3-3-22 of City code. In conformance with Section 3-3-21 of City code, the public improvements shall be completed within a time of no later than two (2) years of the date of Final Map approval by the City Council unless extended as stipulated in City code.
2. The Performance and Maintenance Agreement shall be approved by the City Council.
3. The Developer shall enter into the Performance and Maintenance Agreement within 30 days of approval of the Final Map by the City Council.
4. The Final Map for Tower Hill Phase 4 is approved for 5 residential lots and 1

remainder lot.

5. The Utility Department will issue a Will Serve Letter for the subdivision upon approval of the Final Map by the City Council.
6. Site disturbance shall not commence prior to approval of the project's construction plans by the Nevada Department of Environmental Protection.
7. Site disturbance, including clearing and grubbing, shall not commence prior to the issuance of a grading permit by the City of Elko.
8. Construction shall not commence prior to Final Map approval by the City Council and issuance of a will-serve letter by the City of Elko.
9. Conformance with the conditions of approval of the Tentative Map is required.
10. The Owner/Developer is to provide the appropriate contact information for the qualified engineer and engineering firm contracted to oversee the project along with the required inspection and testing necessary to produce an As-Built for submittal to the City of Elko. The Engineer of Record is to ensure all materials meet the latest edition of the Standard Specifications for Public Works. The Engineer of Record is to certify that the project was completed in conformance with the approved plans and specifications.

Commissioner Puccinelli's findings to support the motion were the Final Map for Tower Hill Phase 4 has been presented before expiration of the subdivision proceedings in accordance with NRS 278.360(1)(a)(2) and City Code. The Final Map is in conformance with the Tentative Map. The proposed subdivision is in conformance with the Land Use and Transportation Components of the Master Plan. The proposed development conforms with Sections 3-3-9 through 3-3-16 (inclusive). The Subdivider shall be responsible for all required improvements in conformance with Section 3-3-17 of City Code. The Subdivider has submitted construction plans in conformance with Section 3-3-18 of City Code. The Subdivider has submitted plans to the City and State Agencies for review to receive all required permits in accordance with the requirements of Section 3-3-19 of City Code. The Subdivider has submitted construction plans which, having been found to be in conformance with Section 3-3-20 of City Code, have been approved by City Staff. The Subdivider will be required to enter into a Performance Agreement to conform to Section 3-3-21 of City Code. The Subdivider will be required to enter into a Performance and Maintenance Guarantee as stipulated in the Performance Agreement in conformance with Section 3-3-22 of City Code. The proposed development conforms to Sections 3-2-3, 3-2-4, 3-2-5(E), 3-2-5(G), 3-2-17, and 3-8 of City Code.

Moved by Giovanni Puccinelli, Seconded by Gratton Miller.

**Motion passed unanimously. (7-0)*

2. Review, consideration, and possible recommendation to City Council for Vacation No. 4-20, filed by Grace Baptist Church, for the vacation of a 25' wide public utility

easement bisecting APN 001-610-112, consisting of an area approximately 9,944 sq. ft., and matters related thereto. **FOR POSSIBLE ACTION**

The applicant is in the process of selling the parcel to a developer who would prefer to have the public easement run along the property line. The applicant will be granting a new public utility easement to the City of Elko in lieu of this easement.

John Ferricks, 234 Aerie Lane, stated that he was available for questions.

Ms. Laughlin went over the City of Elko Staff Report dated October 20, 2020. Staff recommended conditional approval with the findings and conditions listed in the Staff Report.

Ms. Rambo had no comments or concerns.

Mr. Thibault recommended approval as presented.

Chief Griego had no concerns and recommended approval as presented.

Mr. Wilkinson recommended approval as presented.

*****Motion: Forwarded a recommendation to City Council to adopt a resolution which conditionally approves Vacation No. 4-20 subject to the conditions listed in the City of Elko Staff Report dated October 20, 2020, with modifications from the Planning Commission, listed as follows:**

- 1. The applicant is responsible for all costs associated with the recordation of the vacation.**
- 2. Written response from all non-City utilities is on file with the City of Elko with regard to the vacation in accordance with NRS 278.480(6) before the order is recorded.**
- 3. New public utility/drainage easement to be recorded prior to final City Council consideration of this vacation.**

Commissioner Puccinelli's findings to support the recommendation were the proposed vacation is in conformance with the City of Elko Master Plan Land Use Component. The proposed vacation is in conformance with the City of Elko Master Plan Transportation Component. The proposed vacation is in conformance with NRS 278.479 to 278.480, inclusive. The vacation is material detrimental to the public. The existing easement contains no public infrastructure (water, sewer, etc.). Vacating this easement would not result in the need or expense to relocate any pipes, which may then result in an interruption to service. Therefore, the vacation is not materially detrimental to the public. The proposed vacation is not located within the Redevelopment Area. The proposed vacation is in conformance with Elko City Code 8-7.

Moved by Giovanni Puccinelli, Seconded by Tera Hooiman.

**Motion passed unanimously. (7-0)*

3. Review, consideration, and possible action to initiate an amendment to the City of Elko Master Plan, specifically amending the Proposed Future Land Use Plan Atlas Map 8 on: 1) six parcels of land located in the area of W. Cedar Street and D Street; 2) APN 001-01R-004 located on Front Street adjacent to the 5th Street Bridge; and 3) APN 110-620-058 located at the northeast corner of Ruby Vista Drive and College Parkway, and matters related thereto. **FOR POSSIBLE ACTION**

Recent development applications have revealed some inconsistencies between existing Zoning districts and Master Plan designations. The proposed amendment cleans up these inconsistencies.

Ms. Rambo went through the proposed changes included in the City of Elko Staff Report dated October 20, 2020.

Ms. Laughlin reminded the Commission that the NRS allows the City to amend the Master Plan up to four times per year. This is the third amendment for this year, so it is still in compliance.

Mr. Thibault recommended approval.

Chief Griego had no concerns and recommended approval.

Mr. Wilkinson had no comments.

*****Motion: Initiate an amendment to the City of Elko Master Plan and direct staff to bring the item back as a resolution and public hearing.**

Moved by Tera Hooiman, Seconded by Gratton Miller.

**Motion passed unanimously. (7-0)*

4. Review, consideration, and possible action to set regular meeting dates as well as special meeting dates for 2021, and matters related thereto. **FOR POSSIBLE ACTION**

Ms. Laughlin explained that there aren't any special meetings proposed. The only potential conflict would be the September 7th meeting, which is the Tuesday after Labor Day. If there will be an Elko County Fair next year, the meeting would be the day after the fair. All of the meeting dates would fall on the first Tuesday of the month.

Chairman Jeff Dalling said they changed the meeting date the one time and no one showed up. He thought they should go ahead and keep all the dates as the first Tuesday of every month.

Commissioner Gratton Miller agreed with Chairman Dalling.

*****Motion: Keep all 2021 Planning Commission meetings on the first Tuesday of every month.**

Moved by Tera Hooiman, Seconded by Mercedes Mendive.

****Motion passed unanimously. (7-0)***

II. REPORTS

A. Summary of City Council Actions.

Ms. Laughlin reported that the next Planning Commission meeting would be on December 1st, hopefully at the Convention Center as a live meeting. We were going to do a live meeting today, but we couldn't get the Convention Center due to the election. For City Council actions: On Oct 13th they approved the Parcel Map 8-20 for Gallagher Ford, they appointed Mercedes Mendive to the Planning Commission, they also accepted the petition for the vacation for Grace Baptist Church. There was another petition for a vacation for a portion of Silver Street applied for by The Star Hotel. That is Vacation 3-20 and it was tabled. The City Council requested additional information and to contact the neighbors in the area. The Council approved the Tentative Map for Jarbidge Estates. They also approved a modification to the Aspen Heights Performance Agreement. On the 27th the City Council presented a plaque to Evi Buell for her service on the Planning Commission, unfortunately she wasn't able to attend, so the plaque was mailed to her. They accepted the Grant of Easement for the new Utility Easement for Grace Baptist Church. The City Council also approved a Deed and Purchase and Sale Agreement for 2,800 square foot of city owned land that is going to be sold to Anthem Broadband. They also accepted the petition to rename Dakota Street to Dakota Drive.

B. Summary of Redevelopment Agency Actions.

Ms. Laughlin reported that there would be a Redevelopment Agency Meeting on November 10th, next Tuesday at the Convention Center.

C. Professional articles, publications, etc.

1. Zoning Bulletin

D. Miscellaneous Elko County

E. Training

COMMENTS BY THE GENERAL PUBLIC

There were no public comments made at this time.

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

ADJOURNMENT

There being no further business, the meeting was adjourned.

Jeff Dalling, Chairman

Tera Hooiman, Secretary

DRAFT

**Elko City Planning Commission
Agenda Action Sheet**

1. Title: **Review, consideration, and possible adoption of Resolution No. 3-20, a resolution by the Elko City Planning Commission, containing amendments to the City of Elko Master Plan, specifically amending the Proposed Future Land Use Plan Atlas Map 8 on: 1) six parcels of land located in the area of W. Cedar Street and D Street; 2) APN 001-01R-004 located on Front Street adjacent to the 5th Street Bridge; and 3) APN 110-620-058 located at the northeast corner of Ruby Vista Drive and College Parkway, and matters related thereto. FOR POSSIBLE ACTION**
2. Meeting Date: **December 1, 2020**
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 November 3, 2020 meeting.**
6. Business Impact Statement: **Not Required**
7. Supplemental Agenda Information: **Staff Report, Resolution with Exhibits,**
8. Recommended Motion: **Move to adopt Resolution 3-20, containing amendments to 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.**
9. Prepared By: **Michele Rambo, AICP, Development Manager**
10. Agenda Distribution:

STAFF COMMENT FLOW SHEET
PLANNING COMMISSION AGENDA DATE: 12/01/2020

Do not use pencil or red pen, they do not reproduce

Title:	PC Resolution 3-20 for Master Plan Amendment No. 3-20		
Applicant(s):	City of Elko		
Site Location:	N/A		
Current Zoning:	N/A	Date Received:	N/A
		Date Public Notice:	12/17/2020
COMMENT:	This is for an amendment to the City of Elko Master Plan, specifically the Proposed Future Land Use Plan Atlas Map on: 1) six parcels of land located in the area of W. Cedar Street and D Street; 2) APN 001-01R-004 located on Front Street adjacent to the 5th Street Bridge; and 3) APN 110-620-058 located at the northeast corner of Ruby Vista Drive and College Parkway, and matters related thereto.		

If additional space is needed please provide a separate memorandum

Assistant City Manager: Date:	11/20/2020
Recommend approval	
	SAW

Initial

City Manager: Date:	11/20/20
No comments/concerns.	
	cc

Initial

**ELKO CITY PLANNING COMMISSION
RESOLUTION NO. 3-20**

**A RESOLUTION OF THE ELKO CITY PLANNING COMMISSION
AMENDING THE ELKO CITY MASTER PLAN BY UPDATING THE
PROPOSED FUTURE LAND USE PLAN (ATLAS MAP 8)**

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 the Proposed Future Land Use Plan (Atlas Map 8) 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 Land Use Plan (Atlas Map 8) are attached hereto as Exhibit 1, and that the amendments to the Elko City Master Plan attached hereto as Exhibit 1, 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 as Exhibit 1, or any portion thereof, shall be effective upon adoption by the Elko City Council.

PASSED AND ADOPTED this 1st day of December 2020 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

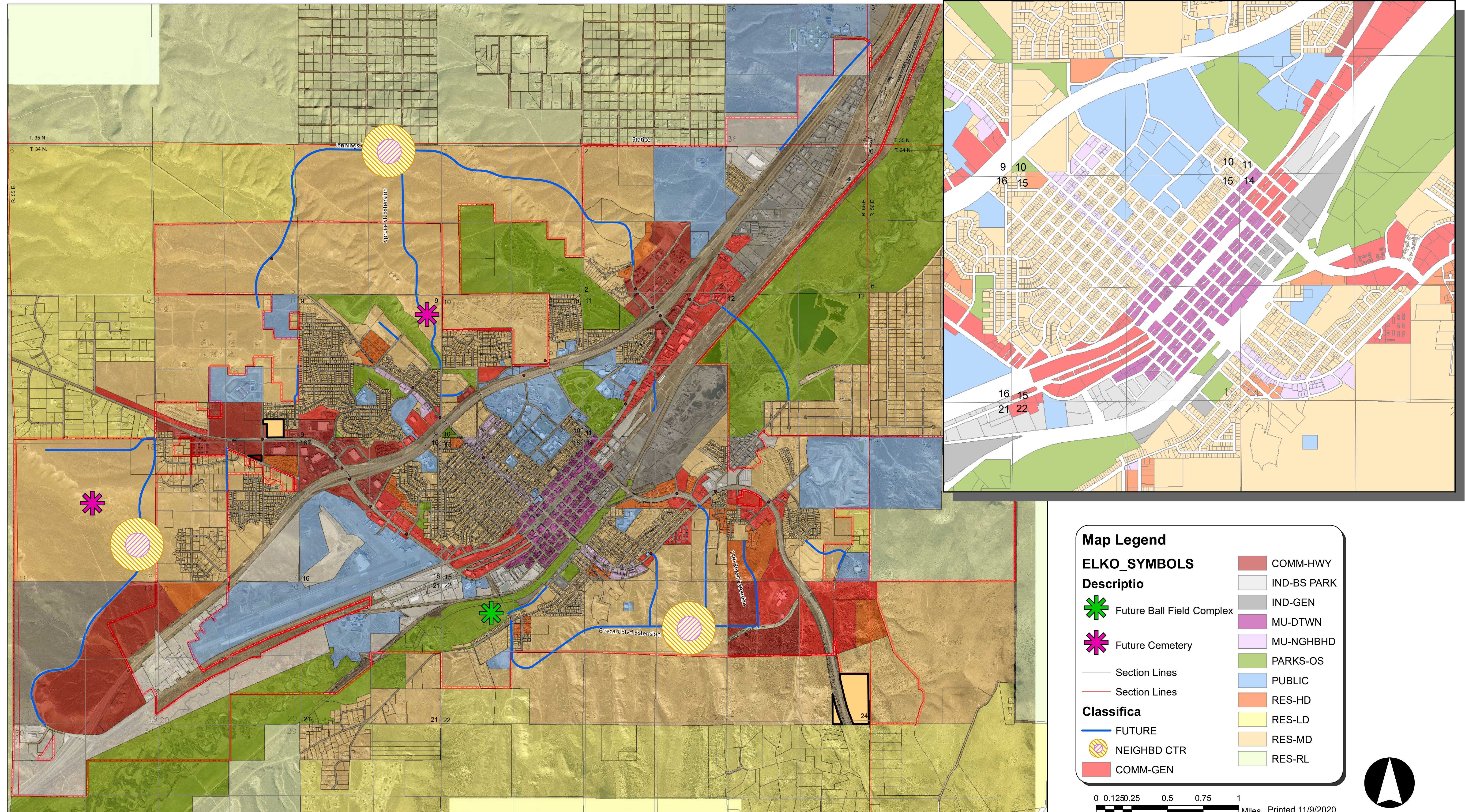
Attest: _____
Tera Hooiman, Secretary

AYES:

NAYS:

ABSENT:

ABSTAIN:



Map Legend

ELKO_SYMBOLS

Description

Future Ball Field Complex

Future Cemetery

Section Lines

Section Lines

Classifica

FUTURE

NEIGHBD CTR

COMM-GEN

COMM-HWY

IND-BS PARK

IND-GEN

MU-DTWN

MU-NGBHD

PARKS-OS

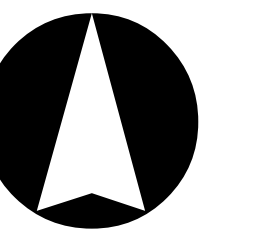
PUBLIC

RES-HD

RES-LD

RES-MD

RES-RL





CITY OF ELKO

Planning Department

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CITY OF ELKO PLANNING COMMISSION ACTION REPORT Regular Meeting of November 3, 2020

WHEREAS, the following item was reviewed and considered by the Elko City Planning Commission on November 3, 2020 per City Code Sections 3-4-12:

Initiate an amendment to the City of Elko Master Plan, specifically amending the Proposed Future Land Use Plan Atlas Map 8 on: 1) six parcels of land located in the area of W. Cedar Street and D Street; 2) APN 001-01R-004 located on Front Street adjacent to the 5th Street Bridge; and 3) APN 110-620-058 located at the northeast corner of Ruby Vista Drive and College Parkway, and matters related thereto. FOR POSSIBLE ACTION

Recent development applications have revealed some inconsistencies between existing Zoning districts and Master Plan designations. The proposed amendment cleans up these inconsistencies.

WHEREAS, the Planning Commission, upon review and consideration of the application and supporting data, public input and testimony, initiated an amendment to the City of Elko Master Plan and directed staff to bring the item back as a resolution and public hearing.


Cathy Laughlin, City Planner

Attest:


Shelby Archuleta, Planning Technician

CC: Kelly Wooldridge, City Clerk
Michele Rambo, Development Manager (email)



City of Elko
1751 College Avenue
Elko, NV 89801
(775) 777-7160
FAX (775) 777-7119

CITY OF ELKO STAFF REPORT

REPORT DATE: October 20, 2020
PLANNING COMMISSION DATE: November 3, 2020
AGENDA ITEM NUMBER: I.A.3.
APPLICATION NUMBER: Master Plan Amendment 3-20

An initiation of an amendment to the City of Elko Master Plan, specifically amending the Proposed Future Land Use Plan Atlas Map 8 on: 1) six parcels of land located in the area of W. Cedar Street and D Street; 2) APN 001-01R-004 located on Front Street adjacent to the 5th Street Bridge; and 3) APN 110-620-058 located at the northeast corner of Ruby Vista Drive and College Parkway.

STAFF RECOMMENDATION:

INITIATE the proposed Master Plan Amendment and direct staff to bring the item back as a resolution and public hearing.

PROPOSED CHANGE #1

BACKGROUND

A code enforcement complaint was received by the City regarding a parcel on W. Cedar Street. During the process of resolving the complaint, it was discovered that the current zoning of the property, General Commercial, is not a corresponding zoning for the existing Master Plan designation of Residential – Medium Density.

A Master Plan Amendment was determined to be needed because the Master Plan requires that the zoning of individual parcels conform with the Master Plan land use designation. As a general practice throughout Nevada, if these designations do not match, new projects cannot be approved or a condition of approval must be placed on the project that a Master Plan Amendment occur.

Once Staff began looking more closely at this area of town, it was discovered that many parcels surrounding W. Cedar Street/D Street/E Street have conflicting zoning and Master Plan designations.

EXISTING CONDITIONS

As seen on the map below, the parcels in questions are zoned General Commercial. Surrounding properties to the west and south are also zoned General Commercial while parcels to the north and east are designated as Single-Family and Multiple-Family Residential.

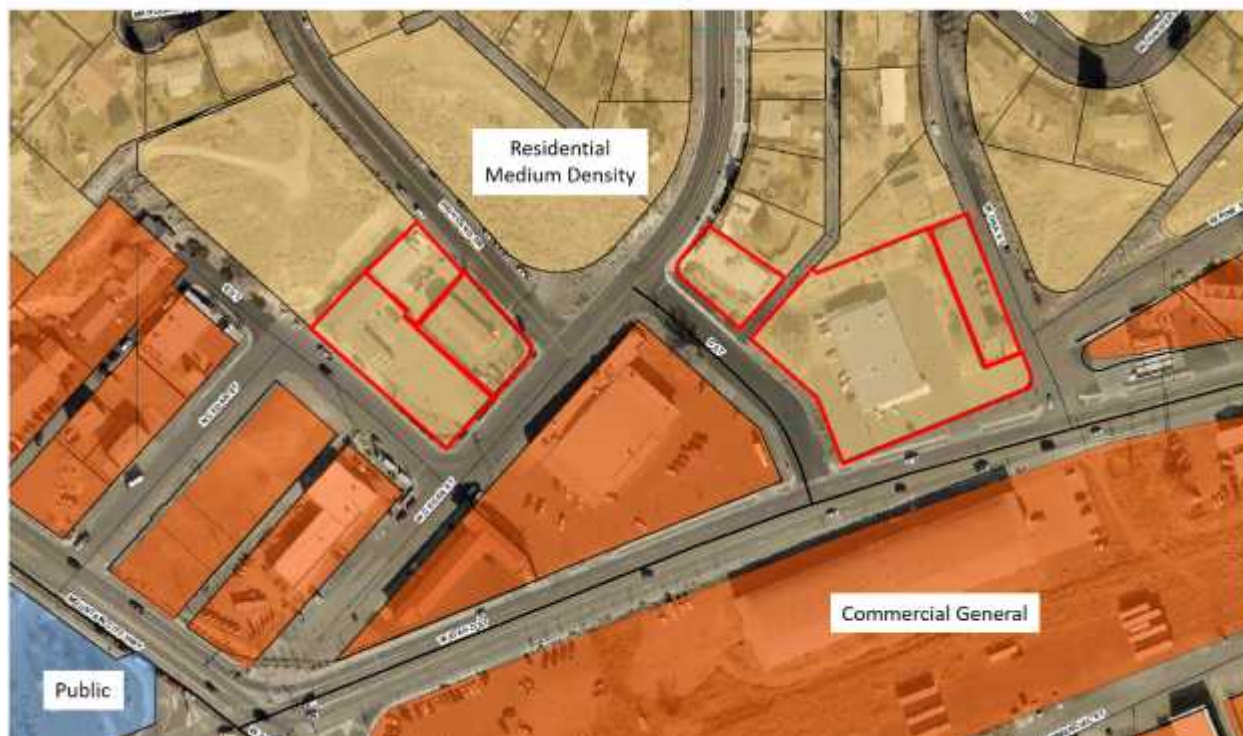
Current Zoning



There are currently a mix of uses in the neighborhood. The six parcels in question include a hotel, retail store, two professional offices, a car wash, and auto repair. The existing zoning districts make sense for this neighborhood and are not proposed to change.

The map below shows the existing Master Plan Designations for the same neighborhood. The properties surrounding the six parcels in question are designated either Commercial General or Residential Medium Density.

Current MP Designation



PROPOSED CHANGES

In order to clean up the discrepancies between the Master Plan designations and Zoning districts of these six parcels, multiple changes are needed. These are outlined below:

APN	Use	Current Zoning	Current Master Plan	Proposed Master Plan
001-132-003	Professional Office	General Commercial	Residential Medium Density	Commercial General
001-132-006	Auto Repair	General Commercial	Residential Medium Density	Commercial General
001-132-007	Car Wash	General Commercial	Residential Medium Density	Commercial General
001-143-001	Professional Office	General Commercial	Residential Medium Density	Commercial General
001-144-002	Retail Store	General Commercial	Residential Medium Density	Commercial General
001-144-004	Hotel	General Commercial	Residential Medium Density	Commercial General

The map below shows the proposed changes to the Master Plan designation of each parcel.

Proposed MP Designation



These changes will bring these parcels into compliance between their existing zoning districts and the proposed land use designations.

JUSTIFICATION

The City of Elko has not adopted findings to be met by Master Plan Amendments. However, other jurisdictions throughout Nevada use some variation of the following findings when reviewing Master Plan Amendments. These are useful when considering the proposed changes.

1. The amendment/project will provide for orderly physical growth of the City, enhance the urban core, and foster safe, convenient, and walkable neighborhoods and shopping districts.

Creating consistency between zoning and Master Plan designations aides in the growth of the City by keeping the intended use of these parcels clear for future development. Inconsistencies create confusion and delay projects, which can ultimately keep somebody from building on a parcel.

2. The amendment/project conforms to the adopted population plan and ensures an adequate supply of housing, including affordable housing.

The proposed change does not have a significant impact on housing or population because the parcels under consideration for this change are currently being used for commercial uses.

3. There has been a change in the area or conditions on which the current designation was based which warrants the amendment.

No change has occurred. The amendment is warranted simply as a means to create consistency between the zoning and land use categories.

4. The density and intensity of the proposed Master Plan Amendment is sensitive to the existing land uses and is compatible with the existing adjacent land use designations.

The uses and density permitted under the new Master Plan designations does not change because the Master Plan is being changed to match the existing uses on the parcels.

5. There are, or are planned to be, adequate transportation, recreation, utility, and other facilities to accommodate the uses and density permitted by the proposed Master Plan designation.

The proposed change to the Master Plan designations does not increase the need for facilities such as transportation, recreation, and utilities. With the exception of some street improvements, all facilities are already in place to serve this area.

6. The proposed change is in substantial conformance with the goals and policies of the Master Plan and other adopted plans and policies.

The proposed changes to each property's Master Plan designation is in substantial conformance with the following objective:

-) Objective 6: Encourage multiple scales of commercial development to serve the needs of the region, the community, and individual neighborhoods.

In addition, the proposed amendment conforms with all other adopted plans and policies within the City of Elko.

PROPOSED CHANGE #2

BACKGROUND

The City of Elko recently sold a piece of City property to Anthem Broadband of Nevada located on Front Street just west of 5th Street. During the review process of PM 7-20, which created the parcel to be sold, it was discovered that the current zoning of the property (Public/Quasi Public) and Master Plan designation (Parks and Open Space) do not allow for the proposed utility facility. An amendment to the zoning designation from Public/Quasi Public to Light Industrial is scheduled for City Council consideration on November 10, 2020.

A Master Plan Amendment is needed to create conformity between the zoning and Master Plan designations, as required by the City's Master Plan. As a general practice throughout Nevada, if these designations do not match, new projects cannot be approved or a condition of approval must be placed on the project that a Master Plan Amendment occur. A condition of approval was added to Parcel Map 7-20 requiring the proposed Master Plan Amendment, which was approved by the City Council.

EXISTING CONDITIONS

As seen on the map below, the parcel in question is currently zoned Public/Quasi-Public, as are the surrounding properties to the west and north. The adjacent parcel to the west is zoned General Industrial and the parcel across Front Street to the south is zoned General Commercial.



There are currently a mix of uses in the neighborhood. The parcel in question is vacant, but is used as a parking area for the HARP Trail. Other surrounding uses include warehouse, RV/Mobile Home Park, and other vacant properties. The existing zoning districts make sense for this neighborhood and are not proposed to change.

The map below shows the existing Master Plan Designations for the same neighborhood. The newly created parcel is currently designated Parks and Open Space. The properties surrounding the parcel in question are designated Parks and Open Space, Industrial General, Residential Medium Density, and Mixed-Use Neighborhood.

Current MP Designation



PROPOSED CHANGES

The map below shows the proposed change to the Master Plan designation.

Proposed MP Designation



This change will bring the parcel into compliance between its existing zoning district and the proposed land use designation.

JUSTIFICATION

The City of Elko has not adopted findings to be met by Master Plan Amendments. However, other jurisdictions throughout Nevada use some variation of the following findings when reviewing Master Plan Amendments. These are useful when considering the proposed changes.

1. The amendment/project will provide for orderly physical growth of the City, enhance the urban core, and foster safe, convenient, and walkable neighborhoods and shopping districts.

Creating consistency between zoning and Master Plan designations aides in the growth of the City by keeping the intended use of these parcels clear for future development. Inconsistencies create confusion and delay projects, which can ultimately keep somebody from building on a parcel.

2. The amendment/project conforms to the adopted population plan and ensures an adequate supply of housing, including affordable housing.

The proposed change does not have a significant impact on housing or population because the parcel under consideration for this change is currently vacant. The parcel is not an ideal location for any new residential development because of the industrial zoning. In addition, a portion of the parcel falls within a designated FEMA flood area. The requirements to provide safe housing in this area would pose some significant hurdles to residential development on this parcel.

3. There has been a change in the area or conditions on which the current designation was based which warrants the amendment.

No change has occurred. The amendment is warranted simply as a means to create consistency between the zoning and land use categories.

4. The density and intensity of the proposed Master Plan Amendment is sensitive to the existing land uses and is compatible with the existing adjacent land use designations.

The uses and density permitted under the new Master Plan designations does not significantly change. The proposed Industrial designation is compatible with the existing land uses and land use designations of surrounding parcels.

5. There are, or are planned to be, adequate transportation, recreation, utility, and other facilities to accommodate the uses and density permitted by the proposed Master Plan designation.

The proposed change to the Master Plan designations does not increase the need for facilities such as transportation, recreation, and utilities. With the exception of some street improvements, all facilities are already in place to serve this area.

6. The proposed change is in substantial conformance with the goals and policies of the Master Plan and other adopted plans and policies.

The proposed change to the property's Master Plan designation is in substantial conformance with the following objective(s):

-) Objective 7: Promote high quality and visually appealing industrial uses, where appropriate, to promote economic sustainability and strengthen the community's image.
-) Objective 8: Encourage new development that does not negatively impact County-wide natural systems, or public/federal lands such as waterways, wetlands, drainages, floodplains, etc., or pose a danger to human health and safety.

In addition, the proposed amendment conforms with all other adopted plans and policies within the City of Elko.

PROPOSED CHANGE #3

BACKGROUND

This property was recently sold and discussions have begun for development of the land. While assisting the new owner with their due diligence, it was discovered that the current Commercial Transitional zoning is not consistent with the Residential High Density Master Plan designation. In addition, a deed restriction was recorded on the property restricting the uses allowed on this parcel, specifically not allowing high-density residential. Therefore, the current Residential High Density designation violates this deed restriction.

A Master Plan Amendment was determined to be needed because the Master Plan requires that the zoning of individual parcels conform with the Master Plan land use designation. As a general practice throughout Nevada, if these designations do not match, new projects cannot be approved or a condition of approval must be placed on the project that a Master Plan Amendment occur.

Therefore, Staff determined that a Master Plan Amendment is required for consistency and compliance with the deed restriction prior to the approval of the proposed use.

EXISTING CONDITIONS

As seen on the map below, the parcel in question is zoned Commercial Transitional. The zoning on surrounding properties includes Single-Family and Multiple-Family Residential to the north, and Public/Quasi-Public on the south, west, and east. Tribal land can be found to the northeast and a small amount of General Commercial is located to the southwest across College Parkway.

Current Zoning



The map below shows the existing Master Plan designations for the same neighborhood. The property in question is designated Residential High Density. Similar to the existing zoning designations, current Master Plan designations include Residential Medium Density to the north, Parks and Open Space to the west, and Public to the south and east. A small area of Commercial Highway is found to the southwest across College Parkway.

Current MP Designation



PROPOSED CHANGES

The map below shows the proposed change to the Master Plan designation of the subject parcel to Commercial General.



JUSTIFICATION

The City of Elko has not adopted findings to be met by Master Plan Amendments. However, other jurisdictions throughout Nevada use some variation of the following findings when reviewing Master Plan Amendments. These are useful when considering the proposed changes.

1. The amendment/project will provide for orderly physical growth of the City, enhance the urban core, and foster safe, convenient, and walkable neighborhoods and shopping districts.

Creating consistency between zoning and Master Plan designations aides in the growth of the City by keeping the intended use of these parcels clear for future development. Inconsistencies create confusion and delay projects, which can ultimately keep somebody from building on a parcel.

2. The amendment/project conforms to the adopted population plan and ensures an adequate supply of housing, including affordable housing.

The change from Residential – High Density to Commercial General does not significantly reduce the amount of land available for residential use. The parcel has historically been considered commercial despite its current land use designation. In addition, the current zoning would only allow for high density residential, which has since been determined infeasible due to the recorded deed restriction.

3. There has been a change in the area or conditions on which the current designation was based which warrants the amendment.

No change has occurred. The amendment is warranted simply as a means to create consistency between the zoning and land use categories.

4. The density and intensity of the proposed Master Plan Amendment is sensitive to the existing land uses and is compatible with the existing adjacent land use designations.

Overall, the proposed amendment is compatible with existing adjacent land use designations. The proposed change is needed to clean up inconsistencies with zoning and deed restrictions and does not fundamentally change the type of uses envisioned for this property. In addition, there are existing commercial properties on the opposite side of College Parkway.

5. There are, or are planned to be, adequate transportation, recreation, utility, and other facilities to accommodate the uses and density permitted by the proposed Master Plan designation.

Curb, gutter, and sidewalk is already in place along both street frontages. Water mains are in place in both College Parkway and Ruby Vista Drive. When the parcel develops, any missing public improvements will be required, including the extension of sewer lines.

6. The proposed change is in substantial conformance with the goals and policies of the Master Plan and other adopted plans and policies.

The proposed changes to each property's Master Plan designation is in substantial conformance with the following objective:

-) Objective 6: Encourage multiple scales of commercial development to serve the needs of the region, the community, and individual neighborhoods.

In addition, the proposed amendment conforms with all other adopted plans and policies within the City of Elko.

Zoning Bulletin

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Variances

Cell phone provider seeks court intervention after local borough denies variances to build new “monopine” tower

Citation: *New Cingular Wireless PCS LLC v. Zoning Board of Adjustment of Borough of North Haledon*, 2020 WL 3542442 (D.N.J. 2020)

Did the Zoning Board of Adjustment of the Borough of North Haledon, New Jersey (ZBA) unlawfully deny New Cingular Wireless PCS LLC d/b/a AT&T Mobility’s (AT&T) application for a zoning variance to construct a cellular telephone monopole in the borough? That’s the question the U.S. District Court for the District of New Jersey recently addressed.

The case arose after AT&T sought to close a coverage gap in a heavily wooded area by constructing the new monopole in the northern part of the borough, which has a population of around 8,400 residents and is located in Passaic County, New Jersey. Specifically, on High Mountain Road, a local thoroughfare that hosted thousands of motorists daily, the cell phone service was unreliable.

The facility AT&T wanted to erect would be located at 5 Sicomac Road, near the intersection of Sicomac Road and High Mountain Road. And, the site would include “a mix of commercial and retail uses, including a bank, medical office space, stores, several restaurants, and a Foodtown supermarket.”

The borough’s code stated that wireless telecommunications towers were prohibited on private property in residential zones, would be permitted on Borough-owned property, and could be conditionally permitted in its business and industrial zones. The only business and industrial zone in the northern part of the borough was the B-1 zone at the intersection of High Mountain Road and Sicomac Road where the proposed facility would be built.

AT&T’s proposed facility included a 143-foot-tall “monopine,” which would have simulated pine branches to blend in with the surroundings. The idea was that the facility could eventually host equipment from three other carriers if necessary.

AT&T sought variances for the facility, including:

- a variance permitted a second principal use on the site, if applicable;
- a height variance for the monopoles’
- a variance from the required setback of “300% of the height of the tower” from certain residential units or zoned land; and
- a variance to physically accommodate the proposed facility on the site and for the size of its equipment.

The borough’s ZBA ultimately denied AT&T’s requests. It concluded the proposed facility wouldn’t fill the entire coverage gap and that testimony it



heard concerning dropped calls wasn't clear or persuasive as to whether other alternative sites for installation or other technologies were better suited to close the gap. It also found AT&T was the primary beneficiary of the proposed facility and not the borough or its residents. And, it surmised that the proposed facility would have a negative impact on the property's aesthetics and obstruct the view of High Mountain.

THE LAWSUIT

AT&T filed suit against the ZBA alleging its denial of its application for the variances was erroneous and asked the court for judgment without a trial.

DECISION: Judgment without a trial granted.

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There wasn't substantial evidence to support the denial of AT&T's application and that denial had the effect of barring AT&T's service.

The Telecommunications Act (TCA) sought to balance "the rapid deployment of new telecommunications technologies" against the "unduly encroach[ment] on traditional local zoning authority." Thus, the federal law "preserve[d] the traditional authority enjoyed by state and local government to regulate land use and zoning, but place[d] several substantive and procedural limits upon that authority when it [wa]s exercised in relation to personal wireless service facilities."

Here, AT&T challenged whether there was substantial evidence to support the ZBA's decision.

The court found that:

- **AT&T, an FCC-licensed personal wireless service provider, had established a need for the proposed facility in the northern portion of the borough by expert testimony**—for instance its radio frequency expert opined that the borough's northern portion contained an area of two square miles where customers couldn't get reliable service;
- **the ZBA erred in concluding that, despite this, the proposed facility would only fill in some coverage gaps** (based on some residents statements about spotty service)—while the ZBA didn't have to "accept expert testimony and [could] reject it where appropriate, it [could] not rely on residents' unsubstantiated testimony to do so"; and
- **AT&T didn't have to show that the proposed facility would completely close the coverage gap, only that the gap would be mitigated by it.**

The bottom line: AT&T met its burden and the ZBA's "conclusions to the contrary were not supported by substantial evidence."

A CLOSER LOOK

The court ruled the ZBA by not analyzing the effect of "deviations . . . for AT&T's requested bulk variances. . . . Instead, it merely concluded that the requested variances were 'contrary to the intent and purposes of the [b]orough's zoning code,' without elaboration."

These requested variances included:

- a five-inch height increase for AT&T's equipment shed;
- a reduction of one foot of width in the size of parking spaces to accommodate the proposed facility;
- around a 15-foot reduction in the required rear setback; and
- a reduction of less than seven feet in the side yard setback.

"There is no evidence in the record that any of these variances would have more than a de minimis effect on the either the public good or the intent and purpose of the zoning plan," The court concluded. For instance, "the five inch increase in equipment shed height [wa]s merely to

accommodate a standard shed AT&T use[d] which fits its equipment, the reduction in width of the parking spaces would reduce their width from 10 feet to nine feet (still significantly larger than many other parking spaces, and would actually add three parking spaces to the lot), and there were significant buffer areas to mitigate any effect of the reduced setbacks.” Also, there wasn’t any evidence “to suggest that any effect of these deviations [wa]s a detriment to the public good or contrary to the intent and purpose of the zoning plan.”

CASE NOTE

The proposed facility was a conditionally permitted use in the B-1 zone; no one denied that. The ZBA noted that when an applicant had an FCC license, that “w[ould] ordinarily suffice for the carrier to establish that its use generally serve[d] the general welfare.” AT&T had the burden of showing its “proposed site [wa]s particularly suited to its proposed use . . . to satisfy the positive criteria. [T]o do so, AT&T ‘must show the need for the facility at that location,’ which it [could] do ‘through competent expert testimony that its existing capacity to serve the public in the area was inadequate.’ ”

Constitutional Issues

Denial of application to operate shooting range sparks Second Amendment-related controversy

Citation: *Oakland Tactical Supply LLC v. Howell Township*, 2020 WL 5440048 (E.D. Mich. 2020)

Oakland Tactical Supply LLC (Oakland), a firearms retailer in Howell Township, Michigan (Howell), wanted to construct one or more outdoor shooting ranges for residents to engage in target practice for self-defense and other lawful purposes, such as long distance (1,000 yard) shooting for qualified individuals, as well as public access to rifle, shotgun, and handgun ranges on property Oakland leased to Howell.

Howell’s zoning ordinance did not permit open air business uses, shooting ranges, or rifle ranges on property zoned Agricultural Residential (AR), and the property in question was zoned AR.

After Howell’s board denied Oakland’s application to construct a shooting range, its members submitted an application for a text amendment to the zoning ordinance so that shooting ranges could be built in the AR district. They also asserted that not granting Oakland’s request to construct the shooting range would prove inconvenient and leave members with inadequate facilities to practice at shooting ranges that were located about 30 minutes away.

The members alleged that Howell’s denial infringed on their Second Amendment rights. They contended that the Second Amendment “afford[d] them ‘the right to operate and practice with firearms at a range, for purposes includ-

ing learning about firearms, safely gaining proficiency with firearms, obtaining any training required as a condition of firearms ownership, recreation, hunting, and competition.’ ” Oakland also contended that Howell violated its Second Amendment right “to own, construct, and operate a range for these purposes.”

Oakland and its members sought an injunction to prevent Howell from enforcing its ordinances that barred the operation of shooting ranges open to the public or “any law against the ordinary operation and use of shooting ranges open to the public.”

Howell asked the court to dismiss the complaint.

DECISION: Request for injunction denied; Howell’s request for dismissal granted.

The complaint was dismissed for failure to state a claim.

Howell did not violate Oakland’s or its members’ Second Amendment rights.

Oakland cited a noteworthy case out of the Seventh U.S. Circuit Court of Appeals in support of its position. In that case, *Ezell v. City of Chicago*, the court invalidated the city’s ordinances “banning or severely restricting all shooting ranges in the city while also requiring gun owners to train at a shooting range as a condition of obtaining a gun permit,” the court here explained. The Seventh Circuit had reasoned that the firing-range ban seriously encroached to “on the right to maintain proficiency in firearm use, an important corollary to the meaningful exercise of the core right to possess firearms for self-defense.”

But, this case did not “suggest that a municipality must permit a property owner (or a property lessee) to construct, and for interested gun owners to use, an outdoor, open-air, 1,000-foot shooting range,” like the one Oakland proposed. Oakland also failed to cite any case law suggesting that Howell must change the zoning ordinance to permit the construction and use of such a facility as a matter of right anywhere within the AR district—which comprised about two-thirds of the land in Howell. “The claimed right simply is not encompassed by the Second Amendment,” the court wrote.

PRACTICALLY SPEAKING

Under *Ezell*, a case might arise when a ban on shooting ranges might raise Second Amendment concerns, the court noted. But, Oakland didn’t “allege plausibly that Howell . . . ha[d] instituted such a ban.”

While shooting ranges weren’t a permitted use in the AR district, Oakland didn’t allege that it had asked for “permission to construct a shooting range on the specific piece of property it leases. It might have done so by seeking conditional rezoning of that parcel . . . or by applying for a special use permit,” the court added.

And, Oakland didn’t assert that it had “pursued these avenues or that they were denied.” Without any allegation that it had pursued such efforts—“or that doing so would be futile”—it wasn’t plausible to accept Oakland’s asserting that Howell had “effectively ban[ned] all firearms ranges within the township.”

Also, Howell's ordinance appeared to permit shooting ranges in other zoning districts—e.g., those zoned for recreation and sports buildings within the highway service commercial district.

Also, “indoor commercial recreation” establishments in the regional service commercial district were allowed as “recreation and physical fitness facilities” in the heavy commercial district. “In light of these ordinance provisions, [Oakland’s] claim that Howell Township ban[ne]d all shooting ranges [wa] not plausible.”

Therefore, Oakland and its members failed to state a Second Amendment claim because their allegation that Howell had banned “all firearms ranges within the township” was implausible.

The case cited is Ezell v. City of Chicago, 846 F.3d 888 (7th Cir. 2017).

Conditional Use Permits

Property owner seeks injunction alleging denial of application to erect billboard violated First Amendment rights

Citation: *Conteers LLC v. City of Akron, 2020 WL 5529656 (N.D. Ohio 2020)*

Conteers LLC (Conteers) was in the business of buying or leasing land to construct, maintain, and operate billboards. It leased property at 475 East North Street in Akron, Ohio with the intention of erecting a billboard on the property.

The billboard would be located on a surface street—North Street—adjacent to State Road 8, which crossed North Street via an approximately 150-foot tall bridge over North Street.

Due to a difference in elevation between the property and the bridge above, Conteers wanted to erect a 202-foot tall, double-faced digital, and steel billboard so that passers in vehicles on State Road 8 could see it.

In July 2019, the Ohio Department of Transportation issued Conteers a permit for the billboard. Conteers then filed an application with the City of Akron for a sign permit.

The city’s planning commission and the city council generally would study several issues when addressing whether to grant a conditional use permit, including whether the proposal would:

- “be harmonious with and in accordance with the general objectives of the [c]ity’s Comprehensive Plan”;
- “be designed, constructed, operated, and maintained . . . to be harmonious and appropriate in appearance with the existing or intended character of the general vicinity and will not change the essential character of the same area”;
- “be hazardous or disturbing to existing or future neighboring uses”;

- “served adequately by essential public facilities such as highways, streets, police and fire protection, drainage structures, refuse disposal, water and sewers and schools”;
- “not create excessive additional requirements at public cost for public facilities and services, and w[ould] not be detrimental to the economic welfare of the community”;
- “not involve uses, activities, processes, materials, equipment, and conditions of operation that will be detrimental to any person or property or the general welfare by reason of excessive production of traffic, noise, smoke, fumes, glare, or odors”;
- “have vehicular approaches to the property which shall be so designed as not to create an interference with traffic on surrounding public streets or roads”; and
- “not result in the destruction, loss, or damage of a natural, scenic, or historic feature of major importance.”

If these criteria were met, the city council could permit a billboard to vary from the specific size, height, and setback requirements.

Ultimately, the city council voted to deny Conteers’ application for the following reasons: 1) the proposed billboard height was over 50 feet; and 2) its “aesthetics.”

Conteers sought an injunction to block that decision. The city filed a request for judgment on the pleadings.

DECISION: Request for injunction granted in part.

There was a likelihood of Conteers’ success on the merits of a claim that sections of the city’s zoning code violated its First Amendment rights.

In deciding whether to grant a preliminary injunction, a court examined whether 1) the requesting party had demonstrated a substantial likelihood of success on the merits and would suffer irreparable injury absent injunction, 2) whether the injunction would cause substantial harm to others, and 3) it would serve the public interest.

Likelihood of success on the merits—Conteers contended the city’s zoning code contained “unconstitutional prior restraints on speech.” The court ruled Conteers had shown that it was likely to succeed on its First Amendment claims. “Specifically, Conteers has submitted evidence establishing a substantial likelihood that the requirements in [the zoning code] . . . provide[d] unbridled discretion to the [c]ity [c]ouncil to grant or deny conditional use permits for billboards and therefore constitute[d] unconstitutional prior restraints on speech on their face and as applied to Conteers.”

ADDITIONAL ANALYSIS REQUIRED

But, this wasn’t the end of the analysis. The court also needed to look at whether Conteers had established a substantial likelihood of showing that the applicable sections of the zoning code weren’t severable from the other sections, so that the city should be enjoined from enforcing those articles in full.

In Conteers' view, the sections weren't severable because striking the sections "would fundamentally disrupt the [c]ity's statutory scheme and not give effect to the [c]ity's intent," the court explained. But, the court rejected this argument and accepted the city's assertion that the sections were severable. Therefore, Conteers had not shown a substantial likelihood of succeeding on its claims that the sections in question should have been invalidated in full, as the challenged provisions likely were severable.

Ultimately, the court found that one of the section's requirement's as to size, height, and set-back requirements operated without reference to the other section for nearly 60 years, "which strongly indicate[d] that these provisions [we]re not so connected to the unconstitutional portions . . . that [the entire article] must be invalidated in its entirety." So, "the likelihood of success factor favor[ed] the issuance of a preliminary injunction, but only to enjoin [the city council] from enforcing [specific sections] against Conteers, rather than precluding the enforcement of [two articles] in their entirety."

The court also addressed the issue of irreparable injury to Conteers, harm to others and the impact on the public interest. According to Conteers, when First Amendment rights were at issue, these additional factors were "summarily satisfied once a plaintiff . . . established a likelihood of success on the merits," the court explained. And, the city didn't dispute this contention. However, it asserted that other factors had not been satisfied based on the argument that the contested ordinances were constitutional.

"The [c]ourt agrees with Conteers that these factors largely collapse once a plaintiff has shown a likelihood of success on the merits of its First Amendment claims, and, therefore, these additional factors weigh in favor of a preliminary injunction," the court wrote.

The bottom line: When a preliminary injunction was based on an alleged First Amendment violation, "likelihood of success on the merits often w[ould] be the determinative factor." That's because "the issues of the public interest and harm to the respective parties largely depend[ed] on the constitutionality of the statute."

Finally, because Conteers had established a substantial likelihood of success on the merits of its First Amendment claims and that its free speech rights have been violated by the city's enforcement of specific sections of the code, Conteers "demonstrated that it would suffer irreparable injury absent an injunction, that [the city] would not be substantially harmed by an injunction, and that the public interest favors an injunction."

CASE NOTE

The city's zoning code regulated the placement of outdoor advertising displays, including billboards and specified that a billboard could be permitted as a conditional use. The city council had the ultimate authority to grant or deny a conditional use permit for a billboard and there wasn't any requirement that such a decision be made within any specified period of time. If an application for a

conditional use permit was rejected, the applicant could appeal to the Summit County Court of Common Pleas.

In this case, the city also filed a request for judgment on the pleadings against Conteers. That request was denied on the grounds that Conteers had "adequately alleged that the [c]ity's [z]oning [c]ode contain[ed] an unconstitutional prior restraint on speech."

Practically Speaking:

A preliminary injunction "[wa]s an extraordinary remedy [that] should be granted only if the movant carry[ed] his or her burden of proving that the circumstances clearly demand[ed] it." And, this had to be established by clear and convincing evidence.

Variances, Cont.

Developer seeks variances to construct 7-11 next to an existing convenience store

Citation: *Patel v. City of South Amboy Planning Board*, 2020 WL 1130333 (N.J. Super. Ct. App. Div. 2020)

Janek Patel and his company A&D Convenience Store objected to the South Amboy Planning Board's (SAPB) approval of a developer's request to build a 7-11 convenience store next to his own convenience store.

The Law Division rejected Patel's arguments, and an appeal followed.

DECISION: Affirmed.

SAPB was entitled to "strong deference," and there was support in the record for its decision to approve and grant the requested variances.

There was evidence that "the variances would advance the public goals of reduced impervious coverage and promote a more efficient use of the property without substantial detriment," the court found.

A CLOSER LOOK

In 2002, South Amboy adopted the "Broadway/Main Street Redevelopment Plan," which covered about 10 acres of land and comprised 46 parcels fronting South Amboy's Broadway and Main Streets.

The proposed project in this case was located within that redevelopment zone. The developer filed an application for a preliminary and final site plan approval for the proposed 7-11 convenience store at a property that currently housed an unused building that previously had been used as an antique store and auto upholstery store. The rest of the lot was being used as a parking lot.

The SAPB held public hearing about the proposal, considering variances and waivers through the process. At the hearing, several people testified.

- **Site design engineer**—This expert opined a variance for 9-by-18-foot parking spaces, rather than the

10-by-20-foot requirement, were appropriate because 1) the 7-11 customers would be making quick trips for small purchases without shopping carts; and 2) deliveries to the small store could be made through the front door during “off peak” hours once a week (there was no need for a formal loading zone).

- **Traffic operations engineer**—This expert projected the expected customer traffic into the 7-11 store and evaluated whether the adjacent roads could handle the traffic changes. He opined that “traffic on adjacent roads would ‘circulate and function well’ with the proposed development.” Also, any increase in traffic would be “negligible,” he concluded, because 60 to 70% of the traffic coming into the store would already be on the roadway because the store “would serve as a stop along customer’s preexisting commute routes.” He also asserted that the proposed 9-by-18-foot parking spaces were appropriate and wouldn’t be a safety issue.
- **Licensed professional planner**—This expert testified to the benefits of the proposed project and the requested variances. For instance, she noted that the proposed store was a permitted use in the redevelopment zone and that the proposed landscaping and green space would improve the “curb appeal” of the property. She also testified that a proposed six-foot fence would give neighbors more screening from the store, and that the project would serve the goal of revitalizing the Broadway/Main Street area by improving the tax base, i.e., it would upgrade existing commercial uses from a preexisting abandoned property. She also explained that the proposed variances would have a “de minimum” effect.

PATEL’S EXPERTS

Patel had several experts testify in support of his position that the developer’s request to build the 7-11 should be denied.

- **Planning**—This expert testified that 9-by-18-foot parking spaces weren’t appropriate for a convenience store because a larger parking space could more easily accommodate delivery vehicles. He opined that the proposed development would cause traffic disruption in the redevelopment zone due to the location of its trash and recycling containers, the inadequate parking space sizes, and the lack of loading area. And, he said parking and circulation issues, as well as a lack of buffer zone, would be a detriment to the surrounding neighborhood.
- **Professional truck driver**—This expert testified that in his experience driving a tractor trailer such a vehicle couldn’t enter or exit the property without swinging into the lane of oncoming traffic.
- **Traffic & noise**—This expert testified that a garbage truck picking up trash from the dumpster on the proposed property would “consistently violate” noise codes, but this expert hadn’t studied the baseline noise level on Broadway at the proposed location.

THE BOTTOM LINE

The court afforded high deference to a municipal planning board’s decision. The law presumed that such a governing body would “act fairly and with proper motives and for valid reasons [and] w[ould] be set aside only when it [wa]s arbitrary, capricious and unreasonable.”

Here, the developer’s experts had been more credible. And, the SAPB “adequately described benefits from the proposed development and variances, specifically a more efficient use of the property and reduced impervious coverage.”

Land Use

Court reviews LUBA decision concerning vacant farm-forest parcel

Citation: *1000 Friends of Oregon v. Linn County*, 306 Or. App. 432, 2020 WL 5417597 (2020)

Ronald Henthorne, Virginia Henthorne, and Lynn Merrill asked the Court of Appeals of Oregon to review a final order by the Land Use Board of Appeals (LUBA). LUBA reversed a decision by Linn County to approving an application for a plan amendment and zone change from Farm Forest (F/F) to Non-Resource 5 Acre Minimum (NR-5) for a 108-acre vacant parcel.

In reversing the county’s findings, LUBA reasoned that the parcel was in an area mapped as big-game habitat. LUBA examined two provisions of the county’s comprehensive plan and concluded those precluded the use of the NR-5 plan and zone designation for such land—for instance, LUBA read the two Linn County Code (LCC) provisions as meaning that land mapped as wildlife habitat must be designated on the comprehensive plan, and zoned, using one of three resource designations that do not include NR-5.

DECISION: Reversed; case sent back for further proceedings.

LUBA erred in determining that the two code provisions—LCC 903.510(B)(3) and LCC 903.550(A)(1)—precluded, as a matter of law, the requested plan and zone amendments.

“We will reverse a land use decision when the decision ‘violates a provision of applicable law and is prohibited as a matter of law,’ ” the court explained. Here, references in the code made “it at least plausible to think that the county intended to allow for amendments away from the specified plan and zone designations,” the court found.

For instance, one could reasonably read the provisions to “require the particular designations for land mapped as wildlife habitat no matter what” and to “separately require an analysis of wildlife impacts during any of the approval processes described in the provisions, regardless of whether the land at issue is mapped as wildlife habitat.”

Another interpretation was possible, too. That is, “the provisions c[ould] be read to set forth a two-step process

for protecting wildlife resources.” In that scenario, the “provisions first set the default plan and zoning designations for land mapped as wildlife habitat, designations that the county ha[d] concluded operate to protect habitat ‘from most conflicting uses.’ ” Then, “[t]he provisions . . . require[d] the assessment of the impacts on wildlife habitat of any proposed changes to those default designations through plan amendments or zone changes.”

The bottom line: In reviewing the context of the two local code provisions at issue, there wasn’t anything to:

- “undercut . . . the plausibility of the county’s implicit interpretation of these provisions”; or
- “point[] definitively to LUBA’s proposed interpretation of them.”

CASE NOTE

Merrill, along with the other owners, contended that it would not be feasible for there to be commercial timber production on the land. But, Merrill asserted that their plans would allow for an oak savannah habitat important to the wildlife ecosystem, the *Capital Press* reported.

About the court’s ruling, Merrill told the news outlet that this ruling is a signal of deference and respect for local jurisdictions to interpret their own zoning codes. Merrill noted that other recent LUBA decisions had a limiting effect on local authorities in this respect.

As of print time, the news outlet had not been able to reach 1,000 Friends of Oregon for comment. That conversation organization was opposed to the rezoning of the area in question, *Capital Press* reported.

Practically Speaking:

The court explained that a “requirement to assess impacts on wildlife habitats in the context of plan amendments and zone amendments . . . [d]e it plausible to read both provisions as allowing for plan amendments and zone changes away from the specified designations provided the impacts on wildlife are analyzed and addressed in the process so that habitats are not adversely affected by any proposed change.”

Source: capitalpress.com

Zoning News from Around the Nation

California

City to appeal ruling ordering it to stop enforcing short-term rental ban in coastal zone

The city of Manhattan Beach, California will appeal a Los Angeles Superior Court judge’s order from August 2020 requiring the city of Manhattan Beach, California to stop enforcing a short-term rental ban in the coastal zone of that community, the *Daily Breeze* reported recently.

In the court’s view, the city had been engaging in the

unauthorized ban of short-term rentals in the coastal zone and needed to obtain approval from the California Coastal Commission to proceed with such a ban.

The lawsuit arose after a Manhattan Beach coastal zone property owner filed suit alleging the city’s prohibition on short-term rents violated the owner’s rights to rent out the property via sites like Airbnb, the news outlet reported.

An attorney for the city said in an email that an amendment to the local coastal program wasn’t required to bar most commercial land uses, which included short-term rentals and hotels, concerning the residential zone at issue and that he believed the court erred in issuing the order, the news outlet reported.

It’s estimated the controversy could last through 2021, the *Daily Breeze* wrote.

Source: dailybreeze.com

Minnesota

Case involving property owners told to tear floating dock down heads to state’s highest court

Two property owners in Shorewood, which sits on Minnesota’s Lake Minnetonka, are suing the city based on its notice for them to remove a seasonal dock. The city opined the 40-foot stretch of lakefront wasn’t big enough for a structure of any kind, the *Star Tribune* reported.

The plaintiffs claim the applicable city ordinance applies to permanent docks, so the structure they built is exempt since it’s removed in the winter months.

The lawsuit came after Shorewood’s city council amended the applicable ordinance so that all docks were prohibited on empty lots, the news outlet reported. Then, the property owners were charged with a misdemeanor.

The lower court dismissed the lawsuit against the city, and the appeals court affirmed that decision. But, the Minnesota Supreme Court accepted the case for review, and with oral arguments scheduled for September 2020, a decision is likely by December 2020.

The League of Minnesota Cities took notice of this case, taking Shorewood’s side, and stating that the court’s decision could be significant because it may impact future zoning decisions statewide, the news outlet reported.

In response to the city’s decision to amend the zoning ordinance, one resident decided to run for mayor. His website states he wants the municipality to treat its citizens equally, with fairness, and respectfully, the *Star Tribune* reported.

Source: startribune.com

North Carolina

One barge won’t budge even if a zoning code ordinance amendment goes into effect

A barge floating on the water near the Carolina Beach Yacht Club and Marina won’t need to budge from its current spot even if a local zoning code change takes effect, *WECT* reported recently.

Oceana residents complained to the Town of Carolina Beach about the barge, which they described as a floating

home. In their view, since floating homes were not allowed according to the town's ordinance, the structure would need to be taken down, the news outlet explained.

But, this barge isn't really a floating home per the ordinance because it contains two outboard motors, which makes it a vessel.

Now, the residents are petitioning for an amendment to the zoning ordinance so that the definition of floating structures will be better defined, the news outlet reported. As of print time, Carolina Beach's planning and zoning board had not yet agreed if any action would be undertaken on the issue.

With respect to the barge in question, the news outlet reported that it would be grandfathered in so that any zoning amendments would not apply.

Source: wect.com

Pennsylvania

Short-term rentals out in one Erie neighborhood

A Court of Common Pleas judge has ruled that a home located in Erie Pennsylvania's Glenwood neighborhood cannot host Airbnb rentals, *GoErie.com* reported recently. The ruling came after the local zoning board reached the same conclusion.

The news outlet reported that the Erie City Council is now deciding whether it should amend its zoning rules to permit Airbnb rental through the city. City Councilwoman Liz Allen told *GoErie.com* that the city is likely ready to make this change but needs guidance on how such an ordinance should be worded.

Currently, Erie's zoning ordinance doesn't address short-term Airbnb rentals with specificity, the news outlet noted. So, when the lawsuit arose, it was up to the Erie County Zoning Board (ECZB) and later an Erie County judge to determine whether the applicable ordinance could be interpreted as permitting an Airbnb rental at a property located at Glenwood's 4706 Upland Drive.

Upholding the ECZB's decision that such rentals were barred at the property, which was located in a single-family, R-1 low density residentially zoned area, the judge ruled it hadn't abused its discretion in reaching its conclusion in this case.

The judge referenced a 2019 decision by the Supreme Court of Pennsylvania—*Slice of Life LLC v. Hamilton Township Zoning Hearing Board*—in which the court had ruled that short-term rentals weren't barred from properties located in Monroe County's Poconos area. In *Slice of Life*, the court had ruled that 1) short-term rentals weren't permitted where a residential zoning district only allowed single-family dwellings; and 2) if a use wasn't explicitly expressed as being permitted in the zoning ordinance, it was barred "by implication," the news outlet noted.

Since there wasn't any language addressing Airbnb's in the existing ordinance, the ECZB found, in August 2019, that such rentals weren't permitted on Upland Drive. That's when the homeowners appealed the decision to the Court of Common Pleas.

The case cited is *Slice of Life, LLC v. Hamilton Township Zoning Hearing Board*, 207 A.3d 886 (Pa. 2019).

Source: goerie.com