



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 3, 2019 in the Council Chambers at Elko City Hall, 1751 College Avenue, Elko, Nevada, and beginning at 5:30 P.M., P.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: November 25, 2019 2:10 p.m.

ELKO COUNTY LIBRARY – 720 Court Street, Elko, NV 89801
Date/Time Posted: November 25, 2019 2:05 p.m.

ELKO POLICE DEPARTMENT – 1448 Silver Street, Elko NV 89801
Date/Time Posted: November 25, 2019 2:15 p.m.

ELKO CITY HALL – 1751 College Avenue, Elko, NV 89801
Date/Time Posted: November 25, 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 25th day of November, 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.S.T., TUESDAY, DECEMBER 3, 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

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

I. NEW BUSINESS

A. MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS

1. Review, consideration, and possible recommendation to City Council for Vacation No. 12-19, filed by the Ellison Properties, for the vacation of a portion of the Front Street right-of-way, consisting of an area approximately 1,926 sq. ft., and matters related thereto. **FOR POSSIBLE ACTION**

The subject property is located generally south of S. 5th Street and east of the terminus of Front Street. (404 S 5th Street- APN 001-422-002)

2. Review, consideration, and possible recommendation to City Council for Vacation No. 11-19, filed by the City of Elko, for the vacation of a portion of the Commercial Street right-of-way adjacent to APN 001-343-008, consisting of an area approximately 100 sq. ft., and matters related thereto. **FOR POSSIBLE ACTION**

The subject property is located generally on the south corner of the intersection of 6th Street and Commercial Street. (592 Commercial Street- APN 001-343-008)

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

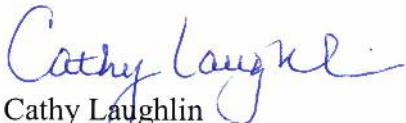
COMMENTS BY THE GENERAL PUBLIC

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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 5, 2019
ELKO CITY HALL, COUNCIL CHAMBERS,
1751 COLLEGE AVENUE, ELKO, NEVADA

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
 Gratton Miller
 Ian Montgomery
 Jeff Dalling
 John Anderson
 Stefan Beck
 Tera Hooiman

City Staff Present: Cathy Laughlin, City Planner
 Bob Thibault, Civil Engineer
 Michele Rambo, Development Manager
 John Holmes, Fire Marshal
 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 1, 2019 – Regular Meeting **FOR POSSIBLE ACTION**

*****Motion: Approve the October 1, 2019 meeting minutes as presented.**

Moved by Tera Hooiman, Seconded by Evi Buell.

**Motion passed (5 - 0, Commissioners Gratton Miller and Ian Montgomery Abstained).*

I. NEW BUSINESS

B. MISCELLANEOUS ITEMS, PETITIONS, AND COMMUNICATIONS

1. Review, consideration, and possible recommendation to City Council for Vacation No. 12-19, filed by the Ellison Properties, for the vacation of a portion of the Front Street right-of-way, consisting of an area approximately 1,979 sq. ft., and matters related thereto. **FOR POSSIBLE ACTION**

The subject property is located generally south of S. 5th Street and east of the terminus of Front Street. (404 S 5th Street- APN 001-422-002)

John Ellison, private business owner, explained that they did a survey and discovered a piece of property between them and the sidewalk. They've been out cleaning the weeds since they bought the property. They are really hoping to get the triangle piece, so they can keep it clean and put in some landscaping. They eventually want to put a new building on the property.

Cathy Laughlin, City Planner, went over the City of Elko Staff Report dated October 24, 2019. Staff recommended conditional approval with the findings and conditions listed in the Staff Report.

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

Bob Thibault, Civil Engineer, pointed out that he just noticed something that concerned him, which he will have to talk to the surveyor about. The area proposed for vacation appears to include a part of 5th Street, which is NDOT right-of-way. It appears that the property line is approximately one foot behind the sidewalk, but the area proposed for vacation seems to go all the way to the sidewalk. He thought they could approve it as it is shown. The City can only vacate what is theirs, not what is NDOT's. If approved as is, it will need to get clarified by the surveyor to make sure the area that is described is not encroaching into NDOT's right-of-way before it goes to the Assessor.

Ms. Laughlin mentioned that the Planning Commission could add a condition that it be modified to not include any NDOT right-of-way prior to going to City Council.

John Holmes, Fire Marshal, had no comments or concerns.

Ms. Laughlin stated that the City Manager's office had no concerns.

*****Motion: Forward a recommendation to City Council to adopt a resolution, which conditionally approves Vacation No. 12-19 subject to the conditions listed in the City of Elko Staff Report dated October 24, 2019, with an additional condition 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. **A water line easement for the existing water line that bisects the area proposed for**

vacation must be approved by the City and recorded.

- 4. Existing sidewalk connecting Front Street and South 5th Street must be demolished and reconstructed in accordance with plans submitted and approved by the City.**

Planning Commission:

- 1. No NDOT property is to be included in the vacation.**

Commissioner Buell's findings to support the motion were that the proposed vacation is not in strict 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 property proposed for vacation is not located within the Redevelopment Area. The proposed vacation is in conformance with NRS 287.479 to 278.480, inclusive. The proposed vacation, with the recommended conditions, is in conformance with Elko City Code 8-7. The proposed vacation will not material injure the public and is in the best interest of the City.

Moved by Evi Buell, Seconded by Gratton Miller.

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

A. PUBLIC HEARING

- 1. Review, consideration and possible recommendation to City Council for Rezone No. 4-19, filed by Elko West Properties, LLC, for a change in zoning from PC (Planned Commercial) to C (General Commercial) Zoning District, approximately 66.30 acres of property, to allow for multi-family residential and commercial development, and matters related thereto. **FOR POSSIBLE ACTION****

The subject property is generally located on the south side of Errecart Boulevard, approximately 545' west of Lamoille Highway. (APN 001-770-004)

Mark Gaughan, 301 Vilberti Court, Las Vegas, NV, Elko Holdings Group, explained that he owned the property to the east and he had concerns in regards to easements, access, cross, ingress and egress, and water and hydrology. He explained that when he had previously developed everything had to be completed before he pulled a permit. He said he read in a document that the applicant had to turn everything in 90 days after they start the work. He asked if the applicant could start building without staff approval and permitting.

Ms. Laughlin said she was unfamiliar with where Mr. Gaughan was reading that, because all of the required information would be submitted with the applicants construction documents and that is reviewed by staff prior to a permit being issued. The applicant is not allowed to do any construction on the project without a permit.

Mr. Gaughan said he had a concern in regards to the adverse effects of hydrology on his property. He was also concerned with working out some sort of ingress and egress.

Ms. Laughlin explained that this agenda item was for the rezone of the property. It is not about the development of the property. Ms. Laughlin mentioned that she could meet with Mr. Gaughan after the meeting to address his concerns.

Ms. Laughlin then went over the City of Elko Staff Report dated September 11, 2019. Staff recommended approval with the findings in the Staff Report.

Ms. Rambo had no comments or concerns.

Mr. Thibault recommended approval as presented.

Mr. Holmes had no comments or concerns.

Ms. Laughlin stated that the City Manager's Office had no comments or concerns.

*****Motion: Forward a recommendation to City Council to adopt a Resolution, which approves Rezone No. 4-19.**

Commissioner Buell's findings to support the motion were that the proposed zone district is in conformance with the Land Use Component of the Master Plan. The proposed zone district is compatible with the Transportation Component of the Master Plan and is consistent with the existing transportation infrastructure. The property is not located within the Redevelopment Area. The proposed zone district and resultant land use is in conformance with City Wellhead Protection Plan. The proposed zone district is in conformance with Elko City Code Section 3-2-4(B). The proposed zone district is in conformance with Elko City Code Section 3-2-10(B). The application is in conformance with Elko City Code Section 3-2-21. The proposed zone district is partially located in a designated Special Flood Hazard Area (SFHA). Development under the proposed zone district will not adversely impact natural systems, or public/federal lands such as waterways, wetlands, drainages, floodplains etc., or pose a danger to human health and safety.

Moved by Evi Buell, Seconded by Ian Montgomery.

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

2. Review, consideration, and possible action of Conditional Use Permit No. 10-19, filed by Elko County School District, which would allow for the expansion of the current Elko High School campus with the addition of a new building, and matters related thereto. **FOR POSSIBLE ACTION**

The subject property is located generally west of the intersection of 13th Street and College Avenue. (1297 College Avenue - APN 001-191-004).

Ms. Laughlin went over the City of Elko Staff report dated October 21, 2019. Staff had concerns regarding parking for the auditorium if it was being used during school hours, as for Cowboy Poetry. They did some research on the parking lots next to the Fairgrounds and the football field, those are both owned by the City of Elko. The City of Elko previously had an agreement with

Elko General Hospital to use that as overflow parking. The City's lease with the Fairgrounds was then modified to allow them to do an agreement with Elko County School District. Staff believes that the Elko County School District does have an agreement with the Elko County Fair Board to utilize those two parking areas. Staff highly recommended that a MOU and a consent agreement be created similarly to what the City of Elko did with the Convention Center. Staff recommended conditional approval with the findings and conditions listed in the Staff Report.

Ms. Rambo mentioned that she also had some concerns with the parking, but felt that the condition included in the Staff Report and ongoing communication with the School District will work out the issues.

Mr. Thibault recommended approval.

Mr. Holmes had no comments or concerns.

Ms. Laughlin stated that the City Manager's Office had no concerns.

Commissioner Stefan Beck explained that he walks in that area every day, and the parking lots next to the fair grounds and the football field are usually empty.

Ms. Laughlin explained that staff was concerned that the auditorium holds 830 fixed seats.

Commissioner Gratton Miller thought there needed to be a Memo of Understanding, especially along College Ave. He pointed out that at a previous meeting a lady mentioned that it was an issue.

Commissioner Tera Hooiman disclosed that she served on the Fair Board. She also thought that the MOU needed to be communicated with the Fair Board. They are pushing to have larger scale events in the Home Arts Building and in the Flower Building. She felt like the communication needed to open between the Fair Board and the School District because it will be a shared space.

Casey Kelly, Elko County School District, mentioned that he is in communication with Tony Buzzetti, who is on the Fair Board. Mr. Buzzetti is aware of what the School is doing.

Chairman Jeff Dalling asked where people would be parking if there is an event in the Auditorium and at the Fair Grounds at the same time.

Mr. Kelly mentioned that there was the gravel parking area across from the Fair Grounds that they could shuttle people from. It would be up to the Cowboy Poetry, and not on the School District. The School District would not allow Cowboy Poetry events to use the auditorium during school hours, because they don't want the interaction with the public and the kids.

Chairman Dalling thought Condition No. 9 would take care of those concerns.

Ms. Laughlin pointed out that they are losing around 20 parking stalls with the design of the building.

Chairman Dalling asked if they were picking up any more in front of the Science Building.

Ms. Laughlin said there was 21 spaces above, and there is the same amount below, so they wouldn't be adding any.

Chairman Dalling asked for any other comments or concerns from the Commissioners.

Commissioner Buell stated that she was satisfied with the parking that was available throughout the campus.

Commissioner Hooiman asked if the Commission felt like there would generally be enough parking if there is a sold out event.

Commissioner Miller stated that he was more worried about elderly people.

Commissioner Hooiman stated that the parking made her nervous.

Commissioner Buell pointed out that it wasn't that different than the parking situation on the college campus. There is a small parking lot next to the theater and it is rarely an issue. There is also a fair amount of drop off for the elderly.

Chairman Dalling pointed out that the Folklife Center uses shuttles.

Commissioner Miller pointed out that there was also a lot of overflow parking on Chilton. He thought it could be problematic if people started to park in front of the residential area.

Commissioner Buell thought they were talking about a relatively irregular occurrence.

*****Motion: Conditionally approve Conditional Use Permit No. 10-19 subject to the conditions listed in the City of Elko Staff Report dated October 21, 2019, listed as follows:**

- 1. The permit is granted to the applicant Elko County School District.**
- 2. The permit shall be personal to the permittee and applicable only to the specific use and to the specific property for which it is issued. However, the Planning Commission may approve the transfer of the conditional use permit to another owner. Upon issuance of an occupancy permit for the conditional use, signifying that all zoning and site development requirements imposed in connection with the permit have been satisfied, the conditional use permit shall thereafter be transferable and shall run with the land, whereupon the maintenance or special conditions imposed by the permit, as well as compliance with other provisions of the zoning district, shall be the responsibility of the property owner.**
- 3. A variance for the College Ave. street line setback for the principal building is required to be approved prior to issuing of a building permit. All conditions of VAR 4-19 to be met prior to occupancy of the building.**
- 4. Slope stabilization will be required on all slope areas.**
- 5. A Parcel Map for the consolidation of the two parcels be recorded prior to issuing a Certificate of Occupancy for the new building.**
- 6. CUP 10-19 to be recorded with the Elko County Recorder within 90 days after the commencement of the construction of the new building.**

7. Access to be limited to 13th Street.
8. If the auditorium is to be used by anyone other than students and staff during scheduled school hours, off-site parking must be arranged with transportation to and from parking.
9. If a Memorandum of Understanding (MOU) and Consent Agreement is not in place for all of the parking on City of Elko property, then one must be approved by City Council within 60 days of CUP approval.

Commissioner Buell's findings to support the motion were that the proposed development is in conformance with the Land Use Component of the Master Plan. The proposed conditional use permit meets Objectives 3 & 8 of the Land Use Component of the Master Plan. The proposed development is in conformance with the existing transportation infrastructure and the Transportation Component of the Master Plan. The proposed development conforms with the goals and objectives of the Redevelopment Plan. The site is suitable for the proposed use. The proposed development is in conformance with the City Wellhead Protection Program. The proposed use is consistent with surrounding land uses. The proposed use is in conformance with City Code 3-2-8 PQP, Public-Quasi, Public with the approval of the Conditional Use Permit and Variance 4-19 for street line setback reduction. Development under the proposed conditional use will not adversely impact natural systems, or public/federal lands such as waterways, wetlands, drainages, floodplains, etc., or pose a danger to human health and safety. The parcel is not located within a Special Flood Hazard Area. The proposed development is in conformance with 3-2-3, 3-2-4, 3-2-17, 3-2-18, and 3-8 of the Elko City Code with the approval of the variance for street line setback that is associated with this CUP.

Moved by Evi Buell, Seconded by Tera Hooiman.

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

3. Review, consideration, and possible action on Variance No. 4-19, filed by Elko County School District for a reduction of the required setback from any Street Line from 66' to 20' for the College Avenue setback from street line, within a PQP (Public, Quasi-Public) Zoning District, and matters related thereto. **FOR POSSIBLE ACTION**

The subject property is located generally west of the intersection of 13th Street and College Avenue. (1297 College Avenue - APN 001-191-004).

Ms. Laughlin, went over the City of Elko Staff Report dated October 23, 2019. Staff recommended conditional approval with the findings and conditions in the Staff Report.

Ms. Rambo had no comments.

Mr. Thibault recommended approval as presented.

Mr. Holmes had no comments or concerns.

Ms. Laughlin stated that the City Manager's Office had no comments or concerns.

*****Motion: Conditionally approve Variance No. 4-19 subject to the conditions listed in the City of Elko Staff Report dated October 23, 2019, listed as follows:**

- 1. Approval of CUP 10-19.**
- 2. A Parcel Map for the consolidation of the two parcels be recorded prior to issuing a Certificate of Occupancy for the new building.**

Commissioner Buell's findings to support the motion were that the proposed variance approval is in conformance with the Land Use Component of the Master Plan. The property is located within the redevelopment area and meets the goals and objectives of the plan. The property will have street frontage on all four sides with the consolidation of the two parcels into one. Approval of VAR 4-19 is required to be in conformance with Elko City Code 3-2-8. The property as developed with the addition of the proposed building, does not exceed the thirty-five percent of the net site area lot coverage. Approval of Variance 4-19 with the recorded parcel map for the consolidation of the two parcels will bring the proposed new development into conformance with Section 3-2-8 of City Code. The special circumstance is directly related to the property as it is developed as the only high school in the City of Elko. It is somewhat land locked and with a growing population, it requires expansion of its classroom facilities. The special circumstance of a fully developed property with several legal non-conforming issues. This circumstance does not generally apply to other properties in the district. The granting of the variance will not result in material damage or prejudice to other properties in the vicinity, nor be detrimental to the public interest, health, safety, and general welfare. The granting of the variance is directly related to the zoning of the property and will not impair the intent or purpose of the zoning and will not change the use of the land or zoning classification. The granting of the variance will not impair natural resources.

The applicant is advised of the right to appeal this decision to the City Council within 10 days of the date of approval as stated above.

Moved by Evi Buell, Seconded by Gratton Miller.

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

II. REPORTS

A. Summary of City Council Actions.

Ms. Laughlin reported that on October 8th the City Council conducted the 1st reading of the Zoning Ordinance to change the Planning Commission section of code to allow Planning Commissioners to serve on other boards. The Second reading of that Ordinance took place on October 22nd. City Council adopted all the Resolutions for the vacations along Commercial Street. They also accepted the Ellison's petition for vacation at the October 22nd meeting. City Council approved the Final Map and the Performance Agreement for Cambridge Estates.

B. Summary of Redevelopment Agency Actions.

Ms. Laughlin reported that there was a Redevelopment Advisory Council meeting on October 24th. NV Energy was there to present a new grant program that will take place within Redevelopment Areas to help funding requests for undergrounding utility lines and eliminating blight.

C. Professional articles, publications, etc.

1. Zoning Bulletin

D. Miscellaneous Elko County

E. Training

Ms. Laughlin mentioned that she emailed the Commissioners a summary of the Planning Commission survey that was sent out. There were four Commissioners that completed the survey.

COMMENTS BY THE GENERAL PUBLIC

There were no public comments made at this time.

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ADJOURNMENT

There being no further business, the meeting was adjourned.

Jeff Dalling, Chairman

Tera Hooiman, Secretary

**Elko City Planning Commission
Agenda Action Sheet**

1. Title: **Review, consideration, and possible recommendation to City Council for Vacation No. 12-19, filed by the Ellison Properties, for the vacation of a portion of the Front Street right-of-way, consisting of an area approximately 1,926 sq. ft., and matters related thereto. FOR POSSIBLE ACTION**
2. Meeting Date: **December 3, 2019**
3. Agenda Category: **NEW BUSINESS**
4. Time Required: **10 Minutes**
5. Background Information: **The applicant is currently working on a proposed development of the property and is asking for a vacation of the excess right-of-way for additional parking, access and landscaping. CL**
6. Budget Information:
 Appropriation Required: **N/A**
 Budget amount available: **N/A**
 Fund name: **N/A**
7. Business Impact Statement: **Not Required**
8. Supplemental Agenda Information: **Application, Staff report**
9. Recommended Motion: **Forward a recommendation to City Council to adopt a resolution, which conditionally approves Vacation No. 12-19 based on facts, findings, and conditions as presented in the Staff Report dated October 24, 2019.**
10. Prepared By: **Cathy Laughlin, City Planner**
11. Committee/Other Agency Review:
12. Council Action:
13. Agenda Distribution: **John Ellison**
 P.O. Box 683
 Elko, NV 89803
 john@ellisonelko.com

STAFF COMMENT FLOW SHEET
PLANNING COMMISSION AGENDA DATE: 12/3

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

Title: Vacation No. 12-19

Applicant(s): Ellison Properties, LLC

Site Location: 404 S. 5th Street APN 001-422-002

Current Zoning: C Date Received: 10/3 Date Public Notice: N/A

COMMENT: This is to vacate a portion of the Front Street
right-of-way located along the North West property line of
APN 001-422-002

If additional space is needed please provide a separate memorandum

Assistant City Manager: Date: 11/22/19

Recommend approval as presented by
Staff

SAW

Initial

City Manager: Date: 11/20/19

No comments/concerns.

CC

Initial



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

CITY OF ELKO STAFF REPORT

MEMO DATE:	October 24, 2019
PLANNING COMMISSION DATE:	November 5, 2019
APPLICATION NUMBER:	Vacation 12-19
APPLICANT:	Ellison Properties
PROJECT DESCRIPTION:	APN 001-422-002

Vacation of excess right-of-way to provide for more parking and landscaping for proposed development of property.



STAFF RECOMMENDATION:

RECOMMEND to APPROVE subject to findings of fact, conditions and waivers.

PROJECT INFORMATION

PARCEL NUMBER: 001-422-002

PARCEL SIZE: .609 acres

EXISTING ZONING: (C) General Commercial

MASTER PLAN DESIGNATION: (MU-NEIGHBORHOOD) Mixed Use
Neighborhood

EXISTING LAND USE: Undeveloped

BACKGROUND:

1. The property is currently undeveloped.
2. The property has access from Front Street as well as 5th Street.

NEIGHBORHOOD CHARACTERISTICS:

The property is surrounded by:
North: Commercial / Developed
East: Commercial / Developed
South: General Industrial / Developed
West: PQP & General Industrial / Undeveloped & Developed

PROPERTY CHARACTERISTICS:

The property is currently undeveloped.
The property is generally flat.

MASTER PLAN AND CITY CODES:

Applicable Master Plans and City Code Sections are:

NRS 278.479 to 278.480, inclusive
City of Elko Master Plan – Land Use Component
City of Elko Master Plan – Transportation Component
City of Elko Redevelopment Plan
City of Elko Code – Section 3-2-10 General Commercial Zoning District
City of Elko Code – Section 8-7 Street Vacation Procedures

MASTER PLAN – Land Use:

1. The Master Plan Land Use Atlas shows the area as Neighborhood Mixed Use.
2. C- General Commercial Zoning District is not listed as a corresponding zoning district for Neighborhood Mixed Use.
3. Objective 6: Encourage multiple scales of commercial development to serve the needs of the region, the community, and individual neighborhoods.
4. 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.

The proposed vacation is not in strict conformance with the Master Plan Land Use component.

MASTER PLAN - Transportation:

1. The area is accessed from South 5th Street and Front Street.
2. The proposed vacation is part of the right-of-way for Front Street roadway.
3. There is pedestrian access along 5th Street and new pedestrian sidewalks will be added to Front Street as well as the outside of the cul-de-sac to tie into the 5th Street sidewalk. The plans show the elimination of sidewalk bisecting the proposed area to be vacated so all public pedestrian access will be within the right-of-way.

The proposed vacation is in conformance with the Master Plan Transportation component.

REDEVELOPMENT PLAN

-) The area is located outside the Redevelopment Area.

ELKO CITY CODE SECTION 8-7 STREET VACATION PROCEDURES

1. If it is determined by a majority vote of the city council that it is in the best interest of the city and that no person will be materially injured thereby, the city council, by motion, may propose the realignment, change, vacation, adjustment or abandonment of any street or any portion thereof. In addition, any abutting owner desiring the vacation of any street or easement or portion thereof shall file a petition in writing with the city council and the city council shall consider said petition as set forth above.

-) The City Council accepted the petition at their meeting on October 22, 2019 and referred the matter to the Planning Commission for further consideration.

2. Except for a petition for the vacation or abandonment of an easement for a public utility owned or controlled by the city, the petition or motion shall be referred to the planning commission, which shall report its findings and recommendations thereon to the city council. The petitioner shall, prior to the consideration of the petition by the planning commission, pay a filing fee to the city in an amount established by resolution of the city council and included in the appendix to this code.

-) The filing fee was paid by the applicant.

3. Whenever any street, easement or portion thereof is proposed to be vacated or abandoned, the city council shall notify by certified mail each owner of property abutting the proposed vacation or abandonment and cause a notice to be published at least once in a newspaper of general circulation in the city setting forth the extent of the proposed vacation or abandonment and setting a date for public hearing, which date may be not less than ten (10) days and not more than forty (40) days subsequent to the date the notice is first published.
4. Order of City Council: Except as provided in subsection E of this section, if, upon public hearing, the City Council is satisfied that the public will not be materially injured by the proposed vacation or abandonment, and that it is in the best interest of the city, it shall

order the street vacated or abandoned. The city council may make the order conditional, and the order shall become effective only upon the fulfillment of the conditions prescribed.

The proposed vacation with the recommended conditions is in conformance with Section 8-7 of City code.

FINDINGS

-) The proposed vacation is not in strict 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 property proposed for vacation is not located within the Redevelopment Area.
-) The proposed vacation is in conformance with NRS 278.479 to 278.480, inclusive.
-) The proposed vacation with the recommended conditions is in conformance with Elko City Code 8-7.
-) The proposed vacation will not materially injure the public and is in the best interest of the City.

STAFF RECOMMENDATION:

Staff recommends forward a recommendation to City Council to adopt a resolution which conditionally APPROVES the proposed vacation with the following conditions:

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. A water line easement for the existing water line that bisects the area proposed for vacation must be approved by the City and recorded.
4. Existing sidewalk connecting Front Street and South 5th Street must be demolished and reconstructed in accordance with plans submitted and approved by the City.

Vacation

Cathy Laughlin

Wed 11/13/2019 9:35 AM

To: john@ellisonelko.com <john@ellisonelko.com>

Cc: Shelby Archuleta <sarchuleta@elkocitynv.gov>

John,

With the error that was discovered at the Planning Commission meeting on the display map and legal description provided by Summit, we have received the new display map and legal description and the difference is significant enough that we need to start the process over with the public hearings so we will be hearing the item again at the Planning Commission in December before we take it to City Council for the resolution. Sorry for the delay, I am glad we caught the Summit error before we went all the way through City Council. This will not hold up the approval of your plans for permitting of the Dotties as we will just condition that the vacation be complete before Certificate of Occupancy.

Let me know if you have any questions.

Thanks,

Cathy Laughlin

City Planner

(775)777-7160 ph

(775)777-7219 fax

claughlin@elkocitynv.gov

City of Elko

1751 College Avenue

Elko, NV 89801



November 5, 2019

Shelby Archuleta
City of Elko Planning Department
1751 College Avenue
Elko, Nevada 89801

RE: Proposed Vacation of a Portion of the Front Street Right-of-Way

Dear Ms. Archuleta:

Per your request in the letter dated October 17, 2019 regarding the proposed vacation of a portion of the Front Street right-of-way located generally along the northwest property line of APN 001-422-002. NV Energy does have facilities within the southernmost portion of the area to be vacated and is requesting that the easement remain in place for those existing facilities.

If you have any questions/concerns please feel free to contact me at 775-834-5430 or at Katherineperkins@nvenergy.com

Sincerely,

A handwritten signature in black ink, appearing to read "Katherine Perkins".

Katherine Perkins
NV Energy



CITY OF ELKO

Planning Department

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

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

October 17, 2019

NV Energy
Mr. Jake Johnson
6100 Neil Road
Reno, NV 89511

SUBJECT: Proposed Vacation No. 12-19

Dear Mr. Johnson:

Please be advised that the City of Elko Planning Department is processing a request filed by Ellison properties to vacate a portion of the Front Street right-of-way located generally along the northwest property line of APN 001-422-002. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on November 5, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures

RECEIVED

NOV 08 2019

November 8, 2019

City of Elko
1751 College Avenue
Elko, Nevada 89801

Re: Vacation Number 12-19
Vacation and Abandonment of a dedicated roadway

To Whom It May Concern:

Southwest Gas Corporation ("SWG") has reviewed the City of Elko request from Shelby Archuleta, Planning Technician on behalf of Ellison properties to vacate and abandon a portion of Front Street Right-of-Way referenced above. After review, SWG has determined:

SWG does not have existing or proposed facilities within the area proposed to be vacated, and has no objection to the request for vacation as presented.

SWG has existing or proposed facilities in all or a portion of the area proposed to be vacated and has no objection to the request for vacation as presented, however, in order to protect these facilities, SWG requests a perpetual easement be saved and reserved to SWG as a condition of the Order of Vacation.

Please RESERVE and EXCEPT the following:

An easement to Southwest Gas Corporation on, over, in, under, across, above and through a portion of Front Street located along the northwest property line of APN 001-422-002, Elko County, Nevada. **in Vacation No. 12-19.**

SWG has existing or proposed facilities within all or a portion of the area proposed to be relinquished. SWG has no objection to the request for vacation; contingent upon the Petitioner contacting SWG and making suitable arrangements, at Petitioner's expense, for such easement or relocations as

required to protect SWG's facilities and property rights within the area to be vacated.

SWG objects to the request for vacation as presented.
(Optional explanation or remove to leave blank)

Nothing in this Vacation or response is intended or shall be construed to affect, reduce, or diminish any other existing property rights or easement SWG may have at this site or within the area affected. SWG retains the right to use any other reservations, easements, licenses or other property rights in which it may have an interest or that otherwise may be located within the area being vacated.

If you or the applicant have any questions; or if the applicant wishes to discuss this matter further, please contact SWG's Engineering Department at 775-887-2871.

Respectfully,

A handwritten signature in cursive script that reads "Amanda Marcucci".

Amanda Marcucci
Supv/Engineering
Northern Nevada Division



CITY OF ELKO

Planning Department

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

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

October 17, 2019

Southwest Gas Corporation
Engineering Department
PO Box 1190
Carson City, NV 89702-1190

SUBJECT: Proposed Vacation No. 12-19

To Whom It May Concern:

Please be advised that the City of Elko Planning Department is processing a request filed by Ellison properties to vacate a portion of the Front Street right-of-way located generally along the northwest property line of APN 001-422-002. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on November 5, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures



CITY OF ELKO

Planning Department

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

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

October 17, 2019

Satview Broadband
Mr. Tariq Ahmad
PO Box 18148
Reno, NV 89511

And VIA EMAIL: taroil@yahoo.com

SUBJECT: Proposed Vacation No. 12-19

Dear Mr. Ahmad:

Please be advised that the City of Elko Planning Department is processing a request filed by Ellison properties to vacate a portion of the Front Street right-of-way located generally along the northwest property line of APN 001-422-002. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on November 5, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures



CITY OF ELKO

Planning Department

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

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

October 17, 2019

Frontier Communication
Mr. John Poole
1520 Church Street
Gardnerville, NV 89410

SUBJECT: Proposed Vacation No. 12-19

Dear Mr. Poole:

Please be advised that the City of Elko Planning Department is processing a request filed by Ellison properties to vacate a portion of the Front Street right-of-way located generally along the northwest property line of APN 001-422-002. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on November 5, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures

Proposed Vacation 12-19

Stephen Lifferth <stephen.lifferth@beehive.net>

Thu 11/7/2019 1:41 PM

To: Shelby Archuleta <sarchuleta@elkocitynv.gov>

Hi Shelby,

Beehive's interests are not in this area.

Thanks,



Stephen Lifferth

Director of OSP

435.837.6140 [d]

801.473.3975 [c]

www.BeehiveBroadband.com



CITY OF ELKO

Planning Department

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

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

October 17, 2019

Beehive Broadband
2000 N. Sunset Road
Lake Point, UT 84074

SUBJECT: Proposed Vacation No. 12-19

To Whom It May Concern:

Please be advised that the City of Elko Planning Department is processing a request filed by Ellison properties to vacate a portion of the Front Street right-of-way located generally along the northwest property line of APN 001-422-002. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on November 5, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures

ELKO HEAT CO.**RECEIVED**

NOV 04 2019

November 4, 2019

City of Elko
Planning Department
Attn: Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov FAX 775.777.7219

Re: Proposed Vacation No. 12-19

Please be advised that Michael W. Lattin, Vice President / Field Operations for Elko Heat Company has reviewed the above vacation and Elko Heat Company has no issues with this vacation.

Please contact us if you have any additional questions or concerns.

Sincerely,



Pamela Lattin
Secretary/Treasurer



CITY OF ELKO

Planning Department

Website: www.elkocity.com

Email: planning@elkocitynv.gov

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

October 17, 2019

Elko Heat
P.O. Box 2347
Elko, NV 89803

SUBJECT: Proposed Vacation No. 12-19

To Whom It May Concern:

Please be advised that the City of Elko Planning Department is processing a request filed by Ellison properties to vacate a portion of the Front Street right-of-way located generally along the northwest property line of APN 001-422-002. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on November 5, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures



CITY OF ELKO PLANNING DEPARTMENT

1751 College Avenue * Elko * Nevada * 89801 *

(775) 777-7160 * (775) 777-7119 fax

APPLICATION FOR VACATION OF CITY STREET, EASEMENT OR OTHER PUBLIC RIGHT-OF-WAY

APPLICANT(s): John Ellison

MAILING ADDRESS: 438 S. 5th Street

PHONE NO (Home) 775-738-6284 **(Business)** same

NAME OF PROPERTY OWNER (If different): same

(Property owner's consent in writing must be provided.)

MAILING ADDRESS: same as above

LEGAL DESCRIPTION AND LOCATION OF PROPERTY INVOLVED (Attach if necessary):

ASSESSOR'S PARCEL NO.: 001-422-002 **Address** 404 S. 5th Street

Lot(s), Block(s), & Subdivision

Or Parcel(s) & File No.

FILING REQUIREMENTS:

Complete Application Form: In order to begin processing the application, an application form must be complete and signed. Applications go before the City Council, Planning Commission, and back to City Council twice.

Fee: A \$600.00 non-refundable fee.

Plot Plan: A plot plan provided by a properly licensed surveyor depicting the existing condition drawn to scale showing property lines, existing and proposed buildings, building setbacks, parking and loading areas, driveways and other pertinent information must be provided.

Legal Description: A complete legal description of the area proposed for vacation along with an exhibit depicting the area for vacation.

Note: One .pdf of the entire application must be submitted as well as one set of legible, reproducible plans 8 1/2" x 11" in size. If the applicant feels the Commission needs to see 24" x 36" plans, 10 sets of pre-folded plans must be submitted.

Other Information: The applicant is encouraged to submit other information and documentation to support the request.

RECEIVED

OWNER(S) OF THE PROPERTY ABUTTING THE AREA BEING REQUESTED FOR VACATION:

John Ellison
(Name)

438 S. 5th Street - Elko, NV. 89801
(Address)

OWNER(S) OF THE PROPERTY ABUTTING THE AREA BEING REQUESTED FOR VACATION:

Same

(Name)

(Address)

1. Describe the nature of the request: We are trying to clean up and enhance this area. It will allow for extra parking and shrubbery. We've been maintaining this area to keep the weeds and garbage down to no expense to the city.

2. Describe any utilities currently located in the area proposed for vacation, and if any are present how they will be addressed: An existing gas line runs along the south side of Front Street behind the existing curb and gutter. This existing line will not be disturbed, this line is to remain in place. There is also a water shut-off valve at the end of the existing sidewalk. This shut-off valve will be brought up to grade with the new construction. No other utilities are located within the vacation area.

Use additional pages if necessary

This area intentionally left blank

By My Signature below:

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

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

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

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

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

Applicant / Agent

John Ellison (Please print or type)

Mailing Address

P.O. Box 683

Street Address or P.O. Box

ELKO Nevada 89803

City, State, Zip Code

Phone Number: 775-738-6284 C-934-6611

Email address: John@ellisonelko.com

SIGNATURE:

John Ellison

FOR OFFICE USE ONLY

File No.: 12-19 Date Filed: 10/3/19 Fee Paid: \$600 CX# 5879

EXHIBIT (A)

**LEGAL DESCRIPTION, showing a
1926 Sq. Ft. portion of Front Street to be
VACATED by the CITY OF ELKO**

A portion of that Public Right of Way, known as Front Street, lying in the SE ¼ SE 1/4 , Section 15, T.34 N. R.,55 E., adjacent to Lot 1, Block H, of the Biegler Addition, City of Elko, Elko County, Nevada being more particularly described as follows:

BEGINNING At the Southwest corner of said lot 1 of Block H,

THENCE NORTH 48° 20' 51" WEST, A DISTANCE OF 10.32 FEET;

THENCE NORTH 41° 59' 57" EAST, A DISTANCE OF 64.08 FEET TO THE BEGINNING OF A NON-TANGENT, 50.08 FEET RADIUS CURVE TO THE LEFT FOR AN ARC LENGTH OF 69.11 FEET (CHORD BEARING OF NORTH 1° 19' 40" EAST, FOR 63.75 FEET);

THENCE NORTH 34° 28' 19" EAST, A DISTANCE OF 1.85 FEET;

THENCE SOUTH 55° 28' 19" EAST, A DISTANCE OF 52.56 FEET;

THENCE SOUTH 41° 56' 41" WEST, A DISTANCE OF 120.81 FEET TO THE POINT OF BEGINNING,

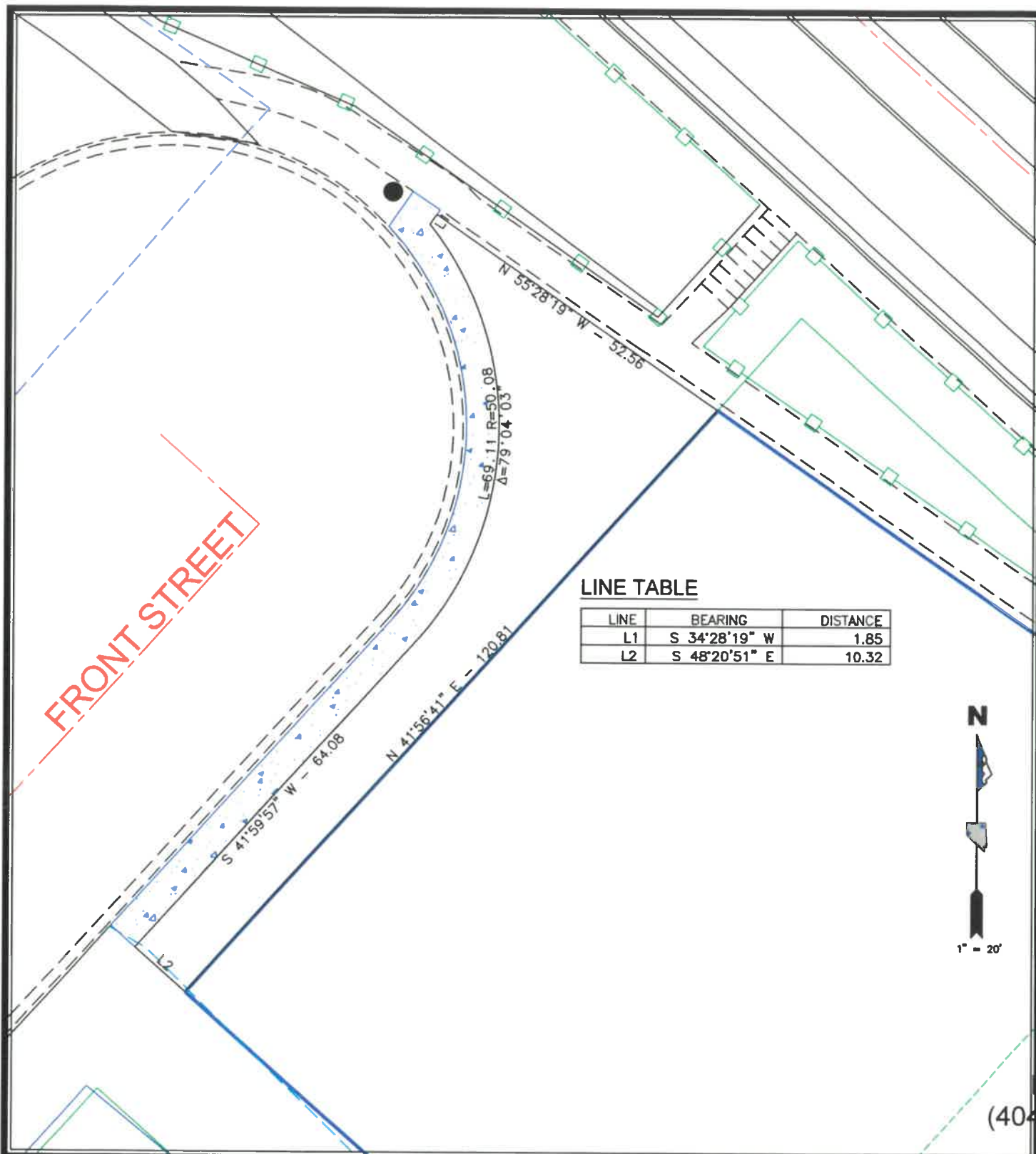
SAID PARCEL BEING 1926 SQ FT MORE OR LESS.

The Basis of Bearings is The Nevada State Plane Coordinate System, East Zone, North American Datum 83/96.

This Legal Description Written by:

Randal L. Briggs, PLS
Summit Engineering Corporation
1150 Lamoille Highway, Elko, Nevada 89801





**ELLISON PROPERTY
404 S. 5TH STREET
LEGAL DESCRIPTION**

BHAKTA
SCALE 1" = 20
APN 001-442-022
October 2, 2019

SUMMIT ENGINEERING CORPORATION
5405 MAE ANNE AVENUE, RENO, NV. 89523
PHONE:(775) 747-8550 FAX:(775) 747-8559

**SHEET
1
OF
1**

**Elko City Council
Agenda Action Sheet**

1. Title: **Review, consideration, and possible recommendation to City Council for Vacation No. 11-19, filed by the City of Elko, for the vacation of a portion of the Commercial Street right-of-way adjacent to APN 001-343-008, consisting of an area approximately 100 sq. ft., and matters related thereto. FOR POSSIBLE ACTION**
2. Meeting Date: **December 3, 2019**
3. Agenda Category: **NEW BUSINESS**
4. Time Required: **10 Minutes**
5. Background Information: **The City of Elko recently vacated a portion of Commercial Street right-of-way from 5th Street to the subject property. Although the subject property doesn't encroach into Commercial Street right-of-way, City Council took action to direct staff to reach out to the property owner to see if they would like to be included in the vacation so that the alignment of the new right-of-way was consistent. The property owner indicated that they would like to be included. CL**
6. Budget Information:
 Appropriation Required: **N/A**
 Budget amount available: **N/A**
 Fund name: **N/A**
7. Business Impact Statement: **Not Required**
8. Supplemental Agenda Information: **Application, display map, Staff Memo**
9. Recommended Motion: **Forward a recommendation to City Council to adopt a resolution, which conditionally approves Vacation No. 11-19 based on facts, findings, and conditions as presented in the Staff Report dated November 18, 2019.**
10. Prepared By: **Cathy Laughlin, City Planner**
11. Committee/Other Agency Review:
12. Council Action:
13. Agenda Distribution:

**MPLDP LLC
c/o Meenakshil Patel
223 Greencrest Drive
Spring Creek, NV 89815-5447**

STAFF COMMENT FLOW SHEET
PLANNING COMMISSION AGENDA DATE: 12/3

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

Title: Vacation No. 11-19
Applicant(s): City of Eiko
Site Location: 592 Commercial St. APN 001-343-008
Current Zoning: C Date Received: 9/17 Date Public Notice: N/A
COMMENT: This is to vacate a portion of the Commercial Street
Right-of-way Along the Northwest property line of APN 001-343-008

If additional space is needed please provide a separate memorandum

Assistant City Manager: Date: 11/22/19
Recommend approval as presented by
staff

SAW

Initial

City Manager: Date: 11/20/19
No comments/concerns.

cc

Initial

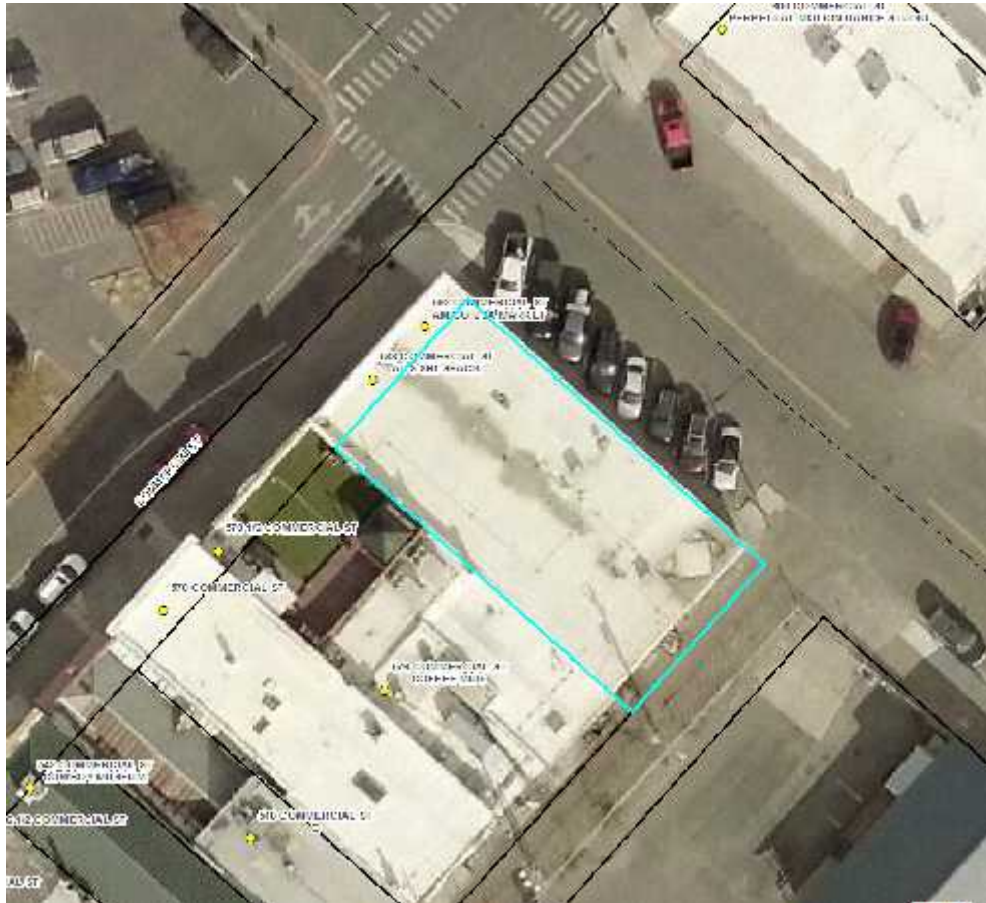


City of Elko
1751 College Avenue
Elko, NV 89801
(775) 777-7160
FAX (775) 777-7119

CITY OF ELKO STAFF REPORT

MEMO DATE:	November 18, 2019
PLANNING COMMISSION DATE:	December 3, 2019
APPLICATION NUMBER:	Vacation 11-19
APPLICANT:	City of Elko
PROJECT DESCRIPTION:	APN 001-343-008

Vacation of the southeasterly portion of Commercial Street between 5th and 6th Street.



STAFF RECOMMENDATION:

RECOMMEND to APPROVE subject to findings of fact and conditions stated in this report.

PROJECT INFORMATION

PARCEL NUMBER: 001-343-008

EXISTING ZONING: C- General Commercial

MASTER PLAN DESIGNATION: Mixed Use Downtown

EXISTING LAND USE: Developed, Commercial

BACKGROUND:

1. The property has been developed as commercial land use.
2. City Council made a motion to vacate the encroachments into Commercial Street at their meeting September 24, 2019 and referred the matter to Planning Commission for their review. This property doesn't have an encroachment but City Council directed staff to reach out to the property owner to see if they wanted to be included in the vacation in order for the alignment of the right-of-way to be consistent. Staff sent a letter to the property owner on October 3, 2019 and she responded by telephone on October 31, 2019 stating that she wanted to be included in the vacation.
3. The area proposed to be vacated is 100 sq. ft.

NEIGHBORHOOD CHARACTERISTICS:

The property is surrounded by:
North: C- General Commercial / Developed
East: C- General Commercial / Developed
South: C- General Commercial / Developed
West: C- General Commercial / Developed

PROPERTY CHARACTERISTICS:

The property is currently developed.
Commercial Street is currently a 60' right-of-way.
There are +/- 12' wide sidewalk along Commercial Street adjacent to the properties.

MASTER PLAN AND CITY CODES:

Applicable Master Plans and City Code Sections are:

NRS 278.479 to 278.480, inclusive
City of Elko Master Plan – Land Use Component
City of Elko Master Plan – Transportation Component
City of Elko Redevelopment Plan
City of Elko Code – Section 8-7 Street Vacation Procedures

NRS 278.479 to 278.480 inclusive

1. 278.480(4) If any right-of-way or easement required for a public purpose that is owned by a city or a county is proposed to be vacated, the governing body, or the planning commission, hearing examiner or other designee, if authorized to take final action by the

governing body, shall, not less than 10 business days before the public hearing described in subsection 5.

2. NRS 278.480 (5) Except as otherwise provided in subsection 6, if, upon public hearing, the governing body, or the planning commission, hearing examiner or other designee, if authorized to take final action by the governing body, is satisfied that the public will not be materially injured by the proposed vacation, it shall order the street or easement vacated. The governing body, or the planning commission, hearing examiner or other designee, if authorized to take final action by the governing body, may make the order conditional, and the order becomes effective only upon the fulfillment of the conditions prescribed. An applicant or other person aggrieved by the decision of the planning commission, hearing examiner or other designee may appeal the decision in accordance with the ordinance adopted pursuant to NRS 278.31895.
3. Per NRS 278.480(6) Public utility companies will be notified of the vacation on November 13, 2019 via first class mail.

MASTER PLAN – Land Use:

1. The Master Plan Land Use Atlas shows the area as Mixed Use Downtown.
2. C- General Commercial Zoning District is listed as a corresponding zoning district for Mixed Use Downtown.
3. Objective 6: Encourage multiple scales of commercial development to serve the needs of the region, the community, and individual neighborhoods.

The proposed vacation is in conformance with the Master Plan Land Use component.

MASTER PLAN - Transportation:

1. The area is accessed from Commercial Street.
2. Commercial Street is classified as an Industrial Commercial Collector.
3. Commercial Street has +/- 12' wide sidewalks.

The proposed vacation is in conformance with the Master Plan Transportation Component.

REDEVELOPMENT PLAN

-) The area is located within the Redevelopment Area.
-) The proposed vacation doesn't relate to parking or other elements which are part of the Redevelopment Plan.

The proposed vacation is in conformance with the Redevelopment Plan.

ELKO CITY CODE SECTION 8-7 STREET VACATION PROCEDURES

1. If it is determined by a majority vote of the city council that it is in the best interest of the city and that no person will be materially injured thereby, the city council, by motion, may propose the realignment, change, vacation, adjustment or abandonment of any street or any portion thereof. In addition, any abutting owner desiring the vacation of any street or easement or portion thereof shall file a petition in writing with the city council and the city council shall consider said petition as set forth above.

-) The City Council made a motion at their meeting on September 24, 2019 and referred the matter to the Planning Commission for further consideration.
2. Except for a petition for the vacation or abandonment of an easement for a public utility owned or controlled by the city, the petition or motion shall be referred to the planning commission, which shall report its findings and recommendations thereon to the city council. The petitioner shall, prior to the consideration of the petition by the planning commission, pay a filing fee to the city in an amount established by resolution of the city council and included in the appendix to this code.
-) The filing fee was paid by the applicant.
3. Whenever any street, easement or portion thereof is proposed to be vacated or abandoned, the city council shall notify by certified mail each owner of property abutting the proposed vacation or abandonment and cause a notice to be published at least once in a newspaper of general circulation in the city setting forth the extent of the proposed vacation or abandonment and setting a date for public hearing, which date may be not less than ten (10) days and not more than forty (40) days subsequent to the date the notice is first published.
4. Order of City Council: Except as provided in subsection E of this section, if, upon public hearing, the City Council is satisfied that the public will not be materially injured by the proposed vacation or abandonment, and that it is in the best interest of the city, it shall order the street vacated or abandoned. The city council may make the order conditional, and the order shall become effective only upon the fulfillment of the conditions prescribed.

The proposed vacation with the recommended conditions is in conformance with Section 8-7 of City code.

FINDINGS

-) 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 property proposed for vacation is located within the Redevelopment Area.
-) The proposed vacation is in conformance with NRS 278.479 to 278.480, inclusive.
-) The proposed vacation with the recommended conditions is in conformance with Elko City Code 8-7.
-) The proposed vacation will not materially injure the public and is in the best interest of the City.

STAFF RECOMMENDATION:

Staff recommends forward a recommendation to City Council to adopt a resolution which conditionally APPROVES the proposed vacation with the following conditions:

1. 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.



CITY OF ELKO

Planning Department

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

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

September 25, 2019

Satview Broadband
Mr. Tariq Ahmad
PO Box 18148
Reno, NV 89511

And VIA EMAIL: taroil@yahoo.com

SUBJECT: Proposed Vacation No. 11-19

Dear Mr. Ahmad:

Please be advised that the City of Elko Planning Department is processing a request filed by the City of Elko to vacate a portion of the Commercial Street right-of-way located generally along the northwest property line of APN 001-343-008. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on December 3, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures



CITY OF ELKO

Planning Department

Website: www.elkocity.com

Email: planning@elkocitynv.gov

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

November 13, 2019

Frontier Communication

Mr. John Poole

1520 Church Street

Gardnerville, NV 89410

SUBJECT: Proposed Vacation No. 11-19

Dear Mr. Poole:

Please be advised that the City of Elko Planning Department is processing a request filed by the City of Elko to vacate a portion of the Commercial Street right-of-way located generally along the northwest property line of APN 001-343-008. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on December 3, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta

Planning Technician

sarchuleta@elkocitynv.gov

Enclosures



November 21, 2019

Shelby Archuleta
City of Elko Planning Department
1751 College Avenue
Elko, Nevada 89801

RE: Proposed Vacation of a Portion of Commercial Street

Dear Ms. Archuleta:

Per your request in the letter dated November 13, 2019 regarding the proposed vacation of a portion of the Commercial Street right-of-way located generally along the northwest property line of APN 001-343-008. NV Energy does not have facilities within the area to be vacated.

If you have any questions/concerns please feel free to contact me at 775-834-5430 or at katherineperkins@nvenergy.com

Sincerely,

A handwritten signature in cursive script, appearing to read "Katherine Perkins".

Katherine Perkins
NV Energy



CITY OF ELKO

Planning Department

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

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

November 13, 2019

NV Energy
Mr. Jake Johnson
6100 Neil Road
Reno, NV 89511

SUBJECT: Proposed Vacation No. 11-19

Dear Mr. Johnson:

Please be advised that the City of Elko Planning Department is processing a request filed by the City of Elko to vacate a portion of the Commercial Street right-of-way located generally along the northwest property lines of APN 001-343-008. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

Please advise the Elko City Planning Department in writing concerning your agency's needs or interests as affected by this requested vacation, or submit a letter or email stating none of your interests are in the area, as **we are required to receive and maintain records of all responses from all local utilities per NRS 278.480(6)**. The Planning Commission will consider this item on December 3, 2019. Thank you for your time and effort in this matter!

If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures

RE: Proposed Vacation No. 11-19

Amanda Marcucci <Amanda.Marcucci@swgas.com>

Tue 11/19/2019 6:57 AM

To: Shelby Archuleta <sarchuleta@elkocitynv.gov>

Hi Shelby,

Southwest Gas does not have any objections to proposed vacation no 11-19.



Amanda Marcucci, PE | Supervisor/Engineering

PO Box 1190 | 24A-580 | Carson City, NV 89702-1190

direct 775.887.2871 | mobile 775.430.0723 | fax 775.882.6072

amanda.marcucci@swgas.com | www.swgas.com

From: Shelby Archuleta <sarchuleta@elkocitynv.gov>

Sent: Wednesday, November 13, 2019 8:13 AM

To: Amanda Marcucci <Amanda.Marcucci@swgas.com>

Subject: EXTERNAL: Proposed Vacation No. 11-19

Please see attached letter and map and respond at your earliest convenience.

Thank you!

Shelby Archuleta

Planning Technician

City of Elko

Planning Department

Ph (775) 777-7160

FX (775) 777-7219



CITY OF ELKO

Planning Department

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

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

November 13, 2019

Southwest Gas Corporation
Engineering Department
PO Box 1190
Carson City, NV 89702-1190

And VIA EMAIL: nndengineering@swgas.com

SUBJECT: Proposed Vacation No. 11-19

To Whom It May Concern:

Please be advised that the City of Elko Planning Department is processing a request filed by the City of Elko to vacate a portion of the Commercial Street right-of-way located generally along the northwest property line of APN 001-343-008. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

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If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures

Re: [EXT] Proposed Vacation No. 11-19

Stephen Lifferth <stephen.lifferth@beehive.net>

Wed 11/13/2019 8:29 AM

To: Shelby Archuleta <sarchuleta@elkocitynv.gov>

Hi Shelby,

Beehive's interests are clear of this area.

Thanks,

 **Stephen Lifferth**
Director of OSP
435.837.6140 [d]
801.473.3975 [c]
www.BeehiveBroadband.com

From: Shelby Archuleta <sarchuleta@elkocitynv.gov>

Date: Wednesday, November 13, 2019 at 9:10 AM

To: Stephen Lifferth <stephen.lifferth@beehive.net>

Subject: [EXT] Proposed Vacation No. 11-19

Resent-From: <stephen@calendar.beehive.net>

Resent-To: <stephen@beehivecos.onmicrosoft.com>

Resent-Date: Wednesday, November 13, 2019 at 9:10 AM

Please see attached letter and map and respond at your earliest convenience.

Thank you!

Shelby Archuleta

Planning Technician

City of Elko

Planning Department

Ph (775) 777-7160

FX (775) 777-7219



CITY OF ELKO

Planning Department

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

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

November 13, 2019

Beehive Broadband
2000 N. Sunset Road
Lake Point, UT 84074

SUBJECT: Proposed Vacation No. 11-19

To Whom It May Concern:

Please be advised that the City of Elko Planning Department is processing a request filed by the City of Elko to vacate a portion of the Commercial Street right-of-way located generally along the northwest property line of APN 001-343-008. Please see enclosed map.

The City respectfully requests your assistance in determining whether there are any utility improvements or any other such interests within the area proposed to be vacated.

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If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures

ELKO HEAT CO.**RECEIVED**

NOV 13 2019

November 13, 2019

City of Elko
Planning Department
Attn: Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

FAX 775.777.7219

Re: Proposed Vacation Nos. 4-19, 5-19, 6-19, 7-19, 8-19, 9-19 & 10-19 (Sept 25, 2019)
Proposed Vacation No. 11-19 (Nov 13, 2019)

Please be advised that Michael W. Lattin, Vice President / Field Operations for Elko Heat Company has reviewed ALL the above vacations and Elko Heat Company has no issues with these vacations.

Please contact us if you have any additional questions or concerns.

Sincerely,



Pamela Lattin
Secretary/Treasurer

V:\CORRESPONDENCE\ElkoHeatVacation2019LtrC.wpd



CITY OF ELKO

Planning Department

Website: www.elkocity.com

Email: planning@elkocitynv.gov

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

November 13, 2019

Elko Heat
P.O. Box 2347
Elko, NV 89803

SUBJECT: Proposed Vacation No. 11-19

To Whom It May Concern:

Please be advised that the City of Elko Planning Department is processing a request filed by the City of Elko to vacate a portion of the Commercial Street right-of-way located generally along the northwest property line of APN 001-343-008. Please see enclosed map.

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If you have any questions, please contact our office at 777-7160.

Sincerely,

Shelby Archuleta
Planning Technician
sarchuleta@elkocitynv.gov

Enclosures



CITY OF ELKO

Planning Department

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

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

October 3, 2019

Certified Return Receipt

MPLDP, LLC.
Attn. Meenakshi Patel
223 Greencrest Drive
Spring Creek, NV 89815

Re: 592 Commercial Street

Dear Ms. Patel:

The purpose of this letter is to notify you of a recent action that Elko City Council took in regards to your property referred to as APN 001-343-008, 592 Commercial Street. It has been brought to our attention that the buildings along Commercial Street, from 5th to 6th Street, encroach into the Commercial Street right-of-way. In other words, the fronts of these buildings are all built over their property line and into the City of Elko property of Commercial Street. Your building is excluded from the encroachment as we have had it surveyed and your building is built right on the property line. City Council has taken action to vacate 2' in depth all along Commercial Street to the adjacent property owners to clean up the encroachment issue. Your property was not included in the vacation process as you do not have an encroachment but City Council in their motion stated for staff to reach out to you to see if you wanted to be included which would mean that your property would gain two additional feet to the front of your property. I have attempted several times to reach you by the phone number you have listed on your business license with no success.

Please contact the City of Elko Planning Department at 775-777-7160 if you have any questions or concerns and if you would like to be included in the vacation process of Commercial Street.

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY		Postal Service™ CERTIFIED MAIL® RECEIPT Electronic Mail Only															
<ul style="list-style-type: none">■ Complete items 1, 2, and 3.■ Print your name and address on the reverse so that we can return the card to you.■ Attach this card to the back of the mailpiece, or on the front if space permits.		<p>A. Signature <i>M Patel</i> <input type="checkbox"/> Agent <input type="checkbox"/> Addressee</p> <p>B. Received by (Printed Name) <i>M Patel</i> C. Date of Delivery</p> <p>Is delivery address different from item 1? <input type="checkbox"/> Yes <input type="checkbox"/> No If YES, enter delivery address below:</p>		<p>Delivery information, visit our website at www.usps.com</p> <p>OFFICIAL USE</p> <p>Postmark Here</p>															
1. Article Addressed to: MPLDP, LLC Attn: Meenakshi Patel 223 Greencrest Dr. Spring Creek, NV 89815		<p>RECEIVED OCT 10 2019</p>		<p>Postage & Fees (check box, add fee as appropriate)</p> <table border="1"><tr><td>Receipt (hardcopy)</td><td>\$</td></tr><tr><td>Receipt (electronic)</td><td>\$</td></tr><tr><td>Mail Restricted Delivery</td><td>\$</td></tr><tr><td>Signature Required</td><td>\$</td></tr><tr><td>Signature Restricted Delivery</td><td>\$</td></tr></table>		Receipt (hardcopy)	\$	Receipt (electronic)	\$	Mail Restricted Delivery	\$	Signature Required	\$	Signature Restricted Delivery	\$				
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2. Article Number (Transfer from service label) 7019 1120 0000 7301 1979		<p>3. Service Type</p> <table border="1"><tr><td><input checked="" type="checkbox"/> Adult Signature</td><td><input type="checkbox"/> Priority Mail Express®</td></tr><tr><td><input type="checkbox"/> Adult Signature Restricted Delivery</td><td><input type="checkbox"/> Registered Mail™</td></tr><tr><td><input type="checkbox"/> Certified Mail®</td><td><input type="checkbox"/> Registered Mail Restricted Delivery</td></tr><tr><td><input type="checkbox"/> Collect on Delivery</td><td><input type="checkbox"/> Return Receipt for Merchandise</td></tr><tr><td><input type="checkbox"/> Collect on Delivery Restricted Delivery</td><td><input type="checkbox"/> Signature Confirmation™</td></tr><tr><td><input type="checkbox"/> Insured Mail</td><td><input type="checkbox"/> Signature Confirmation Restricted Delivery</td></tr><tr><td><input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)</td><td></td></tr></table>		<input checked="" type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®	<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™	<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery	<input type="checkbox"/> Collect on Delivery	<input type="checkbox"/> Return Receipt for Merchandise	<input type="checkbox"/> Collect on Delivery Restricted Delivery	<input type="checkbox"/> Signature Confirmation™	<input type="checkbox"/> Insured Mail	<input type="checkbox"/> Signature Confirmation Restricted Delivery	<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)		<p>Age and Fees</p> <p>M Patel Apt. No. / PO Box No. 223 Greencrest Dr. ZIP+4® Spring Creek, NV 89815</p>	
<input checked="" type="checkbox"/> Adult Signature	<input type="checkbox"/> Priority Mail Express®																		
<input type="checkbox"/> Adult Signature Restricted Delivery	<input type="checkbox"/> Registered Mail™																		
<input type="checkbox"/> Certified Mail®	<input type="checkbox"/> Registered Mail Restricted Delivery																		
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<input type="checkbox"/> Insured Mail Restricted Delivery (over \$500)																			

**Elko City Council
Agenda Action Sheet**

1. Title: **Review, consideration, and possible action to vacate up to 2.5' of the southeasterly portion of Commercial Street between 5th and 6th Street involving 8 properties, filed by City of Elko and processed as individual Vacations 4-19 through 11-19, and matters related thereto. FOR POSSIBLE ACTION**
2. Meeting Date: **September 24, 2019**
3. Agenda Category: **NEW BUSINESS**
4. Time Required: **10 Minutes**
5. Background Information: **A recent survey has been submitted to the City of Elko showing an encroachment of their building into Commercial Street right-of-way. Further surveying has determined that most of the 600 block has encroachments into the Commercial Street right-of-way and therefore the City of Elko is the applicant for the vacation. CL**
6. Budget Information:
 Appropriation Required: **N/A**
 Budget amount available: **N/A**
 Fund name: **N/A**
7. Business Impact Statement: **Not Required**
8. Supplemental Agenda Information: **Application, display map**
9. Recommended Motion: **Findings are that it is in the best interest of the city and that no person will be materially injured thereby, move to approve the proposed individual Vacations 4-19 through 11-19 involving 8 properties and direct Staff to commence the vacation process by referring the matter to the Planning Commission.**
10. Prepared By: **Cathy Laughlin, City Planner**
11. Committee/Other Agency Review:
12. Council Action:
 ** **A motion was made by Councilman Hance, seconded by Councilwoman Simons, that the findings are in the best interest of the City, that no person will be materially injured, thereby, move to approve the proposed individual vacations 4-19, 5-19, 6-19, 7-19, 8-19, 9-19, and 10-19, involving the seven properties and to notify the owner of the last property that would become 11-19, and the eighth property in the block, and direct staff to commence the vacation process by referring the matter to the Planning Commission.**

13. The motion passed unanimously. (3-0)

14. Agenda Distribution:

**JM Capriola Co. Inc.
500 Commercial Street
Elko, NV 89801**

**Jacques Errecart
516 Commercial Street
Elko, NV 89801
Patray Assets LLP
425 Rocky Rd.
Elko, NV 89801**

**Ace Glass Company
536 Commercial Street
Elko, NV 89801**

**Cowboy Arts and Gear Museum
500 Commercial Street
Elko, NV 89801**

**Gremel & Reutner Properties Inc.
P.O. Box 2594
Elko, NV 89803**

**Shigamo Development Inc.
2002 Idaho Street
Elko, NV 89801**

**MPLDP LLC
c/o Meenakshil Patel
223 Greencrest Dr.
Spring Creek, NV 89815**



CITY OF ELKO PLANNING DEPARTMENT

1751 College Avenue * Elko * Nevada * 89801 *

(775) 777-7160 * (775) 777-7219 fax

APPLICATION FOR VACATION OF CITY STREET, EASEMENT OR OTHER PUBLIC RIGHT-OF-WAY

APPLICANT(s): City of Elko

MAILING ADDRESS: 1751 College Avenue

PHONE NO (Home): 775-777-7160

(Business):

NAME OF PROPERTY OWNER (if different):

(Property owner's consent in writing must be provided.)

MAILING ADDRESS:

LEGAL DESCRIPTION AND LOCATION OF PROPERTY INVOLVED (Attach if necessary):

ASSESSOR'S PARCEL NO.: 001-343-008

Address: 592 Commercial Street

Lot(s), Block(s), & Subdivision: SE side of Commercial Street between 5th & 6th Streets

Or Parcel(s) & File No.:

FILING REQUIREMENTS:

Complete Application Form: In order to begin processing the application, an application form must be complete and signed. Applications go before the City Council, Planning Commission, and back to City Council twice.

Fee: A \$600.00 non-refundable fee.

Plot Plan: A plot plan provided by a properly licensed surveyor depicting the existing condition drawn to scale showing property lines, existing and proposed buildings, building setbacks, parking and loading areas, driveways and other pertinent information must be provided.

Legal Description: A complete legal description of the area proposed for vacation along with an exhibit depicting the area for vacation.

Note: One .pdf of the entire application must be submitted as well as one set of legible, reproducible plans 8 1/2" x 11" in size. If the applicant feels the Commission needs to see 24" x 36" plans, 10 sets of pre-folded plans must be submitted.

Other Information: The applicant is encouraged to submit other information and documentation to support the request.

RECEIVED

OWNER(S) OF THE PROPERTY ABUTTING THE AREA BEING REQUESTED FOR VACATION:

--

(Name)

(Address)

OWNER(S) OF THE PROPERTY ABUTTING THE AREA BEING REQUESTED FOR VACATION:

--

(Name)

(Address)

1. Describe the nature of the request:

Buildings along the southeast side of Commercial Street are encroaching into the Commercial Street right-of-way. The proposal is to vacate the portions of Commercial Street that the buildings are occupying.
2. Describe any utilities currently located in the area proposed for vacation, and if any are present how they will be addressed:

There are no known utilities in the area proposed for vacation.

Use additional pages if necessary

This area intentionally left blank

By My Signature below:

- ☒ I consent to having the City of Elko Staff enter on my property only for the sole purpose of inspection said property as part of this application process.
- ☐ I object to having the City of Elko Staff enter onto my property as a part of their review of this application. (Your objection will not effect the recommendation made by the staff or the final determination made by the City Planning Commission or the City Council.)
- ☒ I acknowledge that submission of this application does not imply approval of this request by the City Planning Department, the City Planning Commission and the City Council, nor does it in and of itself guarantee issuance of any other required permits and/or licenses.
- ☒ I acknowledge that this application may be tabled until a later meeting if either I or my designated representative or agent is not present at the meeting for which this application is scheduled.
- ☒ I have carefully read and completed all questions contained within this application to the best of my ability.

Applicant / Agent

City of Elko

(Please print or type)

Mailing Address

1751 College Avenue

Street Address or P.O. Box

Elko, NV 89801

City, State, Zip Code

Phone Number:

775-777-7160

Email address:

claughlin@elkocitynv.gov

SIGNATURE:



FOR OFFICE USE ONLY

File No.: 11-19 Date Filed: 9/17/19 Fee Paid: N/A

EXHIBIT A
COMMERCIAL STREET VACATION FOR
MPLDP, LLC
November 4, 2019

A parcel of land located in Section 15, Township 34 North, Range 55 East, M.D.B. & M., City of Elko, Nevada, being a portion of Commercial Street more particularly described as follows:

Commencing at the monument at the centerline intersection of Sixth Street and Commercial Street, a point from which the monument at the centerline intersection of Fourth Street and Commercial Street bears S 41° 58' 05" W, 760.28 feet, thence S 41° 58' 05" W, 40.00 feet along the centerline of Commercial Street to a point, thence S 48° 00' 44" E, 48.00 feet to Corner No. 1, the True Point of Beginning;

Thence continuing S 48° 00' 44" E, 2.00 feet to Corner No. 2, a point being the most Northerly corner of a parcel of land conveyed to MPLDP, LLC by deed recorded in the office of the Elko County Recorder, Elko, Nevada as Document No. 577615 of Elko County Official Records, a point also being the most Northerly corner of Lot 1, Block L, of the Town now City of Elko and also being a point on the Northwesternly Right of Way of Commercial Street;

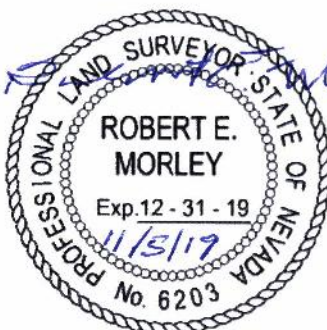
Thence S 41° 58' 05" W, 50.01 feet along the said Northwesternly Right of Way of Commercial Street to Corner No. 3, a point being the most Westerly corner of said MPLDP, LLC parcel and a point also being the most Westerly corner of Lot 2, Block L, of the Town now City of Elko;

Thence N 48° 01' 55" W, 2.00 feet to Corner No. 4;

Thence N 41° 58' 05" E, 50.01 feet to Corner No. 1, the point of beginning, containing 100 square feet, more or less.

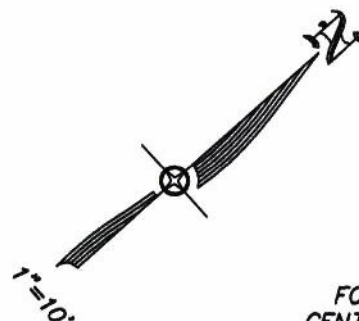
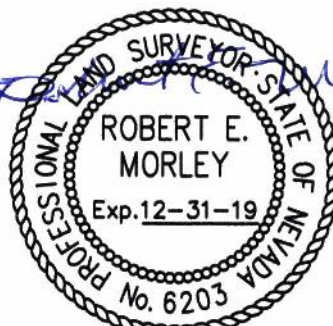
Reference is hereby made to Exhibit B, Map of Street Vacation for MPLDP, LLC attached hereto and made a part hereof.

Prepared by Robert E. Morley, PLS
640 Idaho Street

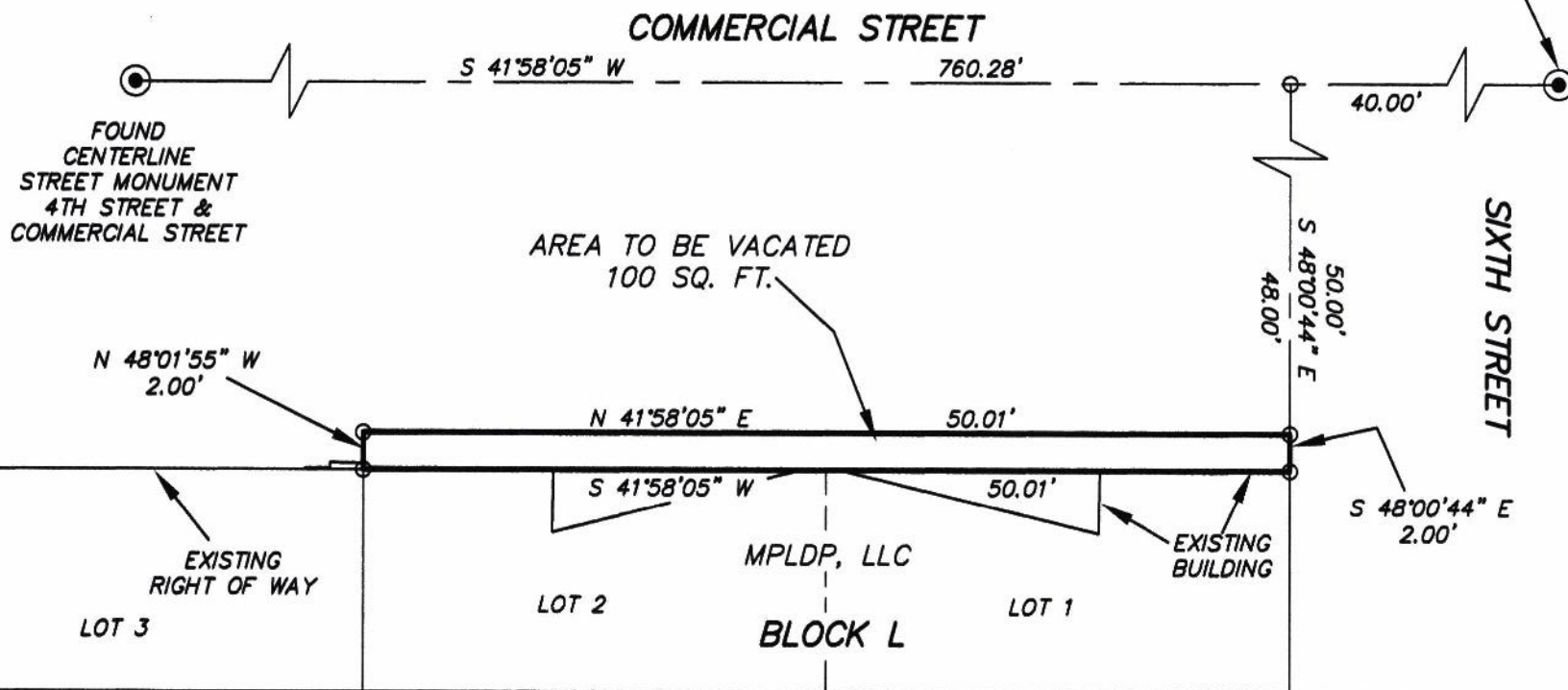


High Desert Engineering
Elko, NV 89801

EXHIBIT B
MAP OF STREET VACATION
FOR
MPLDP, LLC
CITY OF ELKO, NEVADA



FOUND
CENTERLINE
STREET MONUMENT
6TH STREET &
COMMERCIAL STREET



Zoning Bulletin

in this issue:

Authority/Preemption/Wetlands—
Planning Board denies
subdivision application citing
proposal's impact on wetlands 1

Use Violation/Statute of
Limitations—Property owner
admits use violation but
says city is barred from enforce-
ment under statute of
limitations 3

Zoning Enforcement/Equal
Protection/Due Process—
Business owners contend zon-
ing violation citations and
revocation of zoning certificate
violate their constitutional
rights 4

Zoning Enforcement/Due
Process/Nonconforming Use—
City finds property owners
filled in regulated wetlands
without the required permits 5

Permits/Act 250—After trial
court issues Act 250 permit to
rock-crushing operation,
objectors challenge court's find-
ings and legal analysis 6

Zoning News from Around the
Nation 7

Authority/Preemption/Wetlands— Planning Board denies subdivision application citing proposal's impact on wetlands

Applicant contends planning board cannot impose wetland preservation under subdivision regulations and that state law preempts planning board conditions to protect wetlands

Citation: *Girard v. Town of Plymouth*, 2019 WL 4126218 (N.H. 2019)

NEW HAMPSHIRE (08/30/19)—This case addressed the issue of whether a subdivision regulation provided a town planning board with the authority to impose requirements upon a developer to preserve existing wetlands. The case also addressed the issue of whether a town planning board was preempted by state law from imposing a condition on developers to protect wetlands.

The Background/Facts: Denis Girard and Florence Leduc (the "Landowners") owned an undeveloped parcel of land (the "Property") in the Town of Plymouth (the "Town"). The Property was also co-owned by four other people (the "Co-Owners"). In 2009, the Landowners and Co-Owners agreed to subdivide the Property, giving title of a 50-acre parcel (the "Smaller Parcel") to the Landowners and title of a 199-acre parcel (the "Larger Parcel") to the Co-Owners.

Eventually, in 2016, the Landowners and Co-Owners filed a subdivision application with the Town's Planning Board. Among other things, the subdivision application proposed a new access to the Larger Parcel. The Planning Board held multiple public hearings on the subdivision application. At those hearings, an abutter and the Co-Owners raised concerns about the impact the proposed access way would have on wetlands. The Planning Board asked the parties to consider three alternative access options. The Landowners would not agree to any of the proposed alternatives.

The Planning Board ultimately denied the subdivision application, citing concerns about the proposed access road's impact on wetlands, as well as the Landowners' rejection of the three alternatives. The Planning Board's decision further cited Article VIII, Section B of the Town's subdivision regulations, which allowed the Planning Board to "impose requirements upon the subdivider in order to preserve and protect the existing features, . . . [and] other natural resources."

The Landowners appealed the Planning Board's denial of their subdivision application.

The superior court upheld the Planning Board's decision.

The Landowners again appealed. On appeal, the Landowners argued, among



other things, that the Town's Planning Board exceeded its authority when it imposed requirements upon the Landowners in order to protect wetlands. The Landowners contended that while the Town's subdivision regulations authorized the Planning Board to impose requirements upon the subdivider in order to preserve and protect "other natural resources," the term "other natural resources" did not encompass wetlands. The Landowners also contended that the Planning Board could not base its decision on "wetlands" because "wetlands" did not expressly appear in the Town's subdivision regulations and thus a subdivision applicant had no notice that wetlands would be a factor considered by the board. Further, the Landowners contended that the Town's subdivision regulation was impermissibly broad in that it provided the Planning Board with "unbridled discretion to deny any application on any basis." The Landowners also contended that the Planning Board's regulation of wetlands was

preempted by state law regulation of wetlands. (See N.H. Rev. Stat. Ann. §§ 482-A:11, 482-A:15.)

DECISION: Judgment of Superior Court affirmed.

Disagreeing with all of the Landowners' arguments, the Supreme Court of New Hampshire concluded that the Planning Board properly denied the subdivision application based on the proposal's expected wetland impacts.

The court concluded that the Planning Board had the authority to deny the subdivision application based on its impact to wetlands. Specifically, the court found wetlands were "similar in nature to the specifically enumerated natural resources," which the Planning Board had the authority to regulate to "preserve and protect" under the Town's subdivision regulations. Moreover, the court found that "given the nature of the specific terms within the regulation and the express inclusion of wetlands as a 'significant natural resource' in another section of the regulations," the regulation did provide notice to subdivision applicants that wetlands could be considered by the Planning Board. Further, the court found that although state law (N.H. Rev. Stat. Ann. § 674:55) defined the word "wetlands" when it appeared in a municipal regulation, the statute did not expressly prohibit a municipality from regulating wetlands merely because the municipal regulation did not contain the term "wetlands."

The court also concluded that, contrary to the Landowners' argument, the Town's subdivision regulation was not "impermissibly broad" and did not provide the Planning Board with "unbridled discretion to deny any application on any basis." Rather, the court found that the enumerated items listed in the regulation limited the scope of regulable "natural resources" to "items similar in nature," including wetlands. In other words, the court found that the subdivision regulation did not permit the Planning Board to "unconditionally deny an application based upon its perceived impact on wetlands," but rather stated that the Planning Board could "impose 'requirements' on a subdivision application 'to preserve and protect' wetlands."

Finally, the court rejected the Landowners' assertion that state law—N.H. Rev. Stat. Ann. §§ 482-A:11 and 482-A:15—preempted municipalities from regulating wetlands. The court acknowledged that state law gave the New Hampshire Department of Environmental Services ("DES") authority to "regulate excavation, removal, fill, dredge, or construction in or on wetlands through comprehensive permitting process." (See (N.H. Rev. Stat. Ann. §§ 482-A:3, :6, :11.) The court explained that the state law would preempt municipal law—and specifically the Town's subdivision regulations here—if: the state statutory scheme evinced legislative intent to supersede local regulation; there was an actual conflict between state and local law such as where the municipal regulation permitted something which the state law prohibited, or vice versa; and/or where the local ordinance frustrates the state law's purpose.

Here, the court concluded that Article VIII, Section B of the Town's subdivision regulations—which allowed the Planning Board to impose requirements on an application "in order to protect and preserve" existing natural resources—"serve[d], rather than frustrate[d] the purpose of [the state statute, N.H. Rev. Stat. Ann. Chapter 482-A]."

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The court acknowledged that the statute (§ 482-A:11) gave DES the ultimate authority to approve or deny a permit application that impacts wetlands, “even if that decision is contrary to the municipality’s position.” However, the court disagreed that provision implied that “a municipality cannot also consider the impact to wetlands when determining whether to approve a subdivision application in accordance with the municipality statutory authority.” “To be clear,” the court emphasized that “the municipal action at issue here [was] the [P]lanning [B]oard’s decision to condition its approval of the subdivision application upon the relocation of the access way, pursuant to the municipality’s statutory authority over subdivisions and the placement of roads therein”—under N.H. Rev. Stat. Ann. Chapter 674. “The fact that RSA 482-A:11, III(a) gives a municipality the opportunity to investigate and comment on a wetlands permit—a procedure completely separate from municipal subdivision approval under RSA chapter 674—does not, by itself, preempt the planning board’s authority to regulate the development of subdivisions under RSA 676:35, I, and:36,” said the court.

Ultimately, the court concluded that the evidence was sufficient to support the Planning Board’s denial of the Landowners’ subdivision application since the proposed access way would have impacted wetlands and other alternative access options existed that would have had a less significant impact on the wetlands.

Use Violation/Statute of Limitations—Property owner admits use violation but says city is barred from enforcement under statute of limitations

City contends that statute of limitations bars only “structural” violation enforcements, but not use violations

Citation: *In re 204 North Avenue NOV*, 2019 VT 52, 2019 WL 4126711 (Vt. 2019)

VERMONT (08/30/19)—This case addressed the issue of whether a statute of limitations barring enforcement proceedings related to the failure to comply with land use permits to “within 15 years from the date the alleged violation first occurred” barred a city from issuing a notice of violation against a property owner for a use violation, or whether “use” violations were distinct from “structural” violations and thus exempt from the statute of limitations.

The Background/Facts: Sam Conant (“Conant”) owned property (the “Property”) in the City of Burlington (the “City”) from 1979 to 2002. In 1985, the City assessed the Property as a duplex. In 1992, Conant converted the structure on the Property from a duplex to a triplex and began renting its three units in 1993. Conant never obtained a cer-

tificate of occupancy for the triplex. In October 1993, the City found that the building contained three units. In 2002, Pierre Gingue (“Gingue”) purchased the Property from Conant. Gingue continued to rent out the three apartments. In 2017, the City issued to Gingue a Notice of Violation (“NOV”) for “a change of use from a duplex to a triplex without zoning approval” in violation of the City’s Comprehensive Development ordinance.

Gingue did not dispute that the Property was in violation of the ordinance. However, he contended that the City was barred from issuing the NOV against him for the use violation pursuant to Vermont’s statute of limitations—24 V.S.A. § 4544(a).

Section 4544(a) states in relevant part:

“An action, injunction, or other enforcement proceeding relating to the failure to obtain or comply with the terms and conditions of any required municipal land use permit may be instituted under [Vermont statutory law] against the alleged offender if the action, injunction, or other enforcement proceeding is instituted within 15 years from the date the alleged violation first occurred and not thereafter”

In other words, Gingue claimed that the statute of limitations barred the City from issuing to him the NOV because it had been more than 15 years since the use violation of using the Property as a triplex had first occurred (in 1993).

The City argued that while § 4544(a) time-barred “structural” violation enforcements, it did not bar long-standing use violations because use violations should be analyzed as continuing or recurring violations.

Finding there were no material issues of fact in dispute, and deciding the matter based on the law alone, the Superior Court, Environmental Division, issued summary judgment in favor of the City. The court agreed with the City’s argument. In keeping with the court’s “longstanding . . . interpretation of § 4454(a), the court distinguished between ‘use’ and structural violations and determined the ‘change of use from a duplex to a triplex [was] a use violation’ and ‘use violations . . . are not time-barred by the statute of limitations.’”

Gingue appealed. On appeal, Gingue again argued that the City was time-barred from issuing the NOV for the use violation against him pursuant to § 4544(a)’s statute of limitations.

DECISION: Judgment of Superior Court, Environmental Division, reversed.

Agreeing with Gingue, the Supreme Court of Vermont held that § 4544(a)’s statute of limitations did bar the NOV issued by the City against Gingue for the use violation.

In so holding, the court sought to interpret § 4544(a) by looking at its plain language and giving “effect to the intent of the Legislature.” The court found that the statute’s plain language did not distinguish between “use” and structural violations. Rather, the court found that the statute and its limitations period “clearly” applied to “the failure to obtain . . . any required municipal land use permit,” “with no exceptions for use violations.”

The court found further support for its interpretation in finding that if the statute of limitations did not apply to use violations, there would be “no purpose to the ‘first occurred’ language.” The court noted that, for example, changing a

duplex to a triplex occurs once as there are no such “subsequent occurrences of the same construction.”

Additionally, the court concluded that to interpret the statute of limitations as not applying to use violations would “authorize the City to pursue use violations for so long as they continue,” coming “at the expense of potential defendant’s peace of mind, judicial efficiency, and the security of property transactions” The court said that would frustrate the statute’s purpose and the Legislature’s intent, which was “to streamline title searches and increase confidence in property ownership by limiting the time to enforce all zoning violations.”

See also: *In re Budget Inn NOV*, 2013 WL 6570739 (Vt. Super. Ct. 2013).

See also: *State v. Pollander*, 167 Vt. 301, 706 A.2d 1359 (1997).

Zoning Enforcement/Equal Protection/Due Process— Business owners contend zoning violation citations and revocation of zoning certificate violate their constitutional rights

They allege unequal zoning enforcement in violation of equal rights and the loss of a right to conduct business in violation of substantive due process

Citation: *Joey’s Auto Repair & Body Shop v. Fayette County*, 2019 WL 4082950 (3d Cir. 2019)

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

THIRD CIRCUIT (PENNSYLVANIA) (08/29/19)—This case addressed the issue of whether a property owners’ equal protection and substantive due process rights were violated by the county’s citations for zoning violations and a revocation by the county of the property owner’s zoning certificate.

The Background/Facts: Joey’s Auto Repair & Body Shop and On-Par Turf (the “Businesses”) operate on the same property in Fayette County (the “County”). Recently, the County cited the Businesses with several zoning violations and revoked the zoning certificate for On-Par Turf.

In response, the Businesses filed a legal action. The Businesses alleged that the zoning actions stemmed from “a close relationship” between a County Commissioner and the owners of property that abutted the Businesses’ property—the Krisses, who “harbor[ed] animosity towards the [Businesses].” They alleged that, essentially at the Krisses’ request, the County Commissioner allegedly “instructed the County to pursue zoning actions to deprive [the Businesses] of their property rights.” Among other things, the Businesses

claimed that the County zoning actions violated their constitutional substantive due process and equal protection rights. Specifically, the Businesses contended that their equal protection rights were violated because they were treated differently from another business that also abutted the Krisses’ property—the Cellulare Garden Center, in that the Garden Center “was not subjected to arbitrary citations and complaints.” The Businesses further argued that their substantive due process rights were violated because the County’s zoning actions against them “resulted in a loss of business,” which deprived the Businesses of “owning and using real property.”

The County asked the court to dismiss the action, and the court granted that request.

The Businesses appealed.

DECISION: Judgment of district affirmed.

The United States Court of Appeals, Third Circuit, held that the Businesses’ constitutional equal protection and substantive due process rights were not violated by the County’s zoning actions against the Businesses.

The court explained that to establish a “class of one” equal protection claim, the Businesses had to allege: (1) the County treated them differently from others similarly situated; (2) the County did so intentionally; and (3) there was no rational basis for the difference in treatment. The court noted that “[i]rrational and wholly arbitrary” demands on a property that differ from demands on similarly situated properties can be sufficient to plead a [‘class of one’ equal protection] claim.”[KCB1]; However, the court emphasized that “[n]onetheless, this standard for an equal protection claim is ‘difficult’ to meet in a zoning dispute.”

Here, the court concluded that the Businesses’ equal protection claim failed because the Businesses failed to plead the elements of a “class of one” equal protection claim. While the Businesses had pointed to the fact that the Garden Center was also an abutting property to the Krisses, the Businesses failed to provide other, more specific examples of how the Garden Center was similarly situated to the Businesses, found the court. The court also found that the Businesses “failed to allege that they were subjected to different treatment without a rational basis.” While the Businesses had alleged that the Krisses’ animosity to the Businesses led to efforts to deprive the Businesses (and not the Garden Center) of their property rights, the court found the Businesses offered “no facts connecting this animosity to the zoning enforcement actions.”

Addressing the Businesses’ substantive due process claim, the court explained that to succeed on that claim, the Businesses had to show that they had a constitutionally protected “fundamental” property interest that was deprived by the County through conduct that “shocks the conscience.” Here, the Businesses had alleged that the County’s zoning actions resulted in “a loss of business” that deprived the Businesses of “owning and using real property.” The court explained that it had not before held that a right to conduct business was a constitutionally protected substantive due process right, and it refused to extend substantive due process protection to such a “less fundamental property interest.” In any case, the court found that, even assuming such a property interest was constitutionally protected, the

County's zoning actions here did not "shock the conscience." "Conduct 'at issue in a normal zoning dispute,' such as an allegedly unnecessary zoning enforcement action, does not generally shock the conscience," said the court. And, while an "allegation of corruption or self-dealing" might strengthen a substantive due process claim,"[KCB2]; here the court found that the Businesses failed to "provide anything more than conclusory statements to connect their zoning issues to the relationship between [the County Commissioner] and the Krisses."

See also: *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004).

See also: *Nicholas v. Pennsylvania State University*, 227 F.3d 133, 147 Ed. Law Rep. 485, 55 Fed. R. Evid. Serv. 1028 (3d Cir. 2000).

Case Note:

The Businesses also brought a conspiracy claim under § 1983, which the court rejected because the Businesses failed to allege a deprivation of a federally protected right. (See 42 U.S.C. § 1983.)

Zoning Enforcement/Due Process/Nonconforming Use—City finds property owners filled in regulated wetlands without the required permits

Property owners contend legally nonconforming use excused permit compliance, and penalty notice was "unconstitutionally vague"

Citation: *Miller v. City of Sammamish*, 447 P.3d 593 (Wash. Ct. App. Div. 1 2019)

WASHINGTON (08/19/19)—This case addressed the issue of whether property owners were deprived of their due process rights when a hearing examiner rejected their defenses to a zoning violation penalty order for systematically filling in regulated wetlands. The case also addressed whether the property owners had a valid nonconforming use that excused them from compliance with a city restriction on filling wetlands.

The Background/Facts: Donald and Kathleen Miller (the "Millers") owned 2.29 acres of residential property in the City of Sammamish (the "City"). In January 2016, the City received a complaint that the Millers had been filling and grading wetlands on their property. The City investigated the complaint. A 2005 land survey of several parcels, including the Millers', had identified two "class III wetlands" on the Millers' property. A 2008 land survey of property to the south of the Millers had also identified one of

those class III wetlands on the Millers' property. The City notified the Millers that the City had reason to believe unpermitted filling and grading of those wetlands had taken place on the Millers' property. The City advised the Millers that they were violating specific City codes that required permits for the filling and clearing of their property.

The Millers responded to the City's notices by claiming that there were no wetlands on their property and refusing to file permit applications. After the Millers failed to respond to a stop work order, the City issued to the Millers a notice and order to abate civil code violations (the "Notice"). The Notice informed the Millers that they were required to correct their municipal code violations of unauthorized clearing and grading, including the filling of wetlands and wetlands buffers without the required City permits. The Notice assessed a \$15,000 civil penalty for environmental damage and critical areas ordinance violations, plus daily penalties for every day the Millers' property remained noncompliant, and it required the Millers to come into compliance by restoring the destroyed wetlands on their property.

The Millers appealed the Notice to the City's hearing examiner. Prior to the hearing before the hearing examiner, assessments performed by the Washington State Department of Ecology concluded that two wetlands that had existed on the Millers' property prior to 2008 had been filled in and eliminated. Between the multiple hearing dates, the Millers had an additional 20 truckloads of fill delivered to their property, which they used to create a driveway through one of the wetlands. In November 2017, the hearing examiner concluded that the Millers filled in regulated wetlands that had been present on their property without the required filling and grading permits from the City.

The Millers petitioned for review of the hearing examiner's decision to the superior court. The superior court denied the petition for review and affirmed the hearing examiner. The Millers sought reconsideration, which was denied.

The Millers then appealed. On appeal, the Millers argued that the hearing examiner violated their constitutional due process rights by refusing to consider their three claimed defenses: (1) that they had a protected right to a nonconforming use of their property for grazing and animals which exempted them from the permitting requirements as a previous owner of the property had established a pasture and pond on the property for his horses; (2) that the City's failure to notify the Millers that there were regulated wetlands on their property was fundamentally unfair; and (3) that the Notice was unconstitutionally vague and the penalty was assessed in an ad hoc manner.

DECISION: Judgment of superior court affirmed.

The Court of Appeals of Washington, Division 1, concluded that the Millers' contentions "[were] wrong." The court concluded that the Millers' due process rights claim failed because the Millers were afforded due process by the hearing examiner—"including the opportunity to present witnesses, testimony, exhibits, and oral and written argument."

Addressing each of the Millers' specific arguments, the court first held that the Millers "failed to demonstrate a valid nonconforming use that would excuse compliance with the

[City regulation's] restriction on filling wetlands and wetland buffers." The Millers had claimed that "the annual depositing of topsoil and grass seed was an indispensable part of [the agricultural use of pasture and pond for grazing and watering animals]," which the City was prohibited from restricting. The court balked at that suggestion, finding it "hard to see how filling wetlands is a continuation of using a pasture and a pond to graze and water animals," especially as the Millers had not simply added "small amounts of topsoil or reseeding" but had brought over 20 truckloads of fill onto their property. Moreover, the court found that the Millers failed to meet their burden of proving the existence of a nonconforming use in that they simply showed agricultural use of the property in the 1970s but failed to demonstrate such continued use thereafter. Further, the court noted that even if the Millers' were using their property for grazing, the City regulations still required them to obtain a permit before clearing and grading.

With regard to the Millers' contention that it was "unfair" that the City failed to notify them of regulated wetlands on their property, the hearing examiner had explained that the City regulations "warned that not all critical areas are fully mapped" and "place[d] the responsibility on the applicant to disclose critical areas within a proposed development site." The appellate court also found the Millers' argument to be "meritless." The court found that the Millers provided no authority for the proposition that the City had an affirmative duty to inform them that their land included wetlands, and the City code implied that the burden was on the landowner to identify wetlands on their property and inform the City. Moreover, the court found the evidence was clear that there were two regulated wetlands on the property before they were filled, and that the Millers had deposited more than 50 cubic yards of fill into those regulated wetlands.

Finally, the court concluded that the penalty Notice was "not unconstitutionally vague," as alleged by the Millers, because it was "specific about the asserted violations," specific about what sections of the City code the Millers had violated, and specific about what the Millers "were required to do to come into compliance." While the Notice did "not precisely lay out what the actual restoration plan must say," that did not mean it left enforcement officials with "unfettered discretion," said the court. Rather, it meant the Millers were left with some control over their land, and acknowledged that the Millers' wetlands restoration plan "would be guided by the standard application and critical area process delineated in the [City code]." Moreover, the court concluded that the penalty amount itself was not "set in an ad hoc manner," but rather was based on the City code's fee assessment schedule.

See also: *Beatty v. Washington Fish and Wildlife Com'n*, 185 Wash. App. 426, 341 P.3d 291 (Div. 3 2015).

See also: *Johnson v. City of Seattle*, 184 Wash. App. 8, 335 P.3d 1027 (Div. 1 2014).

Permits/Act 250—After trial court issues Act 250 permit to rock-crushing operation, objectors challenge court's findings and legal analysis

Objectors contend operation would cause undue air pollution and noise

Citation: *In re North East Materials Group, LLC/Rock of Ages Corporation Act 250 Permit*, 2019 VT 55, 2019 WL 3980780 (Vt. 2019)

VERMONT (08/23/19)—This case addressed the issue of whether a proposed rock-crushing operation complied with Vermont's Act 250 Criterion 1, with respect to air pollution due to silica dust, or Criterion 8, with respect to noise from off-site truck traffic.

The Background/Facts: Rock of Ages Corp. ("ROA") is a quarrying operation that occupies land in the Town of Barre (the "Town"). North East Materials Group, LLC ("NEMG") maintains a rock-crushing operation as a component of ROA's quarrying operation. The rock-crushing operation "entails drilling, blasting, removing, and transporting rocks to the crusher equipment," as well as trucking material from the crushing operation. The rock-crushing operation began running in 2009. At that time, the District 5 Environmental Commission (the "Commission") had determined that the crushing operation did not need an Act 250 permit. Vermont's Act 250 governs land use and development, providing a "public, quasi-judicial process for reviewing and managing the environmental, social and fiscal consequences of major subdivisions and developments in Vermont." (State of Vermont Natural Resources Board, Act 250 Program summary.) Act 250 permit applications are reviewed by District Environmental Commissions to determine compliance with the requirements of 10 statutory criteria, which focus on projected impacts on air and water quality, water supplies, traffic, local schools and services, municipal costs, historic and natural resources, including scenic beauty, impacts of growth, and municipal and regional plans. (See 10 V.S.A. § 6086.)

In 2016, contrary to the 2009 jurisdictional option from the Commission, the Supreme Court of Vermont determined that the crushing operation did, in fact, require an Act 250 permit. The Commission later issued a decision stating that NEMG's rock-crushing operation complied with the Act 250 criteria except for Criterion 1 and Criterion 8. Criterion 1 requires Act 250 permit applicants to show that their project will not cause "undue water or air pollution." (10 V.S.A. § 6086(a)(1).) Criterion 8 requires an applicant to show that the proposed project "[w]ill not have an undue adverse effect on the scenic or natural beauty of the area, aesthetics, historic sites or rare and irreplaceable natural areas." (10 V.S.A. § 6086(a)(8).)

NEMG appealed the Commission's decision to the Superior Court, Environmental Division (the "trial court"). The

trial court reversed the Commission's denial of the Act 250 permit, finding that NEMG's rock-crushing operation did comply with Criterion 1 and Criterion 8. Specifically, the trial court concluded that the crushing operation's dust emissions complied with Criterion 1 (air pollution) "based on data derived from air-emissions modelling that demonstrated NEMG's adherence with the requirements of its air-pollution permit would ensure the project's compliance with the Vermont Ambient Air Quality Standards (VAAQS)." The trial court also concluded that the project's off-site truck noise complied with Criterion 8 (aesthetics) "based on modelling that measured the increase in average and instantaneous noise due to truck traffic." The court issued an order mandating conditions to mitigate the impacts of noise and dust and remanded the matter to the Commission "for the ministerial act of issuing a Land Use Permit."

Neighbors for Healthy Communities ("Neighbors") appealed the trial court's order. They argued that the trial court erred in concluding that NEMG's rock-crushing operation complied with Criterion 1 and Criterion 8. They asked the Supreme Court of Vermont to reverse the decision and deny NEMG's Act 250 Permit. More specifically, Neighbors argued that the trial court erred in concluding that off-site truck noise caused by NEMG's operation would not be "undue" and thus would meet Criterion 8. Neighbors argued that the trial court erred in looking at the maximum noise level over an average period of time (i.e., the Leq(n) noise measurement), instead of looking only at the maximum noise level that would occur—such as with sudden bursts of noise (i.e., the Lmax noise measurement). Neighbors also argued that the trial court erred in concluding that NEMG's operation would not cause "undue" air pollution and would thus meet Criterion 1. Neighbors maintained that the trial court had erred in its fact finding on Criterion 1, and had applied an incorrect legal standard when assessing whether the crushing operation would result in undue air pollution.

DECISION: Judgment of Superior Court, Environmental Division, affirmed.

The Supreme Court of Vermont rejected Neighbors' arguments and concluded that the trial court "committed no error in concluding that NEMG's rock-crushing operation complied with Act 250 Criterion 1 and Criterion 8."

With regard to Criterion 8—which required the project "not have an undue adverse effect" on things including aesthetics—the court acknowledged that "truck noise is an aesthetic concern under Criterion 8." The court explained that to analyze a project's aesthetic impact to determine whether it is "undue," required a two-part test (known as the "Quechee test"): A project will be found to violate Criterion 8 if "(1) the proposed project will have an adverse aesthetic impact and (2) that impact will be undue."

Here, the trial court had applied that two-part test and concluded that: (1) "the noise levels from the off-site truck traffic alone would not result in an adverse aesthetic impact . . . because the noise levels would 'fit within the character of the surrounding area, which [was] . . . characterized by industrial uses and the sounds that are associated with industrial uses' but the increased frequency of noise caused by the project's off-site traffic would constitute an adverse aesthetic impact; but (2) "with the mitigating conditions in place, the adverse impact from off-site truck noise would

not be undue"—thus complying with Criterion 8. Neighbors had argued that in reaching its conclusion on the first prong of the test, the trial court had erroneously considered two types of noise measurements—the Leq(n) and the Lmax, when, according to Neighbors, it should only have considered the Lmax. But the appellate court disagreed. It held that the trial court was not barred from considering multiple types of data, and that although Lmax had to be considered, other corroborating data—such as the Leq(n)—could also be considered. Moreover, the court concluded that the trial court had also properly applied the second prong of the test when it "considered the context of the area when determining whether the adverse impact from off-site truck traffic would be undue."

With regard to Criterion 1—which required the project not cause "undue water or air pollution," the court noted that the statute does not define when pollution is "undue." The court noted that in the air pollution context, "undue" had been interpreted to mean "that which is more than necessary—exceeding what is appropriate or normal." Determining whether pollution is "undue," is "highly fact specific," said the court.

Here, Neighbors had challenged the trial court's factual findings and legal analysis, but the appellate court found all of those challenges failed. The appellate court found that the trial court had properly relied on expert witness testimony with regard to fact findings. The appellate court also found that the trial court, in assessing whether the rock-crushing operation's dust caused an unduly adverse impact, gave proper weight to the testimony of, and impact to, neighbors, as balanced with the weight given to the project's regulatory compliance.

See also: *In re Application of Lathrop Ltd. Partnership I*, 199 Vt. 19, 2015 VT 49, 121 A.3d 630 (2015).

See also: *In re Hinesburg Hannaford Act 250 Permit*, 206 Vt. 118, 2017 VT 106, 179 A.3d 727 (2017).

Zoning News from Around the Nation

CALIFORNIA

The state Legislature passed the Housing Crisis Act of 2019 (SB 330), "which provides a set of limited reforms to the Housing Accountability Act (HAA), Planning and Zoning Law, and Permit Streamlining Act." Among other things, SB 330 "limit[s] a jurisdiction's ability to change development standards and zoning applicable to the project once a preliminary application is submitted." SB 330 also "modifies the Planning and Zoning Law to prohibit cities or counties from conducting more than five hearings if a proposed housing development complies with the applicable, objective general plan and zoning standards in effect at the time an application is deemed complete." The bill further "amends the Permit Streamlining Act to specify what constitutes a 'preliminary application' and states that a jurisdiction has one chance to identify incomplete items in an initial application and after that may not request the submission of any new information that was not in the initial list of missing items." Moreover, SB 330 "prohibits a jurisdiction (with

some exceptions) from enacting development policies, standards or conditions that would change current zoning and general plan designations of land where housing is an allowable use to 'lessen the intensity of housing,' such as reducing height, density or floor area ratio, requiring new or increased open space, lot size, setbacks or frontage, or limiting maximum lot coverage. It also bans jurisdictions from placing a moratorium or similar restrictions on housing development, from imposing subjective design standards established after Jan. 1, 2020, and limiting or capping the number of land use approvals or permits that will be issued in the jurisdiction, unless the jurisdiction is predominately agricultural." The bill awaits the Governor's signature.

Source: *Holland & Knight LLP, "California Legislature Passes Housing Crisis Act of 2019 and Rent Control Bill, Among Others" (Sept. 12, 2019); www.lexology.com*

MARYLAND

In Washington County, planning officials have reportedly been considering amendments to the County's zoning law to include distilleries. The County Planning Commission is recommending that "all alcohol-production facilities proposed for residential-zoning districts" require a special exception and public hearing process. That recommendation has been forwarded to the County Commissioners for consideration.

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

MARYLAND

The Howard County Council is considering multiple, competing proposals aimed at altering land-use regulations in an effort to ease future flooding in Ellicott City. One proposal would: re-label the City's watershed as a state-recognized watershed zone; bar development from parts of the historic district; "expand protections for buffers around

wetlands, steep slopes and all waterways, including man-made streams." The proposal would also require a "development to meet higher standards for stormwater management, addressing the short duration, high-intensity storms that caused recent, devastating flooding in 2016 and 2018." Another proposed resolution would "increase the fee developers pay when land cannot accommodate stormwater management facilities on-site because of engineering constraints" by 143% if there are "no viable options to adequately manage stormwater on-site," with fees to be directed "towards county efforts to ease flooding in the area."

Source: *The Baltimore Sun; www.baltimoresun.com*

MASSACHUSETTS

The City of Boston has filed a home rule petition, asking the state legislature to authorize the City to self-adjust linkage fees without the need for state approval. Linkage fees are payments from developers to the city that are paid (per square foot) in exchange for zoning relief.

Source: *Boston 25 News; www.boston25news.com*

NEW YORK

Renesselaerville is considering a "solar bill" that would set "general" zoning regulations for "large- and small-scale solar." The bill would apply to new solar system projects or existing projects increasing by more than 5% in scope. Small-scale systems would be subject to the New York State Unified Solar Permit, allowing for roof-mounted systems subject to height limitations, as well as ground-mounted systems subject to restrictions. Under the bill, large-scale solar systems would be subject to visual impact considerations and restrictions.

Source: *The Altamont Enterprise; <https://altamontenterprise.com>*

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First Amendment/Signs—Business alleges sign ordinance violates the First Amendment

Business contends that with listed exceptions to sign ordinance, size and no-paint-on-walls restrictions discriminate based content

Citation: *Leibundguth Storage & Van Service, Inc. v. Village of Downers Grove, Illinois*, 2019 WL 4629897 (7th Cir. 2019)

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

SEVENTH CIRCUIT (ILLINOIS) (09/24/19)—This case addressed the issue of whether a sign ordinance banning painted wall signs and limiting the size of signs on buildings, but providing exceptions for certain types of signs, violated the First Amendment to the United States Constitution through content discrimination.

The Background/Facts: The Village of Downers Grove (the “Village”) has an ordinance that regulates signs (the “Ordinance”). Among other things, the Ordinance prohibits “any sign painted directly on a wall.” It also sets size limits for signs on buildings based on the building’s distance to the street, with a maximum size of 1.5 square feet per linear foot of frontage. The Ordinance has exceptions, providing that permits are not required for many types of signs, including: holiday decorations; temporary signs for personal events; “[n]oncommercial flags;” political and noncommercial signs that do not exceed 12 square feet; and “[m]emorial signs and tablets.”

Leibundguth Storage & Van Service, Inc. (“LSVS”) was in violation of the Ordinance. Among other things, it had a sign painted on a wall and multiple signs that violated the sign-size-limits of the Ordinance. LSVS challenged the Ordinance, alleging it violated the First Amendment to the United States Constitution. Among other things, the First Amendment prohibits governments from “abridging the freedom of speech.” (United States Constitution, Amendment. I.) Specifically, LSVS contended that the Ordinance’s exclusions amounted to content discrimination because the size and no-paint-on-walls restrictions did not apply to the exception-listed subjects.

The district court found the Ordinance was valid, and not in violation of the First Amendment as LSVS alleged.

LSVS appealed.

The Court’s Decision: Judgment of district court affirmed.

The United States Court of Appeals, Seventh Circuit, concluded that the Ordinance is “comprehensive,” applying to all signs in the Village, and therefore not discriminating based on content.



In so holding, the court found that, contrary to LSVS' argument the Ordinance did not except certain listed subjects from the size and no-paint-on-walls restrictions, but rather excluded certain signs from requiring a permit. Moreover, the court found that the Ordinance specifically said that "all the [O]rdinance's rules apply to all signs unless they are 'expressly' excluded," and the Ordinance did "not expressly remove any signs from the size and no-paint-on-walls rules." Further, the court found that LSVS failed to provide any evidence showing that the Village had, for example, enforced the Ordinance in a way that permitted large political signs or flags painted on walls.

The court also held that the Ordinance's restrictions on sign size and ban on painted wall signs were "permissible time, place, and manner restrictions"—forms of aesthetic zoning that are "compatible with the First Amendment." The court found the restrictions were "justified without reference to the content or viewpoint of speech, [and] serve[d]

a significant government interest, and [left] open ample channels for communication." The court found that evidence showed that signs painted on walls deteriorate faster than other signs and become "ugly," which was an aesthetic "fact" that the Village could consider. Similarly, the court found that smaller signs may be more aesthetically pleasing to people, and the Village could thus limit signs on that basis if the size limitations were not based on "content or viewpoint discrimination" (which the court had already concluded they were not). Finally, the court found that the parties agreed that "enforcement of the sign [O]rdinance [left] open plenty of ways [for advertisers] to communicate."

See also: *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015); *Central Hudson Gas & Elec. Corp. v. Public Service Commission of New York*, 447 U.S. 557, 100 S. Ct. 2343, 65 L. Ed. 2d 341, 6 Media L. Rep. (BNA) 1497, 34 Pub. Util. Rep. 4th (PUR) 178 (1980); *Members of City Council of City of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 810-12, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984).

Subdivision Regulations/ Preemption—Subdivision applicant claims state law required consideration of her application within 30 days

City contends it local law, which provides no time limit for application review, prevails

Citation: *Wesolowski v. City of Broadview Heights Planning Commission*, 2019-Ohio-3713, 2019 WL 4418981 (Ohio 2019)

OHIO (09/17/19)—This case addressed the issue of whether the 30-day time limit for consideration of subdivision applications set forth in Ohio statute R.C. 711.09(c) applies to both city and village planning commissions. The case also addressed whether a home-rule municipality's adoption of subdivision regulations is an exercise of its police powers or an exercise of its powers of local self-governance, the latter which would prevail over conflicting state statutory law and the former which would be preempted by state statutory law.

The Background/Facts: Gloria Wesolowski ("Wesolowski") submitted a subdivision application to the Planning Commission (the "Commission") of the City of Broadview Heights (the "City"). In April 2016, the Commission denied Wesolowski's subdivision application. Wesolowski appealed that denial. She alleged that the Commission failed to comply with Ohio statutory law—R.C. 711.09(c), which requires that a planning commission either approve or deny a subdivision application within 30 days

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after its submission. She asserted that she was therefore entitled to a judgment declaring her subdivision application approved and that the Commission must issue to her a certificate in lieu of written endorsement of approval.

The trial court agreed with Wesolowski, finding that the Commission had “failed to comply with the procedural standards and time frames set forth in R.C. 711.09(c).” The court granted a declaratory judgment, ordering the Commission to issue to Wesolowski a certificate of approval.

The Commission appealed. On appeal, the Commission argued that R.C. 711.09(c) did not apply to cities. R.C. 711.009(c) states, in relevant part, that:

“The approval of the planning commission, the platting commissioner, or the legislative authority of a village required by this section, or the refusal to approve, shall be endorsed on the plat within thirty days after the submission of the plat for approval or within such further time as the applying party may agree to; otherwise that plat is deemed approved, and the certificate of the planning commission, the platting commissioner, or the clerk of the legislative authority, as to the date of the submission of the plat for approval and the failure to take action on it within that time, shall be issued on demand and shall be sufficient in lieu of the written endorsement or other evidence of approval required by this section. . . .” (R.C. 711.09(c).)

The Commission argued that because the word “city” did not appear in the statute’s language describing the 30-day time limit for considering subdivision applications, and only referred to “villages,” “the plain and unambiguous language of R.C. 711.09(c) dictated that [the 30-day time limit] [did] not apply to a city planning commission.”

The Commission further argued that, in any case, the City’s regulations—which placed no time limit on consideration of subdivision applications—prevailed over R.C. 711.09(c). More specifically, the City argued that because the City’s subdivision regulations affected only the City itself, “without any extraterritorial effects,” the City’s subdivision regulations were “an exercise of its powers of local self-government,” which prevailed over the state statute and its 30-day time limit for subdivision application consideration.

The Court of Appeals affirmed the trial court’s judgment. It held that R.C. 711.09(c) applies to cities. It further held that local subdivision regulations—like the City’s here—are an exercise of a municipality’s police powers rather than an exercise of a municipality’s powers of local self-government. Thus, the court concluded that where a local subdivision regulation conflicts with a state regulation (such as regarding time frame to review a subdivision application here), the state statute prevails.

The Commission again appealed.

The Court’s Decision: Judgment of Court of Appeals affirmed.

The Supreme Court of Ohio first held that the 30-day time limit set forth in R.C. 711.09(c) applied to both cities and villages. In so holding, the court read the statute. The court found that R.C. 711.09 set forth procedures for approving and recording plats of subdivisions of land. The court found that R.C. 711.09(A) applied specifically to “cities,” and R.C. 711.09(B) applied specifically to “villages.” The language of R.C. 711.09(C)—which sets the 30-day time limit to

consider subdivision applications—stated it applied to “the planning commission, the platting commissioner, or the legislative authority of a village.” The court determined that if the General Assembly in enacting R.C. 711.09(C) had intended for it to apply only to cities or only to villages “it would have made that clear by including the limiting language” of “city planning commission” used in division (A) or of “village planning commission” used in division (B). Since division (C) contained neither limitation, the court concluded that it applied to the planning commission of both cities and villages.

The court also held that a home-rule municipality’s adoption of subdivision regulations is an exercise of its police powers, and thus when it conflicts with state law, state law preempts the local law. Here, the court found that the City ordinance conflicted with the state statute “because it permits[ed] what the statute forbids[]—a response later than 30 days after the submission of a subdivision request.” The court explained that a state statute takes precedence over a municipal ordinance when, among other things, “the ordinance is an exercise of the police power, rather than of local self-government.” The court further explained that while a “power of local self-government” relates “solely to the government and administration of the internal affairs of the municipality,” a “police-power regulation” seeks to “protect the public health, safety, or morals, or the general welfare of the public.” Here, the court found that the City ordinance—which placed no time limit on consideration of subdivision applications—did “not relate solely to the management of the [C]ity’s internal affairs,” but rather “regulate[d] the conduct of the [C]ity’s citizens for the general welfare of the public by restricting the division of land.” Because the City’s ordinance was an exercise of police power that conflicted with state law, the court concluded that “the ordinance must give way to the requirements in R.C. 711.09(c).”

See also: *Ohio Ass’n of Public School Employees, Chapter No. 471 v. City of Twinsburg*, 36 Ohio St. 3d 180, 522 N.E.2d 532, 46 Ed. Law Rep. 714 (1988).

See also: *State ex rel. Kearns v. Ohio Power Co.*, 163 Ohio St. 451, 56 Ohio Op. 389, 127 N.E.2d 394 (1955).

Exemption from Zoning Laws—Hospital proposes property use as a residential program for adolescent males with extreme “emotional dysregulation”

Hospital and city dispute whether such use is “educational” and thus eligible for exemption from zoning regulations under the Dover Amendment

Citation: *McLean Hospital Corporation v. Town of Lincoln*, 483 Mass. 215, 131 N.E.3d 240 (2019)

MASSACHUSETTS (09/23/19)—This case addressed the issue of whether a proposed residential program for adolescent males with extreme “emotional dysregulation” to develop emotional and social skills qualified as having “educational purposes” within the meaning of Massachusetts’ Dover Amendment (G.L. c. 40A, § 3), which exempts from local zoning laws those uses of land and structures that are for “educational purposes.”

The Background/Facts: McLean Hospital Corporation (“McLean”) purchased property in the town of Lincoln (the “Town”). McLean intended to develop on the property a residential life skills program for adolescent males who exhibit extreme “emotional dysregulation.” The program—dubbed the “3East program”—was “designed to instill fundamental life, social, and emotional skills in adolescent males who are deficient in these skills, who experience severe emotional dysregulation, and who have been unable to succeed in a traditional academic setting.” The 3East program uses “a highly structured, nationally recognized, dialectical behavior therapy (DBT) approach to attempt to develop social and emotional skills in students with severe deficits in these skills.” The program “generally lasts for sixty to 120 days,” with “approximately eleven hours per day of instruction and practice in social and emotional skills, focused in [five areas]: mindfulness and ability to pay attention; emotional regulation; development and maintenance of interpersonal relationships; distress tolerance; and validation.” More specifically, the program curriculum “is taught in an experiential manner by specialists in clinical education” in 45-minute classroom sessions, where students learn skills and how to apply them in life. No medical interventions are included as part of the program.

Prior to purchasing the property, the Town’s building commissioner advised McLean that its proposed use was “educational” and could proceed as of right under Massachusetts’ Dover Amendment. (See G.L. c. 40A, § 3.)

The Dover Amendment exempts from local zoning laws those uses of land and structures that are for “educational purposes.” (See G. L. c. 40A, § 3, second par.) The Dover Amendment provides, in relevant part:

“No zoning ordinance or by-law shall . . . prohibit, regulate or restrict the use of land or structures for religious purposes or for educational purposes on land owned or leased . . . by a nonprofit educational corporation . . .” (G.L. c. 40A, § 3, second par.)

Town residents challenged the building commissioner’s determination that McLean’s proposed use of the property was “educational” and was eligible for exemption from zoning regulations under the Dover Amendment. They contended that any educational component of the 3East program was “merely . . . ancillary” to the “predominant purpose of providing medical treatment for a particular psychological condition.” They further argued that the 3East program added “an informal educational component merely as a smokescreen in order to obtain favorable protections under the Dover Amendment . . .” They “caution[ed] against a slippery slope in which every therapist’s or doctor’s office or hospital could become a facility afforded protection under the Dover Amendment.”

The Town’s Zoning Board of Appeals (“ZBA”) determined that McLean’s 3East program was “medical or therapeutic, as opposed to educational,” and thus did not qualify for Dover Amendment exemptions from zoning laws.

McLean appealed.

The Land Court judge determined that the proposed use of the 3East program was “not primarily ‘for educational purposes,’ ” but was “predominantly ‘therapeutic,’ ” and therefore did not qualify for Dover Amendment exemptions.

McLean again appealed.

The Court’s Decision: Judgment of Land Court Department vacated and matter remanded.

The Supreme Judicial Court of Massachusetts concluded that, “although not a conventional educational curriculum offered to high school or college students, the proposed facility and its skills-based curriculum fall well within the ‘broad and comprehensive meaning of educational purposes’ under the Dover Amendment.”

In so concluding, the court explained the two-pronged test it used to determine whether a proposed use falls within the protections of the Dover Amendment. To obtain Dover Amendment protections, the proposed use must have a bona fide goal that is: (1) “educationally significant” and (2) the “‘primary or dominant’ purpose for which the land or structures will be used.” The court further explained that an educationally significant goal is one that involves “the process of developing and training the powers and capabilities of human beings,” and “preparing persons for activity and usefulness in life.” The court also explained that determining whether a use’s purpose is predominantly educational “does not, and should not, turn on an assessment of the population it serves”—such as where the program, as here, serves psychiatric patients.

Here, the court determined that the proposed 3East program had an educationally significant goal of “enabl[ing] the students to return to their communities and families, to succeed in traditional educational programs, and to become able to lead productive lives.” Such a program that installs “a basic understanding of how to cope with everyday programs and to maintain oneself in society is incontestably an educational process,” said the court.

The court also determined that the proposed 3East program's primary or dominant purpose was educational. In so holding, the court rejected the argument that a skill development program—such as the 3East program here—loses its primary educational purpose when it also teaches to therapeutic, rehabilitative, or remedial competencies for an underlying psychiatric condition. The court found that although the 3East program would serve psychiatric patients, that fact alone did not “brand the 3East program as a medical program.” Here, the court found a number of factors led to the conclusion that the dominant purpose here was educational and not medical: students would engage in therapy 2% of the time; the structure of the program would be distinct from a medical appointment or inpatient placement in a psychiatric hospital, as it would include instruction in skills development, group and individual sessions, structured social and athletic time, and homework; the staff would not be doctors; and no medical interventions would be used in the program. In other words, the court found that the 3East program was “a specialized form of education, with therapeutic aspects, that ultimately teaches its participants the skills necessary for their success, ‘activity and usefulness in life.’ ”

Having determined that the 3East program had a goal of educational significance that was its primary or dominant purpose, the court concluded that the program was eligible for exemption from zoning laws under the Dover Amendment.

See also: *Regis College v. Town of Weston*, 462 Mass. 280, 968 N.E.2d 347, 280 Ed. Law Rep. 369 (2012).

See also: *Fitchburg Housing Authority v. Board of Zoning Appeals of Fitchburg*, 380 Mass. 869, 406 N.E.2d 1006 (1980).

See also: *Gardner-Athol Area Mental Health Ass’n, Inc. v. Zoning Bd. of Appeals of Gardner*, 401 Mass. 12, 513 N.E.2d 1272, 42 Ed. Law Rep. 381 (1987).

Case Note:

The Land Court judge had determined that the 3East program was not primarily for “educational purposes” because it focused on “inward”-facing skills (i.e., those that help address any internal manifestations or symptoms of a mental disorder) rather than “outward”-facing skills (i.e., those that help assimilate individuals into their respective communities). While not necessarily accepting that dichotomy of skills, the Supreme Judicial Court of Massachusetts noted that, in any case, both types of skills were part of “the idea that education is the process of preparing persons ‘for activity and usefulness in life.’ ” The court noted that it had made clear that “a basic understanding of how to cope with everyday problems and to maintain oneself in society is incontestably an educational process within the ambit of the Dover Amendment.” and explained that it “would be impossible to exclude the acquisition of these skills from serving a ‘therapeutic’ purpose” as well.

Use/Short-term Rentals— City says property owner can not use single-family home in residential district for short-term rentals

Property owners says its short-term rental use met ordinance's definition of use as a permitted “dwelling unit”

Citation: *Working Stiff Partners, LLC v. City of Portsmouth*, 2019 WL 4725178 (N.H. 2019)

NEW HAMPSHIRE (09/27/19)—This case addressed the issue of whether a zoning ordinance permitted property owners' short-term rental of property as a principal use. In addressing that issue, the case also addressed whether a city ordinance's definition of “dwelling unit” was unconstitutionally vague as applied.

The Background/Facts: Working Stiff Partners, LLC (“Working Stiff”) owned a four-bedroom house in a “General Residence A” (“GRA”) zoning district in the City of Portsmouth (the “City”). Working Stiff renovated the house and began marketing it on Airbnb. Working Stiff's Airbnb listing for the house offered daily rates with accommodations for up to nine guests and touted its availability for rentals as short as one day. As of November 2017, the house had been occupied by guests 17% of the year.

After receiving complaints, the City's code enforcement officer issued to Working Stiff an order to cease and desist using the property for short-term rentals because short-term rentals were not permitted in the GRA zoning district. Under the City's Zoning Ordinance, the GRA zoning district allowed as principal uses single-family dwellings and two-family dwellings. “Single-family dwellings” were defined in the Zoning Ordinance as buildings consisting of a single dwelling-unit, and “[t]wo-family dwellings” were defined as buildings consisting of two dwelling units. The Zoning Ordinance defined “[d]welling unit” as a building or portion of a building “providing complete independent living facilities for one or more persons . . . [but not including] such transient occupancies as hotels, motels, rooming or boarding houses.” The Zoning Ordinance did not define the term “transient” or the phrase “transient occupancies.”

Working Stiff appealed the cease and desist order to the City's Zoning Board of Adjustment (“ZBA”). The ZBA upheld the order. Working Stiff then appealed to the trial court, asking the court to vacate the order and enjoin the City from further attempts to regulate short-term rentals under the City's Zoning Ordinance. The court affirmed the ZBA's decision and denied injunctive relief.

Working Stiff again appealed. On appeal, Working Stiff argued that the trial court had erred in interpreting the City's Zoning Ordinance as not permitting the short-term rental of the house as a principal use. Working Stiff maintained that it was using the house as a “[d]welling unit” as that phrase was defined by the Zoning Ordinance. In other words, Work-

ing Stiff maintained that short-term rentals of single-family dwellings was a permitted principal use in the GRA zoning district. Working Stiff also argued that applying the City Zoning Ordinance so as not to permit Working Stiff's use of the house as a "[d]welling unit" rendered the Zoning Ordinance "unconstitutionally vague" as applied to Working Stiff.

The Court's Decision: Judgment of Superior Court affirmed.

The Supreme Court of New Hampshire rejected Working Stiff's arguments, concluding that Working Stiff's use of its house as a short-term rental was not a permitted principal use in the GRA zoning district.

In reaching that conclusion, the court first held that Working Stiff's use of the property for short-term rentals to paying guests daily was not a "[d]welling unit" use permitted in the GRA zoning district. Again, the Zoning Ordinance defined "[d]welling unit" as a building or portion of a building "providing complete independent living facilities for one or more persons . . . [but not including] such transient occupancies as hotels, motels, rooming or boarding houses." Since the Zoning Ordinance did not define the term "transient" or the phrase "transient occupancies," the court looked to their "common usage, using the dictionary for guidance." The court found that dictionary definitions included: "passing through or by a place with only a brief stay. . ." and "lasting only for a short time" The court determined that those definitions of "transient" "suggest[ed] that short or brief stays at the property constitute[d] 'transient occupancies,' and further suggest[ed] that, insofar as [Working Stiff] [was] using the property for rentals as short as one day, [Working Stiff] [was] not using the property as a '[d]welling unit.'"

The court found further support for its construction of transient in the fact that the Zoning Ordinance's definition of "[d]welling unit" did not exclude all transient occupancies but only "such transient occupancies as hotels, motels, rooming or boarding houses." The Zoning Ordinance defined hotels, motels, and boarding houses, and the court found those definitions all "contemplate[d] the provision of lodging to paying guests on a daily basis." Thus, when the court considered the Zoning Ordinance as a whole, it concluded that Working Stiff's "use of the property for daily rentals to paying guests constituted a 'transient occupanc[y]' similar to a hotel, motel, rooming house, or boarding house." And, because the Zoning Ordinance expressly excluded "such transient occupancies" from the definition of "[d]welling unit," the court concluded that Working Stiff's short-term rental use was not as a "[d]welling unit."

The court also held that, contrary to Working Stiff's argument, the Zoning Ordinance was not unconstitutionally vague as applied to Working Stiff's use of its property. The court explained that an ordinance can be impermissibly vague if it: (1) fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) authorizes or even encourages arbitrary and discriminatory enforcement. Working Stiff had argued that construing the City Zoning Ordinance so as not to permit Working Stiff's use of the property left the definition of "[d]welling units" "in such a state of obscurity" that people of ordinary intelligence would have no way of

determining when rentals are impermissibly "transient." Working Stiff also argued that if the Zoning Ordinance was interpreted so as not to permit Working Stiff's use of the property, then the Zoning Ordinance authorized "arbitrary enforcement because there [was] no evidence in the record that [Working Stiff's] only use of the property was for short-term rentals."

Rejecting Working Stiff's first vagueness argument, the court determined that the Zoning Ordinance's definition of "[d]welling unit" provided Working Stiff "with a reasonable opportunity to understand that its conduct was not permitted as a dwelling unit." The court found that the Zoning Ordinance used "plain and easily understood words." Although the Zoning Ordinance did not define "transient," the court determined that "the plain meaning of 'transient,' together with the four representative examples of transient occupancies which limit the term's application to things that are similar thereto, provided [Working Stiff] with fair notice that using the property to provide short-term rentals to paying guests on a daily basis constitutes a 'transient occupanc[y]' similar to a hotel, motel, rooming house, or boarding house, rather than a permitted '[d]welling unit' use."

Rejecting Working Stiff's second vagueness argument, the court found it irrelevant whether Working Stiff used its property for additional purposes. That had "nothing to do with whether one of those uses [was] permitted under the [O]rdinance" said the court. The court concluded that Working Stiff had failed to demonstrate that the Zoning Ordinance was so vague that it authorized or encouraged arbitrary or discriminatory enforcement.

See also: *State v. MacElman*, 154 N.H. 304, 910 A.2d 1267 (2006).

Hearing/Ex Parte Communications—County Commissioner is alleged to have engaged in ex parte communications in violation of state statute

County Commissioner contends he did not violate statute, and that, in any case, the statute violated his First Amendment right to free speech

Citation: *75-80 Properties, LLC v. Rale, Inc.*, 2019 WL 4072331 (Md. Ct. Spec. App. 2019)

MARYLAND (08/29/19)—This case addressed the issue of whether a Maryland statute—Md. Code Ann., Gen. Prov. § 5-859(b)—requiring disclosure of ex parte communications between a member of a governing body and any "individual" concerning a pending application, during the pendency of the application, applied to a county commissioner's interactions. The case also addressed whether that statute

violated the commissioner's First Amendment right to freedom of speech.

The Background/Facts: In November 2012, Payne Investments LLC and 75-80 Properties LLC (collectively, the "Developers") filed with Frederick County Planning Commission (the "Planning Commission") an application for a zoning map amendment for more than 400 acres of land in the Frederick County (the "County"). With the Application, the Developers asked that the County to rezone the land from agricultural in order to permit a planned unit development ("PUD") with 1500 residential units.

In November 2013, the Planning Commission recommended approval of the PUD. In January 2014, after holding public hearings on the Application, the Board of County Commissioners (the "County Commissioners") approved the PUD, subject to conditions. Thereafter, in March 2014, the Planning Commission recommended approval of a revised plan. In April 2014, the County Commissioners held four public hearings concerning the PUD. Ultimately, the County Commissioners voted to approve the PUD.

RALE, Inc. ("RALE") opposed the Developers' Application for the PUD. RALE (and others) filed a petition for judicial review of the PUD. Among other things, RALE argued that one of the County Commissioners—Commissioner C. Paul Smith—had engaged in undisclosed ex parte communications concerning the Developers' Application, in violation of Maryland statutory law—General Provisions Article ("GP") § 5-859(b). RALE argued that consequently, the court was required to "remand the case to the governing body [i.e., the County Commissioners] for reconsideration." (GP § 5-862(b).)

GP § 5-859(b) states: "A member of the governing body who communicates ex parte with an individual concerning a pending application during the pendency of the application shall file with the Chief Administrative Officer a separate disclosure for each communication within the later of 7 days after the communication was made or received."

RALE pointed to evidence that, prior to the fourth and final hearing of the County Commissioners on the Developers' PUD Application, Commissioner Smith attended a public meeting of the Frederick Area Committee for Transportation ("FACT"). At that FACT meeting, Commissioner Smith had argued in support of the Developers' Application. Those arguments later reappeared, without attribution, in a letter that FACT sent to the County Commissioners on the day of the fourth and final hearing. At the hearing, the FACT letter was read into the record. Commissioner Smith did not disclose that the arguments in the FACT letter had originated with him. At the end of that hearing, the County Commissioners voted to approve the PUD.

Agreeing with RALE, the circuit court concluded that it "could not make a judgment about whether the record supported the decision to approve the PUD, "because the FACT letter, its timing and the potential that the [County Commissioners] had relied on it 'form[ed] an integral part of the record.' " The court remanded the Developers' Application to the County Council (formerly the County Commissioners). (In December 2014, the County became a charter county with a County Executive and a County Council rather than a Board of County Commissioners).

The County Council voted to send the entire matter back to the County Planning Commission. The Developers declined to begin the process anew and return to the Planning Commission. They contended that they had vested rights in the prior approvals. The Council then concluded that it had "done what it [could] to fully comply with [the circuit court's] Remand Order." The County Council asked the circuit court to "take such action as it deems necessary and appropriate so that the County Council may rehear the [Developers' PUD] [A]pplication."

The circuit court then issued an order, vacating the approval of the PUD, and remanding the case to the County Council. In doing so, the circuit court found that Commissioner Smith had engaged in undisclosed ex parte communication, in violation of GP § 5-859(b). The court further concluded that the FACT letter, which was engendered by the ex parte communication, was a substantial factor in the approval of the PUD.

The Developers and Commissioner Smith appealed. Among other things, the Developers and Commissioner Smith argued that Commissioner Smith had not engaged in ex parte communication because: (1) Commissioner Smith's attendance at the FACT meeting was not an ex parte communication; (2) Commissioner Smith could not have engaged in ex parte communication at the FACT meeting because that meeting was open to the public; and (3) Commissioner Smith did not engage in ex parte communication because he did not communicate with a party to the proceeding before him or with a party's representative. Commissioner Smith also argued that, "in prohibiting him from engaging in undisclosed ex parte communications concerning a zoning application in which he was involved as a quasi-judicial decisionmaker, [GP] § 5-859(b) violated his First Amendment right to free speech." Specifically, Commissioner Smith asserted that as a legislator, he had a "right and duty to speak on legislative matters."

The Court's Decision: Judgment of circuit court affirmed.

The Court of Special Appeals of Maryland concluded that, among other things: Commissioner Smith engaged in an ex parte communication in violation of GP § 5-859(b); and GP § 5-859(b) did not violate Commissioner Smith's First Amendment right to free speech.

In holding that Commissioner Smith's interactions with FACT amounted to ex parte communication in violation of GP § 5-859(b), the court rejected the related arguments of the Developers and Commissioner Smith. The court found that it was not Commissioner Smith's attendance or participation at the FACT meeting that amounted to ex parte communication, but rather it was his comments at the FACT meeting regarding the pending PUD Application, which made their way into a FACT letter that was read into evidence at the County Commissioner's public hearing, without disclosure from Commissioner Smith that the comments in the FACT letter originated with him. The court also found that the fact that the FACT meeting was open to the public was irrelevant as to whether Commissioner Smith engaged in ex parte communication. His communications, said the court, were ex parte "because they concerned a pending quasi-judicial proceeding in which he was one of the decisionmakers, but were not part of the record of that

proceeding.” Finally, finding Maryland’s General Assembly, in enacting GP § 5-589(b), “unambiguously chose not to limit Frederick County ethics law to ex parte communications with ‘applicants’ or ‘parties,’ ” the court rejected “the contention that the statute did not apply to Commissioner Smith’s communication with other ‘individuals,’ such as FACT representatives.”

In holding that GP § 5-859(b) did not violate Commissioner Smith’s First Amendment right to free speech, the court explained that restrictions on ex parte communication are “common . . . throughout the United States,” and “serve the important public purpose of fostering public confidence in the fairness and integrity of the decisional process by ensuring that all interested persons have equal access to the information on which the decision is based.” Accordingly, the court concluded that ex parte communication restrictions “do not violate the First Amendment.” Moreover, the court addressed Commissioner Smith’s assertions that he had a right and duty to speak on legislative matters, noting that GP § 5-589(b) did not prohibit Commissioner Smith’s speech, but “merely required him to disclose ex parte communications concerning certain land disputes that were pending before him as a quasi-judicial decisionmaker.”

The court further held that, considering the finding that Commissioner Smith engaged in an ex parte communication in violation of GP § 5-859(b), the court was required to remand the case to the County Council for reconsideration pursuant to GP § 5-862(b). The court concluded that the circuit court did not err in implementing the County Council’s decision to require the Developers to recommence the application.

Case Note:

Commissioner Smith had also argued that GP § 5-589(b) was unconstitutionally vague because “if public statements at public meetings are ex parte communications, then any communication could be an ex parte communication.” The court rejected that argument, finding “persons of ordinary intelligence could discern” that GP § 5-589(b) required them to disclose that they had engaged in—not simply any communication or public statements at a public meeting—but communications arguing in favor of an application pending before him as a quasi-judicial decisionmaker.

Zoning News from Around the Nation

INDIANA

The Columbus City Council has approved several zoning ordinance amendments. Reportedly, the changes clarify existing regulations, respond to new state legislation or case law, address issues from variance requests, and make corrections to typos and cross-references.

Source: *Local News Digital*; www.localnewsdigital.com

ILLINOIS

City of Chicago Mayor Lori Lightfoot is reportedly proposing zoning rules that would limit the number of marijuana dispensaries in each of seven “cannabis zones.” The proposal is aimed at ensuring dispensaries are “distributed equally across the city,” allowing areas to build and profit from marijuana sales and avoiding concentration of such sales in limited small areas. Under the proposal, marijuana sales would be banned in the City’s Central Business District, as well as within 500 feet of a school, any designated residential zoning district, or in any building with a residential unit. The proposal needs Zoning Committee approval and City Council vote.

Source: *CBS Chicago*; <https://chicago.cbslocal.com>

MASSACHUSETTS

A Boston City Councilor is proposing as a home rule petition, “new requirements around transparency,” including “new reporting requirements on [Zoning Board of Appeals] ZBA activity and decisions” and the curtailment of “actual or potential conflicts of interest by barring ZBA staff from participating in real estate business.” The proposal also calls for eliminating a current requirement that one ZBA member be nominated by the Greater Boston Real Estate Board and ensuring board members represent “perspectives from affordable housing, civil rights and fair housing, environmental protection and climate change, urban planning, homeowners, renters, and expertise in zoning and the general laws.”

Source: *WGBH*; www.wgbh.org

MICHIGAN

The United States Department of Justice has sued the City of Troy, alleging that the City’s zoning ordinance violates the Religious Land Use and Institutionalized Persons Act of 2000 by treating proposed places of worship “less favorably” than nonreligious uses. The lawsuit follows the City’s denial of a Muslim group’s use of a building as a mosque. The City’s zoning laws “allow a non-religious place of assembly, such as a theater or banquet hall, to use the same building without further approval but zoning restrictions on places of worship required [the Muslim group] to seek city approval.” The lawsuit further alleges that the City “imposed a ‘substantial burden’ on the group’s Muslim religious exercise in violation of another provision of the same law.”

Source: *MLive.com*; www.mlive.com

Annexation 101

WHEN CITIES SEEK TO EXPAND their boundaries, they typically turn to annexation, the process by which land is transferred from one unit of government to another, most commonly from a county to an incorporated city. Annexation serves many practical purposes: providing more efficient services, adding to the local population (and the tax base), providing areas for future growth, and extending planning and zoning authority. It can also be a controversial and politically contentious process.

Laws governing annexation authority and processes differ from state to state. Most require consent by a majority of landowners and residents in the proposed area. One common exception is when the territory to be annexed is surrounded by an incorporated municipality. A few states (including Texas, North Carolina, and Indiana) permit involuntary annexation. In Texas, home-rule cities may unilaterally annex any land that is under their extraterritorial jurisdiction.

Most states also require annexed areas to adjoin the existing municipal boundary. This requirement encourages orderly expansion and discourages cities from leapfrogging over less desirable parcels in order to annex land on the urban fringe.

Jurisdictions annex for various reasons. For example, a city might annex residential subdivisions, commercial or industrial areas, or undeveloped areas where growth is anticipated. Development in the annexed area can increase property and commercial tax bases and generate additional revenue to support city services and infrastructure development and maintenance that could benefit residents of the city and surrounding areas.

Annexation also allows a jurisdiction to fully extend its regulatory authority, including planning and zoning. The result may be more logical patterns of growth and development in the surrounding area.

Important reminders

Cities should carefully consider the costs and benefits of pursuing annexation, how well it aligns with current goals for growth and development, and the full range of potential impacts that could result.

Any city considering annexation should document existing population figures, land uses, and development within the proposed boundaries of the growth area. It is also important to evaluate how annexation will affect the timing of new development, both within the annexed area and existing municipal boundaries.

Another issue is the likely demand for public services within the proposed annexed area. This may include police and fire protection, road improvements, water supply, and sewers, as well as schools, libraries, and parks. Communities should first evaluate the costs of extending services and determine whether they can be provided efficiently.

While annexation may expand the local tax base, the costs of providing services may exceed the tax revenue generated. Therefore, it is vital to conduct a thorough fiscal analysis at the proposal stage, including comparing likely property tax revenue, license fees, and other income associated with new development with projected service costs. The analysis should also consider whether the transfer will cause the jurisdiction currently governing the annexed area to lose revenue.

Finally, cities should consider potential political challenges, which could range from concerns about higher taxes, changes in political representation, and loss of community identity on one side, to reduction in levels of service and traffic congestion, to name a few, on the other. ■

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