

# ELKO NEW MARKET - PLANNING COMMISSION MEETING

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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, MARCH 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. February 26, 2019 Minutes
- 7. PUBLIC HEARINGS**
  - A. Proposed Zoning Ordinance Amendment – Sexually Oriented Businesses
  - B. Proposed Zoning Ordinance Amendment – Small Wireless Facilities
- 8. GENERAL BUSINESS**
  - A. Concept Plan Review – Chase Real Estate
- 9. MISCELLANEOUS**
  - A. Community Development Updates & Reports
  - B. 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**  
**February 27, 2019**  
**7:00 PM**

**1. CALL TO ORDER**

Chairman Smith called the meeting of the Elko New Market Planning Commission to order at 7:01 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 Hansen to approve the agenda as submitted. Motion carried: (5-0).

**4. PUBLIC COMMENT**

**A. None**

**5. ANNOUNCEMENTS**

**A. None**

**6. APPROVAL OF MINUTES**

A motion was made by Smith and seconded by Kruckman to approve the minutes of the January 29, 2019 Planning Commission meeting as submitted. Motion carried: (5-0).

**7. PUBLIC HEARINGS**

**A. None**

**8. GENERAL BUSINESS**

**A. Draft Amendment to Zoning Ordinance – Sexually Oriented Uses**

Christianson presented her staff report containing information regarding sexually oriented businesses. She noted that the Planning Commission had requested the City review current

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

Christianson explained that the last time the City's regulations pertaining to sexually oriented businesses were reviewed was in 2004, after the City of Elko was faced with a strip club that had illegally opened. When the City closed the establishment, the owner of the strip club sued the City alleging that the City's ordinance was unconstitutional. The district court ultimately concluded that the City's ordinance was constitutional.

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

Christianson noted that staff and the City Attorney are recommending one minor change to the ordinance, and that is to remove the requirement that sexually oriented uses be setback at least 200' from trails. The reason for the recommendation is that this would potentially preclude such uses from locating anywhere in the City which would be unconstitutional.

Following discussion by the Planning Commission, it was moved by Humphrey, seconded by Hanson to direct staff to prepare for a public hearing on an amendment to Section 11-5-16 (C) of the zoning ordinance to remove the requirement that sexually oriented businesses be setback 200' from trails. Motion carried: (5-0).

## **B. Information regarding Medical Cannabis / Marijuana**

Christianson presented her staff report containing information regarding cannabis / medical marijuana. She explained that in 2014 the Minnesota State legislature adopted the Medical Cannabis Therapeutic Research Act of 2014 ("the Act") which legalized the use of marijuana derived compounds for medical purposes.

She explained that 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/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.

Christianson explained that a patient with a qualifying medical condition, as determined by a qualifying medical professional, then makes them eligible for the State's registry program. Once a patient is on the state's registry, they are allowed to possess and use cannabis for medical use. Christianson reviewed the qualifying medical conditions, noting that the Commissioner of Health is authorized to add qualifying medical conditions without the need for legislative approval.

Christianson stated that the City currently does not have any regulations specific to the manufacturing, testing, distribution or sale of cannabis based products. In absence of specific regulations, one could argue that such facilities fall under existing land use categories which allow similar uses, and would therefore qualify as permitted or conditional uses under the existing City Code. Christianson stated that she was seeking feedback from the Planning Commission as to whether they felt such uses should be specifically regulated within the City. She also noted that under the current law it is unlikely the City would receive such a request. However, the statutes could change to become less restrictive or to allow the recreational use of marijuana, which could trigger a request for cannabis related facilities in the City.

Christianson specifically outlined some options available to the City, and requested feedback. Options outlined with the Planning Commission were as follows:

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 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.

It was noted that staff researched the regulations of cities where medical cannabis distribution facilities/dispensaries are currently located and only one of the cities regulates medical cannabis and that being the City of Bloomington.

Kruckman stated that she had recently visited Colorado and did not notice the dispensaries that were operating in a retail setting; they seemed to blend in with the other businesses. Humphrey stated that he thought the Commission should continue to monitor the situation but take no action at this time. He also stated that he would be interested in hearing how the constituents feel about the topic before making any recommendations. There was consensus among the Commission to take no action at this time but continue to monitor the actions of the State Legislature regarding the topic.

After discussion, the Planning Commission recommended that the City continue to monitor the legislation pertaining to medical or recreational cannabis. The also recommended that the City Council be made aware of the discussion by the Planning Commission.

## **9. MISCELLANEOUS**

### **A. Community Development Updates**

Community Development Specialist Christianson stated that a report containing updates on various projects was contained in the Planning Commission packet. There were no further questions from the Commission regarding the report.

### **B. Roundabout Update**

Christianson and Sevensing provided updates regarding the roundabout project, including funding, potential lighting, potential trails, and easement acquisition. Hanson thanked City staff and the consultant for the open house that was held on February 11, 2019 and materials that have been prepared.

### **C. 2018 Building Permit Summary**

Community Development Specialist Christianson stated that 2018 building permit information, which showed an increase in new housing units, was contained in the Planning Commission packet.

### **D. Vacant Lot Inventory 2.1.19**

Community Development Specialist Christianson reviewed a vacant lot inventory, noting that the number of lots available for single-family development was very low. There are multiple lots available for smaller commercial development that have utilities readily available.

### **E. Planning Commission Questions & Comments**

There were no questions or comments from the Commission.

## **10. ADJOURNMENT**

A motion was made by Humphrey and seconded by Smith to adjourn the meeting at 8:09 p.m. Motion carried: (5-0).

Submitted by:



Renee Christianson  
Community Development Specialist

DRAFT



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

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## MEMORANDUM

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

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### **Background / History**

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

### **Requested Action**

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

### **Attachments**

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

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

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

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

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

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

- a) Public parks/~~trails~~

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

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

**CITY OF ELKO NEW MARKET**

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

**ATTEST:**

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



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

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## MEMORANDUM

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

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

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

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

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

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

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

**Current City Ordinances Relating to Adult Entertainment**

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

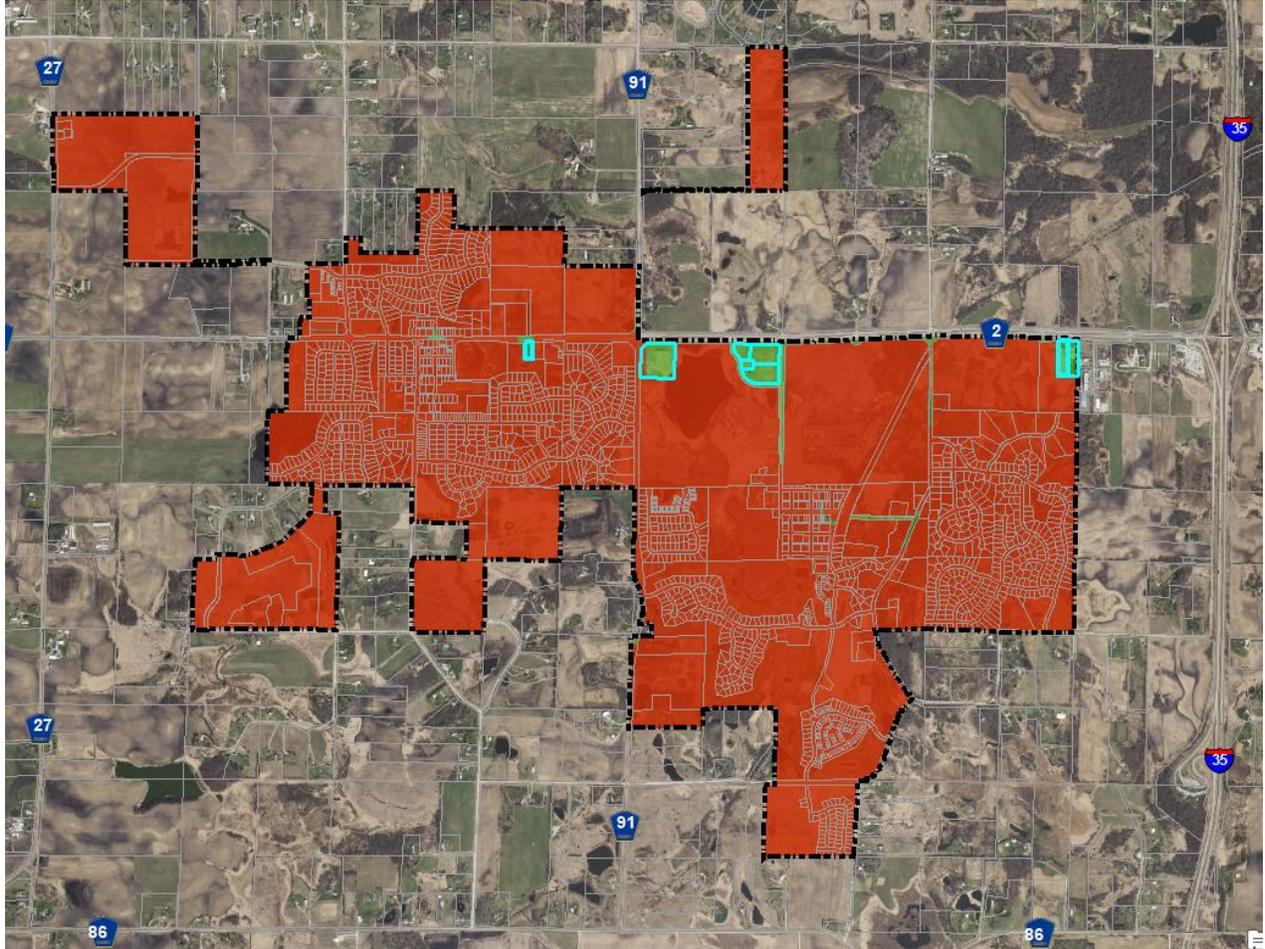
- **Principal sexually oriented businesses are NOT ALLOWED within 200 feet of:**
  - Residential zoning districts
  - Schools
  - Churches
  - Daycare facilities
  - Public parks & trails
  - Other sexually oriented businesses
  
- **Principal sexually oriented businesses are also NOT ALLOWED within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

**Analysis**

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

	ACRES	%
Total Land Area in City Limits	2190.278	
Total Area of Road Rights-of-Way	196.353	
<b>Total Land Area in City Limits, minus Road Rights-of-Ways</b>	<b>1993.925</b>	<b>100.00%</b>
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%
<b>Total Land Available for Sexually Oriented Businesses</b>	<b>40.893</b>	<b>2.05%</b>

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



**City Staff Recommendation**

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

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

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

### **City Attorney Recommendation**

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

### **Requested Action**

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

### **Attachments**

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

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

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

Specified Anatomical Area: Includes either of the following:

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

Specified Sexual Activities: Includes any of the following:

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

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

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

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

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

Establishment: Means and includes any of the following:

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

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

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

Nudity or State Of Nudity:

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

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

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

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

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

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

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

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

Sexually Oriented Business Analysis

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

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

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

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

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

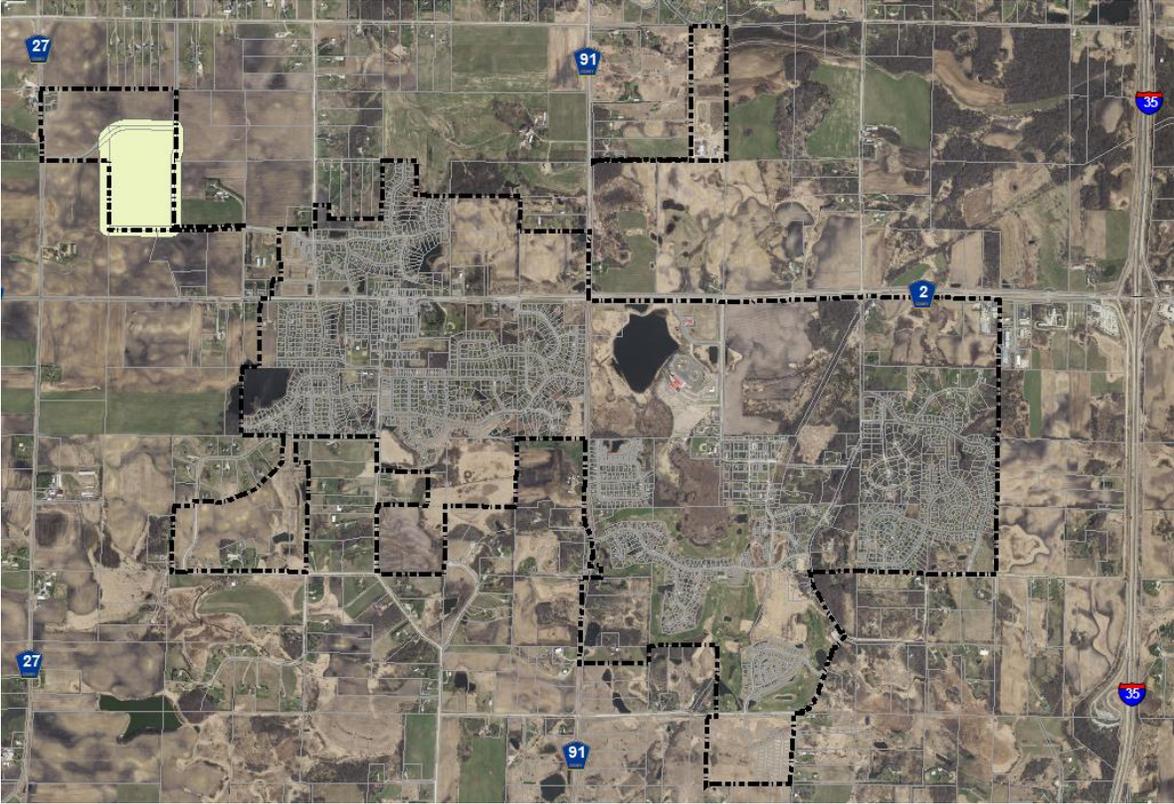
Sexually Oriented Motion Picture Theater: A commercial establishment where, for any form of consideration, films, motion pictures, videocassettes, slides, or similar photographic reproductions are regularly shown which are characterized by the depiction or description of specified sexual activities or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

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

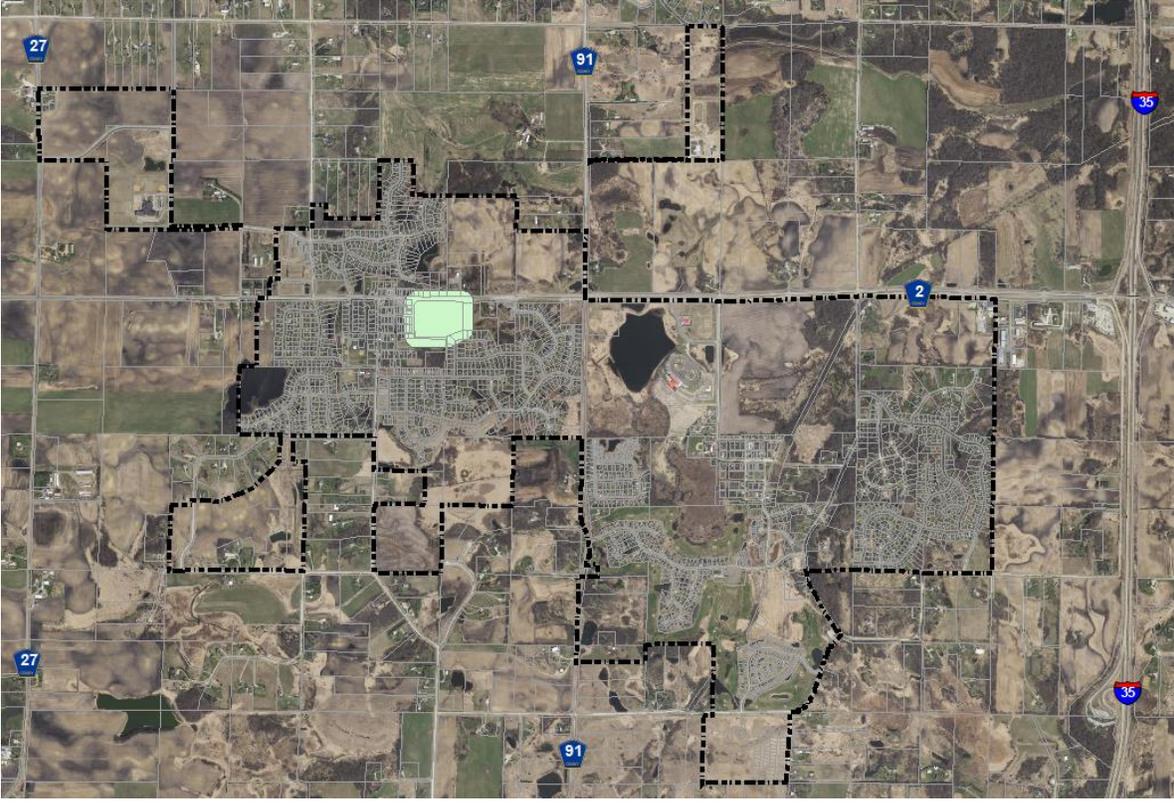
Sexually Oriented Theater: A theater, concert hall, auditorium, or similar commercial establishment which regularly features persons who appear seminude or in a state of nudity or live performances which are characterized by the exposure of specified anatomical areas or specified sexual activities.

**SEXUALLY ORIENTED BUSINESS - ANALYSIS MAPS**

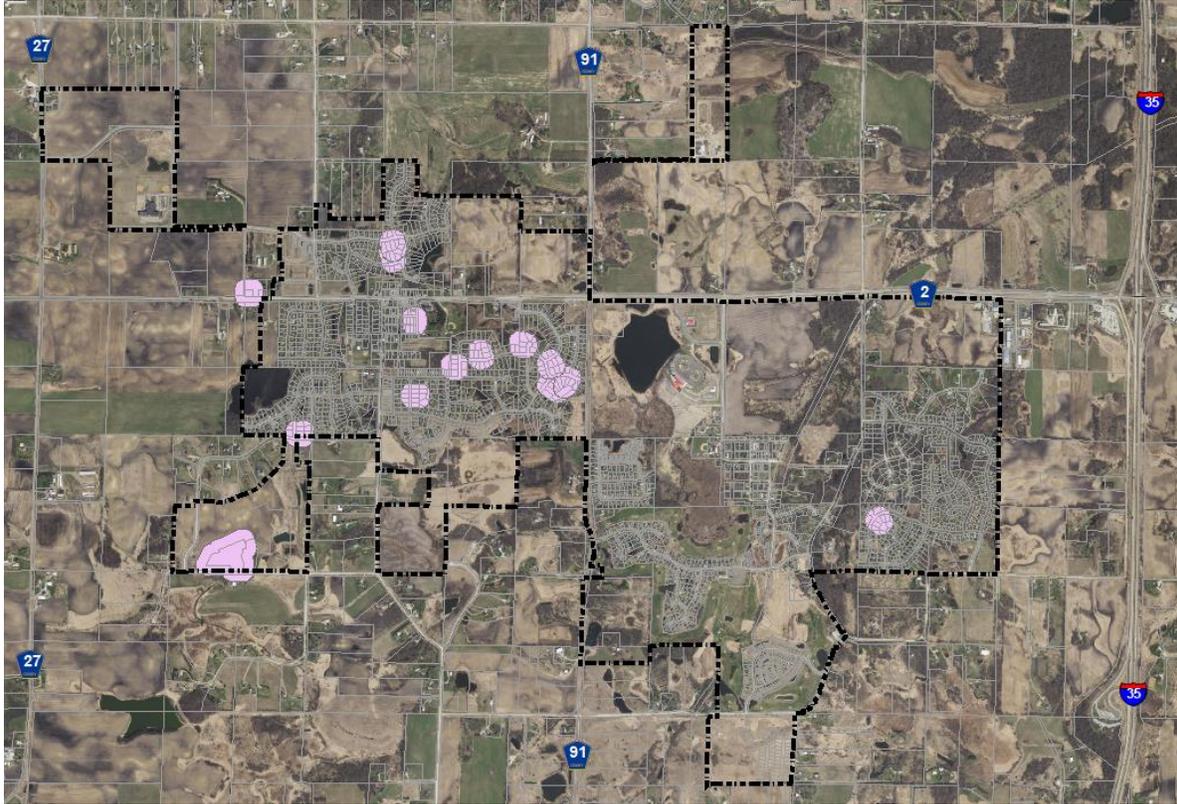
**School Buffer – 200'**



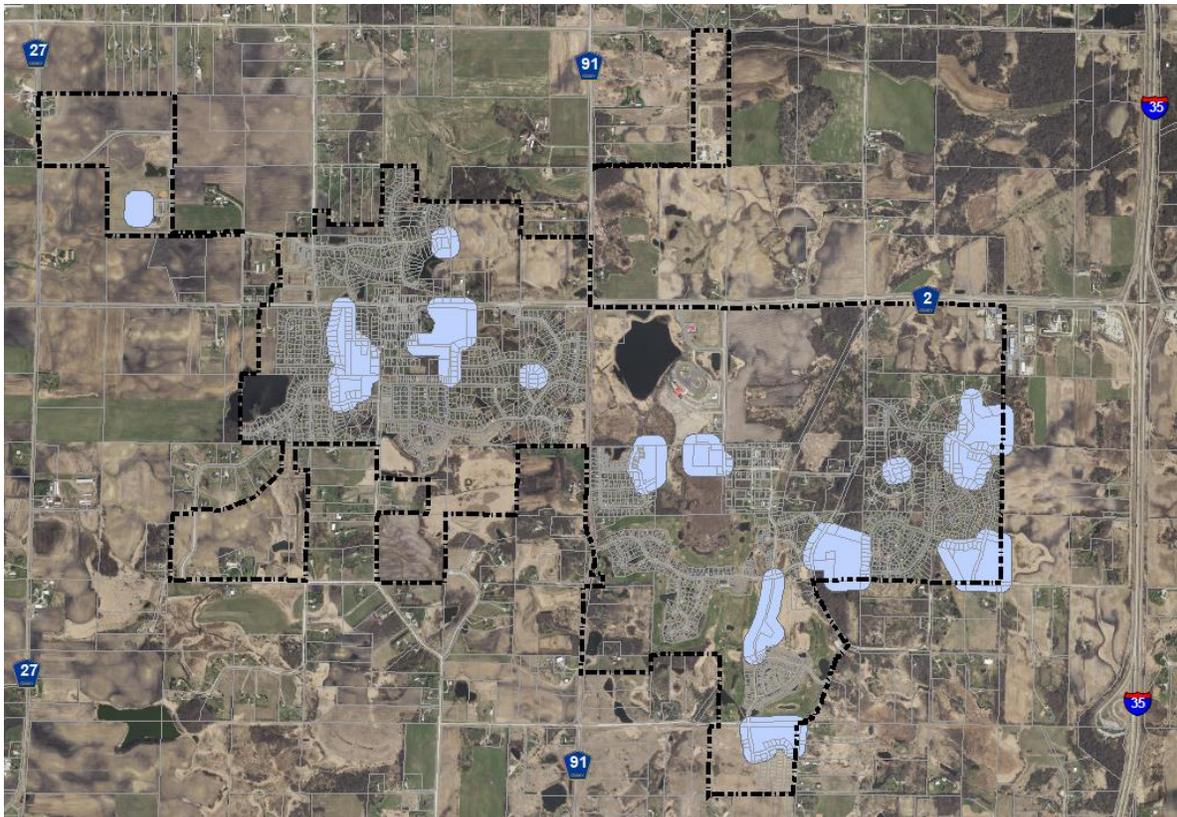
**Church Buffer – 200'**



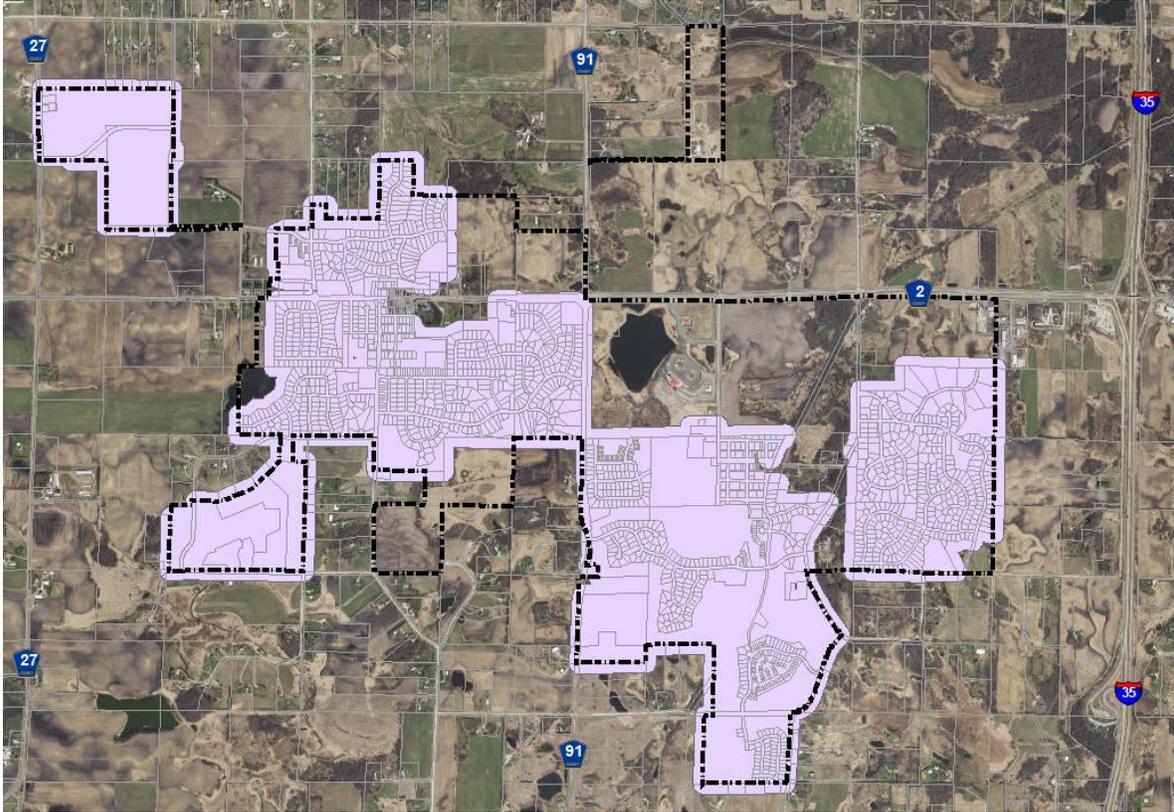
Daycare Buffer – 200'



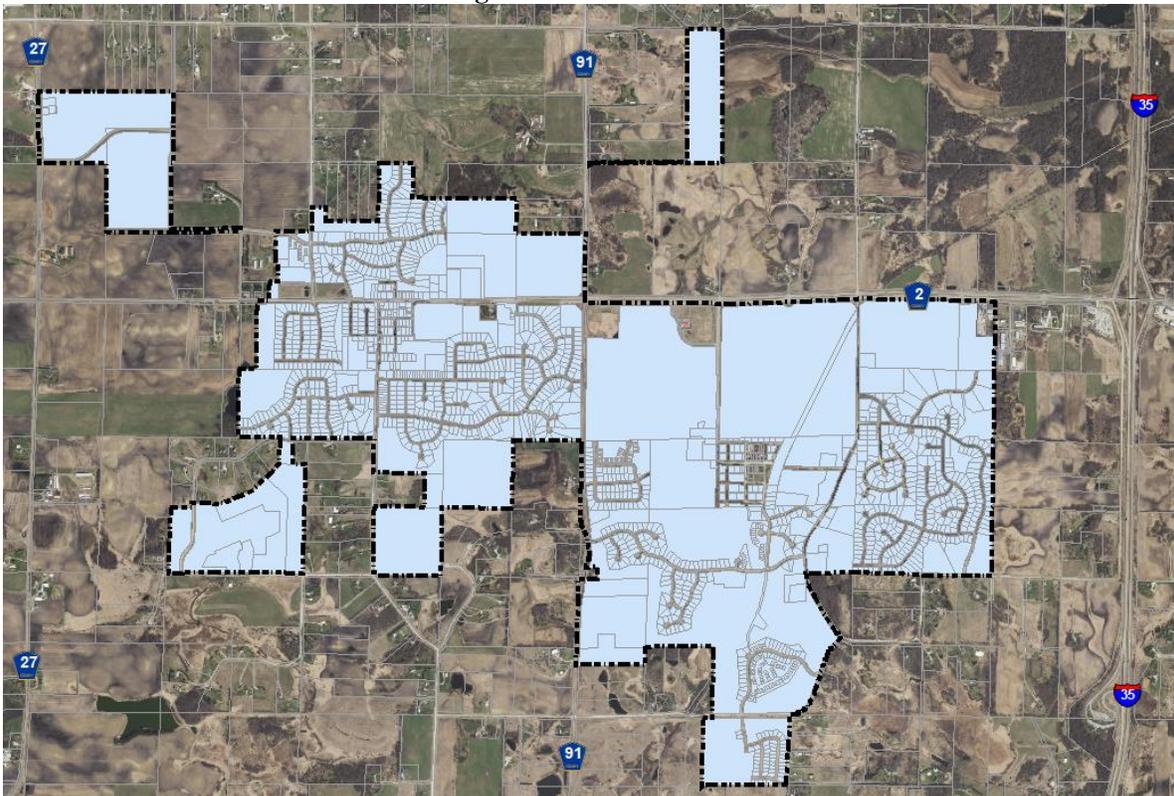
Park Buffer – 200'



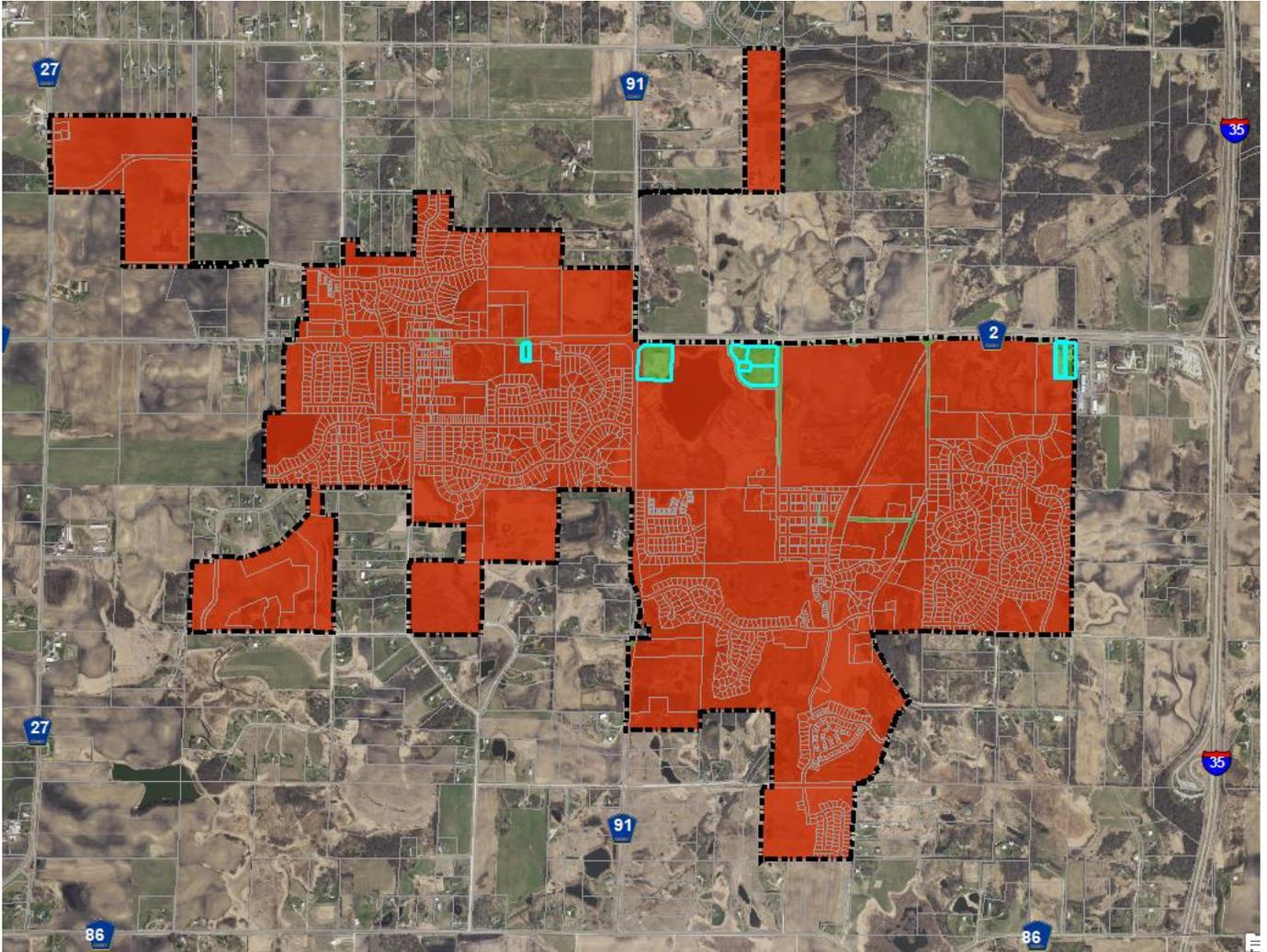
### Residential Zoning District Buffer – 200'



### Zoning Districts Not Allowed In



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



## RELEVANT LINKS:

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

[Minn. Stat. § 617.242](#).

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

[Unconstitutional and Preempted Statutes](#).

[Minn. Stat. § 462.357, subd. 1g](#).

## G. Zoning regulation of adult uses

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

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

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

## H. Restricting Feedlots

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

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

## MEMORANDUM

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

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

### **I. General Rule**

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## B. Struck Down as Unconstitutional

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

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

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

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

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

### III. No Bright Line Test.

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

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

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

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

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

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

## A. Number of Sites Available

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

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

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

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

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

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

## CONCLUSION

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

FindLaw Caselaw Minnesota MN Ct. App. CITY OF ELKO v. Albert LaFontaine, Defendant.

# CITY OF ELKO v. Albert LaFontaine, Defendant.

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## Court of Appeals of Minnesota.

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

No. A03-1050.

Decided: April 13, 2004

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

#### OPINION

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

#### FACTS

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

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

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

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

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

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

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

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

#### ISSUES

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

#### ANALYSIS

##### I

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

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

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

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

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

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

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

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

#### 1. Content Neutral

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

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

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

## 2. Substantial Governmental Interest

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## II

### Disqualification Provisions

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

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

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

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

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

### III

#### Disclosure Provisions

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

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

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

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

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

### IV

#### License Fee Provisions

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

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

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

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

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

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

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

V

#### Distance Restrictions and Prohibition Against Gratuities

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

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

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

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

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

#### DECISION

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

Affirmed.

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

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

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

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

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

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

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

#### FOOTNOTES

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

HUDSON, Judge.

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

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## MEMORANDUM

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**TO:** PLANNING COMMISSION  
**FROM:** HALEY SEVENING, COMMUNITY DEVELOPMENT INTERN  
RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST  
**RE:** SMALL WIRELESS FACILITIES  
**DATE:** MARCH 26, 2019

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### **Background / History**

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

Passing of the new legislation required the City to review its ordinances which may pertain to such wireless facilities and structures. At the January 2018 Planning Commission meeting there was discussion regarding small cell wireless equipment within public rights-of-way, and specifically, whether they should be regulated through the City's Zoning Ordinance (Title 11 of the City Code). The Planning Commission directed Staff to address small cell wireless facilities solely in the City's Right of Way ordinance (Title 8 of the City Code) rather than the Zoning ordinance.

Because Chapter 13 of the Zoning Ordinance does currently regulate towers and antennas, it is necessary to make some minor adjustments to this section of the Zoning Ordinance in response to the new legislation and the 2018 Planning Commission recommendation. The majority of the updates to the City Code needed in response to the new legislation will be addressed in changes proposed to Title 8, which will be addressed by the City Council.

The attached draft ordinance amending section 11-13-10 of the Zoning Ordinance exempts small wireless facilities and wireless support structures from the Zoning Ordinance. Also attached is the draft ordinance amending Title 8 of the City Code (Right-of-Way Ordinance) which is included for informational purposes only.

### **Requested Action**

Staff is requesting that the Planning Commission hold a public hearing regarding the proposed zoning ordinance amendment and make a recommendation to the City Council regarding the matter.

**Attachments**

January 4, 2018 Planning Commission Meeting Minutes

(Draft) Ordinance amending Section 11-13-10 of the City Code

(Draft) Ordinance amending Section 8-1 (Public Rights of Way Management) of the City Code

## January 4, 2018 PC Meeting Minutes

### C. Draft City Code Amendment - Small Cell Wireless Facilities

Chairman Thompson advised the Planning Commission and City Staff that he is employed by a company which is directly related to the “small cell” industry. As a result, he removed himself from the Planning Commission’s discussion of the topic to avoid a potential “conflict of interest.” As a result, Vice Chairman Smith assumed Thompson’s duties for the agenda item.

Vice Chairman Smith asked Community Development Specialist Christianson to present her memorandum dated January 4, 2018 related to the regulation of small cell wireless facilities.

Community Development Specialist Christianson advised the Planning Commission that during the State’s 2017 legislative session, changes were made to Statutes which regulate small cell wireless facilities. It was noted that the new legislation allows wireless data providers to locate facilities (poles, antennae and related equipment) within public rights-of-way. Such allowance basically mimics rights historically provided to electric companies, gas companies and telecommunication companies in regard to the placement of infrastructure within public rights-of-ways.

Christianson explained that the new State law provides the following:

- Small wireless facilities and wireless support structures (poles) are a permitted use in the right-of-way.
- Cities have no authority to deny such facilities.
- Cities may require a provider to obtain a conditional use permit to install a new wireless support structure in the right-of-way in a district zoned for single family residential use.
- The height of wireless support structures is limited to 50 feet above ground level.
- No guidance is provided related to conditions which may be imposed upon conditions which may be imposed upon wireless support structures.

Christianson stated that the City of Elko New Market manages utilities within its rights-of-ways via its right-of-way ordinance, the provisions of which are outside the purview of the Planning Commission. Christianson did however, request specific feedback from the Planning Commission regarding their desire to process a conditional use permit for small cell wireless facilities located within rights-of-way in single family residential zoning districts.

Christianson also referenced a draft amendment to Title 8, Chapter 1 of the City Code pertaining to Public Ways and Property prepared by the City Attorney (included in the Planning Commission meeting packet).

In consideration of this matter, the Planning Commission expressed their preference to address small cell wireless facilities solely in the City’s right-of-way ordinance (rather than the Zoning Ordinance).

The Planning Commission did however, express a willingness to assist the City Council in the formulation of various conditions which would apply to such facilities, if so desired.

Community Development Specialist Christianson indicated that the Planning Commission’s feedback will be passed on to the City Council.

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

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

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

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

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

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

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

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

**ADOPTED** this \_\_\_ day of \_\_\_\_\_, 2019 by the City Council for the City  
of Elko New Market.

**CITY OF ELKO NEW MARKET**

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

**ATTEST:**

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

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

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

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

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

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

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

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

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

This chapter is created to manage and regulate the public use of the city rights of way along city roads and infrastructure pursuant to the authority granted to the city under state and federal statutory, administrative and common law. The city hereby elects to manage the rights of way under its jurisdiction. All rights of way users, including the city, are subject to the provisions in this chapter. The city is exempt from the obligation of paying for permits or other fees imposed by this chapter. This chapter shall be interpreted consistent with 1997 session laws, chapter 123, substantially codified in Minnesota statutes sections 237.16, 237.162, 237.163, 237.79, 237.81, and 238.086 (the "act"), 2017 session laws, chapter 94 amending the act, Minnesota statutes chapter 216D and the other laws governing applicable rights of the city and users of the rights of way. This chapter shall also be interpreted consistent with Minnesota rules 7819.0050 \_ 7819.9950 where possible. To the extent any provision of this chapter cannot be interpreted consistently with the Minnesota rules, that interpretation most consistent with the act and other applicable statutory and case law is intended. This chapter shall not be interpreted to limit the regulatory and police powers of the city to adopt and enforce general ordinances necessary to protect the health, safety, and welfare of the public. "Manage the right of way" means the authority of the city to do any or all of the following<sup>1</sup>:

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

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

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

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

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

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

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

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

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

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

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

**EMERGENCY:** A condition that:

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

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

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

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

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

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

**JOINT TRENCH:** The placement of two (2) or more conductors and/or conduits owned and

operated by separate utilities in the same excavation to minimize occupied space; reduce costs, disruption, and construction time; and simplify mapping and future location of the facilities.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

WIRELESS SERVICE: Any service using licensed or unlicensed wireless spectrum, including the use of Wi-Fi, whether at a fixed location or by means of a mobile device that is provided using wireless facilities. Wireless service does not include services regulated under Title VI of the Communications Act of 1934, as amended, including cable service.

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

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

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

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

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

##### **A. Registration Required:**

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

##### **B. Registration Information:**

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

agency to lawfully operate, where the registrant is lawfully required to have such certificate, authorization or approval from said commission.

d. Such other information as the city may reasonably require.

2. Changes To Information: The registrant shall keep all of the information listed above current at all times by providing changes to the city within fifteen (15) days following the date of which the registrant has knowledge of any change.

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

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

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

B. Exemptions From Permits:

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

deeper than twelve inches (12") are subject to the permit requirements of subsection A of this section.

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

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

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

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

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

- A. Fees Established:
  1. Excavation Permit: The excavation permit fee shall be established by the city in an amount sufficient to recover the following costs. Fees shall be listed on the schedule of fees updated and adopted annually by the city council.
    - a. The city cost to administer the permit, inspect the work, and enforce provisions of this chapter and permit for each project.

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

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

A. Bond Requirements:

1. Performance And Restoration Bond: The performance and restoration bond required in this subsection A1 and in subsection A2 of this section and subsections [8-1-18C2b](#) and [8-1-24A2c](#) of this chapter shall be in an amount determined in the city's sole discretion, sufficient to serve as security for the full and complete performance of the obligations under this chapter, including any costs, expenses, damages, or loss the city pays or incurs because of any failure to comply with this chapter or any other applicable laws, regulations or standards. A minimum bond amount of ten thousand dollars (\$10,000.00) shall be required for all projects unless waived by the administrator. Alternative forms of security such as cash escrow or an irrevocable letter of credit may also be accepted at the discretion of the administrator. During periods of construction, repair or restoration of rights of way or equipment in rights of way, the performance and restoration bond shall be in an amount sufficient to cover one hundred percent (100%) of the estimated cost of such work, as documented by the person proposing to perform such work, or in such lesser amounts as

may be determined by the city, taking into account the amount of equipment in the right of way, the location and method of installation of the equipment, the conflict or interference of such equipment with the equipment of other persons, and the purposes and policies of this chapter. Sixty (60) days after completion of the work, the performance and restoration bond may be reduced in the sole determination of the city.

2. **Additional Bond:** When an excavation permit is required for purposes of installing additional equipment, and a performance and restoration bond which is in existence is insufficient with respect to the additional equipment, in the sole determination of the city, the permit applicant may be required by the city to post an additional performance and restoration bond in accordance with subsection A of this section.
- B. Insurance Requirements:** Before any permit shall be issued allowing work in the right of way, the applicant or registrant shall provide a certificate of insurance or self-insurance:
1. Verifying that an insurance policy has been issued to the applicant/registrant by an insurance company licensed to do business in the state of Minnesota, or a form of self-insurance acceptable to the administrator;
  2. Verifying that the applicant/registrant is insured against claims for bodily injury, including death, as well as claims for property damage arising out of the: a) use and occupancy of the right of way by the registrant, its officers, agents, employees and permittees; and b) placement and use of facilities in the right of way by the registrant, its officers, agents, employees and permittees, including, but not limited to, protection against liability arising from contracts, independent contractors, products and completed operations, explosions, damage of underground facilities and collapse of property;
  3. Naming the city, its officers, employees and agents, as an additional insured as to whom the coverage required herein is in force and applicable and for whom defense will be provided as to all such coverage;
  4. Requiring that the administrator be notified thirty (30) days in advance of cancellation of the policy, nonrenewal or material adverse modification of a coverage term;
  5. Indicating commercial general liability coverage, business automobile liability coverage, workers' compensation and umbrella coverage established by the administrator in amounts sufficient to protect the city and the public and to carry out the purposes and policies of this chapter.

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

- A. Issuance:** If the city determines that the applicant has satisfied the requirements of this chapter, the city may issue a permit.

- B. Conditions: The city may impose any reasonable conditions upon the issuance of a permit and the performance of the applicant thereunder in order to protect the public health, safety and welfare, to ensure the structural integrity of the right of way, to protect the property and safety of other users of the right of way, to minimize the disruption and inconvenience to the traveling public, and to otherwise efficiently manage the use of the right of way.
- C. Small Wireless Facility Conditions: In addition to subsection B, the erection or installation of a wireless support structure, the collocation of a small wireless facility, or other installation of a small wireless facility in the right of way, shall be subject to the following conditions:
- (1) A small wireless facility shall only be collocated on the particular wireless support structure, under those attachment specifications, and at the height indicated in the applicable permit application.
  - (2) No new wireless support structure installed within the right-of-way shall exceed 50 feet above ground level in height without the city's written authorization, provided that the city may impose a lower height limit in the applicable permit to protect the health, safety and welfare or to protect the right-of-way in its current use, and further provided that a registrant may replace an existing wireless support structure exceeding 50 feet above ground level in height with a structure of the same height subject to such conditions or requirements as may be imposed in the applicable permit.
  - (3) No wireless facility may extend more than 10 feet above its wireless support structure.
  - (4) Where an applicant proposes to install a new wireless support structure in the right of way, the city may impose separation requirements between such structure and any existing wireless support structure or other facilities in and around the right of way.
  - (5) Where an applicant proposes installing a new wireless support structure or replacing an existing wireless support structure, the new or replacement wireless support structure shall be of monopole design not exceeding 18 inches in diameter and compatible in design with existing wireless support structures in the area.
  - (6) The small wireless facility shall not interfere with public safety wireless telecommunications.
  - (7) Small wireless facilities in the right-of-way shall be removed and relocated at the City's request and at no cost to the City when the City determines that removal and relocation is necessary to prevent interference with (1) present or future City use of the right-of-way for a public project; (2) the public health, safety, or welfare; or (3) the safety and convenience of travel over the right-of-way.
  - (8) Small wireless facilities shall be mounted so there is vertical clearance of at least (8) eight feet between the facility and any pedestrian sidewalk.
  - (9) No small wireless facilities may be located over street or parking lanes.

- (10) Small wireless facilities shall be located so as not to obstruct light fixtures. If small wireless facilities are to be located on a light pole, a lighting plan shall be submitted to demonstrate the facilities will not block light on the street or sidewalk.
- (11) Small wireless facilities and wireless support structures shall be located so as not to obstruct traffic lights, traffic signs, street signs, or wayfinding signage.
- (12) All wires servicing small wireless facilities and support facilities must be located inside the associated wireless support structure.
- (13) All small wireless facilities shall be flush with the wireless support structure it is collocated on to minimize visual impact.
- (14) Every small wireless facility shall be the same color and finish as the wireless support structure it is collocated on.
- (15) No stickers, signs, or decals shall be visible on any small wireless facility, except safety alerts required by law.
- (16) Brackets supporting small wireless facilities shall be designed to minimize the appearance and profile of the facilities. Bracket colors and materials should match the wireless support structures they are attached to.
- (17) Ground-mounted equipment associated with a small wireless facility is prohibited unless the applicant can show that ground-mounted equipment is necessary for operation of the small wireless facility. If ground-mounted equipment is necessary, it shall be placed below grade unless not technically feasible. If ground-mounted equipment is placed above grade, the design of ground equipment shall minimize its visual impact in the right-of-way. Ground-mounted equipment shall not disrupt traffic or pedestrian circulation or interfere with vehicle and pedestrian sight lines.
- (18) Where an applicant proposes collocation on a decorative wireless support structure, sign or other structure not intended to support small wireless facilities, the city may impose reasonable requirements to accommodate the particular design, appearance or intended purpose of such structure.
- (19) Where an applicant proposes to replace a wireless support structure, the city may impose reasonable restocking, replacement, or relocation requirements on the replacement of such structure.

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

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

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

E. Action on Small Wireless Facility Permit Applications:

1. Deadline for Action: The city shall approve or deny a small wireless facility permit application within 90 days after filing of such application. The small wireless facility permit, and any associated building permit application, shall be deemed approved if the city fails to approve or deny the application within the review periods established in this section.
2. Consolidated Applications. An applicant may file a consolidated small wireless facility permit application addressing the proposed collocation of up to 15 small wireless facilities, or a greater number if agreed to by the city, provided that all small wireless facilities in the application:
  - a. are located within a two mile radius;
  - b. consist of substantially similar equipment; and
  - c. are to be placed on similar types of wireless support structures.In rendering a decision on a consolidated permit application, the city may approve some small wireless facilities and deny others, but may not use denial of one or more permits as a basis to deny all small wireless facilities in the application.
3. Tolling of Deadline. The 90 day deadline for action on a small wireless facility permit application may be tolled if:
  - a. The city receives applications from one or more applicants seeking approval of permits for more than 30 small wireless facilities within a seven (7) day period. In such case, the city may extend the deadline for all such applications by 30 days by informing the affected applicants in writing of such extension.
  - b. The applicant fails to submit all required documents or information and the city provides written notice of incompleteness to the applicant within 30 days of receipt of the application. Upon submission of additional documents or information, the city shall have ten (10) days to notify the applicant in writing of any still missing information.

c. The city and a small wireless facility applicant agree in writing to toll the review period.

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

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

A. Mandatory Denial: Except in the case of an emergency, no right of way permit will be granted:

1. To any person required by section [8-1-5](#) of this chapter to be registered who has not done so;
2. To any person who failed to use commercially reasonable efforts to anticipate and plan for the project;
3. For any project which requires the excavation of any portion of a right of way which was constructed or reconstructed within the preceding five (5) years;
4. To any person who has failed within the past three (3) years to comply or is presently not in full compliance with the requirements of this chapter;
5. To any person as to whom there exists grounds for the revocation of a permit under section [8-1-27](#) of this chapter; and
6. If, in the sole discretion of the city, the issuance of a permit for the particular date and/or time would cause a conflict or interfere with an exhibition, celebration, festival, or any other event. The city, in exercising this discretion, shall be guided by the safety and convenience of ordinary travel of the public over the right of way, and by considerations relating to the public health, safety and welfare.

B. Permissive Denial: The city may deny a permit in order to protect the public health, safety and welfare, to prevent interference with the safety and convenience of ordinary travel over the right of way, or when necessary to protect the right of way and its users. The city may consider one or more of the following factors:

1. The extent of which right of way space where the permit is sought is available;
2. The competing demands for the particular space in the right of way;
3. The availability of other locations in the right of way or in other rights of way for the equipment of the permit applicant;
4. The applicability of ordinance or other regulations of the right of way that affect location of equipment in the right of way;

5. The degree of compliance of the applicant with the terms and conditions of its franchise, if any, this chapter, and other applicable ordinances and regulations;
  6. The degree of disruption to surrounding communities and businesses that will result from the use of that part of the right of way;
  7. The condition and age of the right of way, and whether and when it is scheduled for total or partial reconstruction; and
  8. The balancing of the costs of disruption to the public and damage to the right of way against the benefits to that part of the public served by the expansion into additional parts of the right of way.
- C. Discretionary Issuance: Notwithstanding the provisions of subsection A2 of this section, the city may issue a permit in any case where the permit is necessary: 1) to prevent substantial economic hardship to a customer of the permit applicant; or 2) to allow such customer to materially improve its utility service; or 3) to allow a new economic development project; and where the permit applicant did not have knowledge of the hardship, the plans for improvement of service or the development project when said applicant was required to submit its list of next year projects.
- D. Permits For Additional Next Year Projects: Notwithstanding the provisions of subsection A2 of this section, the city may issue a permit to a registrant who demonstrates that it used commercially reasonable efforts to anticipate and plan for the project, such permit to be subject to all other conditions and requirements of law, including such conditions as may be imposed under subsection [8-1-10B](#) of this chapter.
- E. Procedural Requirements: The denial of a permit must be made in writing and must document the basis for the denial. The city must notify the applicant or right of way user in writing within three (3) business days of the decision to deny a permit. If an application is denied, the right of way user may address the reasons for denial identified by the city and resubmit its application. If the application is resubmitted within 30 days of receipt of the notice of denial, no additional application fee shall be imposed. The city must approve or deny the resubmitted application within 30 days after submission.

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

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

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

- A. No person may excavate or obstruct the right of way beyond the date or dates specified in the permit unless such person: 1) makes a supplementary application for another right of way permit before the expiration of the initial permit; and 2) a new permit or permit extension is granted.

- B. If the obstruction or excavation of the right of way begins later or ends sooner than the date given on the permit, the permittee shall notify the city of the accurate information as soon as this information is known.

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

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

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

- A. Notice Of Completion: When the work under any permit hereunder is completed, the permittee shall notify the city.
- B. Site Inspection: The permittee shall make the work site available to the city inspector and to all others as authorized by law for inspection at all reasonable times during the execution and upon completion of the work.
- C. Authority Of City Inspector: At the time of inspection, the city inspector may order the immediate cessation of any work which poses a serious threat to the life, health, safety or well-being of the public. The city inspector may issue an order to the registrant for any work which

does not conform to the applicable standards, conditions or codes. The order shall state that failure to correct the violation will be cause for revocation of the permit. Within ten (10) days after issuance of the order, the registrant shall present proof to the city that the violation has been corrected. If such proof has not been presented within the required time, the city may revoke the permit pursuant to section [8-1-27](#) of this chapter.

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

##### **A. Emergency Situations:**

1. Each registrant shall immediately notify the city or the city's designee of any event regarding its equipment which it considers to be an emergency. The registrant may proceed to take whatever actions are necessary in order to respond to the emergency. Within two (2) business days after the occurrence of the emergency, the registrant shall apply for the necessary permits, pay the fees associated therewith and fulfill the rest of the requirements necessary to bring itself into compliance with this chapter for the actions it took in response to the emergency.
2. In the event that the city becomes aware of an emergency regarding a registrant's equipment, the city may attempt to contact the local representative of each registrant affected, or potentially affected, by the emergency. In any event, the city may take whatever action it deems necessary in order to respond to the emergency, the cost of which shall be borne by the registrant whose equipment occasioned the emergency.

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

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

- A. Any person required to register under section [8-1-5](#) of this chapter who occupies, uses, or places its equipment in the right of way is hereby granted a right to do so if and only so long as said person: 1) timely pays all fees as provided herein; and 2) complies with all other requirements of law.
- B. The grant of right in subsection A of this section is expressly conditioned on, and is subject to, the police powers of the city, continuing compliance with all provisions of law now or hereinafter enacted, including this chapter, as it may be from time to time amended, and further, is specifically subject to the obligation to obtain any and all additional required authorizations, whether from the city or other body or authority.

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

A. General Requirements: The excavation, backfilling, patching and restoration, and all other work performed in the right of way, shall be done in conformance with Minnesota rules 7819.1100 and 7819.5000 and shall conform to MnDOT standard specifications and other applicable local

requirements, insofar as they are not inconsistent with Minnesota statutes sections 237.162 and 237.163, as may be amended from time to time.

#### B. Installation Requirements:

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

#### C. Restoration Of Rights Of Way:

1. **Timing:** The work to be done under the permit, and the restoration of the right of way as required herein, must be completed within the dates specified in the permit, increased by as many days as work could not be done because of circumstances constituting force majeure or when work was prohibited as unseasonal or unreasonable under subsection [8-1-25B](#) of this chapter, all in the sole determination of the city. In addition to repairing its own work, the permittee must restore the general area of the work and the surrounding areas, including the paving and its foundations, to the same condition that existed before the commencement of the work and must inspect the area of the work and use reasonable care to maintain the same condition for twenty four (24) months thereafter.
2. **Repairs And Restoration; Costs:** In its application for an excavation permit, the permittee may choose to have the city restore the right of way. In any event, the city may determine to perform the right of way restoration and shall require the permittee to pay a restoration fee to provide for reimbursement of all costs associated with such restoration. In the event the permittee elects not to perform restoration, the city may, in lieu of performing the restoration itself, impose a fee to fully compensate for the resultant degradation as well as for any and all additional city costs associated therewith. Such fee for degradation shall compensate the city for costs associated with a decrease in the useful life of the right of way caused by excavation and shall include a restoration fee component. Payment of such fee does not relieve a permittee from any restoration obligation.
  - a. **City Restoration:** If the city restores the right of way, the permittee shall pay the costs thereof within thirty (30) days of billing. If, during the twenty four (24) months following such restoration, the right of way settles due to the permittee's excavation or restoration, the permittee shall pay to the city, within thirty (30) days of billing, the cost of repairing said right of way.
  - b. **Permittee Restoration:** If the permittee chooses at the time of application for an excavation permit to restore the right of way itself, such permittee shall post an

additional performance and restoration bond in an amount determined by the city to be sufficient to cover the cost of restoring the right of way to its pre-excavation condition. If, twenty four (24) months after completion of the restoration of the right of way, the city determines that the right of way has been properly restored, the surety on the performance and restoration bond posted pursuant to this subsection C2b shall be released.

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

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

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

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

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

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

A. Information Required: Each registrant and permittee shall provide project data necessary to allow the city to develop a right of way mapping system in accordance with Minnesota rules 7819.4000 and 7819.4100.

B. Permit Required; Application: The city requires a permit for excavation in or obstruction of its public right of way. A person wishing to undertake a project within the public right of way shall submit a right of way permit application, which will require the filing of mapping information pursuant to subsection C of this section.

C. Mapping Information: The city requires as part of its permit the filing of the following information for placement of utilities:

1. Location and elevation of the applicant's mains, cables, conduits, switches, and related equipment and facilities, with the location based on one of the following methods:

a. The preferred method is X, Y, and Z coordinates in NAD 83 1996 adjustment (also known as HARN adjustment), horizontal datum and NGVD 88 vertical datum. This information is to be supplied in an electronic format in an ASCII comma-delimited file including: point number, northing, easting, elevation and description. The alignment position shall be collected at minimum intervals of two hundred feet (200') or as required by changes in direction of the utility being located to define the horizontal alignment. Elevation "as built" depth locations shall be collected at a minimum of ten (10) per mile. The horizontal and vertical accuracy requirements for all collected positions shall be within 0.5 foot of their reported position as evidenced by the certification of a licensed land surveyor or engineer registered in the state of Minnesota.

- b. Offsets from property lines, distances from the centerline of the public right of way, and curb lines as determined by the city.
  - c. Any other system agreed upon by the right of way user and the city.
2. The type and size of the utility facility.
  3. A description of aboveground appurtenances.
  4. Any facilities to be abandoned, if applicable, in conformance with Minnesota statutes section 216D.04, subdivision 3, as it may be amended from time to time.
- D. Changes And Corrections: The application must provide that the applicant agrees to submit "as built" data, reflecting any changes and variations from the information provided under subsection C of this section within sixty (60) days of completion.
- E. Additional Construction Information: In addition, the right of way user shall submit a completion certificate to the city at the time the project is completed.
- F. Manner Of Conveying Permit Data: A right of way user is not required to provide or convey mapping information or data in a format or manner that is different from what is currently used and maintained by that operator. A permit application fee may include the cost to convert the data furnished by the right of way user to a format currently in use by the city. These data conversion costs, unlike other costs that make up permit fees, may be included in the permit fee after the permit application process.
- G. Data On Existing Facilities: A right of way user shall promptly provide existing data on its existing facilities within the public right of way in the form maintained by the user if requested by the city.
- H. Service Laterals: All permits issued for the installation or repair of service laterals, other than minor repairs, as defined in Minnesota rules 7560.0150, subparagraph 2, shall require the permittee's use of appropriate means of establishing the horizontal locations of installed service laterals and the service lateral vertical locations in those cases where the city reasonably requires it. Permittees or their subcontractors shall submit to the city evidence satisfactory to the city of the installed service lateral locations. Compliance with this subsection and with applicable gopher state one-call law and Minnesota rules governing service laterals installed after December 31, 2005, shall be a condition of any city approval necessary for: 1) payments to contractors working on a public improvement project; and 2) city approval of performance under development agreements, or other subdivision or site plan approval under Minnesota statutes chapter 462. The city shall reasonably determine the appropriate method of providing such information to the city. Failure to provide prompt and accurate information on the service laterals installed may result in the revocation of the permit issued for the work or for future permits to the offending permittee or its subcontractors.

- I. Trade Secret Information: At the request of any registrant, any information requested by the city which qualifies as a trade secret under Minnesota statutes section 13.37(b) shall be treated as trade secret information as detailed therein.

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

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

B. Corridors:

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

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

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

E. Relocation Of Equipment:

1. The person must promptly and at his own expense, with due regard for seasonal working conditions, permanently remove and relocate his equipment and facilities in the right of way whenever the city requests such removal and relocation, and shall restore the right of way to the same condition it was in prior to said removal or relocation. The city may make such requests in order to prevent interference by the company's equipment or facilities with:
  - a. A present or future city use of the right of way;
  - b. A public improvement undertaken by the city;
  - c. An economic development project in which the city has an interest or investment;
  - d. When the public health, safety and welfare require it; or
  - e. When necessary to prevent interference with the safety and convenience of ordinary travel over the right of way.
2. Notwithstanding the foregoing, a person shall not be required to remove or relocate his equipment from any right of way which has been vacated in favor of a nongovernmental entity unless and until the reasonable costs thereof are first paid by such nongovernmental entity to the person therefor.

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

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

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

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

registrant or permittee must pay the relocation costs; or 2) if the vacation proceedings are initiated by the city, the registrant or permittee must pay the relocation costs unless otherwise agreed to by the city and the registrant or permittee; or 3) if the vacation proceedings are initiated by a person or persons other than the registrant or permittee, such other person or persons must pay the relocation costs.

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

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

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

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

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

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

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

- A. Compliance With Other Laws: Obtaining a right of way permit does not relieve the permittee of its duty to obtain all other necessary permits, licenses, and authority and to pay all fees required by the city or other appropriate jurisdiction or other applicable rule, law or regulation. The permittee shall comply with other local codes and with road load restrictions. A permittee shall comply with all requirements of local, state and federal laws, including, but not limited to, Minnesota statutes sections 216D.01 through 216D.09 ("Gopher One-Call Excavation Notice System") and Minnesota rules chapter 7560. A permittee shall perform all work in conformance with all applicable codes and established rules and regulations and is responsible for all work done in the right of way pursuant to its permit, regardless of who performs the work.
- B. Prohibited Work: Except in the case of an emergency, and with the approval of the city, no right of way obstruction or excavation may be performed when seasonally prohibited or when conditions are unreasonable for such work.
- C. Interference With Right Of Way: A permittee shall not so obstruct a right of way that there is interference with the natural free and clear passage of water through the gutters or other waterways. Private vehicles may not be parked within or adjacent to a permit area. The loading or unloading of trucks adjacent to a permit area is prohibited unless specifically authorized by the permit.
- D. Traffic Control: Traffic control shall conform to the "Minnesota Manual On Uniform Traffic Control Devices" (MMUTCD) and its field manual and any written directions of the city engineer.
- E. Trenchless Excavation: As a condition of all applicable permits, permittees employing trenchless excavation methods, including, but not limited to, horizontal directional drilling, shall follow all requirements set forth in Minnesota statutes chapter 216D and Minnesota rules chapter 7560 and shall require potholing or open cutting over existing underground utilities before excavating, as determined by the city.

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

- A. Limitation Of Liability: By reason of the acceptance of a registration or the grant of a right of way permit, the city does not assume any liability:
  - 1. For injuries to persons, damage to property, or loss of service claims by parties other than the registrant or the city; or
  - 2. For claims or penalties of any sort resulting from the installation, presence, maintenance, or operation of equipment by registrants or activities of registrants.
- B. Indemnification: By registering with the city, a registrant agrees, or by accepting a permit under this chapter, a permittee is required to defend, indemnify, and hold the city whole and harmless, from all costs, liabilities, and claims for damages of any kind arising out of the construction, presence, installation, maintenance, repair or operation of its equipment, or out of any activity undertaken in or near a right of way, whether or not any act or omission complained of is

authorized, allowed, or prohibited by a right of way permit. It further agrees that it will not bring, nor cause to be brought, any action, suit or other proceeding claiming damages, or seeking any other relief against the city for any claim nor for any award arising out of the presence, installation, maintenance or operation of its equipment, or any activity undertaken in or near a right of way, whether or not the act or omission complained of is authorized, allowed or prohibited by a right of way permit. The foregoing does not indemnify the city for its own negligence except for claims arising out of or alleging the city's negligence where such negligence arises out of or is primarily related to the presence, installation, construction, operation, maintenance or repair of said equipment by the registrant or on the registrant's behalf, including, but not limited to, the issuance of permits and inspection of plans or work. This section is not, as to third parties, a waiver of any defense or immunity otherwise available to the registrant or to the city; and the registrant, in defending any action on behalf of the city, shall be entitled to assert in any action every defense or immunity that the city could assert in its own behalf.

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

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

- A. Substantial Breach: Registrants hold permits issued pursuant to this chapter as a privilege and not as a right. The city reserves its right, as provided herein and in accordance with Minnesota statutes section 237.163, subdivision 4, to revoke any right of way permit, without fee refund, in the event of a substantial breach of the terms and conditions of any statute, ordinance, rule or regulation, or any condition of the permit. A substantial breach by the permittee shall include, but shall not be limited to, the following:
1. The violation of any material provision of the right of way permit;
  2. An evasion or attempt to evade any material provision of the right of way permit, or the perpetration or attempt to perpetrate any fraud or deceit upon the city or its citizens;
  3. Any material misrepresentation of fact in the application for a right of way permit;
  4. The failure to maintain the required bonds and/or insurance;
  5. The failure to complete the work in a timely manner; or
  6. The failure to correct a condition indicated on an order issued pursuant to subsection [8-1-15C](#) of this chapter.
- B. Written Notice Of Breach: If the city determines that the permittee has committed a substantial breach of a term or condition of any statute, ordinance, rule, regulation or any condition of the

permit, the city shall make a written demand upon the permittee to remedy such violation. The demand shall state that continued violations may be cause for revocation of the permit. Further, a substantial breach, as stated above, will allow the city, at the city's discretion, to place additional or revised conditions on the permit.

- C. Response To Notice Of Breach: Within twenty four (24) hours of receiving notification of the breach, the permittee shall contact the city with a plan, acceptable to the city inspector, for its correction. The permittee's failure to so contact the city inspector, the permittee's failure to submit an acceptable plan, or the permittee's failure to reasonably implement the approved plan shall be cause for immediate revocation of the permit. Further, the permittee's failure to so contact the city inspector, or the permittee's failure to submit an acceptable plan, or the permittee's failure to reasonably implement the approved plan shall automatically place the permittee on probation for one full year.
- D. Cause For Probation: From time to time, the city may establish a list of conditions of the permit which, if breached, will automatically place the permittee on probation, such as, but not limited to, working out of the allotted time period or working on a right of way outside of the permit.
- E. Automatic Revocation: If a permittee, while on probation, commits a breach as outlined above, the permittee's permit will automatically be revoked, and the permittee will not be allowed further permits for one full year, except for emergency repairs.
- F. Revocation of a small wireless facility permit shall be made in writing within three (3) business days of the decision to revoke the permit and shall document the basis for the revocation.
- G. Reimbursement Of City Costs: If a permit is revoked, the permittee shall also reimburse the city for the city's reasonable costs, including restoration costs and the costs of collection and reasonable attorney fees, incurred in connection with such revocation.
- ~~G~~H. Work With No Permit: Upon written notice of a breach for work in the right of way without first obtaining a permit, the violator must subsequently obtain a permit, pay the normal fee for said permit, pay all the other fees required by city ordinance, including, but not limited to, criminal fines and penalties, deposit with the city the fees necessary to correct any damage to the right of way and comply with all of the requirements of this chapter. Registrants will be placed on indefinite probation after the first violation. Fees and penalties for all subsequent violations will be doubled for registrants on probation.

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

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

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

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

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

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

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

If any section, subsection, sentence, clause, phrase, or portion of this chapter is for any reason held invalid or unconstitutional by any court or administrative agency of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions thereof. If a regulatory body or a court of competent jurisdiction should determine by a final non-appealable order that any permit, right or registration issued under this chapter or any portion of this chapter is illegal or unenforceable, any such permit, right or registration granted or deemed to exist hereunder shall be considered as a revocable permit with a mutual right in either party to terminate without cause upon giving sixty (60) days' written notice to the other. The requirements and conditions of such a revocable permit shall be the same requirements and conditions as set forth in the permit, right or registration, respectively, except for conditions relating to the term of the permit and the right of termination. If a permit, right or registration shall be considered a revocable permit as provided herein, the permittee must

acknowledge the authority of the city council to issue such revocable permit and the power to revoke it. Nothing in this chapter precludes the city from requiring a franchise agreement with the applicant, as allowed by law, in addition to requirements set forth herein.

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

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

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

**ADOPTED** this \_\_\_ day of \_\_\_\_\_, 2019 by the City Council for the City of Elko New Market.

**CITY OF ELKO NEW MARKET**

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

**ATTEST:**

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



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

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## MEMORANDUM

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**TO:** PLANNING COMMISSION  
**CC:** TOM WOLTER, CHASE REAL ESTATE  
**FROM:** RENEE CHRISTIANSON, COMMUNITY DEVELOPMENT SPECIALIST  
HALEY SEVENING, COMMUNITY DEVELOPMENT INTERN  
**RE:** REVIEW CONCEPT DEVELOPMENT PLAN FOR PROPOSED RESIDENTIAL  
DEVELOPMENT CONTAINING 31 LOTS ON APPROXIMATELY 10 ACRES.  
**DATE:** MARCH 26, 2019

PLANNING COMMISSION MEETING:	MARCH 26, 2019
CITY COUNCIL MEETING:	UNKNOWN
60-DAY REVIEW DEADLINE:	NA
120-DAY REVIEW DEADLINE:	NA

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### **Background / History**

Tom Wolter of Chase Real Estate has approached the City regarding possible development of a ten-acre property currently located in the City limits and proposed for single-family residential development. In June of 2018, the Planning Commission provided feedback to a previous developer regarding a proposed development and annexation on this same ten-acre property. The previous developer/applicant, Kevin Komorouski, ultimately decided not to pursue the project, and Chase Real Estate now has a purchase agreement on the property. Chase Real Estate is now completing their necessary due diligence to determine if a residential development project is financially feasible.

In 2018, during the Planning Commission review of the Komorouski concept plan, the minimum lot size for single family residential development was 12,000 square feet with a minimum lot width of 85'. The Planning Commission, and consequently the City Council, had recommended the following in regards to development of the property:

1. The City supports the use of the site for single-family residential purposes and supports the annexation of the subject property for such use.
2. The City supports Planned Unit Development (PUD) zoning for the property.
3. The City supports a minimum lot width of 70 feet for the proposed development.
4. The City supports setbacks of 5 feet along the garage side of homes and 10 feet along occupied portions of the homes, or 15 feet between each home.

5. The City recommends that sidewalks be provided on the east side of the proposed north-south street and the south side of Park Street.
6. The City recommends that the developer provide a location for a future trail connection leading from the development to the future trail along the south side of County Road 2.
7. The City recommends that the developer contribute to the cost of a future trail segment along County Road 2.
8. The City recommends that a trail connection from the residential development to the DNR protected wetland area located south of the subject site (as shown on the City's adopted Park & Trail Plan) be provided within the 10-acre site to the west (when it is developed), due to grade issues on the subject property.
9. If architectural requirements are to be imposed as a "trade-off" for PUD zoning, the requirements should not be to an extreme degree.

Following the final City recommendation regarding this concept plan review in 2018, the property was annexed into the City. Late in 2018, the City adopted ordinance amendments which allow an option for a 70' wide residential lot by utilizing R2 zoning, rather than needing PUD zoning as had been discussed with the previous developer.

The 2018 City Council recommendations have been conveyed to the current developer, Tom Wolter, including the City's desire for a minimum 70' residential lot width in this area. He has also been advised of the new R2 zoning district standards that could apply to the property instead of the need for PUD zoning to accommodate the proposed development. Mr. Wolter has considered the recommendations of the Planning Commission and City Council, and is requesting feedback from the Planning Commission regarding potential variances for lot sizes and widths on seven of the proposed 31 lots.

Submitted for concept plan review by the Planning Commission were two sheets prepared by James R. Hill, dated 2/18/19, and labeled 260<sup>th</sup> Street East Site – Preliminary Plat. At this time Mr. Wolter is primarily seeking City feedback regarding potential lot size and width variances on Lots 1 through 7. He is seeking this feedback before officially proceeding with preparation of grading and utility plans for the development.

The proposed development is located just west of the Whispering Creek 2<sup>nd</sup> Addition, on the south side of Co Rd 2.

### **Neighborhood Conditions**

- To the south of the proposed development is a DNR Protected Wetland (owned by the City).
- To the east of the proposed development are single family residential homes in the Whispering Creek neighborhood.
- To the north of the proposed development are small lot rural residential homes and also some commercial.
- To the west of the proposed development is large lot rural residential and agricultural land.

**Development of the property as single family residential is compatible with the adjacent land uses.**

### **Legal Description**

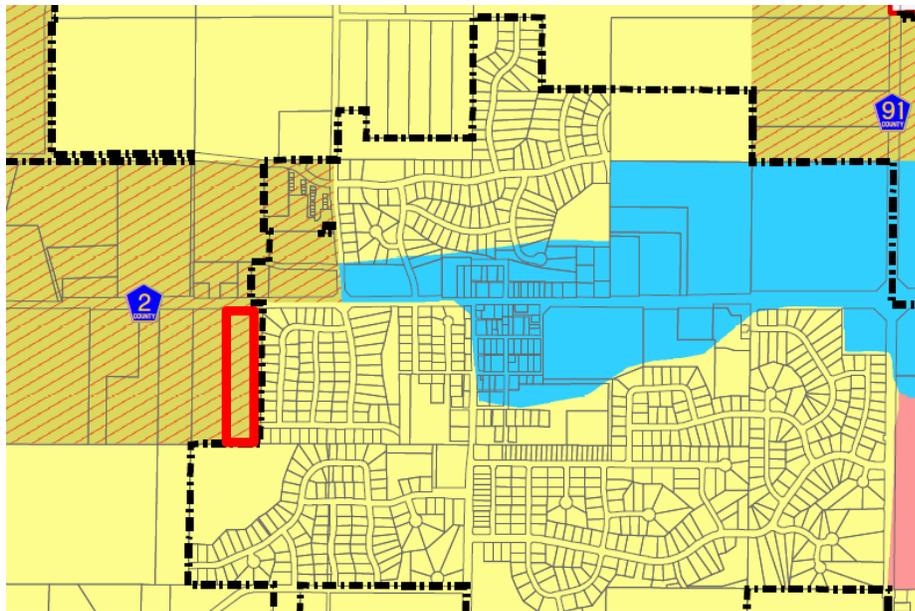
The subject property is 10 gross acres (9.24 net acres) in size. The PID # is 08-929004-2. The legal description is: The east half of the west half of the northeast quarter of the northeast quarter of Section 29 Township 113 Range 21, Scott County, MN.

### Comprehensive Land Use Plan

The city's 2030 comprehensive land use plan guides the property to a "Residential Mixed Use" land use designation. The comprehensive plan contains the following language regarding Residential Mixed Use:

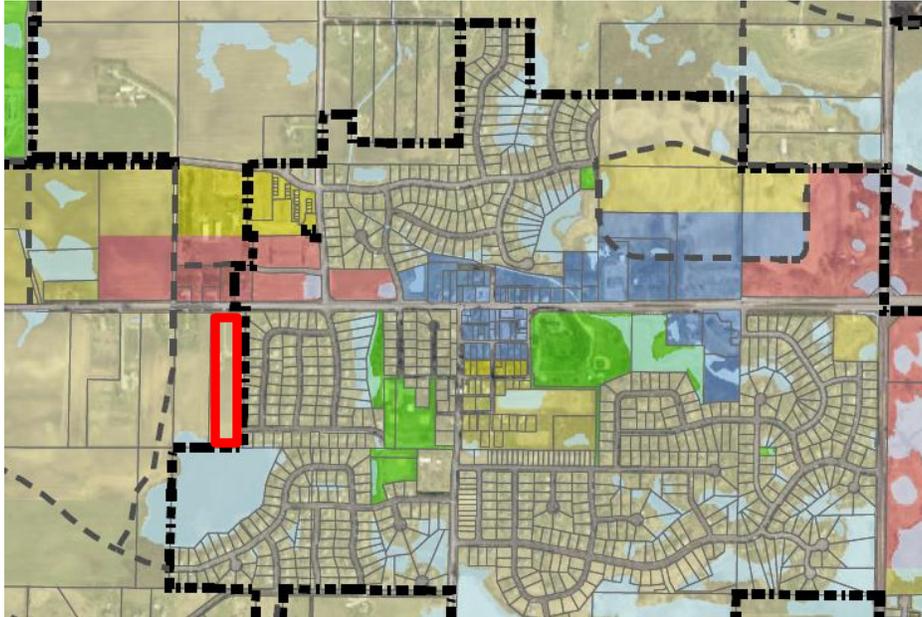
*"This "Residential Mixed Use" development pattern is based on the Low Density Residential District. However, this District is characterized by a greater proportion of non-single family detached homes at higher densities than the Low Density Residential District. This District is intended to provide an opportunity to create population centers and to accommodate the demand for lifecycle and affordable housing located near activity areas and transportation corridors. The dominant housing form will be single family detached homes (75%). Single family attached homes and multi-family residences are expected to represent 25% of the housing opportunities within the development, and may include townhomes, apartments, and senior residential facilities. Single family attached dwellings will be allowed as permitted uses. Dwellings containing over 4 units should be allowed as conditional uses and may be mixed with detached homes in Planned Unit Developments. Commercial uses will be allowed in a Planned Unit Development if the use provides a service to the neighborhood, or creates a buffer between a residential area or public space and a road or more intensive use. Support facilities that are compatible with neighborhoods and accessory uses are allowed within this District. The guided density in this land use designation is 8 units per net acre, with a range between 5 and 15 units per net acres."*

The proposed use of the property for residential single family homes meets the intent of the guided land use for the area. The Comprehensive Plan calls out a preferred residential density range for the entire Residential Mixed Use area of 5 to 15 units per net acre. The proposed development of 31 units on 9.27 acres is 3.3 units per net acre.



2030 Comprehensive Land Use Map

The draft 2040 Comprehensive Land Use Plan has the property re-guided to a Low Density Residential land use designation, which has a preferred density of 2.5 to 5 units per acre.



*Draft (2040) Comprehensive Land Use Map*

### **Zoning**

The property is currently located inside the City limits and is zoned Urban Reserve. Prior to development of the property it would need to be rezoned to R1 or R2 to allow single family development. The developer is requesting R2 zoning which would allow a lot size of 8,400 square feet and a lot width of 70'. The purpose of each district, as stated in the Zoning Ordinance, is as follows:

*“The purpose of the R-1 Suburban Single-Family Residential District is to provide for low density detached single-family uses in developed and developing areas of the community that are predominately residential in character. The R-1 zoning district is intended for those areas containing unique features worthy of preservation, or those areas not located near major transportation corridors, higher density housing, commercial zoning districts, or historic residential development centers.”*

*“The purpose of the R2 Urban (Small Lot) Single-Family Residential District is to provide for single-family dwelling units at a relatively dense urban scale in areas of the community that are located near major transportation corridors, higher density housing, commercial zoning districts, or historic residential development centers.”*

Staff is seeking feedback from the Commission regarding the proposed R2 zoning of the property. Staff supports R2 zoning in this location due to the proximity to Co Rd 2.

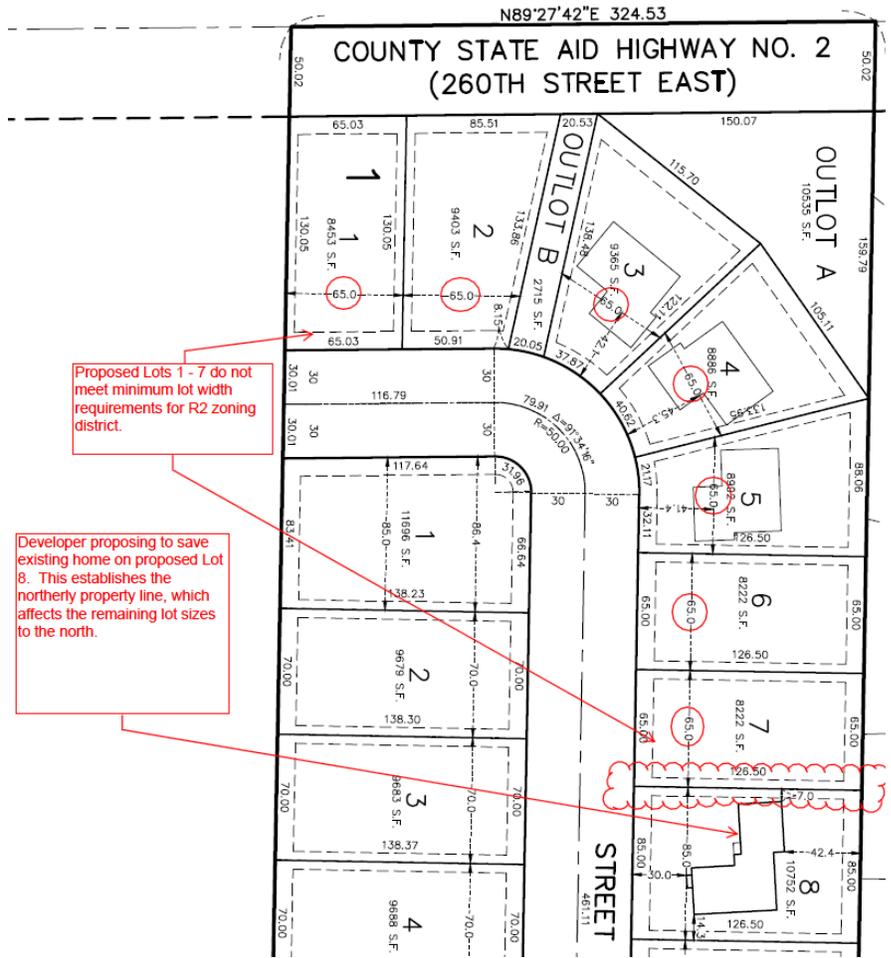
**Lot Size / Width**

Based on R2 zoning district standards the minimum lot size is 8,400 square and the minimum lot width is 70'. The concept plan submitted by the developer depicts 31 residential lots, 24 of which likely meet these minimum requirements, and seven lots do not. The developer and staff are seeking Planning Commission feedback regarding support for lot size and width variances on seven lots. The variance criteria are described in greater detail later in this report.

**Setbacks**

For purposes of discussion regarding setbacks, the R2 zoning district standards will be conveyed. They are as follows:

- Front – 30'
- Side / Interior – 7'
- Side / Front – 25'
- Rear – 30'



The developer has indicated that the established R2 district setbacks are acceptable.

**Height Requirements**

Structures shall not exceed 35' in height in the City's residential zoning districts.

**Miscellaneous Design Information**

The City code requires that for new lots, all site plans for single family homes shall provide for the location of a three stall attached garage, whether or not construction is intended.

Section 11-5-1 (4)(a) of the City Code states:

*Residential Uses: Except as otherwise specified in R-5 Districts, the primary exterior building facade finishes for residential uses shall consist of materials comparable in grade to the following:*

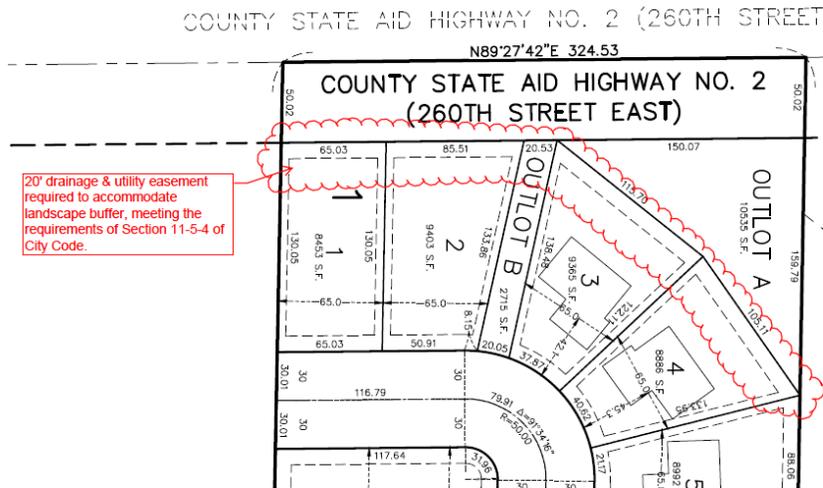
- (1) Brick.
- (2) Concrete composite board.
- (3) Stone (natural or artificial).
- (4) Integral colored split face (rock face) concrete block.
- (5) Wood, natural or composite, provided the surfaces are finished for exterior use, or wood of proven exterior durability is used, such as cedar, redwood or cypress.
- (6) Stucco (natural or artificial)/ EIFS (exterior insulated finish system).
- (7) Vinyl, steel, aluminum or fiber cement siding.

Staff notes that the Planning Commission does not review the individual home designs, but that these above requirements are imposed upon the home builder.

### **Landscaping**

Section 11-5-4 (B) (1) of the Zoning Ordinance requires minimum 20' wide landscaped buffer where lots back onto a major collector street. Co Rd 2 is designated as an arterial roadway and therefore the 20' landscape buffer would apply. The Ordinance specifically states:

*Lot Depth Requirements: Except for lots of record and preliminary platted lots having legal standing on the effective date hereof, double frontage residential lots shall have an additional depth of at least twenty feet (20'), designated as an additional drainage and utility easement, in order to allow space for buffering/ screen planting along the back lot line.*



In terms of buffer design, the Ordinance further states:

*Plantings: All designated buffer yards shall be seeded or sodded except in areas of steep slopes where natural vegetation is acceptable as approved by the zoning administrator. All plantings within designated buffer yards shall adhere to the following:*

- 1) *Plant material centers shall not be located closer than three feet (3') from the fence line or property line, and shall not conflict with public plantings, sidewalks, trails, etc.*
- 2) *Landscape screen plant material shall be planted in two (2) or more rows. Plantings shall be staggered in rows unless otherwise approved by the zoning administrator.*
- 3) *Deciduous shrubs shall not be planted more than four feet (4') on center, and/or evergreen shrubs shall not be planted more than three feet (3') on center.*
- 4) *Deciduous trees intended for screening shall be planted not more than forty feet (40') apart. Evergreen trees intended for screening shall be planted not more than fifteen feet (15') apart.*

The lots proposed along the south side of Co Rd 2 are proposed at only 130' in depth and 65' in width. Staff would typically recommend a 140' lot depth to allow for the required landscape buffer however it is not required by Code. Adding an additional 10' in depth to proposed Lots 1 & 2 would likely result in the loss of a lot within the development. Staff does, however, recommend that Lots 1 – 4 be designed with a 20' wide drainage and utility easement in the rear yard and that a landscaping plan meeting the requirements of Section 11-5-4 of the Zoning Ordinance be submitted.

In addition to the above developer obligations, two trees must be planted upon each lot at the time of building permit, sod placed in the front and side yards, and rear yards must be seeded, hyroseeded or sodded. These additional requirements are placed upon the builder / home building permit.

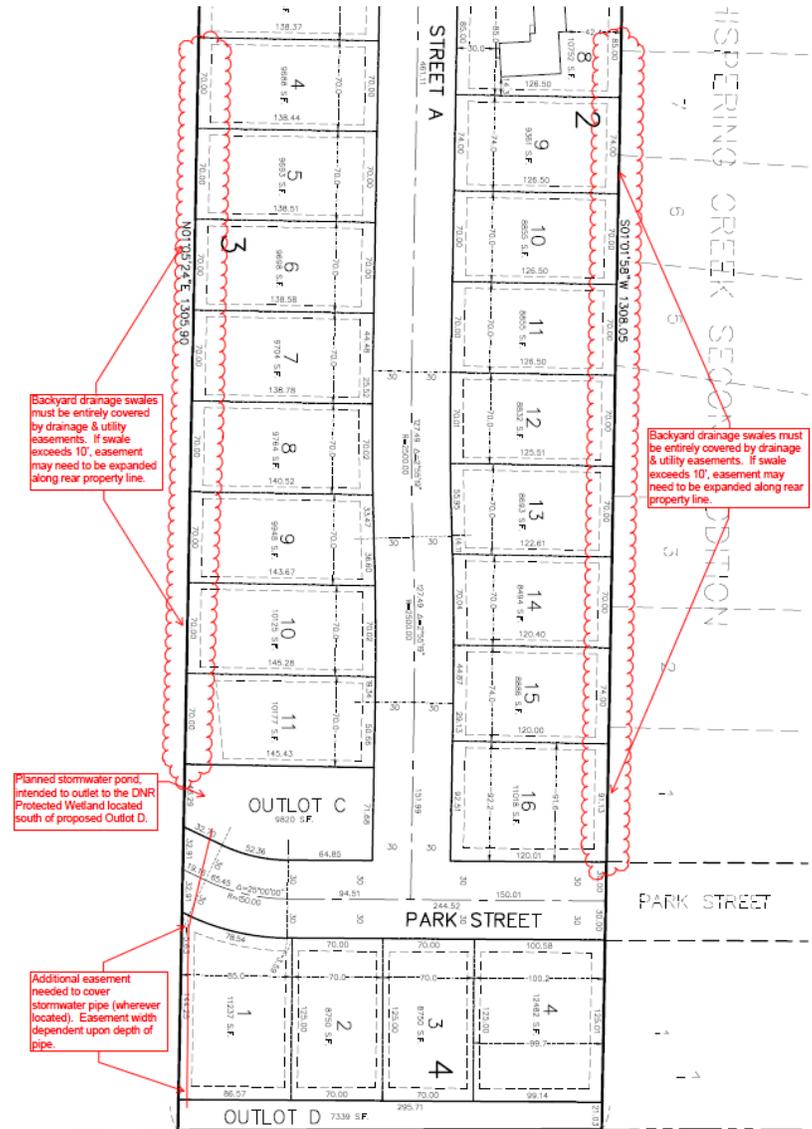
## Tree Preservation

Section 12-9-9 of the City's Subdivision Ordinance contains Tree Preservation and Replacement regulations. A tree inventory must be completed which identifies the location of all significant trees on the property. 40% of the significant trees must be protected as part of the development.

## Easements

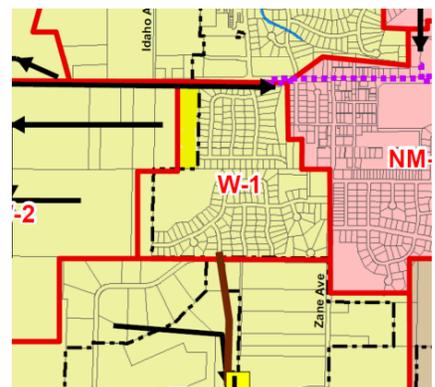
Section 12-9-6 of the Subdivision Ordinance requires that 10' wide perimeter easements and 5' wide interior easements be dedicated along all lot lines.

In areas where public infrastructure, such as sanitary sewer, water, or stormwater lines, are placed along side or rear property lines, the easement widths must be increased as recommended by the City Engineer and Public Works Director. The additional easement width in these areas is needed for potential maintenance or replacement of the lines. Additionally, in areas where grading / drainage swales may be needed to accommodate overland flow across multiple lots, additional easement width may be needed to cover the entire width of the swale. The developer has not yet submitted any grading or utility plans so staff is unable to officially comment regarding additional easement widths that may be needed to cover such infrastructure. Staff has, however, made some presumptions in this regard and preliminary staff comments are depicted on the adjacent drawing.



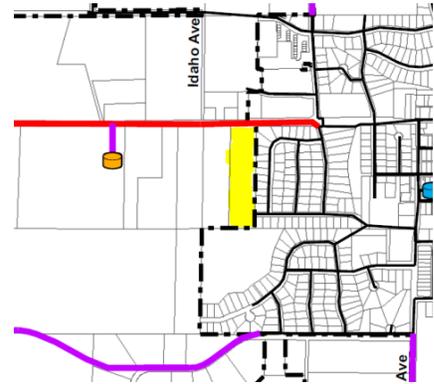
## Sanitary Sewer

The developer has not yet submitted any sanitary sewer plans for review so staff comments are limited in nature. Sanitary sewer service is available to the property at the end of Park Street. There is also an 18" sanitary sewer line along CSAH 2 and a stub is available at the subject property's west property line (northwest corner of property). The City Engineer notes "it may offer some benefit to the proposed project, but may not be deep enough to serve the whole development". Staff has no concerns with sanitary sewer access into the property. Preliminary utility plans have not yet been provided. The sewer plan depicts that sanitary sewer from this property should flow towards the east –into the existing system.



## Water

The developer has not yet submitted any water plans for review so staff comments are limited in nature. Water service is available to the property at the end of Park Street. A 16" water line also exists along the south side of CSAH 2. There are no hydrants in the CSAH 2 water line along the subject property at this time and the line is not charged. The Public Works Director and City Engineer may require that a connection be made to both available water sources to provide for looping through the development. A recommendation will be made at a later date. Staff has no concerns with water access into the property. The water plan depicts a future water tower approximately ¼ mile to the west.



## Stormwater

A stormwater plan has not yet been submitted for review. Some residents to the east have expressed concern in the past regarding drainage from the subject property. Special care should be taken during the development design to ensure no negative impacts to adjacent residents. Portions of the property lie within both the Vermillion and Sand Creek Watershed Districts. A portion of the property currently drains north towards the CSAH 2 right-of-way, and a portion of the property currently drains south towards the DNR protected wetland to the south (locally referred to as Rowena Pond).

## Wetlands / Floodplain / DNR Protected Waters

A wetland delineation was prepared by the previous developer and has been accepted by Scott County (prior to annexation of the property). The City will accept the wetland boundary as approved by Scott County. Wetland buffers are required adjacent to all wetlands; the required buffer width is dependent upon the quality of the wetland. A MnRAM report will need to be completed prior to development of the property; the MnRAM report will identify the quality of the wetland for buffer purposes. Wetland buffer sign markers are also required along all lot lines at buffer locations.

The Subdivision Ordinance requires that wetlands, wetland buffers and stormwater ponds be contained in Outlots, and also requires that the outlots be conveyed to the City upon filing of a plat. The developer has depicted two outlots (A & C) which would be dedicated to the City for stormwater purposes, and Outlot D which would be dedicated to the City for wetland purposes. Staff will need to view the wetland boundary and wetland buffer in relation to the Outlot D boundary to determine that it meets the dedication requirements.

There are no FEMA designated floodplains on the subject property. There is a large DNR Protected Wetland on the southerly end of the property. The City will seek comments from the DNR during the development process.

## Access / Roads / Transportation Issues

The proposed development borders on Co Rd 2 which is designated as an A Minor Arterial Roadway. Access to Co Rd 2 will not be permitted as part of the proposed development, and the existing private driveway will ultimately need to be removed. The City will consult with Scott County during the development process to determine if they will be requesting additional right of way during the platting process. Additional right-of-way dedication is not expected but is under the jurisdiction of Scott County. However, if the County does request additional right-of-way for CSAH 2, a redesign of the subdivision will likely be required.

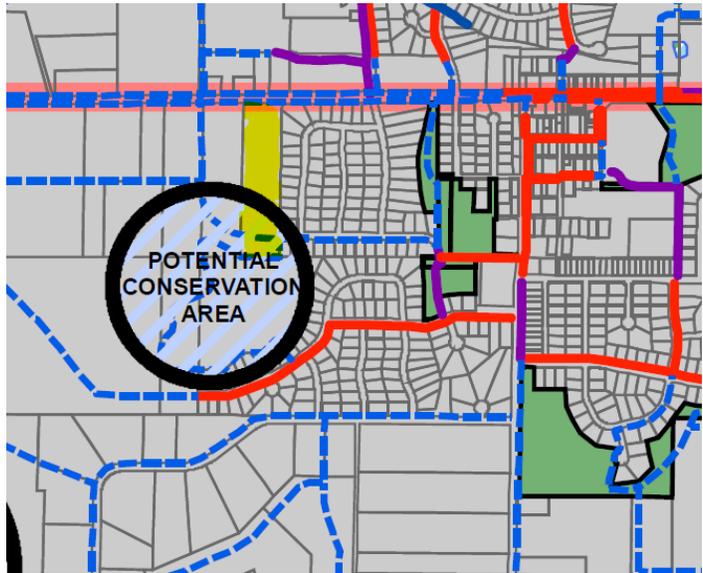
All roads proposed within the development will be considered local streets and are required to be a minimum of 28' in width with insurmountable (B618) curbing. Two streets within the development will

extend to the property's westerly property line to provide future access to the adjacent parcel. Based on the City's Subdivision Ordinance, temporary cul-de-sacs will not be required at the ends of these street segments because they do not exceed 150' in length.

### **Sidewalks & Trails**

The City's Subdivision Ordinance requires that concrete sidewalks are constructed on at least one side of all residential streets; the outside edge shall be located one foot from the property line. The City's Transportation Plan recommends that sidewalks or trails be constructed adjacent to all minor collectors, major collectors, and minor arterial roadways.

The City's 2030 Park & Trail Plan identifies three proposed trail corridors: a) along the south side of Co Rd 2, b) on Park Street, and c) adjacent to the wetland area on the south side of the property. City staff and engineering staff spent time evaluating the feasibility of constructing a public trail adjacent to the wetland on the south side of the subject property, and concluded that the trail along the wetland is not a realistic possibility due to constraints from existing development and steep topography. Alternatively, the trail adjacent to the wetland should be achieved on property located to the west of the subject property. Staff also reviewed the trail location with the Parks Commission who has concurred with staff's recommendation in this regard.

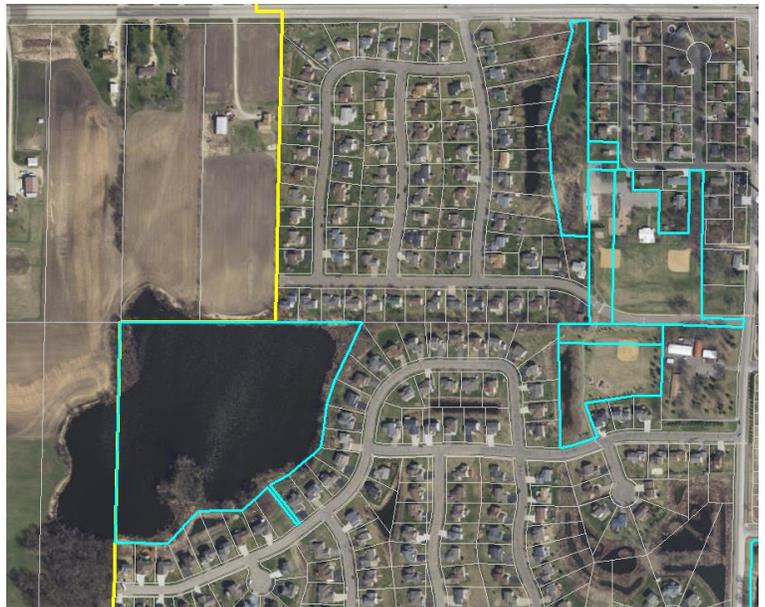


In regards to the future trail along Co Rd 2, there is not currently a sidewalk or trail section to the east or west of the development so it would be impractical to construct the small section without a larger trail project. Staff does recommend that the future trail/sidewalk section along Park Street be incorporated into the development.

### **Parks Related Comments**

The City's Subdivision Ordinance requires 10% of the land be dedicated for parks, playgrounds, public open spaces or trails and/or the developer shall make a cash contribution to the City's park and trail fund roughly related to the anticipated effect of the plat on the park and trail system. If no land dedication is required the City Council has established the park fee at \$2,000 per residential unit.

It is noted that the closest public park is Wagner Park which is classified as a Community Park. Community Parks serve the City as a whole. Wagner Park is the City's most developed park. The park is approximately 1/4 mile from the proposed



development. There are also park facilities at the nearby elementary school.

The Parks Commission did review a previous concept plan for this property on 6/26/18 and made the following recommendations:

- 1) The Parks Commission will accept cash in lieu of land dedication.
- 2) The Parks Commission supports a trail around the DNR protected wetland, and that the trail be allowed on the south side of Park Street within this development. (To be adjacent to the wetland in the development to the west.)
- 3) The Parks Commission recommends that the developer be required to contribute to the construction of a future trail along CSAH 2.
- 4) The Parks Commission recommends that space between proposed lots, near the proposed stormwater pond, be made available for a future connection from the development to the future trail along CSAH 2.

### **Police Department Comments**

The Police Chief has made preliminary comment regarding the concept development plan and noted the following:

- Recommends that the street intersections contain street lighting, and that mid-block lighting also be provided to illuminate the street right-of-way.
- Recommends that a temporary turn-around be considered at the east end of proposed “Street A” to allow for the backing up of emergency fire trucks.

### **Fire Department Comments**

Comments from the Fire Chief have not been solicited at this time.

### **Building Official Comments**

Comments from the Building Official have not been solicited at this time.

### **School District Impacts**

The proposed development is in the New Prague School District. According to the New Prague Superintendent of Schools, the City of Elko New Market has an average of .55 students per household within the district. Using this statistic, the proposed development would add an estimated 17 students to the school system once fully developed.

### **Variance Request**

As noted earlier in this report, the developer is seeking feedback from the Planning Commission regarding their support for lot size and width variance on proposed Lots 1 – 7, or 23% of the lots within the development. The primary reason for the variance is because the developer would like to incorporate the existing home on the property into the development, while maximizing the number of lots. The location of the existing home (on proposed Lot 8) establishes a property line, which therefore affects the remaining lots to the north. The developer would like to maximize the number of lots to the north of the existing home.

The Planning Commission and City Council must carefully consider the circumstances and criteria for granting variances. Minnesota Statute specifically defines variances as “departures from strict enforcement of the Zoning Ordinance as applied to a particular piece of property if the enforcement would cause the owner practical difficulties”. Cities must apply the state statutory “practical difficulties” standard when considering applications for variances, which are specifically, defined as follows:

- The property owner proposes to use the property in a reasonable manner not permitted by the Zoning Ordinance.
- The plight of the landowner is due to circumstances unique to the property not created by the landowner.
- The variance, if granted, will not alter the essential character of the locality.

The City's Zoning Ordinance states the following:

*The purpose of a variance is to provide for deviations from the literal provisions of the Ordinance in instances where their strict enforcement would cause practical difficulties because of circumstances unique to the individual property under consideration, and to grant such variances only when it is demonstrated that such actions will be in keeping with the spirit and intent of the Ordinance.*

The Zoning Ordinance states that variances should not be granted unless it is found that failure to grant the variance will result in practical difficulties. The following criteria for granting a variance are stated in the Zoning Ordinance:

- 1) The variance would be consistent with the Comprehensive Plan.
- 2) The variance would be in harmony with the general purpose and intent of the Zoning Ordinance.
- 3) The purpose of the variance is not based exclusively upon economic considerations.
- 4) The plight of the landowner is due to circumstances unique to the property and not created by the landowner.
- 5) The granting of the variance will not alter the essential character of the neighborhood in which the parcel of land is located.
- 6) The property owner proposes to use the property in a reasonable manner not permitted by this title.
- 7) The requested variance is the minimum action required to eliminate the practical difficulty.
- 8) The proposed variance does not involve a use that is not allowed within the respective zoning district.

### **Staff Recommendation**

Staff believes that the variance request can be minimized by eliminating the proposed Outlot B, which has been proposed for the purposes of locating a stormwater pipe and also a future trail connection from the development to CSAH 2. A 20' easement could instead be retained for these purposes. By eliminating the dedicated outlot and achieving similar entitlements through easements, an additional 10' could be added throughout Lots 1 through 7. Staff would suggest adding an additional 5' to both Lots 6 and 7.

In evaluating the variance request using the "practical difficulties" standards set forth in the law, staff's opinion is that the variances can be justified, as follows:

- **The property owner proposes to use the property in a reasonable manner not permitted by the Zoning Ordinance.** – The applicant intends to use the proposed properties for single family home construction, which is considered a reasonable use of the property as identified in the City's Comprehensive Land Use Plan.
- **The plight of the landowner is due to circumstances unique to the property not created by the landowner.** – The applicant is requesting the variance in response to the location of the existing home on the property, and consequently the width of developable property located north of the existing home. The location of the existing home on the property was not caused by actions of the applicant.
- **The variance, if granted, will not alter the essential character of the locality.** – The variance will not alter the character of the neighborhood. The neighborhood is proposed for construction of single family homes.

In evaluating the request using the City's criteria for granting a variance, staff's opinion is that the variances can be justified as follows:

- 1) **The variance would be consistent with the Comprehensive Plan.** Development of the property with single family detached homes is consistent with the purpose and intent of the Comprehensive Plan which guides the property to Residential Mixed Use land use designation.
- 2) **The variance would be in harmony with the general purpose and intent of the Zoning Ordinance.** The purpose of the R2 Urban (Small Lot) Single-Family Residential District is to provide for single-family dwelling units at a relatively dense urban scale in areas of the community that are located near major transportation corridors, higher density housing, commercial zoning districts, or historic residential districts. Approving lot size variances to allow a 65' lot width on proposed Lots 1-5 is in harmony with the general purpose and intent of the R2 zoning district.
- 3) **The purpose of the variance is not based exclusively upon economic considerations.** The need for the variance could be resolved by eliminating a lot. The elimination of a lot would have a financial impact on the project.
- 4) **The plight of the landowner is due to circumstances unique to the property and not created by the landowner.** The location of the existing home on the property, and consequently the width of developable property located north of the existing home is causing the requested variances. The location of the existing home on the property was not caused by actions of the applicant.
- 5) **The granting of the variance will not alter the essential character of the neighborhood in which the parcel of land is located.** The character of the neighborhood will be single-family residential with or without the granting of the variance. Therefore, the character of the neighborhood will not be affected by the granting of the variance.
- 6) **The property owner proposes to use the property in a reasonable manner not permitted by this title.** The applicant is proposing to use the property for construction of single-family residential homes on a 65' lot, rather than the required 70' lot width, which is considered a reasonable use of the property.
- 7) **The requested variance is the minimum action required to eliminate the practical difficulty.** The variance on proposed Lots 1 through 5 is believed to be the minimum variance action needed to eliminate the practical difficulty.
- 8) **The proposed variance does not involve a use that is not allowed within the respective zoning district.** The proposed use of the properties will be for single family home construction which is a permitted use within the R2 zoning district.

### **Requested Action**

Staff is seeking feedback from the Planning Commission regarding the requested variances on Lots 1 through 7.

### **Attachments:**

Location map

Applicant's letter dated 3/23/19

Concept plan prepared by James R. Hill, dated 2/18/19 and containing 2 sheets.

Concept plan with city staff comments dated 3/22/19

League of Minnesota Cities Information Memo: Land Use Variances





Chase Real Estate  
2140 West County Road 42  
Burnsville, MN 55337

March 23, 2019

City of Elko New Market  
601 Main Street  
Elko New Market, MN 55044

RE: 260<sup>th</sup> Street East Development (AKA "The Preserve")

Dear Ms. Christianson:

Chase Real Estate has a property under contract formally known to the city as "The Preserve". This project is very price sensitive, but with some creative thinking and working together with the city we can make this project a reality.

We have meet with city staff and they have indicated the cities desire for a future trail connection to County Road 2. There is an existing home on the property that we can't move which is a lot line constraint and a future trail connection adds an additional element into our design making it more challenging.

We feel we have a solution that will allow for the trail corridor and keep the existing house. If we can receive a variance on lot sizes for lots 1-7 of Block 2, we can accommodate this trail connection via an outlot but it comes at the expense of lot size. In this sketch plan we show lots 1-7 as 65' wide lots which is less than the city standard but will still fit a standard home.

The standard home built in the twin cities is designed to fit on a 50' wide building pad. The proposed design allows for all the lots in the development to accommodate a 50-foot-wide home. The attached sketch plat shows an example of how 50' wide homes would fit on these lots.

We would like to receive feedback from the city on the proposed plat design before we do any additional engineering on the project.

Sincerely,



Tom Wolter

COUNTY STATE AID HIGHWAY NO. 2 (260TH STREET EAST)

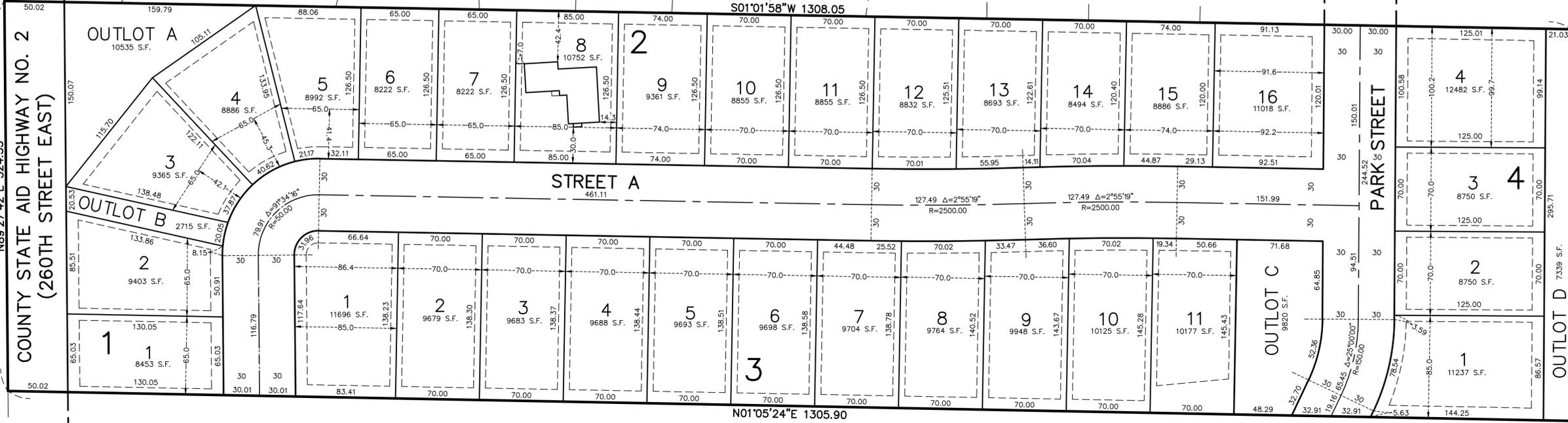
COUNTY STATE AID HIGHWAY NO. 2  
(260TH STREET EAST)

WHISPERING CREEK SECOND ADDITION

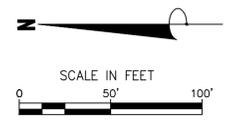
PARK STREET

PARK STREET

OUTLOT D  
7339 S.F.



**PROPERTY DESCRIPTION**  
The East 1/2 of the West 1/2 of the Northwest 1/4 of Section 29,  
Township 113, Range 21, Scott County, Minnesota



BEARINGS ARE BASED ON THE NORTH LINE OF  
THE E 1/2 OF THE W 1/2 OF THE NW 1/4 OF  
SEC. 29, T. 113, R. 21 WHICH IS ASSUMED TO  
HAVE A BEARING OF N 89°27'42" E

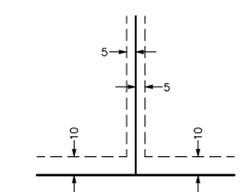
**ZONING INFORMATION**  
CURRENT ZONING UR - URBAN RESERVE  
CURRENT ZONING PUD PLANNED UNIT DEVELOPMENT  
GROSS DENSITY 31 LOTS/9.75 AC = 3.18 LOTS/AC

**SITE DATA**  
TOTAL SITE AREA 9.75 AC.  
NUMBER OF SINGLE FAMILY LOTS 31 LOTS  
LOT AREA 6.80 AC.  
OUTLOT AREA 0.70 AC.  
RIGHT OF WAY AREA 2.25 AC.  
-EXISTING (C.S.A.H. NO. 2 (260TH STREET EAST)) 0.37 AC.  
-SUBDIVISION 1.88 AC.

**SINGLE FAMILY REQUIREMENT & DATA**  
MIN. LOT AREA 8,400 S.F.  
MIN. LOT WIDTH AT SETBACK 70 FEET  
MIN. LOT AREA FOR CORNER LOT 10,200 S.F.  
MIN. LOT WIDTH AT SETBACK FOR CORNER LOT 85 FEET

**PROPOSED MINIMUM SETBACKS (PUD)**  
FRONT 30 FEET  
SIDE 7 FEET  
SIDE (STREET) 20 FEET  
REAR 30 FEET

DRAINAGE AND UTILITY EASEMENTS  
ARE SHOWN THUS:



DRAINAGE AND UTILITY EASEMENTS BEING  
5 FEET IN WIDTH, UNLESS OTHERWISE  
INDICATED, ADJOINING LOT LINES, AND  
BEING 10 FEET IN WIDTH, UNLESS  
OTHERWISE INDICATED, ADJOINING RIGHT  
OF WAY LINES, AS SHOWN ON THE PLAT.

260th Street East Site  
ALTA/NSPS LAND TITLE SURVEY  
FOR  
CHASE REAL ESTATE, INC.

DRAWN BY  
PLM  
DATE  
2/18/2019  
REVISIONS

CAD FILE  
23620pp.dwg  
PROJECT NO.  
23620  
SHEET 1 OF 1

**James R. Hill, Inc.**  
PLANNERS / ENGINEERS / SURVEYORS  
2500 WEST C.R. 42, SUITE 120, BURNSVILLE, MN 55337  
PHONE: 952.890.6044 mhampton@jrhinc.com  
www.jrhinc.com

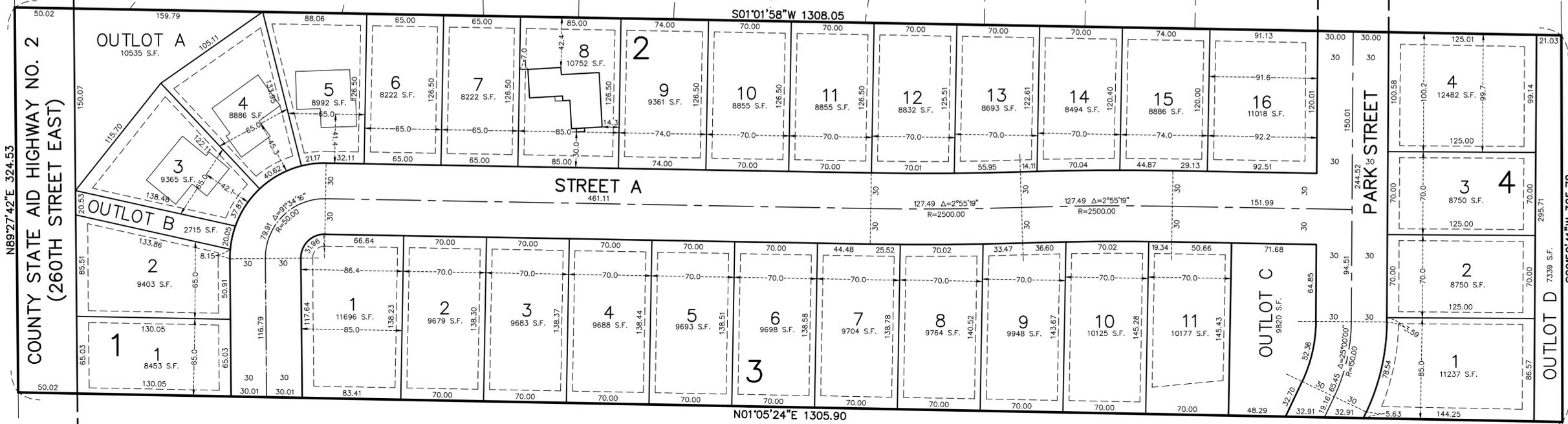
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COUNTY STATE AID HIGHWAY NO. 2 (260TH STREET EAST)

COUNTY STATE AID HIGHWAY NO. 2  
(260TH STREET EAST)

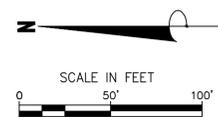
# WHISPERING CREEK SECOND ADDITION

PARK STREET



### PROPERTY DESCRIPTION

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Township 113, Range 21, Scott County, Minnesota



BEARINGS ARE BASED ON THE NORTH LINE OF  
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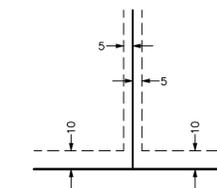
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ARE SHOWN THUS:



DRAINAGE AND UTILITY EASEMENTS BEING  
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BEING 10 FEET IN WIDTH, UNLESS  
OTHERWISE INDICATED, ADJOINING RIGHT  
OF WAY LINES, AS SHOWN ON THE PLAT.

260th Street East Site

PRELIMINARY PLAT  
FOR  
CHASE REAL ESTATE, INC.

DRAWN BY  
PLM  
DATE  
2/18/2019  
REVISIONS

CAD FILE  
23620pp.dwg  
PROJECT NO.  
23620  
SHEET 1 OF 1

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## INFORMATION MEMO

# Land Use Variances

*Learn about variances as a way cities may allow an exception to part of their zoning ordinance. Review who may grant a variance and how to follow and document the required legal standard of “practical difficulties” (before 2011 called “undue hardship”). Links to a model ordinance and forms for use with this law.*

### RELEVANT LINKS:

[Minn. Stat. § 462.357, subd. 6.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

## I. What is a variance

A variance is a way that a city may allow an exception to part of a zoning ordinance. It is a permitted departure from strict enforcement of the ordinance as applied to a particular piece of property. A variance is generally for a dimensional standard (such as setbacks or height limits). A variance allows the landowner to break a dimensional zoning rule that would otherwise apply.

Sometimes a landowner will seek a variance to allow a particular use of their property that would otherwise not be permissible under the zoning ordinance. Such variances are often termed “use variances” as opposed to “area variances” from dimensional standards. Use variances are not generally allowed in Minnesota—state law prohibits a city from permitting by variance any use that is not permitted under the ordinance for the zoning district where the property is located.

## II. Granting a variance

Minnesota law provides that requests for variances are heard by a body called the board of adjustment and appeals; in many smaller communities, the planning commission or even the city council may serve that function. A variance decision is generally appealable to the city council.

A variance may be granted if enforcement of a zoning ordinance provision as applied to a particular piece of property would cause the landowner “practical difficulties.” For the variance to be granted, the applicant must satisfy the statutory three-factor test for practical difficulties. If the applicant does not meet all three factors of the statutory test, then a variance should not be granted. Also, variances are only permitted when they are in harmony with the general purposes and intent of the ordinance, and when the terms of the variance are consistent with the comprehensive plan.

This material is provided as general information and is not a substitute for legal advice. Consult your attorney for advice concerning specific situations.

### III. Legal standards

When considering a variance application, a city exercises so-called “quasi-judicial” authority. This means that the city’s role is limited to applying the legal standard of practical difficulties to the facts presented by the application. The city acts like a judge in evaluating the facts against the legal standard. If the applicant meets the standard, then the variance may be granted. In contrast, when the city writes the rules in zoning ordinance, the city is exercising “legislative” authority and has much broader discretion.

#### A. Practical difficulties

“Practical difficulties” is a legal standard set forth in law that cities must apply when considering applications for variances. It is a three-factor test and applies to all requests for variances. To constitute practical difficulties, all three factors of the test must be satisfied.

##### 1. Reasonableness

The first factor is that the property owner proposes to use the property in a reasonable manner. This factor means that the landowner would like to use the property in a particular reasonable way but cannot do so under the rules of the ordinance. It does not mean that the land cannot be put to any reasonable use whatsoever without the variance. For example, if the variance application is for a building too close to a lot line or does not meet the required setback, the focus of the first factor is whether the request to place a building there is reasonable.

##### 2. Uniqueness

The second factor is that the landowner’s problem is due to circumstances unique to the property not caused by the landowner. The uniqueness generally relates to the physical characteristics of the particular piece of property, that is, to the land and not personal characteristics or preferences of the landowner. When considering the variance for a building to encroach or intrude into a setback, the focus of this factor is whether there is anything physically unique about the particular piece of property, such as sloping topography or other natural features like wetlands or trees.

## RELEVANT LINKS:

[2011 Minn. Laws, ch. 19, amending Minn. Stat. § 462.357, subd. 6.](#)

[Krummenacher v. City of Minnetonka](#), 783 N.W.2d 721 (Minn. June 24, 2010).

[Minn. Stat. § 462.357, subd. 6.](#)  
[Minn. Stat. § 394.27, subd. 7.](#)

See Section I, *What is a variance.*

See Section IV-A, *Harmony with other land use controls.*

### 3. Essential character

The third factor is that the variance, if granted, will not alter the essential character of the locality. Under this factor, consider whether the resulting structure will be out of scale, out of place, or otherwise inconsistent with the surrounding area. For example, when thinking about the variance for an encroachment into a setback, the focus is how the particular building will look closer to a lot line and if that fits in with the character of the area.

### B. Undue hardship

“Undue hardship” was the name of the three-factor test prior to a May 2011 change of law. After a long and contentious session working to restore city variance authority, the final version of HF 52 supported by the League and allies was passed unanimously by the Legislature. On May 5, Gov. Dayton signed the new law. It was effective on May 6, the day following the governor’s approval. Presumably it applies to pending applications, as the general rule is that cities are to apply the law at the time of the decision, rather than at the time of application.

The 2011 law restores municipal variance authority in response to a Minnesota Supreme Court case, *Krummenacher v. City of Minnetonka*. It also provides consistent statutory language between city land use planning statutes and county variance authority, and clarifies that conditions may be imposed on granting of variances if those conditions are directly related to, and bear a rough proportionality to, the impact created by the variance.

In *Krummenacher*, the Minnesota Supreme Court narrowly interpreted the statutory definition of “undue hardship” and held that the “reasonable use” prong of the “undue hardship” test is not whether the proposed use is reasonable, but rather whether there is a reasonable use in the absence of the variance. The new law changes that factor back to the “reasonable manner” understanding that had been used by some lower courts prior to the *Krummenacher* ruling.

The 2011 law renamed the municipal variance standard from “undue hardship” to “practical difficulties,” but otherwise retained the familiar three-factor test of (1) reasonableness, (2) uniqueness, and (3) essential character. Also included is a sentence new to city variance authority that was already in the county statutes.

## RELEVANT LINKS:

[Issuance of Variances](#), LMC Model Ordinance.

[Variance Application](#), LMC Model Form.  
[Adopting Findings of Fact](#), LMC Model Resolution.

[Minn. Stat. § 462.357, subd. 6.](#)

See LMC information memo, [Taking the Mystery out of Findings of Fact.](#)

[Minn. Stat. § 462.357, subd. 6.](#)

## C. City ordinances

Some cities may have ordinance provisions that codified the old statutory language, or that have their own set of standards. For those cities, the question may be whether you have to first amend your zoning code before processing variances under the new standard. A credible argument can be made that the statutory language pre-empts inconsistent local ordinance provisions. Under a pre-emption theory, cities could apply the new law immediately without necessarily amending their ordinance first. In any regard, it would be best practice for cities to revisit their ordinance provisions and consider adopting language that mirrors the new statute.

The models linked at the left reflect the 2011 variance legislation. While they may contain provisions that could serve as models in drafting your own documents, your city attorney would need to review prior to council action to tailor to your city's needs. Your city may have different ordinance requirements that need to be accommodated.

## IV. Other considerations

### A. Harmony with other land use controls

The 2011 law also provides that: “Variances shall only be permitted when they are in harmony with the general purposes and intent of the ordinance and when the terms of the variance are consistent with the comprehensive plan.” This is in addition to the three-factor practical difficulties test. So a city evaluating a variance application should make findings as to:

- Is the variance in *harmony with* the purposes and intent of the ordinance?
- Is the variance *consistent with the comprehensive plan*?
- Does the proposal put property to use in a *reasonable manner*?
- Are there *unique circumstances* to the property not created by the landowner?
- Will the variance, if granted, alter the *essential character* of the locality?

### B. Economic factors

Sometimes landowners insist that they deserve a variance because they have already incurred substantial costs or argue they will not receive expected revenue without the variance. State statute specifically notes that economic considerations alone cannot create practical difficulties. Rather, practical difficulties exist only when the three statutory factors are met.

**RELEVANT LINKS:**

[Minn. Stat. § 462.357, subd. 6.](#)

## **C. Neighborhood opinion**

Neighborhood opinion alone is not a valid basis for granting or denying a variance request. While city officials may feel their decision should reflect the overall will of the residents, the task in considering a variance request is limited to evaluating how the variance application meets the statutory practical difficulties factors. Residents can often provide important facts that may help the city in addressing these factors, but unsubstantiated opinions and reactions to a request do not form a legitimate basis for a variance decision. If neighborhood opinion is a significant basis for the variance decision, the decision could be overturned by a court.

## **D. Conditions**

A city may impose a condition when it grants a variance so long as the condition is directly related and bears a rough proportionality to the impact created by the variance. For instance, if a variance is granted to exceed an otherwise applicable height limit, any conditions attached should presumably relate to mitigating the effect of excess height.

## **V. Variance procedural issues**

### **A. Public hearings**

Minnesota statute does not clearly require a public hearing before a variance is granted or denied, but many practitioners and attorneys agree that the best practice is to hold public hearings on all variance requests. A public hearing allows the city to establish a record and elicit facts to help determine if the application meets the practical difficulties factors.

### **B. Past practices**

While past practice may be instructive, it cannot replace the need for analysis of all three of the practical difficulties factors for each and every variance request. In evaluating a variance request, cities are not generally bound by decisions made for prior variance requests. If a city finds that it is issuing many variances to a particular zoning standard, the city should consider the possibility of amending the ordinance to change the standard.

## RELEVANT LINKS:

[Minn. Stat. § 15.99.](#)

[Minn. Stat. § 15.99, subd. 2.](#)

See LMC information memo,  
*Taking the Mystery out of  
Findings of Fact.*

[Minn. Stat. § 15.99, subd. 2.](#)

Jed Burkett  
LMCIT Land Use Attorney  
[jburkett@lmc.org](mailto:jburkett@lmc.org)  
651.281.1247

### C. Time limit

A written request for a variance is subject to Minnesota's 60-day rule and must be approved or denied within 60 days of the time it is submitted to the city. A city may extend the time period for an additional 60 days, but only if it does so in writing before expiration of the initial 60-day period. Under the 60-day rule, failure to approve or deny a request within the statutory time period is deemed an approval.

### D. Documentation

Whatever the decision, a city should create a record that will support it. In the case of a variance denial, the 60-day rule requires that the reasons for the denial be put in writing. Even when the variance is approved, the city should consider a written statement explaining the decision. The written statement should explain the variance decision, address each of the three practical difficulties factors and list the relevant facts and conclusions as to each factor.

If a variance is denied, the 60-day rule requires a written statement of the reasons for denial be provided to the applicant within the statutory time period. While meeting minutes may document the reasons for denial, usually a separate written statement will need to be provided to the applicant in order to meet the statutory deadline. A separate written statement is advisable even for a variance approval, although meeting minutes could serve as adequate documentation, provided they include detail about the decision factors and not just a record indicating an approval motion passed.

## VI. Variances once granted

A variance once issued is a property right that "runs with the land" so it attaches to and benefits the land and is not limited to a particular landowner. A variance is typically filed with the county recorder. Even if the property is sold to another person, the variance applies.

## VII. Further assistance

If you have questions about how your city should approach variances under this statute, you should discuss it with your city attorney. You may also contact League staff.