

**CITY OF ELKO NEW MARKET  
CITY COUNCIL AGENDA  
ELKO NEW MARKET CITY HALL  
601 MAIN STREET  
ELKO NEW MARKET, MINNESOTA 55054  
THURSDAY, APRIL 11, 2019**

**BUSINESS MEETING  
6:30 PM**

**1. Call to Order**

**2. Pledge of Allegiance**

**3. Adopt/Approve Agenda**

**4. Presentations, Proclamations and Acknowledgements (PP&A)**

- a. Oath of Office – Chief of Police/Emergency Management Director Brady Juell

**5. Public Comment**

*Individuals may address the Council about any item not contained on the regular agenda. The Council may limit the time allotted to each individual speaker. A maximum of 15 minutes will be allotted for Public Comment. If the full 15 minutes are not needed for Public Comment, the City Council will continue with the agenda. The City Council will not normally take any official action on items discussed during Public Comment, with the exception of referral to staff or commission for future report.*

**6. Consent Agenda**

*All matters listed under consent agenda are considered routine by the City Council and will be acted on by one motion in the order listed below. There may be an explanation, but no separate discussion on these items. If discussion is desired, that item will be removed from the consent agenda and considered separately.*

- a. Approve March 28, 2018 Minutes of the City Council Meeting
- b. Approve Payment of Claims and Electronic Transfer of Funds
- c. Adopt Ordinance No. 188 Amending Ordinance For Sexually Oriented Uses
- d. Ordinance Amendments Related to Small Wireless Facilities
  - a. Adopt Ordinance No. 185 Amending Zoning Ordinance Regarding Small Cell
  - b. Adopt Ordinance No. 186 Amending Right of Way Ordinance for Small Cell
  - c. Adopt Ordinance No. 187 Summary Ordinance for 186
  - d. Adopt Ordinance No. 189 Amending Fee Schedule
- e. Approve Recycling Program Agreement
- f. Adopt Resolution 19-15 Adopting Proclamation Policy
- g. Adopt Resolution No. 19-16 Approving Extension of the Deadline for Filing the Final Plat for Dakota Acres 1st Addition
- h. Approve Assignment of Agreement for Municipal Advisor Services between Elko New Market and Baker Tilly

**7. Public Hearings**

## **8. General Business**

- a. Authorize Engineering Services for 2019 Lift Station Standby Generation Project

## **9. Reports**

- a. Administration
  - i. Appointment to SCALE Unified Transit Plan Steering Committee
- b. Public Works
  - i. Monthly Report - March 2019
- c. Police Department
  - i. Monthly Report – March 2019
- d. Fire Department
- e. Engineering
- f. Community Development
  - i. Draft Planning Commission Minutes of the March 26, 2019 Meeting
  - ii. Community Development Updates
- g. Parks Department
  - i. Draft Parks & Recreation Commission Minutes of March 26, 2019 Meeting
  - ii. Monthly Parks & Recreation Update
- h. Community & Civic Events Committee (CCEC)
  - i. Draft Community & Civic Events Committee Minutes of March 19, 2019 Meeting
- i. Other Committee and Board Reports
  - i. Scott County Association for Leadership and Efficiency (SCALE)
  - ii. Minnesota Valley Transit Authority (MVTA)
  - iii. I35 Solutions Alliance
  - iv. Chamber of Commerce
  - v. Downtown Improvement Committee

## **10. Discussion by Council**

## **11. Adjournment**

**1. CALL TO ORDER**

The meeting was called to order by Mayor Julius at 6:30 p.m.

Members Present: Mayor Julius, Councilmembers: Berg, Schwichtenberg, Seepersaud and Timmerman

Members Absent: None

Staff Present: City Administrator Terry, Police Chief Juell, City Attorney Poehler, Community Development Intern Hailey Sevening, Community Development Specialist Christianson and City Engineer Revering

Also Present: Chamber of Commerce Boardmember Tim Sadusky

**2. PLEDGE OF ALLEGIANCE**

Mayor Julius led the Council and audience in the Pledge of Allegiance.

**3. ADOPT/APPROVE AGENDA**

**MOTION** by Councilmember Berg, second by Councilmember Schwichtenberg to approve the agenda. **APIF, MOTION CARRIED**

**4. PRESENTATIONS, PROCLAMATIONS AND ACKNOWLEDGEMENTS**

None

**5. PUBLIC COMMENT**

Mr. Sadusky, Elko New Market Chamber of Commerce thanked the City Council for hosting an awesome luncheon. He stated it was invigorating to hear what kind of development Elko New Market is bringing in so that the Chamber of Commerce can share that with people. He noted ladies night will be the next big item with the Chamber along with a Morning Brew Meeting. He noted at the March meeting the YMCA came in and updated the Board on what is happening with their association.

**6. CONSENT AGENDA**

**MOTION** by Councilmember Timmerman, second Councilmember Seepersaud to approve Consent Agenda.

- a. Approve March 14, 2019 Minutes of the City Council Meeting
- b. Approve Payment of Claims and Electronic Transfer of Funds
- c. Adopt Resolution 19-13 One Day Gambling Permit for St. Nicholas Church
- d. Adopt Resolution 19-14 One Day Temporary Liquor License for St. Nicholas Church

**APIF, MOTION CARRIED**

**7. PUBLIC HEARINGS**

None

## 8. GENERAL BUSINESS

None

## 9. REPORTS

### a) ADMINISTRATION

#### i. Proclamation Policy

City Administrator Terry requested the City Council provide direction on how staff should proceed with the Proclamation Policy.

Community Development Intern Sevensen gave a presentation to the City Council.

After discussion the City Council directed staff to move forward as drafted.

### b) PUBLIC WORKS

Written report included in Council Packet.

### c) POLICE DEPARTMENT

Written report included in Council Packet.

Police Chief Juell stated he was grateful for being hired to the Elko New Market Police Department. He is working the former Chief's typical shift.

### d) FIRE DEPARTMENT

None

### e) ENGINEERING

None

### f) COMMUNITY DEVELOPMENT

#### i. Discussion Regarding Regulation of Mobile Food Units (Food Trucks)

City Administrator Terry requested the City Council provide direction on regulations related to Mobile Food Units.

Community Development Intern Sevensen gave a presentation to the City Council.

After discussion the majority of the City Council felt there should be some regulations. The City Council directed staff to draft an Ordinance for regulation and licensing and come back with recommendations for further discussion. The Council direction was to have staff also look at some level of restriction during community events, especially the Community Festival, and bring back to the City Council for review.

### g) PARKS DEPARTMENT

Written Parks Commission Update and Minutes included in Council Packet.

### h) COMMUNITY & CIVIC EVENTS COMMITTEE (CCEC)

i) OTHER COMMITTEE AND BOARD REPORTS

i. SCALE

None

ii. MVTA

None

iii. I35 SOLUTIONS ALLIANCE

None

iv. CHAMBER OF COMMERCE

None

v. DOWNTOWN IMPROVEMENT COMMITTEE

None

10. DISCUSSION BY COUNCIL

Mayor Julius stated the April 25<sup>th</sup> meeting will be a hefty meeting with the County Road 2 and 91 round-about discussion and he wanted to make sure the entire City Council is at the meeting.

11. ADJOURNMENT

**MOTION** by Councilmember Timmerman, second by Councilmember Berg, to adjourn the meeting at 8:06 p.m. **APIF, MOTION CARRIED**

Respectfully submitted by:

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Thomas Terry, City Administrator



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Presentation of Elko New Market Claims and Electronic Transfer of Funds
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Stephanie Fredrickson, Administrative Assistant
<b>REQUESTED ACTION:</b>	Approve Payment of Current Claims

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

**BACKGROUND**

Each City Council meeting the Administrative Assistant presents for approval the Elko New Market Claims and Electronic Transfer of Funds.

**BUDGET IMPACT:**

Budgeted

Attachments:

- Check Summary Register

**CITY OF ELKO/NEW MARKET**  
**\*Check Summary Register©**

04/05/19 9:03 AM

**April 11, 2019**

Name	Check Date	Check Amt	
<b>AUTOPAYS</b>			
Paid Chk# 006013E DELTA DENTAL OF MINNESOTA	2/1/2019	\$0.00	Delta Dental February
Paid Chk# 006014E DELTA DENTAL OF MINNESOTA	2/1/2019	\$898.70	Delta Dental February
Paid Chk# 006015E NEW MARKET BANK	2/1/2019	\$30.00	FEB Bank Fees
Paid Chk# 006016E HEALTH EQUITY, INC.	2/7/2019	\$538.84	HSA Contribution PR3
Paid Chk# 006017E MN DNR ECO-WATERS-RES	2/15/2019	\$797.48	MPARS for 2018
Paid Chk# 006018E VISA	2/28/2019	\$68.86	Late Fee
Paid Chk# 006019E VISA	2/28/2019	\$385.47	Finance Charge
Paid Chk# 006020E VISA	2/28/2019	\$7.09	Late Fee
Paid Chk# 006021E VISA	2/28/2019	\$908.93	Late Fee
Paid Chk# 006022E VISA	2/28/2019	\$8.54	Late Fee
Paid Chk# 006023E VISA	2/28/2019	\$137.41	PD Chemical Spray
Paid Chk# 006024E VISA	3/25/2019	\$170.07	Fleet
Paid Chk# 006025E VISA	2/28/2019	\$11.25	Annual Fee
Paid Chk# 006026E VISA	3/25/2019	\$0.50	Finance Fee
Paid Chk# 006027E PSN	2/28/2019	\$982.66	Credit Card Processing Fees
Paid Chk# 006028E HEALTH EQUITY, INC.	3/27/2019	\$3,682.76	HSA for Lynda and Brady City C
Paid Chk# 006029E SUN LIFE FINANCIAL	4/1/2019	\$899.91	Life Insurance 4/1-4/30
Paid Chk# 006030E HEALTH PARTNERS	4/1/2019	\$12,709.63	MEDICAL INS-April 2019
Paid Chk# 006031E DELTA DENTAL OF MINNESOTA	4/1/2019	\$844.30	Dental
Paid Chk# 006032E PERA	4/2/2019	\$7,697.49	Vendor Liability
Paid Chk# 006033E MN DEPT OF REVENUE	4/2/2019	\$2,074.01	Vendor Liability
Paid Chk# 006034E INTERNAL REVENUE SERVICE	4/2/2019	\$9,803.13	Vendor Liability
Paid Chk# 006035E HEALTH EQUITY, INC.	4/2/2019	\$788.84	HSA PR7 040419
Paid Chk# 006036E MINNESOTA ENERGY RESOURCES	4/16/2019	\$346.99	26518 France Avenue
Paid Chk# 006037E MINNESOTA ENERGY RESOURCES	4/16/2019	\$65.57	26518 France Avenue
Paid Chk# 006038E XCEL ENERGY	4/22/2019	\$198.19	Storage
Paid Chk# 006039E XCEL ENERGY	4/23/2019	\$77.01	Lift Station / 10010 Ptarmigan
Paid Chk# 006040E XCEL ENERGY	4/24/2019	\$2,696.10	25499 Natchez Ave - Water Trea
Paid Chk# 006041E XCEL ENERGY	4/23/2019	\$901.76	Wellhouse - 26460 France Ave
Paid Chk# 006042E XCEL ENERGY	4/23/2019	\$979.43	26536 France Ave
Paid Chk# 006043E XCEL ENERGY	4/23/2019	\$526.52	Library - 100 J Roberts Way
Paid Chk# 006044E MN VALLEY ELECTRIC COMPANY	4/22/2019	\$1,439.83	Streetlights, Elko
Paid Chk# 006045E MN VALLEY ELECTRIC COMPANY	4/9/2019	\$76.46	Glenborough Dr & Chowen
Paid Chk# 006046E MN VALLEY ELECTRIC COMPANY	4/22/2019	\$46.50	27059 Beard Ave Lift Pump
Paid Chk# 006047E MINNESOTA ENERGY RESOURCES	4/18/2019	\$21.46	408 Carter Street
Paid Chk# 006048E MINNESOTA ENERGY RESOURCES	4/18/2019	\$20.62	359 James Parkway
Paid Chk# 006049E MINNESOTA ENERGY RESOURCES	4/18/2019	\$244.94	110 J Roberts Way - Library
Paid Chk# 006050E MINNESOTA ENERGY RESOURCES	4/22/2019	\$43.55	26518 France Avenue
Paid Chk# 006051E MINNESOTA ENERGY RESOURCES	4/16/2019	\$897.55	PW Facility - Gas Utilities
Paid Chk# 006052E MINNESOTA ENERGY RESOURCES	4/15/2019	\$855.81	25499 Natchez Ave - WTP
Paid Chk# 006053E PSN	4/4/2019	\$1,063.09	Credit Card Processing Fees
<b>TOTAL</b>		<b>\$53,947.25</b>	
<b>PRE-PAIDS</b>			
Paid Chk# 039585 PAYROLL	4/4/2019	\$1,055.50	
Paid Chk# 039586 SCOTT COUNTY RECORDER	12/31/2018	\$46.00	KOMO/Pre-Development Agreement
<b>TOTAL</b>		<b>\$1,101.50</b>	
<b>CHECK REGISTER</b>			
Paid Chk# 039587 ACE HARDWARE & PAINT	4/11/2019	\$123.32	PW - Fleet Maint & Equip
Paid Chk# 039588 ACE HARDWARE & PAINT4	4/11/2019	\$27.17	PW - Small Tools
Paid Chk# 039589 STEPHANIE L. ADAMS	4/11/2019	\$100.00	Facepainting - 3/7/19 Family F
Paid Chk# 039590 AEM FINANCIAL SOLUTIONS, LLC	4/11/2019	\$1,336.88	Financial Services
Paid Chk# 039591 CRAIG ANDERSON	4/11/2019	\$41.76	Mileage for MN Dept of Safety-
Paid Chk# 039592 BOLTON & MENK	4/11/2019	\$10,105.70	T15.100717 - Stormwater Genera
Paid Chk# 039593 CINTAS CORPORATION NO. 2	4/11/2019	\$12.80	PW UNIFORMS
Paid Chk# 039594 CITY OF SAINT PAUL	4/11/2019	\$450.00	Diversity & Implicit Bias Trai
Paid Chk# 039595 CITY OF SAVAGE	4/11/2019	\$7,684.25	IT Items/Support
Paid Chk# 039596 CULLIGAN BOTTLED WATER	4/11/2019	\$57.15	Bottled Water
Paid Chk# 039597 EARL F. ANDERSON, INC.	4/11/2019	\$242.39	PW - Signs
Paid Chk# 039598 CHRISTOPHER FLEGEL	4/11/2019	\$80.00	Calibration Gas (Reimbursement
Paid Chk# 039599 FLOYD TOTAL SECURITY	4/11/2019	\$123.32	PD Door - Battery Replacement
Paid Chk# 039600 FORFEITURE ATTORNEY SCOTT CO.	4/11/2019	\$782.10	30% Proceeds Forfeiture 2007 H
Paid Chk# 039601 FUZIONPRINT	4/11/2019	\$523.93	City Newsletter - Issue #1 201
Paid Chk# 039602 GOPHER STATE ONE CALL	4/11/2019	\$9.45	Locates
Paid Chk# 039603 GOVERNMENT FORMS AND SUPPLIES	4/11/2019	\$207.27	Office Supplies
Paid Chk# 039604 HAWKINS, INC.	4/11/2019	\$4,127.92	PW - Water Chemicals
Paid Chk# 039605 INTERNATIONAL INSTITUTE CLERKS	4/11/2019	\$135.00	Annual Membership - Mark Nagel
Paid Chk# 039606 INNOVATIVE OFFICE SOLUTIONS LL	4/11/2019	\$1,685.53	Office Supplies
Paid Chk# 039607 KELLEY FUELS, INC.	4/11/2019	\$2,800.09	PW - Fuel

**CITY OF ELKO/NEW MARKET**

04/05/19 9:03 AM

**\*Check Summary Register©**

**April 11, 2019**

	<b>Name</b>	<b>Check Date</b>	<b>Check Amt</b>	
Paid Chk# 039608	LARKSTUR ENGINEERING	4/11/2019	\$72.31	PW - Fleet Maint & Equip
Paid Chk# 039609	LEO A DALY	4/11/2019	\$630.00	PD Station Pre-Design thru 3-2
Paid Chk# 039610	LIZ FORD YOGA	4/11/2019	\$200.00	Yoga - 3/21/19 Family Fun Nigh
Paid Chk# 039611	MENARDS - DUNDAS	4/11/2019	\$234.95	Building Maintenance
Paid Chk# 039612	MENARDS - BURNSVILLE	4/11/2019	\$95.98	Building Maintenance
Paid Chk# 039613	METROPOLITAN COUNCIL	4/11/2019	\$19,776.67	Wastewater Charges - May 2019
Paid Chk# 039614	MIDLAND EQUIPMENT CO.	4/11/2019	\$27.30	Fleet Maint & Equip
Paid Chk# 039615	MN CRITTER GETTERS, INC.	4/11/2019	\$1,200.00	Monthly Animal Control
Paid Chk# 039616	MOORE MEDICAL LLC	4/11/2019	\$180.33	FD - Medical Supplies
Paid Chk# 039617	MUNICIPAL INSPECTIONS, INC.	4/11/2019	\$3,531.04	Erosion Control Inspections
Paid Chk# 039618	NAPA AUTO PARTS	4/11/2019	\$65.38	PW - Fleet Maint & Equip
Paid Chk# 039619	NEW MARKET TOWNSHIP	4/11/2019	\$1,400.00	Boulder Heights Annexation 201
Paid Chk# 039620	NORTHFIELD HOSPITAL & CLINICS	4/11/2019	\$270.00	EMT Refresher - Jodi Muelken
Paid Chk# 039621	OLSEN CHAIN & CABLE, INC.	4/11/2019	\$11.58	PW - Small Tools
Paid Chk# 039622	QUILL CORPORATION	4/11/2019	\$109.99	Office Supplies
Paid Chk# 039623	R&R CLEANING CONTRACTORS, INC.	4/11/2019	\$92.70	Rugs
Paid Chk# 039624	RDO EQUIPMENT CO.	4/11/2019	\$63.37	PW - Fleet Maint & Equip
Paid Chk# 039625	RIGID HITCH INCORPORATED	4/11/2019	\$524.73	PW - Fleet Maint & Equip
Paid Chk# 039626	SAFETY-KLEEN SYSTEMS, INC.	4/11/2019	\$410.00	PW - Fleet Maint & Equip
Paid Chk# 039627	SCHLOMKAS PORTABLE	4/11/2019	\$420.00	Portable Restrooms
Paid Chk# 039628	SHERWIN-WILLIAMS	4/11/2019	\$278.71	Building Maintenance
Paid Chk# 039629	SHRED RIGHT	4/11/2019	\$15.00	Shredding
Paid Chk# 039630	SOUTH METRO RENTAL	4/11/2019	\$900.00	PW - Stormwater Repairs
Paid Chk# 039631	SRF CONSULTING GROUP, INC.	4/11/2019	\$563.24	Roundabout - Right of Way Agen
Paid Chk# 039632	STREICHER'S INC	4/11/2019	\$1,344.72	PD - Uniforms/Brady Juell
Paid Chk# 039633	SUEL PRINTING COMPANY	4/11/2019	\$144.00	Legal Ads
Paid Chk# 039634	TIMESAVER OFF SITE SECRETARIAL	4/11/2019	\$145.00	City Council Minutes
Paid Chk# 039635	UNIQUE PAVING MATERIALS CORP	4/11/2019	\$159.30	PW - Streets
Paid Chk# 039636	VAN IWAARDEN ASSOCIATES	4/11/2019	\$600.00	2018 GASB Actuarial Report/50%
Paid Chk# 039637	SPLIT ROCK MANAGEMENT INC	4/11/2019	\$845.00	LIBRARY CLEANING
Paid Chk# 039638	VERIZON WIRELESS	4/11/2019	\$878.75	Cell Phones
Paid Chk# 039639	XEROX CORPORATION	4/11/2019	\$405.47	Copier
<b>TOTAL</b>			<b>\$66,251.55</b>	

**DIRECT DEPOSIT**

Paid Chk# 502406E	Bi-Weekly ACH	4/4/2019	\$31,994.35	
<b>TOTAL</b>			<b>\$31,994.35</b>	



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Zoning Ordinance Amendments
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Renee Christianson, Community Development Specialist
<b>REQUESTED ACTION:</b>	Adopt Ordinance No. 188 Concerning Amendments to the City's Zoning Ordinance

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND**

The Planning Commission recently considered amendments to the City's Zoning Ordinance related to Sexually Oriented Businesses. Late in 2018 the Planning Commission directed staff to review the City's current ordinance pertaining to such uses to ensure that our ordinances were defensible and to better understand where such uses could locate. Following an analysis of the current regulations, City staff, the City Attorney, and the Planning Commission all recommend one minor amendment to the Ordinance.

The City's current ordinance requires that Sexually Oriented Businesses be located at least 200' from all trails. This particular standard would likely preclude all such uses from locating within the City, which is considered unconstitutional. As referenced in the Planning Commission memorandum dated March 26, 2019, such uses are protected by the First Amendment and the City must provide reasonable opportunity for them to locate.

A public hearing was held before the Planning Commission on March 26, 2019 with no comments from the public. The changes being recommended by the Planning Commission should ensure that the City's Ordinance remains legal and defensible.

## **DISCUSSION**

Based on the information provided to the Planning Commission, the recommendations of City staff, public comment received and discussion at the meeting, the Planning Commission has unanimously recommended approval of the request to amend various sections of the City's Zoning Ordinance as depicted in draft Ordinance #188

## **BUDGET IMPACT**

The budget impact for this item is the cost of City staff time, City Attorney review time and the cost to revise the City Code.

## **CITY ATTORNEY RECOMMENDATION**

The City Attorney has reviewed the staff report, the Planning Commission recommendation and draft Ordinance #188, and has recommended approval of the draft ordinances.

## **REQUESTED ACTION:**

The City Council is being asked to adopt Ordinance No. 188 Amending the City Code Concerning Principal Sexually Oriented Uses.

### Attachments:

3.26.19 Planning Commission Report  
3.26.19 DRAFT Planning Commission Minutes  
Draft Ordinance No. 188

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**ORDINANCE NO. 188**

**AN ORDINANCE AMENDING CITY OF ELKO NEW MARKET CITY CODE  
TITLE 11, CHAPTER 5-16 (C) CONCERNING PRINCIPAL SEXUALLY  
ORIENTED BUSINESSES**

THE CITY COUNCIL OF THE CITY OF ELKO NEW MARKET,  
MINNESOTA ORDAINS:

**SECTION 1.** Section 11-5-16 (C)(1)(e) of the Elko New Market City Code is hereby amended as follows:

- a) Public parks/~~trails~~

**SECTION 20.** This Ordinance shall take effect immediately upon its passage and publication.

**ADOPTED** this 11<sup>th</sup> day of April, 2019 by the City Council for the City of Elko New Market.

**CITY OF ELKO NEW MARKET**

BY: \_\_\_\_\_  
Joe Julius, Mayor

**ATTEST:**

\_\_\_\_\_  
Thomas Terry, Acting City Clerk



601 Main Street  
Elko New Market, MN 55054  
phone: 952-461-2777 fax: 952-461-2782

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## MEMORANDUM

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**TO:** PLANNING COMMISSION  
**FROM:** RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST  
HALEY SEVENING, COMMUNITY DEVELOPMENT INTERN  
**RE:** ZONING ORDINANCE AMENDMENT - SEXUALLY ORIENTED BUSINESS  
**DATE:** MARCH 26, 2019

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### **Background / History**

At the February Planning Commission meeting the Commission reviewed the City's current regulations concerning sexually oriented businesses and also an analysis as to how the current regulations applied to land in the City. During the review of the existing ordinance it was recommended that Section 11-5-16 (C) of the City Code be amended to remove the requirement that sexually oriented businesses be setback at least 200' from trails. The reason for the recommendation is that, by keeping the requirement in the City Code, it would preclude sexually oriented businesses from locating anywhere in the City which would be unconstitutional. The Commission directed staff to prepare for a public hearing on the proposed ordinance amendment.

### **Requested Action**

Attached is a draft ordinance amending the Section 11-5-16 (C)(1)(e) of the Zoning Ordinance. Staff is requesting that the Planning Commission hold a public hearing regarding the proposed ordinance amendment, and make a recommendation to the City Council regarding the matter.

### **Attachments**

- February 27, 2019 Planning Commission Memorandum
- (Draft) Ordinance amending Section 11-5-16 (C)(1)(e) of the City Code

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**ORDINANCE NO. \_\_\_\_**

**AN ORDINANCE AMENDING CITY OF ELKO NEW MARKET CITY CODE  
TITLE 11, CHAPTER 5-16 (C) CONCERNING PRINCIPAL SEXUALLY  
ORIENTED BUSINESSES**

THE CITY COUNCIL OF THE CITY OF ELKO NEW MARKET,  
MINNESOTA ORDAINS:

**SECTION 1.** Section 11-5-16 (C)(1)(e) of the Elko New Market City Code is hereby amended as follows:

- a) Public parks/~~trails~~

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**ADOPTED** this 11<sup>th</sup> day of April, 2019 by the City Council for the City of Elko New Market.

**CITY OF ELKO NEW MARKET**

BY: \_\_\_\_\_  
Joe Julius, Mayor

**ATTEST:**

\_\_\_\_\_  
Thomas Terry, Acting City Clerk



601 Main Street  
Elko New Market, MN 55054  
phone: 952-461-2777 fax: 952-461-2782

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## MEMORANDUM

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**TO:** PLANNING COMMISSION  
**FROM:** RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST  
HALEY SEVENING, COMMUNITY DEVELOPMENT INTERN  
**RE:** SEXUALLY ORIENTED BUSINESS ANALYSIS  
**DATE:** FEBRUARY 26, 2019

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### **Government Regulation of Adult Uses / Sexually Oriented Businesses**

State and local governments use zoning laws and ordinances to regulate the uses of land within their borders. A government can impose controls on where certain uses and businesses are permitted to locate, but attempting to prevent certain businesses from locating altogether may violate the rights to free speech protected by the First Amendment. Restricting the location of adult entertainment businesses often results in issues relating to the First Amendment. Adult entertainment businesses typically include businesses where nude or semi-nude dancing occurs, where adult movies are shown or sold, or where sexually oriented products are sold. Cities typically regulate adult businesses because the businesses cause adverse secondary effects, such as increased crime and decreased property values.

The courts have ruled that sexual expression which is indecent but not obscene is protected by First Amendment, and government cannot totally restrict efforts to access this type of speech or communication. A community cannot “zone out” adult uses completely or restrict them to small and highly inaccessible areas. A community can, however, place restriction on their location, such as requiring minimum distances to schools or daycare facilities, or restricting them to certain zoning districts. Based on the 1986 United States Supreme Court holding in *City of Renton v. Playtime Theaters* upholding a zoning ordinance regulating sexually oriented businesses that made only 5% of the City available for such uses, many cities have used a 5% criteria in establishing their own zoning ordinances. Case law over the past few decades has established that 5% of the total land area of the community is a reasonable benchmark to provide for such uses. Although 5% has been used as a benchmark, neither the United States Supreme Court, nor the constitution mandates a community make a minimum of 5% of land available for adult uses and courts have typically reviewed the characteristics of the City in varying downward from that benchmark.

### **Elko Strip Club & Lawsuit / 2002**

It is important for communities to review their ordinances related to adult uses from time to time, to ensure that opportunities are provided for their location. In 2001, the City of Elko adopted ordinances regulating sexually oriented businesses through licensing and zoning for sexually oriented businesses. Shortly thereafter, the City of Elko was faced with a strip club that had illegally opened in the property currently occupied by the End Zone (formerly Glenno’s Pizza). The entity that established the business did not comply with the City’s licensing requirements for the and when the City closed the establishment, the owner and operator of the strip club sued the City alleging that the City’s licensing ordinance was unconstitutional

and requesting an injunction against the application of the ordinance. The case did not challenge the constitutionality of the City's zoning ordinance as the use was allowed in the location where the business was established. The district court ultimately concluded that the City's ordinance was constitutional and denied the injunction. Thereafter, the City made minor adjustments to its ordinances in 2004.

**Current City Ordinances Relating to Adult Entertainment**

The City's Zoning Ordinance defines adult uses as Sexually Oriented Businesses (principal and accessory). The definitions related to Sexually Oriented Businesses are shown in the attachment below. The following are basic criteria for locating a Sexually Oriented Business within the city limits:

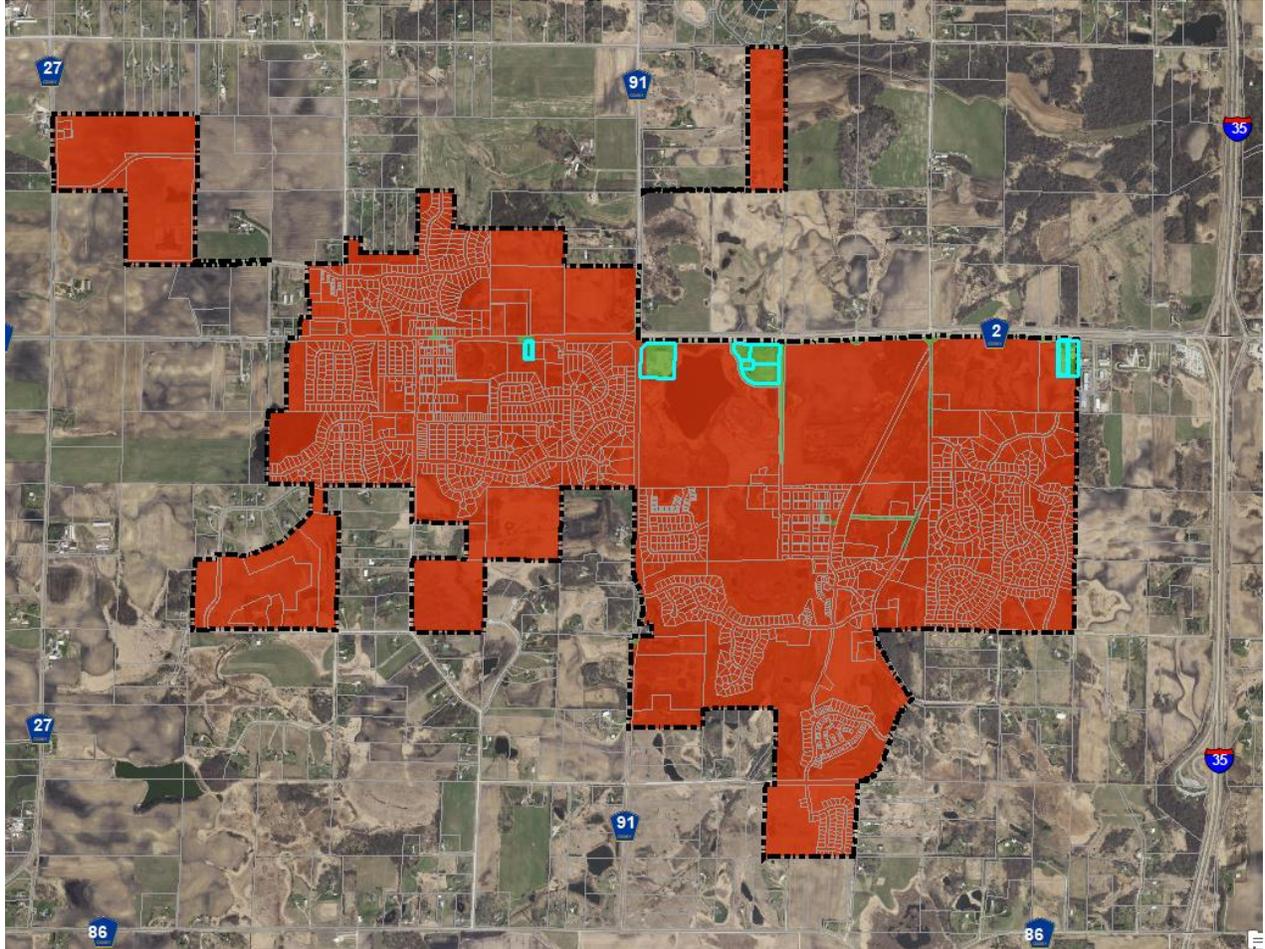
- **Principal sexually oriented businesses are NOT ALLOWED within 200 feet of:**
  - Residential zoning districts
  - Schools
  - Churches
  - Daycare facilities
  - Public parks & trails
  - Other sexually oriented businesses
  
- **Principal sexually oriented businesses are also NOT ALLOWED within these districts:**
  - Residential districts -> ALL
  - Business districts -> B2 and B4
  - Special districts -> UR, INS, and FP
  
- **Principal sexually oriented businesses are ALLOWED within these districts:**
  - Business districts à B1, B3, B5, B6, B7
  - Industrial districts à BOTH
  - Special districts → PUD (potentially)

**Analysis**

Based on the above noted criteria, City staff performed an analysis to determine where a Sexually Oriented Businesses could locate in the City, and what percentage of the City's overall land area is available for such uses to locate on. As part of the analysis it was necessary to map the locations where they were not allowed (based on above criteria); the individual maps depicted the 200' buffer around schools, churches, daycares, etc. are depicted below as an attachment to this report. Based on the analysis it appears that there are eight commercially zoned parcels where a Sexually Oriented Use could locate, and a total of 40.89 acres which comprises 2.05% of the City's overall land area.

	ACRES	%
Total Land Area in City Limits	2190.278	
Total Area of Road Rights-of-Way	196.353	
<b>Total Land Area in City Limits, minus Road Rights-of-Ways</b>	<b>1993.925</b>	<b>100.00%</b>
<b>Total Land Area Zoned Residential</b>	<b>554.561</b>	<b>27.81%</b>
<b>Total Land Area Zoned PUD (with underlying Residential Zoning)</b>	<b>619.495</b>	<b>31.07%</b>
<b>Total Land Area Zoned Commercial</b>	<b>58.720</b>	<b>2.94%</b>
<b>Total Land Area Zoned PUD (with underlying Commercial Zoning)</b>	<b>136.194</b>	<b>6.83%</b>
<b>Total Land Area Zoned Industrial</b>	<b>0.000</b>	<b>0.00%</b>
<b>Total Land Area Zoned UR</b>	<b>486.170</b>	<b>24.38%</b>
<b>Total Land Area Zoned Institutional</b>	<b>138.785</b>	<b>6.96%</b>
<b>Total Land Area in City Limits, minus Road Rights-of-Ways</b>	<b>1993.926</b>	<b>100.00%</b>
<b>Total Land Available for Sexually Oriented Businesses</b>	<b>40.893</b>	<b>2.05%</b>

**Locations Where Sexually Oriented Business Are Permitted  
Based on Elko New Market Zoning Ordinance 1/29/19**



**City Staff Recommendation**

The overall land area currently available for a Sexually Oriented Use to locate in the City is 2.05%, therefore not meeting the suggested benchmark of 5%. The vast majority of the land in Elko New Market is zoned residential; and a very small percentage of the land is zoned for commercial or industrial uses. Based on these two factors, staff suggests that the 2.05% of the City's land area that is available for Sexually Oriented Uses to locate is adequate and defensible. The City has designated ample amounts of commercial and industrially guided land in the City's future growth area (2030 and draft 2040 Comprehensive Land Use Plan). As municipal services are extended to the east, and as the City annexes land towards the east, more land will become available for Sexually Oriented Businesses to locate.

- 58.88% (1,174.056 acres) of the City's land is zoned residential (R1, R2, R3, R4, R5 & PUD)
- 9.77% (194.914 acres) of the City's land is zoned commercial (B1, B2, B3, B4, B5 & PUD)
- 0% of the City's land is zoned industrial
- Of the 194.914 acres that are currently zoned commercial, 40.893 acres (20.980%) is available for Sexually Oriented Uses.

Staff does recommend one minor change to the current ordinance, and that is to remove the requirement that Sexually Oriented Businesses be setback at least 200' from trails. The reason being is that trails are planned adjacent to all arterial and collector roadways, and this would automatically eliminate all of the eligible sites. Staff is also concerned that there is some room for interpretation with the definition of a trail. For example, does a trail include all sidewalks in the City?

### **City Attorney Recommendation**

The City Attorney prepared a very informative memorandum for the City of Monticello in 2011 regarding Adult Uses, which is included as an attachment to this memorandum. Although the memorandum is a bit dated, it contains a lot of pertinent and valuable information. The City Attorney has reviewed the analysis performed by staff and has also opined that the 2.05% of land area available for Sexually Oriented Businesses is adequate and defensible. However, the City Attorney recommends that the current locations available for sexually oriented businesses within the City not be reduced and that the City consider adding additional locations as commercial and industrial areas are added to the City. The City Attorney also concurs with the recommendation to remove the requirement that Sexually Oriented Businesses be setback at least 200' from trails.

### **Requested Action**

Staff is seeking feedback and comments from the Commission on the information provided. Staff is also seeking a recommendation from the Planning Commission regarding removing the requirement that Sexually Oriented Businesses be setback at least 200' from trails. This proposed change requires a public hearing before the City's Planning Commission and approval by the City Council.

### **Attachments**

- Definitions Associated with Sexually Oriented Businesses
- Various Maps Associated with Analysis
- Zoning Regulations of Adult Uses, League of MN Cities (1 page)
- February 23, 2011 Memorandum by City Attorney Andrea McDowell Poehler (7 pages)
- Court of Appeals of Minnesota, City of Elko vs. Albert LaFontaine (9 pages)

**ZONING ORDINANCE DEFINITIONS  
ASSOCIATED WITH SEXUALLY ORIENTED USES**

SEXUALLY ORIENTED BUSINESS: A sexually oriented arcade; sexually oriented bookstore; sexually oriented video store; sexually oriented cabaret; sexually oriented conversation/rap parlor; sexually oriented massage parlor; sexually oriented motel; sexually oriented motion picture theater; sexually oriented sauna; sexually oriented theater; escort agency; nude model studio; sexual encounter center; and other premises, enterprises, establishments, businesses, or places open to some or all members of the public, at or in which there is an emphasis on the presentation, display, depiction, or description of specified sexual activities or specified anatomical areas which are capable of being seen by members of the public.

Specified Anatomical Area: Includes either of the following:

- A. The human male genitals in a discernibly turgid state, even if completely and opaquely covered; or
- B. Less than completely and opaquely covered human genitals, pubic region, buttocks or a female breast below a point immediately above the top of the areola.

Specified Sexual Activities: Includes any of the following:

- A. The fondling or other erotic touching of human genitals, pubic region, buttocks, anus, or female breasts;
- B. Sex acts, normal or perverted, actual or simulated, including intercourse, oral copulation, or sodomy;
- C. Masturbation, actual or simulated; or
- D. Excretory functions as part of or in connection with any of the activities set forth in subsections A, B and C of this definition.

SEXUALLY ORIENTED BUSINESS, ACCESSORY: The offering of retail goods for sale which are classified as sexually oriented uses on a limited scale and which are incidental to the primary activity and goods and/or services offered by the establishment. Examples of such items include the sale of sexually oriented books or magazines, or the sale of and/or rental of sexually oriented motion pictures.

SEXUALLY ORIENTED BUSINESS, PRINCIPAL: The offering of goods and/or services which are classified as sexually oriented uses as a primary or sole activity of a business or establishment and include, but are not limited to, the following:

Escort: A person who, for consideration, agrees or offers to act as a companion, guide, or date for another person, or who agrees or offers to privately model lingerie or to privately perform a striptease for another person.

Escort Agency: A person or business association who furnishes, offers to furnish, or advertises to furnish escorts as one of its primary business purposes for a fee, tip, or other consideration.

Establishment: Means and includes any of the following:

- A. The opening or commencement of any sexually oriented business as a new business;

- B. The conversion of an existing business, whether or not a sexually oriented business, to any sexually oriented business;
- C. The addition of any sexually oriented business to any other existing sexually oriented business; or
- D. The relocation of any sexually oriented business.

Nude Model Studio: Any place where a person who appears in a state of nudity or displays specified anatomical area is provided to be observed, sketched, drawn, painted, sculptured, photographed, or similarly depicted by other persons who pay money or any form of consideration.

Nudity or State Of Nudity:

- A. The appearance of a human bare buttock, anus, male genitals, female genitals, or female breasts; or
- B. The state of dress which fails to opaquely cover a human buttock, anus, male genitals, female genitals, or areola of the female breast.

Seminude: A state of dress in which clothing covers no more than the genitals, pubic region, and areola of the female breast, as well as portions of the body covered by supporting straps or devices.

Sexual Encounter Center: A business or commercial enterprise that, as one of its primary business purposes, offers for any form of consideration:

- A. Physical contact in the form of wrestling or tumbling between persons of the opposite sex; or
- B. Activities between male and female persons and/or persons of the same sex when one or more of the persons is in a state of nudity or semi nudity.

Sexually Oriented Arcade: Any place to which the public is permitted or invited wherein coin operated or slug operated or electronically, electrically, or mechanically controlled still or motion picture machines, projectors, or other image producing devices are maintained to show images to five (5) or fewer persons per machine at any one time, and where the images so displayed are distinguished or characterized by the depicting or describing of specified sexual activities or specified anatomical areas.

Sexually Oriented Bookstore Or Sexually Oriented Video Store: A commercial establishment which, as a principal business purpose, offers for sale or rental for any form of consideration any one or more of the following: books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, videocassettes or video reproductions, compact disks, computer software, digital recordings, slides, or other visual representations which depict or describe specified sexual activities or specified anatomical areas, instruments, devices or paraphernalia which are designed for use in connection with specified sexual activities.

Sexually Oriented Cabaret: A nightclub, bar, restaurant, or similar commercial establishment which regularly features:

- A. Persons who appear seminude or in a state of nudity; or
- B. Live performances which are characterized by the exposure of specified anatomical areas or by specified sexual activities; or

Sexually Oriented Business Analysis

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- C. Films, motion pictures, videocassettes, slides, compact disks, computer software, digital recordings or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

Sexually Oriented Conversation/Rap Parlor: A conversation/rap parlor which excludes minors by reason of age, or which provides the service of engaging in or listening to conversation, talk, or discussion between an employee of the establishment and a customer, if such service is distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas.

Sexually Oriented Massage Parlor: A massage parlor which excludes minors by reason of age, or which provides, for any form of consideration, the rubbing, stroking, kneading, tapping, or rolling of the body, if the service provided by the massage parlor is distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas.

Sexually Oriented Motel: A hotel, motel, or similar commercial establishment which:

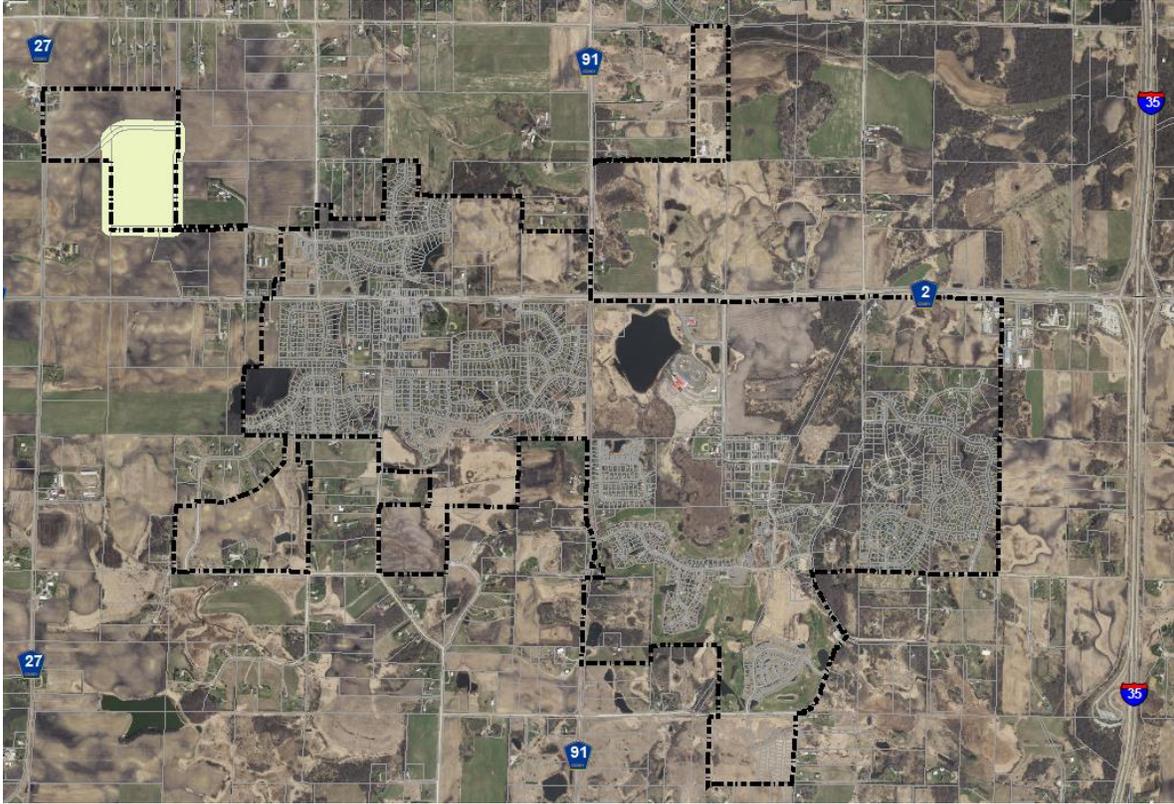
- A. Offers accommodations to the public for any form of consideration; provides patrons with closed circuit television transmissions, films, motion pictures, videocassettes, slides, or other photographic reproductions which are characterized by the depiction or description of specified sexual activities or specified anatomical areas; and has a sign visible from the public right of way which advertises the availability of this adult type of photographic reproductions; or
- B. Offers a sleeping room for rent for a period of time that is less than ten (10) hours or an hourly basis; or
- C. Allows a tenant or occupant of a sleeping room to subrent the room for a period of time that is less than ten (10) hours or an hourly basis.

Sexually Oriented Motion Picture Theater: A commercial establishment where, for any form of consideration, films, motion pictures, videocassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of specified sexual activities or specified anatomical areas.

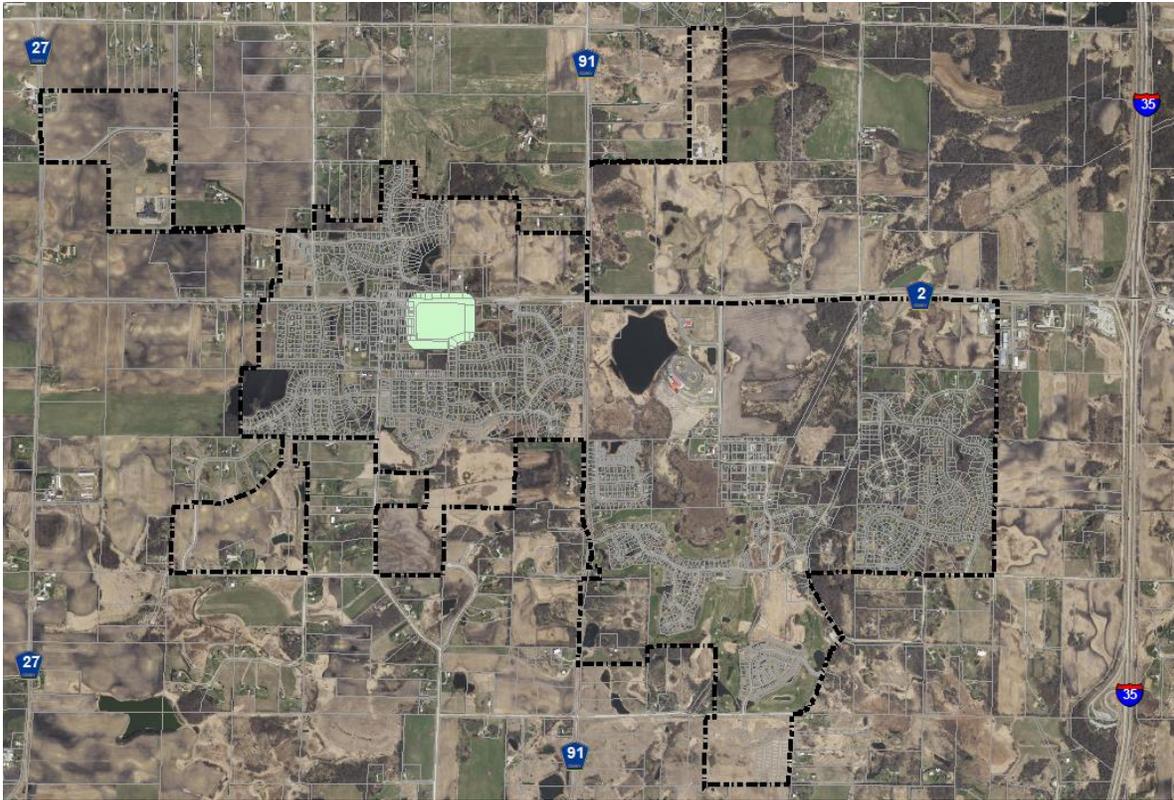
Sexually Oriented Sauna: A sauna which excludes minors by reason of age, or which provides, for any form of consideration, a steam bath or heated bathing room used for the purpose of bathing, relaxing, or reducing, utilizing steam or hot air as a cleaning, relaxing, or reducing agent, if the service provided by the sauna is distinguished or characterized by an emphasis on specified sexual activities or specified anatomical areas.

Sexually Oriented Theater: A theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear seminude or in a state of nudity or live performances which are characterized by the exposure of specified anatomical areas or specified sexual activities.

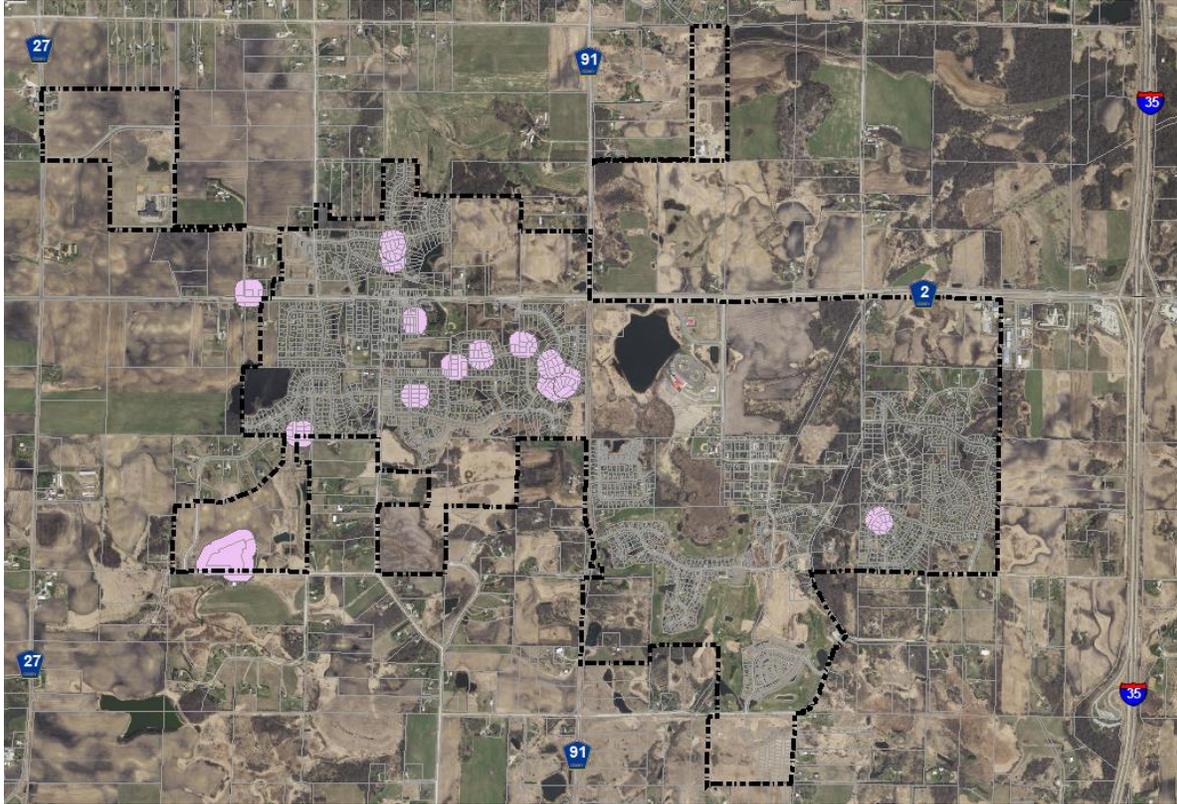
**SEXUALLY ORIENTED BUSINESS - ANALYSIS MAPS**  
School Buffer – 200'



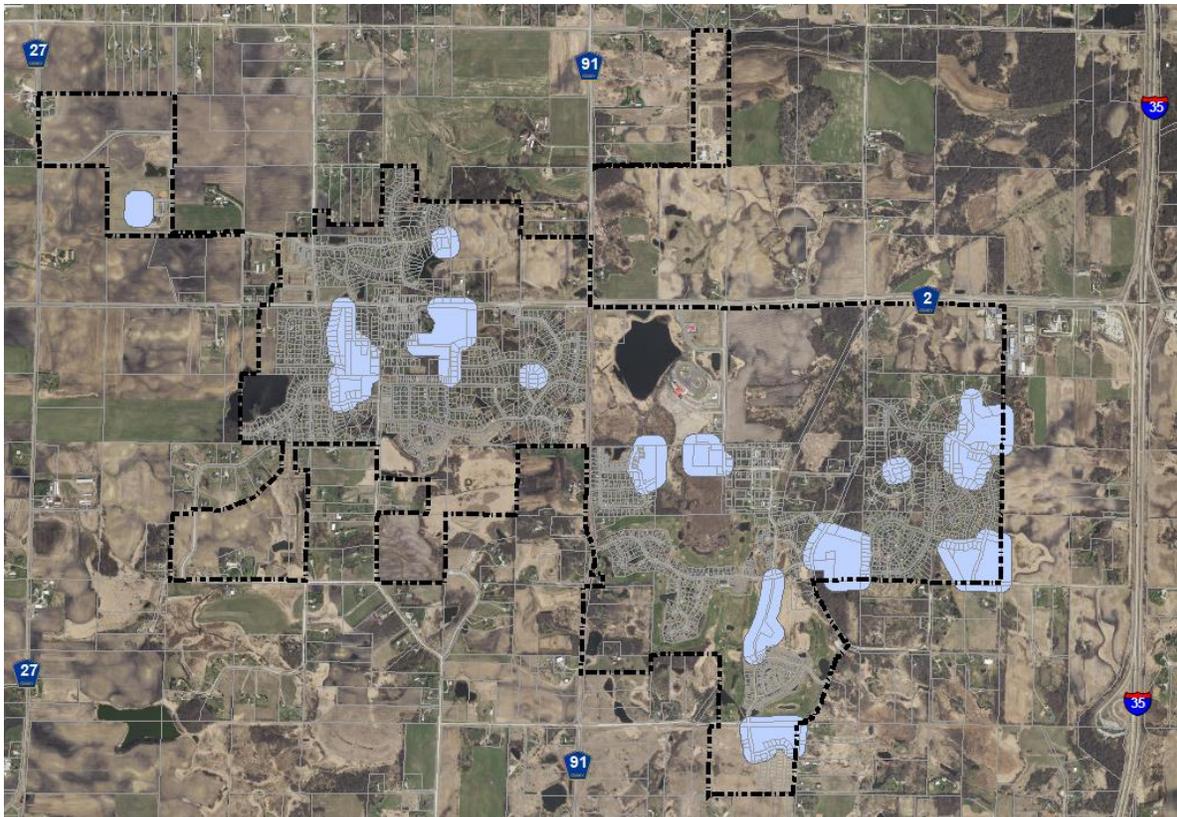
**Church Buffer – 200'**



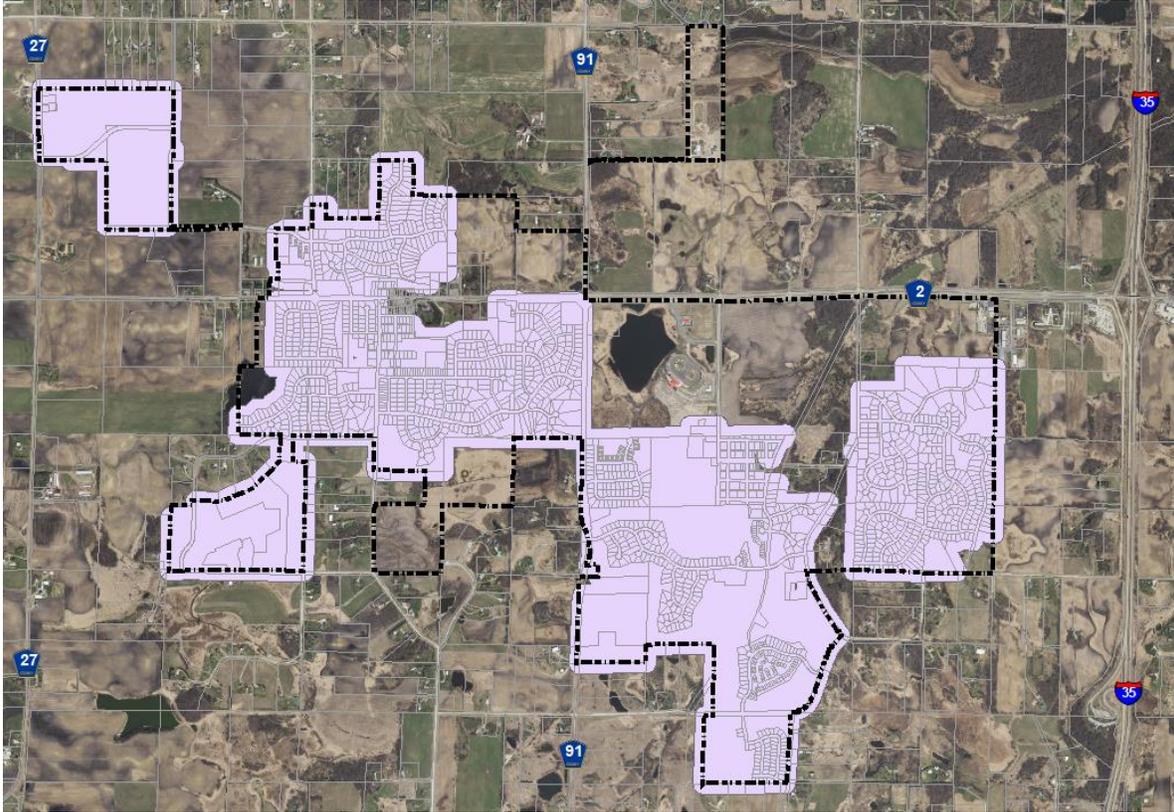
Daycare Buffer – 200'



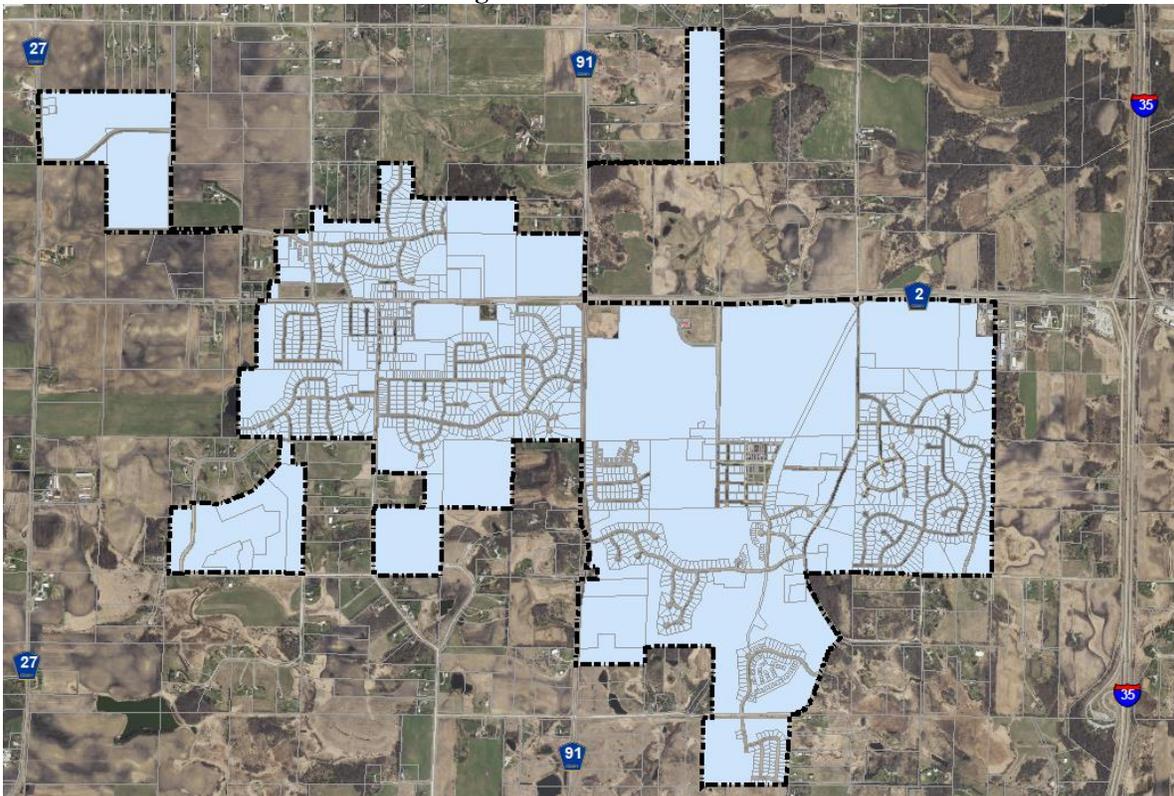
Park Buffer – 200'



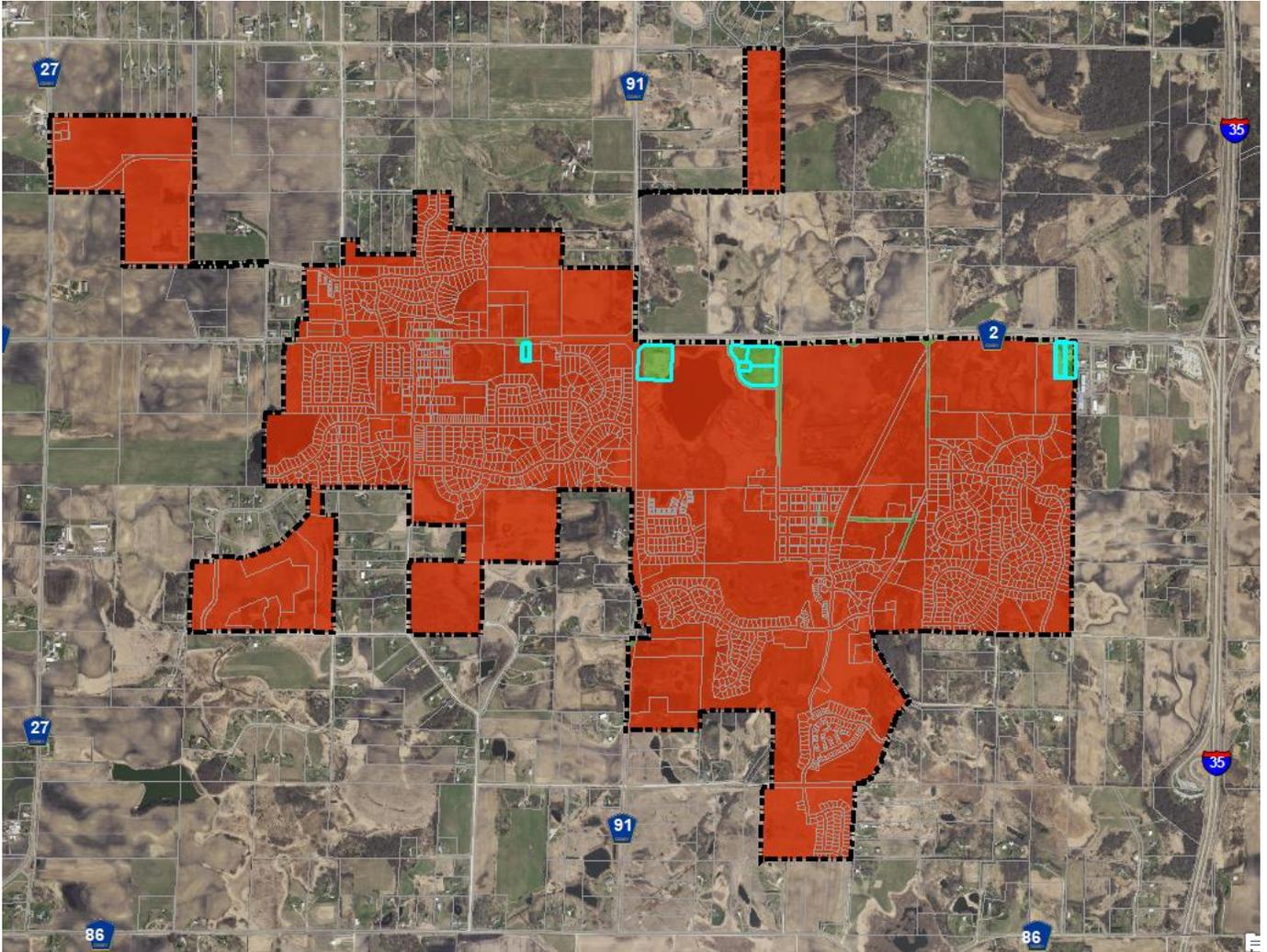
### Residential Zoning District Buffer – 200'



### Zoning Districts Not Allowed In



Locations Where Sexually Oriented Business Are Permitted  
Based on Elko New Market Zoning Ordinance 1/29/19



## RELEVANT LINKS:

[Pao Xiong v. City of Moorhead](#), 641 F.Supp.2d 822 (D.Minn. 2009).

[Minn. Stat. § 617.242](#).

[Northshor Experience, Inc. v. City of Duluth, MN](#), 442 F.Supp.2d 713 (D. Minn. 2006).

[Unconstitutional and Preempted Statutes](#).

[Minn. Stat. § 462.357, subd. 1g](#).

## G. Zoning regulation of adult uses

Adult uses typically refer to bookstores, theaters, bars, and other establishments where sexually explicit books, magazines and videos are sold or sexually explicit films or live performances are viewed. Cities can control the location of adult uses through content neutral zoning ordinances to reduce the negative secondary effects of adult uses.

A state law, enacted in 2006, required that anyone intending to open an adult use business provide notice, 60 days in advance, to the city where the business will locate. The law included numerous other provisions focused on regulation of adult use businesses. In 2006, the federal district court in Minnesota reviewed a challenge to the city of Duluth's adult use ordinance, and found the ordinance invalid based on noncompliance with the Municipal Planning Act. Since the court invalidated the ordinance, state law generally would have applied; however, the court found the constitutional challenge of the new state law legitimate (questioning whether content neutral) and granted an injunction against the city from enforcing the new law. Since then, the Revisor of Statutes has recognized the state law as substantively unconstitutional, making it so cities should not rely on state law as a mechanism for regulating adult entertainment establishments, but rather should adopt adult use ordinances supported by findings of furthering health, welfare and safety of the community.

Cities may want to consider taking proactive measure to adopting local adult use regulations. However, because of the legal complexities of adopting any regulations of adult uses, the city should involve the city attorney in the drafting of any adult use ordinances.

## H. Restricting Feedlots

Zoning ordinances that regulate feedlots must comply with certain procedures outlined in the Municipal Planning Act. When a city considers adopting a new or amended feedlot ordinance, it must notify the Minnesota Pollution Control Agency and the commissioner of Agriculture at the beginning of the process.

A local zoning ordinance that requires a setback for new feedlots from existing residential areas also must require that new residential areas have the same setbacks from existing feedlots in agricultural districts. This requirement does not pertain to a new residence built to replace an existing residence. A city may grant a variance from this requirement.

## MEMORANDUM

**TO:** Angela Schumann  
**CC:** Steve Grittman  
**FROM:** Andrea McDowell Poehler  
**DATE:** Wednesday, February 23, 2011  
**RE:** Monticello – Adult Businesses and Zoning

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Staff has asked this firm to review whether recent case law has addressed the issue of City zoning ordinances limiting the areas in which adult businesses can lawfully operate. Unfortunately there is no “bright line” test or clear answer to this question. A review of recent cases is important to gather general information on how courts are analyzing the zoning question.

### **I. General Rule**

The United States Supreme Court in the City of *Renton v. Playtime Theaters, Inc.* case in 1986 stated that the standard for determining what the proper zoning is for adult businesses is whether an ordinance allows for reasonable alternative avenues of communication. In applying this standard, the Supreme Court determined that, under the specific facts of the City of Renton, the ordinance provided reasonable alternative avenues of communication where “five percent of the entire land area” of the city was available for adult theater sites. Although cities have used the 5% figure from the *Renton* case as a benchmark, neither the United States Supreme Court, nor the Constitution mandates communities make a minimum of 5% percentage of land available for the operation of adult businesses or any specific percentage at all.

Thus, it is important for cities to review case law to understand the factors that a court may consider when determining when *reasonable alternative avenues of communication* are made available under an ordinance. Most cases look beyond a mere percentage to other factors, such as the suitability of the areas purported to be available for commercial development, to determine whether a reasonable alternative channel for adult communication exists in the community.

### **II. Total Land Available to Adult Uses Exceeds 5 percent.**

#### **A. Ordinance Found Constitutional.**

Most of the authority since *Renton* has addressed factual scenarios where more than five percent of the city’s land is available for adult uses. Where more than five percent is available for adult uses courts have seemed generally willing to find the sexually oriented business ordinance constitutional.

In the 1991 case of *Alexander v. Minneapolis*, the Eighth Circuit Court of Appeals upheld a zoning ordinance limiting adult uses to 6.6% of commercial land.

In 2006, the Minnesota Court of Appeals similarly addressed the percentage of land available for adult-use businesses under a county zoning ordinance in *County of Morrison v. Wheeler*, and found the ordinance constitutional. The adult-use business owners argued only five percent of the **total land in the county** was available for adult uses. The county responded by arguing 64 percent of all **commercial property** in the county was available for adult-use businesses. *Id.* In finding the area to represent a constitutional alternative source for operating of an adult use business, the court stated “[t]he law requires at least some chance of an alternative source; it does not require that it be immediately available and cheap.”

Quite a bit of the case law addresses zoning ordinances where *more than* five percent of a city’s land area is available for an adult business. *See e.g., D.H.L.*, 6 F. Supp. at 78-79 (finding 10.4 percent reasonable where additional factors indicated an adult business had a reasonable opportunity to operate); *Alexander v. Minneapolis*, 928 F.2d 278, 284 (8th Cir. 1991) (finding 6.6 percent reasonable); *Buzzetti v. City of New York*, 140 F.3d 134 (2d Cir. 1997) (finding 11 percent reasonable); *Specialty Malls v. City of Tampa*, 916 F. Supp. 1222, 1231 (M.D. Fla. 1996) (finding 7.5 percent adequate because the ordinance “not only [met], but exceed[ed] the First Amendment protection required by *Renton*); *Centerfold Club, Inc. v. St. Petersburg*, 969 F. Supp. 1288, 1303 (M.D. Fla. 1997) (finding 6.3 percent adequate).

## **II. Total Land Available to Adult Uses is Less Than 5 percent.**

### **A. Upheld as Constitutional**

Some courts have upheld ordinances that had the practical effect of allowing adult uses on less than five percent of total land or of land zoned for businesses use.

In *Schneider v. Ramsey*, the District Court for the District of Minnesota found an ordinance provided reasonable alternative channels for communication where 2.5 percent of the **total land** in the rural community was available for adult uses. Approximately **88 percent of the city was zoned for residential use**, meaning that approximately 35 percent of the land zoned for commercial use and **9.7 percent of the general urban area was available for adult uses**.

In *City of Crystal v. Fantasy House, Inc.*, the Minnesota Court of Appeals evaluated a permanent zoning ordinance allowing for adult use businesses in “.9 [percent] of the land in [the city] and **15 [percent] of the city’s industrial and commercial zones**.” In overruling the district court’s finding that the available land for adult uses was insufficient, the Court of Appeals noted “the limited area available [for adult uses] in [the city] is a result of the **city’s overwhelmingly residential character** and conservative planning practices.” Specifically, **only six percent of the entire city was zoned for commercial or industrial uses**. The city’s conservative planning practices meant that “any difficulty that [the business] has in locating in [the city] stems from difficulties faced by all prospective real estate purchasers [and that] the permanent ordinance provides reasonable alternative avenues of communication and is constitutional.”

Following the United States Supreme Court's holding in *Renton*, courts across the United States have found that ordinances restricting adult use to less than five percent of the area covered by the ordinance are reasonable and pass constitutional muster. *See e.g., Casanova Entm't Group, Inc. v. City of New Rochelle*, 165 Fed. Appx. 72, 73-74 (2d Cir. 2006) (upholding an ordinance that had the effect of limiting adult uses to 2.77 percent of the city); *Z.J. Gifts D-4, L.L.C. v. City of Littleton*, 311 F.3d 1220, 1240 (10th Cir. 2002), *vacated on other grounds* by 124 S. Ct. 2219, 541 U.S. 774 (holding availability of approximately one percent of city land was sufficient **where over 20 sites were available for adult businesses** and given the small population of the city and that only one adult business was located in the city)<sup>1</sup>; *North Ave. Novelties*, 88 F.3d at 445 (holding the plaintiff business's reliance on the fact that less than one to three percent of land within the city's limits was available was insufficient to find alternative locations were unavailable); *Lakeland Lounge v. City of Jackson, Michigan*, 973 F.2d 1255 (5th Cir. 1992) (holding availability of 1.2 percent of the city was sufficient); *Allno Enters. v. Baltimore County*, 10 Fed. Appx. 197 (4th Cir. 1991) (upholding zoning ordinance leaving .16 percent of total acres in county available); *M.J. Entm't Enters. v. City of Mt. Vernon*, 328 F. Supp. 2d 480 (S.D.N.Y. 2004) (granting summary judgment in favor of defendant city where .67 percent of city was available for adult uses); *S & G News, Inc. v. City of Southgate*, 638 F. Supp. 1060 (E.D. Mich. 1986) (holding 2.3 percent of the county's land area was sufficient); *Stringfellow's of New York v. City of New York*, 91 N.Y.2d 382, 403, 694 N.E.2d 407, 419 (1998) (holding **4 percent of total land zoned for business** in a city was sufficient).

In *Casanova Entertainment Group v. City of New Rochelle*, the Second Circuit Court of Appeals affirmed the district court's denial of a topless dancing nightclub's request for a preliminary injunction enjoining enforcement of local ordinances barring topless dancing at its current location. In holding the appellant nightclub did not show a substantial likelihood of success on the merits, the court noted that while only 0.04 percent of the city's total land area was available for adult-entertainment businesses, the "statistic [could] not be viewed in isolation [because the city was] **a highly developed residential suburb with less than 5 [percent] of its total land area available for any commercial use. Six lots**, representing 2.77 percent of land zoned for "[l]ight [i]ndustrial development," however, **were available** for adult-entertainment purposes. In holding that the nightclub was unlikely to succeed on the merits, the court impliedly held 2.77 percent is a sufficient alternative area where zoning ordinances restrict adult uses.

In *Stringfellow's of New York v. City of New York*, 91 N.Y.2d 382, 403, 694 N.E.2d 407, 419 (1998), New York's highest state court found a zoning ordinance limiting adult entertainment establishments in certain zoning districts was constitutionally permissible where **"about 4 [percent of the total commercial land was available] when reduced by land encumbered by properties that are unlikely to be developed for commercial use."**

## B. Struck Down as Unconstitutional

Some of the case law addressing a zoning ordinance where *less than* five percent of a city's land area is available has held the ordinance unconstitutional. *See e.g., Franklin Jefferson, Ltd. v. City of Columbus*, 244 F. Supp. 2d 83 (S.D. Ohio 2003) (finding ordinance with effect of limiting adult uses to **0.047 percent of the city's land** and allowing **11 sites for adult use** violated the United States Constitution); *International Eateries of Am., Inc. v. Broward County*, 726 F. Supp. 1556, 1567 (S.C. Fla. 1987) (finding **0.03 percent of the county's land** available to be inadequate). These examples, however, seem particularly extreme in that the cities attempted to limit adult uses to the extent that less than one half of one percent was available (0.047 percent and 0.03 percent).

In 1990 in the *Brookpark News & Books v. Cleveland* case, the Ohio Court of Appeals found that a city's zoning ordinance unconstitutional where only **3.6 acres of 48,384 acres, or seven one-hundred-thousandths of one percent (.00007 percent) of acres**, in the city were available for adult uses. The court held that "[t]his percentage of available adult usage in a city the size of Cleveland on its face is unduly restrictive and significantly curtails freedom of expression and access to protected speech."

In 2002, the Federal District Court for the Western District of Michigan noted in *Exec. Arts Studio, Inc. v. City of Grand Rapids*, that it was generally wary of finding an ordinance limiting adult uses to **less than one percent of the city's acreage or to fewer than a dozen sites** constitutional. The court concluded by finding a zoning ordinance limiting adult uses to less than one-half of one percent of the city's commercial property unconstitutional.

In 2006, the Federal District Court for the District of Minnesota weighed in the question of adult uses in *Northshor Experience, Inc. v. City of Duluth, Minn.* On the city's motion for summary judgment, the court concluded that an ordinance making **4.34% of the city available for adult uses** was not per se reasonable or constitutional because it did not provide a reasonable alternative avenue for communication. The court evaluated photographs provided by the plaintiff adult business and found **the "available land" was occupied by the airport or "heavily industrial, either lacking infrastructure and inaccessible or occupied by an existing heavy industrial use, such as a manufacturing plant or mineral piles."** As such, the court stated that its evaluation of the reasonableness of available alternative locations and the constitutionality of allowing adult uses in 4.24% of the city had to come further in the litigation.

Ultimately, this authority cannot be taken to mean that ordinances restricting adult uses to less than five percent of a city's land are per se unreasonable. Instead, the authority is better taken to mean that there is no bright line separating reasonableness from unreasonableness and additional factors necessarily inform a finding of reasonableness.

### III. No Bright Line Test.

Some Courts have been reticent to find that five percent represents a generally-applicable guidepost. As such, the courts have found that additional inquiry into a particular zoning ordinance and its affect on availability is necessary.

In *PAO Xiong v. City of Moorhead, Minn.* the District Court for the District of Minnesota held in 2009 that it was unable to determine whether an available area of 6.25% of the City's **total land area** and 29% of the city's **commercial and industrial areas** was sufficient to constitute a reasonable alternative avenue for communication. On the city's motion for summary judgment, the court found it had insufficient information because the parties disputed **whether the sites were platted and accessible by road**, the character of the areas had not been established, and the court could not determine whether the space available was sufficient to leave the "quantity and accessibility of speech substantially intact."

The plaintiff business owner in *North Ave. Novelties v. City of Chicago* relied on expert testimony to find that **less than one percent of the land** within the city limits was available for adult use. In relying on *Renton* and other adult use zoning cases, the plaintiff business owner argued the city's availability represented a smaller acreage than other approved areas. The city's expert alternatively testified that between one and three percent of the city was available for adult uses. In rejecting the plaintiff business owner's comparisons to other cases, the court held "that **the amount of acreage, standing alone, is largely irrelevant.**" The court noted that the constitutional requirement of a reasonable opportunity to do business "can, and most likely does, result in vastly different acreage percentages [between regions]." These differences, however, "in no way imply that the regions with lower percentages are acting unconstitutionally."

In *M.J. Entertainment Enterprises v. City of Mt. Vernon*, the District Court for the Southern District of New York granted summary judgment to the defendant city where a zoning ordinance made **only .67 percent of a city available** for adult uses. The court noted that **the constitution does not mandate a minimum percentage** of land be made available for certain types of speech and that the constitution only requires a location provide "a reasonable opportunity to disseminate the speech at issue." The district court judge then noted that at the time alternative avenues of communication were only found constitutionally insufficient in one of two circumstances. First, where there were no sites available. Alternatively, the judge wrote that alternatives are found insufficient where the zoning scheme requires an existing adult business to relocate to a particular area, prohibits an adult business's establishment within 1,000 feet of a school or religious institution, and the ordinance is specifically enacted to create a buffer between the existing business and a school.

### IV. Factors Considered in Determining Reasonable Alternative Avenues of Communication are Available.

Some courts have looked to a variety of factors in determining whether reasonable alternative avenues of communication have been made available.

## A. Number of Sites Available

As an alternative to evaluating the percentage of land area available for adult businesses, some courts have found that the question of constitutionally reasonable alternative locations can be answered by **the number of locations available** that could accommodate additional locations. *See e.g., Diamond v. City of Taft*, 215 F.3d 1052 (9th Cir. 2000) (holding where **seven sites were available**, and **three of those sites could house adult uses simultaneously**, based on the commercial real estate market in the city, the three sites created a constitutionally acceptable alternative); *R.V.S., LLC v. City of Rockford*, 266 F. Supp. 2d 798 (N.D. Ill. 2003), *rev'd on other grounds* by 361 F.3d 402 (7th Cir. 2004) (holding **11 or 12 sites were available** which provided a reasonable opportunity to disseminate the adult speech in this particular community); *3570 East Foothill Blvd., Inc. v. Pasadena*, 912 F. Supp. 1257, 1265 (C.D. Cal. 1995), *aff'd*, 99 F.3d 1147 (holding an ordinance **allowing for the opening of eleven additional adult businesses** was a reasonable opportunity where only one adult business currently existed).

Conversely, however, this parcel availability approach may indicate that a zoning ordinance unconstitutionally limits the ability of a sexually oriented business to operate. *See e.g., Janra Enters. v. Reno*, 818 F. Supp. 1361, 1364 (D. Nev. 1993) (finding **three parcels** insufficient).

## B. Whether Proposed Sites are Physically and Legally Available

As in *PAO Xiong*, the Federal Court of Appeals for the 2<sup>nd</sup> Circuit in *TJS of N.Y. v. Town of Smithtown* evaluated in 2010 “whether proposed sites are physically and legally available, and whether they are part of an actual commercial real estate market in the municipality.” Noting that “[s]everal factual considerations underlie the question of whether sites are part of an actual real estate market[,]” the court evaluated **the likelihood of the sites becoming available, the physical characteristics of the sites such as accessibility to the public, infrastructure, and suitability to “some generic commercial enterprise.”** Where these criteria are met, the sites “can qualify as available, **even if they are in industrial or manufacturing zones.**” Requiring the proposed adult business to develop the site does not render the site unsuitable; however, “[w]here the physical features of a site or the manner in which it has been developed are totally incompatible with *any* average commercial business” or there is a dearth of basic infrastructure critical to private development.

It is important to note, that the failure of a particular site to meet **the sizing, pricing, or logistical needs of an adult business is irrelevant** in determining the overall geographic availability for adult uses. *See e.g., TJS*, 598 F.3d at 31-32 (citing *Renton*, 475 U.S. at 54; *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993)) (stating availability of a particular site is not limited by the site’s best suitability to a “big box” enterprise); *Z.J. Gifts D-4, L.L.C.*, 311 F.3d at 1240 (holding only industrial, warehouse, office, and shopping centers were not part of relevant commercial real estate market); *Isbell v. City of San Diego*, 258 F.3d 1108, 1112 (9th Cir. 2001) (rejecting argument that relevant alternative real estate market must exclude parcels occupied by businesses like car dealership because potential profits, overhead costs, and infeasibility of use were not appropriate factors in evaluating the availability of alternative channels); *Allno Enters.*, 10 Fed. Appx. 197 (4th Cir. 1991) (holding

the unsupported assertion of an adult business operator that the owners of land would lease only to industrial operations were not an appropriate consideration in determining overall availability).

## CONCLUSION

The authority from Minnesota case law and case law outside of Minnesota indicates that multiple factors need to be taken into consideration in addition to a mere percentage of availability. Courts review the specific facts of a particular city to determine whether *alternative avenues of communication* have been made available to adult businesses, such as the percentage of total land area devoted to commercial/industrial and whether a reasonable portion of the commercial/industrial land available, whether a reasonable number of sites have been made available, and whether sites are physically and legally available. As is evident in the court cases noted above, there is no clear bright line test regarding what is “reasonable.” Courts have the hardest time finding ordinances allowing adult uses on less than one percent of land constitutional. Clearly, the “safest” area for a zoning ordinance, however, appears to be above the five percent of total land area available as approved in *Renton*. Below the five percent, courts seem to approve ordinances allowing adult uses on more than two to 2.5 percent of the land more often than not, but courts will make a detailed analysis of the factors noted above.

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# CITY OF ELKO v. Albert LaFontaine, Defendant.

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## Court of Appeals of Minnesota.

**CITY OF ELKO, Respondent, v. Emad ABED, et al., Appellants, Albert LaFontaine, Defendant.**

**No. A03-1050.**

**Decided: April 13, 2004**

Considered and decided by ANDERSON, Presiding Judge; STONEBURNER, Judge; and HUDSON, Judge. James J. Thomson, Mary D. Tietjen, Kennedy & Graven, Chartered, Minneapolis, MN, for respondent. Randall D.B. Tigue, Randall Tigue Law Office, P.A., Minneapolis, MN, for appellants.

### OPINION

In 2001, the City of Elko City Council adopted Ordinance No. 92 establishing licensing requirements for sexually oriented businesses. In 2002, the City of Elko served and filed a summons and complaint seeking an injunction to enforce the ordinance against appellants, Sphinx Properties, L.L.C., and Circus Circus, L.L.C., who were operating an adult establishment that offered nude dancing. Both parties moved for summary judgment and the district court granted summary judgment to respondent City of Elko on all claims. On appeal, appellants challenge the constitutionality of the ordinance and argue that the ordinance is a licensing scheme that is a prior restraint on speech in violation of the First Amendment. Likewise, appellants argue that the disqualification and disclosure provisions, the license and investigation fees, the distance restrictions, and the prohibition against gratuities are all impermissible prior restraints on speech. We affirm.

### FACTS

On November 19, 1999, the Elko City Council adopted Ordinance No. 79, imposing a temporary moratorium on new adult establishments in the city. The city council directed the city planner, Stephen Grittman, to review studies relating to the adverse effects of sexually oriented businesses. Grittman reviewed several studies relating to the impact of sexually oriented businesses on communities, including a report that contained information from studies conducted in Minneapolis, St. Paul, Phoenix, and Indianapolis. Copies of these studies were disseminated to both the planning commission and the city council. Grittman prepared a draft resolution and findings for the City of Elko planning commission and city council that outlined and summarized conclusions relating to the potential adverse secondary effects that sexually oriented businesses would have within the city.

Based on findings in the draft resolution, on November 21, 2000, the planning commission recommended that the city council establish zoning and license controls to minimize secondary effects of sexually oriented businesses and provide those businesses a reasonable opportunity to locate and operate in the city. On December 4, 2000, the city council accepted that recommendation and adopted Grittman's draft resolution. Based on the findings in the resolution, on August 6, 2001, the city council adopted Ordinance No. 92, establishing licensing requirements for sexually oriented businesses.

Ordinance No. 92 prohibits the operation of a sexually oriented business within the city without first obtaining a sexually oriented business license. The ordinance sets forth the procedure for obtaining a license and also provides that individuals convicted of certain crimes are disqualified from licensure for a period of time. The ordinance authorizes the city council to set an annual license and investigation fee; the license fee was set at \$5,000 and the investigation fee at \$1,500. The ordinance also contains a distance requirement for dancers, and a requirement that no gratuity may be given to any semi-nude dancer or performer.

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On December 21, 2001, appellant Sphinx Properties, L.L.C. (Sphinx), purchased a restaurant/bar in the city. Sphinx leased the property to appellant Circus Circus, L.L.C. (Circus Circus). Appellant Emad Abed (Abed) is the president and sole shareholder of both companies. Natalie Brisson (Brisson) is the vice president in charge of dance operations for Circus Circus. Brisson has been convicted of misdemeanor prostitution, thus the ordinance disqualifies her and Circus Circus from licensure for a period of time as long as she remains an officer of Circus Circus.

In September 2002, Sphinx and Circus Circus sued the city in federal district court alleging that the ordinance is unconstitutional. In October 2002, Albert LaFontaine acquired an interest in the property and claimed it was sovereign tribal land exempt from local ordinances and regulations and began offering nude dancing at the property. On November 1, 2002, the Elko police issued citations to three female dancers for dancing nude in violation of the ordinance, and issued a citation to a manager for serving alcohol while nude dancing was occurring, in violation of a separate ordinance. On November 8, 2002, the federal district court denied the city's motion for a temporary restraining order and suggested that any alleged violations of the ordinance should be heard in state court. On November 12, 2002, the city revoked Circus Circus's liquor license for non-payment of license fees and delinquent property taxes. On November 14, 2002, special agents of the Minnesota Alcohol and Gambling Enforcement Division observed alcohol continuing to be served at the property.

On November 19, 2002, the city served and filed a complaint seeking an injunction to enforce Ordinance No. 92. On November 26, 2002, the district court issued a temporary injunction prohibiting appellants from, *inter alia*, operating a sexually oriented business without a license. At some point after the temporary injunction was issued, LaFontaine ceased to have an interest in the property.

On December 13, 2002, appellants filed an answer and counterclaim challenging the constitutionality of Ordinance No. 92. On February 25, 2003, appellants moved to dissolve the temporary injunction and sought an injunction prohibiting the city from enforcing the ordinance. The district court treated the motion and city's response as cross-motions for summary judgment on the merits.

On June 3, 2003, the district court denied appellants' motion for summary judgment and granted the city's motion, thereby concluding that Ordinance No. 92 is constitutional. This appeal follows.

#### ISSUES

- I. Did the district court err in holding that Ordinance No. 92 is a content-neutral time, place and manner regulation?
- II. Did the district court err in holding that the provision providing for license disqualification based on prior criminal convictions of certain offenses is valid?
- III. Did the district court err in holding that the disclosure requirements are valid?
- IV. Did the district court err in holding that the license and investigation fees are valid?
- V. Did the district court err in holding that the distance restrictions and prohibition of gratuities are valid?

#### ANALYSIS

##### I

Summary judgment is appropriate only where there are no genuine issues of material fact and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. On appeal from summary judgment, we examine two questions: "whether there are any genuine issues of material fact and whether the lower courts erred in their application of the law." *Cummings v. Koehnen*, 568 N.W.2d 418, 420 (Minn.1997). The facts are undisputed; therefore, this court's review is whether the district court erred in its application of the law. On appeal from a grant of summary judgment, we review questions of law *de novo*. *Christensen v. Eggen*, 577 N.W.2d 221, 224 (Minn.1998). "The constitutionality of an ordinance is a question of law, which this court reviews *de novo*." *State v. Botsford*, 630 N.W.2d 11, 15 (Minn.App.2001), review denied (Minn. Sept. 11, 2001). The party opposing summary judgment "must do more than rest on mere averments." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 71 (Minn.1997).

Appellants first argue that the district court erred in analyzing the constitutionality of Ordinance No. 92 under the more lenient time, place, and manner standard, because the ordinance is a prior restraint on speech, and as such, it carries a heavy presumption against its constitutional validity. Appellants further contend that even if Ordinance No. 92 is a time, place and manner regulation, in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (2002), the United States Supreme Court heightened the evidentiary burden required to sustain such ordinances under the so-called secondary effects theory. Appellants argue that they cast doubt on the evidence the city used to support the adoption of the ordinance, and under the heightened evidentiary burden articulated in *Alameda Books*, the burden shifted to the city to produce

additional evidence to sustain the ordinance. Appellants claim that the city did not meet its burden. The city counters that nude dancing establishments are only entitled to minimal protection under the First Amendment, and that the ordinance complies with the requirements the Supreme Court has established for regulating adult uses.

It is well established that regulations enacted for the purpose of restraining speech on the basis of content presumptively violate the First Amendment.<sup>2</sup> See *Carey v. Brown*, 447 U.S. 455, 462-63, and n. 7, 100 S.Ct. 2286, 2291, and n. 7, 65 L.Ed.2d 263 (1980). By contrast, a city may regulate a First Amendment-protected use if the ordinance is: (1) a content-neutral time, place, and manner regulation; (2) designed to serve a substantial governmental interest; and (3) which does not unreasonably limit alternative avenues of communication. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47, 106 S.Ct. 925, 928, 89 L.Ed.2d 29 (1986). Thus, the *Renton* test is less stringent than that for content-related restrictions, because content-neutral speech regulations are justified without reference to the content of the regulated speech.

But determining whether an ordinance is “content-based” or “content-neutral” is not always an easy task because certain ordinances do not fit neatly into either category. That is certainly the case with the City of Elko ordinance we are confronted with here. To be sure, the ordinance is enforced through a licensing scheme that prohibits certain expressive conduct (nude dancing), unless the establishment has obtained the appropriate license and satisfied various disclosure and disqualification provisions. As such, it is not a typical content-neutral zoning ordinance where, for example, a city has limited adult entertainment to a certain geographical area. Nevertheless, the ordinance does not ban nude dancing establishments altogether, and as the district court concluded, the ordinance is aimed not at the content of the “message” being conveyed by nude dancing, but rather at the secondary effects of nude dancing establishments on the surrounding community.

Appellants forcefully argue that nude dancing is entitled to the same First Amendment protection afforded to core First Amendment activities and speech, such as, the production of newspapers, books, or films. But the United States Supreme Court has articulated what we believe is a dispositive distinction between the degree of First Amendment protection afforded to expressive conduct, such as nude dancing, and the degree of First Amendment protection afforded to other forms of speech and expressive conduct. For example, the Supreme Court has held that adult films and books receive complete First Amendment protection. See *Alameda Books, Inc.*, 535 U.S. 425, 122 S.Ct. 1728, 152 L.Ed.2d 670 (acknowledging a city ordinance regulating adult bookstores implicates First Amendment rights); *Jacobellis v. Ohio*, 378 U.S. 184, 187, 84 S.Ct. 1676, 1677, 12 L.Ed.2d 793 (1964) (“[m]otion pictures are within the ambit of constitutional guarantees of freedom of speech and of the press”). However, the Supreme Court has consistently stated that while nude dancing is entitled to some First Amendment protection, “it falls only within the outer ambit of the First Amendment's protection.” See *City of Erie v. Pap's A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000); *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991) (holding nude dancing is expressive conduct within the outer perimeters of the First Amendment, though only marginally so).

Furthermore, the Supreme Court has noted that society's interest in this type of expression is different than its interest in non-sexually explicit expression. See *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70, 96 S.Ct. 2440, 2452, 49 L.Ed.2d 310 (1976) (holding that it is manifest that society's interest in protecting this type of expression-sexually explicit materials-is of a wholly different and lesser magnitude than the interest in untrammelled political debate). The First Amendment parameters are admittedly not precise, but it is clear that nude dancing receives some lesser degree of First Amendment protection than adult films and adult books, or traditional political speech. Having established that the First Amendment only minimally protects nude dancing, our analysis now turns to whether Ordinance No. 92 is a valid time, place, and manner regulation, designed to serve a substantial governmental interest.

A city may regulate a First Amendment-protected adult entertainment establishment if the ordinance satisfies a three-prong test: the ordinance must be (1) a content-neutral time, place, and manner regulation; (2) designed to serve a substantial governmental interest; and (3) which does not unreasonably limit alternative avenues of communication.<sup>3</sup> *Renton*, 475 U.S. at 47, 106 S.Ct. at 928. We conclude that Ordinance No. 92 satisfies the three-prong test.

#### 1. Content Neutral

The ordinance satisfies the first prong of *Renton* as it is content-neutral. The Court in *Renton* held that “content-neutral” regulations are those that “are justified without reference to the content of the regulated speech.” *Renton*, 475 U.S. at 48, 106 S.Ct. at 929 (emphasis in original) (quotations omitted). In *Renton*, the Court concluded that the stated purpose of the ordinance was to address the secondary effects of adult businesses and not to suppress unpopular views; therefore the Court held the ordinance was content-neutral. *Id.*

Here, the purpose of Ordinance No. 92 is also to minimize the secondary adverse effects of sexually oriented businesses. The city council considered the relationship between sexually oriented businesses and the potential adverse effects on the community prior to adopting the ordinance. The city relied on studies that

described other cities' experiences with adult businesses and their adverse secondary effects. In addition, the ordinance states on its face that it is to neither have the "purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials." The ordinance also provides that "it is not the intent nor effect of this Ordinance to restrict or deny access by adults to sexually oriented materials protected by the First Amendment, or to deny access by the distributors and exhibitors of sexually oriented entertainment to their intended market." We conclude that Ordinance No. 92 satisfies the first prong of the Renton test, as its purpose is to minimize the secondary adverse effects of sexually oriented businesses. Therefore, the district court correctly held that Ordinance No. 92 is a content-neutral time, place, and manner regulation.

## 2. Substantial Governmental Interest

The second prong of Renton requires that the ordinance be designed to serve a substantial governmental interest. The Supreme Court has recognized that cities have an interest in attempting to preserve the quality of urban life and that interest is one that must be accorded high respect. See *Am. Mini Theaters*, 427 U.S. at 71, 96 S.Ct. at 2453. Thus, the Court has held that combating the harmful secondary effects associated with nude dancing is a substantial governmental interest. *Renton*, 475 U.S. at 50, 106 S.Ct. at 930; *Erie*, 529 U.S. at 296, 120 S.Ct. at 1395. Furthermore, in demonstrating that secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Renton*, 475 U.S. at 51-52, 106 S.Ct. at 931. But appellants argue that the Supreme Court's recent decision in *Alameda Books* heightened the Renton evidentiary standard. We disagree.

The primary issue in *Alameda Books* was the appropriate standard for determining whether an ordinance serves a "substantial government interest" under Renton. *Alameda Books*, 535 U.S. at 433, 122 S.Ct. at 1733. In *Alameda Books*, the Supreme Court rejected the Ninth Circuit's conclusion that a city must prove that the city's theory-in that case whether the adult bookstore would result in damaging secondary effects to the community-is the only theory that can plausibly explain the data the city relies on. *Id.* at 438-39, 122 S.Ct. at 1735. To the contrary, in *Alameda Books*, the Court stated:

[i]n Renton, we specifically refused to set such a high bar for municipalities that want to address merely the secondary effects of protected speech. We held that a municipality may rely on any evidence that is reasonably believed to be relevant for demonstrating a connection between speech and a substantial, independent government interest.

*Id.* at 438, 122 S.Ct. at 1736. Appellants, however, claim that the following language in *Alameda Books* heightened the Renton evidentiary standard:

[t]his is not to say that a municipality can get away with shoddy data or reasoning. The municipality's evidence must fairly support the municipality's rationale for its ordinance. If plaintiffs fail to cast direct doubt on this rationale, either by demonstrating that the municipality's evidence does not support its rationale or by furnishing evidence that disputes the municipality's factual findings, the municipality meets the standard set forth in Renton. If plaintiffs succeed in casting doubt on a municipality's rationale in either manner, the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.

*Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. at 1736.

Appellants claim that under the "new" standard in *Alameda Books*, the city must prove that the ordinance actually diminishes the secondary effects that the ordinance was designed to prevent. Appellants further claim that under *Alameda Books*, the city bears the burden of production to come forward with evidence to reestablish the validity of its initial conclusion when the city's evidence is challenged either by evidence (1) showing the studies relied upon are invalid or unreliable, or (2) that reaches a conclusion contrary to the city's studies. Appellant's position is unavailing.

First, several courts have held that *Alameda Books* did not establish a "new" evidentiary standard, contrary to appellants' contention. In finding an ordinance was valid because the challengers failed to "cast sufficient doubt," the Eighth Circuit rejected the argument that *Alameda Books* changed the evidentiary standard. *SOB, Inc. v. County of Benton*, 317 F.3d 856, 864 (8th Cir.2003). The Eighth Circuit Court of Appeals noted

Justice O'Connor, writing for the four-justice plurality in [*City of Erie v.*] *Pap's*[A.M.], afforded substantial deference to legislative judgments regarding secondary effects.

*Alameda Books* was . deferential in reviewing a zoning ordinance which had a broader impact on protected First Amendment interests. Justice Kennedy's concurring opinion in *Alameda Books* was somewhat less deferential than the plurality to local legislative judgments as to the adverse secondary effects purportedly addressed by zoning regulations. But Justice Kennedy joined the plurality opinions in *Barnes* [*v. Glen*

Theatre, Inc.] as well as [Erie ], and he did not even cite those cases in his Alameda Books concurrence, which means there is nothing to suggest that he has retreated from his votes in Barnes and [Erie ]. In these circumstances, we conclude that the Court's holding in [Erie ] is still controlling regarding the deference to be afforded local governments that decide to ban live nude dancing.

SOB, 317 F.3d at 863-64. Other courts have also held that Alameda Books did not create a new evidentiary burden and did not substantially change the second prong of the Renton test. See *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 516 (4th Cir.2002) (noting that a “city or state need carry a minimal burden to demonstrate its interest in regulation of such activity”); *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471, 481 (5th Cir.2002) (citing Alameda Books and noting that a city is not required to demonstrate with empirical data that its ordinance will successfully lower crime); *Ben's Bar, Inc. v. Village of Somerset*, 316 F.3d 702, 721-22 (7th Cir.2003) (stating Justice Kennedy's concurrence in Alameda Books “agreed with the plurality's overall conclusion that a municipality's initial burden of demonstrating a substantial government interest in regulating the adverse secondary effects associated with adult entertainment is slight”). We likewise conclude that Alameda Books did not establish a “new” evidentiary standard.

Were this court to adopt appellants' reading of Alameda Books, whenever a prospective licensee casts any doubt on the municipality's evidence, the burden would shift to the municipality to supplement the record with evidence renewing support for a theory that justifies the ordinance. Parties to these cases would be on a never-ending merry-go-round of burden shifting. Thus, after careful review of Alameda Books, we conclude that the party challenging an ordinance must cast “direct doubt” on the municipality's rationale by showing the “municipality's evidence does not support its rationale.” *Alameda Books*, 535 U.S. at 438-39, 122 S.Ct. at 1736 (emphasis added). To cast direct doubt, the challenger must present evidence that is directly contrary to the municipality's evidence, not simply produce a general study refuting all secondary effects. This is not a new or heightened evidentiary standard as this interpretation is consistent with the holding in *Renton*, which established the proper evidentiary burden of the parties.

Here, the city relied on relevant studies on the adverse secondary effects of sexually oriented businesses when it adopted Ordinance No. 92. The city used studies that described other cities' experiences as to adverse secondary effects of sexually oriented businesses, and reasonably believed that licensing regulations for sexually oriented businesses would serve to reduce potential secondary adverse effects. In addition, appellants did not produce evidence that cast direct doubt on the city's studies. Appellants merely claim that the studies relied on by the City amount to nothing more than “junk social science.” But as the district court properly noted, it appears these same or similar studies were relied on and upheld in other cases, including *Jakes, Ltd., Inc. v. City of Coates*, 284 F.3d 884 (8th Cir.2002), *Renton*, and *Alameda Books*. In sum, appellants produced one article criticizing the research methods used by municipalities in secondary-effects studies and the prior testimony of a manager of a nude dancing club in an unrelated matter. As the district court aptly noted, the article 4 submitted by appellants was submitted in SOB in that party's unsuccessful attempt to overturn an ordinance. 317 F.3d at 863. General commentary criticizing adverse secondary effect studies is not enough to cast “direct doubt” on the city's rationale for the ordinance.

Because Alameda Books did not change the *Renton* evidentiary standard for determining whether an ordinance serves a “substantial government interest,” and because Ordinance No. 92 meets the three-prong *Renton* test, we hold that Ordinance No. 92 is constitutional and accordingly affirm the decision of the district court.

## II

### Disqualification Provisions

Ordinance No. 92 authorizes the city to conduct background checks and to disqualify license applicants with certain criminal convictions and tax delinquencies. Appellants contend that such disqualification provisions are unlawful prior restraints in violation of the First Amendment. The city counters that disqualifications based on prior criminal convictions of certain crimes are valid, and notes that similar provisions have been upheld. The city further contends that the ordinance does not totally prohibit licensure based on prior convictions, but simply requires a waiting period before obtaining a license.

Section 5 of the ordinance provides, in relevant part, that licenses shall not be issued to individuals who have been convicted of certain enumerated sex crimes and where less than two years have elapsed since the date of conviction or release from confinement, if the conviction is a misdemeanor; and less than five years have elapsed since the date of conviction or release if the conviction is a felony; or if the individual has been convicted of multiple misdemeanors occurring within a 24-month period. Several courts have upheld disqualifications based on past criminal convictions. See *DLS, Inc. v. City of Chattanooga*, 107 F.3d 403, 414-15 (6th Cir.1997) (finding that the disqualification for a conviction of certain sexual offenses within the last five years is valid since the city officials' discretion is limited by objective criteria); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709-10 (5th Cir.1994) (finding that disqualification for convictions for certain sexual offenses, and disclosure of such convictions, are valid since they are correlated with the side effects that can attend these businesses and the “ends and means are substantially related”).

Appellants argue, however, that the Minnesota Supreme Court invalidated such restrictions in *Alexander v. City of St. Paul*, 303 Minn. 201, 227 N.W.2d 370 (1975). In *Alexander*, the city council revoked a theater license after an employee was convicted of selling, distributing or exhibiting an obscene motion picture. *Alexander*, 303 Minn. at 203, 227 N.W.2d at 372. The Minnesota Supreme Court noted that expression by means of motion pictures is included within the First and Fourteenth Amendments. *Id.* The court also noted that “the standards for excluding persons from engaging in the licensed activity must bear a reasonable relationship to their qualifications to engage in that activity.” *Id.* In finding the ordinance unconstitutional, the court noted that because the city was licensing a motion picture theater, “it is licensing an activity protected by the First Amendment, and as a result the power of the city is more limited than when the city licenses activities which do not have First Amendment protection.” *Id.* at 227, 227 N.W.2d at 373-74. Of particular significance to our analysis here, the court also held that revoking a license for a past conviction related to obscenity denies the person the ability to exercise a constitutionally protected right because of a past abuse of that right. *Id.* at 206, 227 N.W.2d at 373.

But *Alexander* is distinguishable on several grounds. First, *Alexander* involved the licensure of motion picture theaters—a category of expression not subject to the limiting language used by the Supreme Court in analyzing nude dancing ordinances.<sup>5</sup> See *Jacobellis*, 378 U.S. at 187, 84 S.Ct. at 1677 (motion pictures are within the ambit of constitutional guarantees of freedom of speech and of the press). The case law is clear that nude dancing receives a lesser degree of First Amendment protection than adult films. *Barnes*, 501 U.S. at 566, 111 S.Ct. at 2457. Secondly, Ordinance No. 92 does not deny a license for a past abuse of a constitutionally protected right, such as showing motion pictures. Rather, the city's ordinance temporarily denies a person a license for a past conviction of certain enumerated sex-crimes, such as prostitution. In addition, the city's ordinance sufficiently limits the decision-maker's discretion because the ordinance contains objective criteria enumerating the disqualifying sex crimes and limiting the period of disqualification by the severity of the crime.

Because similar disqualification provisions have been upheld and the disqualification provisions are substantially related to the city's significant governmental interest, we affirm.

### III

#### Disclosure Provisions

Appellants also argue that the disclosure requirements in Ordinance No. 92 constitute a prior restraint on freedom of expression.<sup>6</sup> The city counters that other courts have held that disclosure requirements in similar ordinances are valid.

Many other courts have upheld similar disclosure requirements. See *TK's Video*, 24 F.3d at 710 (upholding the disclosure requirement, including names, ages, and prior criminal histories); *Ellwest Stereo Theater, Inc. v. Boner*, 718 F.Supp. 1553, 1566-68 (M.D.Tenn.1989) (upholding disclosure requirement as to persons operating and managing the adult-oriented businesses, but finding the disclosure requirement as to their criminal convictions was overbroad); *Broadway Books, Inc. v. Roberts*, 642 F.Supp. 486, 493 (E.D.Tenn.1986) (upholding disclosure requirement, including criminal records). In order for the city to compel disclosure, “it is necessary that there be a substantial relationship between the information sought to be disclosed and a significant governmental interest to be furthered by such disclosure.” *Ellwest Stereo Theater*, 718 F.Supp. at 1567. The Fifth Circuit noted that requiring owners and employees to disclose information about their age, prior regulatory infractions, and sexual offenses, “substantially relates to the substantial government interest of curtailing pernicious side effects of adult businesses.” *TK's Video*, 24 F.3d at 710.

The city has a “significant governmental interest” that is furthered by the disclosures required in the ordinance.

The purpose of the ordinance is to “guard against the inception and transmission of disease” and to guard against the secondary effects of sexually oriented businesses. And, as the Fifth Circuit noted, disclosing information about owners' and employees' ages, prior regulatory infractions and sexually related criminal convictions substantially relates to the city's interests in guarding against the secondary effects of sexually oriented businesses.

Because similar disclosure requirements have been upheld, and because the disclosure requirements are substantially related to the city's significant governmental interest, we affirm.

### IV

#### License Fee Provisions

Appellants also argue that the license fee (of \$5,000) and the investigation fee (of \$1,500) are unconstitutional prior restraints on First Amendment rights. Appellants acknowledge that the city may impose a fee, but, citing *Murdock v. Pennsylvania*, 319 U.S. 105, 63 S.Ct. 870, 87 L.Ed. 1292 (1943), contend that licensing fees on adult entertainment must be reasonably related to recouping the costs of administering the licensing program. Appellants also argue that following the Supreme Court's decision in *Alameda Books*,

the municipality bears the burden of proving the reasonableness of the fees. The city counters that the license fee in the ordinance is valid and notes that the Eighth Circuit has held that the prospective licensee has the burden of proving the license fee is unreasonable. The city also argues that appellants have produced no evidence showing the fee is unreasonable or content-based.

Distinguishing core First Amendment cases such as *Murdock*, which involved the right to distribute religious leaflets, the Eighth Circuit in *Jake's* held that because nude dancing is only marginally protected by the First Amendment, adult entertainment license fees need not be reasonably related to recouping the costs of administering the licensing program. *Jake's*, 284 F.3d at 891. In addition, the *Jake's* court noted that the “prospective licensee has the burden of establishing that a license fee is unreasonable”; however, a “fee may be so large or so discriminatory as to demonstrate that it is not content-neutral.” *Id.* And, as noted earlier in this opinion, *Alameda Books*, which was decided approximately six weeks after *Jake's*, did not change the evidentiary standard municipalities must meet to satisfy the “substantial governmental interest” test. By logical extension, nothing in *Alameda Books* shifts the burden to municipalities to establish the reasonableness of the license fee.

Nevertheless, appellants point to the Eleventh Circuit Court of Appeals, which has held that

when core First Amendment freedoms are made subject to a licensing scheme, only revenue-neutral fees may be imposed so that government is not charging for the privilege of exercising a constitutional right . [and] it is the government's burden to demonstrate that its licensing fee is reasonably related to recoupment of the costs of administering the licensing program.

*Fly Fish, Inc. v. City of Cocoa Beach*, 337 F.3d 1301, 1314 (11th Cir.2003) (citation omitted). The Eleventh Circuit also noted that at least one other circuit and several federal district courts have adopted the same analysis on licensing fees on adult entertainment businesses. *Id.* (citing *Deja Vu of Nashville, Inc. v. Metro. Gov't of Nashville*, 274 F.3d 377, 395 (6th Cir.2001); *Kentucky Rest. Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672, 691-692 (W.D.Ky.2002); *AAK, Inc. v. City of Woonsocket*, 830 F.Supp. 99, 105 (D.R.I.1993); *Ellwest Stereo Theater*, 718 F.Supp. at 1574; *Bayside Enters., Inc. v. Carson*, 450 F.Supp. 696, 704-705 (M.D.Fla.1978)). Appellants urge us to adopt the Eleventh Circuit's analysis. We decline to do so.

Instead, we adopt the Eighth Circuit's analysis regarding licensing fees for businesses that offer nude dancing because, as noted above, nude dancing receives a lesser degree of First Amendment protection. Thus, prospective licensees have the burden of proving that the fees are unreasonable. In adopting the Eighth Circuit's analysis, we acknowledge, as did the *Jake's* court, that an adult entertainment license fee may be “so large or so discriminatory as to demonstrate that it is not content neutral.” *Jake's*, 284 F.3d at 891. But here, appellants have not met their burden to show that the fees are unreasonable. The district court and the city noted that the appellants produced no evidence showing the fee is unreasonable, other than arguing that the fees are unreasonable because they are substantially higher than license fees in other cases. Although we acknowledge that the fees here are high, we cannot say that they are so large or discriminatory as to demonstrate that they are not content neutral.

V

#### Distance Restrictions and Prohibition Against Gratuities

Finally, appellants challenge the provisions in Ordinance No. 92 prohibiting any dancer from receiving gratuities and requiring dancers to be no closer than six feet from any patron. Appellants argue that the distance requirements create so-called “floating buffer zones” and note that these buffer zones have been invalidated by the United States Supreme Court. Appellants also contend that the dancers should be allowed to accept gratuities since the Supreme Court (in other contexts) has invalidated such financial disincentives to engage in constitutionally protected speech. The city counters that the distance restrictions are nearly identical to restrictions that other courts have upheld, and contends that the First Amendment protects neither the desire to dance within a certain distance nor the opportunity to receive tips. Finally, the city argues that the ordinance has a fixed buffer zone, not a floating buffer zone as appellants argue.

Section 18 of the ordinance requires that performers maintain a six-foot distance from customers while performing on a platform raised two feet from the floor where the customers sit. Section 18 also limits the manner in which dancers may solicit or accept gratuities. Several circuits have upheld similar behavioral (distance and gratuity) restrictions on dancers as reasonable, content-neutral time, place, and manner restrictions. See *Jake's*, 284 F.3d at 891-92 (six feet and no tips); *Deja Vu of Nashville*, 274 F.3d at 396-98 (three feet and finding there is no constitutional requirement that compensation come in the form of tips); *Colacurcio v. City of Kent*, 163 F.3d 545, 553 (9th Cir.1998) (ten feet), cert. denied, 529 U.S. 1053, 120 S.Ct. 1553, 146 L.Ed.2d 459 (2000); *Kev, Inc. v. Kitsap County*, 793 F.2d 1053, 1061-62 (9th Cir.1986) (ten feet and no tips).

Appellants argue, however, that similar distance restrictions have been held unconstitutional. In support of their position, appellants point us to *Schenck v. Pro-Choice Network of Western New York*, 519 U.S. 357, 117

S.Ct. 855, 137 L.Ed.2d 1 (1997), where the Supreme Court struck down a so-called “floating buffer zone” that required abortion protesters to remain 15 feet from the abortion clinic doorway and driveway entrances. The Supreme Court invalidated floating buffer zones in the abortion protest context because proximity was essential to the type of expression the protesters sought to protect. *Id.* at 377-78, 117 S.Ct. at 867. The protesters in *Schenck* attempted to persuade patients to reconsider their decision as they approached the entrance to the clinic. *Id.* It was difficult, if not impossible, to speak in a conversational manner with patients and simultaneously comply with the distance requirements. *Id.* The court concluded that the injunction lacked precision and burdened more speech than necessary. *Id.* at 380, 117 S.Ct. at 868. Appellants argue that, in a similar fashion, the entertainers will dance further away from patrons in order to assure they do not inadvertently violate the distance restrictions. The flaw in appellants’ argument is that Ordinance No. 92 is not a “floating buffer zone” as described in *Schenck*. Unlike the distance restriction in *Schenck*, the distance restriction in Ordinance No. 92 is well defined, and is confined to the “platform” where the performers may provide the entertainment. Furthermore, close proximity is not an essential element of nude dancing because the expressive content of such dancing does not depend on being at “a normal conversational distance,” as appellants imply. As the district court aptly noted, “[w]hatever constitutionally protected aspects there are in nude dancing would seem to be preserved from a distance of six feet as well as six inches.”

Because the distance restriction is well defined and sufficiently narrow, we affirm.

#### DECISION

The district court correctly concluded that Ordinance No. 92 is constitutional because nude dancing receives a lesser degree of First Amendment protection than adult films or books, and because the ordinance meets the three-prong *Renton* test. Accordingly, we affirm the district court’s grant of summary judgment to the City of Elko. In addition, we affirm the district court’s grant of summary judgment to the City of Elko with respect to the disqualification and disclosure provisions because they are substantially related to the city’s significant governmental interest. We also affirm the district court’s grant of summary judgment to the City of Elko with respect to the license and investigation fees because appellants did not meet their burden to show the fees are unreasonable, and because the fees are not so large as to demonstrate that they are not content neutral. Finally, we affirm the district court’s grant of summary judgment with respect to the distance restrictions and prohibition against gratuities because the distance restrictions are well defined and narrowly drawn and do not burden more “speech” than is necessary.

Affirmed.

I agree with the majority regarding the disposition of this appeal but concur specially because I do not believe that the activity at issue here is protected by the First Amendment.

In *U.S. v. O’Brien*, four men burned their Selective Service registration certificates in violation of the Universal Military Training and Service Act to encourage “others to adopt [their] antiwar beliefs.” 391 U.S. 367, 369-70, 88 S.Ct. 1673, 1675, 20 L.Ed.2d 672 (1968). The men were prosecuted for this violation; their defense was that it was protected “symbolic speech” because they intended to convey an idea. *Id.* at 376, 88 S.Ct. at 1678. In rejecting this argument, the Court stated, “We cannot accept the view that an apparently limitless variety of conduct can be labeled ‘speech’ whenever the person engaging in the conduct intends thereby to express an idea.” *Id.* When analyzing restrictions on so-called symbolic speech, the Court enumerated a four-part test, all parts of which must be satisfied for the legislation to be constitutional: (1) the government making the law must have the constitutional authority to do so, (2) the law must serve “an important or substantial governmental interest,” (3) the interest must not be related to the suppression of free expression, and (4) the incidental restriction on expression must be no more than is necessary to achieve the governmental interest. *Id.* at 377, 88 S.Ct. at 1679.

Four years later, in *California v. LaRue*, the Supreme Court stated that nude dancing is entitled to some constitutional protection, but observed that this form of “live entertainment” “partake[s] more of gross sexuality than of communication.” 409 U.S. 109, 118, 93 S.Ct. 390, 397, 34 L.Ed.2d 342 (1972). In *Schad v. Borough of Mount Ephraim*, the Court stated, “Entertainment, as well as political and ideological speech, is protected”; the Court continued that “an entertainment program” may not “be prohibited solely because it displays the nude human figure.” 452 U.S. 61, 65-66, 101 S.Ct. 2176, 2181, 68 L.Ed.2d 671 (1981).

The meaning of *LaRue* and *Schad* was clarified in *Barnes v. Glen Theatre, Inc.* where the Supreme Court noted, “[N]ude dancing . . . is expressive conduct within the outer perimeters of the First Amendment.” 501 U.S. 560, 565-66, 111 S.Ct. 2456, 2460, 115 L.Ed.2d 504 (1991). Unfortunately, the Supreme Court has recently reiterated this position, noting that nude dancing is “expressive conduct” falling “within the outer ambit of the First Amendment’s protection.” *City of Erie v. Pap’s A.M.*, 529 U.S. 277, 289, 120 S.Ct. 1382, 1391, 146 L.Ed.2d 265 (2000).

But the better position, and the position that does not necessitate the intellectual gymnastics created by an attempt to find what the “outer ambit” of the First Amendment means, is the position articulated by Justice Scalia in his *Barnes* concurrence where he correctly argued that statutes and ordinances prohibiting or

restricting erotic dancing are “not subject to First Amendment scrutiny at all.” Barnes at 572, 111 S.Ct. at 2463 (Scalia, J., concurring). Justice Scalia noted that there is a long history in American law of prohibiting public nudity, and it is a recent development that such laws have been thought to have First Amendment implications. Id. at 572-73, 111 S.Ct. at 2464.

It is difficult, and ultimately a useless task, to attempt to define the “outer ambit” of the First Amendment that protects erotic dancing. The better approach is to recognize that erotic dancing is solely conduct and not entitled to First Amendment protection.

#### FOOTNOTES

1. The draft resolution, Resolution No. 23, identified potential adverse secondary effects including: increased crime rates (especially sex-related crimes), depression of commercial and residential property values, and increased transiency.
2. U.S. Const. Amend. I provides: “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, or to petition the Government for a redress of grievances.” The protections of the First Amendment are made applicable to the states by the Fourteenth Amendment. Stromberg v. California, 283 U.S. 359, 368, 51 S.Ct. 532, 535, 75 L.Ed. 1117 (1931).
3. The third prong of the Renton test is not at issue in this appeal.
4. Bryant Paul, et al., Government Regulation of “Adult” Businesses Through Zoning and Anti-Nudity Ordinances: Debunking the Legal Myth of Negative Secondary Effects, 6 Comm. L. & Pol. 355 (2001).
5. Similarly, many of the other cases cited by appellants also involved adult motion picture establishments or adult bookstores-businesses also not subjected to the nude dancing constitutional standard.
6. A prospective operator of a sexually oriented business is required to execute an application form which requires applicants to disclose: their name, and any name used in the prior five years, current business address, fingerprints or social security number, name and address of the proposed business, proof of age, and information on any other licenses to operate sexually oriented businesses and the status of such licenses.

HUDSON, Judge.

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# STAFF MEMORANDUM

<b>SUBJECT:</b>	Ordinance Amendments Related to Small Wireless Facilities
<b>MEETING DATE:</b>	March 28, 2018
<b>PREPARED BY:</b>	Haley Sevening, Community Development/Administrative Intern
<b>REQUESTED ACTION:</b>	Adopt Ordinance No. 185, Ordinance No. 186, and the accompanying Summary Ordinance No. 187 Concerning Small Wireless Facilities

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND:**

In recent years, the telecommunications industry has been promoting the need to locate certain types of facilities (“small cell”) within public right of way. Such allowance basically mimics rights historically provided to electric companies, gas companies, and telecommunication companies in regard to the placement of infrastructure within public rights of ways. The 2017 state legislature eventually passed new legislation that required cities to allow small cell installations in the public right of way. The law is intended to expand broadband service coverage and accelerate delivery of service. This accelerated service is needed to address the rapidly growing consumer market and new technologies all utilizing the broadband network.

Historically, many city ordinances address large cell sites, but not small cell facilities. With the recent changes to state law, it was recommended that cities work with their attorney to review their ordinances in consideration of the new statutory permit process for the siting of small wireless facilities. It should be noted that small wireless facilities may choose to locate on private property under the current zoning regulations addressing “large cell” facilities.

The state law provides that small wireless facilities and wireless support structures (poles) are a permitted use in the right of way, except that a city may require a provider to obtain a conditional use permit to install a new wireless support structure in the right of way in a district zoned for single-family residential use. Even with a conditional use permit requirement the wireless support structure would generally be permitted subject to reasonable conditions. The new law does not give guidance on what conditions could be placed on wireless support structures in a right of way in a single-family residential zoning district. In addition, the law prohibits cities from placing maximum height limitations on wireless support structures, but limits the maximum height of wireless support structures to 50’ above ground level. Finally, the law allows cities to enforce aesthetic requirements that are reasonable, no more burdensome than those applied to other types of infrastructure deployments, and objective and published in advance.

Most of the regulations concerning small wireless facilities will be adopted as a part of a Right of Way Management Ordinance within the general City Code. However, certain aspects of these facilities implicate zoning restrictions, particularly where they may be located within residential or historic areas. As such, the City needs to adopt a companion zoning amendment, concurrent with the separate adoption of the Right of Way Ordinance.

The Planning Commission expressed their preference to not require a conditional use permit and rather address small wireless facilities solely in the City’s Right of Way Ordinance. A public hearing was held before the Planning Commission on March 26, 2019 to amend the Zoning Ordinance to exempt small wireless facilities and wireless support structures. No comments were received from the public.

## **DISCUSSION:**

Based on the information provided to the Planning Commission, the recommendations of City staff, and discussion at the meeting, the Planning Commission has unanimously recommended approval of the request to amend section 11-13-10 of the City’s Zoning Ordinance as depicted in draft Ordinance No. 185.

Staff also recommends the adoption of draft Ordinance No. 186 to regulate small wireless facilities in the Right of Way Management Ordinance and the accompanying Summary Ordinance No. 187. Because draft Ordinance No. 186 requires a Small Wireless Facility Permit, the adoption of Ordinance No. 189 amending the 2019 Fee Schedule is also necessary.

Since Staff have no better guidance for the time required to review and approve Small Wireless Facility Permit applications, the fee has been set based on the Federal Communications Commission's (FCC) maximum limits as recommended by the City Attorney's office. Draft Ordinance No. 189 will amend the 2019 Fee Schedule to include the following fees under Building Permit Fees:

**BUILDING PERMIT FEES**

Right-of-Way & Easement Fees

Small Wireless Facility Permit – Collocation	\$500 for up to 5 locations plus \$100 for each additional location
Small Wireless Facility Permit – New Structure	\$1,000 per structure

**CITY ATTORNEY RECOMMENDATION:**

The City Attorney has reviewed the staff report, the Planning Commission recommendation, and draft Ordinances No. 185, 186, 187, and 189 and has recommended approval of the draft ordinances.

**BUDGET IMPACT:**

The budget impact for this item to date is the cost of City staff time and City Attorney review time. Future budget implications will include the cost to revise the City Code and the staff time required to review and approve permit applications. The proposed fees outlined above will cover costs associated with staff time required to review and approve permit applications.

**REQUESTED ACTION:**

The City Council is being asked to adopt Ordinance No. 185 amending the Zoning Ordinance, Ordinance No. 186 amending the Rights of Way Management Ordinance and the accompanying Summary Ordinance No. 187, and Ordinance No. 189 amending the 2019 Fee Schedule concerning small wireless facilities.

**Attachments:**

- 1.4.18 Planning Commission Report
- 3.26.19 DRAFT Planning Commission Minutes
- Draft Ordinance No. 185, 186, 187, & 189
- Collocation Agreement



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## MEMORANDUM

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**TO:** PLANNING COMMISSION  
**FROM:** RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST  
**RE:** DISCUSSION REGARDING POSSIBLE ZONING ORDINANCE AMENDMENT REGARDING SMALL WIRELESS FACILITIES  
**DATE:** JANUARY 4, 2018

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### **Background / History**

During the 2017 legislative session there were changes to state statute in regards to small wireless facilities. The new legislation allows wireless data providers to locate facilities (poles, antennae, and related equipment) within public rights-of-way. This new law conveys similar rights to wireless data providers that had previously been conveyed to electric companies, gas companies, telecommunications companies, allowing their infrastructure within rights-of-ways.

Cities typically manage utilities within their rights-of-ways through establishment of a right-of-way ordinance. Title 8 Chapter 1 of Elko New Market's City Code contains regulations regarding management of public rights-of-ways within the City.

In response to the new legislation, the City Attorney's office has drafted a proposed amendment to the Title 8 Chapter 1 of the City Code (attached). Amendment to this section of the City Code is outside of the purview of the Planning Commission and will therefore be handled through action of the City Council.

The new state law provides that small wireless facilities and wireless support structures (poles) are a permitted use in the right-of-way, except that a city may require a provider to obtain a conditional use permit to install a new wireless support structure in the right-of-way in a district zoned for single-family residential use. Even with a conditional use permit requirement the wireless support structure would generally be permitted subject to reasonable conditions. The new law prohibits cities from placing maximum height limitations on wireless support structures, but limits the maximum height of wireless support structures to 50' above ground level. The new law does not give guidance on what conditions could be placed on wireless support structures in a right-of-way in a single-family residential zoning district. The following are hypothetical conditions that the City may want to consider:

- Design and color of wireless support structures must match surrounding poles
- Wires for small wireless facilities must be located within wireless support structures or be the same color as the wireless support structure.
- Require monopole design and set maximum diameter of new wireless support structures

- No display of stickers, decals, flags or signs, except warning signs or safety alters on wireless support structures
- Wireless support structures shall not be illuminated and shall not display strobe lights unless such lighting is required to regulate traffic, enhance vehicular or pedestrian safety, or by the Federal Aviation Administration, or other federal or state law or regulation that preempts local regulations
- A new wireless support structure may not be placed within 600 feet of an existing wireless support structure.

The question for the Planning Commission at this time is whether they want to require a conditional use permit for each structure that is proposed within a residential zoning district, keeping in mind that the City has no authority to deny them under state statute. The alternative to requiring a conditional use permit for structures within single-family residential districts would be to include any desired conditions in the proposed right-of-way ordinance amendment. Staff needs direction from the Planning Commission on this matter before proceeding further.

#### **Staff Recommendation**

Staff would recommend that a conditional use permit not be required and that any desired conditions for towers be incorporated into the right-of-way ordinance amendment.

#### **City Attorney Comments**

The City Attorney has drafted the amendment to the City's right-of-way ordinance, has prepared a memorandum dated December 5, 2017, and has reviewed this memorandum and has no further comments.

#### **Attachments:**

Current Zoning Ordinance 11-13 - Towers and Antennas

City Attorney Memorandum dated 12.5.17

Draft amendment to Ordinance 8-1 - Rights-of-Way Management

## **CURRENT ZONING ORDINANCE LANGUAGE TOWERS AND ANTENNAS**

### **11-13-1: PURPOSE:**

The purpose of this chapter is to establish predictable and balanced regulations for the siting and screening of wireless communications equipment, including technology associated with amateur radio services, satellite dishes, personal wireless service, radio or television transmitting antennas, public safety communication, and public utility microwave equipment in the city. These regulations are necessary to:

- A. Maximize the use of existing and approved towers and buildings to accommodate new wireless communication antennas in order to reduce the number of new towers necessary to serve the community.
- B. Ensure antennas and towers are designed, located, and constructed in accordance with all applicable code requirements to avoid potential damage to adjacent properties from failure of the antenna and tower through structural standards and setback requirements.
- C. Require antennas and tower sites to be secured in order to discourage trespassing and vandalism.
- D. Require tower equipment to be screened from the view of persons located on properties contiguous to the site and/or to be camouflaged in a manner to complement existing structures to minimize adverse visual effects of antennas and towers. (Ord. 5, 12-14-2006)

### **11-13-2: GENERAL STANDARDS:**

The following standards shall apply to all personal wireless service, public utility, microwave, radio and television broadcast transmitting, radio and television receiving, satellite dish and shortwave radio transmitting and receiving antennas:

- A. Tower Construction Requirements: All antennas and towers erected, constructed, or located within the city, including all necessary wiring, shall comply with the following requirements:
  - 1. All towers shall comply with applicable federal, state, and local regulations. (Ord. 5, 12-14-2006)
  - 2. Towers and their antennas shall be certified by a qualified and licensed professional engineer to conform with the latest structural standards and wind loading requirements of the state building code and the Electronics Industry Association and all other applicable reviewing agencies. (Ord. 5, 12-14-2006; amd. 2011 Code)
  - 3. With the exception of necessary electric and telephone service and connection lines approved by the city, no part of any antenna or tower nor any lines, cable, equipment, wires or braces in connection with either shall at any time extend across or over any part of the right of way, public street, highway, sidewalk, or property line.
  - 4. Towers and their antennas shall be designed to conform with accepted electrical engineering methods and practices and to comply with the provisions of the national electrical code.

5. All towers shall be constructed to conform with the requirements of the occupational safety and health administration.
  6. All towers shall be reasonably protected against unauthorized climbing.
  7. Antennas and towers may only be erected in accordance with applicable zoning restrictions.
  8. Towers shall be constructed of corrosive resistant metal material.
  9. Persons responsible for all communication towers and their antennas shall maintain a general liability insurance policy that provides coverage from any damage to property or injuries to persons caused by collapse of the tower. Said insurance policy shall provide coverage on an occurrence basis in an amount no less than one million dollars (\$1,000,000.00).
  10. The city may employ the services of an independent technical expert to evaluate the application for new communications towers and antennas, and the applicant shall pay all reasonable costs of such review and independent analysis.
- B. Structural Design And Installation: Structural design, mounting and installation of the antenna shall be in compliance with manufacturer's specifications and, as may be necessary, as determined by the building official, shall be verified and approved by a professional engineer.
- C. Signs And Advertising: No signage, advertising, or identification of any kind intended to be visible from the ground or other structures is permitted, except applicable warning and equipment information signage required by the manufacturer or by federal, state, or local authorities.
- D. Height Restrictions:
1. Height Determination: Except as otherwise provided in this subsection, the height of towers shall be determined by measuring the vertical distance from the tower's point of contact with the ground to the highest point of the tower, including all antennas or other attachments. When towers are mounted upon other structures, the combined height of the structure at the tower's point of attachment and tower shall meet the height restrictions of this subsection.
  2. Maximum Heights: Except as otherwise provided in this subsection, the maximum heights for towers and antennas are as follows:
    - a. In all districts and areas of the city, the maximum height of towers and antennas shall be no taller than necessary to provide the functions required, as certified by a registered electrical engineer or other qualified professional.
    - b. In all residentially zoned property, the maximum height of any tower, including all antennas and other attachments, shall be thirty five feet (35'); except, that no tower shall be in excess of a height equal to the distance from the base of the antenna and tower to the nearest overhead electrical power line which serves more than one dwelling or place of business, less five feet (5').
    - c. In all nonresidential zoning districts, the maximum height of any tower, including all antennas and other attachments, shall not exceed one foot (1') for each one foot (1') the tower is set back from residentially zoned property, up to a maximum height of one hundred eighty feet (180'),

by conditional use permit. The city council may allow towers up to two hundred feet (200') high if the applicant can demonstrate that, based upon the topography of the site and surrounding area, siting of the antenna, antenna design, surrounding tree cover and structures and/or through the use of screening, that off site views of the tower will be minimized.

3. Exceptions: The following are exceptions to the maximum height restrictions for towers:
  - a. Multiuser Towers: Multiuser towers may exceed the height limitations of this subsection by up to twenty feet (20'); provided, that if only the antennas of a single wireless communications provider will be attached to the tower at the time of application, the additional twenty feet (20') will not be used but will remain vacant for use by a second wireless communications provider.
  - b. Amateur Radio Antenna Towers: In accordance with the preemption ruling PRB1 of the federal communications commission, towers supporting amateur radio antennas that comply with all other requirements of this chapter are exempted from the height limitations of this subsection up to a total height of seventy feet (70'); provided, that such height is technically necessary to receive and broadcast amateur radio signals.
  - c. Attached Towers And Devices: Towers and other antenna devices which are attached to a structure and not freestanding may be located on residentially zoned property under the following conditions:
    - (1) The towers and antennas are located upon existing or proposed structures allowed as principal or conditional uses in the underlying zoning district and/or upon public structures; and
    - (2) The towers and antennas are limited to a height of fifteen feet (15') projecting above the structure. The city council may permit antenna heights of up to twenty five feet (25') above the structure if the applicant can demonstrate that, by a combination of antenna design, positioning of the structure and/or by screening erected or already in place on the structure, off site views of the antenna are minimized to accepted levels.
  - d. Public Utility Structures: Public utility structures, including, but not limited to, water towers, antennas, lights and signals, power and telephone poles, and poles supporting emergency warning devices.
- E. Illumination: Towers shall not be artificially illuminated unless required by law or by a governmental agency to protect the public's health and safety. When incorporated into the approved design of the tower, light fixtures used to illuminate ball fields, parking lots, or similar areas may be attached to the tower. Any lighting shall not project onto surrounding residential property.
- F. License Requirement: When applicable, proposals to erect a new antenna shall be accompanied by any required federal, state, or local agency licenses.
- G. Color And Design: Towers shall be painted silver or have a galvanized finish to reduce visual impact and shall be of a monopole design.
- H. Amateur Radio Antenna Towers: Amateur radio support structures (towers) shall be installed in accordance with the instructions furnished by the manufacturer of that tower model. Because of the

experimental nature of the amateur radio service, antennas mounted on such a tower may be modified or changed at any time so long as the published allowable load on the tower is not exceeded and the structure of the tower remains in accordance with the manufacturer's specifications.

- I. Abandoned Towers: All abandoned or unused towers shall be removed from the site, unless a time extension is approved by the city. In the event that a tower is not removed within twelve (12) months of the cessation of operations at a site, the tower, antenna or associated facilities may be removed by the city and the costs of removal assessed against the property. After the facilities are removed, the site shall be restored to its original or an improved state. (Ord. 5, 12-14-2006)

### **11-13-3: COLLOCATION/SHARING OF FACILITIES:**

- A. No new tower shall be permitted unless the applicant demonstrates that no existing tower or structure can accommodate the applicant's proposed antenna. Supporting evidence may consist of any of the following conditions:
  1. No existing towers or structures are located within the geographic area required to meet the applicant's engineering requirements.
  2. Existing towers or structures are not of sufficient height to meet the applicant's engineering requirements.
  3. Existing towers or structures do not have sufficient structural strength to support the applicant's proposed antenna and related equipment.
  4. The applicant's proposed system would cause electromagnetic interference with the system on the existing tower or structure, or the system on the existing tower or structure would cause interference with the applicant's proposed system.
  5. The fees, costs, or contractual provisions required by the owner to share an existing tower or structure or to adapt an existing tower or structure for sharing are unreasonable. Costs are considered reasonable if they conform to contractual terms standard in the industry or do not exceed the cost of new tower development.
  6. The applicant demonstrates that there are other limiting factors that render existing towers or structures unsuitable.
- B. New towers with a minimum height of one hundred twenty five feet (125') shall be designed to accommodate at least two (2) other users. New towers with a minimum height of ninety nine feet (99') shall be designed to accommodate one additional user. Towers shall also be designed to allow for future rearrangement of antennas on the tower and accept antennas mounted at different heights.
- C. The holder of a permit for a tower shall allow collocation for additional users as may be accommodated based on the tower design and shall not make access to the tower and tower site for the additional users economically unfeasible. If an additional user(s) demonstrates (through an independent arbitrator or other pertinent means, with the cost to be shared by the holder of the permit and the proposed additional user) that the holder of a tower permit has made access to such tower and tower site economically unfeasible, then the permit shall become null and void. (Ord. 5, 12-14-2006)

#### **11-13-4: ACCESSORY AND SECONDARY USE ANTENNAS:**

The following standards shall apply to all accessory and secondary use antennas including radio and television receiving antennas, satellite dishes, temporary mobile antennas (TVROs), shortwave radio dispatching antennas, or those necessary for the operation of electronic equipment including radio receivers, federally licensed amateur radio stations and television receivers:

- A. Accessory or secondary use antennas shall not be erected in any required yard (except a rear yard) or within public or private utility and drainage easements, and shall be set back a minimum of three feet (3') from all lot lines.
- B. Guywires or guywire anchors shall not be erected within public or private utility and drainage easements, and shall be set back a minimum of one foot (1') from all lot lines.
- C. Accessory or secondary use antennas and necessary support structures, monopoles or towers may extend a maximum of fifteen feet (15') above the normal height restriction for the affected zoning district, except support structures and antennas used in the amateur radio service may extend a maximum of two (2) times the normal height restriction for the affected zoning district.
- D. The installation of more than one support structure per property shall require the approval of a conditional use permit. (Ord. 5, 12-14-2006)

#### **11-13-5: PERSONAL WIRELESS SERVICE ANTENNAS:**

##### **A. Residential And Urban Reserve District Standards:**

- 1. Antennas Located Upon Public Structures Or Existing Towers: Personal wireless service antennas located upon public structures or existing towers shall require the processing of an administrative permit and shall comply with the following standards:
  - a. The applicant shall demonstrate, by providing a coverage/interference analysis and capacity analysis prepared by a professional engineer, that location of the antennas as proposed is necessary to meet the frequency reuse and spacing needs of the cellular system and to provide adequate portable telephone coverage and capacity to areas which cannot be adequately served by locating the antennas in a less restrictive district.
  - b. Transmitting, receiving and switching equipment shall be housed within an existing structure whenever possible. If a new equipment building is necessary for transmitting, receiving and switching equipment, it shall be situated in the rear yard of the principal use, shall have an exterior finish similar to the principal building, and shall be screened from view of neighboring properties and the public right of way by landscaping where appropriate. Proposed fencing shall comply with the residential fence standards<sup>1</sup>.
  - c. An administrative permit is issued in compliance with the procedures established by the city council.

2. Antennas Not Located Upon Public Structures Or Existing Towers: Personal wireless service antennas not located upon a public structure or existing tower shall require the processing of a conditional use permit and shall comply with the following standards:
  - a. The applicant shall demonstrate, by providing a coverage/interference analysis and capacity analysis prepared by a professional engineer, that location of the antennas as proposed is necessary to meet the frequency reuse and spacing needs of the cellular system and to provide adequate portable cellular telephone coverage and capacity to areas which cannot be adequately served by locating the antennas in a less restrictive district.
  - b. The antennas shall be located on an existing structure, if possible, and shall not extend more than fifteen feet (15') above the structural height of the structure to which they are attached.
  - c. If no existing structure which meets the height requirements for the antennas is available for mounting purposes, the antennas may be mounted on a single ground mounted pole; provided, that:
    - (1) The pole shall not exceed seventy five feet (75') in height.
    - (2) The setback of the pole from the nearest residential structure is not less than the height of the antenna. Exceptions to such setback may be granted only from structures on the same parcel if a qualified structural engineer specifies in writing that any collapse of the pole will occur within a lesser distance under all foreseeable circumstances.
  - d. Transmitting, receiving and switching equipment shall be housed within an existing structure whenever possible. If a new equipment building is necessary for transmitting, receiving and switching equipment, it shall be situated in the rear yard of the principal use and shall be screened from view by landscaping where appropriate. Exterior finish of such a building shall be similar to that of the principal structure on the property.
  - e. Unless the antenna is mounted on an existing structure, at the discretion of the city, a security fence not greater than eight feet (8') in height with a maximum opacity of fifty percent (50%) shall be provided around the support structure. The fence shall be of design and materials approved by the city council.
  - f. The conditional use permit provisions of section [11-3-2](#) of this title are considered and determined to be satisfied.

B. Business And Institutional District Standards:

1. Antennas Located Upon Public Structures Or Existing Towers: Personal wireless service antennas located upon public structures or existing towers shall comply with the following standards.
  - a. Transmitting, receiving and switching equipment shall be housed within an existing structure whenever possible. If a new equipment building is necessary for transmitting, receiving and switching equipment, it shall be situated in the rear yard of the principal use and shall be screened from view by landscaping where appropriate. The exterior finish for such building shall comply with the requirements for buildings in the B business districts or INS district, as may be applicable.

- b. An administrative permit is issued in compliance with the procedures established by the city council.
2. Antennas Not Located Upon Public Structures Or Existing Towers: Personal wireless service antennas not located upon public structures or existing towers shall require the processing of a conditional use permit and shall comply with the following standards:
- a. The applicant shall demonstrate, by providing a coverage/interference analysis and capacity analysis prepared by a professional engineer, that location of the antennas as proposed is necessary to meet the frequency reuse and spacing needs of the cellular system and to provide adequate portable cellular telephone coverage and capacity to areas which cannot be adequately served by locating the antennas in a less restrictive district.
  - b. The antennas shall be located on an existing structure, if possible, and shall not extend more than fifteen feet (15') above the structural height of the structure to which they are attached.
  - c. If no existing structure which meets the height requirements for the antennas is available for mounting purposes, the antennas may be mounted on a single ground mounted monopole; provided, that:
    - (1) The pole shall not exceed seventy five feet (75') in height.
    - (2) The setback of the pole from the nearest residential structure is not less than the height of the antenna. Exceptions to such setback may be granted from residential structures on the same parcel if a qualified structural engineer specifies in writing that any collapse of the pole will occur within a lesser distance under all foreseeable circumstances.
  - d. Transmitting, receiving and switching equipment shall be housed within an existing structure whenever possible. If a new equipment building is necessary for transmitting, receiving and switching equipment, it shall be situated in the rear yard of the principal use and shall be screened from view by landscaping where appropriate. The exterior finish for such building shall comply with the requirements for buildings in the B business districts.
  - e. Unless the antenna is mounted on an existing structure, at the discretion of the city, a security fence not greater than eight feet (8') in height with a maximum opacity of fifty percent (50%) shall be provided around the support structure.
  - f. The conditional use permit provisions of section [11-3-2](#) of this title are considered and determined to be satisfied.

C. Industrial District Standards:

1. Antennas Located Upon Public Structures Or Existing Towers: Personal wireless service antennas located upon public structures or existing towers shall require the processing of an administrative permit and shall comply with the following standards: An administrative permit is issued in compliance with the procedures established by the city council.

2. Antennas Not Located Upon Public Structures Or Existing Towers: Personal wireless service antennas not located upon public structures or existing towers shall require the processing of an administrative permit and shall comply with the following standards:
  - a. The antennas shall be located upon existing structures if possible.
  - b. If there is no existing structure which meets the height requirements for mounting the antennas, the antennas may be mounted upon a supporting pole or tower not exceeding one hundred sixty five feet (165') in height. Such pole or tower shall be located on a parcel having a dimension equal to the height of the pole or tower measured between the base of the pole or tower located nearest the property line and said property line, unless a qualified structural engineer specifies in writing that the collapse of the pole or tower will occur within a lesser distance under all foreseeable circumstances.
  - c. An administrative permit is issued in compliance with the procedures established by the city council. (Ord. 5, 12-14-2006)

#### **11-13-6: SATELLITE DISHES:**

- A. Residential And Urban Reserve District Standards: Single satellite dish TVROs greater than one meter (1 m) in diameter may be allowed as a conditional use within the residential zoning and urban reserve districts of the city and shall comply with the following standards:
  1. All accessory and secondary use provisions of this title are satisfactorily met.
  2. The lot on which the satellite dish antenna is located shall be of sufficient size to assure that an obstruction free receive window can be maintained within the limits of the property ownership.
  3. Except where the antenna is screened by a structure exceeding the antenna height, landscape buffering and screening shall be maintained on all sides of the satellite dish antenna in a manner in which growth of the landscape elements will not interfere with the receive window.
  4. The satellite dish antenna is not greater than three meters (3 m) in diameter.
  5. The conditional use permit provisions of section [11-3-2](#) of this title are considered and determined to be satisfied.
- B. Business, Institutional And Industrial District Standards: Commercial, private and public satellite dish transmitting or receiving antennas greater than two meters (2 m) in diameter may be allowed as a conditional use within the B business districts, INS institutional district, and I industrial district(s) of the city and shall comply with the following standards:
  1. All accessory and secondary use provisions of this title are satisfactorily met.
  2. The lot on which the satellite dish antenna is located shall be of sufficient size to assure that an obstruction free transmit-receive window or windows can be maintained within the limits of the property ownership.

3. Except where the antenna is screened by a structure exceeding the antenna height, landscape buffering and screening shall be maintained on all sides of the satellite dish antenna in a manner in which growth of the landscape elements will not interfere with the transmit-receive window.
4. The conditional use permit provisions of section [11-3-2](#) of this title are considered and determined to be satisfied. (Ord. 5, 12-14-2006)

**11-13-7: COMMERCIAL AND PUBLIC RADIO AND TELEVISION TRANSMITTING ANTENNAS; PUBLIC UTILITY MICROWAVE ANTENNAS:**

Commercial and public radio and television transmitting and public utility microwave antennas shall comply with the following standards:

- A. Such antennas shall be considered a conditional use within the industrial zoning districts of the city and shall be subject to the regulations and requirements of section [11-3-2](#) of this title. Where such antennas and/or antenna support structures are not an accessory use to a related principal use such as a television or radio studio, such antennas and/or antenna support structures shall be required to be processed as a planned unit development (PUD) according to the provisions of chapter 28, article C of this title. The city may require conditions relating to aesthetic or other issues, and may require that one or more payments in lieu of property taxes is made by the applicants and/or operators to compensate for the loss of potential property tax revenue to the city.
- B. The antennas, transmitting towers, or array of towers shall be located on a continuous parcel having a dimension equal to the height of the antenna, transmitting tower, or array of towers measured between the base of the antenna or tower located nearest a property line and said property line, unless a qualified structural engineer specifies in writing that the collapse of any antenna or tower will occur within a lesser distance under all foreseeable circumstances.
- C. Unless the antenna is mounted on an existing structure, at the discretion of the city, a fence not greater than eight feet (8') in height with a maximum opacity of fifty percent (50%) shall be provided around the support structure and other equipment. (Ord. 5, 12-14-2006)

**11-13-8: REQUIRED INFORMATION FOR CONDITIONAL USE PERMITS:**

In addition to the information required elsewhere in this title for an application for a building permit for towers and their antennas, applications for conditional use permits for such towers shall include the following supplemental information:

- A. A report from a qualified and licensed professional engineer which does the following:
  1. Describes the tower height and design including a cross section and elevation.
  2. Documents the height above grade for all potential mounting positions for collocation antennas and the minimum separation distances between antennas.
  3. Describes the tower's capacity, including the number and type of antennas that it can accommodate.
- B. For all personal wireless service towers, a letter of intent committing the tower owner and his or her successors to allow the shared use of the tower if an additional user agrees in writing to meet reasonable

terms and conditions for shared use, so long as there is no negative structural impact upon the tower and there is no disruption to the service provided.

- C. Before the issuance of a building permit, the following supplemental information shall be submitted:
1. Confirmation that the proposed tower complies with the requirements of the federal aviation administration, federal communications commission, and any appropriate state review authority or that the tower is exempt from those regulations.
  2. A report from a qualified and licensed professional engineer which demonstrates the tower's compliance with the applicable structural and electrical, but not radio frequency, standards. (Ord. 5, 12-14-2006)

**11-13-9: INSPECTIONS:**

- A. All towers may be inspected at least once each year by the building official to determine compliance with original construction standards. Deviations from original design for which a permit is obtained constitutes a violation of this chapter.
- B. Notice of violations shall be sent by registered mail to the owner of the property, and the owner shall have thirty (30) days from the date the notification is issued to make repairs. The owner shall notify the building official that the repairs have been made, and as soon as possible thereafter, another inspection shall be made and the owner notified of the results. (Ord. 5, 12-14-2006)



**CAMPBELL KNUTSON**  
Professional Association

## MEMORANDUM

**TO:** Elko New Market Planning Commission  
**FROM:** Andrea McDowell Poehler  
**DATE:** December 5, 2017  
**RE:** Small Cell Wireless Communication Facilities

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### **INTRODUCTION**

During the recent legislative session, the state adopted new regulations permitting certain wireless data providers to locate facilities (poles, antennae, and related technical support equipment) within the public right of way, subject to specific requirements. These changes were made to require accommodation of “small cell” facilities, rather than the “large cell” facilities that have been prominent in the development of the cellular telecommunications industry.

Much of the regulation of these facilities will be adopted as a part of a Right of Way ordinance within the general City Code – that ordinance is being addressed by the City Council. Certain aspects of these facilities implicate zoning restrictions, particularly where they may be located within residential or historic areas. As such, the City will need to adopt companion zoning amendments, concurrent with the separate adoption of the Right of Way ordinance.

### **DISCUSSION**

The Elko New Market Zoning Ordinance regulates various types of wireless communications facilities in the City, applying to (generally) the use of private lands for these facilities. Recently, the telecommunications industry has been promoting the need to locate certain types of facilities (“small cell”) within public right of way, similar to other utility installations such as electrical or telephone. Most cities resisted the unrestricted use of public right of way for this additional use, for both aesthetic and right of way management reasons.

Concern over the unregulated proliferation of new poles in the right of way was a part of the aesthetic issue. Placement, management, and potential interference with other existing utilities, as well as street lighting, traffic control signage, and other related issues, raised a greater concern. The state legislature eventually passed new legislation that required cities to allow these installations in the public right of way, subject to a few limitations.

Most of those limitations are built into the Right of Way ordinance, mentioned above, as a part of the general City Code. A few, however, relate to zoning ordinance regulation, and as such, separate zoning amendments will need to be considered.

The two aspects of the legislation that most directly impact zoning are as follows:

- (1) The City may require a Conditional Use Permit when such a facility is proposed in right of way that is within a residential zone or an historical district; and
- (2) The City may limit the height of the support structures (poles), but may not establish a maximum height limit of less than 50 feet. Other than the residential and historic areas, the City must consider the “small cell” installation a permitted use in the right of way, subject to certain provisions that allow for lease, permit, and rent requirements.

City staff will bring forward proposed amendments to the zoning ordinance structured to address only those requirements specific to the zoning aspects of the legislation noted above (residential district CUP and height). For all other aspects, the City’s Right of Way ordinance will provide the regulatory requirements. It should be noted that “small-cell” facilities may choose to locate on private property under the current zoning regulations addressing “large cell” facilities.

### **ACTION**

For Information Purposes Only.

**MINUTES  
CITY OF ELKO NEW MARKET  
PLANNING COMMISSION MEETING  
March 26, 2019  
7:00 PM**

**1. CALL TO ORDER**

Vice-Chairman Humphrey called the meeting of the Elko New Market Planning Commission to order at 7:00 p.m.

Commission members present: Kruckman, Humphrey, Hanson, Priebe and Ex-officio Representative Jeff Krueger

Members absent and excused: Smith and Ex-officio member Anderson

Staff Present: Community Development Specialist Christianson and Community Development Intern Haley Sevensing

**2. PLEDGE OF ALLEGIANCE**

Vice-Chairman Humphrey led the Planning Commission in the Pledge of Allegiance.

**3. APPROVAL OF AGENDA**

A motion was made by Kruckman and seconded by Priebe to approve the agenda as submitted. Motion carried: (3-0).

**4. PUBLIC COMMENT**

**A. None**

**5. ANNOUNCEMENTS**

**A. None**

**6. APPROVAL OF MINUTES**

A motion was made by Kruckman and seconded by Priebe to approve the minutes of the January 29, 2019 Planning Commission meeting as submitted. Motion carried: (3-0). Commissioner Hanson entered the meeting.

**7. PUBLIC HEARINGS**

**A. Proposed Zoning Ordinance Amendment – Sexually Oriented Businesses**

Christianson presented her staff report containing information regarding sexually oriented businesses which was also reviewed at the February, 2019 Planning Commission meeting. She noted that the Planning Commission had requested the City review current ordinances pertaining to sexually oriented businesses to ensure that the City complies with state and

federal regulation. Christianson explained that a government can impose controls on where sexually oriented businesses can locate but cannot prevent them from locating altogether because they are protected by the First Amendment. Case law has determined that having approximately 5% of the City's land area available for such uses is a reasonable benchmark.

The current ordinance was reviewed with the Planning Commission. Maps were displayed depicting where such uses are not permitted to locate, including buffer areas around residential zoning districts, schools, churches, daycare facilities, parks, and certain zoning districts. The results of the analysis were that 2.05% of the City's land area, or 40.89 acres, is currently available for sexually oriented uses to locate and a map was displayed showing those areas. It was explained that the City Attorney believes that the 2.05% is an adequate and defensible amount of land available based on the fact that Elko New Market is primarily a residentially zoned community at this time. As the City annexes more commercially and industrially zoned land, additional land will become available for such uses.

Christianson explained that one minor change to the ordinance is being recommended, and that is to remove the requirement that sexually oriented businesses be setback at least 200' from trails. The reason for the recommendation is that this would potentially preclude such uses from locating anywhere in the City which would be unconstitutional. The public hearing regarding such change was opened at 7:09 p.m., and with no comments from the public it was closed at 7:09 p.m. It was then moved by Kruckman and seconded by Hansen to recommend approval to the City Council that Section 11-5-16 (C) of the City Code be amended to remove the requirement that sexually oriented businesses be setback at least 200' from trails. Motion carried: (4-0).

## **B. Proposed Zoning Ordinance Amendment – Small Wireless Facilities**

Sevening presented her staff report and draft ordinance amendment information regarding small cell wireless equipment. She explained that during the 2017 legislative session a new law was enacted that allows small cell wireless equipment to be placed within public street rights-of-ways. The new legislation allows this equipment to locate on City-owned equipment (i.e. power poles, street lights) and allows for the installation of a 50 foot tall structure within public rights-of-ways to support an antenna array. The new law is intended to expand broadband service coverage and accelerate delivery of service which is needed to address the rapidly growing consumer market and new technologies all utilizing the broadband network.

Sevening explained that passing of the new legislation required the City to review its ordinances that pertain to such wireless facilities and structures. The Planning Commission had previously held discussion regarding small cell wireless equipment within public rights-of-way, and specifically, whether such facilities should be regulated through the City's Zoning Ordinance (Title 11 of the City Code). The Planning Commission directed Staff to address small cell wireless facilities solely in the City's Right of Way ordinance (Title 8 of the City Code) rather than the Zoning ordinance. Sevening further explained that because Chapter 13 of the Zoning Ordinance does currently regulate towers and antennas, it is necessary to make some minor adjustments to this section of the Zoning Ordinance in response to the new legislation and the Planning Commission recommendation. Sevening

presented the draft ordinance amending section 11-13-10 of the Zoning Ordinance which exempts small wireless facilities and wireless support structures from the Zoning Ordinance.

Vice-Chairman Humphrey opened the public hearing at 7:13 p.m. and with no comments from the public, the hearing was closed at 7:13 p.m. It was then moved by Hansen and seconded by Kruckman to recommend to the City Council that Section 11-13-10 of the City Code be amended to exempt small wireless facilities and wireless support structures from the Zoning Ordinance. Motion carried: (4-0).

## **8. GENERAL BUSINESS**

### **A. Review Concept Plan – Chase Real Estate**

Christianson presented information regarding possible development of a ten-acre property located in the City limits and proposed for single-family residential development. In the summer of 2018, the Planning Commission and City Council provided feedback to a previous developer regarding a proposed development and annexation on this same ten-acre property. The previous developer ultimately decided not to pursue the project, and Chase Real Estate now has a purchase agreement on the property. Chase Real Estate is now completing their necessary due diligence to determine if a residential development project is financially feasible and is seeking feedback from the Planning Commission.

Mr. Wolter, representing Chase Real Estate, has considered the previous recommendations of the Planning Commission and City Council and is requesting feedback from the Planning Commission regarding potential variances for lot sizes and widths on seven of the proposed 31 lots. He is seeking feedback before officially proceeding with preparation of grading and utility plans for the development.

Christianson explained that the developer is seeking R2 zoning, which has a minimum lot size of 8,400 square feet and a minimum lot width of 70'. She reviewed neighborhood conditions, the current and planned (2040) comprehensive plan land use guidance for the property, required setbacks, and utility issues (sanitary sewer, water, stormsewer), specifically stating that the City may require looping of the water from CSAH 2 to Park Street. She further reviewed miscellaneous design requirements including the need for a 20' landscape buffer along CSAH 2, the need to design each lot to accommodate a three-car garage, wetland buffer and setback requirements, the need for drainage and utility easements, transportation issues, the need for sidewalks within the development, and the recommendation of the Parks Commission related to development of the property.

Christianson further reviewed the request for lot size & width variances on seven of the proposed thirty-one lots, and reviewed the requirements for granting variances under City Code and State Statute. She offered an alternative design that would reduce the need for variances on two of the lots.

After discussion by the Commission regarding the proposed development and requested variances, the Commission directed City Staff to obtain official feedback regarding the amount of right-of-way dedication that Scott County will be requesting during platting of the

property. The Commission believed that the amount of right-of-way being requested by Scott County might affect the overall development layout. The Commission was generally supportive of limited variances; however, requested feedback from Scott County prior to providing official feedback regarding the variance request.

**9. MISCELLANEOUS**

**A. Community Development Updates**

There were no updates provided at the meeting.

**B. Planning Commission Questions & Comments**

There were no questions or comments from the Commission.

**10. ADJOURNMENT**

A motion was made by Kruckman and seconded by Priebe to adjourn the meeting at 8:07 p.m. Motion carried: (4-0).

Submitted by:



Renee Christianson  
Community Development Specialist

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**ORDINANCE NO. 185**

**AN ORDINANCE AMENDING TITLE 11, CHAPTER 13 OF  
THE ELKO NEW MARKET CITY CODE  
CONCERNING SMALL WIRELESS FACILITIES  
AND WIRELESS SUPPORT STRUCTURES**

THE CITY COUNCIL OF THE CITY OF ELKO NEW MARKET, MINNESOTA  
ORDAINS:

**SECTION 1.** Title 11, Chapter 13 of the Elko New Market City Code is amended by adding a new Section 11-13-10 to read as follows:

**11-13-10: SMALL WIRELESS FACILITIES AND WIRELESS SUPPORT  
STRUCTURES:**

Notwithstanding any other provision in this Title 11 of this Code to the contrary, small wireless facilities and wireless support structures as defined in Title 8, Chapter 1, of this Code and located in the public right-of-way are exempt from this Title 11 of this Code. Location and placement of small wireless facilities and wireless support structures shall be as provided in Title 8, Chapter 1 of this Code.

**SECTION 2.** This ordinance shall take effect immediately upon its passage and publication.

**ADOPTED** this 11<sup>th</sup> day of April, 2019 by the City Council for the City of Elko New Market.

**CITY OF ELKO NEW MARKET**

BY: \_\_\_\_\_  
Joe Julius, Mayor

**ATTEST:**

\_\_\_\_\_  
Thomas Terry, Acting City Clerk

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**ORDINANCE NO. 186**

**AN ORDINANCE AMENDING TITLE 8, CHAPTER 1  
OF THE ELKO NEW MARKET CITY CODE  
CONCERNING PUBLIC RIGHTS-OF-WAY MANAGEMENT**

THE CITY COUNCIL OF THE CITY OF ELKO NEW MARKET, MINNESOTA  
ORDAINS:

**SECTION 1.** Title 8, Chapter 1 of the Elko New Market City Code is hereby amended in its entirety to read as follows:

**8-1-1: PURPOSE AND SCOPE:**

In order to provide for the health, safety, well-being, and convenience of its citizens, as well as to ensure the structural integrity of its streets and the use of the rights of way, the city strives to keep its rights of way in a state of good repair and free from unnecessary encumbrances. Accordingly, the city hereby enacts this chapter relating to rights of way permits and management. This chapter imposes regulations on the placement and maintenance of equipment currently within the city rights of way or to be placed therein at a future time. This chapter is intended to complement the regulatory roles of state and federal agencies. Under this chapter, persons excavating and obstructing the rights of way will bear the financial responsibility for their impacts and for city costs incurred in administering this chapter.

**8-1-2: STATUTE AUTHORITY; INTERPRETATION:**

This chapter is created to manage and regulate the public use of the city rights of way along city roads and infrastructure pursuant to the authority granted to the city under state and federal statutory, administrative and common law. The city hereby elects to manage the rights of way under its jurisdiction. All rights of way users, including the city, are subject to the provisions in this chapter. The city is exempt from the obligation of paying for permits or other fees imposed by this chapter. This chapter shall be interpreted consistent with ~~1997 session laws, chapter 123, substantially codified in~~ Minnesota statutes sections 237.16, 237.162, 237.163, 237.79, 237.81, and 238.086 (the "act"), Minnesota statutes chapter 216D and the other laws governing applicable rights of the city and users of the rights of way as they are amended from time to time. This chapter shall also be interpreted consistent with Minnesota rules 7819.0050 - 7819.9950 as they are amended from time to time where possible. To the extent any provision of this chapter cannot be interpreted consistently with the Minnesota rules, that interpretation most consistent with the act and other applicable statutory and case law is intended. This chapter shall not be interpreted to limit the regulatory and police powers of the city to adopt and enforce general ordinances necessary to protect the health, safety, and welfare of the public. "Manage the right of way" means the authority of the city to do any or all of the following:

- A. Require registration;
- B. Require construction performance bonds and insurance coverage;
- C. Establish installation and construction standards;
- D. Establish and define location and relocation requirements for equipment and facilities;
- E. Establish coordination and timing requirements;
- F. Require rights of way users to submit, henceforth required by the city, project data reasonably necessary to allow the city to develop a right of way mapping system including GIS system information;
- G. Require rights of way users to submit, upon request of the city, existing data on the location of the user's facilities occupying the public rights of way within the city. The data may be submitted in the form maintained by the user in a reasonable time after receipt of the request based on the amount of data requested;
- H. Establish rights of way permitting requirements for access, excavating/grading, utility services, landscaping, collocation, and obstruction;
- I. Establish removal requirements for abandoned equipment or facilities, if required, in conjunction with other rights of way repair, excavation or construction; and
- J. Impose reasonable penalties for unreasonable delays in construction.

**8-1-3: DEFINITIONS:**

The following terms, when used in this chapter, shall have the meanings ascribed to them in this section:

**ADMINISTRATOR:** The city administrator or his designee.

**APPLICANT:** Any person requesting permission to excavate or obstruct a right of way.

**CITY:** The eCity of Elko New Market, Minnesota. For purposes of section [8-1-26](#) of this chapter, "city" means its elected officials, officers, employees, agents or any commission, committee or subdivision acting pursuant to lawfully delegated authority.

**CITY COST:** The actual costs incurred by the city for managing rights of way including, but not limited to, costs associated with registering of applicants; issuing, processing, and verifying right of way permit or small wireless facility permit applications; revoking right of way permits or small wireless facility permits; inspecting job sites; creating and updating mapping systems; determining the adequacy of right of way restoration; restoring work inadequately performed;

maintaining, supporting, protecting, or moving user equipment during right of way work; budget analyses; recordkeeping; legal assistance; systems analyses; and performing all of the other tasks required by this chapter, including other costs the city may incur in managing the provisions of this chapter except as expressly prohibited by law. City costs do not include payment by telecommunications right of way user for the use of the right of way, unreasonable fees of a third party contractor used by the city including fees tied to or based on customer counts, access lines, or revenues generated by the right of way or for the city, the fees and costs of litigation relating to interpretation of Minnesota Session Laws 1997, Chapter 123; Minnesota Statutes Sections 237.162 or 237.163; or any ordinance enacted under those sections, or the city fees and costs related to appeals taken pursuant to Section 8-1-28 of this chapter.

CITY INSPECTOR: Any person authorized by the city to carry out inspections related to the provisions of this chapter.

COLLOCATION: To install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing wireless support structure or utility pole that is owned privately, or by the city or other governmental unit.

DEGRADATION: The accelerated depreciation of the right of way caused by excavation in or disturbance of the right of way, resulting in the need to reconstruct such right of way earlier than would be required if the excavation did not occur.

EMERGENCY: A condition that:

- A. Poses a clear and immediate danger to life or health, or of a significant loss of property; or
- B. Requires immediate repair or replacement in order to restore service to a customer.

EQUIPMENT: Any tangible thing located in any right of way, but shall not include boulevard plantings or gardens planted or maintained in the right of way between a person's property and the street curb.

EXCAVATE: To dig into or in any way remove or physically disturb or penetrate any part of a right of way, except horticultural practices of penetrating the boulevard area to a depth of less than twelve inches (12").

EXCAVATION PERMIT: The permit which, pursuant to this chapter, must be obtained before a person may excavate in a right of way. An "excavation permit" allows the holder to excavate that part of the right of way described in such permit.

EXCAVATION PERMIT FEE: Money paid to the city by an applicant to cover the costs as provided in section [8-1-8](#) of this chapter.

IN: Over, above, in, within, on, or under a right of way when used in conjunction with right of way.

**JOINT TRENCH:** The placement of two (2) or more conductors and/or conduits owned and operated by separate utilities in the same excavation to minimize occupied space; reduce costs, disruption, and construction time; and simplify mapping and future location of the facilities.

**LOCAL REPRESENTATIVE:** The person or persons, or designee of such person or persons, authorized by a registrant to accept service and to make decisions for that registrant regarding all matters within the scope of this chapter.

**OBSTRUCT:** To place any tangible object in a right of way so as to hinder free and open passage over that or any part of the right of way.

**OBSTRUCTION PERMIT:** The permit which, pursuant to this chapter, must be obtained before a person may obstruct a right of way, allowing the holder to hinder free and open passage over the specified portion of a right of way by placing equipment described therein on the right of way for the duration specified therein.

**OBSTRUCTION PERMIT FEE:** Money paid to the city by a registrant to cover the costs as provided in section [8-1-8](#) of this chapter.

**PERFORMANCE AND RESTORATION BOND:** A performance bond or letter of credit posted to ensure the availability of sufficient funds to assure that all obligations pursuant to this chapter, including, but not limited to, right of way excavation and obstruction work, is timely and properly completed.

**PERMITTEE:** Any person to whom a permit to excavate or obstruct a right of way or collocate a small wireless facility or erect or install a wireless support structure in a right of way has been granted by the city under this chapter.

**PERSON:** Any natural or corporate person, business association or other business entity including, but not limited to, a partnership, a sole proprietorship, a political subdivision, a public or private agency of any kind, a utility, a successor or assign of any of the foregoing, or any other legal entity which has or seeks to have equipment located in any right of way.

**PROBATION:** The status of a person that has not complied with the conditions of this chapter.

**REGISTRANT:** Any person who: a) has or seeks to have its equipment located in any right of way; or b) in any way occupies or uses, or seeks to occupy or use, the right of way or any equipment located in the right of way and, accordingly, is required to register with the city.

**REGISTRATION FEE:** An amount of money paid to the city by a registrant to cover the costs of registration.

**RESTORATION FEE:** An amount of money paid to the city by a permittee to cover the cost of restoration.

**RESTORE OR RESTORATION:** The process by which an excavated or obstructed right of way

and surrounding area including, but not limited to, pavement and foundation, is returned to the same condition that existed before the commencement of excavation.

**RIGHT OF WAY:** The area on, below, or above any real property in which the city has an interest including, but not limited to, any street, road, highway, alley, sidewalk, parkway, park, skyway, or any other place, area, or real property owned by or under the control of the city, including other dedicated rights of way for travel purposes and easements for drainage, utilities, trails, or other purposes.

**RIGHT OF WAY PERMIT:** Either the excavation permit or the obstruction permit, or both, depending on the context, required by this chapter.

**SERVICE LATERAL:** An underground facility that is used to transmit, distribute, or furnish gas, electricity, communication, or water from a common source to an end use customer. A service lateral is also an underground facility that is used in the removal of wastewater, stormwater, or groundwater from a customer's premises.

**SERVICE OR UTILITY SERVICE:** A. Those services provided by a public utility as defined in Minnesota statutes section 216B.02, subdivisions 4 and 6, as they may be amended from time to time;

- B. Services of a telecommunications right of way user; including transporting of voice or data information;
- C. Service of a cable communications systems defined in Minnesota statutes chapter 238, as it may be amended from time to time;
- D. Natural gas or electric energy or telecommunications services provided by the city;
- E. Service provided by a cooperative electric association organized under Minnesota statutes chapter 308A, as it may be amended from time to time;
- F. Water and sewer, including service laterals, steam, cooling or heating services; and
- G. Privately owned utility services, including drain tiles.

**SMALL UTILITIES:** The buried facilities required to provide electricity, gas, telephone, cable TV and other telecommunications facilities to users in a subdivision or along a street. This definition is based on how these facilities are typically referred to in the industry.

**SMALL WIRELESS FACILITY:** (1) A wireless facility that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or could fit within such an enclosure; and (ii) all other wireless equipment associated with the small wireless facility provided such equipment is, in aggregate, no more than 28 cubic feet in volume, not including electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer

switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment; and (2) a micro wireless facility.

SMALL WIRELESS FACILITY PERMIT: The permit which, pursuant to this chapter, must be obtained before a person may collocate a small wireless facility or erect a wireless support structure in a right of way. A "small wireless facility permit" allows the holder to collocate a small wireless facility or install a wireless support structure at that part of the right of way described in such permit.

SMALL WIRELESS FACILITY PERMIT FEE: Money paid to the city by an applicant to cover the city costs as provided in section [8-1-8](#) of this chapter.

SUPPLEMENTARY APPLICATION: An application made to excavate or obstruct more of the right of way than allowed in, or to extend, a permit that had already been issued.

TELECOMMUNICATIONS RIGHT OF WAY USER: A person or entity owning or controlling a facility in the right of way, or seeking to own or control the same, that is used or is intended to be used for providing wireless service, or transporting telecommunications or other voice or data information. For purposes of this chapter, a cable communications system defined and regulated under Minnesota statutes chapter 238, and telecommunications activities relating to providing natural gas or electric energy services, a public utility as defined in Minnesota statutes section 216B.02, a municipality, a municipal gas or power agency organized under Minnesota statutes chapters 453 and 453A, or a cooperative electric association organized under Minnesota statutes chapter 308A, are not included in this definition for purposes of this chapter except to the extent such entity is offering wireless service. This definition shall be consistent with Minnesota statutes section 237.162, subdivision 4.

UNUSABLE EQUIPMENT: Equipment located in the right of way which has remained unused for one year and for which the registrant is unable to provide proof that it has either a plan to begin using it within the next twelve (12) months or a potential purchaser or user of the equipment.

UTILITY POLE: A pole that is used in whole or in part to facilitate telecommunications or electric service.

WIRELESS FACILITY: Equipment at a fixed location that enables the provision of wireless services between the user equipment and a wireless service network, including equipment associated with wireless service, a radio transceiver, antenna, coaxial or fiber-optic cable, regular and backup power supplies and a small wireless facility, but not including wireless support structures, wireline backhaul facilities, or cables between utility poles or wireless support structures, or not otherwise immediately adjacent to and directly associated with a specific antenna.

WIRELESS SERVICE: Any service using licensed or unlicensed wireless spectrum, including the use of Wi-Fi, whether at a fixed location or by means of a mobile device that is provided

using wireless facilities. Wireless service does not include services regulated under Title VI of the Communications Act of 1934, as amended, including cable service.

WIRELESS SUPPORT STRUCTURE: A new or existing structure in a right-of-way designed to support or capable of supporting small wireless facilities, as reasonably determined by the city.

WIRELINE BACKHAUL FACILITY: A facility used to transport communications data by wire from a wireless facility to a communications network.

**8-1-4: ADMINISTRATIVE OFFICIAL:**

The city may designate a principal city official responsible for the administration of the rights of way, rights of way permits, and the ordinances related thereto. The city may delegate any or all of the duties hereunder.

**8-1-5: REGISTRATION REQUIREMENTS:**

A. Registration Required:

1. Each person who occupies or uses, or seeks to occupy or use, the right of way or any equipment located in the right of way, including by lease, sublease or assignment, or who has, or seeks to have, equipment located in any right of way must register with the city. Registration will consist of providing application information to and as required by the city and paying a registration fee. Permit applicants may register at the time of permit application or once annually. A separate permit is required for each project. Users placing no permanent facilities in the right of way are exempt from registration but not from permit requirements.
2. No person may construct, install, repair, remove, collocate, relocate, or perform any other work on or use any equipment or any part thereof located in any right of way without first being registered with the city.

B. Registration Information:

1. Information Required: The information provided to the city at the time of registration shall include, but not be limited to:
  - a. The registrant's name, gopher one-call registration certificate number, addresses and e-mail address if applicable, and telephone and facsimile numbers.
  - b. The name, address and e-mail address, if applicable, and telephone and facsimile numbers of a local representative. The local representative or designee shall be available at all times. Current information regarding how to contact the local representative in an emergency shall be provided at the time of registration.

- c. A copy of the registrant's certificate of authority from the Minnesota public utilities commission or other authorization or approval from the applicable state or federal agency to lawfully operate, where the registrant is lawfully required to have such certificate, authorization or approval from said commission.
  - d. Such other information as the city may reasonably require.
2. Changes To Information: The registrant shall keep all of the information listed above current at all times by providing changes to the city within fifteen (15) days following the date of which the registrant has knowledge of any change.

### **8-1-6: PERMITS REQUIRED; EXEMPTIONS:**

A. Required Permits: Except as otherwise provided by city ordinance, no person may obstruct or excavate or collocate or install or place a wireless support structure in any right of way without first having obtained the appropriate right of way permit from the city to do so. The following permits may be required:

1. Excavation Permit: An excavation permit is required to allow the holder to excavate that part of the right of way described in such permit and/or to hinder free and open passage over the specified portion of the right of way by placing equipment described therein, to the extent and for the duration specified therein.
2. Obstruction Permit: An obstruction permit is required to allow the holder to hinder free and open passage over the specified portion of the right of way for activities not associated with an excavation permit by placing materials, equipment, vehicles, or other obstructions described therein on the right of way for the duration specified therein. This permit will be issued at the administrator's discretion and will be denied if a reasonable alternative to the obstruction is available.
3. Small Wireless Facility Permit: A small wireless facility permit is required by a registrant to erect or install a wireless support structure, to collocate a small wireless facility, or to otherwise install a small wireless facility in the specified portion of the right of way, to the extent specified therein, provided that such permit shall remain in effect for the length of time the facility is in use, unless lawfully revoked.

B. Exemptions From Permits:

1. Plantings Within Right Of Way: Nothing herein shall be construed to prevent persons from planting or maintaining boulevard grasses, flowers, and/or other garden plants, but not woody shrubs or trees, in the area of the right of way between their property and the street curb. Persons planting or maintaining boulevard plantings or gardens shall not be deemed to use or occupy the right of way, and shall not be required to obtain any permits or satisfy any other requirements for planting or maintaining such boulevard plantings or gardens under this chapter. However, these plantings are subject to disturbance or damage by city operations or permitted users. Required restoration in these cases will

consist only of boulevard grade turf grasses. Persons planting or maintaining vegetation in the right of way will not be compensated for damaged plantings or vegetation. Excavations for plantings deeper than twelve inches (12") are subject to the permit requirements of subsection A of this section.

2. Irrigation And Pet Containment Facilities: Nothing herein shall be construed to prevent owners of a residential or commercially zoned parcel from placing irrigation lines or pet containment wires in easements in favor of the city and located on their own property within twelve inches (12") of the surface, provided all other applicable regulations are met. The city and other permitted users will not be responsible for the location, protection, repair or replacement of facilities if city work is performed in the easement. No irrigation or pet containment facilities are allowed in any city owned right of way unless a permit is obtained under this chapter.

### **8-1-7: APPLICATION FOR PERMIT:**

Application for a permit is made to the city. Right of way permit applications shall contain, and will be considered complete only upon compliance with, the requirements of the following provisions:

- A. Registration with the city pursuant to this chapter.
- B. Submission of a completed permit application form, including all required attachments, and scaled drawings showing the location and area of the proposed project and the location of all existing and proposed equipment.
- C. Payment of all monies due the city for:
  1. Permit fees and costs due;
  2. Prior obstructions or excavations;
  3. Any loss, damage, or expense suffered by the city as a result of the applicant's prior excavations or obstructions of the rights of way or any emergency actions taken by the city; and
  4. Franchise fees, if applicable.

### **8-1-8: PERMIT FEES:**

- A. Fees Established:
  1. Excavation Permit: The excavation permit fee shall be established by the city in an amount sufficient to recover the following costs. Fees shall be listed on the schedule of fees updated and adopted annually by the city council.

- a. The city cost to administer the permit, inspect the work, and enforce provisions of this chapter and permit for each project.
  - b. The degradation of the right of way that will result from the excavation.
  - c. Restoration, if done or caused to be done by the city.
  - d. Creating and updating city maps.
2. Obstruction Permit: The obstruction permit fee shall be established by the city and shall be in an amount sufficient to recover the city's administration costs. This fee may be waived for local residents for activities at their residence at the discretion of the administrator.
3. Small Wireless Facility Permit Fee: The city shall impose a small wireless facility permit fee in an amount sufficient to recover:
    - a. city costs;
    - b. city engineering, make-ready, and construction costs associated with collocation of small wireless facilities and installation and placement of wireless support structures.
- B. Payment Of Fees: No excavation permit, ~~or~~ obstruction permit, or small wireless facility permit shall be issued without payment of all fees required prior to the issuance of such a permit unless the applicant shall agree (in a manner, amount, and substance acceptable to the city) to pay such fees within thirty (30) days of billing thereafter. Permit fees that were paid for a permit which was revoked for a breach are not refundable. Any refunded permit fees shall be less all city costs up to and including the date of refund.
- C. Use Of Fees: All obstruction, ~~and~~ excavation, and small wireless permit fees shall be used solely for city management, construction, maintenance and restoration costs of the right of way.

### **8-1-9: BOND AND INSURANCE REQUIREMENTS:**

#### **A. Bond Requirements:**

1. Performance And Restoration Bond: The performance and restoration bond required in this subsection A1 and in subsection A2 of this section and subsections [8-1-18C2b](#) and [8-1-24A2c](#) of this chapter shall be in an amount determined in the city's sole discretion, sufficient to serve as security for the full and complete performance of the obligations under this chapter, including any costs, expenses, damages, or loss the city pays or incurs because of any failure to comply with this chapter or any other applicable laws, regulations or standards. A minimum bond amount of ten thousand dollars (\$10,000.00) shall be required for all projects unless waived by the administrator. Alternative forms of

security such as cash escrow or an irrevocable letter of credit may also be accepted at the discretion of the administrator. During periods of construction, repair or restoration of rights of way or equipment in rights of way, the performance and restoration bond shall be in an amount sufficient to cover one hundred percent (100%) of the estimated cost of such work, as documented by the person proposing to perform such work, or in such lesser amounts as may be determined by the city, taking into account the amount of equipment in the right of way, the location and method of installation of the equipment, the conflict or interference of such equipment with the equipment of other persons, and the purposes and policies of this chapter. Sixty (60) days after completion of the work, the performance and restoration bond may be reduced in the sole determination of the city.

2. Additional Bond: When an excavation permit is required for purposes of installing additional equipment, and a performance and restoration bond which is in existence is insufficient with respect to the additional equipment, in the sole determination of the city, the permit applicant may be required by the city to post an additional performance and restoration bond in accordance with subsection A of this section.

B. Insurance Requirements: Before any permit shall be issued allowing work in the right of way, the applicant or registrant shall provide a certificate of insurance or self-insurance:

1. Verifying that an insurance policy has been issued to the applicant/registrant by an insurance company licensed to do business in the state of Minnesota, or a form of self-insurance acceptable to the administrator;
2. Verifying that the applicant/registrant is insured against claims for bodily injury, including death, as well as claims for property damage arising out of the: a) use and occupancy of the right of way by the registrant, its officers, agents, employees and permittees; and b) placement and use of facilities in the right of way by the registrant, its officers, agents, employees and permittees, including, but not limited to, protection against liability arising from contracts, independent contractors, products and completed operations, explosions, damage of underground facilities and collapse of property;
3. Naming the city, its officers, employees and agents, as an additional insured as to whom the coverage required herein is in force and applicable and for whom defense will be provided as to all such coverage;
4. Requiring that the administrator be notified thirty (30) days in advance of cancellation of the policy, nonrenewal or material adverse modification of a coverage term;
5. Indicating commercial general liability coverage, business automobile liability coverage, workers' compensation and umbrella coverage established by the administrator in amounts sufficient to protect the city and the public and to carry out the purposes and policies of this chapter.

## **8-1-10: ISSUANCE OF PERMIT; CONDITIONS:**

- A. Issuance: If the city determines that the applicant has satisfied the requirements of this chapter, the city may issue a permit.
- B. Conditions: The city may impose any reasonable conditions upon the issuance of a permit and the performance of the applicant thereunder in order to protect the public health, safety and welfare, to ensure the structural integrity of the right of way, to protect the property and safety of other users of the right of way, to minimize the disruption and inconvenience to the traveling public, and to otherwise efficiently manage the use of the right of way.
- C. Small Wireless Facility Conditions: In addition to subsection B, the erection or installation of a wireless support structure, the collocation of a small wireless facility, or other installation of a small wireless facility in the right of way, shall be subject to the following conditions:
- (1) A small wireless facility shall only be collocated on the particular wireless support structure, under those attachment specifications, and at the height indicated in the applicable permit application.
  - (2) No new wireless support structure installed within the right-of-way shall exceed 50 feet above ground level in height without the city's written authorization, provided that the city may impose a lower height limit in the applicable permit to protect the health, safety and welfare or to protect the right-of-way in its current use, and further provided that a registrant may replace an existing wireless support structure exceeding 50 feet above ground level in height with a structure of the same height subject to such conditions or requirements as may be imposed in the applicable permit.
  - (3) No wireless facility may extend more than 10 feet above its wireless support structure.
  - (4) Where an applicant proposes to install a new wireless support structure in the right of way, the city may impose separation requirements between such structure and any existing wireless support structure or other facilities in and around the right of way.
  - (5) Where an applicant proposes installing a new wireless support structure or replacing an existing wireless support structure, the new or replacement wireless support structure shall be of monopole design not exceeding 18 inches in diameter and compatible in design with existing wireless support structures in the area.
  - (6) The small wireless facility shall not interfere with public safety wireless telecommunications.
  - (7) Small wireless facilities in the right-of-way shall be removed and relocated at the City's request and at no cost to the City when the City determines that removal and relocation is necessary to prevent interference with (1) present or future City use of the right-of-

way for a public project; (2) the public health, safety, or welfare; or (3) the safety and convenience of travel over the right-of-way.

- (8) Small wireless facilities shall be mounted so there is vertical clearance of at least (8) eight feet between the facility and any pedestrian sidewalk.
- (9) No small wireless facilities may be located over street or parking lanes.
- (10) Small wireless facilities shall be located so as not to obstruct light fixtures. If small wireless facilities are to be located on a light pole, a lighting plan shall be submitted to demonstrate the facilities will not block light on the street or sidewalk.
- (11) Small wireless facilities and wireless support structures shall be located so as not to obstruct traffic lights, traffic signs, street signs, or wayfinding signage.
- (12) All wires servicing small wireless facilities and support facilities must be located inside the associated wireless support structure.
- (13) All small wireless facilities shall be flush with the wireless support structure it is collocated on to minimize visual impact.
- (14) Every small wireless facility shall be the same color and finish as the wireless support structure it is collocated on.
- (15) No stickers, signs, or decals shall be visible on any small wireless facility, except safety alerts required by law.
- (16) Brackets supporting small wireless facilities shall be designed to minimize the appearance and profile of the facilities. Bracket colors and materials should match the wireless support structures they are attached to.
- (17) Ground-mounted equipment associated with a small wireless facility is prohibited unless the applicant can show that ground-mounted equipment is necessary for operation of the small wireless facility. If ground-mounted equipment is necessary, it shall be placed below grade unless not technically feasible. If ground-mounted equipment is placed above grade, the design of ground equipment shall minimize its visual impact in the right-of-way. Ground-mounted equipment shall not disrupt traffic or pedestrian circulation or interfere with vehicle and pedestrian sight lines.

- (18) Where an applicant proposes collocation on a decorative wireless support structure, sign or other structure not intended to support small wireless facilities, the city may impose reasonable requirements to accommodate the particular design, appearance or intended purpose of such structure.
- (19) Where an applicant proposes to replace a wireless support structure, the city may impose reasonable restocking, replacement, or relocation requirements on the replacement of such structure.

D. Small Wireless Facility Agreement: A small wireless facility shall only be collocated on a small wireless support structure owned or controlled by the city, or any other city asset in the right of way, after applicant has executed a standard small wireless facility collocation agreement with the city. The standard collocation agreement shall require payment of the following:

1. \$150 per year for rent to collocate on the city structure;
2. \$25 per year for maintenance associated with the collocation;
3. A monthly fee for electrical service as follows:
  - a. \$73 per radio node less than or equal to 100 maximum watts;
  - b. \$182 per radio node over 100 maximum watts; or
  - c. The actual costs of electricity, if the actual costs exceed the foregoing.

The standard collocation agreement shall be in addition to, and not in lieu of, the required small wireless facility permit, provided, however that the applicant shall not be additionally required to obtain a license or franchise in order to collocate, Issuance of a small wireless facility permit does not supersede, alter or affect any then-existing agreement between the city and applicant.

E. Action on Small Wireless Facility Permit Applications:

1. Deadline for Action: The city shall approve or deny a small wireless facility permit application within 90 days after filing of such application. The small wireless facility permit, and any associated building permit application, shall be deemed approved if the city fails to approve or deny the application within the review periods established in this section.
2. Consolidated Applications. An applicant may file a consolidated small wireless facility permit application addressing the proposed collocation of up to 15 small wireless facilities, or a greater number if agreed to by the city, provided that all small wireless facilities in the application:

- a. are located within a two mile radius;
- b. consist of substantially similar equipment; and
- c. are to be placed on similar types of wireless support structures.

In rendering a decision on a consolidated permit application, the city may approve some small wireless facilities and deny others, but may not use denial of one or more permits as a basis to deny all small wireless facilities in the application.

- 3. Tolling of Deadline. The 90 day deadline for action on a small wireless facility permit application may be tolled if:
  - a. The city receives applications from one or more applicants seeking approval of permits for more than 30 small wireless facilities within a seven (7) day period. In such case, the city may extend the deadline for all such applications by 30 days by informing the affected applicants in writing of such extension.
  - b. The applicant fails to submit all required documents or information and the city provides written notice of incompleteness to the applicant within 30 days of receipt of the application. Upon submission of additional documents or information, the city shall have ten (10) days to notify the applicant in writing of any still missing information.
  - c. The city and a small wireless facility applicant agree in writing to toll the review period.

#### **8-1-11: DENIAL OF PERMIT:**

The city may, in accordance with Minnesota statutes section 237.163, subdivision 4, deny any application for a permit as provided in this section.

- A. Mandatory Denial: Except in the case of an emergency, no right of way permit will be granted:
  - 1. To any person required by section [8-1-5](#) of this chapter to be registered who has not done so;
  - 2. To any person who failed to use commercially reasonable efforts to anticipate and plan for the project;
  - 3. For any project which requires the excavation of any portion of a right of way which was constructed or reconstructed within the preceding five (5) years;
  - 4. To any person who has failed within the past three (3) years to comply or is presently not in full compliance with the requirements of this chapter;

5. To any person as to whom there exists grounds for the revocation of a permit under section [8-1-27](#) of this chapter; and
  6. If, in the sole discretion of the city, the issuance of a permit for the particular date and/or time would cause a conflict or interfere with an exhibition, celebration, festival, or any other event. The city, in exercising this discretion, shall be guided by the safety and convenience of ordinary travel of the public over the right of way, and by considerations relating to the public health, safety and welfare.
- B. Permissive Denial: The city may deny a permit in order to protect the public health, safety and welfare, to prevent interference with the safety and convenience of ordinary travel over the right of way, or when necessary to protect the right of way and its users. The city may consider one or more of the following factors:
1. The extent of which right of way space where the permit is sought is available;
  2. The competing demands for the particular space in the right of way;
  3. The availability of other locations in the right of way or in other rights of way for the equipment of the permit applicant;
  4. The applicability of ordinance or other regulations of the right of way that affect location of equipment in the right of way;
  5. The degree of compliance of the applicant with the terms and conditions of its franchise, if any, this chapter, and other applicable ordinances and regulations;
  6. The degree of disruption to surrounding communities and businesses that will result from the use of that part of the right of way;
  7. The condition and age of the right of way, and whether and when it is scheduled for total or partial reconstruction; and
  8. The balancing of the costs of disruption to the public and damage to the right of way against the benefits to that part of the public served by the expansion into additional parts of the right of way.
- C. Discretionary Issuance: Notwithstanding the provisions of subsection A2 of this section, the city may issue a permit in any case where the permit is necessary: 1) to prevent substantial economic hardship to a customer of the permit applicant; or 2) to allow such customer to materially improve its utility service; or 3) to allow a new economic development project; and where the permit applicant did not have knowledge of the hardship, the plans for improvement of service or the development project when said applicant was required to submit its list of next year projects.

D. Permits For Additional Next Year Projects: Notwithstanding the provisions of subsection A2 of this section, the city may issue a permit to a registrant who demonstrates that it used commercially reasonable efforts to anticipate and plan for the project, such permit to be subject to all other conditions and requirements of law, including such conditions as may be imposed under subsection [8-1-10B](#) of this chapter.

E. Procedural Requirements: The denial of a permit must be made in writing and must document the basis for the denial. The city must notify the applicant or right of way user in writing within three (3) business days of the decision to deny a permit. If an application is denied, the right of way user may address the reasons for denial identified by the city and resubmit its application. If the application is resubmitted within 30 days of receipt of the notice of denial, no additional application fee shall be imposed. The city must approve or deny the resubmitted application within 30 days after submission.

**8-1-12: DISPLAY OF PERMIT:**

Permits issued under this chapter shall be conspicuously displayed at all times at the indicated work site and shall be available for inspection by the city inspector and authorized city personnel.

**8-1-13: EXTENSION OF PERMIT; SUPPLEMENTARY NOTIFICATION:**

- A. No person may excavate or obstruct the right of way beyond the date or dates specified in the permit unless such person: 1) makes a supplementary application for another right of way permit before the expiration of the initial permit; and 2) a new permit or permit extension is granted.
- B. If the obstruction or excavation of the right of way begins later or ends sooner than the date given on the permit, the permittee shall notify the city of the accurate information as soon as this information is known.

**8-1-14: SUPPLEMENTARY APPLICATIONS:**

- A. Limitation On Area: A right of way permit is valid only for the area of the right of way specified in the permit. No permittee may perform any work outside the area specified in the permit, except as provided herein. Any permittee which determines that an area greater than that specified in the permit must be obstructed or excavated must, before working in that greater area:
  - 1. Make application for permit extension and pay any additional fees necessitated thereby; and
  - 2. Be granted a new permit or permit extension; or
  - 3. Verbally request the administrator make a determination that the change is minor and authorize the additional area by note on the application and city copy of the permit.

- B. **Limitation On Dates:** A right of way permit is valid only for the dates specified in the permit. No permittee may begin its work before the permit start date or, except as provided herein, continue working after the end date. If a permittee does not finish the work by the permit end date, it must, before working after the end date of the permit:
1. Make application for a new permit for the additional time it needs;
  2. Pay the new permit fee or permit extension fee;
  3. Pay the delay penalty required under subsection [8-1-18D](#) of this chapter; or
  4. Verbally request the administrator make a determination that the change is minor and authorize the additional time by note on the application and city copy of the permit.

**8-1-15: INSPECTIONS:**

- A. **Notice Of Completion:** When the work under any permit hereunder is completed, the permittee shall notify the city.
- B. **Site Inspection:** The permittee shall make the work site available to the city inspector and to all others as authorized by law for inspection at all reasonable times during the execution and upon completion of the work.
- C. **Authority Of City Inspector:** At the time of inspection, the city inspector may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public. The city inspector may issue an order to the registrant for any work which does not conform to the applicable standards, conditions or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the registrant shall present proof to the city that the violation has been corrected. If such proof has not been presented within the required time, the city may revoke the permit pursuant to section [8-1-27](#) of this chapter.

**8-1-16: WORK WITHOUT PERMIT:**

A. **Emergency Situations:**

1. Each registrant shall immediately notify the city or the city's designee of any event regarding its equipment which it considers to be an emergency. The registrant may proceed to take whatever actions are necessary in order to respond to the emergency. Within two (2) business days after the occurrence of the emergency, the registrant shall apply for the necessary permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with this chapter for the actions it took in response to the emergency.

2. In the event that the city becomes aware of an emergency regarding a registrant's equipment, the city may attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. In any event, the city may take whatever action it deems necessary in order to respond to the emergency, the cost of which shall be borne by the registrant whose equipment occasioned the emergency.

B. Nonemergency Situations: Except in the case of an emergency, any person who, without first having obtained the necessary permit, obstructs or excavates a right of way, is in breach of this chapter.

#### **8-1-17: RIGHT TO OCCUPY RIGHTS OF WAY; PAYMENT OF FEES:**

A. Any person required to register under section [8-1-5](#) of this chapter who occupies, uses, or places its equipment in the right of way is hereby granted a right to do so if and only so long as said person: 1) timely pays all fees as provided herein; and 2) complies with all other requirements of law.

B. The grant of right in subsection A of this section is expressly conditioned on, and is subject to, the police powers of the city, continuing compliance with all provisions of law now or hereinafter enacted, including this chapter, as it may be from time to time amended, and further, is specifically subject to the obligation to obtain any and all additional required authorizations, whether from the city or other body or authority.

#### **8-1-18: INSTALLATION AND RESTORATION REQUIREMENTS:**

A. General Requirements: The excavation, backfilling, patching and restoration, and all other work performed in the right of way, shall be done in conformance with Minnesota rules 7819.1100 and 7819.5000 and shall conform to MnDOT standard specifications and other applicable local requirements, insofar as they are not inconsistent with Minnesota statutes sections 237.162 and 237.163, as may be amended from time to time.

B. Installation Requirements:

1. Installation of service laterals shall be performed in accordance with Minnesota rules chapter 7560 and this chapter. Service lateral installation is further subject to those requirements and conditions set forth by the city in the applicable permits and/or agreements referenced in subsection [8-1-20H](#) of this chapter.
2. The city will generally require small utilities to be installed within five feet (5') of concrete roadway features such as curbs and sidewalks or within five feet (5') of the right of way line where no such features exist. The city will generally require any trees or shrubs permitted in the right of way to be at least five feet (5') from curbs, walks, or roadways.

### C. Restoration Of Rights Of Way:

1. **Timing:** The work to be done under the permit, and the restoration of the right of way as required herein, must be completed within the dates specified in the permit, increased by as many days as work could not be done because of circumstances constituting force majeure or when work was prohibited as unseasonal or unreasonable under subsection [8-1-25B](#) of this chapter, all in the sole determination of the city. In addition to repairing its own work, the permittee must restore the general area of the work and the surrounding areas, including the paving and its foundations, to the same condition that existed before the commencement of the work and must inspect the area of the work and use reasonable care to maintain the same condition for twenty four (24) months thereafter.
2. **Repairs And Restoration; Costs:** In its application for an excavation permit, the permittee may choose to have the city restore the right of way. In any event, the city may determine to perform the right of way restoration and shall require the permittee to pay a restoration fee to provide for reimbursement of all costs associated with such restoration. In the event the permittee elects not to perform restoration, the city may, in lieu of performing the restoration itself, impose a fee to fully compensate for the resultant degradation as well as for any and all additional city costs associated therewith. Such fee for degradation shall compensate the city for costs associated with a decrease in the useful life of the right of way caused by excavation and shall include a restoration fee component. Payment of such fee does not relieve a permittee from any restoration obligation.
  - a. **City Restoration:** If the city restores the right of way, the permittee shall pay the costs thereof within thirty (30) days of billing. If, during the twenty four (24) months following such restoration, the right of way settles due to the permittee's excavation or restoration, the permittee shall pay to the city, within thirty (30) days of billing, the cost of repairing said right of way.
  - b. **Permittee Restoration:** If the permittee chooses at the time of application for an excavation permit to restore the right of way itself, such permittee shall post an additional performance and restoration bond in an amount determined by the city to be sufficient to cover the cost of restoring the right of way to its pre-excavation condition. If, twenty four (24) months after completion of the restoration of the right of way, the city determines that the right of way has been properly restored, the surety on the performance and restoration bond posted pursuant to this subsection C2b shall be released.
3. **Repair And Restoration Standards:** The permittee shall perform the work according to the standards and with the materials specified by the city. The city shall have the authority to prescribe the manner and extent of the restoration, and may do so in written procedures of general application or on a case by case basis. The city, in exercising this authority, shall be guided, but not limited, by the following standards and considerations:
  - a. The number, size, depth and duration of the excavations, disruptions or damage to the right of way;

- b. The traffic volume carried by the right of way;
  - c. The character of the neighborhood surrounding the right of way;
  - d. The pre-excavation condition of the right of way;
  - e. The remaining life expectancy of the right of way affected by the excavation;
  - f. Whether the relative cost of the method of restoration to the permittee is in reasonable balance with the prevention of an accelerated depreciation of the right of way that would otherwise result from the excavation, disturbance or damage to the right of way; and
  - g. The likelihood that the particular method of restoration would be effective in slowing the depreciation of the right of way that would otherwise take place.
4. Guarantees: By choosing to restore the right of way itself, the permittee guarantees its work and shall maintain it for twenty four (24) months following its completion. During this twenty four (24) month period, it shall, upon notification from the city, correct all restoration work to the extent necessary, using the method required by the city. Said work shall be completed within five (5) calendar days of the receipt of the notice from the city, not including days during which work cannot be done because of circumstances constituting force majeure or days when work is prohibited as unseasonal or unreasonable under subsection [8-1-25B](#) of this chapter, all in the sole determination of the city.
5. Failure To Restore: If the permittee fails to restore the right of way in the manner and to the condition required by the city, or fails to satisfactorily and timely complete all repairs required by the city, the city, at its option, may perform or cause to be performed such work. In that event, the permittee shall pay to the city, within thirty (30) days of billing, the cost of restoring the right of way. If the permittee fails to pay as required, the city may exercise its rights under the performance and restoration bond.

D. Delay Penalty: The city may establish and impose a charge or penalty for unreasonable delays in excavations, obstructions, or restoration.

**8-1-19: JOINT INSTALLATIONS AND CITY PROJECTS:**

A. Joint Installations: It is in the city's interest that utilities be located in a joint trench whenever possible. Applicants may be required to place their facilities in the same excavation at the same time; however, a separate permit application will be required for each facility. A shared or joint application will not be accepted. Each permit will reference other operators using the same excavation. No work may proceed until all applications are submitted and approved. Registrants who apply for permits for the same excavation will not be charged a permit fee.

- B. City Projects: Registrants whose planned activities are necessary because of a city project will not be charged a permit fee; however, a permit is still required.

**8-1-20: MAPPING DATA:**

- A. Information Required: Each registrant and permittee shall provide project data necessary to allow the city to develop a right of way mapping system in accordance with Minnesota rules 7819.4000 and 7819.4100.
- B. Permit Required; Application: The city requires a permit for excavation in or obstruction of its public right of way. A person wishing to undertake a project within the public right of way shall submit a right of way permit application, which will require the filing of mapping information pursuant to subsection C of this section.
- C. Mapping Information: The city requires as part of its permit the filing of the following information for placement of utilities:
  - 1. Location and elevation of the applicant's mains, cables, conduits, switches, and related equipment and facilities, with the location based on one of the following methods:
    - a. The preferred method is X, Y, and Z coordinates in NAD 83 1996 adjustment (also known as HARN adjustment), horizontal datum and NGVD 88 vertical datum. This information is to be supplied in an electronic format in an ASCII comma-delimited file including: point number, northing, easting, elevation and description. The alignment position shall be collected at minimum intervals of two hundred feet (200') or as required by changes in direction of the utility being located to define the horizontal alignment. Elevation "as built" depth locations shall be collected at a minimum of ten (10) per mile. The horizontal and vertical accuracy requirements for all collected positions shall be within 0.5 foot of their reported position as evidenced by the certification of a licensed land surveyor or engineer registered in the state of Minnesota.
    - b. Offsets from property lines, distances from the centerline of the public right of way, and curb lines as determined by the city.
    - c. Any other system agreed upon by the right of way user and the city.
  - 2. The type and size of the utility facility.
  - 3. A description of aboveground appurtenances.
  - 4. Any facilities to be abandoned, if applicable, in conformance with Minnesota statutes section 216D.04, subdivision 3, as it may be amended from time to time.

- D. Changes And Corrections: The application must provide that the applicant agrees to submit "as built" data, reflecting any changes and variations from the information provided under subsection C of this section within sixty (60) days of completion.
- E. Additional Construction Information: In addition, the right of way user shall submit a completion certificate to the city at the time the project is completed.
- F. Manner Of Conveying Permit Data: A right of way user is not required to provide or convey mapping information or data in a format or manner that is different from what is currently used and maintained by that operator. A permit application fee may include the cost to convert the data furnished by the right of way user to a format currently in use by the city. These data conversion costs, unlike other costs that make up permit fees, may be included in the permit fee after the permit application process.
- G. Data On Existing Facilities: A right of way user shall promptly provide existing data on its existing facilities within the public right of way in the form maintained by the user if requested by the city.
- H. Service Laterals: All permits issued for the installation or repair of service laterals, other than minor repairs, as defined in Minnesota rules 7560.0150, subparagraph 2, shall require the permittee's use of appropriate means of establishing the horizontal locations of installed service laterals and the service lateral vertical locations in those cases where the city reasonably requires it. Permittees or their subcontractors shall submit to the city evidence satisfactory to the city of the installed service lateral locations. Compliance with this subsection and with applicable gopher state one-call law and Minnesota rules governing service laterals installed after December 31, 2005, shall be a condition of any city approval necessary for: 1) payments to contractors working on a public improvement project; and 2) city approval of performance under development agreements, or other subdivision or site plan approval under Minnesota statutes chapter 462. The city shall reasonably determine the appropriate method of providing such information to the city. Failure to provide prompt and accurate information on the service laterals installed may result in the revocation of the permit issued for the work or for future permits to the offending permittee or its subcontractors.
- I. Trade Secret Information: At the request of any registrant, any information requested by the city which qualifies as a trade secret under Minnesota statutes section 13.37(b) shall be treated as trade secret information as detailed therein.

**8-1-21: LOCATION OF EQUIPMENT:**

- A. Undergrounding: Unless otherwise permitted by an existing franchise or other agreement, or unless existing aboveground equipment is repaired or replaced, or unless infeasible such as in the provision of electric service at certain voltages, new construction, the installation of new equipment, and the replacement of old equipment shall be done underground or contained within buildings or other structures and in conformity with applicable codes unless otherwise agreed to by the city in writing, and such agreement is reflected in applicable permits.

## B. Corridors:

1. The city may assign specific corridors within the right of way, or any particular segment thereof as may be necessary, for each type of equipment that is or, pursuant to current technology, the city expects will someday be located within the right of way. Excavation, obstruction, or other permits issued by the city involving the installation or replacement of equipment may designate the proper corridor for the equipment at issue, and such equipment must be located accordingly.
2. Any registrant whose equipment is located prior to the effective date hereof in the right of way in a position at variance with the corridors established by the city shall, no later than at the time of the next reconstruction or excavation of the area where its equipment is located, move that equipment to its assigned position within the right of way, unless this requirement is waived by the city for good cause shown, upon consideration of such factors as the remaining economic life of the facilities, public safety, customer service needs and hardship to the registrant.

C. Nuisance Equipment: One year after the effective date hereof, any non-permitted equipment found in a right of way shall be deemed to be a nuisance. The city may exercise any remedies or rights it has at law or in equity, including, but not limited to, abating the nuisance or taking possession of the equipment and restoring the right of way to a usable condition.

D. Limitation Of Space: To protect health, safety and welfare, the city shall have the power to prohibit or limit the placement of new or additional equipment within the right of way if there is insufficient space to accommodate all of the requests of registrants or persons to occupy and use the right of way. In making such decisions, the city shall strive to the extent possible to accommodate all existing and potential users of the right of way, but shall be guided primarily by considerations of the public interest, the public's needs for the particular service, the condition of the right of way, the time of year with respect to essential utility, the protection of existing equipment in the right of way, and future city plans for public improvements and development projects which have been determined to be in the public interest.

## E. Relocation Of Equipment:

1. The person must promptly and at his own expense, with due regard for seasonal working conditions, permanently remove and relocate his equipment and facilities in the right of way whenever the city requests such removal and relocation, and shall restore the right of way to the same condition it was in prior to said removal or relocation. The city may make such requests in order to prevent interference by the company's equipment or facilities with:
  - a. A present or future city use of the right of way;
  - b. A public improvement undertaken by the city;

- c. An economic development project in which the city has an interest or investment;
  - d. When the public health, safety and welfare require it; or
  - e. When necessary to prevent interference with the safety and convenience of ordinary travel over the right of way.
2. Notwithstanding the foregoing, a person shall not be required to remove or relocate his equipment from any right of way which has been vacated in favor of a nongovernmental entity unless and until the reasonable costs thereof are first paid by such nongovernmental entity to the person therefor.

**8-1-22: DAMAGE TO OTHER EQUIPMENT:**

- A. When the city performs work in the right of way and finds it necessary to maintain, support, or move a registrant's equipment in order to protect it, the city shall notify the local representative as early as is reasonably possible. The costs associated therewith will be billed to that registrant and must be paid within thirty (30) days from the date of billing.
- B. Each registrant shall be responsible for the cost of repairing any permitted equipment in the right of way which it or its equipment damages. Each registrant shall be responsible for the cost of repairing any damage to the equipment of another registrant caused during the city's response to an emergency occasioned by that registrant's equipment.

**8-1-23: VACATION OF RIGHT OF WAY:**

- A. Reservation Of Right: If the city vacates a right of way which contains the equipment of a registrant, and if the vacation does not require the relocation of registrant or permittee equipment, the city shall reserve, to and for itself and all registrants having equipment in the vacated right of way, the right to install, maintain and operate any equipment in the vacated right of way and to enter upon such right of way at any time for the purpose of reconstructing, inspecting, maintaining or repairing the same.
- B. Relocation Of Equipment: If the vacation requires the relocation of registrant or permittee equipment and: 1) if the vacation proceedings are initiated by the registrant or permittee, the registrant or permittee must pay the relocation costs; or 2) if the vacation proceedings are initiated by the city, the registrant or permittee must pay the relocation costs unless otherwise agreed to by the city and the registrant or permittee; or 3) if the vacation proceedings are initiated by a person or persons other than the registrant or permittee, such other person or persons must pay the relocation costs.

**8-1-24: ABANDONED AND UNUSABLE EQUIPMENT:**

A. Discontinued Operations: A registrant who has determined to discontinue its operations with respect to any equipment in any right of way, or segment or portion thereof, in the city must either:

1. Provide information satisfactory to the city that the registrant's obligations for its equipment in the right of way under this chapter have been lawfully assumed by another registrant; or
2. Submit to the city a proposal and instruments for transferring ownership of its equipment to the city. If a registrant proceeds under this clause, the city may, at its option:
  - a. Purchase the equipment; or
  - b. Require the registrant, at its own expense, to remove it; or
  - c. Require the registrant to post an additional bond or an increased bond amount sufficient to reimburse the city for reasonably anticipated costs to be incurred in removing the equipment.

B. Abandoned Equipment: Equipment of a registrant which fails to comply with subsection A of this section and which, for two (2) years, remains unused shall be deemed to be abandoned. Abandoned equipment is deemed to be a nuisance. The city may exercise any remedies or rights it has at law or in equity, including, but not limited to:

1. Abating the nuisance;
2. Taking possession of the equipment and restoring it to a usable condition;
3. Requiring removal of the equipment by the registrant or by the registrant's surety; or
4. Exercising its rights pursuant to the performance and restoration bond.

C. Removal Required: Any registrant who has unusable equipment in any right of way shall remove it from that right of way during the next scheduled excavation, unless this requirement is waived by the city.

**8-1-25: OTHER OBLIGATIONS:**

A. Compliance With Other Laws: Obtaining a right of way permit does not relieve the permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by the city or other appropriate jurisdiction or other applicable rule, law or regulation. The permittee shall comply with other local codes and with road load restrictions. A permittee shall comply with all requirements of local, state and federal laws, including, but not limited to, Minnesota statutes sections 216D.01 through 216D.09 ("Gopher One-Call Excavation Notice System") and Minnesota rules chapter 7560. A permittee shall perform all work in conformance with all applicable codes and established rules and regulations and is

responsible for all work done in the right of way pursuant to its permit, regardless of who performs the work.

- B. Prohibited Work: Except in the case of an emergency, and with the approval of the city, no right of way obstruction or excavation may be performed when seasonally prohibited or when conditions are unreasonable for such work.
- C. Interference With Right Of Way: A permittee shall not so obstruct a right of way that there is interference with the natural free and clear passage of water through the gutters or other waterways. Private vehicles may not be parked within or adjacent to a permit area. The loading or unloading of trucks adjacent to a permit area is prohibited unless specifically authorized by the permit.
- D. Traffic Control: Traffic control shall conform to the "Minnesota Manual On Uniform Traffic Control Devices" (MMUTCD) and its field manual and any written directions of the city engineer.
- E. Trenchless Excavation: As a condition of all applicable permits, permittees employing trenchless excavation methods, including, but not limited to, horizontal directional drilling, shall follow all requirements set forth in Minnesota statutes chapter 216D and Minnesota rules chapter 7560 and shall require potholing or open cutting over existing underground utilities before excavating, as determined by the city.

#### **8-1-26: INDEMNIFICATION AND LIABILITY:**

- A. Limitation Of Liability: By reason of the acceptance of a registration or the grant of a right of way permit, the city does not assume any liability:
  - 1. For injuries to persons, damage to property, or loss of service claims by parties other than the registrant or the city; or
  - 2. For claims or penalties of any sort resulting from the installation, presence, maintenance, or operation of equipment by registrants or activities of registrants.
- B. Indemnification: By registering with the city, a registrant agrees, or by accepting a permit under this chapter, a permittee is required to defend, indemnify, and hold the city whole and harmless, from all costs, liabilities, and claims for damages of any kind arising out of the construction, presence, installation, maintenance, repair or operation of its equipment, or out of any activity undertaken in or near a right of way, whether or not any act or omission complained of is authorized, allowed, or prohibited by a right of way permit. It further agrees that it will not bring, nor cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against the city for any claim nor for any award arising out of the presence, installation, maintenance or operation of its equipment, or any activity undertaken in or near a right of way, whether or not the act or omission complained of is authorized, allowed or prohibited by a right of way permit. The foregoing does not indemnify the city for its own negligence except for claims arising out of or alleging the city's

negligence where such negligence arises out of or is primarily related to the presence, installation, construction, operation, maintenance or repair of said equipment by the registrant or on the registrant's behalf, including, but not limited to, the issuance of permits and inspection of plans or work. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the registrant or to the city; and the registrant, in defending any action on behalf of the city, shall be entitled to assert in any action every defense or immunity that the city could assert in its own behalf.

- C. Future Uses: In placing any equipment or allowing it to be placed in the right of way, the city is not liable for any damages caused thereby to any registrant's equipment which is already in place. No registrant is entitled to rely on the provisions of this chapter, and no special duty is created as to any registrant. This chapter is enacted to protect the general health, welfare and safety of the public at large.

### **8-1-27: REVOCATION OF PERMITS:**

- A. Substantial Breach: Registrants hold permits issued pursuant to this chapter as a privilege and not as a right. The city reserves its right, as provided herein and in accordance with Minnesota statutes section 237.163, subdivision 4, to revoke any right of way permit, without fee refund, in the event of a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any condition of the permit. A substantial breach by the permittee shall include, but shall not be limited to, the following:

1. The violation of any material provision of the right of way permit;
2. An evasion or attempt to evade any material provision of the right of way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens;
3. Any material misrepresentation of fact in the application for a right of way permit;
4. The failure to maintain the required bonds and/or insurance;
5. The failure to complete the work in a timely manner; or
6. The failure to correct a condition indicated on an order issued pursuant to subsection [8-1-15C](#) of this chapter.

- B. Written Notice Of Breach: If the city determines that the permittee has committed a substantial breach of a term or condition of any statute, ordinance, rule, regulation or any condition of the permit, the city shall make a written demand upon the permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the permit. Further, a substantial breach, as stated above, will allow the city, at the city's discretion, to place additional or revised conditions on the permit.

- C. Response To Notice Of Breach: Within twenty four (24) hours of receiving notification of the breach, the permittee shall contact the city with a plan, acceptable to the city inspector,

for its correction. The permittee's failure to so contact the city inspector, the permittee's failure to submit an acceptable plan, or the permittee's failure to reasonably implement the approved plan shall be cause for immediate revocation of the permit. Further, the permittee's failure to so contact the city inspector, or the permittee's failure to submit an acceptable plan, or the permittee's failure to reasonably implement the approved plan shall automatically place the permittee on probation for one full year.

- D. Cause For Probation: From time to time, the city may establish a list of conditions of the permit which, if breached, will automatically place the permittee on probation, such as, but not limited to, working out of the allotted time period or working on a right of way outside of the permit.
- E. Automatic Revocation: If a permittee, while on probation, commits a breach as outlined above, the permittee's permit will automatically be revoked, and the permittee will not be allowed further permits for one full year, except for emergency repairs.
- F. Revocation of a small wireless facility permit shall be made in writing within three (3) business days of the decision to revoke the permit and shall document the basis for the revocation.
- G. Reimbursement Of City Costs: If a permit is revoked, the permittee shall also reimburse the city for the city's reasonable costs, including restoration costs and the costs of collection and reasonable attorney fees, incurred in connection with such revocation.

GH. Work With No Permit: Upon written notice of a breach for work in the right of way without first obtaining a permit, the violator must subsequently obtain a permit, pay the normal fee for said permit, pay all the other fees required by city ordinance, including, but not limited to, criminal fines and penalties, deposit with the city the fees necessary to correct any damage to the right of way and comply with all of the requirements of this chapter. Registrants will be placed on indefinite probation after the first violation. Fees and penalties for all subsequent violations will be doubled for registrants on probation.

#### **8-1-28: APPEALS:**

A person that: a) has been denied registration; b) has been denied a right of way permit; c) has had its right of way permit revoked; d) believes that the fees imposed are invalid; or e) disputes a determination of the administrator may have the denial, revocation, fee imposition, or determination reviewed, upon written request, by the city council. The city council shall act on a timely written request at its next regularly scheduled meeting. A decision by the city council affirming the denial, revocation, fee imposition, or decision will be in writing and supported by written findings establishing the reasonableness of the decision.

#### **8-1-29: FRANCHISE MAY BE REQUIRED; SUPREMACY ESTABLISHED:**

The city may, in addition to the requirements of this chapter, require any person which has or seeks to have equipment located in any right of way to obtain a franchise to the full extent

permitted by law, now or hereinafter enacted. The terms of any franchise which are in direct conflict with any provisions of this chapter, whether granted prior or subsequent to enactment of this chapter, shall control and supersede the conflicting terms of this chapter; provided, however, that requirements relating to insurance, bonds, penalties, security funds, letters of credit, indemnification or any other security in favor of the city may be cumulative in the sole determination of the city or unless otherwise negotiated by the city and the franchise grantee. All other terms of this chapter shall be fully applicable to all persons whether franchised or not.

#### **8-1-30: RESERVATION OF REGULATORY AND POLICE POWERS:**

- A. The city, by the granting of a right of way permit or by registering a person under this chapter, does not surrender or to any extent lose, waive, impair, or lessen the lawful powers and rights which it has now or may be hereafter vested in the city under the constitution and statutes of the state of Minnesota to regulate the use of the right of way by the permittee; and the permittee, by its acceptance of a right of way permit or of registration under this chapter, agrees that all lawful powers and rights, regulatory power, or police power, or otherwise as are or the same may be from time to time vested in or reserved to the city, shall be in full force and effect and subject to the exercise thereof by the city at any time. A permittee or registrant is deemed to acknowledge that its rights are subject to the regulatory and police powers of the city to adopt and enforce general ordinances necessary to the safety and welfare of the public and is deemed to agree to comply with all applicable general laws and ordinances enacted by the city pursuant to such powers.
- B. Any conflict between the provisions of a registration or of a ~~right of way~~ permit and any other present or future lawful exercise of the city's regulatory or police powers shall be resolved in favor of the latter.

#### **8-1-31: SEVERABILITY:**

If any section, subsection, sentence, clause, phrase, or portion of this chapter is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof. If a regulatory body or a court of competent jurisdiction should determine by a final non-appealable order that any permit, right or registration issued under this chapter or any portion of this chapter is illegal or unenforceable, any such permit, right or registration granted or deemed to exist hereunder shall be considered as a revocable permit with a mutual right in either party to terminate without cause upon giving sixty (60) days' written notice to the other. The requirements and conditions of such a revocable permit shall be the same requirements and conditions as set forth in the permit, right or registration, respectively, except for conditions relating to the term of the permit and the right of termination. If a permit, right or registration shall be considered a revocable permit as provided herein, the permittee must acknowledge the authority of the city council to issue such revocable permit and the power to revoke it. Nothing in this chapter precludes the city from requiring a franchise agreement with the applicant, as allowed by law, in addition to requirements set forth herein.

**8-1-32: NONEXCLUSIVE REMEDIES:**

The remedies provided in this chapter and other city ordinances are not exclusive or in lieu of other rights and remedies that the city may have at law or in equity. The city is hereby authorized to seek legal and equitable relief for actual or threatened injury to the public rights of way, including damages to the rights of way, whether or not caused by a violation of any of the provisions of this chapter or other provisions of city ordinances.

**SECTION 2.** This ordinance shall take effect immediately upon its passage and publication.

**ADOPTED** this 11<sup>th</sup> day of April, 2019 by the City Council for the City of Elko New Market.

**CITY OF ELKO NEW MARKET**

BY: \_\_\_\_\_  
Joe Julius, Mayor

**ATTEST:**

\_\_\_\_\_  
Thomas Terry, Acting City Clerk

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**SUMMARY ORDINANCE NO. 187**

**AN ORDINANCE AMENDING TITLE 8, CHAPTER 1  
OF THE ELKO NEW MARKET CITY CODE  
CONCERNING PUBLIC RIGHTS-OF-WAY MANAGEMENT**

**NOTICE IS HEREBY GIVEN** that, on April 11, 2019, Ordinance No. 186 was adopted by the City Council of the City of Elko New Market, Minnesota.

**NOTICE IS FURTHER GIVEN** that, because of the lengthy nature of Ordinance No. 186, the following summary of the ordinance has been prepared for publication.

**NOTICE IS FURTHER GIVEN** that the ordinance adopted by the Council amends City Code Title 8, Chapter 1, Public Rights of Way Management, to include Small Wireless Facilities. A printed copy of the whole ordinance is available for inspection by any person during the City's regular office hours.

**APPROVED** for publication by the City Council of the City of Elko New Market this 11<sup>th</sup> day of April, 2019.

**CITY OF ELKO NEW MARKET**

By: \_\_\_\_\_  
Joe Julius, Mayor

By: \_\_\_\_\_  
Thomas Terry, Acting City Clerk

**ORDINANCE NO. 189**

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**AN ORDINANCE AMENDING CITY OF ELKO NEW MARKET FEE SCHEDULE,  
ORDINANCE NO. 183, CONCERNING SMALL WIRELESS FACILITIES**

**WHEREAS**, the City's fee schedule for 2019 is set forth under City of Elko New Market Ordinance No. 183; and,

**WHEREAS**, the City has adopted Ordinance No. 186 Amending Title 8, Chapter 1 of the Elko New Market City Code concerning Public Rights-of-Way Management; and,

**WHEREAS**, the City desires to adopt a required fee for Small Wireless Facility Permits;

**NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ELKO NEW MARKET ORDAINS:**

**Section 1.** City of Elko New Market Ordinance No. 183 is hereby amended to add the following fees under Building Permit Fees:

**BUILDING PERMIT FEES**

Right-of-Way & Easement Fees

Small Wireless Facility Permit – Collocation	\$500 for up to 5 locations plus \$100 for each additional location
Small Wireless Facility Permit – New Structure	\$1,000 per structure

**Section 2. Effective Date.** This Ordinance shall be effective upon its passage and publication by the City Council.

**ADOPTED** this 11<sup>th</sup> day of April, 2019 by the City Council of the City of Elko New Market.

**CITY OF ELKO NEW MARKET**

BY: \_\_\_\_\_  
Joe Julius, Mayor

**ATTEST:**

\_\_\_\_\_  
Thomas Terry, Acting City Clerk

## **City of Elko New Market, Minnesota Small Wireless Facility Collocation Agreement**

**THIS SMALL WIRELESS FACILITY COLLOCATION AGREEMENT** (the "Agreement") is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_, between the City of Elko New Market, a Minnesota local government unit, with its principal offices located at 601 Main Street in Elko New Market, Minnesota 55054, ("Lessor) and \_\_\_\_\_, with its principal offices located at \_\_\_\_\_ in \_\_\_\_\_, \_\_\_\_\_ ("Lessee"). Lessor and Lessee are collectively referred to as the "Parties" or individually as a "Party."

**WHEREAS**, the Federal Communications Act of 1934, as amended, authorizes Lessor to manage and control access to and use of public rights-of-way within city limits; and

**WHEREAS**, Lessor has elected to manage its rights-of-way as authorized by Minnesota Statutes, Sections 237.162-.163 and Lessor's municipal code of ordinances (the "Code"); and

**WHEREAS**, this Agreement shall apply to the collocation of Small Wireless Facilities (as hereinafter defined). "Collocate" or "collocation" means to install, mount, maintain, modify, operate, or replace a small wireless facility on, under, within, or adjacent to an existing Wireless Support Structure (as hereinafter defined) that is owned privately or by a local government unit; and

**WHEREAS**, a "Small Wireless Facility" means: (1) a wireless facility, as defined by Minnesota Statutes, Section 237.162, subd. 13, that meets both of the following qualifications: (i) each antenna is located inside an enclosure of no more than six cubic feet in volume or, in the case of an antenna that has exposed elements, the antenna and all its exposed elements could fit within an enclosure of no more than six cubic feet; and (ii) all other wireless equipment associated with the small wireless facility, excluding electric meters, concealment elements, telecommunications demarcation boxes, battery backup power systems, grounding equipment, power transfer switches, cutoff switches, cable, conduit, vertical cable runs for the connection of power and other services, and any equipment concealed from public view within or behind an existing structure or concealment, is in aggregate no more than 28 cubic feet in volume; or (2) a micro wireless facility as defined by Minnesota Statutes, Section 237.162, subd. 14; and

**WHEREAS**, Lessor owns or controls existing structures in the public right-of-way that are designed to support or determined by Lessor as capable of supporting a Small Wireless Facility ("Wireless Support Structure"), which are located within the geographic area of a license held by Lessee to provide wireless services; and

**WHEREAS**, Lessor has elected to set forth the terms and conditions of collocation on its Wireless Support Structures, and Lessee desires to install, maintain and operate Small Wireless Facilities on Lessor's Wireless Support Structures; and

**WHEREAS**, Lessor and Lessee desire to enter into this Agreement to define the general terms and conditions which will govern their relationship with respect to the particular sites at

which Lessee will collocate its Small Wireless Facilities on Lessor's Wireless Support Structures; and

**WHEREAS**, Lessee shall compensate Lessor for the collocation of Small Wireless Facilities on Lessor's Wireless Support Structures. The fees imposed by Lessor are (1) based on the actual costs incurred by Lessor in managing the public rights-of-way; (2) based on an allocation among all users of the public rights-of-way, including Lessor, which shall reflect the proportionate costs imposed Lessor by each of the various types of uses of the public rights-of-way; (3) imposed on a competitively neutral basis; and (4) imposed in a manner so that above ground uses of public rights-of-way do not bear costs incurred by the local government unit to regulate underground uses of public rights-of-way; and

**WHEREAS**, Lessor and Lessee acknowledge that they will enter into an agreement supplement ("Supplement") in substantially the form attached hereto as Exhibit A, with respect to each particular Wireless Support Structure on which Lessee will collocate; and

**WHEREAS**, this Agreement is not exclusive and Lessor reserves the right to grant permission to other eligible and qualified entities to collocate Small Wireless Facilities in Lessor's rights-of-way.

**NOW THEREFORE**, in consideration of the mutual covenants contained herein, the Parties agree as follows:

1. **PREMISES.** Pursuant to all of the terms and conditions of this Agreement and the applicable Supplement, Lessor agrees to lease to Lessee certain space described in the applicable Supplement upon Lessor's Wireless Support Structure in the public right-of-way (Lessor's Wireless Support Structure, personal property, public right-of-way and surrounding real property are hereinafter sometimes collectively referred to as the "Property"), for the installation, operation and maintenance of Small Wireless Facilities; together with the non-exclusive right of ingress and egress from a public right-of-way, seven (7) days a week, twenty four (24) hours a day, over, under and through the Property to and from the Premises (as hereinafter defined) for the purpose of installation, operation and maintenance of Lessee's Small Wireless Facilities. The space leased by Lessor to Lessee described in the applicable Supplement is hereinafter collectively referred to as the "Premises." The Premises may include, without limitation, certain space on the ground (the "Equipment Space") on the Property, and space on the Wireless Support Structure sufficient for the installation, operation and maintenance of antennas and other equipment (the "Antenna Space") as described in the Supplement. Notwithstanding anything in the Supplement to the contrary, the Premises under each Supplement shall include such additional space necessary for the installation, operation and maintenance of wires, cables, conduits, and pipes (the "Cabling Space") running between and among the various portions of the Premises and to all necessary electrical and telephone utility, cable, and fiber sources located within the Property. If there are not sufficient electric and telephone utility, cable, or fiber sources located on the Property, Lessor agrees to grant Lessee, or the local utility, or fiber or cable provider, upon Lessee's approval, the right to install any utilities, cable, and fiber on, through, over, and under other properties owned or controlled by Lessor necessary for Lessee to

operate its communications facility, provided the location of those utilities, cable, and fiber shall be as reasonably designated by Lessor. Lessor's approval shall not be unreasonably withheld.

2. PLANS AND DRAWINGS. Before receiving approval from Lessor to install a Small Wireless Facility on Lessor's Wireless Support Structures in public rights-of-way, Lessee shall submit to the Director of Public Works or the Director's designee, detailed construction plans and drawings for each individual location, together with maps, showing specifically the Wireless Support Structures to be used, the number and character of the attachments to be placed on such Wireless Support Structures, equipment necessary for the use, proposed replacement of existing Wireless Support Structures, any additional Wireless Support Structures which may be required and any new installations for transmission conduit, pull boxes, and related appurtenances. The Director or the Director's designee shall determine whether to give Lessee permission to proceed with the work as proposed by Lessee. Lessee shall perform all work at its own expense and make attachments in such manner as to not interfere with the services of Lessor.

3. CONDITION OF PROPERTY; ENGINEERING STUDY. Any expenses necessary to make the Premises ready for Lessee's construction of its improvements shall be the responsibility of Lessee. Lessee must obtain and submit to Lessor a structural engineering study carried out by a qualified structural engineer showing the Wireless Support Structure and foundation is able to support the proposed Small Wireless Facility. Lessor makes no warranties or representations, express or implied, including warranties of merchantability or fitness for a particular use, except those expressly set forth in this Agreement.

4. USE OF PUBLIC RIGHTS-OF-WAY.

A. Lessor hereby grants to Lessee the right to use the municipal public right-of-way for the installation, maintenance and operation of Lessee's communications equipment in and on the Wireless Support Structure located within the public right-of-way.

B. All communications equipment shall be installed in accordance with applicable Laws (as hereinafter defined) and Lessee shall comply with all laws, ordinances, rules and regulations adopted by Lessor. Within the public rights-of-way, the location of the communications equipment shall be subject to the reasonable and proper regulation, direction and control of the Lessor, or the official to whom such duties have been delegated by Lessor. Lessee shall have no ownership interest in any Wireless Support Structure owned by Lessor.

C. Lessee and its authorized contractors shall give Lessor reasonable notice of the dates, location, and nature of all work to be performed on its communications equipment within the public rights-of-way. This Agreement shall allow Lessee to perform all work on Lessee's communications equipment within the public rights-of-way, and to park vehicles in the streets and other public rights-of-way when necessary for the installation, replacement, abandonment, operation or maintenance of Lessee's communications equipment. Following completion of work in the public rights-of-way,

Lessee shall repair any affected public rights-of-way as soon as possible, but no later than the time frame established in the applicable Supplement. No street, alley, highway, or public place shall be encumbered for a longer period than shall be reasonably necessary to execute the work authorized by the applicable Supplement and this Agreement.

D. Any damages to Lessor's Wireless Support Structures, equipment thereon or other infrastructure caused by Lessee's installation or operations shall be repaired or replaced at Lessee's sole cost and to Lessor's reasonable satisfaction.

## 5. STRUCTURE RECONDITIONING, REPAIR, REPLACEMENT.

A. From time to time, if Lessor paints, reconditions, or otherwise improves or repairs the Wireless Support Structure in a substantial way ("Reconditioning Work"), Lessor shall reasonably cooperate with Lessee to carry out Reconditioning Work activities in a manner that minimizes interference with Lessee's approved use of the Premises.

B. Prior to commencing Reconditioning Work, Lessor shall provide Lessee with not less than ninety (90) days' prior written notice. Upon receiving that notice, it shall be Lessee's sole responsibility to provide adequate measures to cover or otherwise protect Lessee's equipment from the consequences of the Reconditioning Work, including but not limited to paint and debris fallout. Lessor reserves the right to require Lessee to remove all of Lessee's equipment from the Wireless Support Structure and Premises during Reconditioning Work, provided the requirement to remove Lessee's equipment is contained in the written notice required by this Section.

C. During Lessor's Reconditioning Work, Lessee may maintain a temporary communications facility on the Property, or after approval by Lessor, on any land owned or controlled by Lessor in the vicinity of the Property. If the Property will not accommodate Lessee's temporary communications facility, or if the Parties cannot agree on a temporary location, the Lessee, at its sole option, shall have the right to terminate the applicable Supplement upon thirty (30) days written notice to Lessor.

D. Lessee may request a modification of Lessor's procedures for carrying out Reconditioning Work in order to reduce the interference with Lessee's use of the Premises. If Lessor agrees to the modification, Lessee shall be responsible for all reasonable incremental cost related to the modification.

E. If Lessor intends to replace a Wireless Support Structure ("Replacement Work"), Lessor shall provide Lessee with at least ninety (90) days' written notice to remove its equipment. Lessor shall also promptly notify Lessee when the Wireless Support Structure has been replaced and Lessee may re-install its equipment. During Lessor's Replacement Work, Lessee may maintain a temporary communications facility on the Property, or after approval by Lessor, on any land owned or controlled by Lessor in the vicinity of the Property. If the Property will not accommodate Lessee's temporary communications facility or if the Parties cannot agree on a temporary location, the

Lessee, at its sole option, shall have the right to terminate the applicable Supplement upon thirty (30) days written notice to Lessor.

F. If Lessor intends to repair a Wireless Support Structure due to storm or other damage ("Repair Work"), Lessor shall notify Lessee to remove its equipment as soon as possible. In the event of an emergency, Lessor shall contact Lessee by telephone prior to removing Lessee's Equipment. Once the Wireless Support Structure has been replaced or repaired, Lessor will promptly notify Lessee it can reinstall its equipment. During Lessor's Repair Work, Lessee may maintain a temporary communications facility on the Property, or after approval by Lessor, on any land owned or controlled by Lessor in the vicinity of the Property. If the Property will not accommodate Lessee's temporary communications facility, or if the Parties cannot agree on a temporary location, or if the Pole(s) cannot be repaired or replaced within thirty (30) days, Lessee, at its sole discretion, shall have the right to terminate the applicable Supplement upon thirty (30) days' written notice to Lessor. However, at Lessee's sole option, within thirty (30) days after the casualty damage, Lessor must provide Lessee with a replacement Supplement to lease space at a new location upon which the Parties mutually agree. The monthly rental payable under the new replacement Supplement will not be greater than the monthly rental payable under the terminated Supplement.

G. If Lessee's installation requires a new Wireless Support Structure to be constructed or an existing Wireless Support Structure to be replaced by Lessee (the "Replacement Wireless Support Structure") then, any such Replacement Wireless Support Structure, shall be deemed to be a fixture on the Property and the Replacement Wireless Support Structure shall be and remain the property of the Lessor, without further consideration to or from Lessor. Upon completion of Lessee's installation, Lessor shall be responsible for any and all costs relating to the operation, maintenance, repair and disposal of the Replacement Wireless Support Structure, unless such costs are due to the improper or negligent installation by Lessee or contractor hired by Lessee. If the Replacement Wireless Support Structure replaces an existing structure, then also as part of Lessee's installation, Lessee shall remove, dispose, salvage and or discard the existing structure at Lessee's sole discretion.

6. TERM; RENTAL.

Each Supplement shall be effective as of the date of execution by both Parties (the "Effective Date"), at which time rental payments shall commence and be due at a total annual rental of \$175.00 (the "Annual Rental"), representing \$150.00 per year for rent to occupy space on a Wireless Support Structure and \$25.00 per year for maintenance associated with the space occupied on a wireless support structure. Consistent with Minnesota Statutes Sections 237.162-.163, the term of each Supplement shall be equal to the length of time that the Small Wireless Facility is in use (the "Term"), unless the Supplement is terminated pursuant to this Agreement. The annual rental for each Supplement shall be set forth in the Supplement and shall be paid in advance annually on each anniversary of the Effective Date, in advance, to the payee designated by Lessor in the Supplement, or to such other person, firm or place as Lessor may, from time to time, designate in writing. Upon agreement of the Parties, Lessee may pay rent by electronic

funds transfer. Lessor hereby agrees to provide to Lessee the reasonable documentation required for Lessee to pay all rent payments due to Lessor.

7. ELECTRICAL.

Lessor shall, at all times during the Term of each Supplement, provide electrical service and telephone service access within the Premises. As provided by Minnesota Statutes Sections 237.162-.163, a monthly fee for electricity used to operate the Small Wireless Facility, if not purchased directly from a utility, shall be added to the annual rent due under each Supplement at the rate of:

- A. \$73.00 per radio node less than or equal to 100 max watts;
- B. \$182.00 per radio node over 100 max watts; or
- C. The actual costs of electricity, if the actual costs exceed the amount in item (A) or (B).

The amount of any such annual fee shall be set forth in each Supplement.

Lessee shall be permitted at any time during the Term of each Supplement, to install, maintain, and/or provide access to and use of, as necessary (during any power interruption at the Premises), a temporary power source and a temporary installation of any other services and equipment required to keep Lessee's communications facility operational, along with all related equipment and appurtenances within the Premises, or elsewhere on the Property in such locations as reasonably approved by Lessor. Lessee shall have the right to install conduits connecting the temporary power source, and the temporary installation of any other services and equipment required to keep Lessee's communications facility operational, and related appurtenances to the Premises.

Alternatively, Lessee may purchase electricity directly from a utility provider.

8. ENGINEERING COSTS. The Parties acknowledge and agree that, pursuant to Minnesota Statutes, Sections 237.162-.163, Lessor may charge the actual costs of the initial engineering and preparatory construction work associated with Lessee's collocation in the form of a onetime, nonrecurring, commercially reasonable, nondiscriminatory, and competitively neutral charge. Lessee shall pay such reasonable costs within sixty (60) days of receipt of an invoice that itemizes the costs.

9. USE. Lessee shall use the Premises for the purpose of constructing, maintaining, repairing and operating Small Wireless Facilities and uses incidental thereto. Lessee shall have the right, without any increase in rent, to replace or repair its utilities, fiber or cable, equipment, antennas and/or conduits or any portion thereof, and the frequencies over which the equipment operates. Any additions or material modifications shall require Lessor's approval and may be subject to an increase in rent if allowed by law.

10. GOVERNMENTAL APPROVALS; PERMITS. It is understood and agreed that Lessee's ability to use the Premises is contingent upon Lessee obtaining all of the certificates, permits and other approvals (collectively the "Government Approvals") that may be required by

any Federal, State or Local authorities, as well as a satisfactory structural analysis that will permit Lessee use of the Premises as set forth above. Lessor shall cooperate with Lessee in its effort to obtain the Governmental Approvals, and shall take no action which would adversely affect the status of the Property with respect to the proposed use thereof by Lessee. Lessee shall have the right to terminate the applicable Supplement if: (i) any of the applications for Governmental Approvals is finally rejected; (ii) any Governmental Approval issued to Lessee is canceled, expires, lapses, or is otherwise withdrawn or terminated by governmental authority; (iii) Lessee determines that the Governmental Approvals may not be obtained in a timely manner; (iv) Lessee determines that the Premises is no longer technically compatible for its use; or (v) Lessee, in its sole discretion, determines that the use of the Premises is obsolete or unnecessary. Notice of Lessee's exercise of its right to terminate shall be given to Lessor in accordance with the notice provisions set forth in Paragraph 20 and shall be effective upon the mailing of that notice by Lessee, or upon such later date as designated by Lessee. All rentals paid to the termination date shall be retained by Lessor. Upon such termination, the applicable Supplement shall be of no further force or effect except to the extent of the representations, warranties, and indemnities made by each Party to the other thereunder. Otherwise, the Lessee shall have no further obligations for the payment of rent to Lessor for the terminated Supplement.

11. INDEMNIFICATION. To the fullest extent permitted by law, Lessee agrees to defend, indemnify and hold harmless Lessor, and its employees, officials, and agents from and against all claims, actions, damages, losses and expenses, including reasonable attorney fees, arising out of Lessee's negligence, misconduct, or Lessee's failure to perform its obligations under this Agreement. Lessee's indemnification obligation shall apply to Lessee's contractors, subcontractors, or anyone directly or indirectly employed or hired by Lessee, or anyone for whose acts Lessee may be liable. Lessor will provide Lessee with prompt, written notice of any written claim covered by this indemnification provision; provided that any failure of Lessor to provide any such notice, or to provide it promptly, shall not relieve Lessee from its indemnification obligations in respect of such claim, except to the extent Lessee can establish actual prejudice and direct damages as a result thereof. Lessor will cooperate with Lessee in connection with Lessee's defense of such claim. Lessee shall not settle or compromise any such claim or consent to the entry of any judgment without the prior written consent of Lessor and without an unconditional release of all claims by each claimant or plaintiff in favor of Lessor. The indemnity obligation shall survive the completion or termination of this Agreement.

12. INSURANCE.

A. Waiver of Subrogation. To the extent allowed by law, Lessee hereby waives and release any and all rights of action for negligence against Lessor which may hereafter arise on account of damage to Lessee's property, resulting from any fire, or other casualty of the kind covered by standard fire insurance policies with extended coverage, regardless of whether or not, or in what amounts, such insurance is now or hereafter carried by Lessee. This waiver and release shall apply between the Parties and shall also apply to any claim asserted as a right of subrogation. All such policies of insurance obtained by Lessee concerning its property shall waive the insurer's right of subrogation against Lessor.

B. **General Liability.** Lessee agrees that at its own cost and expense, it will maintain commercial general liability insurance with limits not less than \$2,000,000 per occurrence; \$4,000,000 annual aggregate, for bodily injury (including death) and for damage or destruction to property. The policy shall cover liability arising from premises, operations, products-completed operations, personal injury, advertising injury, and contractually assumed liability. Lessee shall add the Lessor as an additional insured.

C. **Automobile Liability.** Lessee shall maintain commercial automobile liability Insurance, including owned, hired, and non-owned automobiles, with a minimum combined single liability limit of \$2,000,000 per occurrence.

D. **Workers' Compensation.** Lessee agrees to provide workers' compensation insurance for all its employees in accordance with the statutory requirements of the State of Minnesota. Lessor shall also carry employers' liability insurance with minimum limits as follows: \$500,000 for bodily injury by disease per employee; \$500,000 aggregate for bodily injury by disease; and \$500,000 for bodily injury by accident.

E. **Additional Insurance Conditions.**

(i) Lessee shall deliver to Lessor a certificate of insurance as evidence that the above coverages are in full force and effect.

(ii) Lessee's policies shall be primary insurance and non-contributory to any other valid and collectible insurance available to Lessor with respect to any claim arising under this Agreement.

(iii) Lessee's policies and certificate of insurance shall contain a provision that coverage afforded under the policies shall not be cancelled without at least thirty (30) days' advanced written notice to Lessor, or ten (10) days' written notice for non-payment of premium.

13. **LIMITATION OF LIABILITY.** Except for indemnification obligations pursuant to Paragraph 11, neither Party shall be liable to the other, or any of their respective agents, representatives, employees for any lost revenue, lost profits, loss of technology, rights or services, incidental, punitive, indirect, special or consequential damages, loss of data, or interruption or loss of use of service, even if advised of the possibility of such damages, whether under theory of contract, tort (including negligence), strict liability or otherwise.

14. **INTERFERENCE.** Lessee shall obtain a radio frequency interference study carried out by an independent professional radio frequency engineer showing that Lessee's intended use will not interfere with any current communication facilities which are located on or near a Wireless Support Structure. Lessee shall not transmit or receive radio waves at the Premises until such evaluation has been satisfactorily completed and approved by Lessor. Lessee agrees to install equipment of the type and frequency which will not cause harmful interference which is measurable in accordance with then existing industry standards to any equipment of Lessor or other tenants of the Property which existed on the Property prior to the date the applicable Supplement is executed by the Parties. In the event any after-installed Lessee's equipment causes such interference, and after Lessor has notified Lessee of such interference,

Lessee will take all commercially reasonable steps necessary to correct and eliminate the interference, including but not limited to, at Lessee's option, powering down such interfering equipment and later powering up such interfering equipment for intermittent testing. If the interference continues for a period in excess of 48 hours following such notification, Lessor shall have the right to require Lessee to reduce power, and/or cease operations until such time Lessee can make repairs to the interfering equipment. In no event will Lessor be entitled to terminate a Supplement or relocate the Equipment as long as Lessee is making a good faith effort to remedy the interference issue. Lessor agrees that Lessor and/or any other users of the Property who currently have or in the future take possession of the Property will be permitted to install only such equipment that is of the type and frequency which will not cause harmful interference which is measurable in accordance with then existing industry standards to the then existing equipment of Lessee. If Lessee determines, in its reasonable discretion, that Lessor's equipment or any other user's equipment permitted by Lessor is causing interference, Lessor shall, upon written communication from Lessee to Lessor take all reasonable steps necessary to correct and eliminate the interference, including causing other users causing such interference to correct and eliminate the interference. If the interference continues for a period in excess of 48 hours following the notification, Lessor shall, or shall require any other user to, reduce power and/or cease operations until such time as Lessor, or the other user, can make repairs to the interfering equipment. The Parties acknowledge that there will not be an adequate remedy at law for noncompliance with the provisions of this Paragraph and therefore, either Party shall have the right to equitable remedies, such as, without limitation, injunctive relief and specific performance.

15. REMOVAL. Lessee shall, within sixty (60) days after expiration of the Term, or any earlier termination of a Supplement, or an abandonment of it facilities, remove its equipment, conduits, fixtures and all personal property and restore the Premises to its original condition, reasonable wear and tear excepted, at Lessee's sole cost and expense. Lessor agrees and acknowledges that all of the equipment, conduits, fixtures and personal property of Lessee shall remain the personal property of Lessee and Lessee shall have the right to remove the same at any time during the Term, whether or not said items are considered fixtures and attachments to real property under applicable Laws. If the time for removal causes Lessee to remain on the Premises after termination of the Supplement, Lessee shall pay rent at the then-existing monthly rate, until such time as the removal of the equipment, fixtures and all personal property are completed. If Lessee fails to remove its facilities within the required time period, Lessor reserves the right to remove the facilities and charge Lessee for the full cost of the removal and storage charges.

16. RIGHTS UPON SALE. If, at any time during the Term of any Supplement, Lessor decides: (i) to sell or transfer all or any part of the Property or the Wireless Support Structure thereon to a purchaser other than Lessee, or (ii) to grant to a third party by easement or other legal instrument an interest in that portion of the Property occupied by Lessee, or a larger portion thereof, for the purpose of operating and maintaining communications facilities or the management thereof, that sale or grant of an easement or interest therein shall be subject to the Supplement, and any such purchaser or transferee must recognize Lessee's rights hereunder and under the terms of the affected Supplement(s). If Lessor completes any such sale, transfer, or grant described in this paragraph without executing an assignment of the Supplement in which

the third party agrees in writing to assume all obligations of Lessor under the Supplement, then Lessor shall not be released from its obligations to Lessee under the Supplement, and Lessee shall have the right to look to Lessor and the third party for the full performance of the Supplement.

17. QUIET ENJOYMENT AND REPRESENTATIONS. Lessor covenants that Lessee, on paying the rent and performing the covenants herein and in a Supplement, shall peaceably and quietly have, hold and enjoy the Premises. Lessor represents and warrants to Lessee as of the execution date of each Supplement, and covenants during the Term, that Lessor has good and sufficient title and interest to the Property, and has full authority to enter into and execute the Supplement. Lessor further covenants during the Term that there are no liens, judgments or impediments of title on the Property, or affecting Lessor's title to the same and that there are no covenants, easements or restrictions that prevent or adversely affect the use or occupancy of the Premises by Lessee as provided in this Agreement and in the applicable Supplement(s).

18. ASSIGNMENT. This Agreement and each Supplement under it may be sold, assigned or transferred by the Lessee without any approval or consent of the Lessor to the Lessee's principal, affiliates, subsidiaries of its principal, or to any entity which acquires all or substantially all of Lessee's assets in the market defined by the FCC in which the Property is located by reason of a merger, acquisition or other business reorganization. As to other parties, this Agreement and each Supplement may not be sold, assigned or transferred without the written consent of the Lessor, which consent will not be unreasonably withheld, delayed or conditioned.

19. NOTICES. All notices hereunder must be in writing and are validly given if sent by certified mail, return receipt requested, or by commercial courier, provided the courier's regular business is delivery service and provided further that it guarantees delivery to the addressee by the end of the next business day following the courier's receipt from the sender, addressed as follows or to any other address that the Party to be notified may have designated:

Lessor: City of Elko New Market  
Attention: City Administrator  
601 Main Street  
Elko New Market, Minnesota 55054

Lessee: \_\_\_\_\_  
Attention: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_

Notice shall be effective upon actual receipt or refusal as shown on the receipt obtained pursuant to the foregoing.

20. DEFAULT. If there is a breach by a Party with respect to any of the provisions of this Agreement, or under the provisions of an individual Supplement, the non-breaching Party

shall give the breaching Party written notice of that breach. After receipt of the written notice, the breaching Party shall have thirty (30) days in which to cure the breach, provided the breaching Party shall have such extended period as may be required beyond the thirty (30) days if the breaching Party commences the cure within the thirty (30) day period and thereafter continuously and diligently pursues the cure to completion, but in no event more than ninety (90) calendar days after receipt of written notice. The non-breaching Party may not maintain any action or effect any remedies for default against the breaching Party unless and until the breaching Party has failed to cure the breach within the time periods provided in this Paragraph. Notwithstanding the foregoing to the contrary, it shall be a default under this Agreement, or under an individual Supplement if Lessor fails, within five (5) days after receipt of written notice of such breach, to perform an obligation required to be performed by Lessor, and if the failure to perform that obligation interferes with Lessee's ability to conduct its business in the Premises; provided, however, that if the nature of Lessor's obligation is such that more than five (5) days after notice is reasonably required for its performance, then it shall not be a default under this Agreement or the applicable Supplement if performance is commenced within such five (5) day period and thereafter diligently pursued to completion, but in no event more than fifteen (15) calendar days after receipt of written notice. Lessor and Lessee agree that a default under an individual Supplement does not constitute a default under this Agreement

21. DISPUTE RESOLUTION. Subject to the provisions of Paragraph 20, the Parties shall cooperate and use their best efforts to ensure that the various provisions of the Agreement are fulfilled. The Parties agree to act in good faith to undertake resolution of disputes, in an equitable and timely manner and in accordance with the provisions of this Agreement. If disputes cannot be resolved informally by the Parties, the following procedures shall be used:

A. Whenever there is a failure between the Parties to resolve a dispute on their own, the Parties shall first attempt to mediate the dispute. The parties shall agree upon a mediator, or if they cannot agree, shall obtain a list of court-approved mediators from the Scott County District Court Administrator and select a mediator by alternately striking names until one remains. Lessor shall strike the first name followed by Lessee, and shall continue in that order until one name remains.

B. If the dispute is not resolved within thirty (30) days after the end of mediation proceedings, the Parties may pursue any legal or equitable remedy.

22. CASUALTY. In the event of damage by fire or other casualty to the Property that cannot reasonably be expected to be repaired within forty-five (45) days following same or, if the Property is damaged by fire or other casualty so that such damage may reasonably be expected to disrupt Lessee's operations at the Premises for more than forty-five (45) days, then Lessee may, at any time following such fire or other casualty, provided Lessor has not completed the restoration required to permit Lessee to resume its operation at the Premises, terminate the Supplement upon fifteen (15) days' prior written notice to Lessor. Any such notice of termination shall cause the Supplement to expire with the same force and effect as though the date set forth in such notice were the date originally set as the expiration date of the Supplement and the Parties shall make an appropriate adjustment, as of such termination date, with respect to payments due under the Supplement. Notwithstanding the foregoing, the rent shall abate during

the period of repair following such fire or other casualty in proportion to the degree to which Lessee's use of the Premises is impaired.

23. APPLICABLE LAWS. Laws means any and all laws, regulations, ordinances, resolutions, judicial decisions, rules, permits and approvals applicable to the subject of this Agreement or Lessee's use that are in force during the term of this Agreement, as lawfully amended including, without limitation, Lessor's city Code. Lessee and Lessor shall comply with all applicable Laws. This Agreement does not limit any rights Lessee may have in accordance with Laws to install its own poles in the right of way or to attach Lessee's equipment to third-party poles located in the right of way. This Agreement shall in no way limit or waive either party's present or future rights under Laws. If, after the date of this Agreement, the rights or obligations of either Party are materially altered, preempted, or superseded by changes in Laws, the parties agree to amend the Agreement and/or Supplement to reflect the change in Laws.

24. GOVERNMENT DATA. The Parties acknowledge and agree that this Agreement is considered public data not on individuals and is accessible to the public under Minnesota Statutes, Section 13.03. Lessee and Lessor agrees to abide by the applicable provisions of the Minnesota Government Data Practice Act, Minnesota Statutes, Chapter 13, and all other applicable state or federal rules, regulations or orders pertaining to privacy or confidentiality.

25. GENERAL PROVISIONS.

A. Entire Agreement. This Agreement supersedes any prior or contemporaneous representations or agreements, whether written or oral, between the Parties and contains the entire agreement.

B. Captions. Captions contained in this Agreement are for reference only, and therefore, have no effect in construing this Agreement.

C. Ambiguities. If any term of this Agreement is ambiguous, it shall not be construed for or against any Party on the basis that the Party did or did not write it.

D. Amendments. Any modification or amendment to this Agreement shall require a written agreement signed by both Parties.

E. Third Party Rights. This Agreement is not a third party beneficiary contract and shall not in any respect whatsoever create any rights on behalf of any person or entity not expressly a party to this Agreement.

F. Nondiscrimination. In the hiring of employees or contractors to perform work under this Agreement, Lessee shall not discriminate against any person by reason of any characteristic or classification protected by State or Federal law.

G. Governing Law. This Agreement shall be governed by and interpreted in accordance with the laws of the State of Minnesota. The venue for all proceedings related to this Agreement shall be in Scott County, Minnesota.

H. Waiver. The failure of either Party to insist upon strict performance of any of the terms or conditions of this Agreement or the waiver by either Party of any breach or failure to comply with any provision of this Agreement by the other Party shall not be construed as, or constitute a continuing waiver of such provision or a waiver of any other breach of or failure to comply with any other provision of this Agreement.

I. Force Majeure. Except for payment of sums due, neither Party shall be liable to the other or deemed in default under this Agreement, if and to the extent that a Party's performance is prevented by reason of force majeure. "Force majeure" includes war, an act of terrorism, fire, earthquake, flood and other circumstances which are beyond the control and without the fault or negligence of the Party affected and which by the exercise of reasonable diligence the Party affected was unable to prevent.

J. Further Assurances. From and after the execution of this Agreement, the parties shall fully cooperate with each other and perform any further act(s) and execute and delivers any further documents which may be necessary in order to carry out the purposes and intentions of this Agreement.

K. Savings Clause. If any court finds any portion of this Agreement to be contrary to law, invalid, or unenforceable, the remainder of the Agreement will remain in full force and effect.

L. Counterparts. This Agreement may be signed in counterparts, each of which shall be deemed an original, and which taken together shall be deemed to be one and the same document.

**IN WITNESS WHEREOF**, the Parties, have caused this Agreement to be approved on the date above.

**Lessor:**  
**City of Elko New Market**

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: Mayor

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: City Clerk

Date: \_\_\_\_\_

**Lessee:**

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_

Its: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT A**  
**COLLOCATION AGREEMENT SUPPLEMENT**

**THIS COLLATION AGREEMENT SUPPLEMENT** (“Supplement”), is made this \_\_\_\_\_ day of \_\_\_\_\_, 20\_\_\_\_\_ between the City of Elko New Market, a Minnesota local government unit, with its principal offices located at 601 Main Street in Elko New Market, Minnesota 55054, (“Lessor”) and \_\_\_\_\_, with its principal offices located \_\_\_\_\_ in \_\_\_\_\_, \_\_\_\_\_, (“Lessee”).

1. **SMALL WIRELESS FACILITY COLLOCATION AGREEMENT.** This Supplement is a Supplement as referenced in that certain Small Wireless Facility Collocation Agreement between the City of \_\_\_\_\_ and \_\_\_\_\_, dated \_\_\_\_\_, 20\_\_\_\_\_, (the “Agreement”). All of the terms and conditions of the Agreement are incorporated herein by reference and made a part hereof without the necessity of repeating or attaching the Agreement. In the event of a contradiction, modification or inconsistency between the terms of the Agreement and this Supplement, the terms of this Supplement shall govern. Capitalized terms used in this Supplement shall have the same meaning described for them in the Agreement unless otherwise indicated herein.

2. **PREMISES.** Lessor hereby leases to Lessee certain spaces on and within Lessor's Property located at \_\_\_\_\_, including the location of the Wireless Support Structure on the Property as shown on Exhibit 1 attached hereto and made a part hereof. The Equipment Space, Antenna Space and Cabling Space are as shown on Exhibit 2, attached hereto and made a part hereof.

3. **TERM.** The Effective Date and the Term of this Supplement shall be as set forth in the Agreement.

4. **CONSIDERATION.** Rent under this Supplement shall be \$175.00 per year, payable to the City of Elko New Market at 601 Main Street, Elko New Market, Minnesota 55054 as set forth in the Agreement.

If Lessor is providing electricity pursuant to Paragraph 7 of the Agreement, an annual electrical service fee shall be added to the annual rent due under this Supplement.

5. **SITE SPECIFIC TERMS.**



*In this section include any site-specific terms, including whether Lessee will be installing a Replacement Wireless Support Structure.*

IN WITNESS WHEREOF, the Parties, have caused this Agreement to be approved on the date above.

**Lessor:**  
**City of Elko New Market**

By: \_\_\_\_\_

Name: \_\_\_\_\_  
Its: Mayor

Date: \_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_  
Its: City Clerk

Date: \_\_\_\_\_

**Lessee:**

\_\_\_\_\_

By: \_\_\_\_\_

Name: \_\_\_\_\_  
Its: \_\_\_\_\_

Date: \_\_\_\_\_

**EXHIBIT 1**  
**Site Plan of Property**

**EXHIBIT 2**

**Equipment Space (if any), Antenna Space and Cabling Space**



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Elko New Market/Scott County Spring Cleanup Agreement
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Mark Nagel, Assistant City Administrator
<b>REQUESTED ACTION:</b>	Approve Recycling Program Agreement with Scott County

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

**BACKGROUND:**

The scheduled Annual Spring Cleanup will be held on Saturday, June 8, 2019, from 8:00 AM to 11:30 AM at City Hall. This will be the twelfth (12<sup>th</sup>) Annual Dropoff Day for the City of Elko New Market and the sixth (7<sup>th</sup>) year that New Market Township has jointly participated in the Spring Cleanup. In 2018, Staff instituted changes in operating Dropoff Day to reduce expenses, which resulted in the smallest deficit ever for this service in 2018 - \$881.40. The average deficit for this program had averaged about \$3,900 per year, so Staff has been able to trim expenses significantly.

Each year, Staff has applied for and received funding through Scott County for this purpose to help offset the cost of providing this service to residents. For the past seven (7) years, the City and New Market Township have worked cooperatively on provision of this program to residents of both the City and the Township.

**DISCUSSION:**

The City has never charged New Market Township residents a higher fee for participating in a City-sponsored Dropoff Day. In exchange for that policy, New Market Township decided to join our Dropoff Day event seven (7) years ago. Scott County agreed to allow the Township's allocation to be used for holding the City's Annual Dropoff Day, which brought an additional \$868.08 grant money from Scott County for reimbursement of expenses. Added to the City's reimbursement of \$1,037.10, the total grant provided by Scott County is \$1,905.18 for the 2019 event. In addition, Staff applied for, and received, a one-time grant of \$2,000 to collect tires, batteries, and carpeting, so the total contract amount for 2019 is \$3,905.18. These additional funds go a long way to helping the City break even on funding this service.

Once the City holds the Recycling Day and completes a report, this Agreement with Scott County allows Elko New Market to receive both our reimbursement of eligible expenses and New Market Township's reimbursement of eligible expenses upon signature and submission of the attached Agreement. This would be a total reimbursement of \$3,905.18.

Staff is recommending the Mayor and City Administrator be authorized to sign that attached Recycling Program Agreement with Scott County.

**BUDGET IMPACT:**

Reimbursement from Scott County in the amount of \$3,905.18 for expenses related to the City/Township Annual Recycling Day for residents of Elko New Market and New Market Township.

Attachments:

- 2019 Recycling Agreement with Scott County

**COUNTY OF SCOTT  
RECYCLING PROGRAM AGREEMENT**

THIS AGREEMENT, by and between the County of Scott, Minnesota, a municipal corporation, hereinafter referred to as the "County," and City of Elko New Market, 601 Main Street, Elko New Market, MN 55020, a municipal corporation, hereinafter referred to as "Provider."

RECITALS:

- a. Pursuant to Minn. Stat. Sec. 373.01, subd. 1(a)(5), each County is a body politic and corporate and may make all contracts and do all other acts in relation to the property and concerns of the County necessary to the exercise of its corporate powers.
- b. The purpose of this Agreement is to establish a mechanism for distribution of funds obtained from the Minnesota Pollution Control Agency for a "clean-up day" to be held by the City in accordance with funding requirements for implementation and/or enhancement of recycling programs in cities and townships within Scott County, consistent with the County Solid Waste Master Plan.
- c. Minn. Stat. Sect. 473.8441, establishes the Local Recycling Development Program, providing grants to counties to be distributed by the Minnesota Pollution Control Agency.
- d. Minn. Stat. Sect. 115A.557, establishes the County Waste Reduction and Recycling Funding program and the framework for funds to be distributed by the Minnesota Pollution Control Agency.
- e. Scott County has received funding from the Minnesota Pollution Control Agency, identified as Local Recycling Development Grant.
- f. These funds are to be used for the activities specified in the Minnesota Pollution Control Agency Grant Agreement.
- g. The City intends to administer a city-wide recycling day which would qualify for receiving funds.

NOW THEREFORE, in consideration of the mutual undertakings and agreement contained within this agreement, the county and Provider hereby agrees as follows:

1. **Compensation and Terms of Payment**

- a. Compensation

The County shall pay to the City a percentage of the grant money available through the County for its one-day city wide clean up on June 8, 2019. The amount of funds available for each Scott County municipality and township is based upon population and a formulation used by the County to determine

shares due to municipalities under the program. This funding is to be used for the development and/or enhancement of recycling programs.

The maximum amount of grant payment available to the City under this Agreement is three thousand nine hundred five and 18/100 Dollars (\$3,905.18).

b. **Terms of Payment**

1. The County shall reimburse the City in one lump sum for actual expenditures used for the collection of recyclable material up to the maximum payment available when the City has met the requirements as specified in section 3 of this Agreement.
2. In the event that another jurisdiction participates with the City event, it shall submit a resolution from its governing body approving such involvement. The County shall then transfer and remit the participating jurisdiction's allocated share in the program funding to the City with the City's share. If any portion of the funding is to go to the participating jurisdiction, it shall be the City's responsibility to ensure such payment is made.

**2. Condition of Payment**

All services provided by Provider pursuant to this agreement shall be performed to the satisfaction of the County, and in accordance with all applicable federal, state and local laws, ordinances, rules and regulations. Payment shall be withheld for work found by the County to be unsatisfactory, or performed in violation of federal, state and local laws, ordinances, rules or regulations.

**3. Scope of Services**

- A. The City shall organize and facilitate a one-day clean up wherein it shall collect materials from residents.
- B. The City is further is obligated and agrees to the following:
  1. A written report shall be submitted to the County within sixty (60) days of the event, identifying the quantities of materials recycled, the facility to which they were delivered and processed, including actual expenditures and revenues.
  2. Only expenditures used for the collection of recyclable material, which results in waste reduction, are eligible for reimbursement from the County's Local Recycling Development Grant. Any solid waste land filled is not included as reimbursable expenditures.
  3. The City shall advertise any neighboring jurisdiction's participation and allow its residents to participate in the collection. In the event that a neighboring jurisdiction participates with the City's event, the City shall provide the Authorized Agent of Scott County a copy of any and all such advertisements.

**4. Effective Date of Contract**

This Agreement shall be effective upon execution by all parties to the Agreement.

**5. Term of Contract**

This Agreement shall remain in effect until December 31, 2019 or until all obligations set forth in this Agreement have been satisfactorily fulfilled or unless earlier terminated as provided in section 13 of this Agreement.

**6. Authorized Agents**

Scott County shall appoint an authorized agent for the purpose of administration of this Agreement. The City is notified of the authorized agent of Scott County as follows:

Mandy Flum  
Scott County Program Specialist  
600 Country Trail E.  
Jordan, MN 55352  
(952) 496-8043  
aflum@co.scott.mn.us

The County is notified the authorized agent for the City is as follows:

Thomas Terry  
City Administrator  
601 Main Street  
P.O. Box 99  
Elko New Market, MN 55020  
(952) 461-2777

**7. County and State Audit**

Pursuant to Minn. Stat. Section 16C.05, Subd. 5, the books, records, documents, and accounting procedures and practices of Provider relative to this agreement shall be subject to examination by the County and the State Auditor. Complete and accurate records of the work performed pursuant to this agreement shall be kept by Provider for a minimum of six (6) years following termination of this agreement for such auditing purposes. The retention period shall be automatically extended during the course of any administrative or judicial action involving the County regarding matters to which the records are relevant. The retention period shall be automatically extended until the administrative or judicial action is finally completed or until the authorized agent of the County notifies Provider in writing that the records need no longer be kept.

**8. Indemnity**

All parties to this Agreement recognize each other as a political subdivision of the State of Minnesota. Each party mutually agrees to indemnify, defend and hold harmless the other from any claims, losses, costs, expenses or damages resulting from the acts or omissions of the respective officers, agents, or employees relating to activities conducted by either party under this Agreement. Each party's obligation to indemnify the other for all claims arising from a single occurrence under this clause shall be limited in accordance with the statutory tort liability limitation as set forth in Minn. Stat. Sec. 466.04.

**9. Insurance**

Each Party shall maintain public liability coverage protecting itself, its Board, officers, agents, employees and duly authorized volunteers against any usual and customary public liability claims in amounts which shall, at a minimum, comply with Minn. Stat. Sec. 466.04 and Workers' Compensation and shall be in accordance with the Minnesota statutory requirements. Said policies shall be kept in effect during the entire term of this Agreement.

**10. Subcontracts**

Provider shall not subcontract any portion of the work to be performed under this agreement nor assign this agreement without the prior written approval of the authorized agent of the County. Provider shall ensure and require that any subcontractor agrees to and complies with all of the terms of this agreement. Any subcontractor of Provider used to perform any portion of this agreement shall report to and bill Provider directly. Provider shall be solely responsible for the breach, performance or nonperformance of any subcontractor.

**11. Force Majeure**

County and Provider agree that Provider shall not be liable for any delay or inability to perform this agreement, directly or indirectly caused by, or resulting from, strikes, labor troubles, accidents, fire, flood, breakdowns, war, riot, civil commotion, lack of material, delays of transportation, acts of God or other cause beyond reasonable control of Provider and the County.

**12. Data Practices**

Provider, its agents, employees and any subcontractors of Provider, in providing all services hereunder, agree to abide by the provisions of the Minnesota Government Data Practices Act, Minn. Stat. Ch. 13, as amended, and Minn. Rules promulgated pursuant to Ch. 13. Provider understands that it must comply with these provisions as if it were a government entity. Provider agrees to indemnify and hold the County, its officers, department heads and employees harmless from any claims resulting from Provider's unlawful disclosure, failure to disclose or use of data protected under state and federal laws.

**13. Termination**

This agreement may be terminated by either party, with or without cause upon thirty days (30) days written notice to the authorized agent of Provider or the authorized agent of the County.

**14. Independent Contractor**

It is agreed that nothing contained in this agreement is intended or should be construed as creating the relationship of a partnership, joint venture, or association with the County and Provider. Provider is an independent contractor, and it, its employees, agents, subcontractors, and representatives shall not be considered employees, agents or representatives of the County. Except as otherwise provided herein, Provider shall maintain, in all respects, its present control over the means and personnel by which this agreement is performed. From any amounts due Provider, there shall be no deduction for federal income tax, FICA payments, state income tax, or for any other purposes which are associated with an employer/employee relationship unless otherwise required by law. Payment of federal income tax, FICA payments, state income tax, unemployment compensation taxes, and other payroll deductions and taxes are the sole responsibility of Provider.

**15. Notices**

Any notices to be given under this agreement shall be given by enclosing the same in a sealed envelope, postage prepaid, and depositing the same with the United States Postal Service, addressed to the authorized agent of Provider, at its address stated herein, or to the authorized agent of the County at the address stated herein.

**16. Controlling Law**

The laws of the State of Minnesota shall govern all questions and interpretations concerning the validity and construction of this agreement, the legal relations between the parties and performance under the agreement. The appropriate venue and jurisdiction for any litigation hereunder will be those courts located within the County of Scott, State of Minnesota. Litigation, however, in the federal courts involving the parties will be in the appropriate federal court within the State of Minnesota.

**17. Successors and Assigns**

The County and Provider, respectively, bind themselves, their partners, successors, assigns, and legal representatives to the other party to this agreement and to the partners, successors, assigns, and legal representatives of such other party with respect to all covenants of this agreement. Neither the County nor Provider shall assign, sublet, or transfer any interest in this agreement without the prior written consent of the other.

**18. Equal Employment and Americans with Disabilities**

In connection with the work under this agreement, Provider agrees to comply with the applicable provisions of state and federal equal employment opportunity and nondiscrimination statutes and regulations. In addition, upon entering into this

agreement, Provider certifies that it has been made fully aware of Scott County's Equal Employment Opportunity and Americans With Disabilities Act Policy, attached hereto and incorporated herein as **Exhibit A** through both oral and written communications, that it supports this policy and that it will conduct its own employment practices in accordance therewith. Failure on the part of Provider to conduct its own employment practices in accordance with County Policy may result in the withholding of all or part of regular payments by the County due under this agreement unless or until Provider complies with the County policy, and/or suspension or termination of this agreement.

**19. Changes/Amendments**

The parties agree that no change or modification to this agreement, or any attachments hereto, shall have any force or effect unless the change is reduced to writing, dated, and made part of this agreement. The execution of the change shall be authorized and signed in the same manner as this agreement, or according to other written policies of the original parties.

**20. Severability**

In the event any provision of this agreement shall be held invalid and unenforceable, the remaining provisions shall be valid and binding upon the parties unless such invalidity or non-enforceability would cause the agreement to fail its purpose. One or more waivers by either party of any provision, term, condition or covenant shall not be construed by the other party as a waiver of a subsequent breach of the same by the other party.

**21. Entire Agreement**

It is understood and agreed that the entire agreement of the parties is contained herein and that this agreement supersedes all oral agreements and negotiations between the parties relating to the subject matter hereof as well as any previous agreements presently in effect between the County and Provider relating to the subject matter hereof.

IN WITNESS WHEREOF, the parties have caused this Agreement to be duly executed intending to be bound thereby.

**CITY OF ELKO NEW MARKET**

(SEAL)

By \_\_\_\_\_  
Joe Julius, Mayor

And \_\_\_\_\_  
Thomas Terry, City Administrator

Date \_\_\_\_\_

Date \_\_\_\_\_

**COUNTY OF SCOTT**

ATTEST:

By \_\_\_\_\_  
Paul Nelson,  
Environmental Services Manager

Date \_\_\_\_\_

APPROVED AS TO FORM:

By \_\_\_\_\_  
Jeanne Andersen,  
Assistant County Attorney

Date \_\_\_\_\_





# STAFF MEMORANDUM

<b>SUBJECT:</b>	Proclamation Policy
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Haley Sevening, Community Development/Administrative Intern
<b>REQUESTED ACTION:</b>	Adopt Resolution No. 19-15 Adopting the Proclamation Policy

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

**BACKGROUND:**

Proclamations and Certificates of Recognition are ceremonial documents issued to recognize exceptional events and individuals. Typically, proclamations are only issued for events or occasions that affect a broad group of people, are directly related to the city, and are not for profit. When proclamation criteria or guidelines are not met, many cities choose to instead issue a Certificate of Recognition.

Currently, the City of Elko New Market has no formal policy regarding proclamations. The process for making and approving a request has been informal, not defined and based on past practice and circumstances.

At the March 28, 2019 City Council meeting, Staff was directed to prepare the draft Proclamation Policy for approval. The proclamation policy outlines issuance criteria, guidelines for requests, and how requests should be made and will help to clarify and streamline the proclamation request process, as well as eliminate approval bias.

**DISCUSSION:**

Based on direction provided at the March 28, 2019 City Council meeting, the Council is being asked to adopt Resolution No. 19-15 adopting the Proclamation Policy.

**BUDGET IMPACT:**

The budget impact for this item is the cost of City staff time.

Attachments:

Resolution No. 19-15 Adopting the Proclamation Policy  
City of Elko New Market Proclamation Policy

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**RESOLUTION NO. 19-15**

**RESOLUTION ADOPTING PROCLAMATION POLICY**

**WHEREAS**, the City of Elko New Market has the power to issue proclamations and certificates of recognition to recognize exceptional events, causes, and achievements; and

**WHEREAS**, the Policy will streamline the proclamation request process and eliminate approval bias; and

**WHEREAS**, the City has determined it is appropriate to adopt a policy regarding proclamation and certificate of recognition guidelines;

**NOW, THEREFORE BE IT RESOLVED THAT** the City Council of the City of Elko New Market, County of Scott, Minnesota, hereby adopts the Proclamation Policy attached hereto as Exhibit A.

**ADOPTED BY THE CITY COUNCIL OF THE CITY OF ELKO NEW MARKET THIS  
11<sup>th</sup> DAY OF APRIL, 2019.**

**SIGNED:**

\_\_\_\_\_  
Joe Julius, Mayor

**ATTEST:**

\_\_\_\_\_  
Thomas Terry, Acting City Clerk

## EXHIBIT A

### City of Elko New Market Proclamation Policy

The City of Elko New Market welcomes the opportunity to recognize exceptional events, causes, and achievements within the City. All proclamations and certificates are ceremonial documents issued by the City Council. Please read the proclamation guidelines before making a request.

#### Proclamation Guidelines

Proclamations are ceremonial documents signed by the Mayor and issued for:

- Public awareness
- Charitable fundraising campaigns
- Days that are noteworthy or historically significant
- Arts and cultural celebrations
- Special honors (on the recommendation of the Mayor)

Proclamations will not be issued for:

- Events or organizations with no direct relationship with the City
- Campaigns or events contrary to City policies
- Matters of political controversy, ideological or religious beliefs, or individual convictions
- Commercial purposes (i.e. opening of a new business, new product/professional service, business anniversaries, etc.)
- Deceased individuals, retirements, birthdays, weddings, wedding anniversaries, family reunions, or religious events or celebrations
- For profit businesses or organizations

Other guidelines for proclamation requests:

- Must be made by a City resident (or other person affiliated with an Elko New Market business or organization)
- Must affect a broad group of people (proclamations will not be issued for individuals)
- An organization does not have exclusive rights to the day, week or month of their proclamation
- More than one cause can be proclaimed simultaneously
- An organization may request only one proclamation annually
- Proclamations are not automatically renewed each year
  - Requests must be made on an annual basis
- Requests must be made at least 30 days in advance of the date the document is needed
  - Requests made less than 30 days in advance may not be approved by the date it is needed
- Should not be interpreted as an endorsement by either the Mayor or the City
- The City retains the right to modify, edit, or otherwise amend the proposed proclamation to meet its requirements, needs, or policy determinations
- The City will review and make the final decision on whether a proclamation is placed on the Council agenda in accordance with these guidelines

- When proclamation criteria are not met, the City may issue Certificates of Recognition as an alternative
  - Includes, but is not limited to:
    - Outstanding public service
    - Prestigious achievements within a service organization
    - Distinguished academic achievements
    - Accomplishments of local significance

How to make a proclamation request:

- All requests should be sent to the City (info@ci.enm.mn.us) with the subject line “PROCLAMATION/CERTIFICATE REQUEST”
- A proclamation request should include:
  - Requesters first and last name, street address, telephone number, and email address
  - A brief summary and/or background of the event or organization being proclaimed
  - Name and date(s) of the day, week, or month to be proclaimed
  - Draft text for the proclamation, including 4-6 “Whereas” clauses
  - A date when the proclamation is needed
- A certificate of recognition request should include:
  - Requesters first and last name, street address, telephone number, and email address
  - A brief summary and/or background of the event, organization, or person to be recognized
  - A date when the certificate is needed



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Extension of Deadline for Filing the Final Plat for Dakota Acres 1 <sup>st</sup> Addition
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Renee Christianson, Community Development Specialist
<b>REQUESTED ACTION:</b>	Adopt Resolution No. 19-16 Approving Extension of the Dealine for Filing the Final Plat for Dakota Acres 1 <sup>st</sup> Addition

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND**

On September 27, 2018 the City Council adopted Resolution 18-50 Granting Approval of the Preliminary and Final Plat and Development Contract for Dakota Acres 1<sup>st</sup> Addition. The development consists of 28 townhome units on 2.71 acres. Section 12-8-5 (C) of the City Code states:

“The developer shall record the plat within ninety (90) days after the date of approval. Otherwise the approval of the final plat shall be considered void, unless the developer requests an extension, in writing, and receives approval from the City Council. The subdivider shall, immediately upon recording, furnish the city clerk with a print and reproducible tracing of the final plat showing evidence of the recording. No building permits shall be issued for construction of any structure on any lot in said plat until the city has received evidence of the plat being recorded by the county.”

The developer, Syndicated Properties, elected not to start construction of the project last fall as originally planned and therefore, did not record the plat/mylars. The developer would like to begin construction on the project in the summer of 2019 and has requested an extension of the deadline for filing the plat until August 1, 2019.

## **DISCUSSION:**

City fees and ordinances pertaining to approval of the development have not changed since the original approvals in September of 2018. Staff has no concerns with extension of the original approvals as adopted in Resolution #18-50.

## **CITY ATTORNEY RECOMMENDATION:**

The City Attorney has drafted Resolution #19-16 Approving the Extension of the Deadline for Filing the Final Plat for Dakota Acres 1<sup>st</sup> Addition, and is recommending approval its adoption.

## **BUDGET IMPACT:**

There is currently no budget impact for this item, other than the cost of City staff time. An escrow is in place to cover the cost of consultant expenses.

## **REQUESTED ACTION:**

Motion to:

- Adopt Resolution No. 19-16 Extending the Approval of Preliminary and Final Plat and Development Contract for Dakota Acres 1<sup>st</sup> Addition.

## **Attachments:**

September 27, 2018 City Council Memorandum  
Resolution No.18-50

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**RESOLUTION NO. 19-16**

**RESOLUTION OF THE ELKO NEW MARKET CITY COUNCIL  
APPROVING EXTENSION OF THE DEADLINE FOR FILING THE FINAL PLAT FOR DAKOTA  
ACRES 1<sup>ST</sup> ADDITION**

**WHEREAS**, on September 27, 2018, the City of Elko New Market passed Resolution No. 18-50 Approving the Preliminary and Final Plat and Development Contract for Dakota Acres 1<sup>st</sup> Addition pursuant to the application by Syndicated Properties, LLC (“Developer”);

**WHEREAS**, Section 12-8-5(C) of the Elko New Market City Code requires a final plat to be recorded within 90 days after the date of approval, unless an extension is approved by the City Council;

**WHEREAS**, the Developer has requested an extension until August 1, 2019 to record the final plat;

**NOW, THEREFORE, BE IT RESOLVED** by the City Council of the City of Elko New Market that an extension to record the final plat for Dakota Acres 1<sup>st</sup> Addition is hereby granted until August 1, 2019.

**PASSED, ADOPTED AND APPROVED** this 11<sup>th</sup> day of April, 2019.

**CITY OF ELKO NEW MARKET**

\_\_\_\_\_  
Joe Julius, Mayor

**ATTEST:**

\_\_\_\_\_  
Thomas Terry, Acting City Clerk



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Dakota Acres 1st Addition PUD, Preliminary & Final Plat
<b>MEETING DATE:</b>	September 27, 2018
<b>PREPARED BY:</b>	Renee Christianson, Community Development Specialist
<b>REQUESTED ACTION:</b>	Adopt Ordinance No. 176 Rezoning Property to Planned Unit Development District Zoning for Dakota Acres 1 <sup>st</sup> Addition Adopt Resolution No. 18-50 Approving the Preliminary and Final Plat and Development Contract for Dakota Acres 1 <sup>st</sup> Addition

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

**BACKGROUND**

Syndicated Properties purchased a 2.17 acre property that had previously been approved for construction of townhome units. Syndicated has submitted an application to the City for rezoning and plat approval associated with a new townhome development that they would now like to construct on the property. The new plat is Dakota Acres 1<sup>st</sup> Addition, which is a continuation of the existing townhome development to the north.

**DISCUSSION:**

Planning Commission Recommendation Based on information provided to the Planning Commission, the recommendations of City Staff, public comment received and discussion at the June 26<sup>th</sup> meeting, the Planning Commission has unanimously recommended approval of the request to rezone the property to Planned Unit Development and the request for preliminary plat approval of Dakota Acres 1<sup>st</sup> Addition containing 28 lots on 2.17 acres, as proposed by Syndicated Properties for the following reasons:

- 1) The proposed development of 28 units on 2.71 acres meets the intent of the Comprehensive Plan Residential Mixed Use land use density objectives, being 12.9 units per acre.
- 2) The property had previously been approved for townhome development and the proposed development is very similar, in terms of site layout and land use, as the previously approved development.
- 3) The proposed development is compatible with the adjacent land uses.

And noting that the lots shall be subject to the requirements of the R-4 High Density Residential Zoning District except as follows:

	<b>R4 District Requirements</b>	<b>Approved for Dakota Acres 1<sup>st</sup> Addition</b>
<b>Permitted Uses</b>	Multiple Family Dwellings Containing more than 8 units	Multiple Family Dwellings containing less than 8 units, as depicted on plans dated 6/21/18
<b>Front setback to curb of private street</b>	30'	3' for single unit building 20' for all 4-unit and 7-unit buildings
<b>Setback between buildings</b>	20'	10' to 55' (25' average) as depicted on plans dated 6/21/18
<b>Setback to periphery property lines</b>	30'	5' along west side, as depicted on plans dated 6/21/18
<b>Setback to major collector street</b>	50'	30'
<b>Easements</b>	10' along perimeter and 5' along interior lot lines	Not required along western property line or interior lot lines
<b>Building Design/Exterior Finish 11-25D-8</b>	Minimum 25% of all building facades shall have an exterior of brick, stucco or	Stone on front and sides of buildings, as depicted on proposed building elevations dated 11/19/17.
<b>Garage Stall Area &amp; Width</b>	Attached garage of minimum 540 sq ft & minimum width of 20'	Attached garages of 418 sq ft minimum & 19' minimum width

And noting the following improved subdivision design elements:

- 1) The proposed open space and recreation areas designated for the project residents will exceed the minimum area required by City Code.
- 2) The landscaping plan exceeds the minimum requirements of City Code by providing more than the minimum required number of trees, and also provides for an aesthetically pleasing variety of trees and plantings throughout the site.

And with the following conditions:

- 1) PUD and Preliminary plat approval is granted in accordance with the following drawings: Preliminary Plat drawing prepared by Stantec and dated 6/20/18, Preliminary Grading & Construction plans containing 7 sheets prepared by Larsen Engineering and dated 6/21/18, Landscaping plan prepared by RHA Architects and dated 8/15/16, Building elevations and sample floor plans prepared by RHA Architects and dated 11/19/17 (7-unit, 4-unit and 1-unit buildings).
- 2) The civil plans must address comments of City staff as depicted on the drawing dated 6/21/18 and the landscape plan must be corrected to address comments of City staff as depicted on drawing dated 6/20/18, both on file with the Elko New Market Community Development office.
- 3) Syndicated Properties must enter into a Developer's Agreement with the City of Elko New Market at the time of final plat approval.
- 4) The proposed development must be added to the Dakota Acres Townhome Association, or a new Townhome Association must be formed. If a new association is formed, it must work out an agreement for access through the two existing private drives (Oriole and Cardinal Streets) with the Dakota Acres Townhome Association.
- 5) The applicant must comply with the recommendations of the City Engineer, Public Works Director and City Attorney.
- 6) A park dedication fee in lieu of land dedication is being required.
- 7) An in-ground irrigation system is required.
- 8) Additional access to James Parkway and Dakota Avenue will not be permitted.
- 9) Drainage and utility easements must be provided for the sanitary sewer and water mains running through the site.
- 10) Ground level patios must be provided for all townhome units. Patios shall not exceed 8' x 8' in size and may not encroach into adjacent properties, except that they may encroach into the common area outlot subject to the same being permitted by the homeowners association. Privacy fences constructed of wood, vinyl or brick and of consistent design shall be provided between rear yard patio areas prior to issuance of a certificate of occupancy. 3 and 4 season porch additions may not be added to the townhome units.
- 11) Developer shall work with the Elko New Market Postmaster to find an acceptable location within the development for mailbox banks. Mailboxes shall be moved off of James Parkway.
- 12) Townhome buildings shall contain not less than three earthtone colors. Adjacent townhome buildings on the same side of the street shall not be of identical color.
- 13) A lighting plan meeting the requirements of City Code must be submitted for review by City staff. The lighting plan shall utilize the Domus style fixture or visually equivalent.
- 14) Garbage receptacles shall be stored within garages or fully screened from view.

- 15) The developer shall be responsible for the removal of the Oriole Street access (to James Parkway) and restoration of area, as approved by the City Engineer.

And noting that:

- 1) The conditions contained in the Dakota Acres Development Contracts, recorded in the Office of the Scott County Recorder as Documents #736584 and #771917 are released upon rezoning of the property to PUD and no longer apply.

Staff Recommendation. Following the recommendations of the Planning Commission on June 26, 2018, the applicant submitted revised construction plans which address the primary conditions recommended by the Planning Commission and staff. Any remaining conditions have been incorporated into the attached Ordinance and Development Contract. Below is a summary of items contained in the development contract:

- Park fee of \$56,000
- Stormwater trunk fee of \$7,612.10
- Sanitary sewer trunk fee of \$113,568.00
- Water trunk fee of \$101,220.00
- Street light fee of \$1,458.24
- Security required in the amount of \$470,761.59 to guarantee construction of a private streets, water, sanitary sewer and stormsewer

The City Engineer and Planner have completed a review of the current application and are recommending approval of the request.

**CITY ATTORNEY RECOMMENDATION:**

The City Attorney has reviewed the Planning Commission recommendation, Draft Ordinance #176 Rezoning the property to PUD Zoning, Resolution #18-50 Approving the Preliminary and Final Plat of Dakota Acres 1<sup>st</sup> Addition, and the Development Contract, and has recommended approval of the documents as presented.

**BUDGET IMPACT:**

There is currently no budget impact for this item, other than the cost of City staff time. An escrow is in place to cover the cost of consultant expenses.

**REQUESTED ACTION:**

Motion to:

- Approve Ordinance No. 176 Rezoning the Property to PUD Zoning
- Adopt Resolution No. 18-50 Approving the Preliminary and Final Plat and Development Contract for Dakota Acres 1<sup>st</sup> Addition.

**Attachments:**

(Draft) Ordinance No.176

(Draft) Resolution No.18-50

(Draft) Development Contract for Dakota Acres 1<sup>st</sup> Addition

Approved Plans, Dakota Acres 1<sup>st</sup> Addition dated September 4, 2018

Planning Commission Staff Report dated June 26, 2018

**CITY OF ELKO NEW MARKET  
SCOTT COUNTY, MINNESOTA**

**RESOLUTION NO. 18-50**

**RESOLUTION  
GRANTING APPROVAL OF THE PRELIMINARY AND FINAL PLAT AND  
DEVELOPMENT CONTRACT FOR  
DAKOTA ACRES 1<sup>ST</sup> ADDITION**

**WHEREAS**, Syndicated Properties LLC, a Minnesota limited liability company (“Developer”) is the fee owner of real property in the County of Scott legally described as follows:

Outlot C, Dakota Acres, according to the recorded plat thereof, Scott County, Minnesota, except that part lying westerly of the east line of Outlot D, said Dakota Acres and its southerly extension.

AND

That part of Outlot B, Dakota Acres, according to the recorded plat thereof, Scott County, Minnesota, described as follows: Commencing at the most northerly corner of said Outlot B; thence South 00 degrees 24 minutes 49 seconds East, assumed bearing, along a west line of said Outlot B, a distance of 245.75 feet to a southwest corner of said Outlot B; thence north 89 degrees 35 minutes 11 seconds East, along a south line of said Outlot B, a distance of 6.02 feet to the point of beginning; thence North 00 degrees 24 minutes 46 seconds West, a distance of 31.56 feet; thence North 89 degrees 35 minutes 11 seconds East, a distance of 45.00 feet; thence South 00 degrees 24 minutes 49 seconds East, a distance of 31.56 feet to said south line of Outlot B; thence South 89 degrees 35 minutes 11 seconds West, along said south line of Outlot B, a distance of 45.00 feet to the point of beginning.

AND

The south 20.50 feet of Lot 1, Block 2, Dakota Acres, according to the recorded plat thereof, Scott County, Minnesota and that part of Outlot B, said Dakota Acres, described as follows: Beginning at the southeast corner of said Lot 1; thence South 00 degrees 23 minutes 54 seconds West, along the southerly extension of the east line of said Lot 1, a distance of 9175 feet; thence South 31 degrees 53 minutes 32 seconds West, a distance of 892 feet to a southwest corner of said Outlot B; thence North 89 degrees 36 minutes 06 seconds West, along a south line of said Outlot B, a distance of 40.34 feet; thence North 00 degrees 23 minutes 54 seconds West, a distance of 17.36 feet to the southwest corner of said Lot 1; thence South 89 degrees 36 minutes 06 seconds East, along the south line of said Lot 1, a distance of 45.00 feet to the point of beginning. (“Property”).

**WHEREAS**, Developer is requesting preliminary and final plat approval of Dakota Acres 1<sup>st</sup> Addition consisting of twenty-eight lots and one outlot on 2.17 gross acres, which is located on the above real estate; and,

**WHEREAS**, the Elko New Market Planning Commission held a public hearing on June 26, 2018, preceded by the required notice;

**WHEREAS**, the Planning Commission unanimously recommended approval of the application for preliminary plat subject to adopted conditions and findings; and,

**WHEREAS**, the City Engineer and City Planner have recommended approval of the Development Contract, Preliminary and Final Plat for Dakota Acres 1<sup>st</sup> Addition, under the conditions provided herein; and

**WHEREAS**, City Council has reviewed the Development Contract and Preliminary and Final Plat for Dakota Acres 1<sup>st</sup> Addition; and finds:

- 1) The proposed development of 28 units on 2.71 acres meets the intent of the Comprehensive Plan Residential Mixed Use land use density objectives, being 12.9 units per acre.
- 2) The proposed plat complies with requirements of City Code Title 12, Subdivision Regulations.
- 3) The property had previously been approved for townhome development and the proposed development is very similar, in terms of site layout and land use, as the previously approved development.
- 4) The proposed development is compatible with the adjacent land uses.

**NOW, THEREFORE, BE IT RESOLVED** that the Preliminary Plat for Dakota Acres 1<sup>st</sup> Addition is approved subject to the following conditions:

- 1) Implementation of the recommendations listed in the June 26, 2018 planning report.
- 2) And with the following conditions:
  - a. PUD and Preliminary plat approval is granted in accordance with the following drawings: Preliminary Plat drawing prepared by Stantec and dated 6/20/18, Preliminary Grading & Construction plans containing 7 sheets prepared by Larsen Engineering and dated 6/21/18, Landscaping plan prepared by RHA Architects and dated 8/15/16, Building elevations and sample floor plans prepared by RHA Architects and dated 11/19/17 (7-unit, 4-unit and 1-unit buildings).
  - b. The civil plans must address comments of City staff as depicted on the drawing dated 6/21/18 and the landscape plan must be corrected to address comments of City staff as depicted on drawing dated 6/20/18, both on file with the Elko New Market Community Development office.
  - c. Syndicated Properties must enter into a Developer's Agreement with the City of Elko New Market at the time of final plat approval.
  - d. The proposed development must be added to the Dakota Acres Townhome Association, or a new Townhome Association must be formed. If a new association is formed, it must work out an agreement for access through the two existing private drives (Oriole and Cardinal Streets) with the Dakota Acres Townhome Association.
  - e. The applicant must comply with the recommendations of the City Engineer, Public Works Director and City Attorney.
  - f. A park dedication fee in lieu of land dedication is being required.
  - g. An in-ground irrigation system is required.
  - h. Additional access to James Parkway and Dakota Avenue will not be permitted.
  - i. Drainage and utility easements must be provided for the sanitary sewer and water main lines running through the site.
  - j. Ground level patios must be provided for all townhome units. Patios shall not exceed 8' x 8' in size and may not encroach into adjacent properties, except that they may encroach into the common area outlot subject to the same being permitted by the homeowners association. Privacy fences constructed of wood, vinyl or brick and of consistent design shall be provided between rear yard patio areas prior to issuance of a certificate of occupancy. 3 and 4 season porch additions may not be added to the townhome units.

- k. Developer shall work with the Elko New Market Postmaster to find an acceptable location within the development for mailbox banks. Mailboxes shall be moved off of James Parkway.
- l. Townhome buildings shall contain not less than three earthtone colors. Adjacent townhome buildings on the same side of the street shall not be of identical color.
- m. A lighting plan meeting the requirements of City Code must be submitted for review by City staff. The lighting plan shall utilize the Domus style fixture or visually equivalent.
- n. Garbage receptacles shall be stored within garages or fully screened from view.
- o. The developer shall be responsible for the removal of the Oriole Street access (to James Parkway) and restoration of area, as approved by the City Engineer.

**NOW, THEREFORE, BE IT FURTHER RESOLVED** that the Dakota Acres 1<sup>st</sup> Addition final plat and Development Contract are hereby approved, subject to the Developer's execution of the development contract, payment of all required fees and providing the security required under the terms of the Development Contract.

**PASSED, ADOPTED AND APPROVED** this 27<sup>th</sup> day of September, 2018.

**CITY OF ELKO NEW MARKET**

  
Robert Crawford, Mayor

**ATTEST:**

  
Sandra Green, Deputy City Clerk



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Consent to Assign Springsted Agreement with Baker Tilly
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Kellie Stewart, Accountant
<b>REQUESTED ACTION:</b>	Approve to Assign "Agreement for Municipal Advisor Services" between Elko New Market and Baker Tilly.

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND**

On June 14, 2018 the City approved an Agreement for Municipal Advisor Services between Elko New Market and Springsted Inc. In accordance to the Municipal Securities Rulemaking Board (MSRB) and the Dodd-Frank Act of 1934, municipal advisors must be registered with the U.S. Securities and Exchange Commission (SEC) and must comply with applicable laws and regulations as they pertain to Municipal Advisors. The contract outlines these laws and regulations along with scope of services and fees associated with those services.

Services provided by Springsted to the City of Elko New Market include General Municipal Advisory Services, Securities Issuance, Arbitrage Monitoring Services, and Continuing Disclosure Services.

## **DISCUSSION:**

Springsted has provided the City with municipal advice and services for several years, but they have recently decided to combine with Baker Tilly Virchow Krause, LLP. Baker Tilly is a financial services and accounting firm. The combination of both companies working as one will allow them to broaden the services they offer to Elko New Market. The combined firm will operate its public sector advisory business under the name Baker Tilly Municipal Advisors, Inc.

To continue to provide services to Elko New Market they are requesting the City sign a Consent to Assignment Agreement and a Continuing Disclosure Services Agreement. This agreement has been reviewed by the City Attorney.

## **BUDGET IMPACT:**

These two agreements with Bank Tilly will have no impact on the budget but will ensure the City receives continued services.

## **Attachments:**

- Springsted Agreement for Municipal Advisor Services (Original)
- Consent to Assign
- Continuing Disclosure Services



Springsted Incorporated  
380 Jackson Street, Suite 300  
St. Paul, MN 55101-3002

Tel: 651.223.3000  
Fax: 651.223.3002  
www.springsted.com

March 7, 2019

City of Elko New Market, MN  
ttery@ci.enm.mn.us

Re: Post-Issuance Authorizations and Consent to Assign the following for Springsted Incorporated:  
Agreement for Municipal Advisor Services, dated 6/4/2018

On January 10, 2019, Springsted Incorporated ("Springsted") announced its intention to combine with Baker Tilly Virchow Krause, LLP (Chicago, Illinois), a financial services and accounting firm. Following the closing, the combined firm will operate its public sector advisory business under the name Baker Tilly Municipal Advisors, LLC ("Baker Tilly"). This combination will allow us to broaden and enhance the services we provide you. All Springsted personnel have been invited to join Baker Tilly and, after the closing, we look forward to continuing to serve you through Baker Tilly.

To assist in the combination and enable continued service to you, we are requesting that you consent to the assignment of your above-referenced contract with Springsted, including any addendums and post-issuance authorizations, to Baker Tilly (the "Assignment"). By executing the Consent to Assignment enclosed with this letter, you hereby consent to the Assignment effective as of the closing of our transaction with Baker Tilly, scheduled to occur on or about April 1, 2019. Until the transaction is complete and the Assignment is effective, we will continue to advise you as Springsted.

We have taken this opportunity to also update any authorizations for post-issuance compliance services Springsted performs for you by adding recently completed transactions and deleting issues for which reporting requirements have been satisfied. The authorization/s are attached to this email and should be signed and returned to us as noted below.

Please return a signed copy of the enclosed Consent to Assignment and the authorization/s to me by email at [assignment@springsted.com](mailto:assignment@springsted.com) no later than March 22, 2019.

Should you have any questions about the foregoing, please feel free to call me or your Springsted representative. Our general number is (651) 223-3000. My personal contact information is: Bonnie Matson, bmatson@springsted.com, (651) 223-3014. We appreciate the opportunity to continue to work with you in the future.

Sincerely,

SPRINGSTED INCORPORATED

  
\_\_\_\_\_, Principal  
Bonnie C. Matson,

Enclosure



Public Sector Advisors

**ADDENDUM**

**Consent to Assignment**

Agreement for Municipal Advisor Services, dated 6/4/2018

The undersigned consents to the assignment of the above-referenced contract by and between Springsted Incorporated, or its wholly owned subsidiary doing business as Springsted Water or Springsted Human Capital Advisors, and City of Elko New Market, MN, including any addendums and post-issuance authorizations, to Baker Tilly Municipal Advisors, LLC upon the effective date of the combination of Springsted Incorporated and Baker Tilly Virchow Krause, LLP:

City of Elko New Market, MN

By: \_\_\_\_\_

Name: \_\_\_\_\_ (print)

Title: \_\_\_\_\_ (print)

Date: \_\_\_\_\_, 2019

Optional Second Signature, if required

By: \_\_\_\_\_

Name: \_\_\_\_\_ (print)

Title: \_\_\_\_\_ (print)

Date: \_\_\_\_\_, 2019

## AGREEMENT FOR MUNICIPAL ADVISOR SERVICES

THIS AGREEMENT FOR SERVICES ("Agreement") is made as of the 04 day of June, 2018 (the "Effective Date"), by and between the City of Elko New Market, Minnesota ("Client") and Springsted Incorporated ("Advisor").

WHEREAS, the Client wishes to retain the services of the Advisor on the terms and conditions set forth herein, and the Advisor wishes to provide such services; and

NOW, THEREFORE, the parties hereto agree as follows:

1. Dodd-Frank Compliance. Springsted is a Municipal Advisor as defined in Section 15B of the Securities Exchange Act of 1934 and as amended by Section 975 of the Dodd-Frank Wall Street Reform and Consumer Protection Act. For purposes of any Municipal Advisor Services rendered by Advisor, Springsted affirms that it is registered as a Municipal Advisor and in good standing with both the Securities and Exchange Commission (registration #867-00226) and the Municipal Securities Rulemaking Board (registration #K0457). The Advisor shall maintain such registration and compliance with applicable laws and regulations as they pertain to Municipal Advisors during the term of this Agreement.
2. Engagement; Duties. On the terms and conditions set forth herein, Client hereby engages Advisor as its Municipal Advisor. Advisor shall provide those services described in **Appendix A** to Client on an as-requested basis by Client; provided, however, that Advisor's obligations under this Agreement shall be expressly limited to such services. Notwithstanding the foregoing, if Client requests Advisor to provide services in connection with a particular municipal issuance-related matter and the parties agree that the services that will be required to be provided in connection therewith differ in scope from those services set forth on **Appendix A**, the parties shall negotiate a mutually agreeable set of services that will be provided by Advisor to Client. Upon the parties' agreement to a particular set of alternate services, Advisor shall deliver to Client an addendum to this Agreement (an "Addendum"). Any such Addendum shall set forth the scope of Advisor's engagement with respect to such municipal issuance-related matter, as well as any alterations to the terms of this Agreement that may have been agreed upon by the parties in connection with such alternate services.

Client authorizes its City Administrator ("Client Representative") to discuss with Advisor the terms of any such Addendum, and authorizes Client Representative to consult with other Client staff or counsel in order to take any and all actions necessary to negotiate, receive, acknowledge or undertake any other step(s) necessary to effectuate any such Addendum on behalf of Client.

3. Compensation and Expenses. Client shall compensate the Advisor and be responsible for the payment of such expenses as set forth on, and in accordance with, **Appendix B** attached hereto. Unless otherwise noted in Appendix B, compensation shall be due to the Advisor within thirty (30) days of the invoice date. The fees set out herein shall be effective for the twelve (12) month period immediately following the Effective Date and shall extend to any service provided by the Advisor pursuant to this Agreement within said 12-month period. Thereafter, the Advisor's compensation shall be at the rates charged other similar clients as of the time a Debt Obligation is commenced.
4. Term and Termination. This Agreement shall be effective as of the Effective Date and shall remain in effect until terminated by either party for any reason upon thirty (30) days prior written notice to the other party. Provided, however, that a termination of this Agreement shall not relieve Client of its obligations to pay Advisor for all services rendered and reimbursable expenses incurred prior to the effective date of termination.
5. Indemnification; Sole Remedy. The Client and the Advisor each hereby agree to indemnify, defend and hold the other harmless from and against any and all losses, claims, damages, expenses, including without limitation, reasonable attorney's fees, costs, liabilities, demands and cause of action (collectively referred to herein as "Damages") which the other may suffer or be subjected to as a consequence of any act, error, material misstatement or omission of the indemnifying party in connection with any information provided, or the performance or nonperformance of its obligations hereunder, less any payment for damages made to the indemnified party by a third party.

Notwithstanding the foregoing, no party hereto shall be liable to the other for Damages suffered by the other to the extent that those Damages are the consequence of: (a) events or conditions beyond the control of the indemnifying party, including without limitation, changes in economic conditions; (b) actions of the indemnifying party which were reasonable based on facts and circumstances existing at the time and known to the indemnifying party at the time the service was provided; or (c) errors made by the indemnifying party due to its reliance on facts and materials provided to the indemnifying party by the indemnified party. Neither party shall be entitled to indemnification under this Agreement for Damages related to any service provided hereunder more than three years prior to the date on which a claim for indemnification is first asserted in writing and delivered to the party from which indemnification is asked.

Whenever the Client or the Advisor becomes aware of a claim with respect to which it may be entitled to indemnification hereunder, it shall promptly provide written notice to the other, which shall include a description of the nature of the claim. If the claim arises from a claim made against the indemnified party by a third party, the indemnifying party shall have the right, at its expense, to contest any such claim, to assume the defense thereof, to employ legal counsel in connection therewith, and to compromise or settle the same, provided that any compromise or settlement by the indemnifying party of such claim shall be deemed an admission of liability hereunder. The remedies set forth in this section shall be the sole remedies available to either party against the other in connection with any Damages suffered by it.

Notwithstanding any other term, covenant or condition of this Agreement, the Client's liability under this Agreement for any claim of any nature or any cause of action against the Client, by any person or party, is limited to the liability limits set forth in Minnesota Statutes, Chapter 466.

6. Standard of Care. Adviser shall exercise the same degree of care, skill, and diligence in the performance of the services as is ordinarily possessed and exercised by members of the profession under similar circumstances in Scott County, Minnesota. Adviser shall be liable to the fullest extent permitted under applicable law, without limitation, for any injuries, loss or damages proximately caused by Adviser's breach of this standard of care. Client shall not be responsible for discovering deficiencies in the accuracy of Adviser's services. Adviser shall be responsible for the accuracy of the work and shall promptly make necessary revisions or corrections resulting from errors and omissions on the part of Adviser without additional compensation.
7. Compliance with Laws and Regulations. In providing services hereunder, Adviser shall abide by all statutes, ordinances, rules and regulations pertaining to the provisions of services to be provided.
8. Insurance. Adviser shall secure and maintain such insurance as will protect Adviser from claims under the Worker's Compensation Acts, automobile liability, and from claims for bodily injury, death, or property damage which may arise from the performance of services under this Agreement. Such insurance shall be written for amounts not less than:

Commercial General Liability	\$1,000,000 each occurrence/aggregate
Automobile Liability	\$1,000,000 combined single limit
Excess/Umbrella Liability	\$2,000,000 each occurrence/aggregate*

The Adviser shall secure and maintain a professional liability insurance policy. Said policy shall insure payment of damages for legal liability arising out of the performance of professional services for the Client, in the insured's capacity as Adviser, if such legal liability is caused by a negligent act, error or omission of the insured or any person or organization for which the insured is legally liable. The policy shall provide minimum limits of One Million Dollars (\$1,000,000.00) with a deductible maximum of Two Hundred and Fifty Thousand Dollars (\$250,000) for bond issuance and investment advising and Twenty-Five Thousand (\$25,000) for other services rendered.

Before commencing work, the Adviser shall provide the Client a certificate of insurance evidencing the required insurance coverage in a form acceptable to Client.

9. Independent Contractor. The Client hereby retains the Adviser as an independent contractor upon the terms and conditions set forth in this Agreement. The Adviser is not an employee of the Client and is free to contract with other entities as provided herein. Adviser shall be responsible for selecting the means and methods of

performing the work. Adviser shall furnish any and all supplies, equipment, and incidentals necessary for Adviser's performance under this Agreement. Client and Adviser agree that Adviser shall not at any time or in any manner represent that Adviser or any of Adviser's agents or employees are in any manner agents or employees of the Client. Adviser shall be exclusively responsible under this Agreement for Adviser's own FICA payments, workers compensation payments, unemployment compensation payments, withholding amounts, and/or self-employment taxes if any such payments, amounts, or taxes are required to be paid by law or regulation.

10. Subcontractors. Adviser shall not enter into subcontracts for services provided under this Agreement without the express written consent of the Client.
11. Assignment. Neither party shall assign this Agreement, or any interest arising herein, without the written consent of the other party.
12. Waiver. Any waiver by either party of a breach of any provisions of this Agreement shall not affect, in any respect, the validity of the remainder of this Agreement.
13. Records. Adviser shall maintain complete and accurate records of time and expense involved in the performance of services and all records and documents associated with its services under this agreement shall be subject to inspection and audit by the Client or State Authorities.
14. Minnesota Government Data Practices Act. Adviser must comply with the Minnesota Government Data Practices Act, Minnesota Statutes Chapter 13, as it applies to (1) all data provided by the Client pursuant to this Agreement, and (2) all data, created, collected, received, stored, used, maintained, or disseminated by the Adviser pursuant to this Agreement. Adviser is subject to all the provisions of the Minnesota Government Data Practices Act, including but not limited to the civil remedies of Minnesota Statutes Section 13.08, as if it were a government entity. In the event Adviser receives a request to release data, Adviser must immediately notify Client. Client will give Adviser instructions concerning the release of the data to the requesting party before the data is released. Adviser agrees to defend, indemnify, and hold Client, its officials, officers, agents, employees, and volunteers harmless from any claims resulting from Adviser's officers', agents', partners', employees', volunteers', assignees' or subcontractors' unlawful disclosure and/or use of protected data. The terms of this paragraph shall survive the cancellation or termination of this Agreement.
15. Confidentiality; Disclosure of Information.
  - 15.1 Client Information. All information, files, records, memoranda and other data of the Client which the Client provides to the Advisor, or which the Advisor becomes aware of in the performance of its duties hereunder ("Client Information"), shall be deemed by the parties to be the property of the Client. Adviser may disclose Client Information to third parties in connection with the performance by it of its duties hereunder.
  - 15.2 Advisor Information. The Client acknowledges that, in connection with the performance by the Advisor of its duties hereunder, the Client may become aware of internal files, records, memoranda and other data, including without limitation computer programs of the Advisor ("Advisor Information"). The Client acknowledges that all Advisor Information, except reports prepared by the Advisor for the Client, is confidential and proprietary to the Advisor, and Client agrees that it will not, directly or indirectly, disclose the same or any part thereof to any person or entity except upon the express written consent of the Advisor.
16. Conflicts of Interest. Client acknowledges that it has received those disclosures set forth and contained within **Appendix C** attached hereto and incorporated herein by reference. Client further acknowledges that it has been given the opportunity to raise questions and discuss the above-referenced matters with Adviser and that it fully appreciates the nature of these conflicts and corresponding disclosures. Client hereby waives such conflicts. In the event any conflict arises during the term of this Agreement, Adviser will promptly disclose the same. Upon receiving any additional disclosures, Client agrees that it will carefully consider any such conflicts, will seek independent advice if it determines it is appropriate, and will, in a writing executed by Client Representative, specifically acknowledge the conflict(s) and, so long as Client believes that Adviser is able to appropriately manage the above-referenced conflicts, authorize Adviser to proceed with the engagement.

17. Dispute Resolution. Upon any dispute under this Agreement, and for a period of 30 days following written notice of a claim or dispute, the senior management of the parties shall first attempt to resolve the dispute informally. If informal dispute resolution is unsuccessful, within 30 days thereafter, the parties shall submit the matter to non-binding mediation before a mutually agreed, certified, neutral third party mediator. If the parties cannot agree upon a mediator, the matter shall be submitted to the American Arbitration Association, Commercial Mediation Division, for selection of a mediator. The parties shall share the cost of the mediator and pay their own mediation expenses and attorney fees. If mediation is unsuccessful, the parties may pursue all available legal and equitable remedies.
18. Miscellaneous.
- 18.1 No Underwriting Participation. The Advisor shall not during the term of this Agreement directly or indirectly engage in the underwriting of any securities issuance.
- 18.2 Delegation of Duties. The Advisor shall not delegate its duties hereunder to any third party without the express written consent of the Client.
- 18.3 No Third Party Beneficiary. No third party shall have any rights or remedies under this Agreement.
- 18.4 Entire Contract; Amendment. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof, and supersedes all prior written or oral negotiations, understandings or agreements with respect hereto. This Agreement may be amended in whole or in part by mutual consent of the parties, and this Agreement shall not preclude the Client and the Advisor from entering into separate agreements for other projects.
- 18.5 Governing Law. The parties agree and acknowledge that any action brought for breach of this Agreement or to enforce any of its provisions shall be brought in Ramsey County District Court, Minnesota. This Agreement shall be governed by and construed in accordance with the laws of the State of Minnesota.
- 18.6 Change in Laws or Regulations. The parties agree and acknowledge that changes in law or regulations issued by federal or state authorities may affect the terms of this Agreement. If there are any changes in law or regulations made after the date of this Agreement, the Client agrees to amend this Agreement if required, to maintain compliance with all applicable laws and regulations. Unless stated otherwise in this Agreement, Advisor may amend this agreement at any time by providing thirty (30) days advance written notice to Client. If no objection is made by the client within thirty (30) days following delivery of such notice, Advisor will assume Client's inactivity constitutes consent.
- 18.7 Severability. To the extent any provision of this Agreement shall be determined invalid or unenforceable, the invalid or unenforceable portion shall be deleted from this Agreement, and the validity and enforceability of the remainder shall be unaffected.
- 18.8 Notice. All notices required hereunder shall be in writing and shall be deemed to have been given when delivered, transmitted by first class, registered or certified mail, postage prepaid and addressed as follows:

If to the Client:

City of Elko New Market  
601 Main Street, P.O. Box 99  
Elko New Market, MN 55020-0099  
Attention: Thomas Terry, City Administrator

If to the Advisor, to:

Springsted Incorporated  
380 Jackson Street, Suite 300  
Saint Paul, MN 55101-2887  
Attention: Managing Principal

The foregoing Agreement is hereby entered into on behalf of the respective parties by signature of the following persons each of whom is duly authorized to bind the parties indicated.

FOR CLIENT

SPRINGSTED INCORPORATED

\_\_\_\_\_  
Thomas Terry  
Print Name  
\_\_\_\_\_  
City Administrator  
Title  
\_\_\_\_\_

\_\_\_\_\_  
Bonnie Matson  
Print Name  
\_\_\_\_\_  
Principal  
Title  
\_\_\_\_\_

**APPENDIX A OF AGREEMENT BETWEEN**

**City of Elko New Market, Minnesota**

**AND**

**Springsted Incorporated**

**Effective as of June 4, 2018**

**SCOPE OF SERVICES**

**A. General Municipal Advisory Services**

Unless otherwise agreed to by the parties, in connection with any request for services relative to any financial topic, new project concept planning or other financially related topic or project (each referred to herein as a "Project"), the Advisor shall perform the following services, as applicable:

1. Provide general financial advice relative to a Project.
2. Survey the resources available to determine the financial feasibility of a Project.
3. Assist in the development of a plan or plans for a particular Project that may be available and appropriate for such Project.
4. Recommend to the Client a plan for any Project.
5. Advise the Client on current market conditions, federal, state or other law considerations, and other general information and economic data that might be relevant to any Project.
6. Assist Client in coordinating the activities between various parties to any Project as needed.
7. Assist Client in selecting and, working with, members of a working group to procure services deemed necessary to a Project. Services that may be procured may include, but are not limited to: general counsel; special tax counsel; credit facilities; credit rating; and engineering or design services.
8. Assist with the review of all documents, including but not limited to any governing body resolutions, purchase agreement, and any other relevant documents.
9. Assist the Client with other components of a Project as requested and agreed upon.
10. Coordinate with the proper parties and oversee the completion of each Project.

**B. Securities Issuance**

Unless otherwise agreed to by the parties, in connection with any request for services relative to any new money issuance, refunding of a prior issuance or other financings (each referred to herein as a "Transaction"), the Advisor shall perform the following services, as applicable:

1. Provide general financial advice relative to any Transaction.
2. Survey the financial resources of the Client to determine its borrowing capacity and analyze existing debt structure as compared to the existing and projected sources of revenues.
3. Assist in the development of a plan or plans for the financing or refinancing of any improvements through the issuance of general bond obligations, loans and/or notes, school bonds, revenue or refunding bonds, or other type of financing alternatives that may be available and appropriate for the particular issuance ("Debt Obligations").

4. Recommend to the Client an amount, the maturity structure, call provisions, pricing, and other terms and conditions of the Debt Obligation.
5. Advise the Client on current market conditions, forthcoming bond, loans and note issues, federal, state or other tax law considerations, and other general information and economic data that might normally be expected to influence the interest rates of the financing.
6. Assist the Client in the analysis of and the selection of a credit rating firm or Firms for the Debt Obligation and further assist in the development and presentation of information to obtain a credit rating or credit ratings for the Debt Obligation.
7. Advise the Client on utilizing credit enhancement and provide assistance in seeking such credit enhancement if, in the opinion of the Advisor, such credit enhancements would be advantageous to the Client.
8. Assist Client in coordinating the financing activities between various parties to any Transaction as needed.
9. Assist Client in selecting and, working with, members of a working group to procure services deemed necessary to the issuance or post-issuance requirements of the Debt Obligation. Services that may be procured may include, but are not limited to: bond counsel; special tax counsel; disclosure counsel; trustee selection; paying agent selection; credit facilities; underwriter; and printing services.
10. Assist with the review of all financing documents, including but not limited to the preliminary and final offering statement, any governing body resolutions, purchase agreement, and any official notice of sale.
11. Communicate with potential underwriters or investors, as appropriate to any Transaction, to ensure that each is furnished with the information they need to render an independent, informed purchase or investment decision concerning the Client's proposed financing.
12. Coordinate with the proper parties and oversee the closing process so as to ensure the efficient delivery of the Debt Obligations to the applicable purchaser.

**C. Arbitrage Monitoring Services**

Upon receipt of written authorization by the Client to proceed, Advisor shall, based on information supplied by Client, make arbitrage calculations (to include for purposes of this document, rebate and yield reduction calculations) required by Section 148 of the Internal Revenue Service ("IRS") Code and related U.S. Treasury regulations with respect to specified Debt Obligations for the period of time designated for any such Debt Obligation. In carrying out its duties, the Advisor shall periodically, for each specified Debt Obligation:

1. Determine the yield on the applicable Debt Obligation;
2. Determine if spending exceptions have been met;
3. Determine the amount of any arbitrage payment due the IRS;
4. Notify Client and/or its designee of any liability amount;
5. Prepare for submission by Client the form/s with which to submit any payment amount due to the IRS at the appropriate intervals throughout the term of the engagement relative to each specified Debt Obligation;

Client agrees to timely provide the Advisor with accurate information concerning cash and investment activity within all funds relative to the subject Debt Obligations. The information to be provided shall include:

1. Deposits and withdrawals of proceeds or money from other sources within any funds subject to the IRS arbitrage rules;
2. Payments of principal and interest on the Debt Obligations; and
3. All investment activity including:
  - a) Date of purchase or acquisition;

- b) Purchase price of investments including any accrued interest;
  - c) Face amount and maturity date;
  - d) Stated rate of interest;
  - e) Interest payment dates;
  - f) Date of sale, transfer, or other disposition;
  - g) Sale or disposition price; and
  - h) Accrued interest due on the date of sale or disposition;
4. Any other information necessary for the Advisor to make the calculations required for the specified Debt Obligation.

**D. Continuing Disclosure Services**

Upon receipt of written authorization from the Client to proceed, Advisor shall, based on the information supplied thereby, assist Client in satisfying its obligations for specified Debt Obligations under any applicable continuing disclosure undertaking executed by and requiring the Client to provide certain financial information and operating data and timely notices of the occurrence of certain events determined to be significant to investors. Such assistance will include the following for each specified Debt Obligation:

- 1. Compile, as needed, and file an annual report according to the continuing disclosure undertaking (the "Undertaking") executed by Client pursuant to SEC Rule 15c2-12(b)(5) for the Debt Obligation(s) for submission by Client to the Municipal Securities Rulemaking Board (MSRB) and the State Information Depository (SID), as applicable. The annual report will generally include:
  - a) An annual audited financial statement to be prepared by Client's accountants.
  - b) Updates of certain specified operating and financial data if not included in the annual audited financial statement.
- 2. Monitor through periodic requests for information, the significant events listed in the Undertaking and assist, as necessary, in the drafting and filing of a significant event notice relative thereto.
- 3. Advisor will furnish a receipt of filing for any continuing disclosure filing made within 30 days after its submission to the MSRB.

Client agrees to provide the Advisor with accurate information with respect to compiling the annual report in a timely manner and to fully disclose to Advisor any significant events as they occur.

**APPENDIX B OF AGREEMENT BETWEEN**

**City of Elko New Market, Minnesota**

**AND**

**Springsted Incorporated**

**Effective as of June 4, 2018**

**A. COMPENSATION FOR SERVICES RELATING TO CLIENT'S DEBT OBLIGATIONS**

1. a. General obligation debt:
  - Base fee of \$7,500 for a bond issuance, plus
  - \$5 per \$1,000 for the first \$2,500,000 of bonds issued
  - \$1 per \$1,000 for amounts over \$2,500,000 of bonds issued
- b. The foregoing schedule shall include the Advisor's services through closing of a Debt Obligation. If the Advisor performs post-closing services relative to a Debt Obligation, it shall be compensated for such services at the hourly rates set out in paragraph B of this appendix.
- c. A single Debt Obligation with multiple financing plans is charged per plan with a discount of \$4,000 per plan applied after the first plan.
- d. Non ad valorem supported debt and advance refunding shall be compensated at 1.25 times the fee set out in paragraph 1.a. above.
- e. Debt Obligations dependent on successful referenda shall be compensated at 1.10 times the fee set out in paragraph 1.a. above.
- f. In the event it is necessary for the Advisor to repeat Debt Obligation services because of events beyond the Advisor's control, the Advisor shall be compensated for such repetitive services at the hourly rates set out in the foregoing paragraph B. of this Appendix. The Advisor shall not be entitled to compensation under this section for failed referenda unless otherwise provided by agreement between the Client and the Advisor.
- g. The Advisor's fees shall be payable as follows:
  - (i) For a Debt Obligation, fees shall be contingent upon closing of the Debt Obligation, except that if the Debt Obligation is awarded but cannot be closed by reason of an error, act or omission of the Client, the Advisor shall be paid the amount which it would have been due upon closing.
  - (ii) If an issuance does not close for a reason that is beyond the control of the Client and without fault of the Client, then the Advisor shall be compensated at one-half the amount which would have been due upon closing.
  - (iii) Fees for services provided in connection with a private placement are not contingent on the successful placement of the Debt Obligation.
  - (iv) If a Client Debt Obligation is abandoned for any reason and the Advisor is without fault for such abandonment, the Advisor shall be paid a fee in the amount that would have been due if the Advisor's services to the point of abandonment had been charged at the hourly rate set out in paragraph B. herein however not more than the fee had the Debt Obligation been issued. A Debt Obligation shall be deemed abandoned upon notice by the Client to the Advisor of abandonment or whenever the Client has taken no action with respect to the Debt Obligation within one year, whichever occurs first. Delay in the issuance of Debt Obligations resulting from failed authorization

referenda shall not constitute abandonment unless otherwise provided by agreement between the Client and the Advisor.

2. The Client shall be responsible for issuance expenses including, without exclusion of other expenses: (i) posting and distributing the Official Statement, (ii) legal fees, (iii) printing, (iv) delivery and settlement, (v) travel, (vi) rating fees, (vii) out-of-pocket Debt Obligation related expenses, and (viii) governmental and governmental agency fees and charges.

**B. HOURLY RATES FOR NON-DEBT ISSUANCE RELATED SERVICES**

Principal, Senior Officer .....	\$260
Senior Professional Staff .....	\$215
Professional Staff.....	\$160
Associates .....	\$ 75

**C. ARBITRAGE AND REBATE MONITORING SERVICES**

1. Fees for arbitrage services shall be as applied as follows:
  - a. \$1,500 per determination per Debt Obligation when such determinations are made annually as of the selected computation date of the applicable Debt Obligation's date of issuance, or
  - b. \$1,500 for the first year, plus \$400 for each additional year up to a five year period per determination for each Debt Obligation when such determinations are made for periods in excess of one year.
2. At such time as the original proceeds and investment earnings thereon are completely expended and only a non-commingled bona fide debt service fund remains, the Advisor will notify the Client if compliance with the arbitrage provisions can be accomplished through monitoring of the Debt Service fund. In the event such recommendation is made and it is accepted by the Client, the Advisor will perform monitoring activities for a fee of \$400 for annual monitoring or \$850 for monitoring at the close of every fifth bond year. If, for any determination period, monitoring reveals that the debt service fund is no longer bona fide and a rebate calculation must be performed, any charge for monitoring for that determination period will apply toward the applicable fee for rebate and arbitrage services.
3. If (i) separate information for each Debt Obligation is not provided, (ii) Advisor is required to perform allocations of investments among funds, or (iii) the Advisor is required to perform other analysis, additional compensation will be charged for such allocations/analyses at the hourly rates in paragraph B.

**D. CONTINUING DISCLOSURE SERVICES**

Report preparation and filing per type of obligation:

- a. Full disclosure report created by Advisor, \$1,300, plus \$200 each debt obligation
- b. Full or limited disclosure official statement with updated data that can be referenced, \$0, plus \$200 each debt obligation
- c. Full disclosure all operating data included within CAFR, \$600, plus \$200 each debt obligation
- d. Limited disclosure, \$600, plus \$200 each debt obligation

Client shall be responsible for county auditor certification fees, if required, and any legal fees incurred in connection with determining compliance with continuing disclosure certificates or interpretation of significant events or filing of the annual report.

**E. EXPENSES AND HOURLY FEES**

Amounts due the Advisor for expenses and services charged at hourly rates shall not be contingent.

## APPENDIX C OF AGREEMENT BETWEEN

City of Elko New Market, Minnesota

AND

Springsted Incorporated

Effective as of June 4, 2018

### CONFLICTS OF INTEREST

Contingent Fee. The fees to be paid by the Client to Springsted are or may be based on the size of the transaction and partially contingent on the successful closing of the transaction. Although this form of compensation may be customary in the municipal securities market, it presents a conflict because Springsted may have an incentive to recommend unnecessary financings or financings that are disadvantageous to the Client. For example, when facts or circumstances arise that could cause the financing or other transaction to be delayed or fail to close, Springsted may have an incentive to discourage a full consideration of such facts and circumstances, or to discourage consideration of alternatives that may result in the cancellation of the financing or other transaction. Springsted manages and mitigates this conflict primarily by adherence to the fiduciary duty which it owes to municipal entity clients which require it to put the interests of the Client ahead of its own and its duty of fair dealing that it owes to obligated person clients which require it to deal fairly with all persons.

Affiliated Entities and Subsidiaries. Springsted's wholly owned subsidiary, Springsted Investment Advisors Incorporated ("SIA") may provide services to the Client in connection with the investment of proceeds from an issuance of securities. In such instances, services will be provided under a separate engagement, for an additional fee. Notwithstanding the foregoing, Springsted may act as solicitor for and recommend the use of SIA, but Client shall be under no obligation to retain SIA or to otherwise utilize SIA relative to Client's investments. The fees paid with respect to investments are based in part on the size of the issuance proceeds and Springsted may have incentive to recommend larger financings than would be in the Client's best interest. Springsted will manage and mitigate this potential conflict of interest by this disclosure of the affiliated entity's relationship, a Solicitation Disclosure Statement when Client retains SIA's services and adherence to Springsted's fiduciary duty and/or fair dealing obligations to the Client.

Springsted's wholly owned subsidiary, SpringstedIWaters, Incorporated ("SW"), may provide services to the Client in connection with human resources consulting, including, but not limited to, executive search and community survey services. In such instances, such services will be provided under a separate engagement, for an additional fee. Certain executives of the Client may have been hired after utilizing the services of SpringstedIWaters and may make decisions about whether to engage the services of Springsted. Notwithstanding the foregoing, Springsted may recommend the use of SpringstedIWaters, but Client shall be under no obligation to retain SpringstedIWaters or to otherwise utilize SpringstedIWaters relative to the Client's activities. Springsted will manage and mitigate this potential conflict of interest by this disclosure of the affiliated entity's relationship and adherence to Springsted's fiduciary duty to the Client.

No additional conflicts of interest have been identified by Springsted. To the extent any such material conflicts of interest arise after the date of this disclosure document, Springsted will provide information with respect to such conflicts in the form of a supplement to this disclosure.

### LEGAL OR DISCIPLINARY EVENTS

Springsted is registered as a "municipal advisor" pursuant to Section 15B of the Securities Exchange Act and rules and regulations adopted by the United States Securities and Exchange Commission ("SEC") and the Municipal Securities Rulemaking Board ("MSRB"). As part of this registration Springsted is required to disclose to the SEC information regarding criminal actions, regulatory actions, investigations, terminations, judgments, liens, civil judicial actions, customer complaints, arbitrations and civil litigation involving Springsted. Pursuant to MSRB Rule G-42,

Springsted is required to disclose any legal or disciplinary event that is material to the Client's evaluation of Springsted or the integrity of its management or advisory personnel. There are no criminal actions, regulatory actions, investigations, terminations, judgments, liens, civil judicial actions, customer complaints, arbitrations or civil litigation involving Springsted. Copies of Springsted filings with the United States Securities and Exchange Commission ("SEC") can currently be found by accessing the SEC's EDGAR system Company Search Page which is currently available at <https://www.sec.gov/edgar/searchedgar/companysearch.html> and searching for either Springsted Incorporated or for our CIK number which is 1613940. The MSRB has made available on its website ([www.msrb.org](http://www.msrb.org)) a municipal advisory client brochure that describes the protections that may be provided by MSRB rules and how to file a complaint with the appropriate regulatory authority.

## Arbitrage Monitoring Services

### Authorization to Engage Services

Pursuant to the Agreement for Arbitrage Monitoring Services ("Agreement") by and between City of Elko New Market, Minnesota ("Client") and Springsted Incorporated ("Advisor") effective June 4, 2018, Client wishes to retain the services of the Advisor to provide arbitrage calculations required by Section 148 of the Internal Revenue Service Code and related U.S. Treasury regulations with respect to the following Debt Obligation(s):

Bond Issue	Closing Date	Frequency
\$910,000 General Obligation Bonds, Series 2006A	11/1/2006	5th Year
\$1,735,000 General Obligation Improvement Bonds, Series 2007A	7/25/2007	5th Year
\$60,500 General Obligation Equipment Certificates of Indebtedness, Series 2009A	4/8/2009	5th Year
\$1,380,000 General Obligation Improvement Refunding Bonds, Series 2011A	7/7/2011	5th Year
\$1,290,000 General Obligation Refunding Bonds, Series 2012B	11/5/2012	5th Year
\$2,100,000 General Obligation Bonds, Series 2013A	12/19/2013	5th Year
\$1,385,000 General Obligation Bonds, Series 2015A	8/20/2015	5th Year
\$970,000 General Obligation Refunding Bonds, Series 2015B	8/20/2015	5th Year

Acceptance:

FOR CLIENT

SPRINGSTED INCORPORATED

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Thomas Terry

Bonnie Matson

Print Name

Print Name

City Administrator

Principal

Title

Title

## Continuing Disclosure Services

### Authorization to Engage Services

Pursuant to the Agreement for Continuing Disclosure Services ("Agreement") by and between the City of Elko New Market, Minnesota ("Client") and Springsted Incorporated ("Advisor") effective June 4, 2018, Client wishes to retain the services of the Advisor to provide continuing disclosure services required by Securities and Exchange Commission Rule 15c2-12(b)(5) for submissions to the Municipal Securities Rulemaking Board with respect to the following Debt Obligation(s):

#### General Obligation

- \$910,000 General Obligation Bonds, Series 2006A
- \$1,380,000 General Obligation Improvement Refunding Bonds, Series 2011A
- \$1,290,000 General Obligation Refunding Bonds, Series 2012B
- \$2,100,000 General Obligation Bonds, Series 2013A
- \$1,385,000 General Obligation Bonds, Series 2015A
- \$970,000 General Obligation Refunding Bonds, Series 2015B

Acceptance:

FOR CLIENT

SPRINGSTED INCORPORATED

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Thomas Terry

Bonnie Matson

Print Name

Print Name

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City Administrator

Principal

Title

Title

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**Continuing Disclosure Services**

Authorization to Engage Services

This authorization is pursuant to the Agreement for Municipal Advisor Services ("Agreement") by and between the City of Elko New Market, Minnesota ("Client") and Springsted Incorporated ("Advisor") effective on June 4, 2018, Client wishes to retain the services of the Advisor to provide continuing disclosure services required by Securities and Exchange Commission Rule 15c2-12(b)(5) for submissions to the Municipal Securities Rulemaking Board with respect to the following Debt Obligation(s):

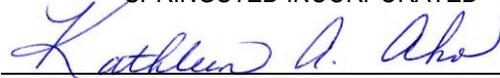
General Obligation

- \$1,380,000 General Obligation Improvement Refunding Bonds, Series 2011A
- \$1,290,000 General Obligation Refunding Bonds, Series 2012B
- \$2,100,000 General Obligation Bonds, Series 2013A
- \$1,385,000 General Obligation Bonds, Series 2015A
- \$970,000 General Obligation Refunding Bonds, Series 2015B

Acceptance:

FOR CLIENT

SPRINGSTED INCORPORATED



Kathleen A. Aho

Print Name

Print Name

President

Title

Title



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Authorize Engineering Services for 2019 Lift Station Standby Generation Project
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Thomas Terry, City Administrator
<b>REQUESTED ACTION:</b>	Accept Proposal and Authorize Engineering Services for 2019 Lift Station Standby Generation Project

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND**

Staff had recommended to the City Council the installation of dedicated standby power generation (generators) at several of the City's lift stations. On-site generation provides increased reliability for lift station operation in the event of power outages to reduce the potential of sewer backups. In addition, it increases worker safety – power outages typically occur during severe weather events.

The City currently has some mobile generators. However, the number of generators is insufficient to handle all of the City's lift station. In addition, mobile generation requires multiple staff to respond, especially during extended outages. Mobile generation also requires storage. Lastly, the cost of onsite vs. mobile is similar (generator on concrete pad powered by natural gas or generator on trailer powered by diesel fuel).

## **DISCUSSION:**

The City Council is being asked to accept the proposal and authorize engineering services for the 2019 Lift Station Standby Generation Project. The construction and installation cost for the project is estimated (pre-design) to be \$160,000-\$180,000. Including engineering fees, the total project cost is estimated to be \$190,000-\$210,000. Assumptions related to the project have been included in previous sewer utility fund financial models.

## **BUDGET IMPACT:**

Design and Bid phase work for a fee not to exceed \$24,000 and construction services estimated at \$6,000.00, for a total estimated project fee of \$30,000. Any additional services such as topo, boundary survey and sheet layout (if required) would be an additional expense and are not included in the estimated project fee.

The engineering fees would be considered a project expenses and financed as part of the project. The project would be bundled with our debt issuance for capital projects/purchases in 2019.

## **Attachments:**

- Engineering Scope and Fee Proposal for 2019 Lift Station Standby Generation Project



**BOLTON  
& MENK**

Real People. Real Solutions.

12224 Nicollet Avenue  
Burnsville, MN 55337-1649

Ph: (952) 890-0509  
Fax: (952) 890-8065  
Bolton-Menk.com

April 11, 2019

Thomas Terry, City Administrator

RE: 2019 Lift Station Standby Generation  
City of Elko New Market  
Engineering Services Scope and Fee

Dear Tom,

This letter outlines our proposed scope of work and fee for engineering services related to the procurement of four dedicated standby generators for the following lift stations:

1. Boulder Heights
2. Oxford
3. Downtown Elko
4. Ptarmigan

The City is proposing to add dedicated standby generation in accordance with a study completed by our firm in 2017. Each station would have stand-alone generation capable of operating the lift station in the event of a power outage. No station would be dependent upon another station's generation to operate. The stations would be fueled by natural gas.

The design work primarily involves electrical engineering that would be performed by our sub-consultant, Barr Engineering. Their work tasks are listed in italics below. Their contract; however, would be with Bolton & Menk, Inc. and their fees are included in the compensation section below.

*Design and Bid Phase*

- 1. Site visit to verify existing conditions at each site.*
- 2. Coordinate with both the electric utility and the natural gas utility regarding provisions for service to the sites.*
- 3. Prepare electrical plans and specifications for the project. The plans will include an electrical site plan, electrical one-line diagram, and any relevant electrical installation details pertaining to each site.*
- 4. Answer questions from contractors, issue addendums as required, etc. during the project bidding phase.*
- 5. Coordinate addition of Generator monitoring points to existing SCADA system telemetry.*

*Construction Phase*

- 1. Engineering services during the construction phase of the project will include review of shop*

Name: Mr. Thomas Terry

Date: April 11, 2019

Page: 2

*drawings, answering questions from the contractor, issuing change orders, etc.,*

*2. Provide two (2) site visits per station, with one (each) being the final inspection visit with punch list. For purposes of this proposal it is assumed that all the sites will be constructed simultaneously (although cut-over activities would not be simultaneously).*

While responsible for the complete scope of work, Bolton & Menk Inc's in-house design-phase work would be limited to project coordination, preparation of a Project Manual and bidding. It is further assumed that no field survey or civil site plan would be required or prepared for any site. An 8 1/2 by 11-inch location map would be provided for the Project Manual. Our construction phase work would consist of project coordination and one final site walk-through.

Bolton & Menk, Inc. proposes to perform the above Design and Bid phase work for a fee not to exceed \$24,000 (\$6,000 per station). Subconsultant fees are included in this total. We will add a 10% markup to subconsultant fees. The markup is also included in the not-to-exceed fee. Construction services will be on an hourly basis, estimated at \$6,000.00, for a total estimated project fee of \$30,000. There will; however, be a reduction of this total by an estimated amount of \$3,095.50 as described in the next section.

You will recall Bolton & Menk, Inc. agreed in September of 2017 to a not-to-exceed fee of \$17,000 for the Boulder Heights lift station design, including standby generation. This discounted fee was for the resolution of a matter related to wells for the water treatment facility. To-date we've billed \$14,095.50 for the Boulder Heights lift station design work, meaning \$2,904.50 is left. We would apply 25% of our design fee (\$6,000) towards the Boulder Heights standby generation, but honor the cap of \$17,000. The total not-to-exceed design fee for all four generators is effectively reduced by this application to \$20,904.50. The math is: \$24,000 less (\$6,000-\$2,904.50) = \$20,904.50. Fees related to construction were not part of the cap.

We cannot cap construction fees since variables beyond our control are involved; however, we would advise you if it appears the \$6,000 estimate will be exceeded.

Electrical site plans would be based on advice from the electrical engineer and direction from the Public Works Superintendent as he sees fit for access and operation. Should changes to site boundaries, access drives and/or drainage be desired, Bolton & Menk, Inc. would conduct a topo and boundary survey and prepare a single-sheet layout and grading plan on an hourly basis not to exceed \$5,000 per site in addition to the fees above.

Feel free to reply or call with any questions on the above proposal.

Sincerely,

**Bolton & Menk, Inc.**

**Rich Revering, PE**

Senior Project Manager



# STAFF MEMORANDUM

<b>SUBJECT:</b>	Appoint Council Representative to Unified Transit Management Plan (UTMP) Steering Committee
<b>MEETING DATE:</b>	April 11, 2019
<b>PREPARED BY:</b>	Thomas Terry, City Administrator
<b>REQUESTED ACTION:</b>	Appoint Council Representative to Unified Transit Management Plan (UTMP) Steering Committee

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
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## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance "shovel ready" status of areas guided for commercial and industrial development
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- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND**

The existing Unified Transit Management Plan (UTMP) for Scott County, developed in 2004, focused largely on capital investments to initiate new transit options; including consolidation of dial a ride services within Scott County and developing express service to employment centers outside of Scott County (primarily Minneapolis and the U of M). SCALE is seeking to update the SCALE Transit Plan. This includes strategically tying transit planning to the 50x30 economic goals of SCALE. This will include analysis and recommendations on:

- land use decisions for housing and how they impacts transit operations
- consider and shape future employment and how it impacts transit operations
- improve access to labor for employers through potential public private partnerships and last mile connections
- improve transit dependent population access to jobs, food and services
- ensure the County's aging populations continue to have transportation and housing options so they can remain connected and active in their community as they age

## **DISCUSSION:**

SCALE is seeking elected representatives from each of the cities in Scott County to serve o the Steering Committee for the UTMP update. A summary of the UTMP update project description has been included, along with the Executive Summary of the current plan with annotations.

## **Attachments:**

- SCALE Transit Plan Update Project Description
- UTMP Executive Summary with Annotations

## SCALE Transit Plan Update

### SCALE Exec Committee – December 7, 2018

**Objective:** To update the SCALE Transit Plan. This includes strategically tying transit planning to the 50x30 economic goals of SCALE. This will include analysis and recommendations on:

- land use decisions for housing and how they impacts transit operations
- consider and shape future employment and how it impacts transit operations
- improve access to labor for employers through potential public private partnerships and last mile connections
- improve transit dependent population access to jobs, food and services
- ensure the County's aging populations continue to have transportation and housing options so they can remain connected and active in their community as they age

The outcome of this plan would be to develop a comprehensive set of prioritized tactics based on the plan's strategies that SCALE could implement and measure over the next 10 year period. This would include short term and long term tactics for implementation.

**Background:** The existing Unified Transit Management Plan, developed in 2004, focused largely on capital investments to initiate new transit options; including consolidation of dial a ride services within Scott County and developing express service to employment centers outside of Scott County (primarily Minneapolis and the U of M). This focus was:

- Construct Park and Rides on TH 169 that could accommodate 2000 vehicles by 2025 (streamlined off of CH 16 and TH 169) - Completed – Southbridge, Eagle Creek and MRTS
- Consolidate all dial-a-ride services within Scott County (Shakopee/County)
- Provide express service as the Blue Express and have the cities of Shakopee and Prior Lake work together (at the time the Laker Lines had the lowest ridership numbers in the region)
- Worked with MnDOT to provide transit advantages on TH 169 (bus shoulders, bus bypass lane)
- Consolidate dial-a-ride service with Carver County – look beyond our borders for productivity as transit transcends government borders (Smartlink)
- Transit Advisory Board (local elected officials) completed a 10 year operations plan for express service and needs which included maintenance needs for the park and ride facilities
- Established intercity bus service with LandToAir from Mankato to Downtown Mpls.
- Evaluate the governance of the Blue Express operations and look for efficiencies from an operational standpoint (merger with MVTA)
- Last key recommendations of that plan expected to be implemented in 2019 with MVTA establishing a 169 connector service from Scott County to employment centers in the golden triangle area (Eden Prairie and Minnetonka).

In conjunction with the need to update the Unified Plan:

- The County and 7 Cities recently completed their comprehensive plans which include land use and transportation components
- MVTA as part of the merger completed the Northern Scott County Transit utilizing the data for service planning
- Partnered with Dakota County in 2016 on the Dakota County East West Service Study that evaluated CH 42 and business connections
- TH 169 Bus Rapid Transit Study was completed in 2018
- TH 169 MNPass project scored very well in the 2018 Corridors of Commerce submission
- The Green Line LRT extension began construction in November of 2018

So with completion of the Unified Transit Plan, other recent studies and construction approvals it is appropriate for SCALE to update the SCALE Transit Plan. As part of LiveLearnEarn it has become evident for the need to evaluate housing, workforce and transit in an integrated context.

So elements to explore in this plan:

1. What is the County's vision for Transit?
  - a. Update UTMP? If so,
    - i. Goals/objectives to be put together by the Communities
    - ii. SCALE Communities and MVTA
    - iii. Focus areas
      1. Transit dependent populations
      2. Transit system that services retail and employment areas connected to residential areas
      3. Identify workforce housing areas that are compatible and productive for transit
        - a. Employers needing greater access to the work force
2. Service and Facility planning beyond the Northern Scott County Transit Study & 169 Mobility
  - a. 42 corridor
  - b. City of Savage 495 route stop
  - c. Local fixed route in Prior Lake & Savage
  - d. Intercity Bus from Mankato serving Belle Plaine & Jordan
  - e. SmartLink Service Expansions
  - f. On Demand Service feasibility
  - g. Elko New Market Service Needs
  - h. Future Park and Ride Needs
  - i. System Connections outside of County
    - i. Green Line
    - ii. Orange Line
    - iii. American Blvd BRT
3. City Land Use Plan developed with Transit Considerations
4. Affordable & Work Force Housing Locations
5. Pedestrian facilities within ¼ of transit route/stop
6. Improving Pedestrian environment from bus stop to destination-Site Planning & retrofitting existing development
7. Bus stop amenities
8. Transit Governance-Opt outs, Met Council, MnDOT
9. Funding Opportunities (Private and Public)

Executive Summary Annotated 2018 version

# Unified Transit Management Plan

For the Communities of Scott County,  
Minnesota

New TRANSIT  
In The WORKS



May 2005

Prepared for Scott County by:



**Pertec**

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# Unified Transit Management Plan Executive Summary

**Annotations in red include work completed since 2005 plan completed**

## Identified Issues

A number of transit-related issues have been identified in the course of this study, including the following:

### River Crossings

There are three major roadway crossings of the Minnesota River: The Cedar Street Bridge, Interstate 35W and US Trunk Highway (TH) 169. Of these, two have been the focus of separate public transportation studies in recent years, the I-35W Bus Rapid Transit Study and the Cedar Street Transit way Study, that have recommended significant transit improvements in each of these respective corridors.

The TH 169 corridor is significantly under-utilized as a transit corridor, with no regular transit crossings of the Bloomington Ferry Bridge, the most direct corridor connecting northwestern Scott County with the Minneapolis metro area to the north.

- Belle Plaine Hwy 25 bridge
- Minnesota River Crossing Flood Mitigation Study
- CH 69 Interchange
- Shakopee Hwy 101 bridge
- 169 Corridor study
- 169/Co Rd 41 Interchange
- 169 BRT/MnPASS Study

### Existing Services

Scott County is served by four separate transit operators: Scott County Transit, predominantly a dial-a-ride operator, Laker Lines, Shakopee Transit and the Minnesota Valley Transit Authority (MVTA). The latter three entities are service providers that “opted out” from Metro Transit’s service area, electing to provide their own services funded, in part, by state Motor Vehicle Sales Tax (MVST) funds. Of the six Metro area opt-out regions, Prior Lake and Shakopee exhibit the lowest ridership and highest

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relative costs for transit services and provide the lowest level of transit service per capita to their citizenry.

While MVTA does provide significant local and express service out of the Burnsville Station, that service is remote from much of the western portions of Scott County and utilized to a much lesser degree by residents of Prior Lake and Shakopee as compared to residents of Savage, (an MVTA member) located further to the east. While more than 300 regular park-and-ride users, identified as residing in Scott County, predominantly at Burnsville Station, a significant majority reside in the eastern third of the County; in part because present transit services are oriented to the I-35W corridor rather than to the TH 169 corridor.

The more rural portions of Scott County, including the communities of Jordan and Belle Plaine in the southwestern portion of Scott County and the communities of Elko, New Market and New Prague in southern Scott County, are served exclusive via dial-a-ride services provided by Scott County Transit. Lower developmental and residential densities in these regions make fixed route transit service impractical at the present time, but steady rapid growth in this region suggests that close monitoring of densities, population and travel patterns of residents of these communities should be conducted.

The Shakopee Mdewakanton Sioux Community (SMSC) currently provides its own fixed route services to multiple origins and destinations throughout the Metropolitan Area for the purpose of employee transportation. Fourteen buses are operated by a subcontractor for these purposes.

## **Study Recommendations**

The significant park-and-ride demand identified from Scott County shows the need for improved transit services, in particular, commuter express services into downtown Minneapolis and into suburban areas such as Edina, Bloomington, Richfield and Eden Prairie. It is recommended that new services focus first on the Minneapolis commuter market and later expand into other northern and eastern adjacent commuter markets, downtown St. Paul, the University of Minnesota, Normandale Community College, and Hennepin Technical College.

There are a number of small park-and-ride facilities throughout Scott County that have inadequate levels of transit service and do not generate any appreciable transit demand. Scott County needs to develop a large (500-1,000 parking stall) park-and-ride/transit center that will consolidate commuter transit demand and focus service on the TH 169 corridor. In order to accomplish these, and other, objectives, the following recommendations have been made.

### **Dial-a-Ride**

Dial-a-ride services in Scott County ultimately need to be consolidated into one provider: Scott County Transit. Existing opt-outs in the Cities of Shakopee and Prior Lake need to focus their efforts and funding instead on big bus fixed route services.

With the impending transfer of Metro Mobility ADA-paratransit services throughout Scott County to Scott County Transit, that organization will be the sole provider of demand response services throughout Scott County. Scott County Transit is encouraged to adopt that role as its mission. The City of Shakopee should then correspondingly ramp down its provision of additional dial-a-ride services over the next 1-2 years.

Scott County's 2005 budget for dial-a-ride is \$994,000, including \$543,000 in Metropolitan Council funding covering approximately 60 percent of the cost of providing service. As all county dial-a-ride services come under Scott County Transit's control, the 25,000 rides currently funded by the City of Shakopee will be included in Scott County Transit's total, making it eligible for additional funding under the Council's performance-based funding program. This could generate approximately \$160,000 in additional funding, with the remainder of the cost of these services paid for from the fare box, the increased subsidy from ADA passengers, and other County funds.

Scott County Transit needs to continually monitor both ridership and travel patterns of dial-a-ride users. As ridership on these services increases, Scott County Transit needs to develop a series of service benchmarks to identify high ridership and high productivity dial-a-ride corridors as candidates for transitioning from dial-a-ride to route deviation or fixed route services.

- Shakopee discontinued dial a rides services and hired Scott County Transit
- Created a circulator route for Shakopee
- Contracted with the Met Council to be the ADA and Dial a Ride provider
- Merged with Carver County Transit Dial a Ride
- Formed a Mobility Management Board, (Commissioners, HHS, Met Council, MNDOT and Local Cities) Users Group(customers) and Providers Group (MVTA, South West, and a variety of other providers)
- Mobility Management started the Shared Vehicle and Travel Trainer Programs
- Regional ADA service was restructured
- The Dial a Ride service was contracted out
- Scott County started expanded services of the Dial a Ride program to include evening and weekend service

## Fixed Route

The existing Shakopee and Prior Lake opt-out areas should begin to pool their transit resources over the near-term (3-4 years) and focus their attention on fixed route services to their constituents. Services to be provided should include: 1) commuter express trips to downtown Minneapolis via TH 169 and I-394, incorporating the existing Laker Lines trips and adding at least three more (for a minimum of 5) morning and afternoon trips to provide an attractive level of service to induce expanded ridership, 2) local services connecting the major communities of Shakopee, Prior Lake and Savage to the Burnsville Station, permitting the transferring of riders to MVTA services to expand access for Scott County residents to additional destinations in the Metro area, and 3) connections between the Burnsville Station and the Mystic Lake Casino

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complex, Savage, Shakopee, and Prior Lake to provide improved commuter connections from the Metro region to employment opportunities in Scott County. The initial year's cost of local service, assuming continued operation by Scott County Transit at current contracting rates of about \$37 per hour, are estimated to be about \$325,000, leaving approximately \$1.4 million for fixed route services.

Initially, at least five morning and five afternoon commuter express transit trips from Scott County will be needed to help balance commuter growth and generate additional commuter express transit demand. Within 1-2 years as many as 8 morning and 8 afternoon trips may be needed to satisfy short-term demand until a permanent park-and-ride facility (see below) is completed. Future service additions, including commuter express, local and midday express, should respond to increased demand as it develops.

While combining the two Cities resources should result in enhanced transit services for users, the two entities need not relinquish the identities of the services of their individual systems. What is needed is to create the appearance of a single system, enhanced levels of service, coordinated schedules, marketing and planning.

Currently the Cities of Prior Lake and Shakopee are programmed to receive about \$1.39 million in MVST funds in 2005. With a 20 percent fare box recovery, an additional \$345,000 in fare revenues would bring the transit budget for the two cities to approximately \$1.74 million.

In the longer term, as the transit market matures and the permanent TH 169 park-and-ride/transit center is in operation, the additional concentration of transit demand will permit the expansion of commute travel destinations to additional areas within the Metro region, including the area adjacent to the I-494 corridor, to downtown St. Paul, and improved east-west connections to Dakota County. These improvements will require close cooperation between Scott County transit operators and Southwest Metro Transit, MVTA, and Metro Transit.

Additionally, developments in southern Scott County should be continually monitored. While existing developmental and residential densities do not warrant dedicated fixed route services, a continuation of current growth trends will generate increasing transit demand from this region, which will be best served via the I-35W corridor.

- Merged Prior Lake and Shakopee and formed Transit Review Board
- Blue Express was formed to provide direct service to MPLS
- A Jobs Access Reverse commute Grant was secured and a bus from downtown Minneapolis to Mystic was started in 2012.
- An attempt was made to provide service to the Golden Triangle in Eden Prairie
- The 495 service between the Marschall Road Transit Station and the Mall of America was started.
- The 495 also provides service to and from the Burnsville Transit Station (Dakota County local service; University of Minnesota and downtown St. Paul) and Mystic Lake Casino, along with stops at the Amazon Fulfillment Center in Shakopee

- Mystic Lake Casino started a shuttle program for its employees to and from the Marschall Road Transit Station
- Land to Air Express (Jefferson Lines) started serving the Marschall Road Transit Station with its Airport Service
- 169 Connector (intercity bus service) running from Mankato to the Minneapolis Bus Depot, started in 2016 and was expanded to 2 round trips a day in 2017
- State Fair service out of the Marschall Road Transit Station was started

## Facilities

Scott County needs to immediately begin the process of site selection and acquisition, design and construction of a new transit center in the area south of the Bloomington Ferry Bridge near the confluence of CSAH 18, TH 169, TH 13, and the future CSAH 21 extension. This transit center needs an initial capacity of approximately 500 parking stalls and should be ultimately expandable to provide between 1,000 and 1,100 parking stalls within 6-8 years. This facility should take advantage of commercial and residential joint development opportunities in the Southbridge area to develop an expanded market for transit services in Scott County.

The transit center can also serve as office space for transit operators in the Scott County area, particularly with respect to marketing and promotional activities. While the transit center is probably not compatible with maintenance and storage operations, Scott County Transit could also take advantage of this site for administrative staff as well.

If Scott County Transit chooses to continue providing dial-a-ride services directly, a separate maintenance and storage facility will need to be developed for dial-a-ride and local circulator service vehicles. This facility should be located in close proximity to the transit center in order to minimize deadhead (non-revenue) service hours and costs.

A temporary facility with parking capacity between 100 and 200 stalls needs to be developed in the neighborhood of the permanent facility in preparation for implementation of additional commuter express transit services.

- Southbridge Park and Ride was added (460 stalls)
- Eagle Creek Park and Ride was added (563 stalls; expandable to 761 stalls)
- Marshall Road Transit Station was added (435 stalls); includes a heated waiting area, customer service & a bus garage for part of the dial a ride fleet.

## Municipal Participation

In the short term, the primary beneficiaries of improved transit use of the TH 169 corridor will likely be the Cities of Shakopee and Prior Lake, although many residents of western portions of the City of Savage may well decide to take advantage of improved services in this corridor. The City of Savage should remain part of MVTA for the short-term, but should be an active participant in the planning and marketing of all transit

services in Scott County. The Cities of Shakopee and Prior Lake need to open discussions with the MVTA and Southwest Metro Transit concerning the future potential of joining either regional provider as a long-term strategy.

In the future, as service levels improve and additional transit facilities are developed, the Cities of Shakopee, Prior Lake and Savage need to assess joining together formally to provide transit services throughout the northern portion of Scott County. Discussions concerning this long term strategy need to begin immediately so that a long term strategy is in place when the need for formal action occurs. At that time, the three jurisdictions can re-evaluate the desirability of joining together in a new opt-out area, or formally joining an existing opt-out such as Southwest Metro Transit or the Minnesota Valley Transit Authority.

At that time, a dedicated source of local transit funding will also need to be secured to fund the local portion of enhanced transit services and facilities. It is estimated that between \$2.5 million and \$3.5 million will need to be generated locally to subsidize transit operations and facilities in Scott County by 2020.

There is also a longer-term need to begin identifying a mechanism for expanding the Transit Taxing District in the future and for annexing areas such as Belle Plaine, Jordan, New Market, Elko and New Prague. Consider that the residents of these cities will likely make-up a percent of the transit ridership on the newly implemented commuter express route system. Currently there is no formal policy for expanding the District and for assessing tax support for transit improvements in areas outside the District.

- Partnered with MVTA
- Started the 0.5% (half of one percent) Transportation Sales Tax, with City support, up to \$1 million per year considered for Transit and Last Mile related program. Scheduled to sunset in 2022.
- Partnered with Land to Air Express (Jefferson Lines)
- Partnered with Southwest Transit
- Mobility Management Board

## Service Delivery

The Cities of Shakopee and Prior Lake should provide transit services to their constituents by means of contracting with third parties rather than entering into direct operations themselves. This will result in lower initial capital outlays for equipment and facilities and take advantage of existing operating expertise and maintenance and storage capacity in the region. Currently, for local fixed route small vehicles 35 ft or smaller, Scott County Transit could continue providing this service through contract, as they have proven to be cost-beneficial.

Additionally, these cities should take advantage of the expertise of the Metropolitan Council's Regional Transportation Services to identify, negotiate and manage contracted services. This policy is expected to yield lower contracting prices and better contractor oversight than either or both jurisdictions electing to "go it alone" in

contracting for services. This will also reduce the administrative overhead while the two jurisdictions work out the sharing of resources, both financial and human, enhancing transit services in Scott County.

Finally, Shakopee should transfer operations and administration of its vanpools over to the Metro Commuter Services and reinvest those finances into fixed route services. Allowing these passengers to convert to using the new commuter express route or continue as a vanpool passenger under this agency.

- Partnered with MVTA
- Scott County and Carver County join their Dial a Ride programs
- The Amazon Fulfillment Center is added to the 495 bus routing
- Mystic Lake Casino starts their “last mile solution” in providing a shuttle service to and from the Marschall Road Transit Station for their employees
- Dial a Ride services in Scott and Carver Counties are contracted out
- Mobility Management administers the Dial a Ride, Volunteer Driver and Expanded Services programs
- Assisted MVTA in securing a 2014 CMAQ grant for a Golden triangle, Bren Road express service, yet to be implemented

## Planning Needs

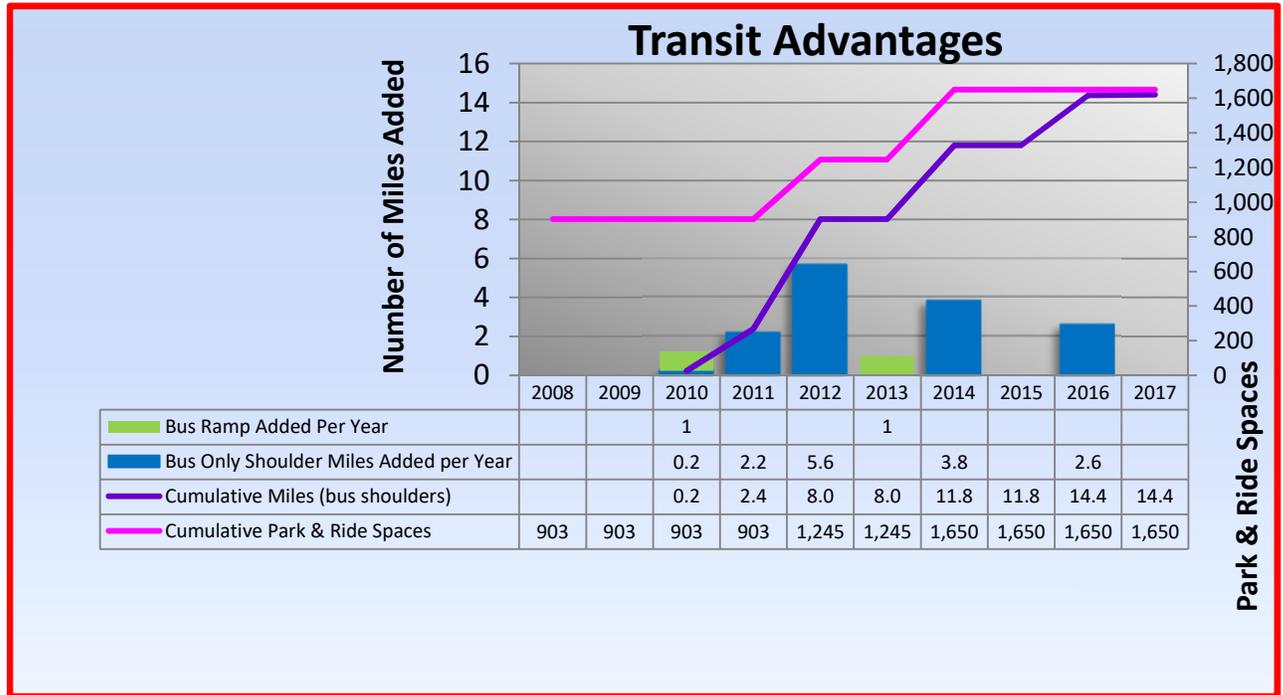
A number of supporting policies need to be developed and adopted by Scott County and the municipalities in existing and future opt-out areas. These policy initiatives include the following:

**Signage** – current signage of transit facilities and services is inadequate. Scott County, MnDOT and the opt-out communities need to work together to develop standards and warrants for transit signage, including the signing of every bus stop in the urban areas of the county and adequate signage at park-and-rides and other transit facilities

- Secured Facility and trailblazing signage for all major park and rides on County Highways and Trunk Highway’s serving Scott County.

**Shoulder access** – while the need for shoulder bus lanes on county and state roads in the Scott County region will be increasing over time, there is an existing need to provide these lanes along SH 13 between CSAH 18 and the Burnsville Station, particularly in the eastbound direction. Studies need to begin to develop warrants for the future expansion of this program based on transit and auto volumes, congestion characteristics and potential for travel time savings

- Added bus ramp to 169 serving South Bridge and Eagle Creek Park and Ride Facilities
- Added bus ramp to 169 serving Marschall Road Transit Station.
- Added bus shoulders on TH169, TH13, CH21 and CH 17 to support transit advantage in congested periods.
- Advocated for additional bridge width on TH169 9-mile creek bridge replacement to support both Bus Shoulders and MnPASS, Completed in 2016



**Transit Oriented Design** - Scott County needs to pursue the development of transit-oriented design standards to guide the development of land uses adjacent to, and nearby transit facilities. Particular attention should be given to the location of public housing developments and essential human services in close proximity to major transit developments (such as the TH 169 Transit Center)

- Through the Scale Technical Committee, updated the Scott County Regional Model in 2014 developing transit and entertainment scenarios
- Involved Cities in the PAC and TAC for the 169 Intercity Bus and BRT studies
- Collaborate with cities on their housing plans for increasing density.
- Completed CH16, CH21 and CH 17 highway projects include pedestrian/bike connections to park and rides.
- Secured 2023 funding for Pedestrian improvements to MRTS area.
- Funding bus shelter improvements at Walmart (SouthBridge) and Amazon

**Comprehensive Planning** - The County and the individual cities need to include transit considerations in their comprehensive planning efforts, including the designation of major and minor transit corridors in their roadway network and the development of land uses along these corridors that are compatible with, and supportive of, pedestrian, bicycle and transit uses, including lower vehicle speeds, extensive pedestrian and bicycle paths and traffic control devices

- 2040 Comp Plan

**Planning** – The County and its constituent municipalities need to maintain a more regional perspective in planning transit services and improvements. These considerations include working with transit agencies in other areas (such as MVTA and Southwest Metro Transit) in the joint

planning and development of services between service areas and the potential for joint funding of services and facilities benefiting a more regional audience

- North Scott County Study
- East/West Scott and Dakota County Study
- 169 Mobility Study (BRT, Intercity Bus, spot mobility and MnPASS)
- Southwest Light Rail
- 35W BRT /Orange Line
- Transportation Committee, Live Learn Earn

**Marketing** – The County and its cities need to keep the promotion and marketing of transit services and facilities at a high priority. This effort includes development and distribution of promotional and informational materials, encouraging communities to consider transit impacts in all of the zoning and land use decisions and working with the Metropolitan Council to integrate transit information with the region-wide information network

- SmartLink hired a Marketing position along with a Travel Trainer
- Partnering done with MVTA and Southwest Transit

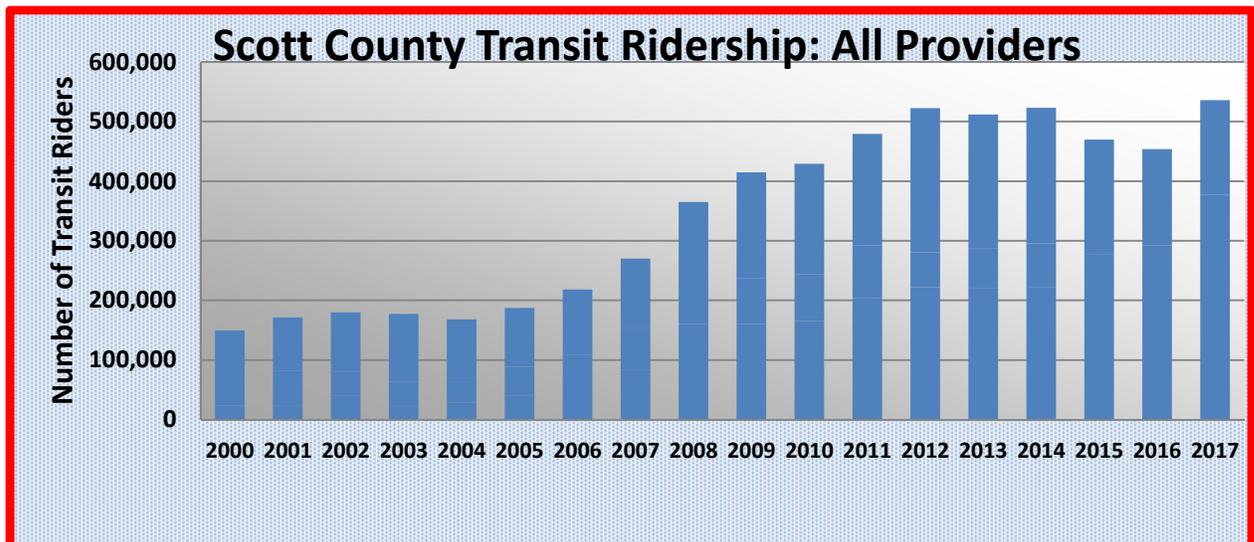
## Expected Results

The expanded funding and emphasis on transit services in Scott County can be expected to have widespread results on the economic, mobility and quality of life throughout the County. A planning model developed by the Transportation Research Board (TRB) was used to monetize the anticipated benefits of improved mobility.

Anticipated benefits include:

**Economic and Mobility** – Based on the TRB model, it is estimated that every dollar spent on transit improvements in Scott County will return approximately \$1.20 on mobility and economic benefits to Scott County, its municipalities and citizens; benefits from reduced use of energy and other natural resources accrue to society as a whole.

**Improved Transit Ridership** – Approximately 2,400 additional daily transit trips will be taken by transit within Scott County and into Hennepin County.



**Mode Split Improvements** – The transit mode split of trips between Scott County and Hennepin County would improve from less than one percent to over five percent.

**Reduced Congestion** – A reduction of approximately 2,400 daily automobile trips from Scott County to Hennepin County is estimated; reduced costs of accidents due to the relative safety of bus travel to that of automobile travel accrue to all road users and society as a whole.

**Improved Air Quality** - The estimated annualized air quality benefits of improved transit in Scott County due to reduced vehicular emissions are approximately \$86,000 per year, including improved hydrocarbon, carbon monoxide, and NOx emissions; improved mobility for pedestrians and bicyclists due to reduced vehicle use.



# STAFF MEMORANDUM

**SUBJECT:** Monthly Public Works Report – March 2019  
**MEETING DATE:** April 11, 2019  
**PREPARED BY:** Corey Schweich, Public Works Superintendent  
**REQUESTED ACTION:** Information Only

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance “shovel ready” status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND:**

Staff is presenting a written report for Public Works activities in March.

## **DISCUSSION:**

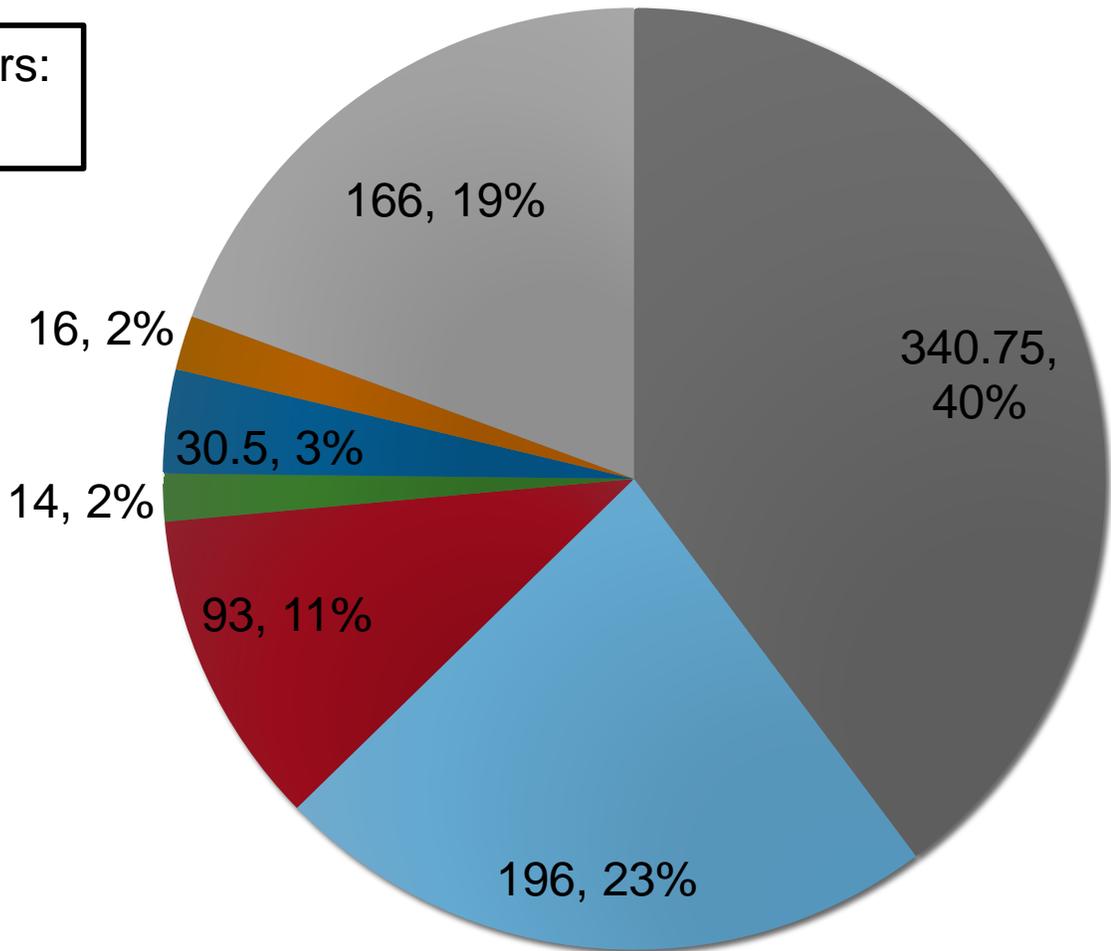
- Public Works Staff performed snow & ice control operations on two events in March. In early March, Staff spent their time moving piles, pushing back piles, cleaning cul-de-sacs, widening streets, widening sidewalks and bike path, and other associated tasks.
- As a result of the melting, Staff had to address very icy gravel roads. Salt and other deicing materials are not used on gravel roads, rock chips, gravel and sand are used to add traction to the ice. Over time the chips melt into the ice and need to be reapplied multiple times. On March 11<sup>th</sup>, Staff had to back down every gravel road and apply chips in reverse to provide traction as the roads were glare ice and almost impassable.
- Superintendent Schweich attended a three day water operator training in Rochester. It should be noted that all licensed Staff has to attend a certain amount of water and sewer trainings to maintain their licenses. For example, Superintendent Schweich has to complete 24 hours of water training and 16 hours of sewer training every three years. As a result of being short staffed for the past couple years, it had been very difficult to pull away from the day to day operations to attend trainings.
- As part of the regional safety group made up of Elko New Market, Lakeville, and Farmington, training was cancelled this month due to the weather. Staff will continue to attend monthly safety trainings through this group.
- Rinks were open this season longer than they have been any other year. Staff closed the rinks in early March.
- As a result of the large amount of snow this winter and the heavy rain in March, Staff spent about a week and a half jetting, cleaning and thawing storm water structures throughout the community. At one point in time, Public Works had to close 255<sup>th</sup> St. by Eagleview Elementary as a result of the flooded road. Staff worked until 9pm that night trying to get the blockage opened up before closing the road for the night. Staff rented a mini backhoe the following morning to dig out all of the hard pack snow that was frozen in the ditch blocking the flow of water. Once the ditch was open, Staff had to continue to break up snow and ice chunks as they would continue to plug up the ditch. Staff was able to open up the road that day before school was out. Staff did an excellent job inspecting and keeping the storm water infrastructure open throughout the melting process, on many occasions they were waist deep in freezing cold water with neoprene chest waders on.
- Staff assisted the County with a plugged culvert west of town. As part of the SCALE philosophy Public Works and Scott County work collaboratively by sharing equipment and resources.
- As reported previously, Staff has picked up the utility tractor that was budgeted in Capital Outlay for 2018 and purchased in 2019. The tractor will be used primarily to pull the 16' batwing mower in the summer. The tractor will also be used during snow and ice control operation, dragging ball fields, applying fertilizer and herbicide to City property. The mower has been picked up and will be put into service in the spring when the mowing season gets underway.
- Staff installed spring road restriction signs, they will be removed when the weight restrictions are lifted in the region.

- Superintendent Schweich attended the initial kickoff meeting with the architects that have been contracted to perform the design work associated with the Police Department remodel. There will be more meetings to attend in the coming months.
- Staff filled in a significant amount of potholes with cold patch. This season has been one of the worst for potholes. It should be noted that a majority of the potholes were located on roads that are scheduled to be milled and overlaid in 2019.
- Public Works Staff has started to paint the interior of the well houses. This work should be completed sometime in April, as time permits.
- As we are somewhat between seasons, Staff has been performing many inside building maintenance tasks that were scheduled to be completed this winter, but were put on hold with all of the snow.
- The Department has been extremely busy dealing with various minor breakdowns within the Department's fleet. Joe, the Mechanic, continues to do an excellent job juggling projects, depending on equipment needs.

# PUBLIC WORKS Combined Time By Department

March 2019

Total Hours:  
856.25



Public Works

Snow Plowing

Buildings

Parks & Grounds

Water

Sewer

Stormwater

# PHOTO ALBUM

COREY SCHWEICH

PUBLIC WORKS SUPERINTENDENT













# STAFF MEMORANDUM

**SUBJECT:** Monthly Police Activity – March 2019  
**MEETING DATE:** April 11, 2019  
**PREPARED BY:** Brady Juell, Chief of Police  
**REQUESTED ACTION:** Information only

## COMMUNITY VISION:

- A mature growing freestanding suburb of the Twin Cities Metropolitan Area, preserving historic landmarks and small town character while providing suburban amenities and services, as well as full range of employment, housing, business, service, social, technology infrastructure and recreational opportunities for citizens and visitors
- Promote a diverse commercial base including light industrial and facilitating planned redevelopment which will be aesthetically pleasing with architectural standards that promotes quality development
- Provide a full range of municipal services to its residents. The City will allocate sufficient resources to meet the growing needs of the community
- A comprehensive park and trails system that will have sufficient facilities, play fields and open space to meet the needs of residents
- An effective and efficient transportation system, including access to the greater metropolitan area, transit opportunities, and improved connectivity to the interstate
- Provide community oriented local government and be financially sound, engaging in long-term financial planning to provide municipal services without undue burden on tax payers

## 5 YEAR GOALS:

- Diverse tax base, employment opportunities, additional businesses and services, promote high quality broad spectrum of residential development
- Advance “shovel ready” status of areas guided for commercial and industrial development
- Acquisition of land for public purposes, position City to take advantage of land acquisition opportunities
- Enhance quality of life through parks, trails, recreational programming and cultural events
- The development of residential lots and an increase in residential building permit activity

## COMMUNITY ORIENTED LOCAL GOVERNMENT:

- Community Involvement
- Organizational Improvement
- Problem Solving
- Performance Measurement
- Professionalism

## **BACKGROUND:**

Staff is presenting a written report to the City Council reporting on Police Department activities for the past month.

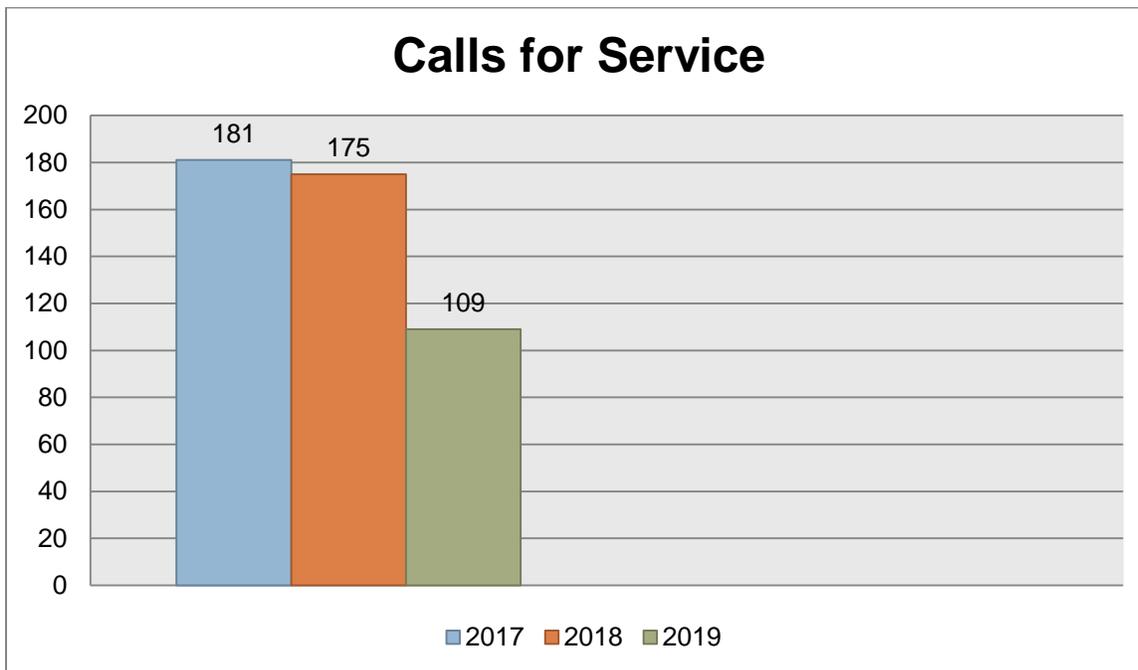
## **DISCUSSION:**

- Officer Gareis and Officer Wirtz attended the Family Fun night “Glow Stick Dance” event at the ENM library. Officer Gareis showed off his fancy dance moves to impress the children (see attached photos).
- Chief Juell gave a 30 minute presentation to the Chamber of Commerce on workplace safety and workplace safety audits.
- Officer Machaby and Officer Gareis attended Public Service Information System (PSIS) to discuss radio protocol, CAD, and LETG systems.
- Call in Windrose neighborhood of, “a woman screaming behind a home.” Call resulted in a dispatch radio error which created a large presence of squad cars and personnel to the area thinking an officer was in need of assistance. Result of investigation was a disturbance between suspected intoxicated parties who left prior to police arrival.
- Chief and City Administrator Tom Terry took a half day tour of the city and met local business owners and employees to introduce the new chief. Created a great dialogue with many community members and business owners.

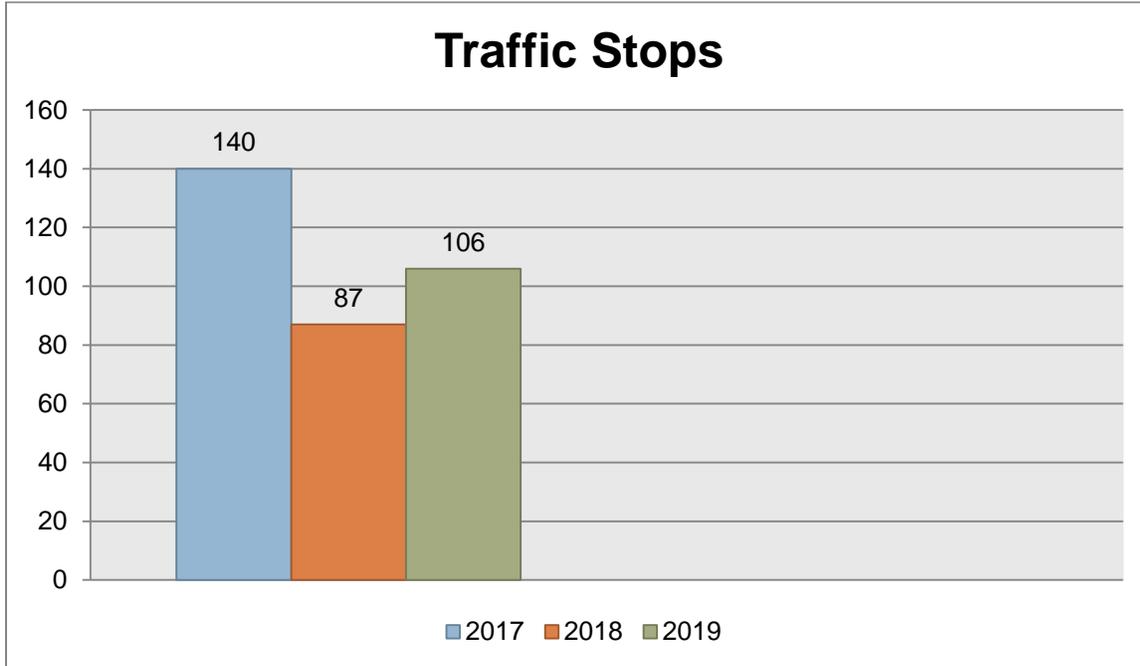
## STATISTICAL INFORMATION – MARCH 2019

- 2 Noise/nuisance complaints
- 23 Assists to public
- 1 Domestic
- 9 Hazards
- 1 Disputes
- 8 Suspicious persons/vehicles/activities
- 2 Theft
- 2 Harassment
- 7 Medicals
- 27 Assists to other agencies
- 4 Mental Health (Officers referred parties to Canvas Health)

Calls for Service:

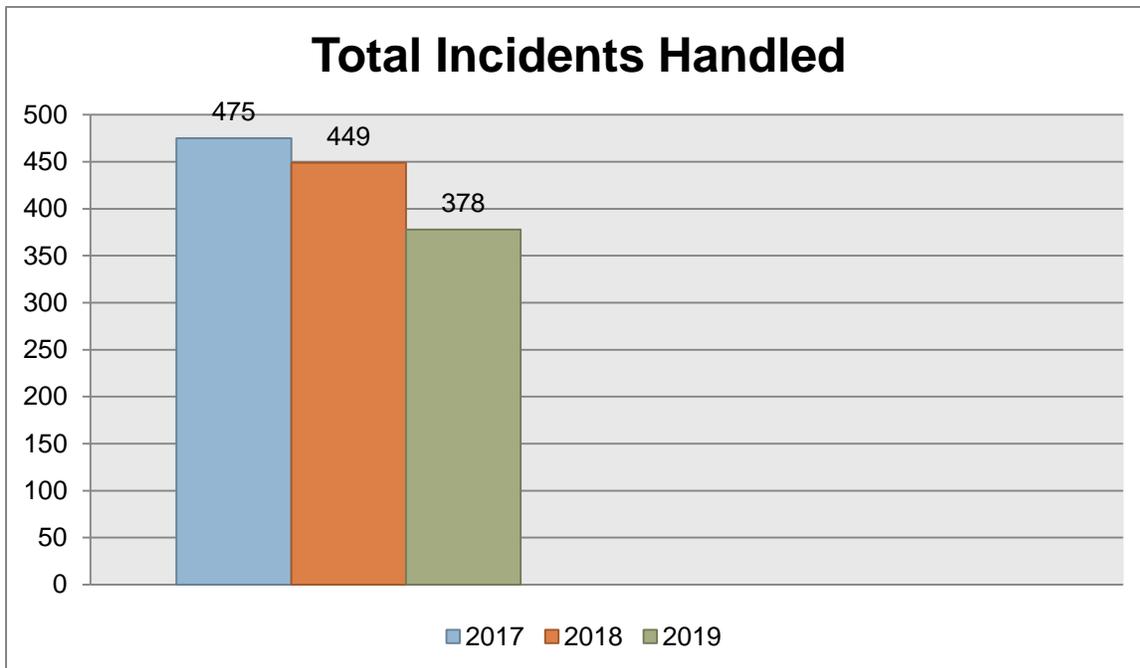


Total Traffic Stops:



**106** traffic stops were conducted in February 2019. **94** warnings issued and **10** citations issued for speed, expired registration, no proof of insurance/no insurance, careless driving, and driving after revocation. **2** citations issued for violation of winter parking ordinances on plowing days.

Total Incidents Handled:



# PHOTO ALBUM

BRADY JUELL  
CHIEF OF POLICE











**MINUTES  
CITY OF ELKO NEW MARKET  
PLANNING COMMISSION MEETING  
March 26, 2019  
7:00 PM**

**1. CALL TO ORDER**

Vice-Chairman Humphrey called the meeting of the Elko New Market Planning Commission to order at 7:00 p.m.

Commission members present: Kruckman, Humphrey, Hanson, Priebe and Ex-officio Representative Jeff Krueger

Members absent and excused: Smith and Ex-officio member Anderson

Staff Present: Community Development Specialist Christianson and Community Development Intern Haley Sevensing

**2. PLEDGE OF ALLEGIANCE**

Vice-Chairman Humphrey led the Planning Commission in the Pledge of Allegiance.

**3. APPROVAL OF AGENDA**

A motion was made by Kruckman and seconded by Priebe to approve the agenda as submitted. Motion carried: (3-0).

**4. PUBLIC COMMENT**

A. None

**5. ANNOUNCEMENTS**

A. None

**6. APPROVAL OF MINUTES**

A motion was made by Kruckman and seconded by Priebe to approve the minutes of the January 29, 2019 Planning Commission meeting as submitted. Motion carried: (3-0). Commissioner Hanson entered the meeting.

**7. PUBLIC HEARINGS**

**A. Proposed Zoning Ordinance Amendment – Sexually Oriented Businesses**

Christianson presented her staff report containing information regarding sexually oriented businesses which was also reviewed at the February, 2019 Planning Commission meeting. She noted that the Planning Commission had requested the City review current ordinances pertaining to sexually oriented businesses to ensure that the City complies with state and

federal regulation. Christianson explained that a government can impose controls on where sexually oriented businesses can locate but cannot prevent them from locating altogether because they are protected by the First Amendment. Case law has determined that having approximately 5% of the City's land area available for such uses is a reasonable benchmark.

The current ordinance was reviewed with the Planning Commission. Maps were displayed depicting where such uses are not permitted to locate, including buffer areas around residential zoning districts, schools, churches, daycare facilities, parks, and certain zoning districts. The results of the analysis were that 2.05% of the City's land area, or 40.89 acres, is currently available for sexually oriented uses to locate and a map was displayed showing those areas. It was explained that the City Attorney believes that the 2.05% is an adequate and defensible amount of land available based on the fact that Elko New Market is primarily a residentially zoned community at this time. As the City annexes more commercially and industrially zoned land, additional land will become available for such uses.

Christianson explained that one minor change to the ordinance is being recommended, and that is to remove the requirement that sexually oriented businesses be setback at least 200' from trails. The reason for the recommendation is that this would potentially preclude such uses from locating anywhere in the City which would be unconstitutional. The public hearing regarding such change was opened at 7:09 p.m., and with no comments from the public it was closed at 7:09 p.m. It was then moved by Kruckman and seconded by Hansen to recommend approval to the City Council that Section 11-5-16 (C) of the City Code be amended to remove the requirement that sexually oriented businesses be setback at least 200' from trails. Motion carried: (4-0).

## **B. Proposed Zoning Ordinance Amendment – Small Wireless Facilities**

Sevening presented her staff report and draft ordinance amendment information regarding small cell wireless equipment. She explained that during the 2017 legislative session a new law was enacted that allows small cell wireless equipment to be placed within public street rights-of-ways. The new legislation allows this equipment to locate on City-owned equipment (i.e. power poles, street lights) and allows for the installation of a 50 foot tall structure within public rights-of-ways to support an antenna array. The new law is intended to expand broadband service coverage and accelerate delivery of service which is needed to address the rapidly growing consumer market and new technologies all utilizing the broadband network.

Sevening explained that passing of the new legislation required the City to review its ordinances that pertain to such wireless facilities and structures. The Planning Commission had previously held discussion regarding small cell wireless equipment within public rights-of-way, and specifically, whether such facilities should be regulated through the City's Zoning Ordinance (Title 11 of the City Code). The Planning Commission directed Staff to address small cell wireless facilities solely in the City's Right of Way ordinance (Title 8 of the City Code) rather than the Zoning ordinance. Sevening further explained that because Chapter 13 of the Zoning Ordinance does currently regulate towers and antennas, it is necessary to make some minor adjustments to this section of the Zoning Ordinance in response to the new legislation and the Planning Commission recommendation. Sevening

presented the draft ordinance amending section 11-13-10 of the Zoning Ordinance which exempts small wireless facilities and wireless support structures from the Zoning Ordinance.

Vice-Chairman Humphrey opened the public hearing at 7:13 p.m. and with no comments from the public, the hearing was closed at 7:13 p.m. It was then moved by Hansen and seconded by Kruckman to recommend to the City Council that Section 11-13-10 of the City Code be amended to exempt small wireless facilities and wireless support structures from the Zoning Ordinance. Motion carried: (4-0).

## **8. GENERAL BUSINESS**

### **A. Review Concept Plan – Chase Real Estate**

Christianson presented information regarding possible development of a ten-acre property located in the City limits and proposed for single-family residential development. In the summer of 2018, the Planning Commission and City Council provided feedback to a previous developer regarding a proposed development and annexation on this same ten-acre property. The previous developer ultimately decided not to pursue the project, and Chase Real Estate now has a purchase agreement on the property. Chase Real Estate is now completing their necessary due diligence to determine if a residential development project is financially feasible and is seeking feedback from the Planning Commission.

Mr. Wolter, representing Chase Real Estate, has considered the previous recommendations of the Planning Commission and City Council and is requesting feedback from the Planning Commission regarding potential variances for lot sizes and widths on seven of the proposed 31 lots. He is seeking feedback before officially proceeding with preparation of grading and utility plans for the development.

Christianson explained that the developer is seeking R2 zoning, which has a minimum lot size of 8,400 square feet and a minimum lot width of 70'. She reviewed neighborhood conditions, the current and planned (2040) comprehensive plan land use guidance for the property, required setbacks, and utility issues (sanitary sewer, water, stormsewer), specifically stating that the City may require looping of the water from CSAH 2 to Park Street. She further reviewed miscellaneous design requirements including the need for a 20' landscape buffer along CSAH 2, the need to design each lot to accommodate a three-car garage, wetland buffer and setback requirements, the need for drainage and utility easements, transportation issues, the need for sidewalks within the development, and the recommendation of the Parks Commission related to development of the property.

Christianson further reviewed the request for lot size & width variances on seven of the proposed thirty-one lots, and reviewed the requirements for granting variances under City Code and State Statute. She offered an alternative design that would reduce the need for variances on two of the lots.

After discussion by the Commission regarding the proposed development and requested variances, the Commission directed City Staff to obtain official feedback regarding the amount of right-of-way dedication that Scott County will be requesting during platting of the

property. The Commission believed that the amount of right-of-way being requested by Scott County might affect the overall development layout. The Commission was generally supportive of limited variances; however, requested feedback from Scott County prior to providing official feedback regarding the variance request.

**9. MISCELLANEOUS**

**A. Community Development Updates**

There were no updates provided at the meeting.

**B. Planning Commission Questions & Comments**

There were no questions or comments from the Commission.

**10. ADJOURNMENT**

A motion was made by Kruckman and seconded by Priebe to adjourn the meeting at 8:07 p.m. Motion carried: (4-0).

Submitted by:



Renee Christianson  
Community Development Specialist



601 Main Street  
Elko New Market, MN 55054  
phone: 952-461-2777 fax: 952-461-2782

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## MEMORANDUM

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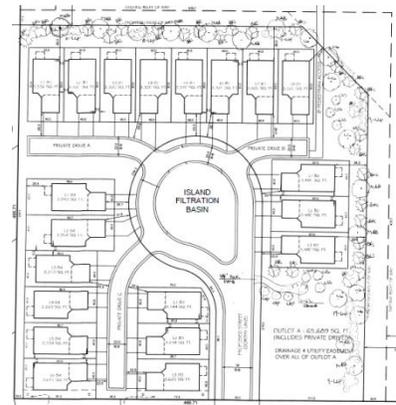
**TO:** CITY COUNCIL, PLANNING COMMISSION, EDA & CHAMBER OF COMMERCE  
**FROM:** RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST  
**SUBJECT:** COMMUNITY DEVELOPMENT UPDATES  
**DATE:** APRIL 5, 2019

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### Background / History

The purpose of this memo is to provide updates regarding miscellaneous projects and activities being worked on by Community Development staff. Below is a summary of projects that are currently being worked on, inquiries received, and miscellaneous information:

**Christmas Pines** – This is a residential detached townhome subdivision containing 20 lots. The City issued an early grading permit to the developer in September and initial site grading is complete. The developer decided to withhold installation of utilities due to early winter weather. The plat and development contract need to be signed by the developer; the project has been fully approved by the City. The developer has been in contact with City staff and has indicated that construction will resume as soon as weather permits and the plat is filed.



**Oakland Property / Chase Real Estate** – Staff is working with Chase Real Estate regarding the possible residential development of approximately 31 residential lots on ten acres on the west side of the City (diagram to left). The property was annexed into the City in November, 2018. The Planning Commission reviewed a concept plan for the development in March, 2019.

**Dakota Acres / Global Properties**

– Global Properties purchased this 3.1 acre lot from the City in December, 2018. On March 30, 2019 City staff received a concept plan for preliminary review. Currently proposed are two apartment buildings containing a total of 70 units. The first phase, which is proposed for 2019, would consist of one 28 unit building. The property is zoned High Density Residential. Below is a rendering of a proposed building.



**Adelmann Property** – City staff continues to work with the Adelmann family and their consultants in the preparation of an AUAR, a required environmental study, for their 243 acres located near the I-35 / CSAH 2 interchange. As part of the AUAR and preparation for development, several studies are being completed, including a wetland delineation, traffic impact study, tree inventory, and geotechnical work. The AUAR project is underway and is expected to be completed late summer of 2019.



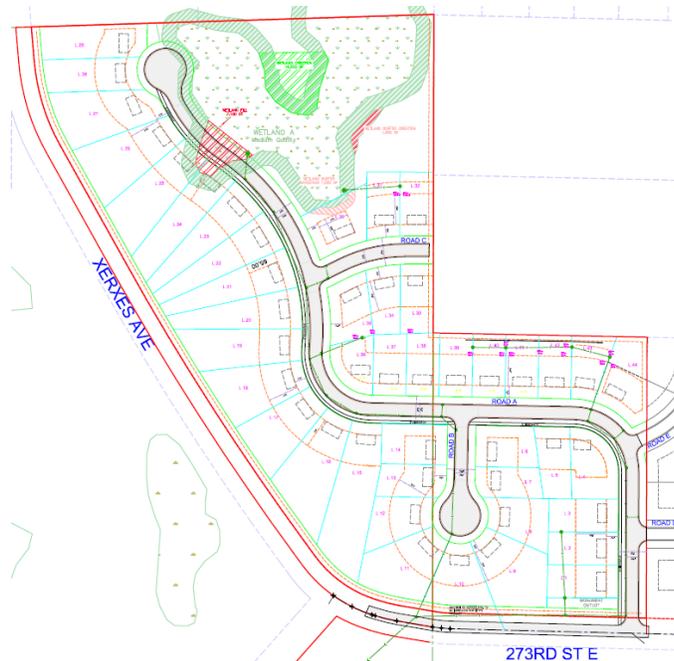
**Aaron Le Property** – City staff provided feedback on a concept development plan and possible annexation in February, 2019. The property owner, who attended a City Development Review Team meeting in December, 2018, is currently seeking to sell the property to a developer. The current concept plan depicts 77 single-family residential lots on approximately 33.5 acres. Development requires annexation of the property from New Market Township.



**Sylvester Meadows** – The City has received an application for rezoning, and preliminary and final plat approval of Sylvester’s Meadow, a single-family residential development containing 9 lots on approximately 5.3 acres. The application is currently being reviewed for completeness before forwarding to the Planning Commission and City Council.



**Pete’s Hill Park** – On April 2, 2019 City staff was contacted by a representative of the development team for this 34-acre property proposed for development. The property is located immediately south of Pete’s Hill Park. A new partnership is being established to handle the development. The development project requires annexation of the property from New Market Township. The representative has indicated a desire to plat lots for single family homes, and possibly a mix of executive style twin-homes.



**Business Leads** – Staff has prepared community marketing information for hardware stores, convenience stores and grocery stores. The information was disseminated to a few real estate brokers.

**Building Permits** – The City issued permits for one single family home in January, 2019 and one single family home in March, 2019.

**Ordinance Updates** –

- A review of City Ordinances pertaining to sexually oriented businesses was recently conducted, with one small change recommended to the City Council. The recommended change is to ensure that the City's Ordinance is constitutional and not violating the First Amendment.
- Staff conducted research regarding new legislation pertaining to small cell wireless facilities, and its impact on City Ordinances. Amendments to City Ordinances regarding small wireless cell towers are being considered by the City Council on 4/11/19.
- City staff has been conducting research and obtaining stakeholder feedback regarding the need for a City Ordinance regulating mobile food units (food trucks). The City Council reviewed the research on 3/28/19 and directed staff to prepare an ordinance for consideration on the matter.
- Research was conducted and reviewed with the City's Planning Commission regarding regulating medical cannabis. No changes to City Ordinances are currently proposed in this regard.
- Staff conducted research regarding the adoption of a Conduit Financing Policy, which could be utilized by private and non-profit developers to obtain tax exempt financing. The City Council adopted the policy in January, 2019.
- Amended the City's fee schedule to remove city fees for development concept plan reviews.

**Networking** – City staff spoke at a lunch & learn event sponsored by the Chamber of Commerce, attended a Chamber of Commerce after-hours event, attended a First Stop Shop lunch & learn, attended a workshop on Priced Out: The True Cost of Minnesota's Broken Housing Market, and hosted an open house for the proposed roundabout project.

**Roundabout Project** – City staff and Bolton & Menk, the City's engineering firm, have been working on the roundabout project scheduled for construction in 2020. A project layout has been identified and staff is working with County staff regarding a cooperative agreement. A right-of-way agent has been authorized for acquisition of easements needed to construct the project. An open house was held in February, 2019. City staff updated the City's website with the most recent information - <https://www.ci.enm.mn.us/roundabout>.



**ELKO NEW MARKET PARKS COMMISSION  
TUESDAY, MARCH 26, 2019  
REGULAR MEETING MINUTES**

**PRESENT:**

Present at Roll Call were Chair Sutton, Commissioner Miller, Commissioner Melgaard and Commissioner Dornseif. Also present was Assistant City Administrator Mark Nagel

**CALL TO ORDER:**

The meeting was called to order at 4:03 PM in Conference Room B at Elko New Market City Hall, 601 Main Street.

**APPROVE AGENDA:**

Mr. Nagel added 3 bills to the Agenda Item on Approval of Bills – Schlomka’s Portable restrooms and 2 from vendors for the winter Programs at the Library – Liz ford Yoga and Stephanie L. Adams Face Painting. Upon motion by Commissioner Miller, seconded by Commissioner Dornseif, the Parks Commission unanimously added the 3 bills to the Agenda under 7.f. Approval of bills.

**CITIZEN COMMENTS:**

There were no citizens present at the March Parks Commission Meeting to make comments to the Parks Commission.

**APPROVAL OF MINUTES OF FEBRUARY 19, 2019 PARKS COMMISSION MEETING:**

Upon motion by Commissioner Dornseif, seconded by Commissioner Miller, the Parks Commission unanimously approved the February 19, 2019 Parks Commission Minutes, as printed.

**PETITIONS, REQUESTS, AND COMMUNICATIONS**

Mr. Nagel reviewed the NRPA Inclusion Policy Guide, noting that this would be a topic that the Parks Commission would need to discuss later this year.

## **UPDATES:**

Mr. Nagel reviewed the February 28, 2019 ENM Parks Commission Update, which contained 17 items, with the Commissioners. Mr. Nagel said commented that the new Accountant, Kellie Stewart, had started, so he would have the 2019 Budget update available by the April 9<sup>th</sup> Parks Commission Meeting

Chair Sutton reported that the CCEC would be discussing the 2019 Egg Hunt at their April 9, 2019 meeting, which will immediately followed the Parks Commission meeting.

## **OLD/NEW BUSINESS:**

Mr. Nagel provided a copy of the Spring/Summer spreadsheet of all of the New Prague Community Ed programs to be held in Elko New Market for the information of Commissioners. He said that this format will make it easier for Staff to publicize these events. No further action this item by the Parks Commission.

Mr. Nagel presented 3 bids for 100 yards of Engineered Wood Fiber – MW Playground for \$1,799; Finnegan Playground Adventures for \$2,115; and Flagship Recreation for \$2,107.43 – noting that the wood fiber would be used on the City playgrounds as need to maintain handicapped accessibility. He said that he recommended the Parks Commission approve the low bid from MW Playground. Upon motion by Commissioner Miller, seconded by Commissioner Melgaard, the Parks commission unanimously accepted the low bid of \$1,799 for 100 yards of Engineered Wood Fiber from MW Playground.

Mr. Nagel reviewed the details of the 2019 Twins Youth Baseball Clinic with the Parks Commissioners. The date for the Clinic will be on Saturday, June 15<sup>th</sup> with participants ages 6 – 9 from 10 AM to 11:30 AM and ages 10 – 13 from 11:30 AM to 1 PM. As in the past, both boys and girls are invited participate. The event will be held at Fredrickson Field along with the Elko Express. Upon motion by Commissioner Miller, seconded by Chair Sutton, the Parks Commission unanimously approved co-sponsoring the 2019 Twins Youth Baseball Clinic with the Elko Express Baseball Team.

Mr. Nagel said that there's been renewed interest in having a Farmer's Market in Elko New Market and is on the 2019 Goals list for the Parks Commission. He reviewed his memorandum with the Commissioners noting that there were a few options available for implementation of a Farmers' Market in the city – it could be run by the Chamber of Commerce or another civic organization; it could be done with another area City; it could be hosted by a nearby farm; or the City could be done by an Intern hired by the City to handle this program. After much discussion, the Parks Commission directed Mr. Nagel to pursue all options for a Farmers' Market and report back to the Parks Commission at the April meeting. No further action was taken.

Mr. Nagel called the Parks Commissioners attention to a Memorandum from Leiviska Golf Design saying that construction of the new Disc Golf course would begin on Monday, June 3<sup>rd</sup> with a Pre-construction Meeting tentatively scheduled for Monday, May 13<sup>th</sup> at 10 AM. No further action was taken by the Parks Commission on this item.

Mr. Nagel presented the Bill List to the Commissioners – 2 bills from Schlomka's Portable Restrooms for services for January and March for a total of \$840.00; National Archery in the Schools Program for equipment for \$2,250; Liz Ford Yoga for a Winter event presentation for \$200; and Stephanie L. Adams for Face Painting at a winter event for \$100. Upon motion by Commissioner Melgaard, seconded by Commissioner Miller, the Parks Commission unanimously approved the Bill List for the March meeting.

### **OTHER BUSINESS:**

Mr. Nagel reported that he had forwarded the interest of Commissioners Melgaard and Miller to be reappointed to a 3-year term. He said that the Council accepted their interest in continuing to serve the community, but chose to consider other potential applicants, as well. He asked that both Commissioners Melgaard and Miller re-apply by filling out the application form online.

There were no additional business items to come before Commissioners at the March 26, 2019 Parks Commission meeting.

### **NEXT MEETING:**

Upon motion by Commissioner Melgaard, seconded by Commissioner Dornseif, the next meeting of the Parks Commission was set for Tuesday, April 9, 2019 at 4:00 PM in conference Room B of Elko New Market City Hall.

**PARK COMMISSIONER COMMENTS:**

There were no additional comments from Commissioners at the March 26, 2019 Parks Commission meeting.

**ADJOURNMENT:**

There being no further business to come before the Parks Commission, upon motion by Commissioner Melgaard, seconded by Commissioner Dornseif, the meeting was adjourned by voice vote at 5:05 PM.

**Respectfully Submitted,  
Mark Nagel, Assistant City Administrator**

## ENM Parks Commission Update

### March 31, 2019

1. After Parks Commission approval on 3/26, I have notified the Minnesota Twins that the City and Elko Express will host a Twins Baseball Clinic! This year, it will be on Saturday, June 15<sup>th</sup> from 10 AM to 1 PM @ Fredrickson Field.
2. As you know from our February meeting, I applied for SMSC Trail Grant funds with the assistance from Bolton-Menk, Inc for a segment to connect the Windrose 8<sup>th</sup> Addition to the Woodcrest Addition, so that Woodcrest residents could have better access to the Pete's Hill "Lookout" and trail and the Windrose 8<sup>th</sup> residents could have access to Woodcrest Park. On March 29<sup>th</sup>, I received word from the SMSC that the City was awarded the grant of \$22,120...more information will be presented at the Tuesday, April 9<sup>th</sup> Parks Commission Meeting
3. The Rowena Pond Park RePurposing Master Plan is now underway! The Public Works Department has completed the first phase by relocating the playground equipment. Now that the playground equipment has been moved, the next step will be to move the baseball field. I will meeting with the neighbors adjacent to the park in early April before that part of the project is started to go over resolution of their current drainage issues now that the City Engineer has determined options. Assuming assent from the neighbors, we can start grading as soon as the end of May for the new T-Ball field, while the current one is in use over the Summer. I will be looking at a Twins Community Fund grant to see if the upgrade T-Ball Field qualifies for funding.
4. The Skating Rink at Little Windrose Park is now closed, so the Public Works Department will begin the annual transition into a basketball court.
5. Jessica Davidson did a great job on the Winter programming at the library on Thursday evenings at 6:30 PM. The 4 March "Calmness" events focused on Family Wellness and Health activities that emphasize movement, relaxation, and fitness challenges! As of March 21<sup>st</sup>, we had about 125 people for 3 of the 4 events, so I'll have the final total by our April 9<sup>th</sup> meeting. Again, our thanks to Jessica Davidson and New Prague Community Ed for their support in managing these events!
6. Speaking of programming, the Winter/Spring Community Ed catalogues are out for both New Prague and Lakeville. This Winter, we've focused on

more senior programming, so a sampling of those in Elko New Market include AARP Smart Driver Courses at the ENM Library; Hearts and Flowers for Valentine's Day; a Movie Day each month; and a Spring Fling. Other programming for both seniors and adults includes: How to Pay for a Nursing Home; Understanding Long Term Care Insurance; and Understanding Trusts and Wills. In addition, the popular Adult Open Basketball is back at Eagle View every Tuesday evening from 8 PM to 10 PM and Zumba; Dance Fitness; Pilates; and Hall Walking return to Eagle View for the Winter. Finally, online learning on 52 different subjects is available on ed2go/ce721 to all ENM residents! As you may recall, Community Ed Director, Janelle Kirsch, provided a nice summary of each the programs at our March meeting.

7. As you recall from the November Parks Commission Meeting, the Open House on the Disc Golf Course was held. I did 2 Facebook postings on it and a Website invitation to talk about it with interested residents at the meeting, but none showed, nor did I receive any other email or phone feedback. I've firmed up the course design with the assistance of the City Engineer's Office and showed you a better graphic at the December Parks Commission Meeting. I met with the vendor on December 10<sup>th</sup> and reviewed/confirmed the design and layout of the course. A Preliminary Construction meeting has been tentatively set for Monday, May 13<sup>th</sup> and construction may begin as soon as Monday, June 3<sup>rd</sup>. I will be letting the neighborhood know the schedule as soon as it's firm.
8. As we discussed at the December Parks Commission meeting, another residential development starting to take shape is the Le Property on the NW Quadrant of Dakota Avenue and James Parkway, which would be annexed to the City for about 70 single family homes. I conveyed the Parks Commission recommendation that should the development move forward, cash, rather than land, should be paid by the developer. There has been no further progress to date on the development. However, it appears the land exchange for Park Dedication Fees offered by the developer of the housing project at the corner of CSAH 2/CSAH 91 may be back on the table.
9. Based on the criteria established by the Parks Commission at the January meeting, I reviewed 3 options, along with costs, for the 5 additional pet waste stations at the February Parks Commission meeting. Consensus was to go with Dog Waste Depot's "Dog Waste Station with a patented One Pull Bag System for \$219.99 each. I will have the invoice from the company

ready for consideration of final approval at the April 9th Parks Commission meeting.

10. Morton Building Systems repaired most of the damage to the Wagner Park Shelter on Thursday, March 28<sup>th</sup> ...they have a couple of small pieces to install to complete the project.
11. I am working with St Nicholas Church on a 5K race/walk for this Fall as fundraiser for church activities...more at the April Parks Commission meeting.
12. See you on April 9<sup>th</sup> @ 4 PM @ ENM City Hall for our April Parks Commission meeting!

**COMMUNITY AND CIVIC EVENTS COMMITTEE (CCEC) MEETING**  
**March 19, 2019 Minutes**

Meeting was called to order at 5:30 PM by Chair Mike Sutton in the ENM City Hall Council Chambers.

Members Attending: Chair Mike Sutton, Terre Larsen, Toni Maat, Jodi Muelken, Amanda Cambronne, and Janelle Kirsch.

Others Attending: Mark Nagel (By Phone) and Sandy Green

Absent: Leander Wagner and Dawn Seepersaud

Former City Clerk Sandy Green, now PT, said that Mark Nagel would be joining meeting at 5:30 PM by phone. There were no changes to the proposed Agenda.

**MOTION** by Janelle Kirsch, second by Jodi Muelken, to approve the March 19, 2019 Agenda. **APIF, MOTION CARRIED**

**MOTION** by Terre Larsen, second by Amanda Cambronne, to approve the Minutes of the February 19, 2019 Meeting. **APIF, MOTION CARRIED**

The Commissioners continued their discussion of sponsorship of Community Events. Mark Nagel handed out updated copies on a tiered sponsorship program based on comments from the February meeting. The updated version included reducing the number of tiers from 5 to 3 – Silver, Gold, and Diamond - and to use the tiered sponsorship approach, rather than a single sponsor. **MOTION** by Jodi Muelken, seconded by Janelle Kirsch, to approve the Tiered Sponsorship Program for City Events, as printed. **APIF, MOTION CARRIED**

The upcoming Egg Hunt plans on Saturday, April 13<sup>th</sup> was discussed by the Commission with the following assignments of tasks/duties:

1. Mike Sutton will assume the duties of the Event Coordinator
2. Jodi Muelken will handle the layout of Eagle View for the event
3. Janelle Kirsch draft the flyer for the event
4. Mark/Sandy will print 25 - 11 X 17 inch posters for mike to place at stores
5. Jodi will email the Chamber of Commerce about bags and participating in the event
6. Final preparations will be made at the March meeting. No further action was taken by the Committee on this Agenda Item
7. Mike will purchase the candy
8. Janelle will coordinate the use of Honor Students to assist
9. Amanda will check on the availability of Lakeville Honor Students to assist
10. Mark will confirm the use of the popcorn maker at the event and see if Public Works can put out signs for the event
11. Mark will contact the New Prague Times, Lakeville Sun This Week, KCHK radio station for coverage of the event
12. EVERYONE WILL BE AT EAGLE VIEW ELEMENTARY SCHOOL AT 8:30 AM For SETUP

No further action was taken on the Committee on this Agenda Item.

Mark Nagel said that the next meeting of the CCEC is scheduled for Tuesday, April 16, 2019 at 5:30 PM at ENM City Hall, but noted that it may be better to move back a week to April 9, 2019 at 5:30 to complete preparations for the Egg Hunt on Saturday, April 13<sup>th</sup>. Committee members concurred. **MOTION** by Mike Sutton, seconded by Terre Larsen, the Committee to approve changing the April meeting of the CCEC from the 16<sup>th</sup> to 9<sup>th</sup> at 5:30 PM. **APIF, MOTION CARRIED**

**MOTION** by Jodi Muelken, second by Toni Maat to adjourn the meeting at 6:41 PM.  
**APIF, MOTION CARRIED**

Respectfully submitted,

Mark Nagel, Assistant City Administrator.

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