

ELKO NEW MARKET - PLANNING COMMISSION MEETING

PC Members: Brad Smith, Nicole Kruckman, Thomas Humphrey, Melissa Hanson, Todd Priebe and Harry Anderson
City Staff: City Planner Bob Kirmis, Community Development Specialist Renee Christianson and City Engineer Rich Revering



AGENDA

TUESDAY, FEBRUARY 26, 2019 @ 7:00 PM
COUNCIL CHAMBERS – NEW MARKET AREA HALL
601 MAIN STREET, PO BOX 99, ELKO NEW MARKET, MN 55020

- 1. CALL TO ORDER**
- 2. PLEDGE OF ALLEGIANCE**
- 3. APPROVAL OF AGENDA**
Consider Approval of the Agenda
- 4. PUBLIC COMMENT** (public opportunity to comment on items not listed on the agenda)
- 5. ANNOUNCEMENTS**
 - A. None
- 6. APPROVAL OF MINUTES**
Consider Approval of the following:
 - A. January 29, 2019 Minutes
- 7. PUBLIC HEARINGS**
 - A. None
- 8. GENERAL BUSINESS**
 - A. Draft Amendment to Zoning Ordinance - Sexually Oriented Businesses
 - B. Information regarding Medical Cannabis/ Marijuana
- 9. MISCELLANEOUS**
 - A. Community Development Updates
 - B. Roundabout Update
 - C. 2018 Building Permit Summary
 - D. Vacant Lot Inventory 2.1.19
 - E. Planning Commission Questions & Comments
- 10. ADJOURNMENT**

BOARD NOTICE:

TO DETERMINE IF A QUORUM WILL BE PRESENT, PLEASE CONTACT ELKO NEW MARKET AREA HALL AT 952-461-2777
IF YOU ARE UNABLE TO ATTEND

PUBLIC NOTICE:

ANYONE SPEAKING TO THE BOARD SHALL STATE THEIR NAME AND ADDRESS FOR THE RECORD

**MINUTES
CITY OF ELKO NEW MARKET
PLANNING COMMISSION MEETING
January 29, 2019
7:00 PM**

1. CALL TO ORDER

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

Commission members present: Smith, Kruckman, Humphrey, Hanson and Priebe

Members absent and excused: Ex-officio member Anderson

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

2. PLEDGE OF ALLEGIANCE

Chairman Smith led the Planning Commission in the Pledge of Allegiance.

3. APPROVAL OF AGENDA

A motion was made by Kruckman and seconded by Humphrey to approve the agenda as submitted. Motion carried: (5-0).

4. PUBLIC COMMENT

A. None

5. ANNOUNCEMENTS

A. Introduction of Planning Commissioner Todd Priebe

Christianson introduced newly appointed Planning Commissioner Todd Priebe who was recently appointed by the City Council to serve the remainder of Heather Vetter's term. His term expires on March 31, 2020. Priebe also introduced himself, citing that he works as a Realtor and has also done development work in the Scott County area.

6. APPROVAL OF MINUTES

A motion was made by Kruckman and seconded by Hanson to approve the minutes of the November 27, 2018 Planning Commission meeting with one correction. Motion carried: (5-0).

7. PUBLIC HEARINGS

A. None

8. GENERAL BUSINESS

A. Food Truck Discussion

Sevening presented her staff report containing information regarding the regulation of food trucks. She explained that Minnesota State Statute defines all Mobile Food Units, Seasonal Temporary Food Stands and Seasonal Permanent Food Stands. A food truck is considered a Mobile Food Unit based on definition. She explained that Mobile Food Units and Food Stands are annually licensed by the Minnesota Department of Health, and the licensing process includes a review of the menu, sinks/plumbing, ceilings, utilities (water, wastewater, sewage disposal) and an inspection is required. They must also operate in compliance with the Minnesota Food Code. She explained that all food storage and preparation must occur in the Mobile Food Unit or in a licensed establishment. No catering operations are allowed from the Mobile Food Unit unless approved by the local jurisdiction.

Sevening explained that the Elko New Market City Code does not currently address the licensing of food trucks specifically. By the City's current definitions a food truck is considered a transient merchant, which does require an annual license of the individual operating the food truck. She explained that many cities have chosen to regulate food trucks in order to mitigate potential negative impacts that may be created, such as noise, smell, light, traffic or safety hazards, and to address possible unfair competition with brick and mortar food establishments. She noted that some cities have chosen not to regulate food trucks / Mobile Food Units, some cities adopt regulations but do not require a city license, and some cities adopt regulations and do require a city license.

It was explained to the Commission that if the City Council ultimately decided to regulate Mobile Food Units, the regulations would not be contained in the City's zoning ordinance, but in the business regulations section of the code. Input is being sought from numerous stakeholder groups; the input will be forwarded to the City Council for consideration.

Sevening and Christianson asked for input from the Planning Commission regarding the topic. After discussion, the Commission recommended that the City Council regulate food trucks by creating an additional section in the City Code pertaining to Mobile Food Units and that a City license should be required. They also recommended that the following:

- Mobile Food Units should be allowed in commercial and industrial zoning districts.
- Mobile Food Units should not be allowed in residential zoning districts, but an exception should be made for them to operate at private parties (such as weddings or graduation parties) and for licensed block parties. They should also be allowed on the golf course property.
- Mobile Food Units should be allowed in City parks in conjunction with community events, only with the permission of the City.
- Mobile Food Units should not be allowed within road rights-of-way or on trails or sidewalks, unless the street is closed down in conjunction with a community event.
- Mobile Food Units should have restricted hours from 7:00 a.m. to midnight.
- There should not be a minimum distance requirement from existing restaurant/food establishments or schools.

- Mobile Food Units should be allowed in conjunction with community events such as church, school or community festivals, and also farmers markets.
- Catering should be allowed from Mobile Food Units in the City.
- A City license should be required for a Mobile Food Unit wishing to operate in the City and a fee required, although the license fee should be very minimal.
- Proof of insurance and state licensure should be provided to the City at the time of issuance of a local license.
- Background checks for Mobile Food Unit employees should not be required.
- The Planning Commission saw no need to regulate the size of the truck, the signage, lighting or power supply associated with a Mobile Food Unit.
- There should be an exception made to the current peddler/solicitor licensing requirements for those youth that are participating in youth fundraising events, such as Girl Scouts, Boy Scouts, or those taking orders for youth sports fundraising.
- The City staff person / department responsible for enforcement of Mobile Food Unit regulations should be clearly identified, and the process for enforcement and the penalty for noncompliance should be clear.

9. MISCELLANEOUS

A. City Staff/Consultant Business Updates and Reports

Community Development Specialist Christianson stated that a report containing updates on various projects was contained in the Planning Commission packets. She reminded the Commission of the upcoming open house related to the roundabout project.

B. Planning Commission Questions and Comments

There were no questions or comments from the Commission.

10. ADJOURNMENT

A motion was made by Smith and seconded by Kruckman to adjourn the meeting at 8:02 p.m. Motion carried: (5-0).

Submitted by:



Renee Christianson
Community Development Specialist



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

MEMORANDUM

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

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

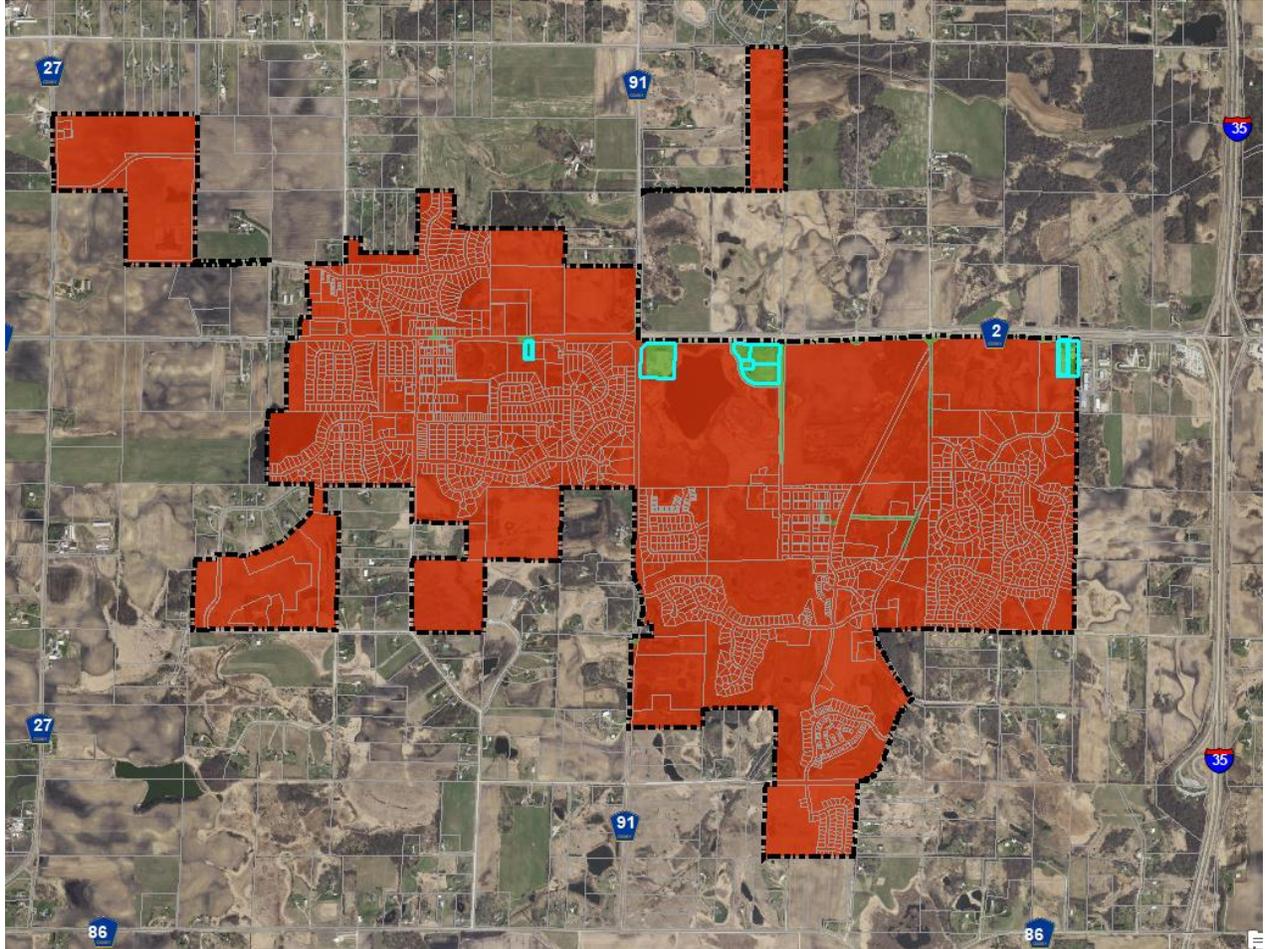
- **Principal sexually oriented businesses are ALLOWED within these districts:**
 - Business districts à B1, B3, B5, B6, B7
 - Industrial districts à BOTH
 - Special districts → PUD (potentially)

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

**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.

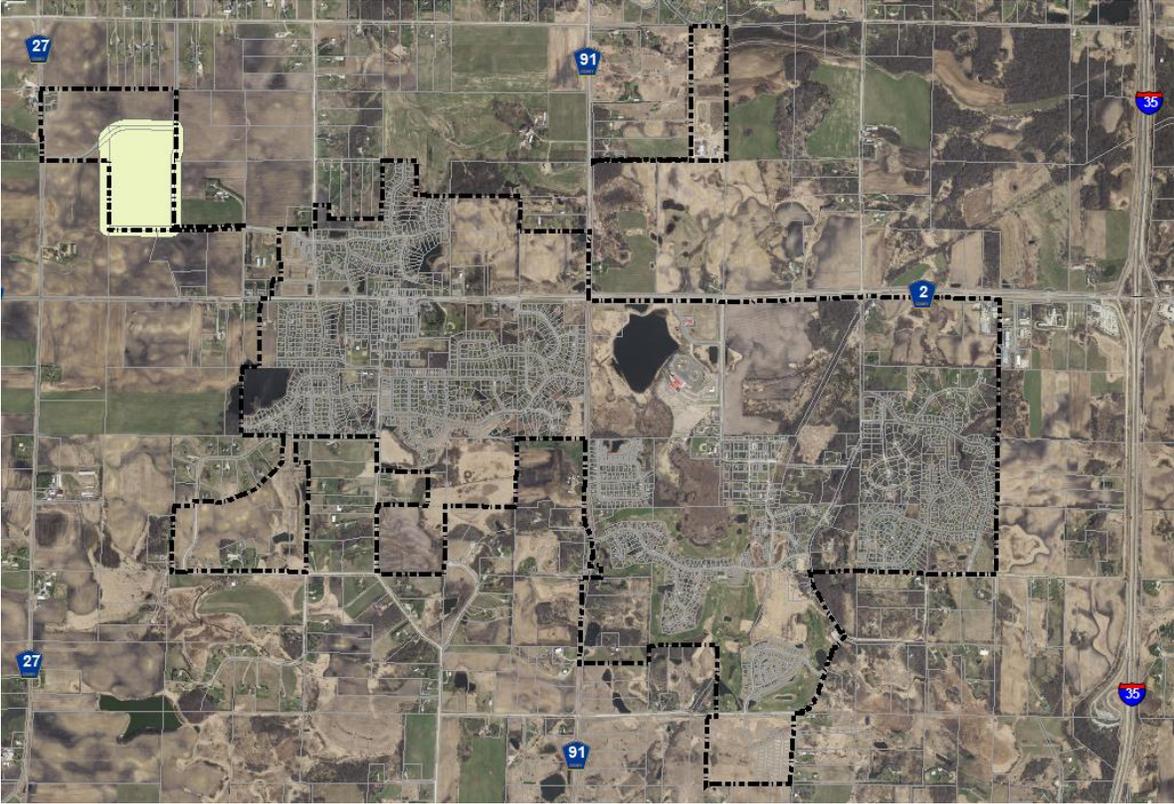
Sexually Oriented Motion Picture Theater: A commercial establishment where, for any form of consideration, films, motion pictures, videocassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of specified sexual activities or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

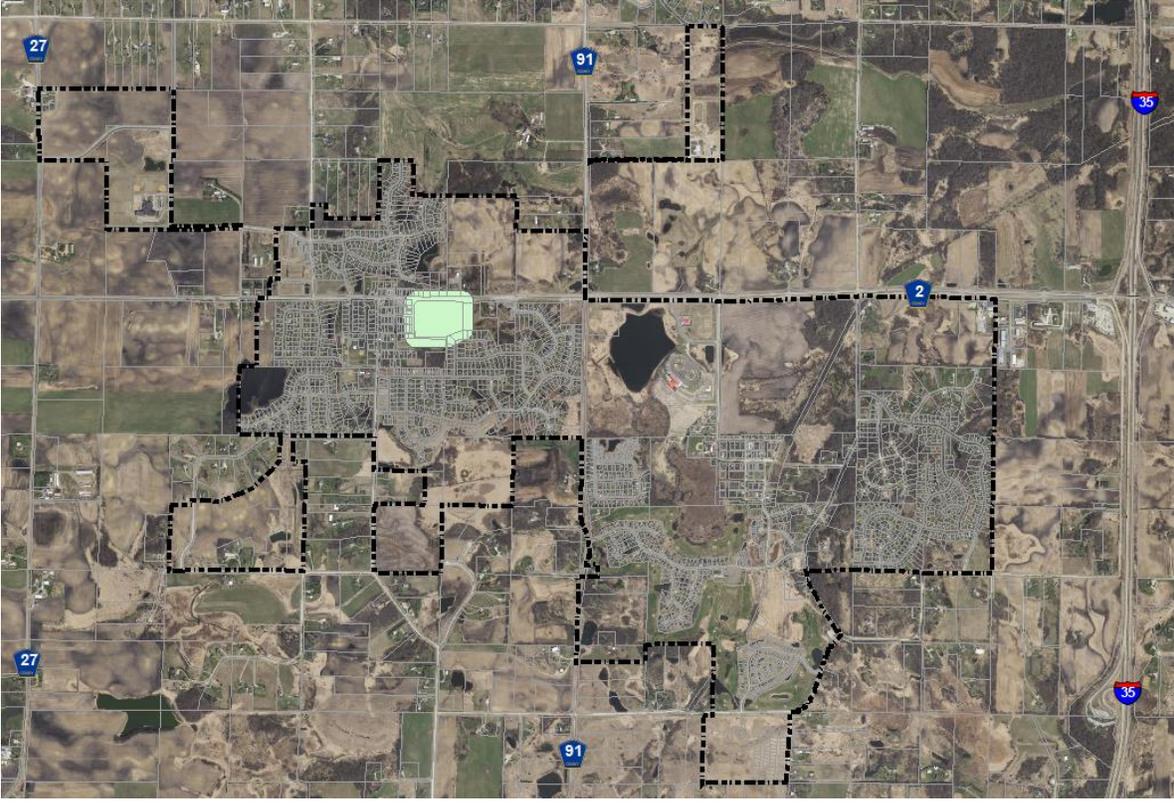
Sexually Oriented Theater: A theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear seminude or in a state of nudity or live performances which are characterized by the exposure of specified anatomical areas or specified sexual activities.

SEXUALLY ORIENTED BUSINESS - ANALYSIS MAPS

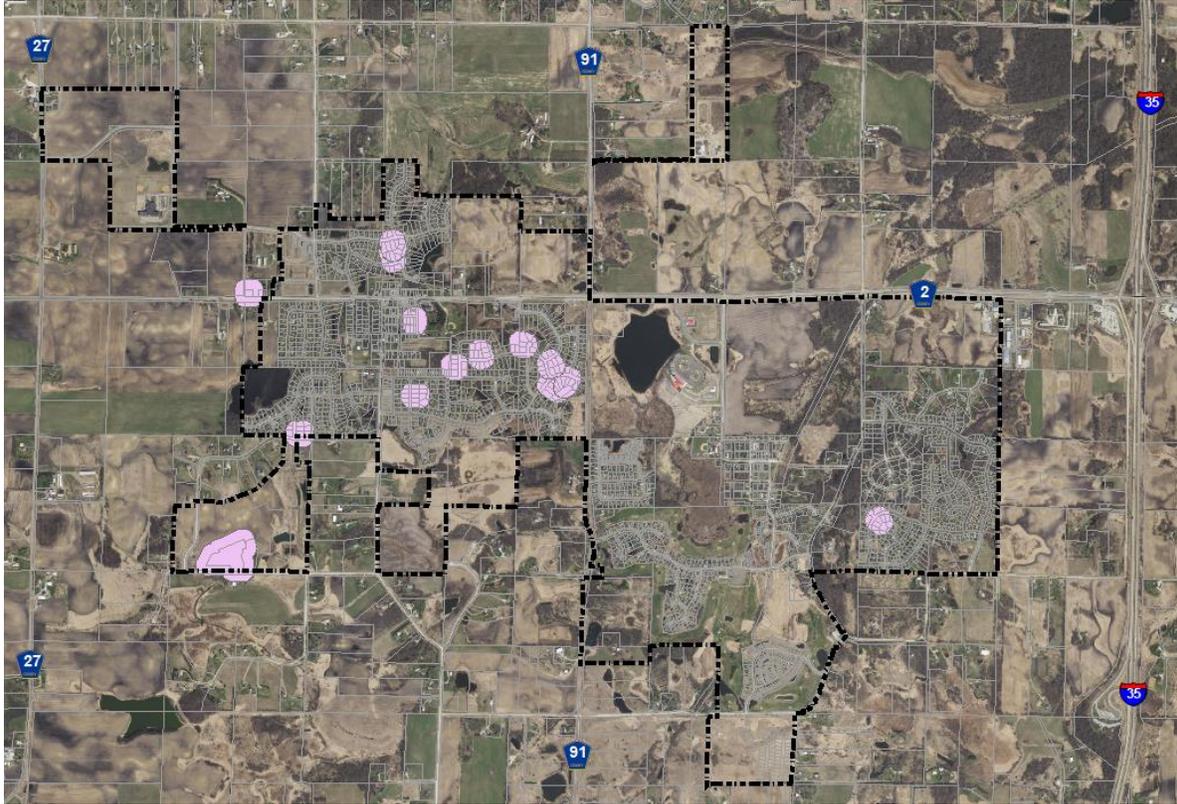
School Buffer – 200'



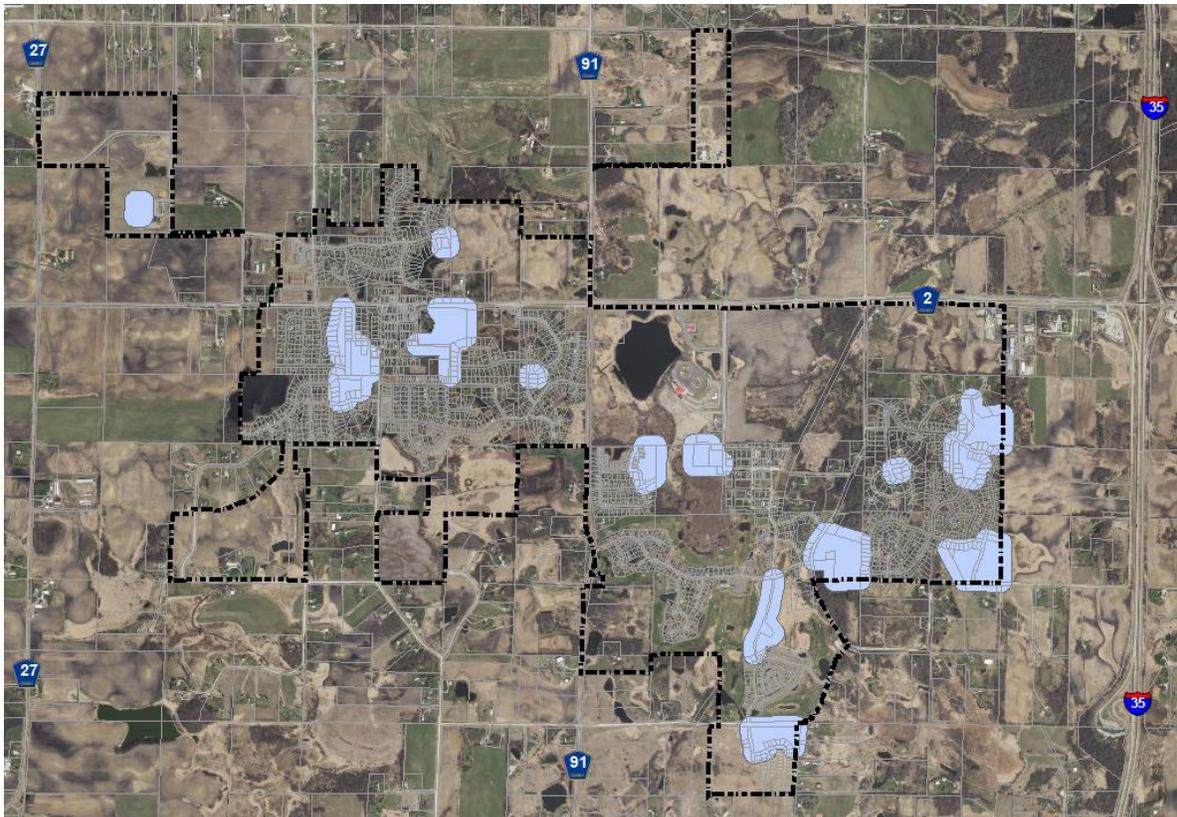
Church Buffer – 200'



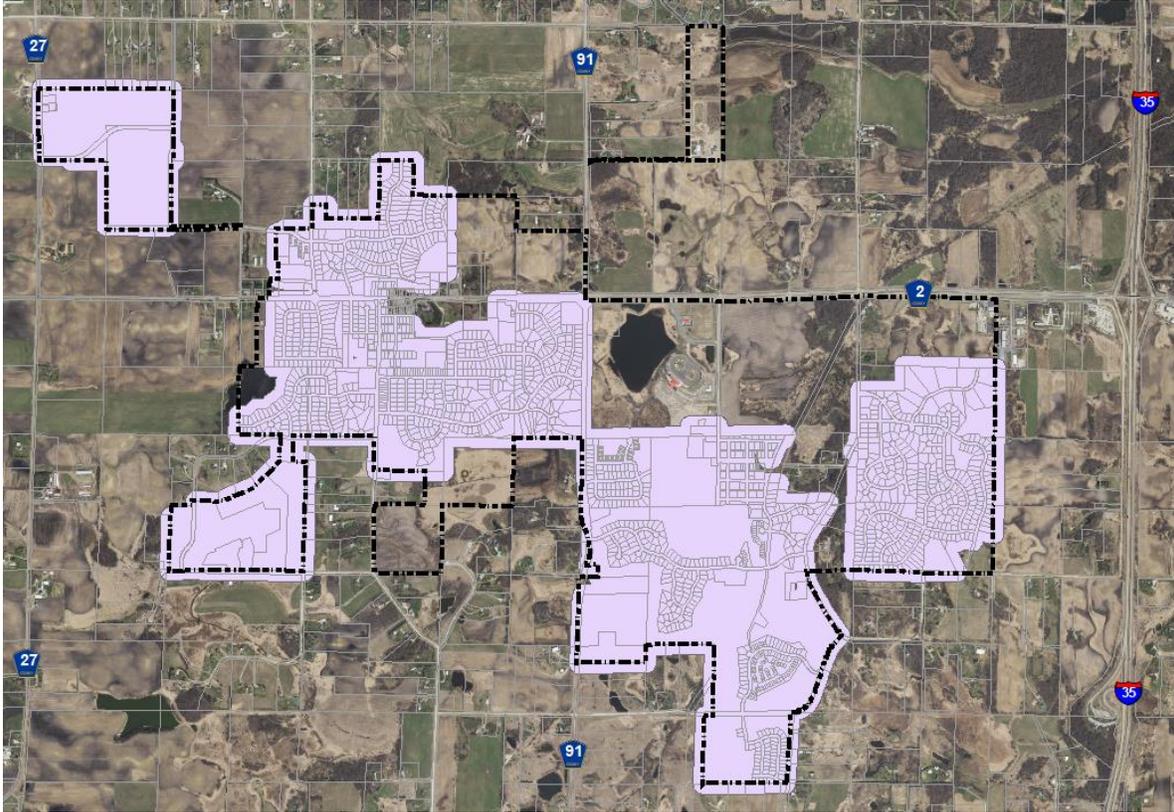
Daycare Buffer – 200'



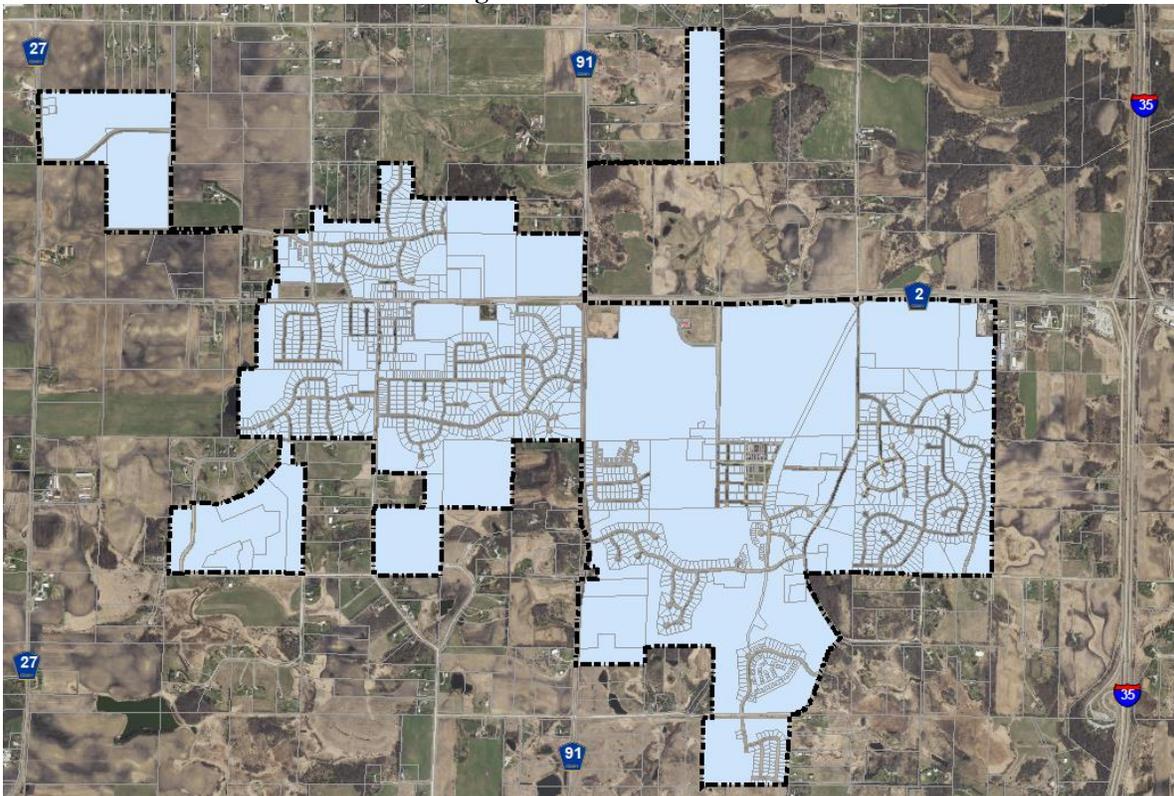
Park Buffer – 200'



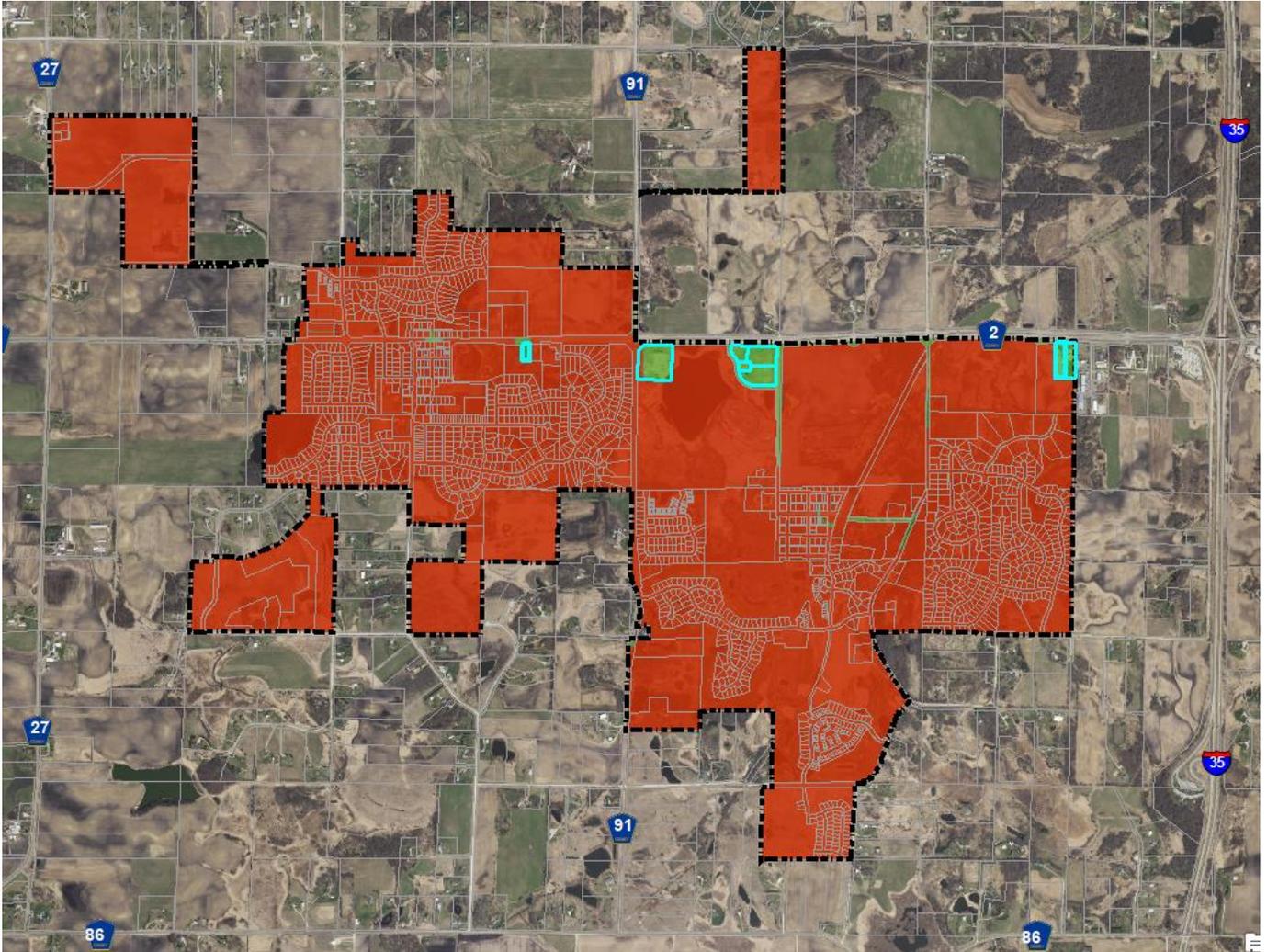
Residential Zoning District Buffer – 200'



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

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)¹; *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 2nd 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.² 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.³ *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.⁵ 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.⁶ 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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MEMORANDUM

TO: PLANNING COMMISSION
FROM: RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST
HALEY SEVENING, COMMUNITY DEVELOPMENT INTERN
RE: CANNABIS / MEDICAL MARIJUANA
DATE: FEBRUARY 26, 2019

Background

Staff would like to bring to the attention of the Planning Commission the issue of legal medical cannabis use, commonly referred to as medical marijuana. In 2014 the Minnesota State legislature adopted the Medical Cannabis Therapeutic Research Act of 2014 (“the Act”) which is contained in Minnesota Statute Chapter 152.21 – 152.37. The Act legalized the use of marijuana derived compounds for medical purposes.

The Act allows for two in-state manufacturers to produce medical cannabis, and also allows each of the two permitted manufacturers to operate four distribution facilities (total of eight). The two manufacturers who have been permitted by the State are Leafline Labs who operates in Cottage Grove, and Minnesota Medical Solutions who operates in Otsego. The distribution facilities, often referred to as dispensaries, are required to operate throughout the state based on geographical need. Distribution facilities are currently located in Bloomington, Eagan, Hibbing, Minneapolis, Moorhead, Rochester, St. Cloud, and St. Paul.

A health care practitioner may diagnose a patient with a qualifying medical condition, which then makes them eligible for the State’s registry program. The patient registry program, which allows qualifying patients to possess and use cannabis for medical use, has been established by the Commissioner of Health to evaluate data on patients utilizing medical cannabis (demographics, medical condition, outcomes, etc.) The qualifying medical conditions that would permit a health care practitioner to allow eligibility into the program are: cancer, glaucoma, human immunodeficiency virus or acquired immune deficiency syndrome (HIV/AIDS), tourette’s syndrome, amyotrophic lateral sclerosis (ALS), seizures – including epilepsy, severe and persistent muscle spasms - including MS, inflammatory bowel disease – including Crohn’s disease, terminal illness with life expectancy under one year, intractable pain, post-traumatic stress disorder, autism spectrum disorder, and obstructive sleep apnea. The Act allows the Commissioner of Health to identify and add qualifying medical conditions, without the need for legislative approval. Effective August 1, 2019, the Commissioner has also added Alzheimer’s disease to the list of qualifying conditions.

It is possible that the number of permitted medical cannabis or distribution locations, and/or the list of qualifying conditions will be expanded by the Legislature and/or the Commissioner of Health at some point in the future. In the current 2019 legislative session bills have been introduced in both the house and the

senate supporting legalization of recreational cannabis.

Land Use Issues Related to Medical Cannabis

Although the current legislation permits only two manufacturers and eight distribution sites, there are no assurances that the current limitations will remain in effect or that use will remain limited to medical purposes. In the absence of municipal regulation specific to cannabis/medical marijuana facilities, one could argue that manufacturing, laboratories, and distribution facilities for medical cannabis fall under existing land use categories which allow similar uses, and would therefore qualify as permitted or conditional uses under existing the City Code.

For example, “manufacturing” is allowed as either a permitted or conditional use in the City’s B6, B7, I1 and I2 zoning districts. Laboratories are considered a permitted use in the City’s B6 and B7 zoning district. Retail sales are permitted in most of the City’s commercial zoning district. The argument can be made that would allow operation of such facilities in an existing zoning district.

Nothing in the statute expressly requires a city to allow such facilities or on the other hand, prohibits from applying more restrictive ordinances. It is presumed that a city would have a good faith basis for adopting regulations, provided that it offered legitimate planning and zoning reasons for such action. The following are some options that the City may want to consider at this time:

Do Nothing

The City could take no action. If such uses do not create a concern from an appointed and elected official’s perspective, the City may choose to do nothing, with the presumption that medical cannabis facilities could locate in areas where other manufacturing, laboratories, distribution or sales facilities could be located.

Expressly Authorize Medical Cannabis Related Uses

The City could expressly authorize medical cannabis related uses in some or all of its zoning districts. Specific language recognizing that these types of uses as permitted or conditional uses removes any doubt in the City’s zoning regulations.

Impose Zoning Restrictions

The City could adopt restrictions on the location of medical cannabis related facilities. Nothing in the Act prohibits cities from adopting more restrictive ordinance regarding the locations of manufacturing, laboratory, distribution or sales facilities. The City could consider limitations such as the following:

- Restricting the uses to specific zoning districts, such as certain commercial or industrial zones only
- Requiring that facilities not produce noxious odors through an odor mitigation plan
- Require minimum distances from other land uses such as child care facilities, churches, treatment facilities, adult uses, etc.
- Requiring minimum distances between other cannabis related uses
- Limiting the square footage of facilities
- Imposing signage restrictions
- Adding more stringent security measures

Adopt Local Licensing Regulations

The City could adopt local licensing requirements. An argument could be made that local licensing is

necessary to protect the public health, safety and welfare. A licensing ordinance for manufacturers, labs and distribution facilities could include things such as:

- Minimum insurance requirements
- Restricted hours of operation
- Minimum age requirement for applicants (21)
- Requiring applicants to have no felony convictions, no violations of any local ordinances regarding the manufacture, sale, distribution, or possession of controlled substances or liquor within any jurisdiction
- Requiring applicants to disclose all previous liquor and marijuana operations
- Requiring applicants to disclose all parties with an ownership interest in the business
- Requiring criminal background investigations of all owners and applicants
- Limiting the number of licensed facilities within the City

Relationship to Federal Law

The federal Controlled Substances Act does classify cannabis as a Schedule-I controlled substance. (Schedule I drugs, substances, or chemicals are defined as drugs with no currently accepted medical use and a high potential for abuse. Some examples of Schedule I drugs are: heroin, lysergic acid diethylamide (LSD), marijuana (cannabis), 3,4-methylenedioxymethamphetamine (ecstasy), methaqualone, and peyote.) The United States Department of Justice has, however, issued several memoranda stating that it would not expend significant resources to prosecute individuals whose actions are in compliance with state laws on medical cannabis.

Research of Other City Ordinances

Staff researched only those cities where medical cannabis distribution facilities are currently located. The results are as follows:

- Bloomington – Requires business license for distribution facilities. Allowed by conditional use in certain zoning districts. Zoning ordinance contains performance standards.
- Eagan – No business or zoning regulations specific to medical cannabis facilities.
- Hibbing – No business or zoning regulations specific to medical cannabis facilities.
- Minneapolis – No business or zoning regulations specific to medical cannabis facilities.
- Moorhead – No business or zoning regulations specific to medical cannabis facilities.
- Rochester – No business or zoning regulations specific to medical cannabis facilities.
- St. Cloud – No business or zoning regulations specific to medical cannabis facilities.
- St. Paul – No business or zoning regulations specific to medical cannabis facilities.

Requested Action

Staff is seeking Planning Commission feedback on the topic of medical cannabis facilities and the need for development of regulations specific to medical cannabis facilities. Specific questions for the Planning Commission are shown below:

- Should the City regulate medical cannabis facilities any different than other facilities (manufacturing, laboratories, warehousing, distribution, retail sales)?
- Should the City pursue amending the City's Zoning Ordinance to specifically regulate medical cannabis facilities?

- Should the City choose not to amend the City's Zoning Ordinance at this time, and possibly revisit the issue at some point in the future, should the State Legislature amend State Statute to allow additional facilities, or permit recreational cannabis use?

Regardless of how or whether the City decides to permit, regulate, or prohibit such operations, city officials should be aware of the issues surrounding medical cannabis manufacturing, testing, distribution and sales, and also understand that the current legislation may not be long term.

Staff Comment

The purpose of this memorandum is not intended to be a political argument for or against medical cannabis regulation in Elko New Market. The memo is intended to raise awareness about medical cannabis from a zoning and licensing perspective. It is important that the Planning Commission and City Council are aware of the topic and make decisions regarding the appropriate framework within the City Code and Zoning Ordinance that will promote orderly development while protecting the public health, safety and welfare.

Attachment:

Minnesota Statutes 152.21 – 152.37



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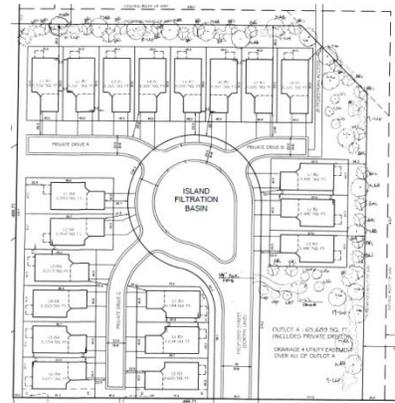
MEMORANDUM

TO: CITY COUNCIL, PLANNING COMMISSION, EDA & CHAMBER OF COMMERCE
FROM: RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST
SUBJECT: COMMUNITY DEVELOPMENT UPDATES
DATE: JANUARY 25, 2019

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.



Oakland Property / The Preserve at Elko New Market

– Staff had been working with a developer regarding the proposed residential development of approximately 31 residential lots on ten acres on the west side of the City (diagram to left). The property owner and developer petitioned for annexation of the property which was completed in November. City staff recently learned that the original developer is no longer pursuing the project. Staff has since met with the real estate broker marketing the property, and two potential developers over the past few weeks. The property is currently listed for sale on the MLS.

Dakota Acres / City Owned Property – On June 14th the City Council approved a purchase agreement for the sale of a 3.1 acre City-owned property in Dakota Acres. A closing on the property is scheduled for Tuesday, December 18, 2018. The property is zoned High Density Residential, and the buyer’s intended use of the property is a 60-unit apartment development (two separate buildings). Below is a rendering of a proposed thirty-six unit building. The new owner is currently planning to construct one of the buildings in the summer of 2019.



Adelmann Property – City staff recently completed working with the Adelmann family on concept development plans for their properties located adjacent to the I-35 / CR 2 interchange (approximately 243 acres). The project included coming to an agreement regarding future land uses for the property, and the creation of concept development plans. An impressive marketing package was created, including a flyover video /rendering of how the property could be developed.

<https://www.youtube.com/watch?v=uGubOWmGRi0&feature=youtu.be>

A second phase of the project was kicked off in November 2018 and will include preparation of an AUAR, a required environmental study, a wetland delineation and tree inventory. The AUAR project is now 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 December, 2018. A revised concept plan has now been submitted which depicts 77 single-family residential lots on approximately 33.5 acres. The property owner also met with the City’s Development Review Team to review the concept plan. (Concept plan to the right.)



Business Leads – Staff has received inquiries regarding a possible pharmacy, car wash, and medical marijuana dispensary. Current state statute limits the number of permissible dispensaries in the state to a total of 8. There are no opportunities to locate new medical marijuana dispensaries in the state under the currently adopted legislation.

Building Permits – The City issued permits for two single family homes in December, 2018. The total for 2018 is 31 housing unit permits (13 townhomes and 18 single family housing unit), up from 11 total units in 2017.

Ordinance Updates – On December 20, 2018 the City Council approved an amendment to the City’s zoning code which would allow a smaller single family residential lot size than is currently permitted by the City’s code in some areas of the City.

In November, 2018 the City Council approved amendments to the City’s Zoning Ordinance regarding permitted and conditional uses in the B1 Neighborhood Business zoning district. The changes made it easier for certain business to locate in the B1 zoning district without needing a conditional use permit and will also clean up some of the currently listed definitions.

Staff is currently reviewing regulations regarding food trucks. Feedback is being sought from various stakeholder groups before bringing the information to the City Council for further direction.

Networking – City Planning staff attended a SCALE meeting and also a New Market Township meeting, and gave a presentation regarding the I35/CR2 interchange area. Attended a Chamber of Commerce coffee/networking event.

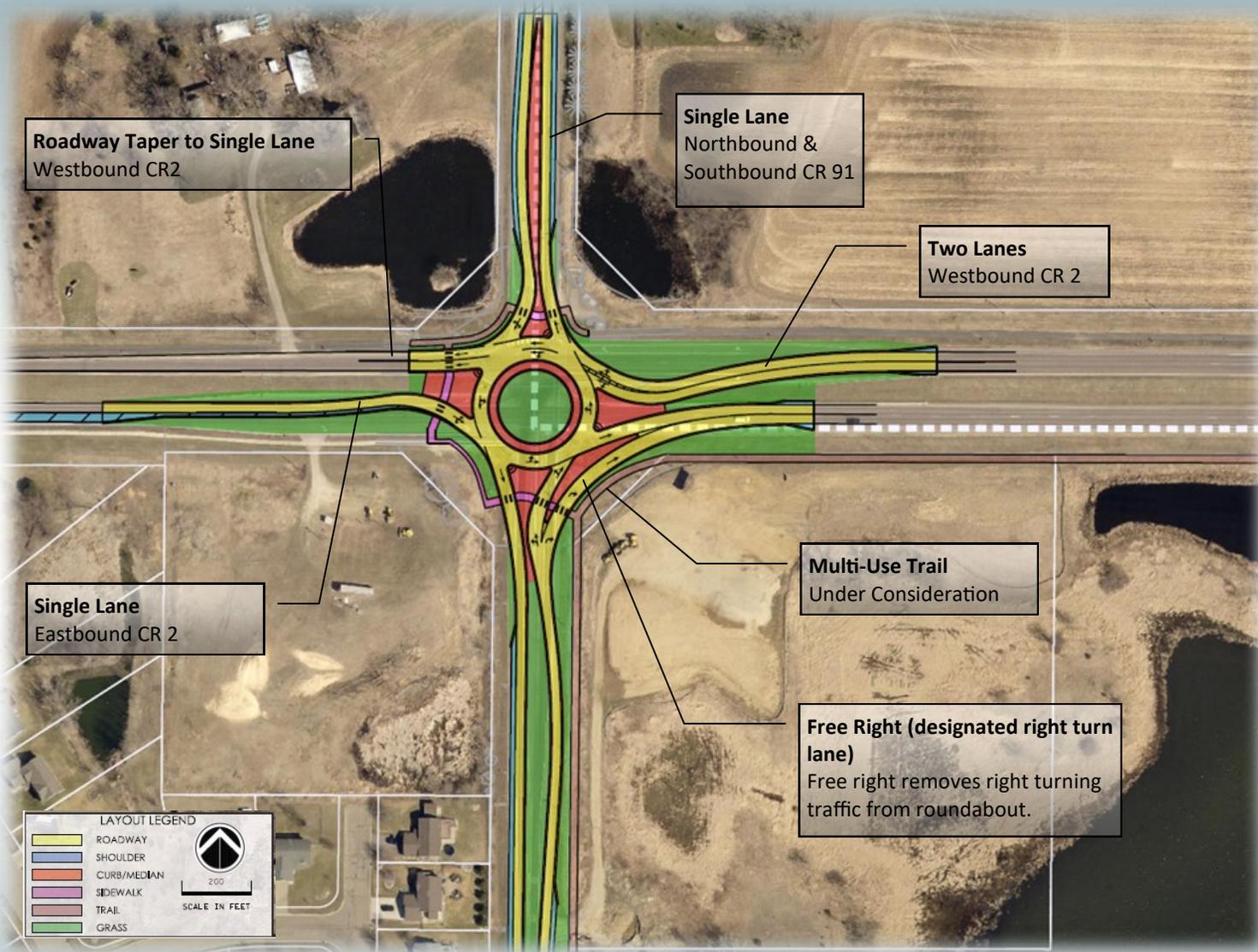
Roundabout Project – City staff and Bolton & Menk, the City’s engineering firm, have been working on the roundabout project scheduled for construction in 2020. Final construction limits have been identified, including easements that are needed from three property owners. Staff has been working with the three property owners regarding easement terms, and has also received proposals for right-of-way agent services. Staff is preparing for an open house which has been scheduled for February 11, 2019. City staff updated the City’s website with the most recent information - <https://www.ci.enm.mn.us/roundabout>.



ROUNDBABOUT AT CSAH 2 & 91

PROJECT UPDATE

February, 2019



PURPOSE:

The purpose of this project is to address safety concerns, reduce existing traffic delays, and plan for future growth at the CR 91 (Natchez Ave) & CR 2 (Main St) intersection.

PROJECT BENEFITS:

- ◆ Traffic calming (reduced speeds)
- ◆ Eliminate risk of right-angle and head on crashes
- ◆ Increase mobility for peak conditions and future growth

SCHEDULE:

- ◆ **Concept Plans** ⇒ Completed June, 2018
- ◆ **Final Design** ⇒ 2018 & 2019 (In Process)
- ◆ **Construction** ⇒ 2020

FUNDING:

- ◆ The base level design is estimated at **\$2.4 million**.
- ◆ Scott County / City secured a Highway Safety Improvement (HSIP) **grant of \$1.8 million**.
- ◆ Based on public input received, and information presented to the City Council, the following additional items are **under consideration** to be included in the project. Preliminary cost estimates are based on current concept plans:
 - ◇ Trails along the east side of CR 91 and south side of CR 2—\$475,000
 - ◇ Decorative / Acorn style lighting west of the roundabout and into downtown—\$496,600

NEXT STEPS:

The project will be in final design through the summer of 2019. Project bidding proposed in February, 2020.

HOW CAN I STAY INFORMED?

Visit the City's webpage for project updates, background information, and for upcoming open house details, or contact the below City representatives. <https://www.ci.enm.mn.us>

Bolton & Menk
Rich Revering, City Engineer
952-890-0509
Richard.revering@bolton-menk.com

City of Elko New Market
Renee Christianson, Community Development
952-461-2777
rchristianson@ci.enm.mn.us



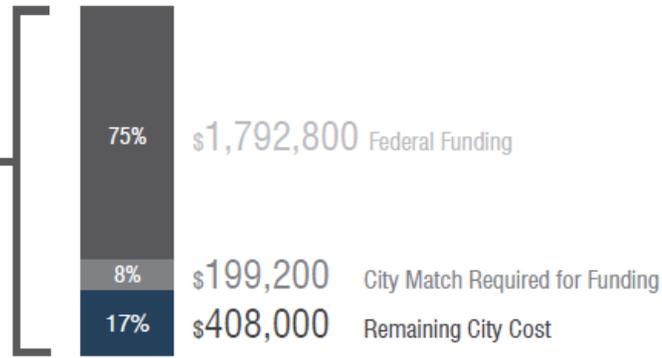
Project Funding and City Cost

CSAH 2 & CH 91 Roundabout

Project Components → **Total Intersection Project Cost** → Funding Breakdown

\$2 million Estimated Construction Costs
+ \$400,000 Design/Administration Costs

= \$2.40M



\$607,200
Total city cost for intersection project

Tax Impact for Typical Home:
~\$36/year for 15 years

Please Note:

Current project cost estimates are based on full closure for construction.

What does this mean for me?

The annual debt service levy for the typical home* for costs included in this project can be estimated as follows:

\$100k of city costs =

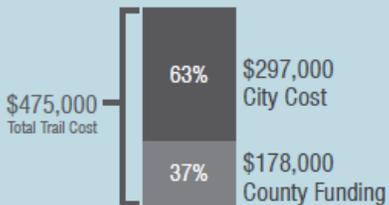
property tax increase of
~\$5.50-6.50 annually

* A typical home is valued at approximately \$280,000.

All additional project elements outside of the intersection improvements as identified in the federal funding application will be costs borne by the City.

Additional Proposed Corridor Improvements

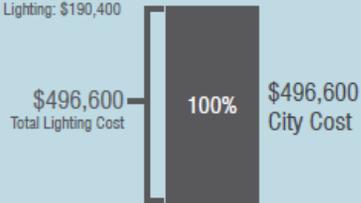
Trail Connections



Tax Impact for Typical Home:
~\$18/year for 15 years

Continuous Lighting

- Continuous Lighting: \$306,200
- Downtown Lighting: \$190,400



Tax Impact for Typical Home:
~\$30/year for 15 years

\$793,600

Total city cost for additional corridor improvements

Tax Impact for Typical Home:
~\$48/year for 15 years

Project Purpose

The purpose of this project is to address safety concerns, reduce existing delays, and plan for future growth at the CH 91 (Natchez Ave)/CSAH 2 (Main St) intersection.

Project Benefit

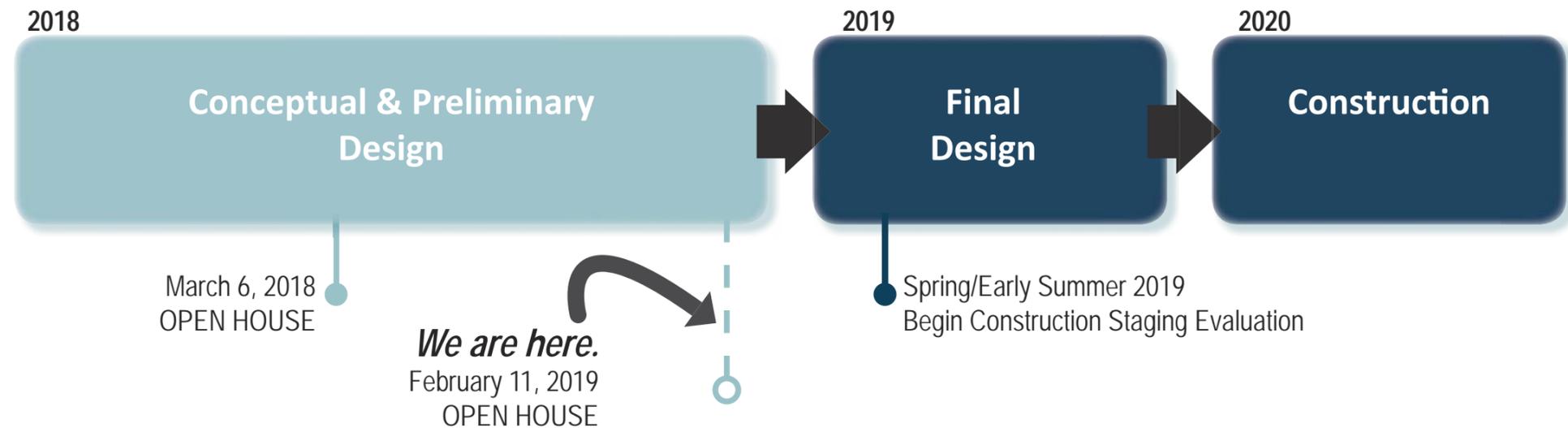
- Traffic calming (slow traffic)
- Eliminate risk of right-angle and head on crashes
- Increased mobility for peak conditions and future growth
- All single-lane legs of roundabout expandable as needed in the future
- *Opportunity for the community to explore the character of the roadway leading into and out of the city!*

How do I Stay Informed?

Visit the City's Planning & Zoning webpage for project updates & background information:

<https://www.ci.enm.mn.us/planningandzoning>

Project Timeline



Where Have We Been?

- Property Owner Meetings February 22, 2018
- Business Advisory Meeting February 28, 2018
- Open House March 6, 2018
- City Council Meeting March 22, 2018



Existing Conditions: Looking down CSAH 2 towards Downtown.



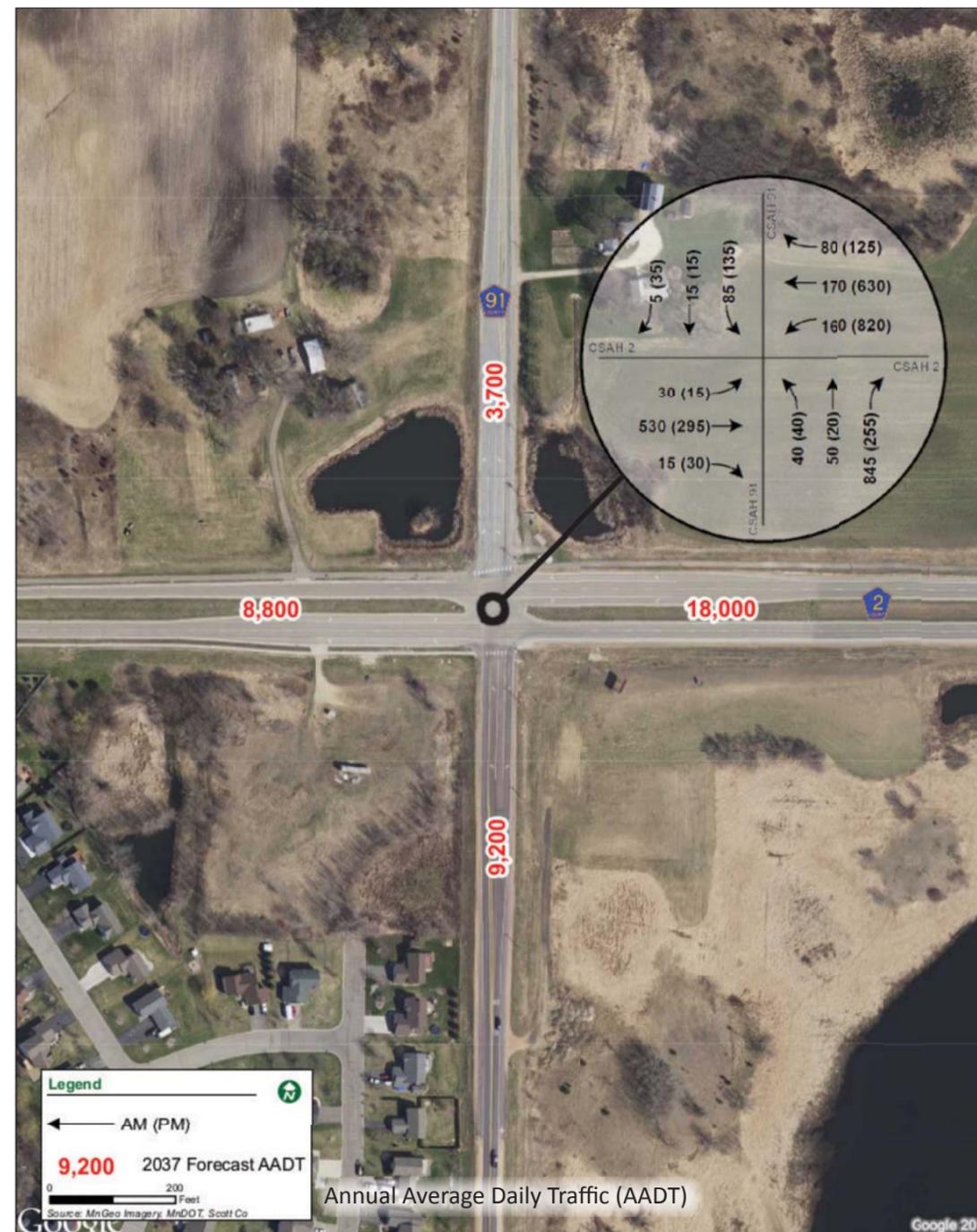
Current Volumes

Dominant AM movement: eastbound right-turn from CH 91
Dominant PM movement: westbound thru traffic from CSAH 2



Projected Volumes

Dominant AM movement: eastbound right-turn from CH 91
Dominant PM movement: southbound left-turn from CSAH 2



Safety First!

- High speed intersection
- Traffic levels increasing
- Long history of crashes
 - Six recorded crashes for last three-year period
 - Four injury crashes

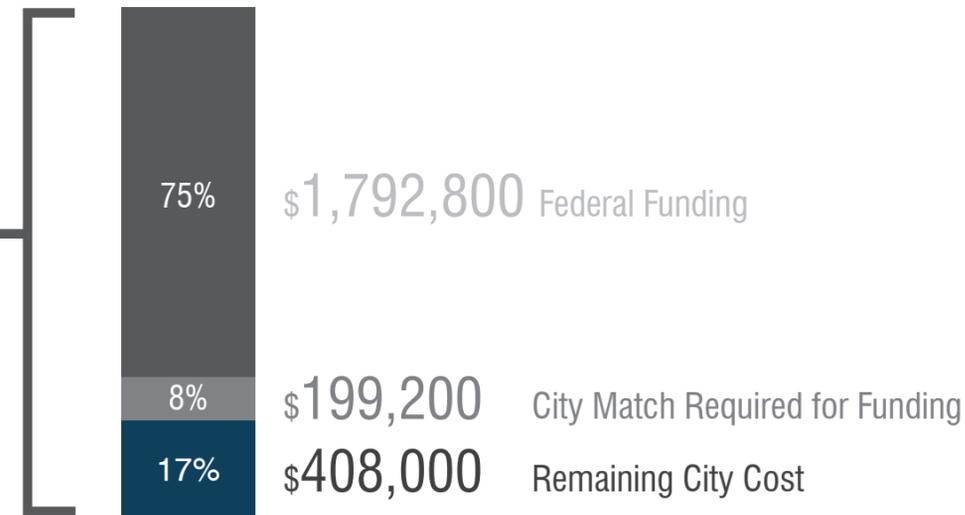
Roundabouts solve these problems!

- Almost 90% reduction in injury crashes
- Increased safety benefits over existing traffic control and traffic signals

Project Components → **Total Intersection Project Cost** → Funding Breakdown

\$2 million Estimated Construction Costs
+ \$400,000 Design/Administration Costs

= \$2.40M



\$607,200
Total city cost for intersection project

Tax Impact for Typical Home:
~\$36/year for 15 years

Please Note:

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What does this mean for me?

The annual debt service levy for the typical home* for costs included in this project can be estimated as follows:

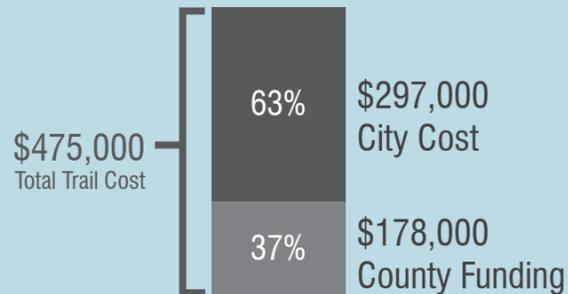
\$100k of city costs =  property tax increase of **~\$5.50-6.50 annually**

* A typical home is valued at approximately \$280,000.

All additional project elements outside of the intersection improvements as identified in the federal funding application will be costs borne by the City.

Additional Proposed Corridor Improvements

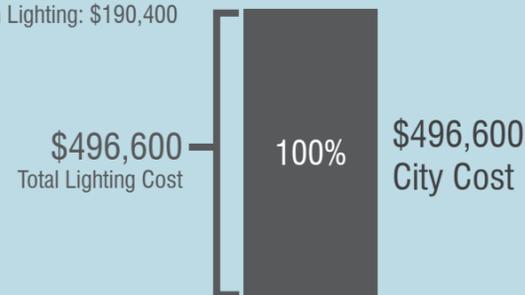
Trail Connections



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- Continuous Lighting: \$306,200
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\$793,600
Total city cost for additional corridor improvements

Tax Impact for Typical Home:
~\$48/year for 15 years

Trail Connections

CSAH 2 & CH 91 Roundabout



Cost Estimates

CSAH 2 Trail

Total Estimated Cost \$255,000 (construction, right-of-way, and 'soft costs')

CH 91 Trail

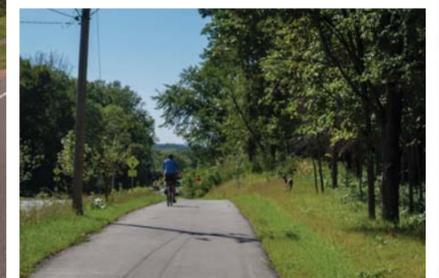
Total Estimated Cost \$220,000 (construction, right-of-way, and 'soft costs')

Note: The County has included \$178,000 towards the trail improvements in their Transportation Improvement Plan

What will the trails look like?



Extension to existing trail south of Aaron Drive



Trail Examples

Lighting Layout



 **Continuous Lighting**

 **Downtown Lighting**

 **Roundabout Lighting**

The proposed decorative lighting would extend from the roundabout along Main Street (CSAH 2) through the downtown.

- This lighting type is a continuation of lighting identified in **Downtown Improvement Committee** lighting plan (conduit for lighting is already installed in the downtown area).
- Light poles will include banner arm and flagpole attachments. These can be switched out seasonally or as desired.
- Light poles along Main St will create a sense of rhythm and continuation of streetscape elements to draw visitors into downtown from the roundabout. **Decorative lighting is also anticipated to contribute to traffic calming and creating a sense of place.**

Estimated Cost:

\$306,200 - CSAH 2 Continuous Lighting (between roundabout and Downtown)

\$190,400 - Downtown Lighting

Total Estimated Cost: \$496,600

What else was considered?

A continuation of the functional lighting (similar to that shown at the roundabout) as well as more decorative lighting styles were explored in the concept development. The acorn lighting style (left) was determined to achieve the best balance between cost and aesthetic character.

This is considered a safety feature and is included in the base cost of the roundabout.

Estimated Cost: \$80,000 (included in base roundabout project cost)



Staging Considerations

- Key Routes (regional and local)
- Access in/out of area
- Public safety
- Space for contractor to work safely and efficiently
- Specific business needs
- Emergency services
- Community events
- Cost to construct

Schedule Considerations

- Duration of construction is based on production rates and probable working days
- May thru October is “normal” construction season
- 5 day working weeks, not including holidays

Please Note:

Current project cost estimates are based on full closure for construction.

Staging Alternatives

Alternative 1

Construct Under Traffic | Build in Multiple Stages

If your priority is: **ACCESS**
(Maintain access between downtown and I-35W at all times)

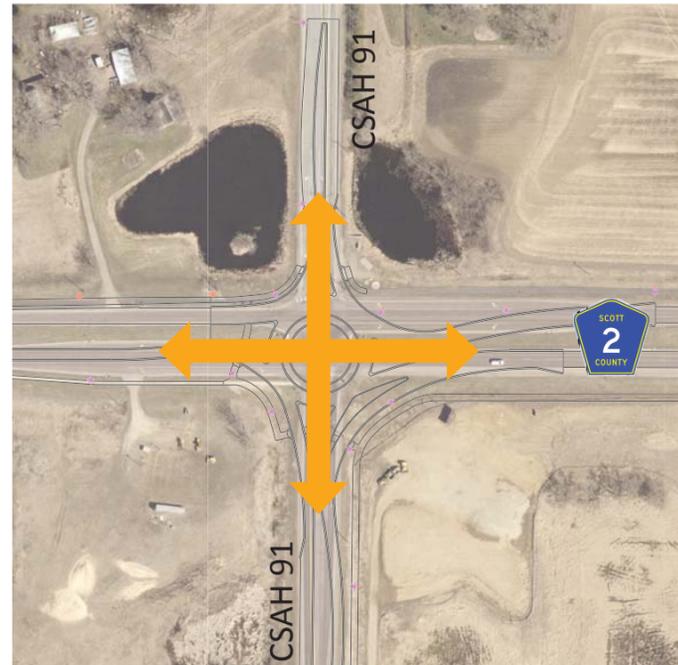
Estimated Construction
12-18 Weeks

- Takes more time to construct
- **Considerable additional cost** due to longer, more complicated construction
- Construction time-frame varies with level of access needed to remain open

Maintain CSAH 2 Traffic



Maintain All Traffic



Alternative 2

Full Closure | Detour Traffic

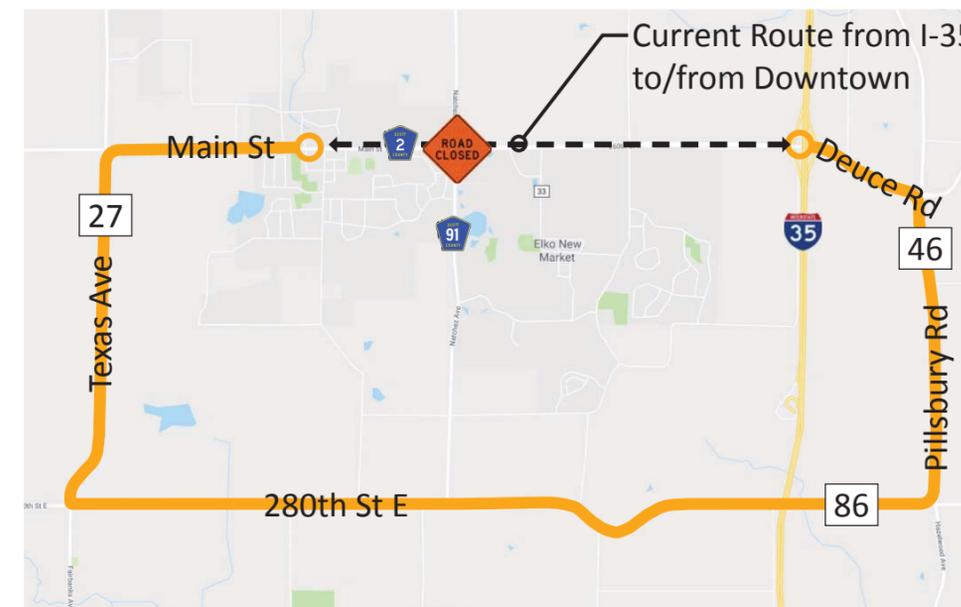
If your priority is: **SHORTEST TIME FRAME**
(shortest and least expensive construction, but requires detour route for intersection improvements)

Estimated Construction
6-8 Weeks

- Two-way detour route designated
- Contractor can be more efficient and complete work with less time

Proposed detour route:

I35W <> CSAH 2 (Deuce Rd) <> CSAH 46 (Pillsbury Rd) <> CSAH 86 (280th St E) <> CSAH 27 (Texas Ave) <> CSAH 2 (Main St)



Detour Routes Estimated Time

- Current Route: 4 minutes, 2.7 miles
- Proposed Detour Route: 14 minutes, 10.9 miles

Detour Routes Rules of Thumb

- 1/3 follow detour
- 1/3 find different route or change trip
- 1/3 local trips (local origin and destination)

2018 ANNUAL BUILDING PERMIT REPORT

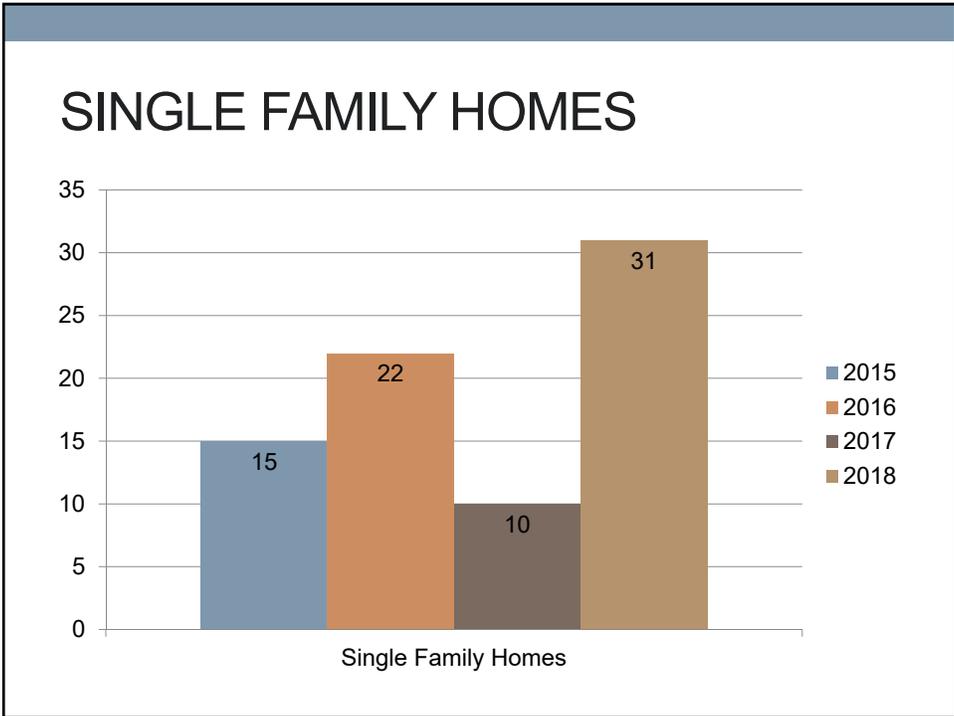
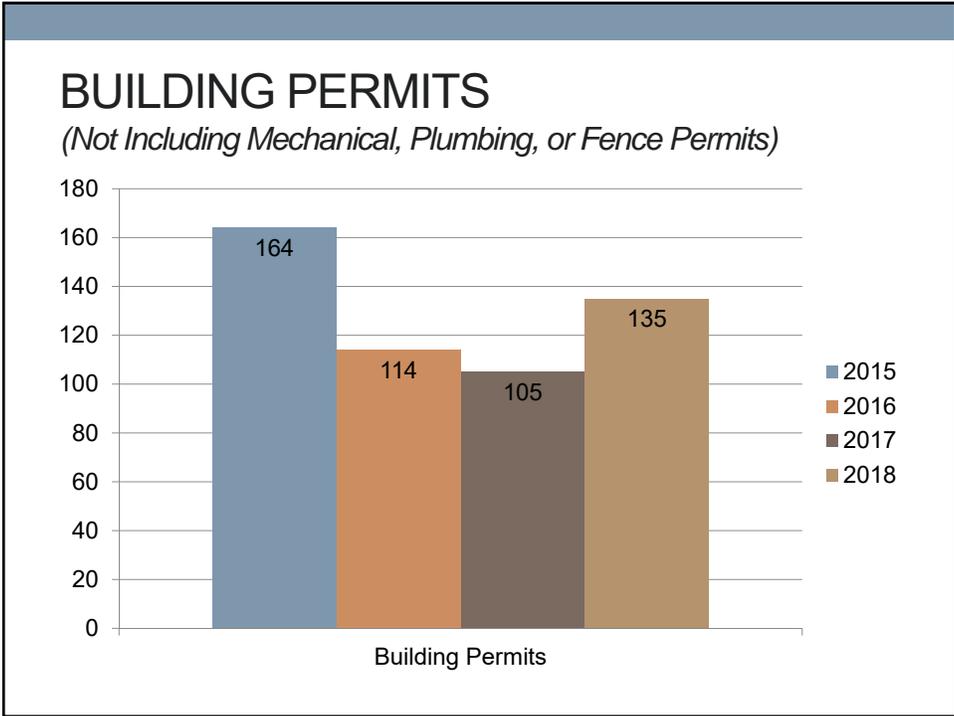
PRESENTED BY:
 RENEE CHRISTIANSON
 CITY OF ELKO NEW MARKET
 COMMUNITY DEVELOPMENT SPECIALIST



ELKO NEW MARKET BUILDING PERMIT STATISTICS

Type of Permit	2015	2016	2017	2018
Building <i>(Not including Mechanical, Plumbing or Fence)</i>	164	114	105	135
Single Family Homes	15*	22	10	31**
Commercial Development	0	0	1	5
Mechanical	41	64	72	85
Plumbing	41	57	64	79
Fence	23	20	15	18
Finish Basement	16	14	20	10
Deck/Porch	23	26	33	26
Reside/Reroof	79	31	19	18

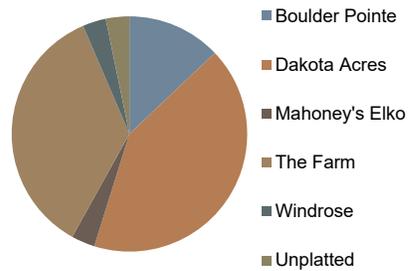
* Includes 2 Attached Townhome Units
 ** Includes 13 Attached Townhome Units



2018 SINGLE FAMILY HOME PERMITS BY DEVELOPMENT (Attached & Detached)

Development / Neighborhood	Single Family Home Permits Issued
Boulder Pointe	4
Dakota Acres	13
Mahoney's Elko	1
The Farm	11
Windrose	1
Unplatted	1
Total	31

Single Family Home Permits Issued (Attached & Detached)



2018 LIST OF BUILDERS

Builder	Number of Homes Built
K Michael Homes	3
Mahowald Builders	3
Hoagland Homes	1
Exceptional Outdoor Living	1
Eternity Homes	2
Syndicated Properties, LLC	13
Robert McNearney Custom Homes	4
Youngfield Homes	1
Fieldstone Family Homes	1
Nick Kes	1
Art Seidel	1

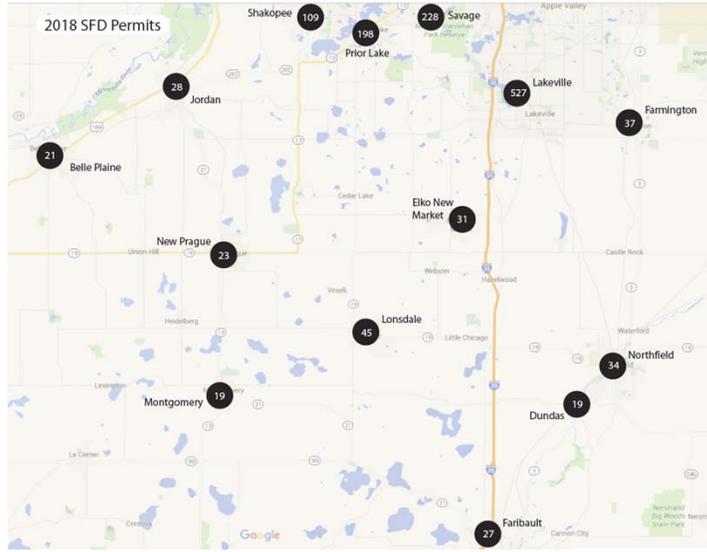
ENM HOUSING STARTS – 2006 to 2018

Year	Units
2006	140
2007	49
2008	15
2009	10
2010	19 (Plus 49 Apt. Units)
2011	4
2012	27 (Includes 2 Twin Homes)
2013	40
2014	18 (Includes 2 Twin Homes)
2015	15 (Includes 2 Twin Homes)
2016	22
2017	10
2018	31 (Includes 13 Townhomes)

2018 SOUTH METRO/I-35 & HWY 19 AREA CITIES SFH STATISTICS

City	2015	2016	2017	2018	4-Yr Total
Lakeville	420	465	531	527	1943
Savage	85	151	204	228	668
Prior Lake	122	112	83	198	515
Farmington	54	66	44	37	201
New Prague	21	53	84	23	181
Lonsdale	23	35	32	45	135
Northfield	31	32	30	34	127
Faribault	23	20	33	27	103
Elko New Market	15	22	10	31	78
Dundas	5	12	21	19	57
Montgomery	8	7	18	19	52

2018 AREA BUILDING PERMITS



Lot Inventory

Subdivision	Vacant Lots
Boulder Heights	53 (lots not buildable until streets & utilities completed)
Boulder Pointe 6 th Addn	11
Boulder Pointe 7 th Addn	16
Dakota Acres	1
Elko	2
The Farm	19
Whispering Creek North 3 rd Addn	1
Woodcrest	5
Unplatted	2
Total	110

Total Lots Remaining: 110
 Townhome Lots Remaining: 26
 Single Family Detached Lots Remaining: 84

CONCLUSION

The year 2018 was a better year than 2017 for Building Permit activity. Single Family housing starts have gone from 10 in 2017 to 31 in 2018.

One reason for the increase in housing units was the sale of the Dakota Acres townhome lots and the issuance of all 13 townhome unit permits at one time. The lot inventory in the Farm and Boulder Pointe continues to decrease.

Housing Starts	2016	2017	2018
1 st Quarter	1	2	3
2 nd Quarter	10	4	18
3 rd Quarter	4	2	8
4 th Quarter	7	2	2

A summary of 2016, 2017 and 2018 housing starts are provided above.

Data shows an uptick in construction in 2018. With new lots anticipated in 2019, our lot inventories will increase which will hopefully result in additional housing starts in 2019.



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

MEMORANDUM

TO: MAYOR AND CITY COUNCIL, EDA, PLANNING COMMISSION
FROM: RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST
SUBJECT: 2019 VACANT LOT INVENTORY: RESIDENTIAL, COMMERCIAL, INDUSTRIAL
DATE: FEBRUARY 1, 2019

Background / History

The Community Development Department has completed an inventory of all vacant lots (residential, commercial, industrial) within the city limits as of February 1, 2019. As part of the analysis only those lots that have municipal utilities available to them and are nearly building permit ready were identified. Attached to this memo are maps showing the vacant lots in each of the three categories.

Residential Lots: There are currently a total of 110 vacant residential lots available in the city limits. It is noted that 53 of these platted lots are within the Boulder Heights development and although they are platted, they are not yet ready for construction because the street and utility construction has not been completed. Of the remaining 57 lots that are ready for construction, there are 31 lots available for single family home construction and 26 lots available for detached townhome construction (part of an association). A breakdown of vacant lots by development is as follows:

- Boulder Heights – 53 lots (not buildable until infrastructure is complete)
- Boulder Pointe 6th Addition – 11 lots (all 11 are part of an association)
- Boulder Pointe 7th Addition – 16 lots (10 single family, and 6 that are part of an association)
- Dakota Acres – 1 lot
- Elko – 2 lots
- The Farm – 6 lots (6 that are part of an association)
- The Farm 2nd Addition – 3 lots (3 that are part of an association)
- The Farm 3rd Addition – 10 lots
- Whispering Creek North 3rd Addition – 1 lot
- Woodcrest – 5 lots (2 of these vacant lots are existing homes where the property owner owns 2 adjacent lots; the home sits on one lot and the adjacent lot is vacant)
- Unplatted – 2 lots (1 of these vacant lots is an existing home where the property owner owns 2 adjacent lots; the home sits on one lot and the adjacent lot is vacant)

Commercial Lots: There are currently 7 vacant commercial lots available in the city limits. The total acreage of the commercial lots is 27.3 acres. It is noted that all commercial lots identified on the attached map need to be further platted into lots and blocks before being eligible for building permits. With the exception of platting, the lots are relatively close to being building permit ready. All of the identified lots have municipal utilities available to them.

Industrial Lots: There are currently no vacant industrial lots available within the city limits.

Staff Recommendation:

Staff recommends that the City Council, EDA and Planning Commission review the reports as information.
2019 Vacant Lot Inventory
2/1/19



City of Elko New Market Vacant Lot Inventory

Residential, Commercial & Industrial Properties

February, 2019

Contacts for Vacant Residential Land

Bernie Mahowald
612-369-5341
Owner/developer for various lots in:
The Farm development (multiple phases)

Luke Israelson
KJ Walk
952-826-9068
Owner/developer for various lots in:
Boulder Heights development

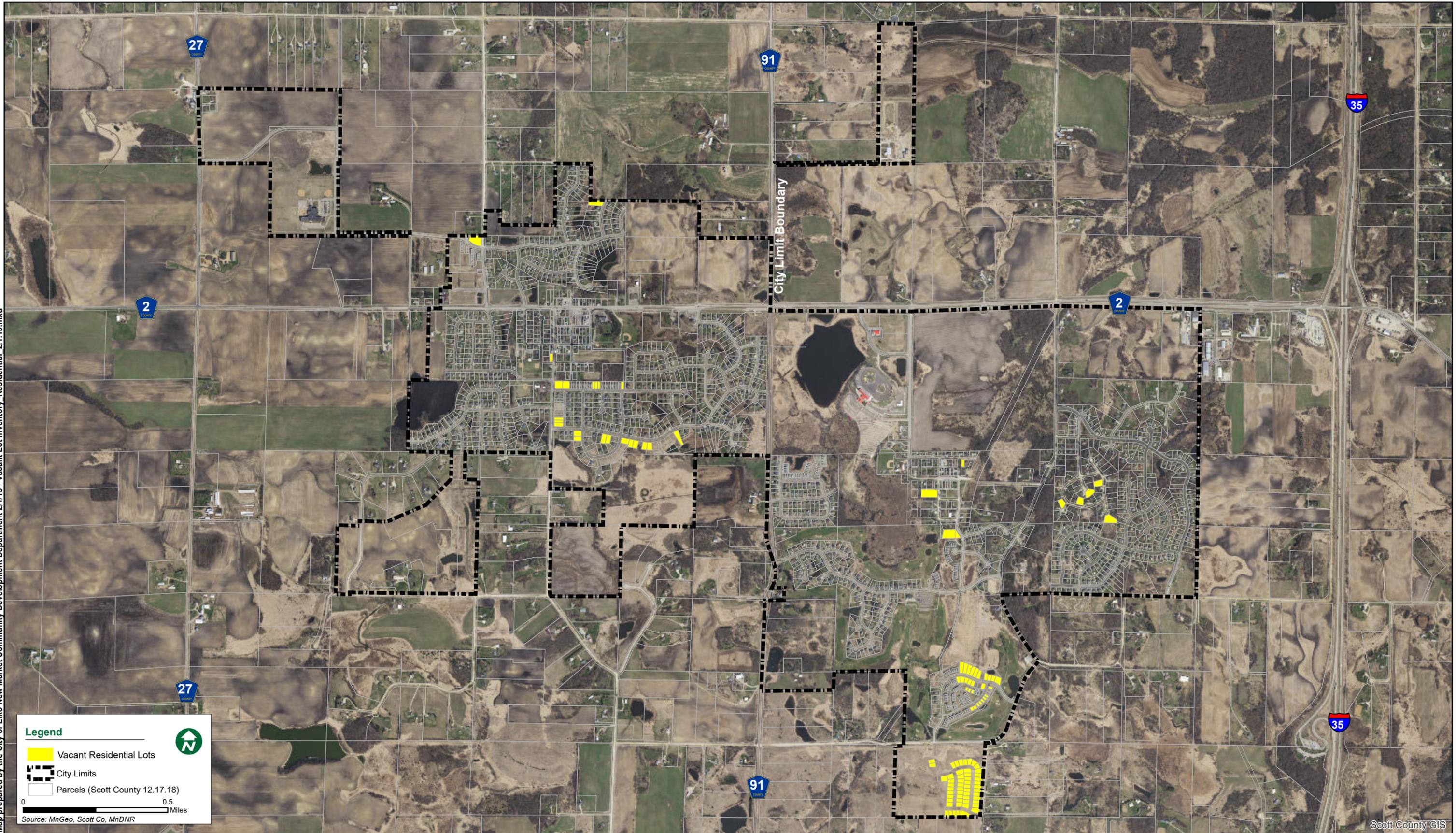
Bjorn Vogen
RAV Holdings, LLC
612-393-2123
Owner/developer for various lots in:
Boulder Pointe 6th & 7th Additions

Many local realtors are also able to help in your search as well.

Contacts for Vacant Commercial Land

1. Dan Ringstad
New Market Bank
952-223-2319
2. Bart Winkler
952-432-7101
3. Linda Zweber
612-987-1549
4. Linda Zweber
612-987-1549
5. Dan Ringstad
New Market Bank
952-233-2319
6. Northfield Hospital
Jerry Ehn
507-646-1515
7. Tom Ryan
612-282-4330

Map prepared by the City of Elko New Market Community Development Department 2/1/19 - Vacant Lot Inventory Residential_2.1.19.mxd



Legend

- Vacant Residential Lots
- City Limits
- Parcels (Scott County 12.17.18)

0 0.5 Miles

Source: MnGeo, Scott Co, MnDNR

Map prepared by the City of Elko New Market Community Development Department 2/1/19 - Vacant Lot Inventory Commercial 2.1.19.mxd

