

NOTE: Supporting Documents Follow Agenda

CITY OF BILLINGS

***CITY OF BILLINGS MISSION STATEMENT:
TO DELIVER COST EFFECTIVE PUBLIC SERVICES
THAT ENHANCE OUR COMMUNITY'S QUALITY OF LIFE***

AGENDA

COUNCIL CHAMBERS

October 27, 2008

6:30 P.M.

CALL TO ORDER – Mayor Tussing

OATH OF OFFICE CEREMONY: New Ward II Councilmember

PLEDGE OF ALLEGIANCE – Mayor Tussing

INVOCATION – Councilmember Ruegamer

ROLL CALL

MINUTES – October 14, 2008

**COURTESIES - Billings Adoption Day, November 1, 2008, and
National Adoption Month, November 2008**

PROCLAMATIONS

ADMINISTRATOR REPORTS – Tina Volek

PUBLIC COMMENT on “NON-PUBLIC HEARING” Agenda Items: 1 and 5

ONLY. Speaker sign-in required. (Comments offered here are limited to 1 minute per speaker. Please sign up on the clipboard located at the podium. Comment on items listed as public hearing items will be heard ONLY during the designated public hearing time for each respective item.)

(NOTE: For Items not on this agenda, public comment will be taken at the end of the agenda. Please sign up on the clipboard located at the back of the room.)

CONSENT AGENDA:

1. A. Bid Awards:

(1) W.O. 05-09, Wastewater Treatment Plant Generator Installation. (Opened 10/14/08) Recommend Colstrip Electric; \$423,599.

B. Change Order #12, SID 1379 – King Avenue West reconstruction from S. 31st Street West to Shiloh Road; Knife River Corporation, \$139,645.68.

C. Professional Services Contract for W.O. 08-21, Lake Elmo Drive Improvements from Main Street to Wicks Lane; HKM Engineering, Division of DOWL, LLC, \$211,941.

D. Amendment #6, Airport Engineering Services, Morrison-Maierle, Inc. for land acquisition services, including an environmental assessment and appraisal work; \$108,975.

E. Amendment #7, Architectural and Engineering Services, CTA Architects Engineers for emergency electrical generator replacement at Billings Airport Terminal Building; \$56,680.36.

F. Right-of-Way Easement Request from NorthWestern Energy to relocate electric power lines in Sahara Sands Park for Aronson Avenue Road Project; with no financial impact to the City.

G. Approval of extension of Recreational Trails Program Grant with MT Fish, Wildlife and Parks to 10/15/09 for trail development along the Bannister Drain from 29th Street West to the east edge of the BBWA canal south of King Avenue West.

H. Approval and Acceptance of Homeland Security Grant to the Police Department Bomb Squad; \$298,200.

I. Approval and Acceptance of Bureau of Justice Assistance Grant for establishment of an Adult Misdemeanor Mental Health Treatment Court, \$249,415 over three years; city match – approximately \$60,000 per year.

J. Approval and acceptance of donation from Faith Chapel for labor and materials for installation of concrete ramps and pads up to and around existing picnic tables and benches along Heritage Trail on the west end of Swords Park; \$7,000 in materials and labor.

K. Approval of sale of Fire Department surplus property - 8 LifePac® 300 defibrillators and miscellaneous Survivair™ self-contained breathing apparatus equipment.

L. Second/Final Reading Ordinance expanding the boundaries of Ward V to include recently annexed property in Annex #08-08: 55.45 acres described as Tracts 7-A and 6-A-1, Certificate of Survey 2314 and Tract 1-A-1, Certificate of Survey 2702, generally located on the south side of Grand Avenue between 30th Street West to west of Zimmerman Trail. Yegen Grand Avenue Farms, Inc., owner and petitioner.

M. Exempt Plat of Amended Lot 7, Lyons Subdivision, a portion of the Leavens Reservoir site located at Rimrock Road and Normal Avenue north of

MSU-B campus; relocation of lot line for 10,000-foot parcel of city land approved for sale to Karen Cabell on 5/27/08.

N. Preliminary Subsequent Minor Plat of E.D. King Subdivision, 3rd Filing, described as three lots on a 2.10-acre parcel of land generally located on the southeast corner of the intersection of Avenue E and Zimmerman Trail; Speculators, Inc., owner; Engineering, Inc., agent; conditional approval of the plat and adoption of the findings of fact.

O. Preliminary Subsequent Minor Plat of Amended Lots 5 & 6, Block 1, Bellville Subdivision, generally located north of Wicks Lane and just west of Hawthorne Lane in Billings Heights; Ray & Dave LLC, owners; Blueline Engineering, LLC, agent; conditional approval and adoption of the findings of fact.

P. Preliminary Major Plat of High Sierra Subdivision, 5th Filing, generally located on the north side of Matador Avenue between Cortez Avenue and Vesca Way in Billings Heights; Dover Ranch, owner; Engineering, Inc., agent; conditional approval and adoption of the findings of fact.

Q. Final Plat Approval

- (1) Romero Subdivision
- (2) Marisela Subdivision

R. Bills and Payroll

- (1) September 26, 2008
- (2) October 3, 2008
- (3) April 1, 2008 – September 30, 2008 (Municipal Court)

(Action: approval or disapproval of Consent Agenda.)

REGULAR AGENDA:

2. **PUBLIC HEARING** for MET Transit Route and Schedule Changes and Fare Increases. Staff recommends approval. **(Action:** approval or disapproval of staff recommendation.)
3. **PUBLIC HEARING AND FIRST READING ORDINANCE FOR ZONE CHANGE #850:** A text amendment to the Unified Zoning Regulations, regulating the location of Sexually-Oriented Businesses within the City of Billings; amending Section 27-201, Section 27-405(g), and Section 27-611 BMCC. Zoning Commission recommends approval. **(Action:** approval or disapproval of Zoning Commission recommendation.)

4. **PUBLIC HEARING AND FIRST READING ORDINANCE FOR ZONE CHANGE #849:** A text amendment to the Unified Zoning Regulations, regulating the review and approval of condominium and multi-unit developments within the Unified Zoning Jurisdiction; amending Section 27-201, Section 27-310(b), and Section 27-622 BMCC. (**Action:** approval or disapproval of Zoning Commission recommendation.)
5. **2008 CTEP PROJECT APPLICATIONS** funding construction of various community pedestrian and/or bicycle facilities. Staff recommends Council formulate a recommendation for presentation at the Policy Coordinating Committee meeting. (**Action:** approval or disapproval of staff recommendation.)
6. **PUBLIC HEARING AND SPECIAL REVIEW #868:** A special review to allow an All-Beverage Liquor License with gaming in a Controlled Industrial zone on property described as Lots 4C and 4D1, Studer Acreage Tracts; located at the current Doc & Eddy's West, 1251 S. 32nd Street West. George Frank, owner; Design Lab Architects, agent. Zoning Commission recommends conditional approval. (**Action:** approval or disapproval of Zoning Commission recommendation.)
7. **PUBLIC HEARING AND SPECIAL REVIEW #869:** A special review to allow a Beer and Wine Beverage License with gaming in a Highway Commercial zone on property described as Lot 3, Block 1, Citizens Center Subdivision; located at 414 Lincoln Lane. Kreitzberg Rentals, LLC, owner; Darrell Kreitzberg, agent. Zoning Commission recommends conditional approval. (**Action:** approval or disapproval of Zoning Commission recommendation.)
8. **PUBLIC COMMENT on Non-Agenda Items -- Speaker sign-in required.**
(Restricted to ONLY items not on this printed agenda; comments limited to 3 minutes per speaker. Please sign up on the clipboard located at the back of the Council Chambers.)

Council Initiatives

ADJOURN

Additional information on any of these items is available in the City Clerk's Office.

Reasonable accommodations will be made to enable individuals with disabilities to attend this meeting. Please notify Cari Martin, City Clerk, at 657-8210.



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: W.O. 05-09—Wastewater Treatment Plant Generator Installation, Construction Contract Award

DEPARTMENT: Public Works

PRESENTED BY: David D. Mumford, P.E., Public Works Director

PROBLEM/ISSUE STATEMENT: This project consists of the installation of a new generator (previously purchased by the City) and associated electrical switchgear and wiring, and installation of the bulk diesel storage tank (also previously purchased by the City). Also included is the construction of a CMU partition wall in the single drive-thru bay in the Solids Processing Building at the Wastewater Treatment Plant (WWTP) where the generator will be installed in lieu of having to construct a separate building to house the generator. The generator will be used initially to provide backup power to the Secondary Pump Station and ultimately to the WWTP blowers, basin complex, and possibly the new effluent disinfection system to be constructed in the near future. The project was designed by HDR Engineering, with whom the City has a contract for these professional services. Bids were opened October 14, 2008. Council delayed action on the bids at the October 14 meeting.

A design was previously completed for a new structure to house the generator and switchgear, but did not include the full installation of wiring and implementation of the generator. When that segment of the project was put out for bids, no contractors expressed interest in the project or obtained project plans and specifications. As a result, Staff worked with HDR to modify the scope of the project to its current state. The existing scope has many positive aspects in that the project now utilizes existing space at the WWTP that was used very little in the past, and the installation and implementation of the generator should now be completed within the expanded budget.

FINANCIAL IMPACT: The project is being funded by Wastewater Building and Operation Facility Funds and the Wastewater Electrical Infrastructure Fund. The approved FY 09 budget provides \$236,000 and \$332,000, respectively, for professional services and construction. Only \$18,800 has been allocated for professional services, so there are adequate funds available to cover the construction costs.

Bids were opened October 14, 2008, with the following results:

Firm(s)		Schedule I	Schedule II	
Colstrip Electric		\$376,388.00	\$47,211.00	
ACE Electric		\$493,600.00	\$114,100.00	
Engineer's Estimate		\$286,000.00	\$91,000.00	

Schedule I includes the construction of a CMU wall in the Solids Processing Building and installation of the generator, bulk fuel tank, and switchgear, and wiring to the Secondary Pumping Station. Schedule II includes the installation of transfer switches serving the non-potable water pumps and a blower and the conduit and wiring between the generator and these transfer switches.

RECOMMENDATION

Staff recommends that Council award a construction contract for W.O. 05-09—Wastewater Treatment Plant Generator Installation to Colstrip Electric for Schedules I and II, totaling \$423,599.00.

Approved By: **City Administrator** _____ **City Attorney** _____



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: SID 1379 King Avenue West Reconciling Change Order

DEPARTMENT: Public Works/Engineering

PRESENTED BY: David D. Mumford, PE, Public Works Director

PROBLEM/ISSUE STATEMENT: SID 1379 reconstructed King Avenue West from S. 31st Street West to Shiloh Road. The purpose of Change Order No. 12 (Reconciling) is to account for a few miscellaneous items that were added to the contract and to reconcile final installed quantities against bid quantities. As the City Administrator's change order approval authority has been exceeded, this last change order needs to be approved by Council. The total amount of Change Order No. 12 (Reconciling) is \$139,645.68. Of this number, \$19,739.92 is to provide for extra items such as a retaining wall at the northwest corner of 32nd and King, flexible delineators located throughout the project, and extra signing and striping at various locations throughout the project. The other \$119,905.76 for this change order is for reconciliation of actual installed quantities against bid quantities. Change Orders 1-12 result in an increase to the original contract amount of \$867,403.84, or 17.45%. Of the \$867,403.84, \$238,133.49 was for mitigation of an unanticipated clay layer, and \$330,190.95 was for the construction of underground improvements associated with the King Avenue Lift Station (W.O. 08-06).

ALTERNATIVES ANALYZED:

1. Approve Change Order No. 12 (Reconciling) for a net increase of \$139,645.68;
2. Do not approve Change Order No. 12 (Reconciling).

FINANCIAL IMPACT: Construction assessments to property owners passed at the August 13, 2007, City Council Meeting were \$374,738.94. Shiloh Crossing Development has already made a cash contribution in the amount of \$120,128.32 for their SID assessment, and will be assessed approximately \$138,701.00 for the roundabout construction. The remaining project costs are to be paid for from City funds.

SID 1379 Funding

SID Assessments	\$ 374,738.94
Shiloh Crossing Cash Contribution	\$ 120,128.32
Shiloh Crossing Roundabout Cash Contribution	\$ 138,701.00
Storm Drain Funds	\$ 634,450.19

Water/Sewer Funds	\$1,467,489.24
Arterial Funds	
<u>Contract Amount (This Memo)</u>	<u>\$(5,839,156.34)</u>
Remaining Funds	\$ 0.00

RECOMMENDATION

Staff recommends that Council approve Change Order No. 12 (Reconciling) for a net increase of \$139,645.68.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT

A. Change Order No. 12 (Reconciling) with Knife River Corporation (3 Copies)

CHANGE ORDER

No. 12 (Reconciling)

DATE OF ISSUANCE 10-8-08 EFFECTIVE DATE 10-8-08

OWNER City of Billings, Montana
 CONTRACTOR Knife River Corporation
 Contract: N/A
 Project: S.I.D. 1379: Utility and Street Improvements to King Avenue West from South 31st St W to Shiloh Road
 OWNER's Contract No. N/A ENGINEER's Contract No.
 ENGINEER City of Billings

You are directed to make the following changes in the Contract Documents:

Description:

- 1) Block retaining wall at the NW intersection of 32nd and King, flexible delineators throughout the project, extra street name signs at 32nd and King, and extra stripping work performed between 31st and 32nd.
- 2) Reconcile Quantities

Reason for Change Order:

- 1) The purpose of this change order is to compensate the contractor for extra work that was required to bring the project into final completion.
- 2) The purpose of this change order is to reconcile actual final installed quantities against bid quantities.

Attachments: (List documents supporting change)

CHANGE IN CONTRACT PRICE:	CHANGE IN CONTRACT TIMES:
Original Contract Price \$ 4,971,752.50	Original Contract Times: Substantial Completion: August 1, 2008 Ready for final payment: (days or dates)
Net Increase (Decrease) from previous Change Orders No. 1 to 11 : \$ 727,758.16	Net change from previous Change Orders No. 1 to No. 11 : Substantial Completion: August 22, 2008 Ready for final payment: (days)
Contract Price prior to this Change Order: \$ 5,699,510.66	Contract Times prior to this Change Order: Substantial Completion: August 22, 2008 Ready for final payment: (days or dates)
Net increase (decrease) of this Change Order: \$ 139,645.68	Net increase (decrease) this Change Order: Substantial Completion: _____ Ready for final payment: (days)
Contract Price with all approved Change Orders: \$ 5,839,156.34	Contract Times with all approved Change Orders: Substantial Completion: August 22, 2008 Ready for final payment: (days or dates)

RECOMMENDED:
By Ty W. L.
(ENGINEER - Signature)

Date: 10-16-08

EJCD 1910-8-B

APPROVED:
OWNER (Authorized Signature)

Date: _____

ACCEPTED:
CONTRACTOR(Authorized Signature)

Date: 10/14/08

Prepared by the Engineers Joint Contract Documents Committee and endorsed by The Associated General Contractors of America and the Construction Specifications Institute.



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: W.O. 08-21 Lake Elmo Drive – Main St to Wicks Ln 100% Design Professional Services Contract

DEPARTMENT: Public Works/Engineering

PRESENTED BY: David D. Mumford, PE, Public Works Director

PROBLEM/ISSUE STATEMENT: W.O. 08-21 Lake Elmo Drive – Main St to Wicks Ln is a combined project consisting of W.O. 99-07 Main St to Hansen and Hilltop to Wicks. DOWL HKM was selected through the consultant selection process to design W.O. 02-08 Milton Road Improvements and Lake Elmo Drive (Hilltop to Wicks). W.O. 02-08 Milton Road Improvements was developed under its own contract leaving Lake Elmo Drive (Hilltop to Wicks) to be under a separate contract. Because of a shortage of available funding to design and construct two separate projects on Lake Elmo Drive, it was decided to include Lake Elmo Drive (Main to Hansen) with Lake Elmo Drive (Hilltop to Wicks) to design and construct one project from Main to Wicks that would maximize available funding. The projected available funding is estimated to be \$3,500,000.00 for design and construction.

This contract with DOWL HKM is for 100% design. Design alternatives will be determined and evaluated through the design process that will incorporate new curb and gutter, sidewalk/multi-use trail/ bike lanes, storm drain, parking, turn bays, and pavement rehabilitation or road reconstruction. Submittals for 30%, 70%, and 100% design are included in the contract which is the normal progression. The 100% design is expected to be completed and project out to bid by spring of 2009. The project is to be constructed through the summer/fall of 2009.

FINANCIAL IMPACT: The professional services contract with DOWL HKM is for the amount of \$211,941.

RECOMMENDATION

Staff recommends that Council approve the professional services contract for W.O. 08-21 Lake Elmo Drive – Main St to Wicks Ln in the amount of \$211,941.

ATTACHMENT

A. W.O. 08-21 Lake Elmo Drive – Main St to Wicks Ln Professional Services
Contract

Approved By: **City Administrator** **City Attorney**

Contract for Professional Engineering Services

W.O. 08-21 Lake Elmo Drive-Main St to Wick Ln

In consideration of the mutual promises herein, City of Billings and DOWL HKM agree as follows. This Contract consists of:

Part I, consisting of 15 Sections of Special Provisions;
Part II, consisting of 11 Sections of General Provisions;
Appendix A consisting of 9 pages (Basic Services of Contractor);
Appendix B consisting of 2 pages (Methods and Times of Payment);
Appendix C consisting of 1 page (Additional Services of Contractor);
Appendix D consisting of Schedule of Professional Fees;
Appendix E consisting of 1 page (Project Schedule);
Appendix F consisting of 4 pages (Federal Aid Requirements);
Appendix G consisting of Certificate(s) of Insurance; and

PART I

SPECIAL PROVISIONS

Section 1. Definitions.

In this Contract:

- A. "Administrator" means the City Engineer of the Engineering Division of the Public Works Department or his designee.
- B. "Billings" means the City of Billings.
- C. "Contractor" and "Engineer" means DOWL HKM.

Section 2. Scope of Services.

- A. The Contractor shall perform professional services in accordance with Appendix A, which is attached hereto and incorporated in this Section by reference.
- B. Billings shall pay the Contractor in accordance with the Schedule of Professional Fees attached as Appendix D and incorporated herein by reference for services actually performed under this Contract.

C. Billings shall not allow any claim for services other than those described in this Section. However, the Contractor may provide, at its own expense, any other services that are consistent with this Contract.

Section 3. Time for Performance.

- A. This Contract becomes effective when signed on behalf of Billings.
- B. The Contractor shall commence performance of the Work described in Section 2 on receipt of written Notice to Proceed and complete that performance in accordance with the schedule set forth in Appendix E.
- C. This Contract shall terminate at midnight on December 31, 2010.

Section 4. Compensation: Method of Payment.

- A. Each month, or at the conclusion of each phase of the Work for which payment is due, as negotiated on a per-task basis, the Contractor shall present a bill to the Administrator describing the Work for which it seeks payment and documenting expenses and fees to the satisfaction of the Administrator. If any payment is withheld because the Contractor's performance is unsatisfactory, the Administrator must, within ten (10) days of the payment denial, notify the Contractor of the payment denial and set forth, with reasonable specificity, what was unsatisfactory and why. Billings will pay Contractor within 30 days of receiving an acceptable invoice.
- B. The Contractor is not entitled to any compensation under this Contract, other than is expressly provided for in this Section.
- C. As a condition of payment, the Contractor shall have paid all City taxes currently due and owing by the Contractor.

Section 5. Termination of the Contractor's Services.

The Contractor's services under Section 2 of this Part may be terminated:

- A. By mutual consent of the parties.
- B. For the convenience of Billings, provided that Billings notifies the Contractor in writing of its intent to terminate under this paragraph at least 10 days prior to the effective date of the termination.
- C. For cause, by either party where the other party fails in any material way to perform its obligations under this Contract. Termination under this Subsection is subject to the condition that the terminating party notifies the other party of its intent to terminate, stating with reasonable specificity the grounds therefor, and the other party fails to cure the default within 30 days after receiving the notice.

Section 6. Duties Upon Termination

- A. If Billings terminates the Contractor's services for convenience, Billings shall pay the Contractor for its actual costs reasonably incurred in performing before termination and Billings shall pay for services rendered prior to termination. Payment under this Subsection shall never exceed the total compensation

allowable under Section 4 of this Part. All finished and unfinished documents and materials prepared by the Contractor shall become the property of Billings.

- B. If the Contractor's services are terminated for cause, Billings shall pay the Contractor the reasonable value of the services satisfactorily rendered prior to termination, less any damages suffered by Billings because of the Contractor's failure to perform satisfactorily. The reasonable value of the services rendered shall never exceed ninety percent (90%) of the total compensation allowable under Section 4 of this Part. Any finished or unfinished documents or materials prepared by the Contractor under this Contract shall become the property of Billings at its option.
- C. If the Contractor receives payments exceeding the amount to which it is entitled under Subsections A or B of this Section, he shall remit the excess to the Administrator within 30 days of receiving notice to do so.
- D. The Contractor shall not be entitled to any compensation under this Section until the Contractor has delivered to the Administrator all documents, records, Work product, materials and equipment owned by Billings and requested by the Administrator.
- E. If the Contractor's services are terminated for whatever reason the Contractor shall not claim any compensation under this Contract, other than that allowed under this Section.
- F. If a final audit has not been performed before the Contractor's services are terminated, Billings may recover any payments for costs disallowed as a result of the final audit.
- G. Except as provided in this Section, termination of the Contractor's services under Section 5 of this Part does not affect any other right or obligation of a party under this Contract.

Section 7. Insurance.

- A. The Contractor shall maintain in good standing the insurance described in Subsection B of this Section. Before rendering any services under this Contract, the Contractor shall furnish the Administrator with proof of insurance in accordance with Subsection B of this Section.
- B. The Contractor shall provide the following insurance:
 - 1. Workers' compensation and employer's liability coverage as required by Montana law.
 - 2. Commercial general liability, including contractual and personal injury coverage's -- \$1,500,000 per occurrence.
 - 3. Commercial automobile liability -- \$500,000 per accident.
 - 4. Professional liability in the amount of \$1,500,000 per claim.
- C. Each policy of insurance required by this Section shall provide for no less than 30 days' advance notice to Billings prior to cancellation.
- D. Billings SHALL be listed as an additional insured on all policies except Professional Liability and Worker's Compensation Policies. In addition, all policies except Professional Liability and Worker's Compensation shall contain a waiver of subrogation against Billings.

Section 8. Assignments.

Unless otherwise allowed by this Contract or in writing by the Administrator, any assignment by the Contractor of its interest in any part of this Contract or any delegation of duties under this Contract shall be void, and an attempt by the Contractor to assign any part of its interest or delegate duties under this Contract shall give Billings the right immediately to terminate this Contract without any liability for Work performed.

Section 9. Ownership; Publication, Reproduction and Use of Material.

- A. Except as otherwise provided herein, all data, documents and materials produced by the Contractor under this Contract shall be the property of Billings, which shall retain the exclusive right to publish, disclose, distribute and otherwise use, in whole or in part, any such data, documents, or other materials. Exclusive rights shall not be attributed to portions of such materials presently in the public domain or which are not subject to copyright. Contractor shall retain rights to pre-existing proprietary property including but not limited to interactive models. The Contractor shall have the right to include photographic or artistic representations of the design and construction of the Project among the Contractor's promotional and professional materials. The Contractor's materials shall not include Billings' confidential or proprietary information regardless of whether Billings has previously advised the Contractor in writing of the specific information considered by Billings to be confidential and proprietary.
- B. Equipment purchased by the Contractor with Contract funds: See Appendix A, Section 3. Scope of Work.
- C. Should Billings elect to reuse Work products provided under this Contract for other than the original project and/or purpose, Billings will indemnify and hold harmless the Contractor from any and all claims, demands and causes of action of any kind or character arising as a result of reusing the documents developed under this contract. Additionally, any reuse of design drawings or specifications provided under this Contract must be limited to conceptual or preliminary use for adaptation, and the original Contractor's or subcontractor's signature, professional seals and dates removed. Such reuse of drawings and specifications, which require professional seals and dates removed, will be signed, sealed, and dated by the professional who is in direct supervisory control and responsible for adaptation.

Section 10. Notices.

Any notice required pertaining to the subject matter of this Contract shall be either sent via facsimile (FAX) or mailed by prepaid first class registered or certified mail, return receipt requested to the following addresses:

Billings: Debi Meling
City Engineer
Department of Public Works – Engineering Division
2224 Montana Ave
Billings, Montana 59101 FAX: (406) 237-6291

Contractor: Karen Fagg
Vice President
DOWL HKM
P.O. Box 31318
Billings, MT 59107-1318

FAX: (406) 656-6398

Notices are effective upon the earlier of receipt, proof of good transmission (facsimiles only), or 5 days after proof of proper posting.

Section 11. Contract Budget.

In connection with its performance under this Contract, the Contractor shall not make expenditures other than as provided in line items in the Contract budget.

Section 12. Force Majeure.

- A. Any failure to perform by either party due to force majeure shall not be deemed a violation or breach hereof.
- B. As used in this Contract, force majeure is an act or event of substantial magnitude, beyond the control of the delayed party, which delays the completion of this Contract, including without limitation:
 1. Any interruption, suspension or interference resulting solely from the act of Billings or neglect of Billings not otherwise governed by the terms of this Contract.
 2. Strikes or Work stoppages.
 3. Any interruption, suspension or interference with the project caused by acts of God, or acts of a public enemy, wars, blockades, insurrections, riots, arrests or restraints of governments and people, civil disturbances or similar occurrences.
 4. Order of court, administrative agencies or governmental officers other than Billings.

Section 13. Financial Management System.

The Contractor shall establish and maintain a financial management system that:

- A. Provides accurate, current, and complete disclosure of all financial transactions relating to the Contract;
- B. Maintains separate accounts by source of funds for all revenues and expenditures and identifies the source and application of funds for the Contractor's performance under this Contract, including information pertaining to subcontracts, obligations, unobligated balances, assets, liabilities, outlays and income;
- C. Effectively controls and accounts for all municipal funds and Contract property;
- D. Compares actual expenditures with budgeted amounts and relates financial information to performance or productivity data including unit cost information where applicable;
- E. Allocates administrative costs to direct service delivery units;
- F. Minimizes the time between receipt of funds from Billings and their disbursement by the Contractor;
- G. Provides accounting records supported by source documentation; and

- H. Provides a systematic method assuring the timely and appropriate resolution of audit findings and recommendations.

Section 14. Funding Requirements.

In the event that any funding source for this Contract should impose additional requirements upon Billings for the use of those funds, the Contractor agrees to abide by those additional requirements immediately upon receipt of written notice thereof from Billings.

Section 15. Subcontracts.

The Contractor may enter into subcontracts for the purchase of goods and services necessary for the performance of this Contract, provided:

- A. Every subcontract shall be reduced to writing and contain a precise description of the services or goods to be provided and the nature of the consideration paid therefor.
- B. Every subcontract under which the Contractor delegates the provision of services shall be subject to review and approval by the Administrator before it is executed by the Contractor.
- C. Every subcontract in an amount exceeding \$1,000 shall require reasonable access to business records of the subcontractor relating to the purchase of goods or services pursuant to the subcontract.

PART II
GENERAL CONTRACT PROVISIONS

Section 1. Relationship of Parties.

The Contractor shall perform its obligations hereunder as an independent Contractor of Billings. Billings may administer the Contract and monitor the Contractor's compliance with its obligations hereunder. Billings shall not supervise or direct the Contractor other than a provided in this Section.

Section 2. Nondiscrimination.

- A. The Contractor will not discriminate against any employee or applicant for employment because of race, color, religion, national origin, ancestry, age, sex, or marital status or who is a "qualified individual with a disability" (as that phrase is defined in the Americans With Disabilities Act of 1990). The Contractor will take affirmative action to ensure that applicants are employed and that employees are treated during employment without regard to their race, color, religion, or mental or physical impairment/disability. Such action shall include, without limitation, employment, upgrading, demotion or transfer, recruitment or recruiting advertising, layoff or termination, rates of pay or other forms of compensation, and selection for training including apprenticeship. The Contractor agrees to post, in conspicuous places available to employees and applicants for employment, notices setting forth the provisions of this non-discrimination clause.
- B. The Contractor shall state, in all solicitations or advertisements for employees to Work on Contract jobs, that all qualified applicants will receive equal consideration for employment without regard to race, color, religion, national origin, ancestry, age, sex or marital status, or mental or physical impairment/disability.
- C. The Contractor shall comply with any and all reporting requirements that may apply to it which the City of Billings may establish by regulation.
- D. The Contractor shall include the provisions of Subsections A through C of this Section in every subcontract or purchase order under this Contract, so as to be binding upon every such subcontractor or vendor of the Contractor under this Contract.
- E. The Contractor shall comply with all applicable federal, state, and city laws concerning the prohibition of discrimination.

Section 3. Permits, Laws, and Taxes.

The Contractor shall acquire and maintain in good standing all permits, licenses and other entitlements necessary to its performance under this Contract. All actions taken by the Contractor under this Contract shall comply with all applicable statutes, ordinances, rules and regulations. The Contractor shall pay all taxes pertaining to its performance under this Contract.

Section 4. Nonwaiver.

The failure of either party at any time to enforce a provision of this Contract shall in no way constitute a waiver of the provision, nor in any way affect the validity of this Contract or any part hereof, or the right of such party thereafter to enforce each and every provision hereof.

Section 5. Amendment.

- A. This Contract shall only be amended, modified or changed by a writing, executed by authorized representatives of the parties, with the same formality as this Contract was executed.
- B. For the purposes of any amendment modification or change to the terms and conditions of this Contract, the only authorized representatives of the parties are:

Contractor: Karen Fagg, Vice President, or Authorized Designee

Billings: City Council or Authorized Designee

- C. Any attempt to amend, modify, or change this Contract by either an unauthorized representative or unauthorized means shall be void.

Section 6. Jurisdiction; Choice of Law.

Any civil action rising from this Contract shall be brought in the District Court for the Thirteenth Judicial District of the State of Montana, Billings. The law of the State of Montana shall govern the rights and obligations of the parties under this Contract.

Section 7. Severability.

Any provision of this Contract decreed invalid by a court of competent jurisdiction shall not invalidate the remaining provisions of the Contract.

Section 8. Integration.

This instrument and all appendices and amendments hereto embody the entire agreement of the parties. There are no promises, terms, conditions or obligations other than those contained herein; and this Contract shall supersede all previous communications, representations or agreements, either oral or written, between the parties hereto.

Section 9. Liability.

The Contractor shall indemnify, defend, save, and hold Billings harmless from any and all claims, causes of action, lawsuits, damages, judgments, liabilities, and litigation costs and expenses including reasonable attorneys' fees and costs, arising from any wrongful or negligent act, error or omission of the Contractor or any agent, employee or subcontractor as a result of the Contractor's or any subcontractor's performance pursuant to this Contract.

- A. The Contractor shall not indemnify, defend, save and hold Billings harmless from claims, causes of action, lawsuits, damages, judgments, liabilities, and litigation costs and expenses or attorneys' fees and costs arising from wrongful or negligent acts, error or omission solely of Billings occurring during the course of or as a result of the performance of the Contract.
- B. Where claims, lawsuits or liability, including attorneys' fees and costs arise from wrongful or negligent act of both Billings and the Contractor, the Contractor shall indemnify, defend, save, and hold Billings harmless from only that portion of claims, causes of action, lawsuits, damages, judgments, liabilities, and litigation costs and expenses including attorneys' fees and costs, which result from the Contractor's or any subcontractor's wrongful or negligent acts occurring as a result from the Contractor's performance pursuant to this Contract.

Section 10. Inspection and Retention of Records.

The Contractor shall, at any time during normal business hours and as often as Billings may deem necessary, make available to Billings, for examination, all of its records with respect to all matters covered by this Contract for a period ending three years after the date the Contractor is to complete performance in accordance with Section 2 of the Special Provisions. Upon request, and within a reasonable time, the Contractor shall submit such other information and reports relating to its activities under this Contract, to Billings, in such form and at such times as Billings may reasonably require. The Contractor shall permit Billings to audit, examine and make copies of such records, and to make audits of all invoices, materials, payrolls, records of personnel, and other data relating to all matters covered by this Contract. Billings may, at its option, permit the Contractor to submit its records to Billings in lieu of the retention requirements of this Section.

Section 11. Availability of Funds.

Payments under this Contract may require funds from future appropriations. If sufficient funds are not appropriated for payments required under this Contract, this Contract shall terminate without penalty to Billings; and Billings shall not be obligated to make payments under this Contract beyond those which have previously been appropriated.

IN WITNESS WHEREOF, the parties have executed this Contract on the date and at the place shown below.

City of Billings **Contractor**

City Council or Designee _____
Name: _____
Title: _____
Date: _____

ATTEST: IRS Tax ID #

City Clerk APPROVED AS TO FORM:

Date: _____ By _____
BRENT BROOKS, City Attorney

STATE OF MONTANA)
COUNTY OF YELLOWSTONE)
ss.

On this _____ day of _____, 2004, before me, the undersigned, a Notary Public for the State of Montana, personally appeared _____, known to me to be the _____ of _____, and acknowledged to me that they executed the foregoing instrument on behalf of said corporation having first been authorized to do so.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my Notarial Seal the day and year first above written.

Notary Public for the State of Montana
Residing at Billings, Montana
My Commission Expires: _____

Note: Final contract documents will require the Contractor's signature to be notarized.

Appendix A

Basic Services of Engineer

Section 1. Engineer's Rights and Duties.

- A. To furnish all labor, materials, equipment, supplies, and incidentals necessary to conduct and complete the Engineer's portion of the project as defined in the scope of work and to prepare and deliver to Billings all plans, specifications, bid documents, and other material as designated herein.
- B. Ascertain such information as may have a bearing on the work from local units of government, utility companies, and private organizations and shall be authorized to procure information from other authorities besides Billings, but shall keep Billings advised as to the extent of these contacts and the results thereof.
- C. Prepare and present such information as may be pertinent and necessary in order for Billings to pass critical judgment on the features of the work. The Engineer shall make changes, amendments or revisions in the detail of the work as may be required by Billings. When alternates are being considered, Billings shall have the right of selection.
- D. Engineer's work shall be in accordance with the standards of sound engineering and present City, State, and National standards and policies currently in use.
- E. Conform to the requirements of the Montana Code Annotated Title 18 "Public Contracts" and more particularly Sections 18-2-121 and 18-2-122, and all other codes of the State of Montana applicable to providing professional services including codes and standards nationally recognized.
- F. The Engineer shall certify with the submission of final plans that the plans are in conformance with applicable sections of Title 69, Chapter 4, Part 5, of the Montana Code Annotated as pertaining to existing utilities.
- G. To perform professional services in connection with the project and will serve as Billings' representative in those phases of the project to which this agreement applies.
- H. Where Federal funds are involved, the necessary provisions to meet all requirements will be complied with and documents secured and placed in the bidding documents.
- I. Submit an estimated progress schedule as to time and costs at the beginning of the work, and monthly progress reports thereafter until complete. The reports will include any problems, potential problems, and delays as foreseen by the Engineer. Reports will be submitted in a timely manner to permit prompt resolution of problems.

J. Name a Project Manager who shall be the liaison between Billings and the Engineer. For this project the Project Manager designated for the Engineer is Todd Cormier, PE.

Section 2. Billings Rights and Duties.

- A. To furnish all labor, materials, equipment, supplies, and incidentals necessary to conduct and complete Billings' portion of the project as designated in the scope of work.
- B. Name a Project Manager who shall be the liaison between the Engineer and Billings. For this project, the Project Manager designated is Ken Ard, PE, Staff Engineer.

Section 3. Scope of Work.

This narrative provides a description of the anticipated scope of services for the City of Billings Work Order (WO) 08-21 "Lake Elmo Drive – Main Street to Wicks Lane" project. The project is also funded by CTEP under STPE 1099(56) CN 6401 "Lake Elmo Drive Path-Billings" (Main to Hansen) and STPE 1099(41) CN 5292 "Lake Elmo Ped/Bike-Billings" (Hansen to Wicks). The narrative is organized in outline format to correspond to the project activities identified by DOWL HKM necessary for the successful completion of this project.

The project scope includes project development and design activities related to the reconstruction of Lake Elmo Drive from the intersection with Main Street to the intersection with Wicks Lane, including the design of new curb, gutter, pedestrian facilities (sidewalk and/or multi-use trail), and storm drain. The consultant tasks include geotechnical investigations, roadway design, storm drain design, and utility coordination. The anticipated scope of services is more particularly described in the activity descriptions contained herein.

This project includes 30%, 70%, and 100% design submittals. The 30% design submittal for this project consists of two alternatives for the preliminary design and geometric layout and a second submittal of a single alternative based on recommendations from the Owner upon review of the alternatives. Upon review of the final 30% submittal, DOWL HKM will proceed to the 70% submittal package developing final design and geometrics including final hydraulics, final intersection and turn lane geometrics, final parking design, and final multi-use path, sidewalk and/or bike lane design as directed by the Owner. DOWL HKM will then incorporate any pertinent 70% comments into preparing the final construction documents package.

30% Design Submittal - Preliminary Engineering

Task 0100 – Consultant Interactive Project Evaluation

1. Project scoping meeting (field and office review) with City of Billings
2. Investigate available information, documents, and studies
3. Coordination with the City of Billings (scope, budget, schedule, contract)

4. Coordination of News Release; to be submitted by City of Billings.
5. Prepare monthly progress reports for the City of Billings
6. Project management.

Task 0110 – Preliminary Right of Way, Utilities, Survey and Control

1. The Owner will provide right of way plans and ownership for this project. An ownership report will not be developed by DOWL HKM.
2. To the extent required, utility locates will be requested for the project corridor (using One-Call service) and surveyed from the roadway segment between Hansen to Wicks as part of a Phase I SUE. Information detailing City utilities, as available, will be provided by Public Works. Available atlas maps will be collected and incorporated into the Phase I SUE. Phase II SUE is not anticipated at this time, and if it becomes necessary, it will be addressed in a contract amendment.
3. Coordinate with Heights Water District, gas, power, CATV, telephone, and fiber optic companies, as necessary.
4. The owner will provide existing survey data and control for this project and DOWL HKM will supplement this with design survey, as needed.
5. Create control diagram.
6. Provide coordinate listings of benchmarks and control stations as provided by the Owner.
7. Found property corner locations will be provided by the Owner. No new property pins or survey monuments will be set.

Task 0130 – Preliminary Geotechnical and Materials

1. Review available information regarding regional geology, soil survey, site setting and topography, including project coordination with City of Billings.
2. A site investigation which included field exploration, borings, and laboratory testing was conducted on Lake Elmo Road from Main Street to Hansen. All geotechnical information for this section will be provided by the Owner. DOWL HKM will review the given geotechnical information and supplement further investigation as a part of the Phase II work, if necessary.
3. A site investigation including geologic mapping, field exploration, borings, and laboratory testing will be performed for the section of Lake Elmo Road from just north of Hilltop to just south of Wicks Lane.
4. Rehabilitation of the existing pavement sections would likely be the most cost effective alternative for new pavement sections along the alignment. Asphalt pavement may appear relatively sound near the surface but degraded with depth. To effectively evaluate existing pavement conditions, pavement cores will be cut for evaluation of the full depth of the asphalt pavement. A visual pavement surfacing inventory will also be conducted for the entire project length to estimate what sections of roadway, if any, could be reused.

8. Develop preliminary cost opinion for the range of alternatives.
9. Plan and facilitate a public informational meeting for the preliminary design. DOWL HKM will run the meeting with attendance by the Owner. The meeting is anticipated to be an "open house" allowing interested individuals the opportunity to review the project without a formal presentation.

***Submittal: Preliminary 30% Alignment and Grade Plans
Preliminary Opinion of Probable Cost***

Task 0170 – Preliminary Hydraulics

1. Obtain from the Owner past reports or other information related to storm drainage through the project limits. Obtain from the Owner the 1"=100', 2-foot contour interval topographic mapping developed through the West Heights Master Plan for the adjacent area, as available.
2. Evaluate the capacity of existing storm drainage collection system.
3. Develop preliminary design of a storm drain system.
4. Review Owner supplied design of irrigation mitigation for BBWA laterals along the southern portion of the project. Coordinate preliminary design with the Owner and the BBWA.
5. A concise hydraulics memo summarizing the information collected during the hydraulics activity will be prepared for submittal to the City.

Submittal: Preliminary Hydraulics Technical Memo

Task 0180 – Finalize Preliminary Design Activities

1. Establish pre-final alignment and grade based on preliminary analyses, City staff input, and public input.
2. 30% plans will be prepared for review by the City of Billings with a planning-level opinion or probable costs prepared to assist in the option evaluation. The plans will include a control diagram, typical sections, right-of-way as provided by the Owner, plan and profile, probable limits of construction, preliminary traffic (striping only), and storm drainage.
3. A design memo detailing the 30% design will be developed for this phase of work detailing the Owner approved design elements.

***Submittal: 30% Alignment and Grade Plans
Opinion of Probable Cost
30% Design Technical Memo***

Series 0200 - 70% Design Phase

Task 0225 – Utilities

1. DOWL HKM and the City of Billings will coordinate with Public Works regarding existing and proposed sanitary sewer within the project area. Sewer service stub locations will be included based on direction from the City of Billings.
2. Coordination with private utilities (Heights Water District, NWE, MDU, Quest, Bresnan, AT&T) will be performed to include existing and proposed utilities. DOWL HKM will not provide design or engineering for the relocation of private utilities including the Heights Water District except for the relocation of curb stops and fire hydrants.
3. A Phase II SUE (soft dig) for utility locations is not included within this scope of work, but can be included under a separate amendment if deemed necessary.

Task 0230 – Geotechnical and Materials

1. Develop final surfacing design recommendations based on City of Billings supplied traffic data and CBR test results, as well as selected typical section and roadway alignment.
2. It is anticipated that retaining wall may be needed along Lake Elmo between Main Street and Hansen Lane. DOWL HKM will develop foundation recommendations and limits for retaining walls, as necessary, for this area.

Task 0240 – Environmental

1. Environmental review and compliance with applicable regulations will be performed by the City of Billings with technical input from DOWL HKM. Coordination of environmental items identified by the City of Billings will be conducted by DOWL HKM throughout the project. An environmental checklist conducted by the City of Billings will be provided to DOWL HKM upon its completion.

Task 0250 – 70% Traffic and Roadway Design

1. The Owner will provide right of way plans for this project and this information will be incorporated into the plans package. Therefore, typical R/W duties will not be performed for this job. DOWL HKM will not develop an ownership report, provide title commitments or last deeds of record, amend or prepare certificates of survey, provide right of way appraisals or negotiations, survey property corners, set property pins, field stake R/W, assist in the acquisition of right-of-way, or assist in the condemnation process.

5. Based on Owner provided geotechnical information and traffic projections, and from the field investigation north of Hilltop, a preliminary surfacing design will be developed for approval by the Owner.
6. A preliminary geotechnical report including a review of the existing data, surfacing evaluation, subsurface exploration, laboratory testing, and a preliminary surfacing design will be prepared for the Owner. One report will be issued presenting the findings of both roadway sections.

Submittal: Geotechnical Recommendations Technical Memo

Task 0140 – Environmental

1. The environmental portion of this project including determination of environmental concerns, permits, and agency coordination will be performed and coordinated by the City of Billings, as necessary, for the completion of this project. Based on the scope of work and considering the location of the roadway within the City of Billings, minimal environmental effort is anticipated.

Task 0150 – Preliminary Roadway Design

1. Lake Elmo Drive will be developed as a two lane facility from Main Street to Wicks Lane. No new field traffic data is anticipated or will be collected for this project. Field data collection and detailed operational / intersection analyses are not included in this scope of services, but could be performed as an additional service, if needed.
2. Roadway lighting will not be evaluated along the corridor.
3. Traffic flows and signal operational analyses will not be evaluated along the corridor, or at the intersections of Lake Elmo Road and Main Street or Lake Elmo Road and Wicks Lane. Traffic signal loop detector information at the intersection of Lake Elmo Road and Main Street will be provided by the City of Billings.
4. Parking will be provided based on information collected by the Owner and at the direction of the Owner.
5. A multi-use path, sidewalk, and/or bike lanes will be reviewed as options along the roadway. Final determination will be provided by the Owner based on preliminary opinions of cost and right-of-way constraints.
6. DOWL HKM will develop a preliminary design using up to three (3) typical sections and a horizontal and vertical design. The preliminary horizontal/vertical alignment will be recreated from survey data provided by the Owner and verified by field surveys, as required. Two (2) alternatives will be reviewed for the surfacing; full roadway reconstruction and partial reconstruction utilizing portions of the existing surface of Lake Elmo Drive as identified through the pavement surfacing inventory.
7. Develop a preliminary striping layout with input from the Owner regarding where left-turn bays will be provided. At the direction of the Owner, a TWLTL is not included in this design.

2. Final intersection and turn lane geometrics will be developed and included in the 70% plans package.
3. An inventory of existing signing and markings will be completed for the Lake Elmo corridor within the project limits, and Signing and Pavement Marking Plans will be developed for the 70% design package.
4. No traffic lighting is included in this project.
5. No traffic signal design or redesign is included within this project. All existing signals are anticipated to operate as currently configured. No new signals are anticipated based on Owner comments.
6. A multi-use path, sidewalk, and/or bike lanes will be developed based on Owner recommendation from the 30% design package submittal.
7. Parking will be developed based on Owner recommendation from the 30% design package submittal.
8. Provide structural design for retaining walls related to the irrigation lateral as identified in the 30% design.
9. Develop construction plans for 70% design review package for the City of Billings. Plans will include typical sections, detail sheets, plan and profile sheets, storm drain sheets and details, signing and striping sheets, cross-section sheets, and an opinion of construction cost.
10. Preliminary project specifications and special provisions will be based on the current edition of the Montana Public Works Standard Specifications (MPWSS) as modified by the City of Billings Standard Modifications. The MPWSS will be supplemented as needed by Special Provisions.
11. Participate in City review for the 70% submittal, reviewing detailed design of all critical components.

Submittal: 70% Plans

70% Project Specifications
Opinion of Probable Cost

Task 0270 – Final Hydraulics

1. Complete final hydraulic design of the storm drainage system including storm drain inlet spacing, culvert sizing, and storm drain sizing based on Owner recommendation from the 30% design package submittal.
2. Complete final design of irrigation mitigation for BBWA laterals along the southern portion of the project based on Owner recommendation from the 30% design package submittal.
3. The City of Billings will review the need for a Municipal Storm Drain Permit, and if required will secure this permit as part of the City of Billings environmental checklist. DOWL HKM will assist the City of Billings with the permit, as necessary.
4. Assist in development of construction plans, details and specifications for the 70% design submittal.

5. Prepare a final hydraulics technical memo suitable for appending the West Heights Storm Drainage Master Plan.

Submittal: Final Hydraulics Technical Memo

Series 0300 - 100% Design - Final Design

Task 0340 – Final Environmental

1. Coordinate any environmental issues identified by the City of Billings to ensure that they are appropriately addressed in the contract documents.
2. Environmental Water Quality Permits, Stream Protection Act permit applications, Floodplain Permits, and COE 404 permit applications will be prepared, as necessary, by the City of Billings with technical input from DOWL HKM.

Task 0350 – Final Roadway Design

1. Submittal of final plans incorporating pertinent 70% comments.
2. Develop construction package including Specifications and Special Provisions including CTEP related documentation.
3. Develop final engineers estimate for construction.
4. Attend review meeting with City of Billings for 100% plan set.
5. Complete final construction documents package based on final comments received during the final plan review including 1 full size set of the plans package, 20 half size sets of the plans package, 20 specification books. In addition, the final electronic files will be submitted to Selby's for reproduction by contractors and interested parties.

Submittal: Final Plans
Final Construction Package
Opinion of Probable Cost

Series 0400 – Bidding and Construction Services

Task 0410 – Bidding and Preconstruction Services

1. This scope of work assumes that the City will advertise the project, answer contractor questions regarding the bid package, and conduct the pre-bid meeting and the bid opening with attendance by DOWL HKM.
2. The City will distribute bid sets, maintain the plan-holders list, issue addenda and clarifications, and prepare a tabulation of bids following the opening.

3. DOWL HKM will attend the pre-bid meeting, will assist the City during the pre-bid meeting with questions related to the construction package, and issue meeting minutes.
4. DOWL HKM will attend the preconstruction meeting.
5. DOWL HKM will provide the City of Billings an award recommendation based on a City provided tabulation of bids.
6. Preconstruction and construction services including construction staking are not included within this scope of work.

Task 0420 – Construction Administration

1. Construction administration and engineering support, construction staking, observation, construction notes, and testing are not included within this scope of work. These services can be provided under a separate amendment or on a time and materials basis, if desired.
2. DOWL HKM can provide engineering assistance to the City of Billings for the project during construction on a time and material basis.
3. DOWL HKM will prepare record drawings based on Owner supplied construction notes and drawings.
4. DOWL HKM will accompany the Owner on a 1-year walk-through of the project.

***Submittal: Record Drawings
1-year-walk-through comments***

Appendix B

Methods and Times of Payment

Section 1. Payments for Basic Services.

Billings shall authorize payment to the Engineer for services performed under Appendix A of this Agreement. Partial payment shall be due the Engineer upon receipt of the Engineer's pay estimate, said estimate being proportioned to the work completed by the Engineer.

Partial payment shall be made to the Engineer upon receipt of the Engineer's pay estimate, said estimate being proportioned to the work completed by the Engineer. The final payment shall be made only after acceptance of final documents by Billings, and determination that the scope of work has been satisfactorily completed.

A. For services rendered, Appendix A, the Engineer shall be paid based upon actual time accrued, but not to exceed the following amounts:

1. Appendix A Scope of Work	\$211,941
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B. Materials and other expenses are included in the total fee amount. Final payment shall be the above stated basic fee less all previous payments.

Section 2. Payments for Extra Services when Authorized by Billings.

The Engineer will not perform any work that the Engineer deems outside the scope found in Appendix A prior to receiving written approval from City of Billings. Any such work performed, even if requested by City of Billings will not be paid by Billings and any claims for such work will be denied. The Engineer will immediately discuss scope of work issues with the Project Manager for the City of Billings.

Requests made or conditions identified by interested groups at the agency or public meetings, which are beyond the scope and intent of this study shall be paid for on an hourly basis at the applicable fees in Appendix D.

Section 3. Corrections.

Costs of Billings work that is required for corrections to the Engineer's work which requires redoing by Billings shall be deducted from any payments due the Engineer, if the Engineer fails to make the required corrections.

Section 4. Fee Increases

For contracts and services that are expected to require more than one (1) year to complete, the above stated basic services payments may be reviewed and adjusted annually by mutual agreement of the parties, based upon documented evidence that the Engineer's costs and hourly rates as shown in Appendix D have increased for all comparable clients.

Appendix C

Additional Services of Engineer

Extra Services of the Engineer will be paid only with written prior authorization by Billings.

- A. Field and laboratory testing of materials and reports.
- B. Requests made or conditions identified by interested groups at the agency or public meetings, which are beyond the scope and intent of this study.

Appendix D
Schedule of Professional Fees

The Engineer shall provide a listing of Standard Hourly Rates to be used in this contract.
(listing attached).

PROJECT: W.O. 08-21 Lake Elmo Drive		DATE: September 16, 2008						
EST. PREPARED BY: DOWL HKM		WORK TYPE: Reconstruct						
Series 0100 -30% Design Phase - Preliminary Engineering and Survey Activities								
Activity	Tasks	Total Hours	Principal	Proj. Mgr./Engineer	Senior Prof. Engineer	Staff Engr. S. Designer	Designer	CADD Tech. Survey Crew
100 CONSULTANT PROJECT EVALUATION								
Investigate Available Project Info and Data	10		2		6			
Project Coordination w/ City of Billings	52		40		12			
Coordination of News Release (by City of Billings)	2				2			
Monthly Progress Reports	12		12		1			
Project Management	40		40					
SUBTOTAL (HOURS)	116		94		22			
110 PRELIMINARY RW, UTILITIES, SURVEY, AND CONTROL								
Review of City Provided Ownership Report & RW Plans	8				4	4		
Utility Locations / Phased I SUE	70		2		4	24	40	
Utility Coordination	18		2		16			
Review of City Provided Survey and Control	4				2	2		
Survey Pick-Ups	24					9	16	
Control Diagram	4					4		
Review City Provided Coordinate Listings	2					2		
Review of City Provided Found Property Pins	2					2		
SUBTOTAL (HOURS)	132		4		26	46	66	
120 PRELIMINARY GEOTECHNICAL & MATERIALS								
Review of Existing Geotechnical Investigation	6		2		4			
Site Investigation (North of Hansen)	22		2		12	2	4	
Field Review and Surfacing Analysis	30		2		36			
Geotechnical Memo	20		2		16			2
SUBTOTAL (HOURS)	86		8		68	4	4	2
140 ENVIRONMENTAL								
Coordination of Environmental (by City of Billings)								
SUBTOTAL (HOURS)								
160 PRELIMINARY ROADWAY DESIGN								
Review City Provided Parking Assessment	8		4		4			
Environmental Coordination with COB	4		2		2			
30% Preliminary Layout (2 alternatives)	216		24		72	120		
Parking Lane Assessment								
Mult-use path/bike lane assessment								
Alignment and Grade								
Preliminary Layouts (3 typicals)								
Drainage Improvements								
Preliminary Cost Opinions								
Traffic Striping								
QA/QC	12	4	8					
Design Submittal	22		4		16			2
Public Informational Meeting	20		2		8	8		2
SUBTOTAL (HOURS)	282	4	44		102	128		4
170 PRELIMINARY HYDRAULICS								
Review Available Hydraulics Information	6		2		6			
Evaluate Existing Storm Drainage System	22		2		20			
Develop Preliminary Design of SD System	66		2		40	24		
Preliminary Irrigation Design	42		2		24	18		
Prepare Preliminary Hydraulics Memo	27		2		20			1
SUBTOTAL (HOURS)	165		10		110	40		1
180 FINALIZE PRELIM. DESIGN ACTIVITIES								
Establish prefinal alignment and grade	34		4		10	20		
Prepare 30% Plans for Submittal	240		16		90	140		4
Alignment and Grade								
Storm Drain								
Irrigation								
Details								
Cross-sections								
30% Cost Opinion								
Prepare 30% Specs T.O.C. for Submittal	7		2		5			
Prepare 30% Design Memo	16		2		8	4		2
Preliminary Opinion of Probable Const. Cost	20				6	12		
QA/QC Review	10	2	6					
30% Design Review Meeting with City / Utilities	6		2		4			
Field Review Meeting	4		2		2			
SUBTOTAL (HOURS)	337	2	36		117	175		6
TOTAL 100 SERIES PHASE HOURS	1118	6	196	4	446	394	60	13

PROJECT: W.O. 08-21 Lake Elmo Drive		DATE: September 16, 2008						
EST. PREPARED BY: DOWL HKM		WORK TYPE: Reconstruct						
Series 0300 - 100% Design Phase - Final Design Activities								
Activity	Tasks	Total Hours	Principal	Proj. Mgr./Engineer	Senior Prof. Engineer	Staff Engr. S. Designer	Designer	CADD Tech. Survey Crew Clerc.
340 FINAL ENVIRONMENTAL								
Finalize Environmental Issues	14		2		4	8		
Permit Coordination	14		2		4	8		
SUBTOTAL (HOURS)	28		4		8	16		
360 FINAL ROADWAY DESIGN								
Develop Final Plan Package	124		12		24	80		6
Develop Final Specs and Special Provisions	48		12		32			4
Develop Final Engineers Estimate	36		2		16	20		
QA/QC Review	10	2	8					
Review Meeting with City of Billings	6		2		4			
Field Review	2		1		1			
SUBTOTAL (HOURS)	228	2	37		77	100		12
TOTAL 300 SERIES PHASE HOURS	256	2	41		85	116		12
Series 0400 - Bidding and Construction Services								
Activity	Tasks	Total Hours	Principal	Proj. Mgr./Engineer	Senior Prof. Engineer	Staff Engr. S. Designer	Designer	CADD Tech. Survey Crew Clerc.
410 BIDDING AND RECONSTRUCTION SERVICES								
Pre-bid meeting	8		2		6			
Bid Opening	3		1		2			
Pre-construction meeting	6		2		4			
SUBTOTAL (HOURS)	17		5		12			
420 CONSTRUCTION ADMINISTRATION								
Permit Drawings	44		4		6	32		
Final Walk-Through	2		2					
SUBTOTAL (HOURS)	46		6		8	32		
TOTAL 400 SERIES PHASE HOURS	63		11		20	32		

PROJECT: W.O. 08-21 Lake Elmo Drive		DATE: September 16, 2008	
EST. PREPARED BY: DOWL HKM		WORK TYPE: Reconstruct	
COST SUMMARY			
PROJECT: W.O. 08-21 Lake Elmo Drive		DATE: Sep-08	
EST. PREPARED BY: DOWL HKM		WORK TYPE: Reconstruction	
Principal	Hours	Rate	Extension
	10	164.30	1,643
Project Manager / Engineer	327	119.35	39,027
Senior Professional Engineer	16	135.63	2,170
Staff Engineer / Senior Designer / PLS	804	90.00	72,360
CADD / Designer / Inspector	946	73.32	69,356
Survey Crew	60	165.00	9,300
Clerical	33	65.00	2,145
	TOTAL HOURS	2196	
			LABOR SUBTOTAL
			196,001
	GENERAL OVERHEAD @		OVERHEAD SUBTOTAL
			\$196,001
DIRECT NONLABOR			
Miscellaneous (blue-line prints, mailers, multi-line paper, telephone, postage, misc. equipment rental, maps, photos, survey mtds., display boards, etc.)		(LUMP SUM)	
Reproductions	LS		1,000
Computer	Hours	Per Hour	
Title Commitments	Parcels	Per Parcel	
Property Deeds, Plats	Parcels	Per Parcel	
Vehicle Rental	Days	Per Day	
Mileage	Miles	200 Per Mile	0.700
Airline Trips	Trips	Per Trip	
Per Diem	Days	Per Day	
Other (GPS Rental)	Days	\$ Per Day	400
Other (Lab Testing)	LS		3,000
			TOTAL DIRECT NONLABOR
			\$7,540
OUTSIDE SERVICES AND SUBCONTRACTS			
R/W Appraisals, Negotiation & Acquisition	NA		
Surveys	In-House Service - Included Above		
Subsurface Utility Engineering (Phase I Only)	In-House Service - Included Above		
Aerial Photography/Mapping	NA		
Ownership Report	Provided by Owner		
Record Plans/Deeds	Provided by Owner		
Soils/Geotechnical Survey/Report	In-House Service - Included Above		
Geotechnical Drilling	Haz-Tech		7,400
Test Pits	NA		
Outside Testing	NA		
Traffic Control	Billing Construction Supply		1,000
Cultural Resource Studies/Report	NA		
Noise Study	NA		
Traffic Study/Report	NA		
Biological Resources Studies/Report	NA		
Hazardous Materials (Initial Site Assessment)	NA		
Landscaping Plans	NA		
Electrical/Lighting/Signalization etc.	NA		
Other	NA		
			TOTAL OUTSIDE SERVICES AND SUBCONTRACTS
			\$8,400
RECAPITULATION			
Total Labor/ Overhead			196,001
Total Direct NonLabor			7,540
Total Outside Services & Subcontracts			8,400
Fee (0%)			
			TOTAL ESTIMATED COST
			\$211,941

Appendix E

Project Schedule

Based on a notice to proceed by Billings dated no later than 12/01/2008, the completion date for the Engineer's work through final design shall be:

100% Design, specifications, and cost estimate	not later than May 2009
Record drawings	not later than December 2009
One year walk through	not later than December 2010

It is anticipated that this project will be constructed summer of 2009. The Construction Engineering (CE) phase of this project is expected to be complete by December 31, 2010.

Delays affecting the completion of the work within the time specified of more than ninety (90) days, not attributable to or caused by the Parties hereto, may be considered as cause for the renegotiation or termination of this Contract.

If the Engineer is behind on this Contract due to no fault of Billings, then the Engineer hereby acknowledges the right of Billings to withhold future Contracts to the Engineer in addition to any other remedy until this Contract is brought back on schedule or otherwise resolved.

Appendix F

Federal Aid Requirements

NON-DISCRIMINATION NOTICE

During the performance of this Agreement, DOWL HKM (hereafter in this Section "the Party"), for itself, its assignees and successors in interest, agrees as follows:

A) COMPLIANCE WITH TITLE VI OF THE CIVIL RIGHTS ACT OF 1964 FOR FEDERAL-AID CONTRACTS

- (1) **Compliance with Regulations:** The Party shall comply with all Regulations relative to nondiscrimination in Federally-assisted programs of the Department of Transportation, 49 Code of Federal Regulations (CFR), Part 21, as they may be amended (hereafter referred to as the Regulations), which are incorporated by reference and made a part of this Agreement, even if only state funding is here involved.
- (2) **Nondiscrimination:** The Party, with regard to the work performed by it during the Agreement, shall not discriminate on the grounds of sex, race, color, or national origin in the selection and retention of subcontractors, including procurement of materials and leases of equipment. The Party shall not participate either directly or indirectly in the discrimination prohibited by 49 CFR Sec. 21.5.
- (3) **Solicitations for Subcontracts, Including Procurement of Materials and Equipment:** In all solicitations, whether by competitive bidding or negotiation by the Party for work to be performed under a subcontract, including procurement of materials or leases of equipment, any potential subcontractor or supplier shall be notified by the Party of the Party's obligations under this Agreement and the Regulations relative to nondiscrimination.
- (4) **Information and Reports:** The Party will provide all reports and information required by the Regulations, or directives issued pursuant thereto, and permit access to its books, records, accounts, other sources of information and its facilities as may be determined by State or the Federal Highway Administration (FHWA) to be pertinent to ascertain compliance with Regulations or directives. Where any information required of the Party is in the exclusive possession of another who fails or refuses to furnish this information, the Party shall so certify to the Department or the FHWA as requested, setting forth what efforts it has made to obtain the information.
- (5) **Sanctions for Noncompliance:** In the event of the Party's noncompliance with the nondiscrimination provisions of this Agreement, State may impose sanctions as it or the FHWA determines appropriate, including, but not limited to,
 - (a) Withholding payments to the Party under the Agreement until the Party complies, and/or
 - (b) Cancellation, termination or suspension of the Agreement, in whole or in part.

DBE GOAL

The Contractor will make all reasonable efforts to utilize MDT's currently certified DBE firms for applicable subcontracting services that are necessary. The MDT Civil Rights website, <http://www.mdt.state.mt.us/civilrights/>, contains information related to MDT's certified DBE firms. An MDT Compliance Specialist may be contacted at (406) 444-9229 should subcontracting opportunities arise.

Each invoice submitted for payment must state the established DBE goal for the project and the current and cumulative amounts expended to date towards that goal.

The DBE Goal for this project is **Zero percent (0.0%)**.

CERTIFICATE OF CONSULTANT

I am a duly authorized representative of the firm of **DOWL HKM** whose address is **222 N 32nd Street, Suite 700, Billings, MT, 59101** and I hereby certify as follows:

1. That neither the firm nor any person associated therewith in a management capacity:

(a) has employed or retained for commission, percentage, brokerage, contingent fee, or other consideration, any firm or person (other than a bona fide employee working solely for me or the above consultant) to solicit or secure this Agreement;

(b) has agreed, as an express or implied condition for obtaining this Agreement, to employ or retain the services of any firm or person in connection with carrying out the Agreement, or

(c) has paid or agreed to pay to any firm, organization or person (other than a bona fide employee working solely for me or the above consultant), any fee, contribution, donation, or consideration of any kind for, or in connection with, procuring or carrying out the Agreement; with no exceptions.

2. That neither the firm, nor any person who has critical influence on or substantial control in the firm, nor any person associated therewith in a management or supervisory capacity:

(a) is currently under suspension, debarment, voluntary exclusion, or determination of ineligibility by any federal agency or any agency of any state government;

(b) has, within a three-year period preceding this Agreement, been convicted of or had a civil judgment rendered against them for commission of fraud; a criminal offense in connection with obtaining, attempting to obtain, or performing a public transaction or contract under a public transaction; violation of antitrust statutes; commission of embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, or receiving stolen property.

(c) is currently indicted for or otherwise criminally or civilly charged by a governmental entity with commission of any of the offenses listed in paragraph 2(b) of this certification.

(d) has had one or more public transactions terminated for cause or default within a three-year period preceding this Agreement.

3. That to the best of my knowledge and belief:

(a) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of any Federal agency, a member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.

(b) If any funds other than Federal appropriated funds have been paid or will be paid to any person for influencing or attempting to influence an officer or employee of any Federal agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form-LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions.

I acknowledge that this certificate is to be furnished to the **City of Billings**, State of Montana, Department of Transportation, and the Federal Highway Administration, in connection with this Agreement involving participation of Federal-Aid highway funds, and is subject to applicable state and federal laws, both criminal and civil.

Date _____ Signature _____
DOWL HKM

CERTIFICATE OF THE CITY OF BILLINGS, MONTANA

I hereby certify that I am the **The City Administrator of the City of Billings**, of the State of Montana, and that the above consulting firm, or its representatives, has not been required, directly or indirectly, as an express or implied condition in connection with obtaining or carrying out this Agreement, to:

(a) employ or retain, or agree to employ or retain, any firm or person, or
(b) pay, or agree to pay to any firm, person or organization, any fee, contribution, donation or consideration of any kind; with no exceptions.

I acknowledge that this certificate is to be furnished the Montana Department of Transportation and Federal Highway Administration in connection with this Agreement involving participation of Federal-Aid highway funds, and is subject to applicable state and federal laws, both criminal and civil.

Date _____ Signature _____
City Administrator, City of Billings

(6) **Incorporation of Provisions:** The Party will include the provisions of paragraphs (1) through (6) in every subcontract, including procurement of materials and leases of equipment, unless exempt by the Regulations or directives issued pursuant thereto. The Party will take such action with respect to any subcontract or procurement as the State or the FHWA may direct to enforce such provisions including sanctions for noncompliance: Provided, however, that in the event the Party is sued or is threatened with litigation by a subcontractor or supplier as a result of such direction, the Party may request the State to enter into the litigation to protect the interests of the State, and, in addition, the Party or the State may request the United States to enter into such litigation to protect the interests of the United States.

B) COMPLIANCE WITH THE MONTANA GOVERNMENTAL CODE OF FAIR PRACTICES, SEC. 49-3-207, MCA

In accordance with Section 49-3-207, MCA, the Party agrees that for this Agreement all hiring will be made on the basis of merit and qualifications and that there will be no discrimination on the basis of race, color, religion, creed, political ideas, sex, age, marital status, physical or mental disability, or national origin by the persons performing the Agreement.

C) COMPLIANCE WITH AMERICANS WITH DISABILITIES ACT (ADA)

- (1) The Party will comply with all regulations relative to implementation of the AMERICANS WITH DISABILITIES ACT.
- (2) The Party will incorporate or communicate the intent of the following statement in all publications, announcements, video recordings, course offerings or other program outputs: **"The Party will provide reasonable accommodations for any known disability that may interfere with a person in participating in any service, program or activity offered by the Party. In the case of documents, recordings or verbal presentations, alternative accessible formats will be provided. For further information call the Party."**
- (3) All video recordings produced and created under contract and/or agreement will be closed-captioned.

D) COMPLIANCE WITH PARTICIPATION BY DISADVANTAGED BUSINESS ENTERPRISES IN DEPARTMENT OF TRANSPORTATION FINANCIAL ASSISTANCE PROGRAMS, 49 CFR PART 26

Each Agreement the Department signs with a Party (and each subcontract the prime contractor signs with a subcontractor) must include the following assurance:

The Party, subrecipient or subcontractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The Party shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of DOT-assisted contracts. Failure by the Party to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as the recipient deems appropriate

Appendix G
Certificate(s) of Insurance

(Attach Certificate(s) of Insurance)



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: Amendment Six to Morrison-Maierle, Inc. Engineering Contract to Perform Land Acquisition Services Including an Environmental Assessment and Appraisal Work

DEPARTMENT: Aviation and Transit

PRESENTED BY: Thomas H. Binford, A.A.E., Director of Aviation and Transit

PROBLEM/ISSUE STATEMENT: Due to the specialized nature of the civil engineering services required for airfield infrastructure design, as well as knowledge of the Federal Aviation Administration (FAA) design criteria and grant funding process, the City has historically entered into a five-year term contract to provide engineering services at the Airport. On November 13, 2006, the City approved a five-year contract with Morrison-Maierle, Inc. The base five-year contract is amended each time a new infrastructure project is undertaken, and Amendment Six for \$108,975 includes all services required to provide the Land Acquisition Services for a parcel of land west of the Airport.

Airport staff was approached by the landowners of an adjacent parcel of property next to the west end of the Airport regarding their desire to sell their property. This parcel includes 58.66 acres that lies directly in line with the Airport's Runway 7. Because a large section of this parcel falls under the protected Runway approach, the purchase of this land has been approved by the FAA and this land is eligible to be purchased using the Airport's Passenger Facility Charge (PFC) funds. Because PFC funds approved by the FAA will be used, staff must first have the parcel appraised and an Environmental Assessment performed. Morrison-Maierle, Inc. will coordinate these efforts for the Airport.

FINANCIAL IMPACT: The total cost of Amendment Six to the five-year Engineering Contract with Morrison-Maierle, Inc. will be \$108,975, and will be funded using the Airport's PFC funds. The purchase of this parcel was included in the City's CIP for Fiscal Year 2010. However, due to the long lead time to perform the appraisal and environmental assessment work, as well as the landowner's desire to sell this property sooner versus later, staff is recommending that the professional services required to do the land acquisition be approved in this fiscal year. The funds are available in the Airport's PFC Capital fund.

RECOMMENDATION

Staff recommends that the City Council approve Amendment Six to the Morrison-Maierle, Inc. Engineering Contract for the amount of \$108,975 to perform Land Acquisition Services Including an Environmental Assessment and Appraisal Work.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: Amendment Seven with CTA Architects Engineers, for the Architectural and Engineering Services for the Emergency Electrical Generator Replacement at Billings Logan International Airport's Terminal Building

DEPARTMENT: Aviation and Transit

PRESENTED BY: Tom Binford, A.A.E., Director of Aviation and Transit

PROBLEM/ISSUE STATEMENT: Due to the specialized nature of administering facility construction projects following the Federal Aviation Administration (FAA) design criteria and grant funding process, the City of Billings Logan International Airport has historically entered into a five-year term contract for architectural services for various Airport facilities, buildings, electrical design, and remodel projects. On November 27, 2006, the City approved a five-year contract with CTA Architects Engineers to provide project design, plans, specifications and bidding documents, and contract administration items such as coordination meetings, pay requests, and change orders, etc. The base five-year contract is amended each time a new facility/building project is undertaken, and this Amendment Seven for \$56,680.36, includes all of the services indicated above for the replacement of the existing Airport Terminal Building's emergency electrical generator. The existing generator only supplies enough power to operate the Terminal's emergency lighting and the Security Access Control System. The replacement generator will provide the power necessary to operate all electrical systems in the Terminal Building, including the Transportation Security Administration's (TSA) security screening equipment and the five passenger loading bridges used by the airlines. The scope of work for this project and associated architectural and engineering fees have been approved and negotiated by Airport staff. This project is included in the approved FY 09 Capital Improvement Program. Including Amendment Seven, the total cost of the architectural work under this five-year contract totals \$168,421.74 and has produced an estimated \$2,616,113 of facility/building construction work.

FINANCIAL IMPACT: The total cost of Amendment Seven to the five-year Architectural Contract with CTA Architects Engineers is \$56,680.36. The source of funding for this Amendment is the Airport's Passenger Facility Charge (PFC) Capital Fund, which is part of the City's approved Capital Improvement Program.

RECOMMENDATION

Staff recommends that the City Council approve Amendment Seven to the CTA Architects Engineers Services Contract in the amount of \$56,680.36 for the architectural

and engineering services for the Emergency Electrical Generator Replacement at Billings Logan International Airport's Terminal Building.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: Northwestern Energy Right-of-Way Easement to Relocate Electric Power Lines as Required for Aaronson Avenue Road Project.

DEPARTMENT: Parks, Recreation and Public Lands (PRPL)

PRESENTED BY: Michael Whitaker, Director of Parks, Recreation and Public Lands

PROBLEM/ISSUE STATEMENT: Northwestern Energy is requesting a Right-of-Way Easement to locate a power line feed for a future electrical service in the Aaronson Right-of-Way for a city irrigation controller. This work will take place on the South end of Sahara Sands Park that is located east of Aaronson Avenue and South of Caravan Avenue. This work is necessary as part of the construction associated with the Aaronson Avenue Road Project. Northwestern Energy is responsible for all construction costs; however, since the lines will be located on PRPL property, we need to enter into this Right-of-Way Easement.

FINANCIAL IMPACT:

There will be no financial impact to the City of Billings for this Right-of-Way Easement. The easement will accommodate a service line to provide power for a city irrigation controller along Aaronson Avenue.

RECOMMENDATION

Staff recommends that the City Council approve this Right-of-Way Easement with Northwestern Energy to extend the electric power line.

Approved By: **City Administrator** **City Attorney**

Attachments: Attachment A – Cover Letter, Easement and Exhibit

NorthWesternTM Energy

September 26, 2008

City of Billings, Parks and Recreation
ATTN: Mark Jarvis
390 N. 23rd St.
Billings, MT 59101

Re: Sahara Sands Park Easement

Dear Mark,

Enclosed in this letter are 3 copies of the easement that Northwestern Energy is requesting from the City of Billings. Again, the easement will be about 100-150 long and only 16' wide. The easement will consist of 8' on both sides of NWE's conductors. The conductor's will be a vertical construction (one line on top of the other, with about 3 ft. of separation). The line will start at the top of the park from the middle overhead power structure heading southwest to a newly installed pole behind the new Aronson Ave. The overhead span will basically be covering the slope that is in between the park elevation and the finish grade elevation of Aronson Ave.

Please review them and contact me if you have any questions regarding it. I look forward to hearing from you.

Respectfully,



Kane Claunch
Division Engineer, Billings
Northwestern Energy
655-2526

RETURN TO:
NORTHWESTERN ENERGY
LANDS and PERMITTING DEPARTMENT
40 East Broadway
Butte, MT 59701-9394

Form No. 3443 12/05 OL

EASEMENT – OVERHEAD ELECTRIC POWERLINE

City of Billings

P.O. Box 1178

of Billings, Mt, Zip 59103, "Grantor", in consideration of \$1.00 and other good and valuable consideration, in hand paid, the receipt of which is acknowledged, does grant and convey to **NORTHWESTERN CORPORATION d/b/a NORTHWESTERN ENERGY**, a Delaware Corporation, of 40 East Broadway, Butte, MT 59701-9394, "Grantee", and to its successors, assigns and apportionees, an easement 16 feet in width upon which to construct, operate, maintain, replace, upgrade and remove an overhead electric powerline, communications system, and necessary appurtenances, including any guy wires which may extend beyond the easement width over, under, along and across that certain real property located in Yellowstone County, Montana, and particularly described as follows:

TOWNSHIP 1 North, RANGE 26 East, P.M.M.

SECTION(S) 28: Affecting a portion of Sahara Sands 1st and 2nd
Filings, Sahara Park, as shown on the attached Exhibit "A"

TOGETHER with reasonable right of access to and from the easement area over lands of the Grantor using existing roads and trails where practicable; the right to use and keep the easement area free and clear of any and all obstructions or structures, except fences; and the right to clear and remove all timber, brush or vegetation outside of the easement that may in the Grantee's opinion endanger the powerline, communications system, necessary appurtenances or guy wires.

THE GRANTOR covenants with the Grantee that the Grantor is lawfully seized and possessed of the real estate above-described, and that the Grantor has a good and lawful right to convey it, or any part thereof.

DATED this _____ day of _____, 2008.

City of Billings

By: _____ Its: _____

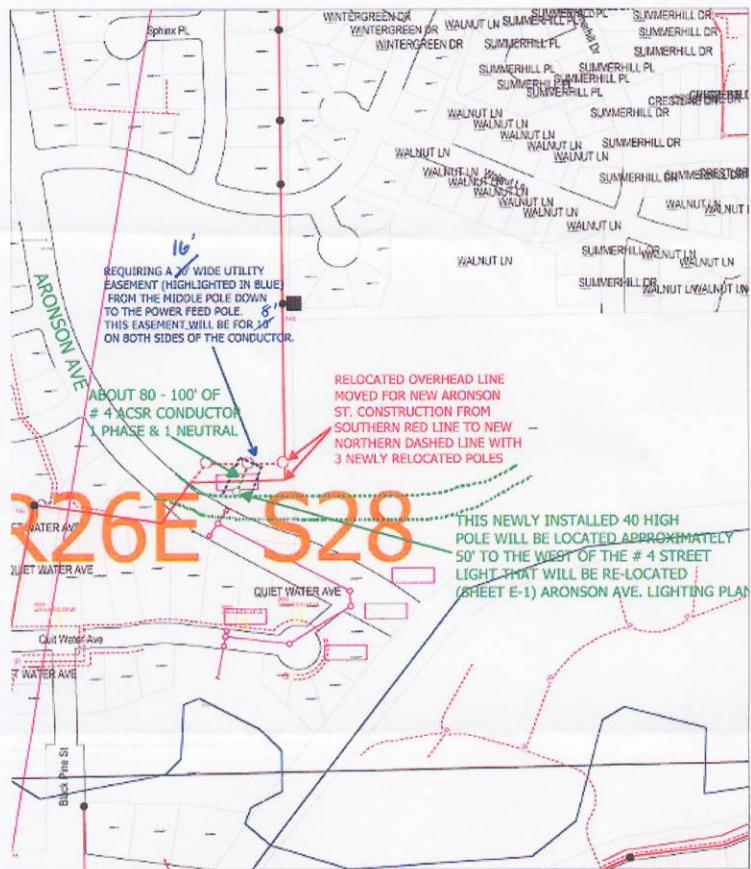
STATE OF Mt)
)
)ss.

COUNTY OF Yellowstone)

On this _____ day of _____, 2008, before me, personally appeared City of Billings, being the _____ of _____ known to me to be the persons whose names are subscribed to the within instrument and acknowledged to me that they executed the same.

NOTARIAL SEAL, WITNESS SIGNATURE	<p>Signature: _____ Print Name: _____ Notary Public for the State of _____ Residing at _____ My Commission Expires _____, 20 _____ Project: _____ Map No.: _____ Order No.: _____ Acquired by: <u>Steve McFarland</u> E No.: _____</p>
----------------------------------	--

EXHIBIT "A"





CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: Recreational Trails Program Grant Amendment Agreement for a portion of the Gabel Road Connector Trail

DEPARTMENT: Planning and Community Services Department

PRESENTED BY: Darlene Tussing, Alternate Modes Coordinator

PROBLEM/ISSUE STATEMENT: The City of Billings Planning Division applied for the Recreational Trails Program grant through Montana Fish, Wildlife and Parks for the year 2006 for a portion of the trail development along the Bannister Drain from 29th Street West to the east edge of the BBWA canal south of King Avenue behind Pierce Flooring. The grant was approved for \$23,000 with a requirement that the project should be completed by October 15, 2008. The City of Billings has requested a year extension for the RTP grant for a number of reasons. The City has had several delays with this project due to land ownership changes and most currently, with the Montana Department of Transportation delaying its approval of a mid-block bicycle/pedestrian crossing on King. MDT has now allowed the City of Billings to continue with this project, but it is too late to get it under construction for this current construction season and the project will need to be bid in January. Fish, Wildlife and Parks has approved the extension and now needs the City of Billings to review this amended agreement and, if it is acceptable, have the Mayor sign both copies and return one copy to the State Trails Program in Helena. The other copy will be retained for the City's records.

FINANCIAL IMPACT: The Recreational Trails Program Grant was written to provide funding for a portion of the Gabel Road Connector Trail along the City-owned Bannister Drain from 29th Street West to the east edge of the BBWA canal. This grant provides reimbursement after monies have been expended. A 20% match or \$5,875 was approved by the Council in April 2004 to be used from the 1999 GO Bond.

RECOMMENDATION

Staff recommends that Council approve the extension of the grant to October 15, 2009, and authorize the Mayor to sign the Recreational Trails Program Grant Amendment agreement for the Gabel Road Connector Trail.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT:

A. Recreation Trails Program Grant Amendment

RECREATION TRAILS PROGRAM GRANT AMENDMENT
#RT2006-02

THIS AGREEMENT, entered into this 19th day of September, 2008, by and between FISH, WILDLIFE & PARKS, the government agency of the state of Montana, for the purpose of implementing the Recreation Trails Program, with its principal place of business at Helena, Montana, hereafter called the "Department", and the City of Billings hereinafter referred to as the "Sponsor".

WITNESSETH:

WHEREAS, the sponsor desires to extend the time within which it completes a trail project called the Gabel Road Connector/Heritage Bicycle-Pedestrian Trail to fulfill its requirements under the Recreation Trails Program Agreement identified as number RT2006-02; and,

WHEREAS, the Department desires to allow the Sponsor sufficient time to complete its requirements of the Recreation Trails Program Agreement;

NOW THEREFORE, in consideration of the covenants to be performed by each party on behalf of the other, as herein set forth, it is hereby understood and agreed by and between the parties hereto as follows:

1. The Sponsor's project will be extended to the agreed upon new completion date of October 15, 2009.
2. This Amendment makes no other changes; all other terms and conditions of this Agreement will stay in full force and effect.

IN WITNESS WHEREOF, the Department has caused its name to be subscribed thereunto duly authorized and the Sponsor has caused its name to be subscribed by its proper officers, thereunto duly authorized, on this day and year.

BY: 
FISH, WILDLIFE & PARKS

DATE: 9/19/08

BY: _____ DATE: _____
PROJECT SPONSOR

(Federal I.D. # of sponsor _____)

AGENDA ITEM: **H**



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

SUBJECT: Approval and Acceptance of FY 08 U.S. Department of Homeland Security Grant in the amount of \$298,200

DEPARTMENT: Police Department

PRESENTED BY: Rich St. John, Chief of Police

PROBLEM/ISSUE STATEMENT: The State of Montana has \$298,200 available through the FY 08 U.S. Dept. of Homeland Security Equipment Program for the City of Billings Bomb Squad to purchase equipment. The purchase of this equipment enables Billings to increase its capability to respond to multiple incidents at the same time. The approach is consistent with the direction of the National Bomb Squad Commanders Advisory Board and the FBI. Staff recommends City Council approve and accept this grant in the amount of \$298,200 for the purchase of Bomb Squad equipment, and authorize the Mayor to sign the award letter.

FINANCIAL IMPACT: The grant is pass through money for the FY 2008 State Homeland Security Grants Program and will be administered by the State Disaster and Emergency Services Office. There is no match required by the City.

RECOMMENDATION

Staff recommends that City Council approve and accept the FY 2008 Homeland Security Grant in the amount of \$298,200 to purchase equipment and training for the bomb squad, and authorize the Mayor to sign the award letter.

Approved By: **City Administrator** **City Attorney**

AGENDA ITEM:



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

October 27, 2008

TITLE: Bureau of Justice Assistance Grant Acceptance

DEPARTMENT: Municipal Court

PRESENTED BY: Mary Jane Knisely, Municipal Court Judge

PROBLEM/ISSUE STATEMENT: The overall goal is to develop the Billings Adult Mental Health Court (BAMHC) in response to the needs of persons with a mental illness and/or co-occurring disorders within the criminal justice system, thus furthering the mission of increased public safety. BAMHC will partner with community mental health and law enforcement to develop a system that will screen adult misdemeanor offenders with serious mental illness for eligibility into the mental health court, provide diversion and treatment programs that address the specific needs of the participants. BAMHC will measure short term outcomes regarding maintenance of treatment and medication regimens, employment, education and family support. Long term goals will focus on independent living in a pro-social manner, reduced recidivism and increased sobriety.

Furthermore, with the Billings Adult Misdemeanor Drug Court program's infrastructure already in place, this will essentially act to expand the treatment court to include offenders with mental health disorders. Additionally, the Team and Community Crisis Center will work with local law enforcement to provide Crisis Intervention Training for officers, develop a Law Enforcement Liaison program to BAMHC participants and train mental health and substance abuse providers in specialty courts diversion, which will support community public safety. The current approach to dealing with defendants with a mental illness is fragmented and ineffective. Financial and human resources for ongoing or intensive treatment to assist offenders are limited.

ALTERNATIVES ANALYZED: Council may choose to ACCEPT the Bureau of Justice Assistance (BJA) Grant for the establishment of the adult misdemeanor mental health treatment court, or Council may choose to DECLINE the Bureau of Justice Assistance (BJA) Grant.

FINANCIAL IMPACT: ACCEPT BJA Grant Offer – MINOR FINANCIAL IMPACT. The City will receive \$249,415 over a period of three years. "In kind" match of

approximately \$60,000 per year is already included in the Municipal Court FY09 budget through employee salaries and indigent mental health line items. “In kind” contribution is broadly defined in this grant. The majority of the City’s contribution would include the hours on which team members, (i.e. prosecutor, judge, public defender) spend on mental health-related activities. The City of Billings would not be required to hire additional staff. The evaluator, coordinator and treatment professionals would be employed by contract and without City benefits.

DECLINE BJA Grant Offer – CONSIDERABLE FINANCIAL IMPACT ON COMMUNITY.

Most offenders do not have private insurance and cannot afford treatment. Untreated offenders consistently re-offend and re-victimize the community.

RECOMMENDATION

Staff recommends that Council approve the request to allow Mayor Tussing to accept the Bureau of Justice Assistance Grant in the amount of \$249,415 on behalf of the Billings Municipal Court for the establishment of an adult misdemeanor mental health court.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: A donation to provide concrete access paths to picnic tables and benches in Swords Park

DEPARTMENT: Park, Recreation, and Public Lands

PRESENTED BY: Michael Whitaker, Director, PRPL Department

PROBLEM/ISSUE STATEMENT: Faith Chapel under the direction of Pastor Ron Todd has generously provided concrete ramps and pads up to and around existing picnic tables and benches along the Heritage Trail on the west end of Swords Park. This work makes the picnic tables and benches more user-friendly and reduces maintenance requirements around them. Also one additional bench was provided and placed along the trail for resting and viewing the surrounding scenery. The total contribution in materials and labor is \$7,000.00

ALTERNATIVES ANALYZED:

- Accept the donation from the Faith Chapel or,
- Decline the donation.

FINANCIAL IMPACT: There is no financial impact to the City.

RECOMMENDATION

Staff recommends that Council accept this generous donation from Faith Chapel and publicly acknowledge this gift to the community.

Approved By: **City Administrator** _____ **City Attorney** _____



CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: Sale of Surplus Property – AED (LifePac Defibrillators) and Miscellaneous Survivair SCBA equipment

DEPARTMENT: Fire

PRESENTED BY: Paul A. Dextras, Fire Chief

PROBLEM/ISSUE STATEMENT: The Fire Department currently has in its possession eight (8) LifePac® 300 defibrillators manufactured by Physio-Controls™ that were originally purchased with General Fund (010) and special revenue funds (214/BUFSA) in August 1996. These units are currently being stored at Station #1 because they no longer meet the Heart Associations standards and cannot be reprogrammed to shock at the appropriate number of jules. Since defibrillators are a highly specialized type of EMS equipment and cannot be reprogrammed for use as a defibrillator, they could not be sold at the City's annual auction.

We also have miscellaneous Survivair™ SCBA (self-contained breathing apparatus) equipment that we can offer for sale to other fire departments who have Survivair™ systems. The equipment includes the following: 4-each Survivair™ pack cases; 2-each radio com hookups; 4-each HazMat radio equipped masks; 46-each SmallTalks®; 51 interior mask microphones; 4-each Survivair masks; 4-each 'escape' bottles and 4-each 'escape' packs. We would like Council approval to dispose of this equipment.

ALTERNATIVES ANALYZED: Several local companies salvage or recycle electronic equipment for either parts and/or base metals of which they are constructed. If these units can be used for parts, Chief Dextras will be requesting a letter from the salvage or recycling company that they will not try to sell the defibrillation units 'as is' and the Survivair™ equipment will be also offered in a 'as is' state on a first-come/first-serve basis.

FINANCIAL IMPACT: No negative financial impact.

RECOMMENDATION

Staff requests Council approval to dispose of this equipment.

Approved By: **City Administrator** ____ **City Attorney** ____

AGENDA ITEM: **L**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Second Reading of an Ordinance Expanding Ward V: Annexation #08-08

DEPARTMENT: Planning and Community Services Department

PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: On September 22, 2008, the City Council approved the annexation of a 55.45-acre parcel located on the south side of Grand Avenue from 30th St. West to just west of Zimmerman Trail and all of the Zimmerman Trail right-of-way from Grand Ave. to Broadwater Ave. (see Attachment A). The request for annexation was submitted by Yegen Grand Avenue Farms, the owner of the property. Upon annexation, the property must be added to one of the City's election wards. The first reading and public hearing on the ordinance to add the property to Ward V was conducted at the October 14, 2008 Council meeting. The second reading of the ordinance will be conducted on October 27, 2008.

FINANCIAL IMPACT: There are no direct financial impacts if this ordinance is approved.

RECOMMENDATION

Staff recommends that the City Council hold the public hearing and approve the second reading of this ordinance that adds property to City Ward V.

Approved by: **City Administrator** _____ **City Attorney** _____

ATTACHMENT

A. Ward Ordinance and Exhibit A

ATTACHMENT A

ORDINANCE NO. 08-_____

AN ORDINANCE OF THE CITY OF BILLINGS, AMENDING BILLINGS MUNICIPAL CODE, CHAPTER 11, ELECTIONS, IN PARTICULAR, SECTION 11-102(c), WARD BOUNDARIES; AND CHANGING THE WARD BOUNDARIES ESTABLISHED THEREIN BY ADDING CERTAIN NEWLY ANNEXED REAL PROPERTY TO WARD V PROVIDING FOR CERTIFICATION AND REPEALING OF ALL ORDINANCES AND RESOLUTIONS INCONSISTENT THEREWITH.

BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

1. AMENDMENT. Pursuant to Billings Municipal Code, Section 11-102(c) and the State Law, Billings Municipal Code, Section 11-102(c) Ward Boundaries is hereby amended by adding to the following designated Ward the following described real property:

Tracts of land situated in the SW1/4 of Section 34, T.1N., R.25E., the NW1/4 of Section 1, T.1S., R.25E., and the NE1/4 of Section 2, T.1S., R.25E., P.M.M., Yellowstone County, Montana, more particularly described as:

Tract 7-A, Certificate of Survey No 2314 Amended, Recorded December 30, 1987, under Document No.

1468780, Records of Yellowstone County;

Tract 6-A-1, Amended Tract 6-A of Certificate of Survey No 2314 Amended, Recorded May 30, 2008, under

Document No. 3467337, Records of Yellowstone County;

Tract 1-A-1, Amended Tracts 1-A & 2 of Certificate of Survey No 2702, Recorded September 3, 2008, under

Document No. 3478524, Records of Yellowstone County.

Including Yellowstone County road easement for Grand Avenue also described as a portion of County Road Petition Number 5, filed December 26, 1883, Declared a County Road March 6, 1884, described as follows:

Those portions of Grand Avenue County road easement and deeded right-of-way adjacent to Tract 1-A-1, of said Certificate of Survey 2702, Tract 6-A-1, of said Certificate of Survey No 2314 and Tract 7-A, of said Certificate of Survey No 2314.

Including all adjacent right-of-way of Zimmerman Trail and that portion of Zimmerman Trail right-of-way not adjacent but extending south to Broadwater Avenue , being Tracts 11-B, 12-B and 6-C of Amended Tracts 1, 6, 8, 11 and 12 of Certificate of Survey No. 2702, Recorded May 30, 2008, under Document No. 3467336, Records of Yellowstone County.

Containing 55.4518 gross acres and 46.0984 net acres.
(# 08-08) See Exhibit "A" Attached

2. **CERTIFICATION.** Pursuant to M.C.A. Section 13-3-103, the above change and alteration is hereby certified to the election administrator by the City Council, and the City Administrator or his designee is hereby directed to certify the changes and alterations and to deliver a map showing the boundaries of the ward, the streets, avenues and alleys by name and the ward by number, to the election administrator not more than ten (10) days after the effective date of this ordinance.
3. **REPEALER.** All other ordinances, sections of the Billings Municipal Code and ordinances inconsistent herewith are hereby repealed.

PASSED by the City Council on the first reading this 14th day of October, 2008.

PASSED by the City Council on the second reading this 27th day of October, 2008.

THE CITY OF BILLINGS:

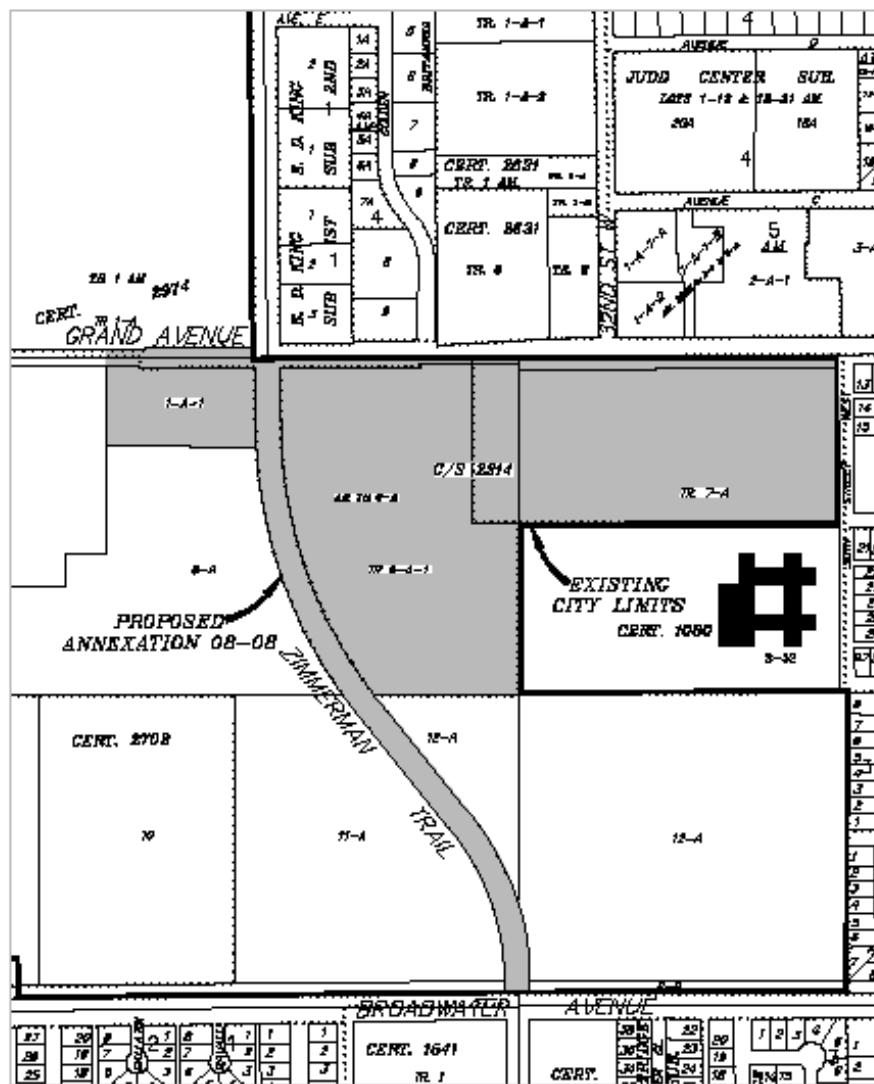
Ron Tussing, MAYOR

ATTEST:

BY: _____
Cari Martin, CITY CLERK

(AN 08-08)

EXHIBIT A





CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: Exempt Plat of Amended Lot 7, Lyons Subdivision

DEPARTMENT: Planning and Community Services

PRESENTED BY: Dave Green, Planner I

PROBLEM/ISSUE STATEMENT: On July 28, 2008, Karen Cabell and Morrison Maierle, Incorporated submitted Lyons Subdivision Exempt Plat of Amended Plat of Lot 7, taking in a portion of city owned property, located in the SW1/4 of the SW1/4 of Section 29, Township 1N, Range 26 East, which is a portion of the City's Leavens Reservoir site. The approximately 10,000 square foot parcel of City land was approved for sale to Karen Cabell by the City Council on May 27, 2008. The applicants' property is located at 3011 Lyons Lane off of Rimrock Road. The applicant and agent is Karen Cabell. Morrison Maierle, Incorporated is providing engineering services.

ALTERNATIVES ANALYZED: Pursuant to Section 73-3-101, MCA, certain divisions of land, which would otherwise constitute a subdivision, are exempt from local subdivision review, provided that they meet the criteria of the exemption being requested. In this case, a lot line relocation is being requested in order to create one larger parcel of Lot 7, in Lyons Subdivision.

FINANCIAL IMPACT: The financial impact will be minimal. The tax revenue increase for the city will be minimal for the residential property versus city owned property.

RECOMMENDATION

Pursuant to Section 76-3-207(1)(e), staff recommends that the City Council approve the exempt plat relocating a lot line and authorizing the mayor to sign the Amended Plat.

Approved By: **City Administrator** _____ **City Attorney** _____

INTRODUCTION

On July 28, 2008, Karen Cabell and Morrison Maierle, Incorporated, submitted Lyons Subdivision Exempt Plat of Amended Plat of Lot 7, taking in a portion of city owned property, located in the SW1/4 of the SW1/4 of Section 29, Township 1N, Range 26 East. The property is a portion of the City's Leavens Reservoir site. The approximately 10,000 square foot parcel of City land has been approved by the City Council for sale to Karen Cabell. The subject property is located at Rimrock Road and Normal Avenue, north of MSU-B campus. The land to be purchased lies north of the reservoir and is currently vacant land.

BACKGROUND

Pursuant to Section 73-3-101, MCA, certain divisions of land, which would otherwise constitute a subdivision, are exempt from local subdivision review, provided that they meet the criteria of the exemption being requested. In this case, the exemption is a lot line relocation to take in 10,000 square feet of city owned land.

On May 27, 2008, City Engineering staff came before the City Council with the request that the land be made available for sale to Karen Cabell. Ms. Cabell contacted the city asking if she could purchase additional land behind her home to increase the size of her yard. When Engineering staff investigated the site, it was determined that the existing yard was encroaching on city property. Ms. Cabell wished to purchase the additional property to maintain the existing yard and to have additional property to enlarge the back yard. After a public hearing and discussion, the City Council approved the land sale to Ms. Cabell on May 27, 2008. A comparative market analysis established that the property value is \$2.08 per square foot. This survey will be used to accurately determine the total square footage of the purchase area and subsequently the total purchase price. If the total square footage of the purchase area is 10,000 square feet the total sale price would be \$20,800.

This plat is being presented to the City Council for approval and signature to complete the platting portion of the sale of land to Ms. Cabell.

RECOMMENDATION

Pursuant to Section 76-3-207(1)(e), staff recommends that the City Council approve the lot line relocation.



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Preliminary Subsequent Minor Plat E. D. King Subdivision, 3rd Filing

DEPARTMENT: Planning and Community Services

PRESENTED BY: David Green, Planner I

PROBLEM/ISSUE STATEMENT: On September 15, 2008, the Planning Division received an application for a subsequent minor plat approval for E. D. King Subdivision, 3rd Filing, which contains three lots on approximately 91,476 square feet (2.10 acres) of land for professional office development. The proposed subdivision is located on the south east corner of the intersection of Avenue E and Zimmerman Trail. The owner is Speculators, Inc. The representing agent is Engineering Incorporated.

ALTERNATIVES ANALYZED: In accordance with state law, the City Council has 35 working days to act upon this minor plat; the 35 working day review period for the proposed plat ends on November 3, 2008. State and City subdivision regulations also require that preliminary plats be reviewed using specific criteria, as stated within this report. The City may not unreasonably restrict an owner's ability to develop land if the subdivider provides evidence that any identified adverse effects can be mitigated. Within the 35 day review period, the City Council is required to:

1. Approve;
2. Conditionally Approve; or
3. Deny the Preliminary Plat

FINANCIAL IMPACT: Should the City Council approve the preliminary plat, the subject property may further develop under private ownership, resulting in additional tax revenues.

RECOMMENDATION

Staff recommends conditional approval of the preliminary subsequent minor plat of E. D. King Subdivision 3rd Filing, and adoption of the Findings of Fact as presented in the staff report to the City Council.

Approved by: _____ **City Administrator** _____ **City Attorney** _____

ATTACHMENTS

- A. Preliminary Plat
- B. Findings of Fact
- C. Mayor's Approval Letter

INTRODUCTION

On September 15, 2008, the Planning Division received an application for a subsequent minor plat for E. D. King Subdivision, 3rd Filing, which contains three lots on approximately 91,476 square feet (2.10 acres) of land for professional office development. The proposed subdivision is located on the southeast corner of the intersection of Avenue E and Zimmerman Trail. The surrounding property zoning is; North, Residential 8000 (R-80), South, Community Commercial (CC), East, R-80, and West, Agriculture Open (A-1) property still in the county across Zimmerman Trail.

PROCEDURAL HISTORY

- The preliminary plat application was submitted to the Planning Division on September 15, 2008.
- The City Council will consider the preliminary plat application on October 27, 2008.

BACKGROUND

General location:	Southeast corner of the intersection of Avenue E and Zimmerman Trail
Legal Description:	Lot 2, E. D. King Subdivision, 2 nd Filing
Subdivider:	Speculators Inc.
Owner:	Same
Engineer and Surveyor:	Engineering Incorporated
Existing Zoning:	Residential Professional (RP)
Existing land use:	Vacant/New Construction
Proposed land use:	Professional Offices
Gross area:	91,476 square feet
Net area:	91,476 square feet
Proposed number of lots:	3
Lot size:	Max: 62,521 square feet (1.43 acres) Min.: 11,380 square feet (.26 acres)
Parkland requirements:	A parkland dedication is not required, as this is a commercial, subsequent minor subdivision.

ALTERNATIVES ANALYSIS

One of the purposes of the City's subdivision review process is to identify potential negative effects of property being subdivided. When negative effects are identified it is the subdivider's responsibility to mitigate those effects. Various City departments have reviewed this application and provided input on effects and mitigation. The Findings of Fact, which are presented as an attachment, discuss the potential negative impacts of the subdivision and the following conditions of approval are recommended as measures to further mitigate any impacts.

RECOMMENDED CONDITIONS OF APPROVAL

Pursuant to Section 76-3-608(4), MCA, the following conditions are recommended to reasonably minimize potential adverse impacts identified within the Findings of Fact:

1. To ensure the provision of easements and minimize effects on public health and safety, the subdivider shall work with the City Engineering Division and the private utility companies to determine suitable locations for utility easements. These easements shall be depicted on the final plat. (*Recommended by the Engineering Division*)
2. To ensure the provision of easements and to minimize the effects on public health and safety, the subdivision final plat shall show existing utilities on the site in easements where the existing utilities cross from one lot into another lot. (*Recommended by the Engineering Division*)
3. To ensure public health and safety the applicant shall provide reciprocal access agreement documents. The reciprocal access agreement documents will be provided prior to final plat. (*Recommended by the Planning Division*)
4. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Engineering Departments to clarify the documents and bring them into the standard acceptable format.
5. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of City of Billings, and the laws and Administrative Rules of the State of Montana.

VARIANCES REQUESTED

None requested

STAKEHOLDERS

A public hearing is not scheduled for the City Council meeting; however nearby property owners may attend the City Council meeting. The Planning Division has received no public comments or questions regarding the proposed subdivision.

CONSISTENCY WITH ADOPTED POLICIES OR PLANS

Consistency with the Growth Policy, the 2005 Transportation Plan Update, and Heritage Trail Plan are discussed within the Findings of Fact.

RECOMMENDATION

Staff recommends conditional approval of the preliminary plat of E. D. King Subdivision 3rd Filing, and adoption of the Findings of Fact as presented in the staff report to the City Council.

ATTACHMENTS

- A. Preliminary Plat
- B. Findings of Fact
- C. Mayor's Approval Letter

ATTACHMENT A

E.D. KING SUBDIVISION, 3RD FILING
BEING TRACT C-1 OF AMENDED TRACT C OF AMENDED CERTIFICATE OF SURVEY NO. 1011
SITUATED IN THE SE 1/4 SECTION 34, T. 1 N., R. 25 E., P.M.M.
BILLINGS, YELLOWSTONE COUNTY, MONTANA

E.D. KING SUBDIVISION, 3RD FILING

NORTH

20
10
0
20
4
BILLINGS, MONTANA

BASIS OF BEARING: AMENDED TRACT C COS 1011

- = FOUND SURVEY MONUMENT, AS NOTED
- = PLAT 50% OF THE CAP DESIGNATED MARKED WITH THE LICENSE NUMBER OF THE UNDESIGNED LAND SURVEYOR AND ENGINEERING INC BILLINGS MT.
- = SET INTERSECTION MONUMENT 5/8" REAR WITH CAP MARKED WITH THE LICENSE NUMBER OF THE UNDESIGNED LAND SURVEYOR AND ENGINEERING INC BILLINGS MT. WILL BE REPLACED WITH CAP MONUMENT BOX UPON COMPLETION OF STREET IMPROVEMENTS.

PLATAIA

PLA DAI

BRITANNIA SUBDIVISION
LOT 1A, BLK 4

PROPOSED LAND USE	EXISTING LAND USE	PERMITTING REQUIREMENTS
AG/RESIDENTIAL	AG/RESIDENTIAL	PERMIT
CC/RP	CC/RP	PERMIT

EJ_KNG_360.jpg

ATTACHMENT B

Findings of Fact

Staff is forwarding the recommended Findings of Fact for E. D. King Subdivision 3rd Filing for review and approval by the City Council. These findings are based on the preliminary plat application and supplemental documents and address the review criteria required by the Montana Subdivision and Platting Act (76-3-608, MCA) and the City of Billings Subdivision Regulations (Sections 23-304(c), BMCC).

A. What are the effects on agriculture, local services, the natural environment, wildlife and wildlife habitat and public health, safety and welfare? [MCA 76-3-608 (3) (a) and (23-302(H)(2), BMCC)]

1. Effect on agriculture and agricultural water user facilities

The subject property currently has new construction taking place on proposed Lot 2A with the rest of the site being vacant. Irrigation facilities on the property have been abandoned. There is no anticipated effect on remaining irrigation facilities in the area..

2. Effect on local services

- a. **Utilities** – Water and sanitary sewer for the proposed subdivision shall come from the existing mains located in Avenue E. The property owner will be responsible for all connection fees and improvement cost as stated in the SIA.
- b. **Storm water** – Storm drainage shall be provided by a combination of surface drainage and curbs and gutter, drained to underground storm drains. All drainage improvements shall comply with the provisions of the City of Billings Stormwater Management Manual and Section 23-706, BMCC.
- c. **Solid waste** - The City of Billings will provide solid waste collection and disposal. The City's landfill has adequate capacity for this waste.
- d. **Streets** - Access to the proposed subdivision shall be a shared access with Lot 1, E. D. King Subdivision, 2nd Filing, onto Zimmerman Trail. This access is on the southwest corner of proposed Lot 2A. There is a one foot no access easement along Avenue E and the majority of Zimmerman Trail frontage for this proposed subdivision. The subdivider will be responsible for its share of the costs for improvements on Avenue E.
- e. **Emergency services** - The Billings Police and Fire Departments will respond to emergencies within the proposed subdivision. The nearest fire station is located at 604 South 24th Street West (Station #5). The subdivision is located within the ambulance service area of American Medical Response.
- f. **Schools** –Schools will not be affected by this subdivision as it is proposed to be a professional office development.
- g. **Parks and Recreation** - A parkland dedication is not required, as this is a commercial development.

3. Effect on the natural environment

The proposed subdivision should have only minor effects on the natural environment, as there will be short term air and noise pollution associated with construction on the property.

4. Effect on wildlife and wildlife habitat

The proposed subdivision should not affect wildlife or habitat. There are no known endangered or threatened species on the property.

5. Effect on the public health, safety and welfare

The subdivision should not negatively affect public health or safety. The subject property is not within a mapped floodway or flood zone. There are no obvious threats to public health, safety or welfare.

B. Was an Environmental Assessment required? (76-3-210, MCA) (23-901, BMCC)

The proposed subdivision is exempt from the requirement for an Environmental Assessment pursuant to Section 76-3-210, MCA and 23-901, BMCC.

C. Does the subdivision conform to the Yellowstone County-City of Billings 2003 Growth Policy, the Urban Area 2000 Transportation Plan and the Heritage Trail Plan? (23-301, BMCC)

1. Yellowstone County-City of Billings 2003 Growth Policy

The proposed subdivision is consistent with the following goals of the Growth Policy:

- a. Predictable land use decisions that are consistent with neighborhood character and land use patterns. (Land Use Element Goal, Page 5)

The proposed residential professional offices on the site are consistent with the commercial uses to the south and the multi-family residential neighborhoods to the north and east. The RP zoning of this proposed subdivision will provide a buffer between more intense commercial uses to the south and the existing residential neighborhood to the north and east.

- b. New developments that are sensitive to and compatible with the character of adjacent City neighborhoods and County townsites. (Land Use Element Goal, Page 6)

The subject property is zoned RP. The property to the north is zoned R-80, to the east is zoned R-80, to the south CC with A-1 to the west. The proposed subdivision that is zoned RP creates a good separation from the residential zoning to the north and the CC zoning to the south. The property owner has held neighborhood meetings to meet surrounding property owners concerns in an effort to be compatible with the character of the adjacent neighborhoods.

- c. Contiguous development focused in and around existing population centers separated by open space. (Land Use Element Goal, Page 6)

The subject property is within the City and there are existing residential properties to the east and north with proposed commercial developments to the south; this proposed subdivision will provide services next to existing businesses and residential and could be considered as infill development.

2. Urban Area 2005 Transportation Plan Update

The proposed subdivision adheres to the goals and objectives of the 2005 Transportation Plan Update and preserves the street network and street hierarchy specified within the plan.

3. Heritage Trail Plan

The Heritage Trail Master Plan has no trail through this portion of the subdivision. The trail is identified along the east side of the existing Zimmerman Trail along the frontage of this subdivision and is already constructed.

D. Does the subdivision conform to the Montana Subdivision and Platting Act and to local subdivision regulations? [MCA 76-3-608 (3) (b) and (23-301, BMCC)]

The proposed subdivision, with the proposed conditions, satisfies the requirements of the Montana Subdivision and Platting Act and conforms to the design standards specified in the local subdivision regulations. The subdivider and the local government have complied with the subdivision review and approval procedures set forth in the local and state subdivision regulations.

E. Does the subdivision conform to sanitary requirements? [(23-408, BMCC)]

The property is served by City of Billings water, sewer and solid waste services.

F. Does the proposed subdivision conform to all requirements of the zoning in effect? [(23-402, BMCC)]

The subject property is located within RP zoning districts and complies with the standards set forth in Section 27-308, BMCC.

G. Does the proposed plat provide easements for the location and installation of any utilities? [MCA 76-3-608 (3) (c) and (23-410(A)(1), BMCC)]

The City Engineering Division will work with the utility companies to provide easements in acceptable locations on the plat. The City maintains that utility easements provided on front lot lines creates conflicts with sanitary water and sewer lines and have requested that they be located on the rear and sides of lots for public health and safety. Condition #1 requires the subdivider to work with the City Engineering Division and the private

utility companies to provide acceptable utility easements on the plat. The site currently has a building under construction with utilities in place. The water and sanitary sewer lines shown on the plat cross into portions of the proposed lots on the north end of the subject property. Condition #2 is recommending the existing utility lines on the site have easements shown on the final plat where they cross property lines of the proposed lots on the north end of the subject property.

H. Does the proposed plat provide legal and physical access to each parcel within the subdivision and notation of that access on the plat? [MCA 76-3-608 (3) (d) and (23-406, BMCC)]

Since there is no access allowed onto Avenue E at this time, accesses from Zimmerman Trail will provide legal and physical access to the lots via reciprocal access agreements with the property owners to the south. The reciprocal access agreement documents will be provided prior to final plat approval, see Condition #3.

CONCLUSIONS OF FINDING OF FACT

- The preliminary plat of E. D. King Subdivision 3rd Filing does not create any adverse impacts that warrant denial of the subdivision.
- The proposed subdivision conforms to several goals and policies of the 2003 Growth Policy and does not conflict with the 2005 Transportation Plan Update or the Heritage Trail Plan.
- The proposed subdivision complies with state and local subdivision regulations, local zoning, and sanitary requirements and provides legal and physical access to each lot.
- Any potential negative or adverse impacts will be mitigated with the proposed conditions of approval.

Approved by the Billings City Council, October 27, 2008

Ron Tussing, Mayor

ATTACHMENT C
Mayor's Approval Letter

October 28, 2008

Speculators Incorporated
Doug Neuhoff
2502 17th Street West
Billings, Montana 59102

Dear Applicant:

On October 27, 2008, the Billings City Council conditionally approved the preliminary plat of E. D. King Subdivision 3rd Filing, subject to the following conditions of approval:

1. To ensure the provision of easements and minimize effects on public health and safety, the subdivider shall work with the City Engineering Division and the private utility companies to determine suitable locations for utility easements. These easements shall be depicted on the final plat. (*Recommended by the Engineering Division*)
2. To ensure the provision of easements and to minimize the effects on public health and safety, the subdivision final plat shall show existing utilities on the site in easements where the existing utilities cross from one lot into another lot. (*Recommended by the Engineering Division*)
3. To ensure public health and safety the applicant shall provide reciprocal access agreement documents. The reciprocal access agreement documents will be provided prior to final plat. (*Recommended by the Planning Division*)
4. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Engineering Departments to clarify the documents and bring them into the standard acceptable format.
5. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of City of Billings, and the laws and Administrative Rules of the State of Montana.

Should you have questions please contact Dave Green with the Planning Division at 247-8654 or by email at greend@ci.billings.mt.us.

Sincerely,

Ron Tussing, Mayor

AGENDA ITEM: **O**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Preliminary Plat of Amended Lots 5 & 6, Block 1, Bellville Subdivision

DEPARTMENT: Planning and Community Services

PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: On September 15, 2008, the subdivider, Ray & Dave LLC, applied for preliminary plat approval for Bellville Subdivision, Amended Lots 5 & 6, Block 1. The proposed subsequent minor subdivision creates 3 new lots from 2 lots that were previously platted as part of Bellville Subdivision in 2006. The subject property is generally located north of Wicks Lane and just west of Hawthorne Lane in the Heights. The currently vacant property is zoned Residential-7000 (R-70) and surrounding lots are developed in single-family and duplex residential uses. The representing agent is Blueline Engineering, LLC. The City Council will review the preliminary plat, and approve, conditionally approve, or deny the proposed subdivision at the October 27, 2008, meeting.

ALTERNATIVES ANALYZED: State and City subdivision regulations require that preliminary plats be reviewed using specific criteria, as stated within this report. The City may not unreasonably restrict an owner's ability to develop land if the subdivider provides evidence that any identified adverse effects can be mitigated.

FINANCIAL IMPACT: Should the City Council approve the preliminary plat, the subject property may further develop, resulting in additional tax revenues for the City.

RECOMMENDATION

Planning staff recommends conditional approval of the preliminary plat of Amended Lots 5 & 6, Block 1, Bellville Subdivision, and adoption of the Findings of Fact as presented in the staff report to the City Council.

Approved by: **City Administrator** _____ **City Attorney** _____

ATTACHMENTS

A. Preliminary Plat

B. Findings of Fact

C. Mayor's Approval Letter

INTRODUCTION

On September 15, 2008, the subdivider, Ray & Dave LLC, applied for preliminary plat approval for Bellville Subdivision, Amended Lots 5 & 6, Block 1. The proposed subsequent minor subdivision creates 3 new lots from 2 lots that were previously platted as part of Bellville Subdivision in 2006. The subject property is generally located north of Wicks Lane and just west of Hawthorne Lane in the Heights. The currently vacant property is zoned Residential-7000 (R-70) and surrounding lots are developed in single-family and duplex residential uses.

PROCEDURAL HISTORY

- A pre-application meeting was held on August 28, 2008, to discuss the proposal.
- The preliminary plat application was submitted to the Planning Division on September 15, 2008.
- The City Council will consider the preliminary plat on October 27, 2008.

BACKGROUND

General location:	North of Wicks Lane, west of Hawthorne Lane in the Heights.
Legal Description:	Lots 5 & 6, Block 1, Bellville Subdivision, located in SE ¼ of S14, T1N, R26E
Subdivider/Owner:	Ray and Dave, LLC
Engineer and Surveyor:	Blueline Engineering, LLC
Existing Zoning:	R-70
Existing land use:	vacant
Proposed land use:	Single-family and two-family residential
Gross area:	0.689 acres
Proposed number of lots:	3
Lot sizes:	Max: 13,390 square feet Min.: 7,000 square feet
Parkland requirements:	Parkland dedication requirements were met with the previous subdivision

ALTERNATIVES ANALYSIS

One of the purposes of the City's subdivision review process is to identify potentially negative effects of property subdivision. When negative effects are identified it is the

subdivider's responsibility to mitigate those effects. Various City departments reviewed this application and provided input on effects and mitigation. The Planning Division staff develops and recommends conditions of approval that are based on departmental comments. The Findings of Fact, which are presented as an attachment, discuss the potential negative impacts of the subdivision and the following conditions of approval are recommended as measures to further mitigate any impacts.

RECOMMENDED CONDITIONS OF APPROVAL

Pursuant to Section 76-3-608(4), MCA, the following conditions are recommended to reasonably minimize potential adverse impacts identified within the Findings of Fact:

1. The "Block 1" label shall be added to the final plat title and on the face of the plat and to all subdivision name references in the Subdivision Improvements Agreement. (*Required by BMCC, 23-Appendix J.2.*)
2. To minimize effects on local services, the location of the centralized mailbox shall be reviewed and approved by the United States Postal Service prior to final plat approval. (*Recommended by the United States Postal Service*)
3. To minimize effects on local services, a new water meter pit shall be installed on Lot 5-B to the specifications of the County Water District of Billings Heights prior to final plat approval.
4. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
5. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

VARIANCES REQUESTED

None

STAKEHOLDERS

A public hearing is not required for minor subdivisions. However, any interested party may review the proposal and make comments. The Planning Division has received no public input on this proposal at the time this staff report was completed.

CONSISTENCY WITH ADOPTED POLICIES OR PLANS

Consistency with the Growth Policy, the Transportation Plan and Heritage Trail Plan is discussed within the Findings of Fact.

RECOMMENDATION

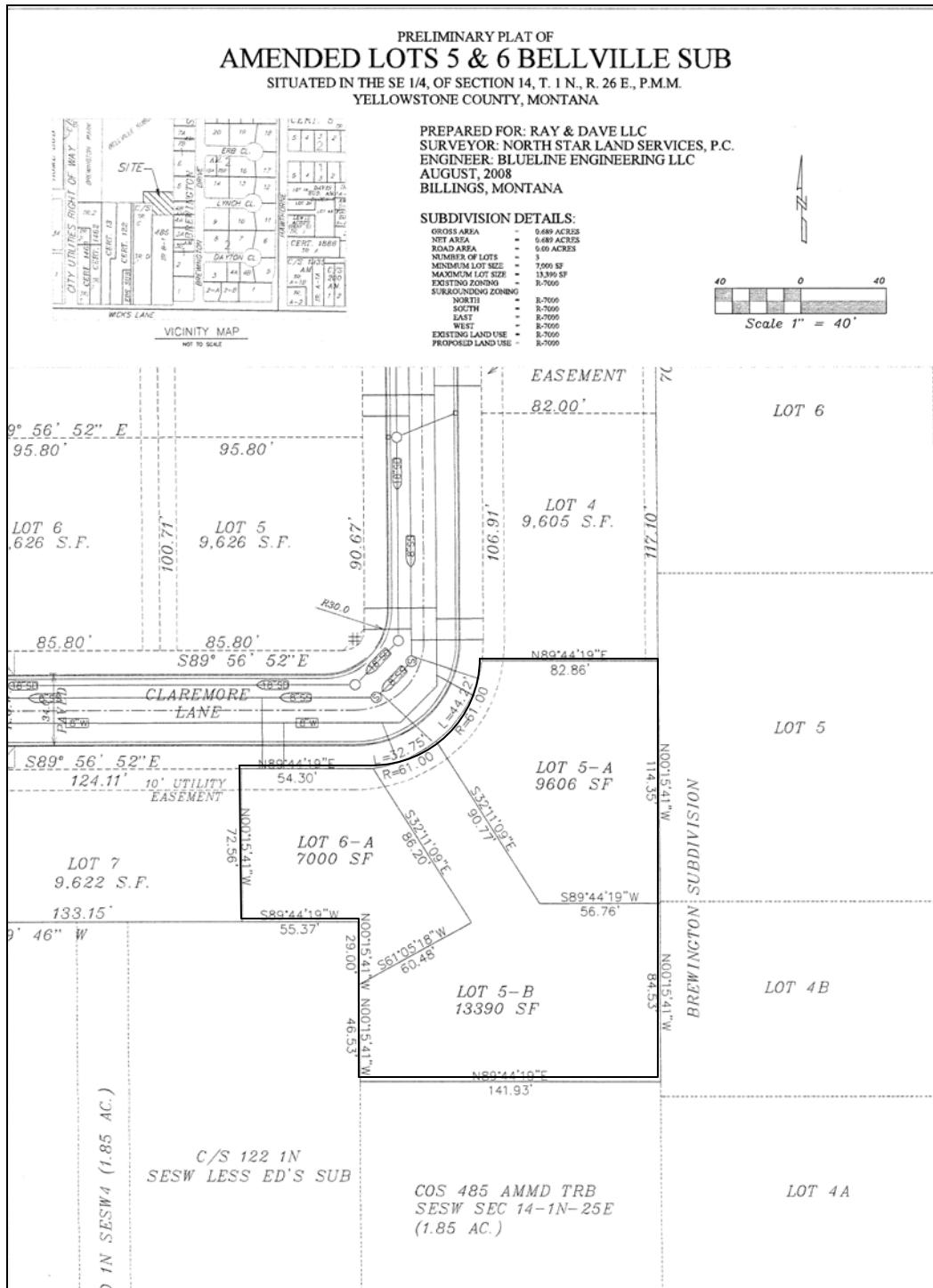
Planning staff recommends conditional approval of the preliminary plat of Amended Lots 5 & 6, Block 1, Bellville Subdivision, and adoption of the Findings of Fact as presented in the staff report to the City Council.

ATTACHMENTS

- A. Preliminary Plat
- B. Findings of Fact
- C. Mayor's Approval Letter

ATTACHMENT A

Preliminary Plat of Amended Lots 5 & 6, Block 1, Bellville Subdivision



ATTACHMENT B

Findings of Fact

The Planning staff is forwarding the recommended Findings of Fact for Amended Lots 5 & 6, Block 1, Bellville Subdivision for review and approval by the City Council. These findings are based on the preliminary plat application and supplemental documents and address the review criteria required by the Montana Subdivision and Platting Act (76-3-608, MCA) and the City of Billings Subdivision Regulations (23-303(H)(2), BMCC).

A. What are the effects on agriculture, local services, the natural environment, wildlife and wildlife habitat and public health, safety and welfare? [MCA 76-3-608 (3) (a) and BMCC 23-304 (c) (1)]

1. Effect on agriculture and agricultural water user facilities

The land to be subdivided was historically used for pasture land. However, since the original subdivision was created in 2006, many surrounding lots have been developed in residential uses. There are no water user facilities apparent onsite.

2. Effect on local services

- a. **Utilities** – Water services can be provided by the County Water District of Billings Heights for the new lots. The District manager notes that two water meters exist and one new one will need to be installed on Lot 5-B. This has been added as a recommended condition of approval (**Condition #3**).

Sanitary sewer service can be provided by connecting to the existing sewer lines in Claremore Lane. No new sewer extensions are proposed at this time.

MDU will provide gas services, and Northwestern Energy will provide electric services to the subdivision in the future.

- b. **Storm water** – There is an 18-inch storm drain line in Claremore Lane, fronting the new lots. A storm water master plan has been prepared for when the lots are re-platted. All improvements shall satisfy the criteria set forth by the *City of Billings Stormwater Management Manual* and will be subject to review and approval by the Engineering Department.
- c. **Solid waste** – The City of Billings will provide solid waste collection and disposal. The City's landfill has adequate capacity for this waste.
- d. **Streets** – The lots within the proposed subdivision front Claremore Lane, which is a local residential street built to City standards. There are no further street improvements required for this subdivision.
- e. **Emergency services** – The Billings Police and Fire Departments will respond to emergencies within the proposed subdivision. The nearest fire station is located

at 1601 St. Andrews Drive (Station #6). The subdivision is located within the ambulance service area of American Medical Response (AMR).

- f. **Schools** –School District #2 provides educational services to elementary through high school students. Bitterroot Elementary School, Castle Rock Middle School, and Skyview High School will serve the children in this subdivision. The principal from Bitterroot Elementary reviewed the proposal and indicated that the current enrollment at the school is 318 students, and the maximum enrollment is 322. He also noted that the subdivision is not currently on a bus route, nor is one proposed to be expanded. However, the school is within walking distance to the west, and there is a trail corridor leading to it.
- g. **Parks and Recreation** – There are no parkland requirements for minor subdivisions.
- h. **Mail Delivery** - The United States Postal Service will provide postal service to the subdivision and has requested centralized mail delivery boxes. It is recommended as a condition of approval that the location of the central mailbox be reviewed and approved by the Postal Service prior to final plat approval (**Condition #2**).

3. Effect on the natural environment

The creation of these three lots should have minimal effects on the natural environment. The lots are within an already established neighborhood.

4. Effect on wildlife and wildlife habitat

There are no known endangered or threatened species on the property. There is a note in the SIA that warns future lot owners of the presence of deer and antelope in the area, which may cause damage to their landscaping. This subdivision should have a minimal effect on wildlife and wildlife habitat, as it is on the edge of an urbanized area.

5. Effect on the public health, safety and welfare

The subdivision is located in an area with no known natural hazards.

B. Was an Environmental Assessment required? [(MCA 76-3-603 and BMCC 23-304 (c) (1)]

The proposed subdivision is exempt from the requirement for an Environmental Assessment pursuant to Section 76-3-210, MCA.

C. Does the subdivision conform to the Yellowstone County-City of Billings 2003 Growth Policy, the Urban Area 200 Transportation Plan Update and the Heritage Trail Plan? [BMCC 23-304 (c) (3)]

1. Yellowstone County-City of Billings 2003 Growth Policy

The proposed subdivision is consistent with the following goals of the Growth Policy:

- d. **Goal: More housing and business choices within each neighborhood (p. 6).**
- b. **Goal: New developments that are sensitive to and compatible with the character of adjacent City neighborhoods and County townsites (p. 6).**
- c. **Goal: Contiguous development focused in and around existing population centers separated by open space (p. 6).**

2. Urban Area 2005 Transportation Plan Update

The proposed subdivision adheres to the goals and objectives of the 2005 Transportation Plan and preserves the street network and street hierarchy specified within the plan.

3. Heritage Trail Plan

The proposed subdivision lies within the jurisdiction of the Heritage Trail Plan. No trail corridors are identified on the plan within this subdivision. However, a park area on the southwestern edge of the subdivision is adjacent to the Kiwanis Trail and a pedestrian connection from the Subdivision to the Kiwanis Trail and to the street system to Bitterroot Elementary is in place.

D. Does the subdivision conform to the Montana Subdivision and Platting Act and to local subdivision regulations? [MCA 76-3-608 (3) (b) and BMCC 23-304 (c) (4)]

The proposed subdivision satisfies the requirements of the Montana Subdivision and Platting Act and conforms to the design standards specified in the local subdivision regulations. The subdivider and the local government have complied with the subdivision review and approval procedures set forth in the local and state subdivision regulations.

a. Does the subdivision conform to sanitary requirements? [BMCC 23-304 (c) (5)]

The subdivision will eventually utilize the Heights Water District system, the City's sanitary sewer system, and the City's solid waste collection and disposal services. All services are approved and regulated by state and federal authorities.

F. Does the proposed subdivision conform to all requirements of the zoning in effect? [BMCC 23-304 (c) (6)]

The subject property is located within the R-70 zoning districts and shall comply with the standards set forth in Section 27-308, BMCC.

G. Does the proposed plat provide easements for the location and installation of any utilities? [MCA 76-3-608 (3) (c) and BMCC 23-304 9 (c) (7)]

The subdivider will provide utility easements as requested by MDU and NWE.

H. Does the proposed plat provide legal and physical access to each parcel within the subdivision and notation of that access on the plat? [MCA 76-3-608 (3) (d) and BMCC 23-304 9 (c) (8)]

Legal and physical access is provided to the proposed lots from Claremore Lane.

CONCLUSIONS OF FINDING OF FACT

- The preliminary plat of Amended Lots 5 & 6, Block 1, Bellville Subdivision does not create any adverse impacts that warrant denial of the subdivision.
- The proposed subdivision conforms to several goals and policies of the 2003 Growth Policy and does not conflict with the Transportation or Heritage Trail Plans.
- The proposed subdivision complies with state and local subdivision regulations, local zoning, and sanitary requirements and provides legal and physical access to each lot.
- Any potential negative or adverse impacts will be mitigated with the proposed conditions of approval.

Approved by the Billings City Council, October 27, 2008.

Ron Tussing, Mayor

ATTACHMENT C
Mayor's Approval Letter

October 28, 2008

Ray & Dave, LLC
P.O. Box 21371
Billings, MT 59104

Dear Applicant:

On October 27, 2008, the Billings City Council conditionally approved the preliminary plat of Amended Lots 5 & 6, Block 1, Bellville Subdivision. The conditions of approval are as follows:

1. The "Block 1" label shall be added to the final plat title and on the face of the plat and to all subdivision name references in the Subdivision Improvements Agreement.
2. To minimize effects on local services, the location of the centralized mailbox shall be reviewed and approved by the United States Postal Service prior to final plat approval.
3. To minimize effects on local services, a new water meter pit shall be installed on Lot 5-B to the specifications of the County Water District of Billings Heights prior to final plat approval.
4. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
5. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

Should you have questions please contact Juliet Spalding with the Planning Department at 247-8684 or by email at spaldingj@ci.billings.mt.us.

Sincerely,

Ron Tussing, Mayor

Pc: Marshall Phil, Blueline Engineering, LLC
Tom Kelly, North Star Land Services, PC



**CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008**

TITLE: Preliminary Plat of High Sierra Subdivision, 5th Filing
DEPARTMENT: Planning and Community Services
PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: On August 1, 2008, the subdivider, High Sierra II, Inc., applied for preliminary major plat approval for High Sierra Subdivision, 5th Filing. The proposed subdivision creates 73 lots out of 19.7 acres, and is the first filing in a larger master planned area. The subject property is located on the north side of Matador Avenue, between Cortez Avenue and Vesca Way, in the Heights. The property is zoned Residential-7000-Restricted (R-70-R). The owner is Dover Ranch and the representing agent is Engineering, Inc. The Yellowstone County Board of Planning conducted a public meeting and reviewed the proposal at its September 23, 2008, meeting. The City Council will review the preliminary plat, and approve, conditionally approve, or deny the proposed subdivision at this meeting.

ALTERNATIVES ANALYZED: State and City subdivision regulations require that preliminary plats be reviewed using specific criteria, as stated within this report. The City may not unreasonably restrict an owner's ability to develop land if the subdivider provides evidence that any identified adverse effects can be mitigated.

FINANCIAL IMPACT: Should the City Council approve the preliminary plat, the subject property may further develop, resulting in additional tax revenues for the City.

RECOMMENDATION

The City-County Planning Board recommends conditional approval of the preliminary plat of High Sierra Subdivision, 5th Filing, and adoption of the Findings of Fact as presented in the staff report to the City Council.

Approved by: City Administrator _____ City Attorney _____

ATTACHMENTS

- A. Preliminary Plat
- B. Findings of Fact
- C. Mayor's Approval Letter

INTRODUCTION

On August 1, 2008, the subdivider, High Sierra II, Inc., applied for preliminary major plat approval for High Sierra Subdivision, 5th Filing. The proposed subdivision creates 73 lots out of 19.7 acres, and is the first filing in a larger master planned area. The subject property is located on the north side of Matador Avenue, between Cortez Avenue and Vesca Way, in the Heights.

PROCEDURAL HISTORY

- A pre-application meeting was held on June 19, 2008 to discuss the proposal.
- The preliminary plat application was submitted to the Planning Division on August 1, 2008.
- A departmental review meeting was conducted on August 14, 2008.
- The preliminary plat was resubmitted with revisions based on department reviews on August 21, 2008.
- The Planning Board will review the plat on September 9, 2008.
- The Planning Board will conduct a public hearing on September 23, 2008, and forward a recommendation to the City Council.
- The City Council will consider the preliminary plat on October 27, 2008.

BACKGROUND

General location:

Along the north side of Matador Avenue, between Cortez Avenue and Vesca Way, in the Heights.

Legal Description:

Lot 1, Block 1 of Marisela Subdivision, located in the N ½ of S17, T1N, R26E

Subdivider:

High Sierra II, Inc. (Gary Oakland, Pres.)

Owner:

Dover Ranch

Engineer and Surveyor:

Engineering, Inc.

Existing Zoning:

R-70-R

Existing land use:

Pasture/range land

Proposed land use:

Single-family residential

Gross and Net area:

19.72 acres/ 14.67 acres

Proposed number of lots:

73

Lot size:

Max: 15,305 square feet
Min.: 7,012 square feet

Parkland requirements:	1.61 acres of parkland dedication is required; cash in lieu is proposed for this filing.
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ALTERNATIVES ANALYSIS

One of the purposes of the City's subdivision review process is to identify potentially negative effects of property subdivision. When negative effects are identified it is the subdivider's responsibility to mitigate those effects. Various City departments reviewed this application and provided input on effects and mitigation. The Planning Division staff develops and recommends conditions of approval that are based on departmental comments. The Findings of Fact, which are presented as an attachment, discuss the potential negative impacts of the subdivision and the following conditions of approval are recommended as measures to further mitigate any impacts.

RECOMMENDED CONDITIONS OF APPROVAL

Pursuant to Section 76-3-608(4), MCA, the following conditions are recommended to reasonably minimize potential adverse impacts identified within the Findings of Fact:

1. Section III.D. of the Subdivision Improvements Agreement (SIA) should be amended to include the dollar amount of the cash contribution for the proportionate share of the signal at the intersection of Wicks Lane and St. Andrews Drive.
2. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
3. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

VARIANCES REQUESTED

None

STAKEHOLDERS

A public hearing was held by the City-County Planning Board on September 23, 2008. One adjacent neighbor attended and asked questions about the proposal and future Master Plan for the larger High Sierra community. The questions were in regard to parks, street lighting, and future construction of Wicks Lane. It was discussed that the proposed Master Plan for the entire 400-acre multiple-filing subdivision addresses parkland provisions. Approximately 30 acres of parkland is required through the subdivision process which will be met through both land dedication and cash-in-lieu of land contribution. This proposal was satisfactory to the developer, the Parks Department staff, and the adjacent neighbor. In terms of street lighting, the developer indicated that there are no requirements or plans to install street lights within the subdivision, but if in the future the homeowners wished to establish a lighting district, they could petition to do so.

Lastly, in regard to the construction of Wicks Lane westward from its terminus just beyond High Sierra Boulevard, the developer was not certain on a completion date. Those details would be at the discretion of City Engineering and the property owners adjacent to that right-of-way. The subject property does not front Wicks Lane.

CONSISTENCY WITH ADOPTED POLICIES OR PLANS

Consistency with the Growth Policy, the Transportation Plan and Heritage Trail Plan is discussed within the Findings of Fact.

RECOMMENDATION

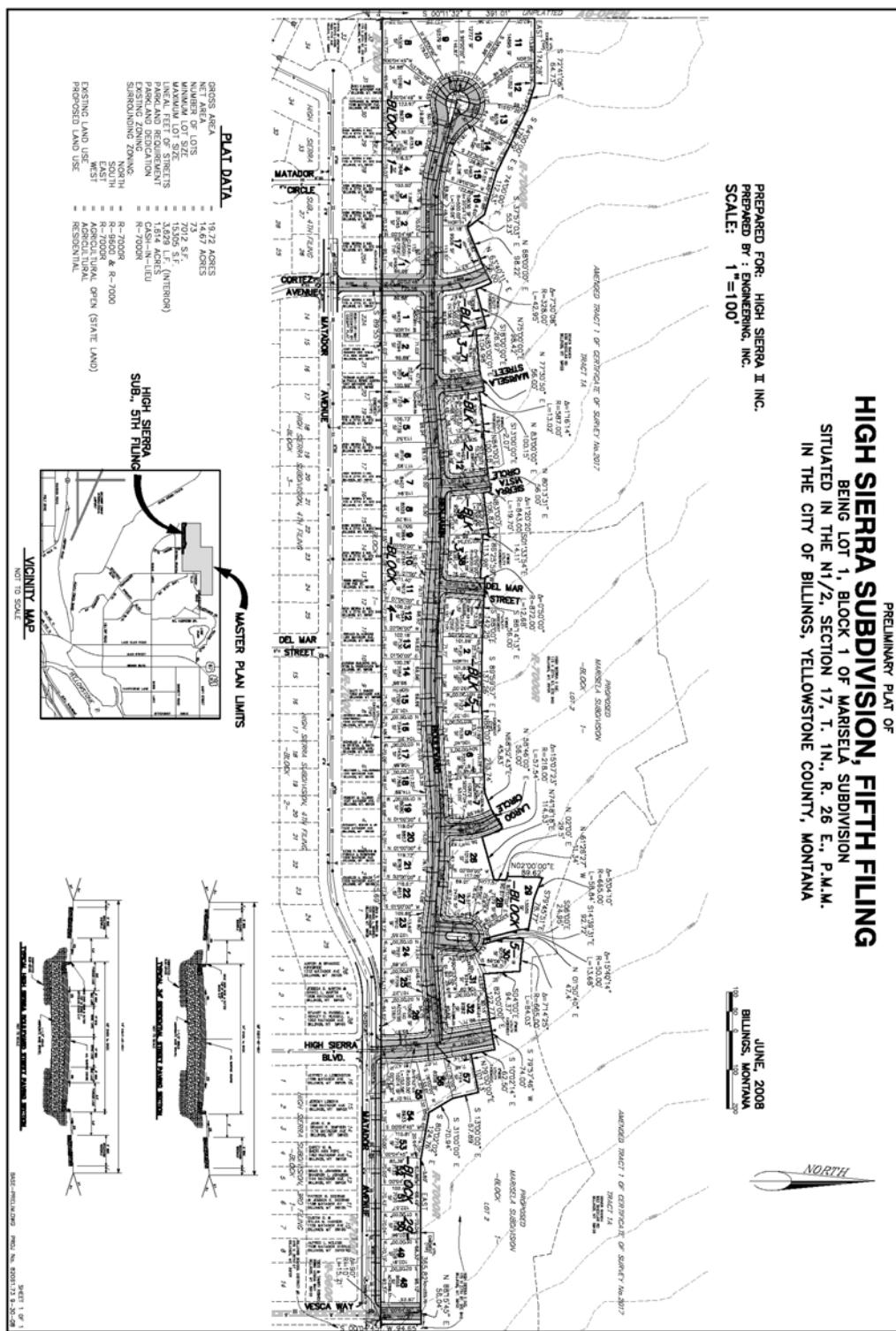
The City-County Planning Board recommends conditional approval of the preliminary plat of High Sierra Subdivision, 5th Filing, and adoption of the Findings of Fact as presented in the staff report to the City Council.

ATTACHMENTS

- A. Preliminary Plat
- B. Findings of Fact
- C. Mayor's Approval Letter

ATTACHMENT A

Preliminary Plat of High Sierra Subdivision, 5th Filing



ATTACHMENT B

Findings of Fact

The Planning staff has prepared and the City-County Planning Board is forwarding the recommended Findings of Fact for High Sierra Subdivision, 5th Filing for review and approval by the City Council. These findings are based on the preliminary plat application and supplemental documents and address the review criteria required by the Montana Subdivision and Platting Act (76-3-608, MCA) and the City of Billings Subdivision Regulations (23-303(H)(2), BMCC).

A. What are the effects on agriculture, local services, the natural environment, wildlife and wildlife habitat and public health, safety and welfare? [MCA 76-3-608 (3) (a) and BMCC 23-304 (c) (1)]

1. Effect on agriculture and agricultural water user facilities

The subject property is currently used for dryland pasture by the Dover Ranch operation to the north. It, along with approximately 380 additional acres was annexed by the City and rezoned for single-family residential uses in 2007. It is adjacent to similar residential uses to the south and east and will provide community housing in an area that is not particularly productive for agriculture. It should not have a negative effect on the agricultural industry.

The BBWA irrigation ditch is located approximately 1½ mile northeast of the property. This subdivision does not contain any ditches or water shares, and therefore will not have an effect on agricultural water user facilities.

2. Effect on local services

- a. **Utilities** –Water services to the subject property are provided by the City of Billings. The existing 8-inch main in Matador Avenue will be extended in three locations (at Cortez Ave., High Sierra Blvd., and Vesca Way) to serve the new interior streets. The improvements are subject to the review and approval of the City Public Works--Distribution and Collection Division during the time of construction. As proposed, the City of Billings finds that the water main extensions are acceptable.
 - a. Sanitary sewer service will be provided by connecting to two existing 8-inch sewer mains in Matador Ave. As proposed, the City of Billings Public Works-- Distribution and Collection Division finds the sewer main extensions to be acceptable.
 - b. MDU will provide gas services, and Yellowstone Valley Electric Cooperative will provide electric services to the subdivision. Easements have been shown on the face of the plat that are acceptable to these utility providers.

- b. **Storm water** –An overall Storm Water Master Plan was developed by the applicant’s engineer for the entire master planned 400-acre development, of which this is the first filing. To mitigate stormwater runoff for the proposed 73 lots, storm drains will be installed to carry water to the north to detention ponds, with an eventual outfall to Five Mile Creek. This and all other drainage improvements shall satisfy the criteria set forth by the *City of Billings Stormwater Management Manual* and will be subject to review and approval by the Engineering Division.
- c. **Solid waste** – The City of Billings will provide solid waste collection and disposal. The City’s landfill has adequate capacity for this waste.
- d. **Streets** – The proposed subdivision makes three connections to Matador Ave. at Cortez Ave., High Sierra Blvd., and Vesca Way, and funnels traffic to High Sierra Boulevard and eventually to Wicks Lane. High Sierra Blvd. is designated as a Collector street on the Area Transportation Classification map and will be continued north within the subdivision and constructed to Collector street standards. All of the remaining streets are considered local residential streets and will be constructed to those standards. Typical street sections for these streets are found on the face of the preliminary plat.
 - a. A Traffic Accessibility Study (TAS) was completed for this subdivision and based on its findings, it was determined that the installation of a signal at the intersection of Wicks Lane and St. Andrews should be considered in the next two years. Based on the proportionate share calculations, High Sierra Subdivision, 5th Filing should contribute 2% of the construction costs. City Engineering has requested that a dollar amount for this contribution be added to the final SIA document (**Condition #1**).
- e. **Emergency services** – The Billings Police and Fire Departments will respond to emergencies within the proposed subdivision. The nearest fire station is located at 1601 St. Andrews Drive (Station #6). The subdivision is located within the ambulance service area of American Medical Response (AMR).
- f. **Schools** –School District #2 provides educational services to elementary through high school students. Sandstone Elementary School, Castle Rock Middle School, and Skyview High School will serve the children in this subdivision. Responses from these schools were not received at the time this report was written.
- g. **Parks and Recreation** – The parkland dedication requirement for this subdivision amounts to 1.614 acres (11% of the net area of 14.67 acres). The subdivider proposes to provide cash in lieu of land dedication for this

filings, and is in the process of finalizing a Park Master Plan for the remaining filings. The Parks Department has reviewed the proposal for cash in lieu of land and is satisfied with it. PRPL also has been working with the subdivider to develop a mutually agreeable park master plan for the future filings.

- h. **Mail Delivery** - The United States Postal Service will provide postal service to the subdivision and has requested centralized delivery facilities or individual mail boxes if there is room to have their delivery truck out of traffic. These details will need to be addressed prior to mail delivery to the subdivision.

3. Effect on the natural environment

The subject property is relatively level prairie land adjacent to the city limits on its south and east sides. A geotechnical evaluation was done for the subject area in June of 2008, to investigate soil, rock, and groundwater conditions and provide recommendations to support design and construction of foundation and drainage elements. The major finding that study indicated was that the area is characterized by moderate to highly expansive claystone bedrock. Construction on this type bedrock can result in foundation damage if not properly engineered, therefore close attention to the recommendations provided in the report is critical. The City Building Official has reviewed this geotechnical report, and made notes on its recommendations that will be enforced at the time of building permit issuance and subsequent inspections.

4. Effect on wildlife and wildlife habitat

There are no known endangered or threatened species on the property. There is a note in the SIA that warns future lot owners of the presence of deer and antelope in the area, which may cause damage to their landscaping. This subdivision should have a minimal effect on wildlife and wildlife habitat, as it is in an area that is rapidly urbanizing.

5. Effect on the public health, safety and welfare

The subdivision is located in an area with no known natural hazards.

B. Was an Environmental Assessment required? [(MCA 76-3-603 and BMCC 23-304 (c) (1)]

The proposed subdivision is exempt from the requirement for an Environmental Assessment pursuant to Section 76-3-210, MCA.

C. Does the subdivision conform to the Yellowstone County-City of Billings 2003 Growth Policy, the Urban Area 200 Transportation Plan Update and the Heritage Trail Plan? [BMCC 23-304 (c) (3)]

1. Yellowstone County-City of Billings 2003 Growth Policy

The proposed subdivision is consistent with the following goals of the Growth Policy:

- a. Goal: More housing and business choices within each neighborhood (p. 6).**

The proposed subdivision would provide for more housing choices within this portion of the city.

- b. Goal: New developments that are sensitive to and compatible with the character of adjacent City neighborhoods and County townsites (p. 6).**

The subject property is adjacent to similar sized residential lots.

- c. Goal: Contiguous development focused in and around existing population centers separated by open space (p. 6).**

The subject property is adjacent to existing similar development within the City and its development will help to complete road and utility loops, and create a neighborhood.

- d. Goal: Safe and efficient transportation system characterized by convenient connections and steady traffic flow (p. 10).**

The proposed subdivision will provide public streets improved to city standards that connect with existing streets, thus creating more efficient transportation connections and ease of traffic flow.

2. Urban Area 2005 Transportation Plan Update

The proposed subdivision adheres to the goals and objectives of the 2005 Transportation Plan and preserves the street network and street hierarchy specified within the plan.

3. Heritage Trail Plan

The proposed subdivision lies within the jurisdiction of the Heritage Trail Plan. No trail corridors are identified on the plan within this subdivision.

D. Does the subdivision conform to the Montana Subdivision and Platting Act and to local subdivision regulations? [MCA 76-3-608 (3) (b) and BMCC 23-304 (c) (4)]

The proposed subdivision satisfies the requirements of the Montana Subdivision and Platting Act and conforms to the design standards specified in the local subdivision regulations. The subdivider and the local government have complied with the subdivision review and approval procedures set forth in the local and state subdivision regulations.

E. Does the subdivision conform to sanitary requirements? [BMCC 23-304 (c) (5)]

The subdivision will utilize the City's water system. It will also make use of the City's sanitary sewer, and solid waste collection and disposal services. All services are approved and regulated by state and federal authorities.

F. Does the proposed subdivision conform to all requirements of the zoning in effect? [BMCC 23-304 (c) (6)]

The subject property is located within the R-70-R zoning district and shall comply with the standards set forth in Section 27-308, BMCC.

G. Does the proposed plat provide easements for the location and installation of any utilities? [MCA 76-3-608 (3) (c) and BMCC 23-304 9 (c) (7)]

The subdivider has provided utility easements as requested by MDU, NWE, and YVEC on the face of the plat.

H. Does the proposed plat provide legal and physical access to each parcel within the subdivision and notation of that access on the plat? [MCA 76-3-608 (3) (d) and BMCC 23-304 9 (c) (8)]

Legal and physical access is provided to all of the proposed lots.

CONCLUSIONS OF FINDING OF FACT

- The preliminary plat of High Sierra Subdivision, 5th Filing does not create any adverse impacts that warrant denial of the subdivision.
- The proposed subdivision conforms to several goals and policies of the 2003 Growth Policy and does not conflict with the Transportation or Heritage Trail Plans.
- The proposed subdivision complies with state and local subdivision regulations, local zoning, and sanitary requirements and provides legal and physical access to each lot.
- Any potential negative or adverse impacts will be mitigated with the proposed conditions of approval.

Approved by the Billings City Council, October 27, 2008.

Ron Tussing, Mayor

ATTACHMENT C
Mayor's Approval Letter

October 28, 2008

Dover Ranch
633 Sindelar Road
Billings, MT 59105

High Sierra II, Inc.
174 N. 27th St., Suite 900
Billings, MT 59101

Dear Applicant:

On October 27, 2008, the Billings City Council conditionally approved the preliminary plat of High Sierra Subdivision, 5th Filing. The conditions of approval are as follows:

1. Section III.D. of the Subdivision Improvements Agreement (SIA) should be amended to include the dollar amount of the cash contribution for the proportionate share of the signal at the intersection of Wicks Lane and St. Andrews Drive.
2. Minor changes may be made in the SIA and final documents, as requested by the Planning, Legal or Public Works Departments to clarify the documents and bring them into the standard acceptable format.
3. The final plat shall comply with all requirements of the City of Billings Subdivision Regulations, rules, regulations, policies, and resolutions of the City of Billings, and the laws and Administrative Rules of the State of Montana.

Should you have questions please contact Juliet Spalding with the Planning Department at 247-8684 or by email at spaldingj@ci.billings.mt.us.

Sincerely,

Ron Tussing, Mayor

Pc: Gary Owen
 Mac Fogelsong, Engineering, Inc.



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Final Plat of Romero Subdivision

DEPARTMENT: Planning and Community Services

PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: The final plat for Romero Subdivision is being presented to Council for approval. On May 8, 2008, the Planning Division held a pre-application meeting for this proposed subdivision where City staff and other agencies reviewed the proposal. It was determined at the meeting that this subdivision qualifies for "Expedited Review." According to the City Subdivision Regulations, Section 23-305, proposed subdivisions creating no more than 2 lots on previously unplatte land may qualify for the expedited review process, if certain conditions are also met. This process allows a subdivider to skip the preliminary plat review process, and go straight to the final plat review following a pre-application meeting.

This subdivision will create 2 lots at the southwest corner of State Avenue and Van Buren Street. The property currently has a single-family home and a Mexican restaurant located on it. The subdivision will split the two uses. The property is zoned R-9600 and Neighborhood Commercial. The subdivider are Guy and Lloyd Romero and the representing agent is Harlan Lund. Upon City Council approval, these documents are appropriate as to form for filing with the Clerk and Recorder.

FINANCIAL IMPACT: Should the City Council approve the final plat, the subject property may further develop, resulting in additional tax revenues for the City.

RECOMMENDATION

Staff recommends that the City Council approve the final plat of Romero Subdivision.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT

A: Plat

ATTACHMENT A

Romero Subdivision

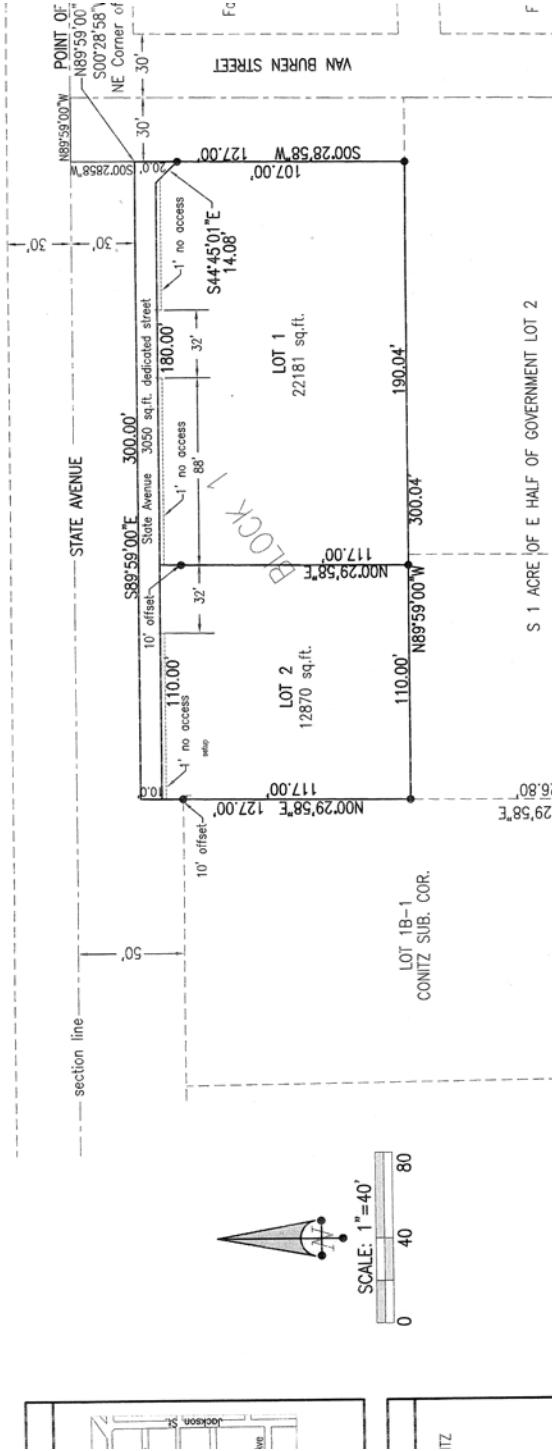
BEING THE NORTH 1 ACRE OF EAST HALF OF GOVERNMENT LOT 2
IN NE1/4 SECTION 9, T.1S., R.26E., P.M.M.
CITY OF BILLINGS, YELLOWSTONE COUNTY, MONTANA

for: Guy C. Romero, & Lloyd B. Romero
by: Harlan M. Lund, R.L.S. 1827S

Scale: 1"=40'
Billings, Montana

May 2008

PLAT OF





CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Final Plat of Marisela Subdivision

DEPARTMENT: Planning and Community Services

PRESENTED BY: Juliet Spalding, AICP, Planner II

PROBLEM/ISSUE STATEMENT: The final plat for Marisela Subdivision is being presented to Council for approval. On August 25, 2008, the City Council conditionally approved a preliminary plat for 4 lots on approximately 68 acres for single-family residential development. The subject property is located on the north side of Matador Drive and Annandale Road, in the northwest corner of the Heights. The property is zoned R-9600 and R-7000 Restricted. The subdivider is High Sierra Development Corporation and the representing agent is Engineering, Inc. Upon City Council approval, these documents are appropriate as to form for filing with the Clerk and Recorder.

FINANCIAL IMPACT: Should the City Council approve the final plat, the subject property may further develop, resulting in additional tax revenues for the City.

RECOMMENDATION

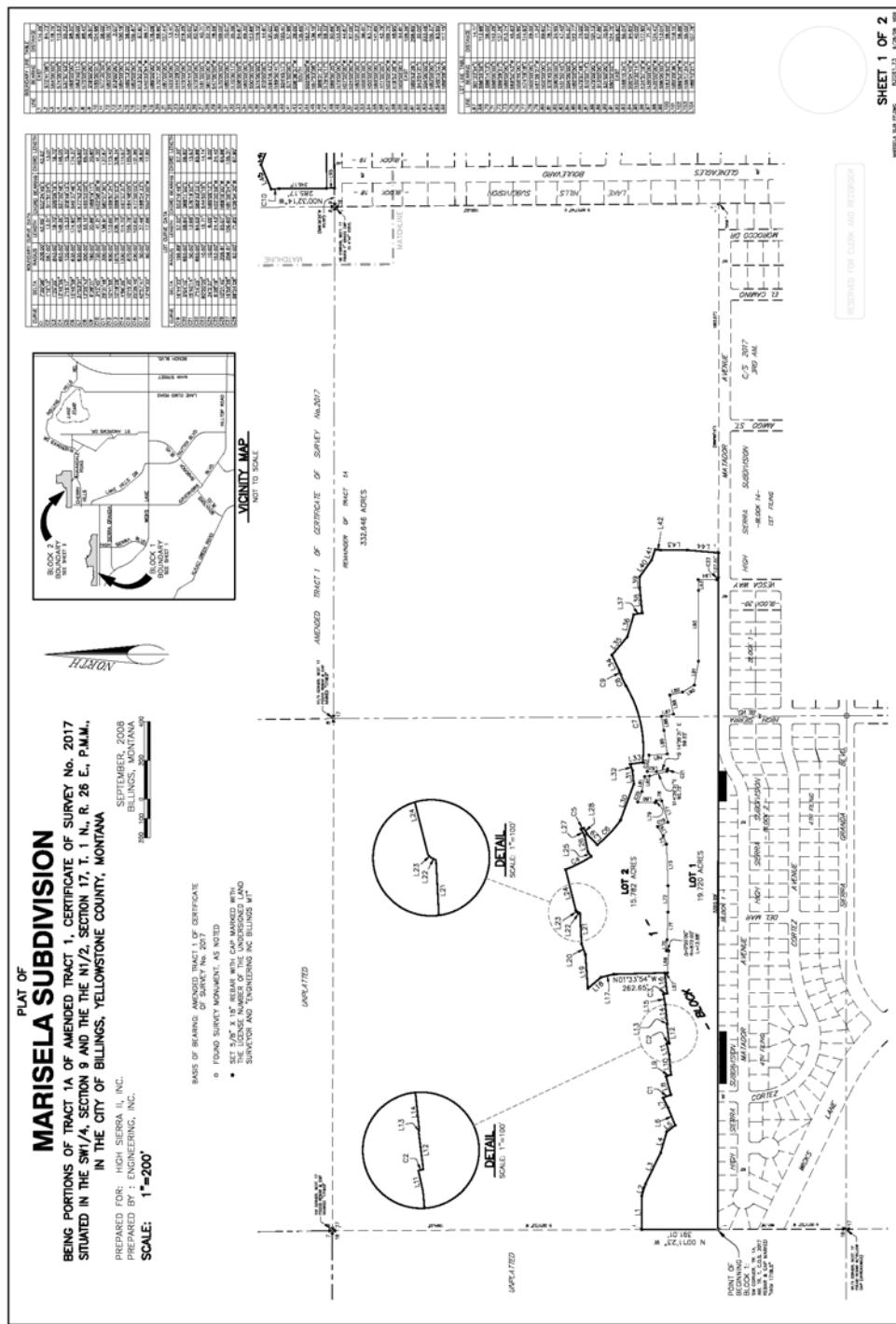
Staff recommends that the City Council approve the final plat of Marisela Subdivision.

Approved By: **City Administrator** **City Attorney**

ATTACHMENT

A: Plat

ATTACHMENT A





CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Payment of Claims

DEPARTMENT: Administration – Finance Division

PRESENTED BY: Patrick M. Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: Claims in the amount of \$2,206,110.91 have been audited and are presented for your approval for payment. A complete listing of the claims dated September 26, 2008, are on file in the Finance Department.

RECOMMENDATION

Staff recommends that Council approve Payment of Claims.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Payment of Claims

DEPARTMENT: Administration – Finance Division

PRESENTED BY: Patrick M. Weber, Financial Services Manager

PROBLEM/ISSUE STATEMENT: Claims in the amount of \$1,146,850.54 have been audited and are presented for your approval for payment. A complete listing of the claims dated October 03, 2008, are on file in the Finance Department.

RECOMMENDATION

Staff recommends that Council approve Payment of Claims.

Approved By: **City Administrator** **City Attorney**



AGENDA ITEM: **R3**

CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
October 27, 2008

SUBJECT: Payment of Claims

DEPARTMENT: Municipal Court

PRESENTED BY: Melinda Balter, Acting Municipal Court Administrator

PROBLEM/ISSUE STATEMENT: Claims in the amount of \$1,169,500.47 have been audited and are presented for your approval for payment. A complete listing of the claims dated April 1, 2008, to September 30, 2008, is on file in the Municipal Court. Claims include payments to individual victims and businesses for restitution, disbursement of surcharges and revenues and return of bonds posted to ensure court appearance.

RECOMMENDATION

Staff recommends that Council approve Payment of Claims.

Approved By: **City Administrator** **City Attorney**



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Public Hearing and Approval of MET Transit Route & Schedule Changes and Fare Increases

DEPARTMENT: Aviation and Transit Department

PRESENTED BY: Thomas H. Binford, A.A.E., Director of Aviation and Transit

PROBLEM/ISSUE STATEMENT: During August 2007, the MET fixed route bus schedules were adjusted to comply with an arbitration ruling to provide the MET drivers with additional breaks throughout the day. Since these changes resulted in customer complaints and ridership declines, MET Transit contracted with LSC Transportation Consultants, Inc. to complete an evaluation of the existing routes and schedules to determine if service improvements could be accomplished while still complying with the break requirements. LSC was also retained to review and compare MET's fare structure to similarly sized transit systems and to make recommendations on possible fare adjustments.

LSC began this analysis by first reviewing MET's current and projected ridership, operational, and financial data. They also conducted boarding and alighting counts for each route, surveyed riders and employees, and completed a community wide telephone survey. Six community meetings were held throughout the study process to review the information that had been gathered and to receive input. LSC has now completed their analysis and recommends that minor route and time changes be made to include, adding additional commuter runs, deleting some unproductive service, moving several midday runs to more productive routes, and undertaking some route realignments. Attachment A contains a complete list of these proposed route and schedule changes.

Staff also recommends that the City Council approve a fare increase along with the recommended service improvements. During our July 2008 community meetings, three fare adjustment options were presented to the public. Our recommended adjustments (Attachment B) have taken into account many of the comments we received during these meetings to include, implementing a gradual fare increase, and the importance of keeping the elderly and disabled pass rates as low as possible. Even after the proposed increase, our fares are comparable or lower than many of the cities we surveyed, and our monthly pass rates still offer a significant discount for our core customers.

In order to establish new fares, a resolution authorizing the Mayor to execute the proposal is included (Attachment C). There is also a requirement for a public hearing for this proposal. Public hearing notices were published in the *Billings Times* on September 25 and October 2, advertising a public hearing on October 27, 2008.

FINANCIAL IMPACT: MET Transit receives funding through a local transit mill levy, Federal and State grants, and fares. The proposed route and schedule changes would not have a financial impact on our current budget, as these changes will be made without increasing our current budget. Staff estimates that the recommended fare increases will generate an additional \$57,600 per year in new fare revenue.

RECOMMENDATION

Staff recommends that following the public hearing, Council approve the recommended route and schedule changes and a resolution authorizing the fare increases to be implemented on February 1, 2009.

Approved By: **City Administrator** _____ **City Attorney** _____

Attachments:

- A: Route and Schedule Changes
- B: Fare Increases
- C: Authorizing Resolution

ATTACHMENT A

RECOMMENDED ROUTE AND SCHEDULE CHANGES

Proposed Route Changes

Route 2P-Rimrock

- Serve both directions on Rimrock Road. Poly would no longer be served east of Rehberg. Poly is already served by Route 3D-Crosstown and is within walking distance of Rimrock.

Route 6P-Lewis

- This route would be modified to go south on 32nd Street West to Monad Road and no longer serve the College of Technology. Route 7D-Broadwater will continue to serve the College of Technology.

Route 10D-Southside

- To avoid duplication and add additional service, the inbound route will travel further east on State Avenue to South 27th Street to downtown. This will now provide new service to a number of businesses who have requested it.

Route 16P-Main

- This route will now travel on North 25th Street instead of North 23rd Street because of more passenger demand.

Route 18M-Heights

- This route will now travel on North 25th Street instead of North 23rd Street because of more passenger demand.

Proposed Schedule Changes

Route 2P-Rimrock

- A commuter run would be added in the morning and in the evening to help people traveling to and from jobs downtown. This route will also eliminate some unproductive midday service.

Route 4P-Parkhill

- This route will no longer have service throughout the day, but would have peak service only. Passenger activity shows very low boardings during midday, with a productivity of less than two passengers per service hour.

Route 7D-Broadwater

- This route will have one extra inbound and outbound run added in the mid-morning to allow for better transfers.

Route 9D-Central

- This route is proposed to have increased service during the midday. The current schedule provides for midday service in only one direction, and this proposed schedule change is to operate in both directions throughout the day.

Route 12P-Overland

- This route will add an early morning run to help people traveling to work, including Wells Fargo Operations Center. This route will become a peak service route with some unproductive midday service eliminated.

Route 13P-Southwest

- This route will eliminate the early morning run and two midday runs, but add a mid-morning run to allow for better transfers and connections with Route 12D-Overland.

Route 14P-Alkali

- This route will eliminate the unproductive midday run as it has very low demand.

Route 18M-Heights

- On this route, an early morning run has been added to help support the commute trips from the Heights to downtown.

ATTACHMENT B**RECOMMENDED FARE INCREASES**

<u>CATEGORY</u>	<u>EXISTING</u>	<u>PROPOSED</u>
Adult Cash	\$.75	\$ 1.25
*E&D Cash	\$.25	\$.50
Regular Pass	\$18.00	\$22.00
*E&D Pass	\$ 3.00	\$ 6.00
Student Pass	\$10.00	\$15.00
10-Ride Ticket	\$ 6.00	\$10.00

*Elderly & Disabled

Fare Comparison

<u>TOPEKA, KS</u>	<u>GREAT FALLS, MT</u>	<u>LA CROSSE, WI</u>
Adult Cash \$ 1.25	Adult Cash \$ 1.00	Adult Cash \$ 1.25
E&D Cash \$.60	E&D Cash \$.50	E&D Cash \$.60
Regular Pass \$33.00	Regular Pass \$30.00	Regular Pass \$30.00
E&D Pass \$22.00	E&D Pass \$22.00	E&D Pass \$20.00
Student Pass (None offered)	Student Pass \$25.00	Student Pass (None offered)
10-Ride Ticket \$11.00	11-Ride Ticket \$10.00	10-Ride Ticket (None offered)

ATTACHMENT C

AUTHORIZING RESOLUTION

RESOLUTION O8-_____

A RESOLUTION ESTABLISHING NEW FARES TO BE CHARGED BY THE CITY OF BILLINGS FOR TRANSIT SERVICES PROVIDED BY THE AVIATION AND TRANSIT DEPARTMENT AND ESTABLISHING AN EFFECTIVE DATE.

WHEREAS, the City of Billings provides certain transit services to the public through the MET Transit system, which is operated by the Aviation and Transit Department; and

WHEREAS, it is in the best interest of the citizens of the City that the City provide said services and that the City Council establish new fares for said services; and

WHEREAS, the City Council having duly considered the matter,

NOW THEREFORE, BE IT RESOLVED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

1. **FARES:** The new fares to be charged by the City for Transit service provided by the MET Transit system are hereby established as follows:

MET Transit One-Way Fares:

Adults/Children 6 Years & Older	\$1.25
Senior Citizens (62 Years & Older) and Disabled Citizens	\$0.50
Pre-School Under 6 Years	Free
Transfers	Free
10-Ride Ticket	\$10.00
Regular Monthly Pass	\$22.00

Senior Citizens (62 Years & Older) and
Disabled Pass \$6.00

Student Pass \$15.00

2. **TERM OF FARES:** Said fares shall continue in full force and effect until changed by the City Council by subsequent resolution.

3. **EFFECTIVE DATE:** Said fees established shall be effective February 1, 2009.

4. **REPEALER:** All resolutions inconsistent herewith, including Resolution 91-16441, are hereby repealed.

APPROVED AND PASSED by the City Council of the City of Billings this 27th day of October 2008.

THE CITY OF BILLINGS:

BY: _____
RON TUSSING, MAYOR

ATTEST:

CARI MARTIN, CITY CLERK

CERTIFICATE

The undersigned duly qualified and acting City Clerk of the City of Billings certifies that the foregoing is a true and correct copy of a Resolution, adopted at a legally convened meeting of the Billings City Council held on October 27, 2008.

If applicant has an Official Seal, impress here.

(Seal)

Signature of Recording Officer

Title of Recording Clerk

Date



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Zone Change #850 - Sexually Oriented Businesses (SOB) – Amending Sections 27-201, 27-405(g) and 27-611 BMCC

DEPARTMENT: Planning and Community Services

PRESENTED BY: Nicole Cromwell, AICP, Planner II, Zoning Coordinator

PROBLEM/ISSUE STATEMENT: Section 27-611 of the Unified Zoning Regulations regulates where Sexually Oriented Businesses (SOBs) may locate within the City of Billings. The existing regulations are intended to diminish the negative secondary effects of SOBs throughout the city. In June 2008, a deficiency in the existing regulations allowed an SOB to locate in the Central Business District zone at 222 N Broadway. This location is within 1,000 feet of a school, a park, three churches and the Parmly Billings Public Library. Section 27-611 does not currently regulate commercial establishments that offer or provide live adult nude or semi-nude performances. The City does prohibit this activity only where alcoholic beverages are served (Section 3-304 BMCC). The City Zoning Commission held a public hearing on the amendment to the zoning regulation on October 7, 2008, and voted 5-0 to recommend approval to the City Council.

ALTERNATIVES ANALYZED: The City Zoning Commission held a public hearing on the proposed text amendment on October 7, 2008. The City Zoning Commission is forwarding a recommendation of approval. The City Council may choose to approve, deny or delay action for thirty (30) days on the proposed text amendment.

FINANCIAL IMPACT: There should be no direct financial impact to the City as a result of the new zoning regulation.

RECOMMENDATION

The Zoning Commission on a 5-0 vote recommends that the City Council approve Zone Change #850.

Approved by: _____ **City Administrator** _____ **City Attorney**

ATTACHMENTS:

A: Terry McKay v City of Billings – Court Decision

B: GIS Maps
C: Ordinance

INTRODUCTION

Section 27-611 of the Unified Zoning Regulations regulates where Sexually Oriented Businesses (SOBs) may locate within the City of Billings. The existing regulations are intended to diminish the negative secondary effects of SOBs throughout the city. In June 2008, a deficiency in the existing regulations allowed an SOB to locate in the Central Business District zone at 222 N Broadway. This location is within 1,000 feet of a school, a park, three churches and the Parmly Billings Public Library. Section 27-611 does not currently regulate commercial establishments that offer or provide live adult nude or semi-nude performances. The City does prohibit this activity only where alcoholic beverages are served (Section 3-304 BMCC). The City Zoning Commission held a public hearing on the amendment to the zoning regulation on October 7, 2008, and voted 5-0 to recommend approval to the City Council.

On June 23, 2008, the City Council adopted an interim ordinance to eliminate the deficiency in the existing SOB zoning regulations until a permanent ordinance could be drafted and submitted to the Zoning Commission and City Council for review and public hearings. Montana state law allows cities to adopt interim zoning as a matter of urgency without the review of the City Zoning Commission or the publication of several legal ads in advance of the City Council public hearing. Interim zoning regulations may only be in effect for six (6) months from the date of enactment. The current interim zoning will expire on December 23, 2008.

PROCEDURAL HISTORY

- On June 23, 2008, the City Council approved an interim zoning ordinance to regulate adult cabarets as Sexually Oriented Businesses.
- The Planning Division prepared and submitted a permanent amendment to the SOB zoning regulation on September 2, 2008.
- Interested parties were notified in writing of the proposed change on September 17, 2008 and September 29, 2008.
- On October 7, 2008, the City Zoning Commission conducted the public hearing.
- On October 20, 2008, the City Council discussed the ordinance at a Work Session.
- The City Council will hold a public hearing and 1st reading of the ordinance on October 27, 2008, and make a decision on the changes to the SOB zoning regulations.
- If the Zone Change ordinance is approved on first reading, the City Council will consider it for second reading on November 10, 2008.
- If adopted on 2nd reading, the new ordinance will go into effect on December 10, 2008.

ALTERNATIVES ANALYSIS

The City Council may approve, deny, or delay the adoption of the changes to the SOB regulations. If adopted, 3 of the 5 existing SOBs will become nonconforming locations and will have to relocate within the 4-year amortization period. These businesses are Aphrodite's Inferno at 222 N Broadway (Central Business District zone), Broadway Books at 5364 Midland Road (Highway Commercial zone) and Ball Book Store at 15 S

26th Street (Central Business District zone). The Highway Commercial zone and the Central Business District zone will no longer allow the location of SOBs.

BACKGROUND

Cities throughout the state and nationally are allowed to regulate SOBs within their jurisdictions so long as the regulation does not infringe on the rights of individuals guaranteed by state law or by the U.S. Constitution. There are numerous and lengthy court decisions surrounding the local regulation of SOBs and in particular live entertainment that features nude or semi-nude dancing. The courts have consistently held that any local ordinance regulating live nude entertainment must not unduly impair the exercise of First Amendment rights. A city may, through zoning, provide for adequate separation from areas that are incompatible with a Sexually Oriented Business such as residential neighborhoods, parks, libraries, churches and schools. A city may not prohibit SOBs from locating within its jurisdiction either through required separation distances or through outright prohibition in the code.

Section 27-611 was drafted and adopted in April 1992 and minor amendments have occurred since that time. The original regulations allowed SOBs in 4 zoning districts including Central Business District (CBD), Highway Commercial (HC), Controlled Industrial (CI) and Heavy Industrial (HI) so long as those locations could meet minimum separation distances to incompatible uses. Four SOBs existing in 1992 had to relocate based on the new regulations. The ordinance allowed those nonconforming locations 4 years to find a conforming location or close the business. Most business owners moved within the required 4-year amortization period. One owner, Terry McKay, did not move his business out of the nonconforming location and subsequently brought suit against the city in U.S. District Court. The city prevailed in that civil action (Attachment A). The court upheld Billings' reasonable 4-year amortization period for SOBs in nonconforming locations.

Since 1992, the city has adopted and supported a downtown revitalization plan, adopted and expanded Tax Increment Finance (TIF) districts to support downtown improvement and residential uses in the downtown area have grown significantly. In addition, development in HC zoning districts has included approximately 1,600 new acres of retail stores, hotels, restaurants, business services and entertainment located along I-90 between South Billings Boulevard and 32nd Street West. These uses may not be compatible with new or existing SOBs. It appears that development and uses within the CBD zone and the HC zone may no longer be compatible with SOB locations.

The Planning Division staff worked with the Billings GIS Coordinator, Tom Tully, to produce a series of maps to determine whether amendments to the SOB ordinance would still allow sufficient area for the relocation of nonconforming SOBs (Attachment B). The proposed ordinance eliminates SOBs as allowed uses in the CBD and HC zoning districts. Even after eliminating these two zoning districts, there are still 830 acres of land appropriately zoned and separated from residential areas, parks, schools and churches. This represents 31% of the total area in the CI and HI zoning districts within the City limits. This provides a reasonable opportunity for the relocation of nonconforming SOBs

out of the CBD and HC zoning districts and away from incompatible uses. The Planning Division is proposing a 4-year amortization period for these businesses.

Other proposed amendments in the ordinance include clarification of uses requiring separation to include trails, cemeteries, any Planned Development zone, Agriculture Open-Space zones, and any Community Residential Facility (group home). The ordinance adds Adult Cabarets where live nude or semi-nude entertainment as a regulated SOB and defines those terms. The City Attorney has reviewed the proposed ordinance for conformance with existing state law and court decisions.

STAKEHOLDERS

The Zoning Commission held a public hearing on October 7, 2008, on the proposed changes. Planning Staff explained the proposed changes to the Zoning Commission. No one testified in favor or in opposition to the amendment. No written testimony was received by the Planning Division.

RECOMMENDATION

The Zoning Commission on a 5-0 vote recommends that the City Council approve Zone Change #850.

ATTACHMENTS:

- A: Terry McKay v City of Billings – Court Decision
- B: GIS Maps
- C: Ordinance

Attachment A – Terry McKay v City of Billings Court Decision

FILED

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IN THE UNITED STATES DISTRICT COURT JUL 24 1996

FOR THE DISTRICT OF MONTANA

LOU ARENDSEN, Clerk
By
Deputy Clerk

BILLINGS DIVISION

TERRY MCKAY ENTERPRISES,) Cause No. CV 96-55-BLG-JDS
INC., a Montana corporation,)
and TERRY MCKAY,)
Plaintiffs,)
vs.)
CITY OF BILLINGS, MONTANA,) MEMORANDUM AND ORDER
a municipal corporation,) *****
Defendant.)

BACKGROUND

On April 23, 1992, the City of Billings passed an ordinance restricting the location of sexually oriented businesses to three zoning districts: the Central Business District zone, Highway Commercial zone, and Controlled Industrial zone. The ordinance also defined residential zones and prevented sexually oriented businesses from locating within 1000 feet of public libraries, public playgrounds or parks, public or private schools, day-care homes and centers, churches or other places of worship; or from locating within 600 feet of other adult businesses. The ordinance included an amortization period of four years to allow existing businesses time to relocate and come into compliance. The ordinance was passed after the City of Billings conducted extensive research into other cities with similar problems. The Zoning Coordinator ultimately relied on studies from the cities of Houston, Texas, Phoenix, Arizona, Oklahoma City, Oklahoma, and Seattle, Washington, in his recommendation to the City

Council that the ordinance be approved. Included with this study was an assessment of possible relocation sites for existing businesses in Billings. The study and associated map roughly outlined what was presented in detail in Defendant's brief and testimony at hearing; specifically that: (1) 36 acres are available in the downtown business district for relocation, all of which have full services available (city water, electricity, sewer, paved access, and curb and gutter); and (2) 573 acres are available in the west end of Billings for relocation which also have full services available. Total, the City found approximately 609 acres available for relocation which represents 14.5% of all commercial land available in the City of Billings.

Plaintiff Terry McKay Enterprises, Inc., doing business under the trade names of "Ball Book Store and Theater" and "The Other Place," is engaged in the adult entertainment business, selling, exhibiting and distributing books, magazines, newspapers, videotapes and similar materials, many of which are sexually explicit in nature. Plaintiff's store, "The Other Place," is not in compliance with the City ordinance in that it is located within 1000 feet of a defined residential zone. Plaintiff maintains that he has made a good faith effort to relocate, but that it has been virtually impossible under the specific restrictions contained within the ordinance to find a suitable location in which to relocate.

At the time the ordinance was passed in 1992, there were four existing sexually oriented businesses that came within the

definition of the ordinance. All were located in violation of the new ordinance and were granted legal non-conforming status for the four year amortization period. Two of the businesses relocated and are in compliance with the ordinance. Plaintiff's one business has not relocated and continues to be in violation. During the four year amortization period, Plaintiff only requested the assistance of the City Planning Department for zoning clarification on one potential property. Further, Plaintiff admits that he did not consult a real estate agent during the four year amortization period to assist in finding a relocation site.

On March 20, 1996, approximately one month before the expiration of the amortization period, Plaintiff filed this action pursuant to 42 U.S.C. § 1983, challenging the constitutionality of the Billings Code on the grounds of the First and Fifth Amendments to the Constitution. Plaintiff is seeking both declaratory relief, to declare the ordinance unconstitutional, and injunctive relief, to prohibit Defendant City of Billings from enforcing the ordinance against Plaintiff. Plaintiff further filed a Motion for Preliminary Injunction under Rule 65(b), Fed.R.Civ.P., to refrain the Defendant from enforcing the Billings Municipal Code during the pendency of this suit. Defendant, in response to the initial pleading, filed a Motion to Dismiss Plaintiff's claims, asserting that the claims are barred by the appropriate statute of limitations.

Pending before the Court are Defendant's Motion to Dismiss

and Plaintiff's Motion for Preliminary Injunction.

DISCUSSION

I. Motion to Dismiss

The first issue before the Court is whether Plaintiffs' claims are barred by the appropriate statute of limitations. Because no federal limitation period exists for § 1983 suits, the applicable limitations provision is borrowed from the analogous state statute of limitations. Wilson v. Garcia, 471 U.S. 261, 267-68 (1985). Actions brought under § 1983 are best characterized as personal injury actions for limitations purposes. Id. at 280. The Supreme Court later refined Wilson, holding that "where state law provides multiple statutes of limitations for personal injury actions, courts considering § 1983 claims should borrow the general or residual statute for personal injury actions." Owens v. Okure, 488 U.S. 235, 249-250 (1989). Personal injury actions in Montana are subject to a three year limitations period. Mont. Code Ann. § 27-2-204 (1995). Accordingly, the instant § 1983 cause of action would be subject to a three year limitations period.

With a three year statute of limitations established, the remaining question is when did Plaintiffs' cause of action accrue. In a takings case, the alleged injury occurs on a discrete date, and the statute of limitations begins to run on the date of enactment of the statute or ordinance. De Anza Properties X, Ltd. v. County of Santa Cruz, 936 F.2d 1084, 1087 (9th Cir. 1991). A § 1983 plaintiff alleging an unconstitutional

taking is precluded from bringing a claim after the statute of limitations has run. Id. at 1087.

In the present case, Plaintiff participated in the rule-making proceedings prior to adoption of the ordinance and clearly knew of its terms when the ordinance was enacted. Upon adoption of the ordinance, Plaintiff was in a position to challenge it. Plaintiff, however, chose to file his suit almost four years after the ordinance was enacted. As in De Anza, Plaintiff sat on his rights and let the statute of limitations run, waiting over three years to assert the Fifth Amendment claim so that Plaintiff's cause of action is stale; therefore, Plaintiff's Fifth Amendment claim is barred by the statute of limitations and is properly dismissed.

At the same time, courts have refused to apply the rational of De Anza to facial challenges of statutes which allegedly impugn on First Amendment rights.

The Court refuses to apply the rule applicable in takings cases to the plaintiff's facial challenge to [the ordinance] because the nature of the injury in a First Amendment case differs from that in a takings case. A First Amendment challenge such as the one brought in the present case involves a continuing injury based upon the statute's on-going effect on protected speech.

Santa Fe Springs Really v. City of Westminster, 906 F.Supp. 1341, 1364 (C.D. Cal. 1995) (citing the reasoning of National Advertising Co. v. City of Raleigh, 947 F.2d 1158, 1168 (4th Cir. 1991) cert. denied, 504 U.S. 931 (1992) (which noted that "it is doubtful that any ordinance facially offensive to the First Amendment can be insulated from challenge by a statutory

limitations period"')). Beyond this, the court reasoned that "a facial challenge may be the only effective way to challenge an ordinance which chills First Amendment speech." Santa Fe, 906 F. Supp. at 1365.

Plaintiff's First Amendment challenge is not barred by the statute of limitations. Given the continuing nature of an alleged First Amendment injury based upon a statute's ongoing effect on protected speech and the strong policy reasons for allowing facial challenges to statutes which violate the constitution, this Court joins in refusing to apply the rule applicable in takings cases to the First Amendment. Accordingly, Defendant's Motion to Dismiss the First Amendment claim is denied.

II. Injunction

The second issue before the Court is whether to grant a preliminary injunction enjoining Defendant from enforcing the Billings Municipal Code during the pendency of this suit. In the context of location-restrictive ordinances, the Ninth Circuit has determined that a preliminary injunction should be issued upon a clear showing of either: (1) probable success on the merits and irreparable injury; or (2) sufficiently serious questions going to the merits to make the case a fair ground for litigation and a balance of hardships tipping decidedly in favor of the party requesting relief. Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1527 (9th Cir. 1993). Further, these inquiries are not two separate tests but are merely extremes of a single

continuum. Id. Accordingly, while a showing of an irreparable injury need not be made, the moving party must show that he or she will suffer a degree of hardship if the injunction is not issued and that hardship must outweigh any hardship to the non-moving party. Id. Similarly, a showing of success on the merits of the case need not be made; the moving party must show that, at minimum, his cause of action presents a serious question of law deserving of litigation. Id. In short, Plaintiff must show either a hardship or that the present cause of action presents a serious question of law.

In this case, Plaintiff argues that the Court should issue a preliminary injunction because: (1) enforcement of the ordinance will present hardship in that Plaintiff will suffer economic damage and a loss of First Amendment freedoms; and (2) the ordinance presents a serious question of law as zoning ordinances which raise First Amendment constitutional questions are by definition a "fair ground for litigation."¹

A. Hardship Inquiry

In a motion for preliminary injunction, Plaintiff has the burden of first proving that enforcement of the ordinance presents a hardship. Plaintiff asserts that his business will

¹ In addition to the First Amendment, Plaintiff argues that the zoning regulation denies his expectations concerning his business investments and is a taking without compensation under the Fifth Amendment. Plaintiff claims that this taking raises a serious question of law deserving of litigation and, therefore, the Court should issue a preliminary injunction. However, as previously discussed, Plaintiff's Fifth Amendment claim is barred by the statute of limitations.

suffer economic loss of income during the pendency of this suit and, moreover, without the injunction Plaintiff would suffer a loss of First Amendment freedoms in protected speech. Plaintiff correctly states that "[a]ny loss of First Amendment freedoms, even briefly can constitute irreparable injury." Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211, 1214 (9th Cir. 1984). However, economic injury is not relevant to the issue of hardship; rather, lower courts may only consider whether enforcement of an ordinance is likely to impugn the moving party's First Amendment rights. Topanga Press, Inc. v. City of Los Angeles, 989 F.2d 1524, 1528 (9th Cir. 1993). The test for determining whether First Amendment rights are denied is whether a local government has effectively denied the adult business a reasonable opportunity to open and operate. Id. at 1530.

Further, that court held:

There are two questions which must be answered when determining whether an adult business has been given a reasonable opportunity to relocate. The first question is whether relocation sites provided to a business may be considered part of an actual business real estate market. The second question is whether, after excluding those sites that may not properly be considered to be part of the relevant real estate market, there are an adequate number of potential relocation sites for already existing businesses.

Id.

Actual Real Estate Market

The Ninth Circuit has held that a particular relocation site may be considered part of the relevant real estate market when it meets certain conditions. The First Amendment only requires a relocation site to be potentially available; however, the

requirement of potentiality connotes genuine possibility. Id. at 1531. The court in Topanga further listed the following sites which would be considered part of the actual real estate market: (1) relocation sites that are generally accessible to the public may be part of the market; (2) areas in manufacturing zones which have a proper infra-structure such as sidewalks, roads and lighting may be included in the market; (3) when a relocation site suits some generic commercial enterprise; and most obvious, (4) those relocation sites which are commercially zoned are part of the market. Id. The court emphasized that:

... assuming a relocation site is part of the relevant market, it is not relevant whether a relocation site will result in lost profits, higher overhead costs, or even prove to be commercially infeasible for an adult business. The issue is whether any site is part of an actual market for commercial enterprises generally.

Id.

The City of Billings, in its brief and at hearing on this issue, offered evidence of the availability of relocation sites. The City Zoning Coordinator testified that there were a total of 609 acres available for relocation, all commercially zoned property with full services available where Plaintiff could relocate. Plaintiff did not present any evidence in opposition to these figures. Instead, Plaintiff and Plaintiff's real estate agent maintained that the aforementioned property would be too costly, result in lost profits, and was commercially infeasible for an adult business. Plaintiff testified that he only considered property which Plaintiff and his agent deemed

commercially feasible for an adult business; specifically, property which cost approximately \$100,000.00, was approximately one acre in size or less, had appropriate parking, lighting, sidewalks, and was situated to attract pedestrian walk in business.

Previous cases which have excluded property have done so where the potential relocation sites were practically unavailable. For example, courts have excluded submerged land located under the Pacific Ocean or land being used for permanent municipal enterprises such as airports and landfills. Id. at 1532. Unlike these examples, none of the property cited by the City is practically unavailable. In fact, all 609 acres in the City's relocation study are commercially zoned property and have full city services including paved access, curb and gutter, water, sewer, and electricity. Indeed, many of the sites are vacant lots which could be custom developed to suit the needs of an individual owner. For these reasons, it is the factual determination of the Court that all 609 acres of the City's relocation study are part of the actual real estate market.

Adequacy of Potential Relocation Sites

With the potential real estate market established, the question becomes whether that acreage provides the adult business with a reasonable opportunity to relocate. There were a total of four businesses which were forced to relocate as a result of the ordinance. Two businesses have relocated and, after their relocation, there remains 609 acres of real estate for the

remaining two businesses to relocate. The Supreme Court held that a zoning ordinance which prevented adult theaters from locating within 1000 feet of any residential zone, church, park or school, did not unreasonably limit alternative avenues of communication where there were 502 acres of land (5% of the total land in the city) available for the relocation of two theaters. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 53 (1985) (upholding summary judgment in favor of the city); see also, Young v. American Mini Theaters, 427 U.S. 51 (1976) (holding that a city ordinance which prevented adult theaters from locating within 1000 feet of any two other "regulated uses" or within 500 feet of a residential area was constitutional); Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211 (9th Cir. 1984) (overturning the granting of a preliminary injunction involving a similar ordinance and noting that zoning ordinances are presumptively valid and local governments have broad power to zone and control land use). In the present case, the large amount of acreage for relocation in relation to the small number of remaining businesses which are required to relocate is prima facie adequate. Moreover, Plaintiff's business has 609 acres (14.5% of all commercial land available in the city - 4% of the total land in the city) in which to relocate, and this amount is consistent with the holdings of Renton and Young.

Additionally, the amount of acreage computed by the City for relocation is a conservative estimate; the actual acreage

available for relocation would be greater.² While it is true that the requirement of a 600 foot separation between any two adult businesses would reduce the actual available acreage after any one business has relocated, only two businesses need to relocate so that this requirement does not present any practical obstacle given the large amount of land available. Beyond all this, Plaintiff did not consider property which did not meet his 'personal specification' nor did he consult a real estate agent any time during the four year amortization period. Plaintiff only contacted a real estate agent the week of this hearing in order to prepare for oral arguments. For these reasons, the Court finds that there are adequate potential relocations sites available to the Plaintiff.³

² In conducting the survey, the City Surveyor did not consider whole property which was partially in compliance and could be subdivided into a property which would comply with the ordinance. Further, there are 51 additional westend acres which are nearly ready for development with roads currently under construction which are not included in the 609 acres, but which would be suitable for relocation.

³ The Court in Topanga further held that a business must not only show hardship, but must show that a hardship tips in their favor considering the hardship on the City of not enforcing the injunction. It is presumed that an injunction which prevents a city from enforcing its ordinances a fortiori causes the City harm since the city's interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Lydo Enterprises, Inc. v. City of Las Vegas, 745 F.2d 1211, 1214 (9th Cir. 1984). While previous courts have held that a forbearance of enforcement of such regulations implied that the city did not perceive an urgency in enforcement, this Court finds the four year amortization period implies a spirit of good will between small business owners and the city government stemming from an acknowledgement that relocation will involve time, costs, and effort. Regardless, Plaintiff is unable to show any legal hardship whatsoever.

B. Serious Questions of Law

Next, the Court must determine if this case presents serious questions of law. Plaintiff alleges that the ordinance may not have been passed to serve a substantial governmental purpose. Further, Plaintiff argues that the First Amendment issue presents a serious question of law, as zoning ordinances which raise a constitutional question are by definition a "fair ground for litigation." Topanga, 989 F.2d at 1534.

Plaintiff's allegations that the ordinance was passed for prejudicial reasons, without objective evidence, and that it does not serve a substantial governmental purpose are without merit and support. Plaintiff correctly notes that ". . . regulations on the exercise of free speech are valid under the First Amendment as long as they are designed to serve a substantial governmental interest and allow alternative avenues of communication. City of Renton v. Playtime Theaters, Inc., 475 U.S. 41, 47, (1986). However, Plaintiff presents virtually no evidence to indicate that the present ordinance does not satisfy this test.⁴

The City Zoning Coordinator testified, and the legislative

⁴ Plaintiff's only evidence presented to indicate a contrary purpose is a single quote from the local paper in which a member of the City Council stated that, "When we passed [the ordinance], we knew it would essentially run them out of town." This assessment is factually and legally wrong in that there are 609 acres in the City in which to locate. Further, the quote does not override the minutes of the Council meetings, the legislative history, and the language of the statute which clearly establish that the ordinance was passed to promote the health, safety, morals, and the general welfare of the public; and to prevent a downgrading of property values in the City.

history states that the zoning ordinance was passed to promote the health, safety, morals, and the general welfare of the public; and, moreover, to prevent a downgrading of property values in the City.

It is the purpose of this ordinance to regulate sexually oriented businesses to promote the health, safety, morals, and the general welfare of the citizens of the City of Billings. . . The establishment of adult uses in business districts which are immediately adjacent to and which serve residential neighborhoods has a deleterious effect on both the businesses and residential segments of the neighborhood, causing or contributing to blight and a downgrading of property values.

Billings, Mt., Municipal City Code § 27-813. The City of Billings relied on the objective studies of four other cities within the Rocky Mountain region, all with similar problems and similar ordinances, in reaching their conclusions and in recommending the present ordinance to the City Council.

Plaintiff offers no evidence to indicate that these studies are not objective or that the ordinance is not designed to further these governmental interests. As previously determined, there are adequate alternative avenues of communication presented by the numerous possible relocations sites; further, the ordinance serves a substantial governmental purpose so that the ordinance meets the test of Renton.

Plaintiff further attempts to justify the substantial question of law by noting that the Ninth Circuit considers zoning ordinance cases such as this to "present complex constitutional problems." Topanga, 989 F.2d at 1534. However, the complexity of Topanga was justified given the great ambiguity involved in

determining what constituted a reasonable opportunity to relocate. Id. In analyzing the present case, there is no ambiguity in the determination of what constitutes a reasonable opportunity to relocate where there are 609 acres of commercially zoned property where Plaintiff could have relocated. In certain circumstances, cases of this nature may present complex constitutional problems; however, the present case does not fall into this category. There is no complexity to the obvious conclusion that there are and have been adequate relocation sites available for Plaintiff's relocation. Moreover, there are no other issues or evidence presented which distinguish this case from the previous cases cited in this opinion holding similar zoning ordinances constitutional. For these reasons, the Court finds that the zoning ordinance does not present a serious question of law under the First Amendment. Plaintiff has failed to show any legally sufficient hardship or that the present issue presents a serious question of law; therefore, the motion for preliminary injunction is denied.

Accordingly,

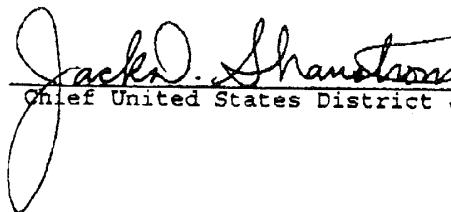
IT IS ORDERED:

1. Defendant's Motion to Dismiss Plaintiff's Fifth Amendment Claim is granted.
2. Defendant's Motion to Dismiss Plaintiff's First Amendment Claim is denied.
3. Plaintiff's Motion for Preliminary Injunction is denied and Plaintiff has 90 days from the date of this order in which to

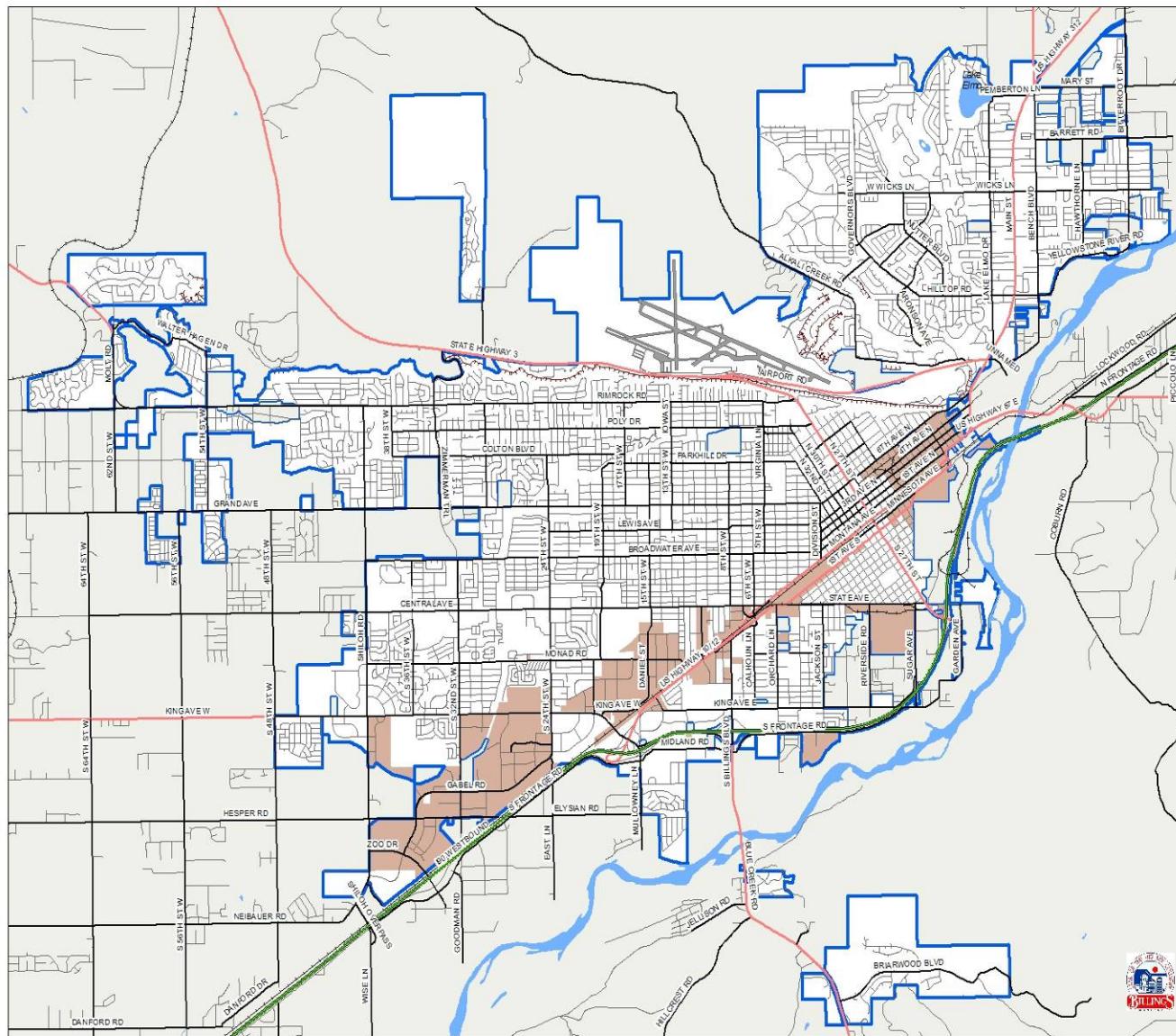
comply with the Billings City Ordinance.

The Clerk of Court is directed to forthwith notify the parties of the making of this order.

DONE and DATED this 14th day of July, 1996


Jackson L. Shanahan
Chief United States District Judge

Attachment B – GIS Maps ZC #850

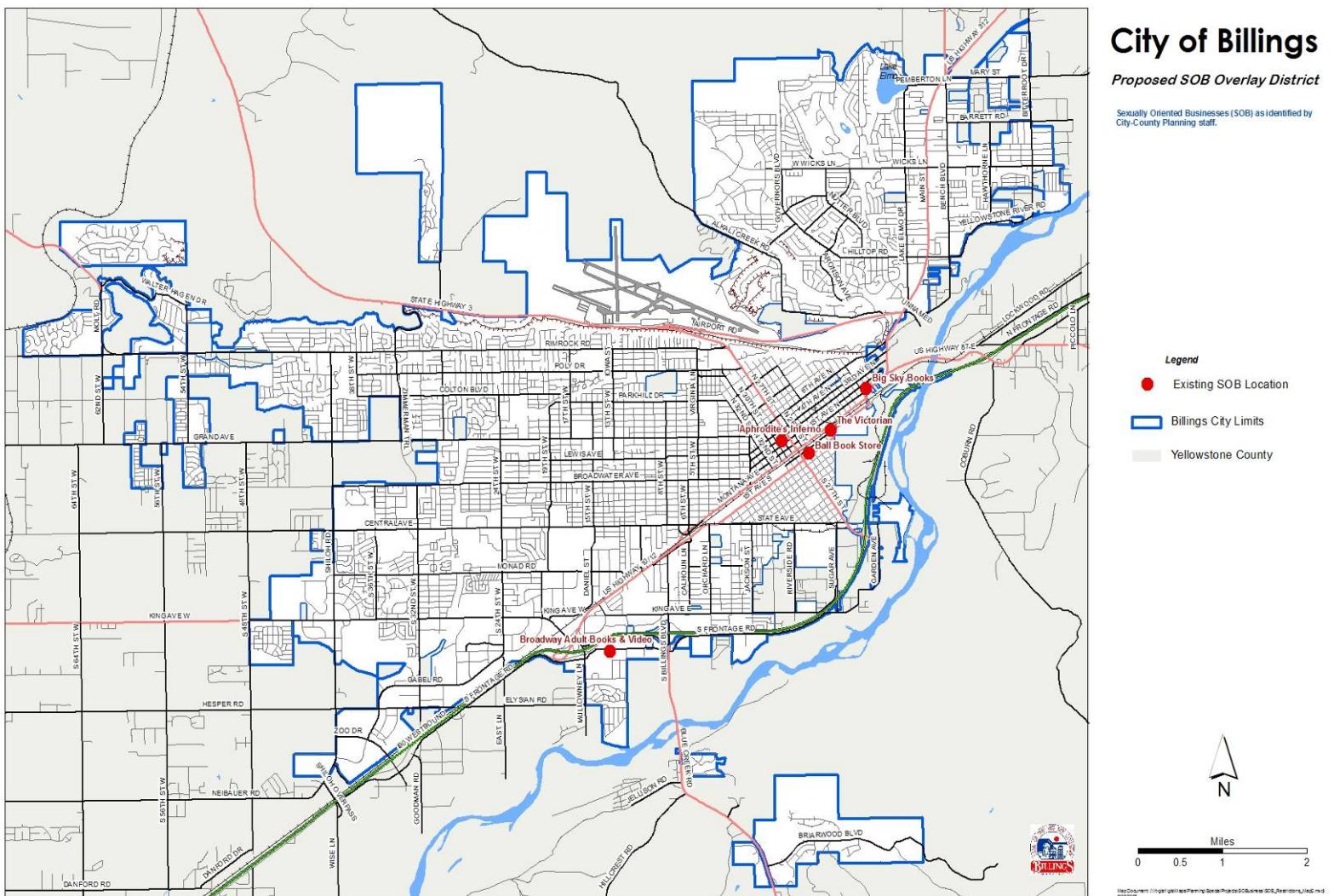


City of Billings

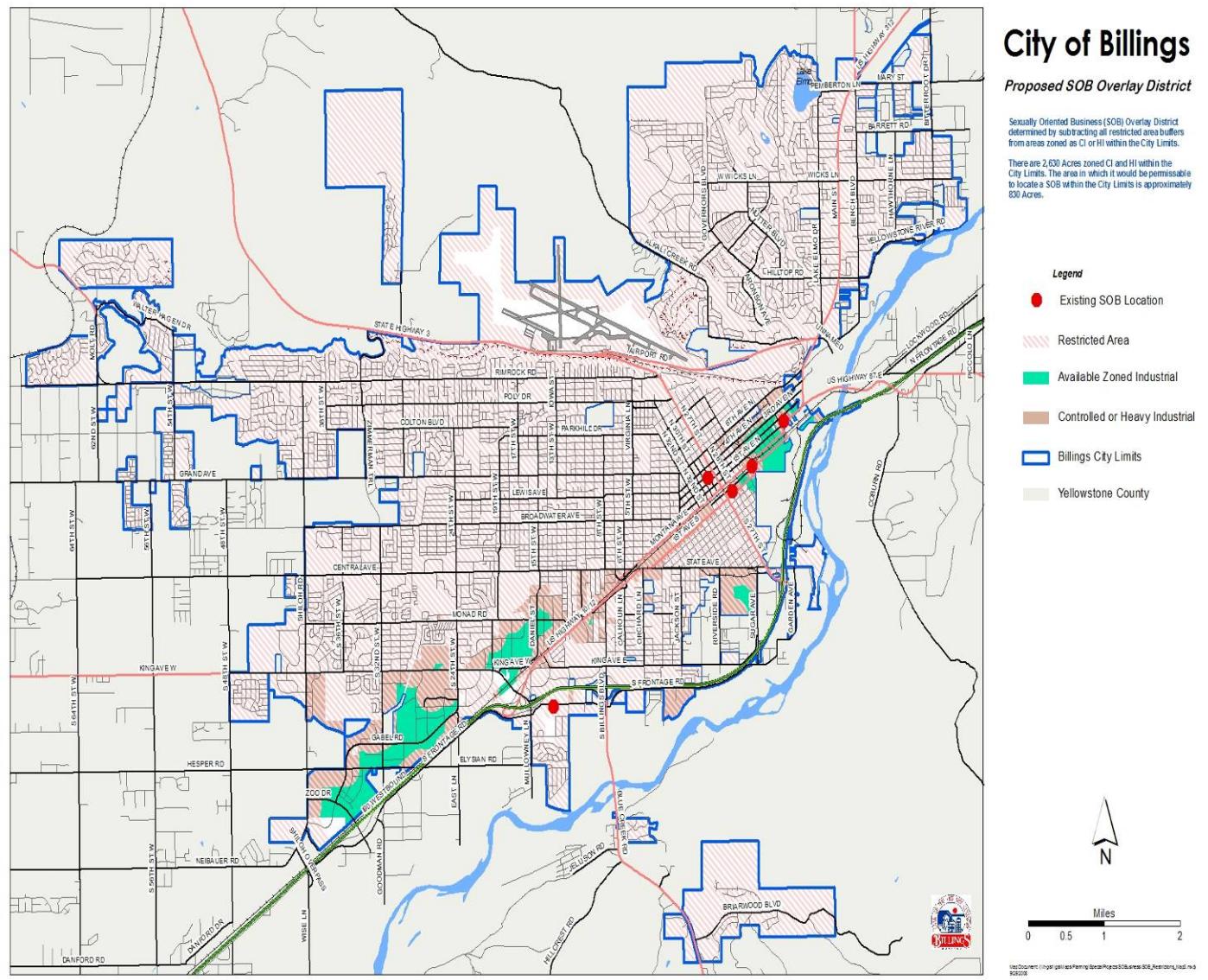
Proposed SOB Overlay District

There are 2,630 Acres zoned CI and HI within the City Limits.

Attachment B – GIS Maps ZC #850, cont.



Attachment B – GIS Maps ZC #850, cont.



Attachment C – Ordinance ZC #850
ORDINANCE NO. 08-

AN ORDINANCE OF THE CITY OF BILLINGS, PROVIDING THAT THE BILLINGS, MONTANA CITY CODE BE AMENDED BY REVISING, SECTION 27-201, SECTION 27-611(a) THROUGH SECTION 27-611(f) AND SECTION 27-405(g) SETTING DEFINITIONS FOR SEXUALLY ORIENTED BUSINESS AND SETTING AN AMORTIZATION PERIOD FOR NONCONFORMING SEXUALLY ORIENTED BUSINESS AS A RESULT OF THESE AMENDMENTS AND ADOPT THE REVISIONS AS AN AMENDMENT TO ZONING REGULATIONS AND SET A TIME PERIOD FOR THE REGULATION TO BE EFFECTIVE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

Section 1. RECITALS. *Title 76, Chapter 2, Part 3, MCA, and Section 27-1502, BMCC, provide for amendment to the City Zoning Regulations from time to time. The City Council initiated the amendment to the City Zoning Regulations and the City Zoning Commission and staff have reviewed the proposed zoning regulations hereinafter described. The recommendations of the Zoning Commission and staff have been submitted to the City Council, and the City Council, in due deliberation, has considered the proposed amendments to the City Zoning Regulations.*

Section 2. DESCRIPTION. The zoning regulation shall apply to all land within the City of Billings.

Section 3. That the Billings, Montana City Code be amended by revising Section 27-201 to add new language as follows:

SEC. 27-201. DEFINITIONS.

SEXUALLY ORIENTED BUSINESS: An "adult" arcade, "adult" bookstore, "adult" cabaret, "adult" video store, "adult" motel or "adult" motion picture theater, as those terms are defined in BMCC Section 27-611.

Section 4. That the Billings, Montana City Code be amended by revising Section 27-611 to delete certain language and add new language to read as follows:

SEC. 27-611. SEXUALLY ORIENTED BUSINESSES.

(a) FINDINGS OF FACT. The City Council hereby finds:

1. There are a substantial number of adult businesses in the Billings area that require special supervision from the public safety agencies in order to protect and preserve the health, safety, and welfare of the patrons of such businesses as well as the citizens of the area.

2. Adult businesses are frequently used for unlawful and unhealthy sexual activities, including prostitution and sexual liaisons of a casual nature.

3. The concern over sexually transmitted diseases is a legitimate health concern of the City which demands reasonable regulation of adult businesses in order to protect the health and well-being of the citizens.

4. There is convincing documented evidence that adult businesses, because of their very nature, have a deleterious effect on both the existing businesses around them and the surrounding residential areas, causing increased crime and the downgrading of property values.

5. It is recognized that adult businesses, due to their nature, have serious objectionable characteristics, particularly when they are located in close proximity to each other, thereby contributing to urban blight and downgrading the quality of life in the adjacent area.

6. The City Council desires to minimize and control these adverse effects and thereby protect the health, safety, and welfare of the citizenry; protect the citizens from increased crime; preserve the quality of life; preserve the property values and character of surrounding neighborhoods and deter the spread of urban blight.

7. The City Council has previously acted to regulate the location and operation of other types of businesses that cause secondary effects, such as casinos and taverns or drinking establishments. This ordinance is part of an overall plan to improve and protect the quality of life from the secondary effects of a variety of activities through reasonable regulation and land use controls.

8. It is not the intent of this ordinance to suppress any speech activities protected by the First Amendment, but to enact a content neutral ordinance which addresses the secondary effects of adult businesses.

9. It is not the intent of the City Council to condone or legitimize the distribution of obscene material, and the Council recognizes that state law prohibits the distribution of obscene materials and expects and encourages law enforcement officials to enforce anti-obscenity laws against any such illegal activities that are now occurring or may occur in the future within the City.

(a) (b) Purpose and Intent. It is the purpose of this section to regulate sexually oriented businesses to promote the health, safety, ~~morals~~, and the general welfare of the citizens of the City of Billings and ~~Yellowstone County~~, and to establish reasonable uniform regulations to prevent the continued deleterious location and concentration of sexually oriented businesses within the City and ~~County~~ jurisdictions. The provisions of this section have neither the purpose nor effect of imposing a limitation or restriction on the content of any communicative materials, including sexually oriented materials. Similarly it is not the intent or effect of these regulations to restrict or deny access by adults to distributors and exhibitors of sexually oriented entertainment to their intended market. Neither is it the intent nor effect of these regulations to condone or legitimize the distribution of obscene materials.

(b) (c) Findings and Determinations. The Billings City Council and ~~Yellowstone County~~ Commission hereby finds and determines that:

The establishment of adult uses in the downtown business area and in business districts which are immediately adjacent to and which serve residential neighborhoods has a deleterious effect on both the business and residential segments of the neighborhood, causing or contributing to blight and a downgrading of property values.

The establishment of more than two (2) adult uses within six hundred (600) feet of each other has a deleterious effect on surrounding residential and business areas and the fostering of

such businesses within a close proximity tends to create a "skid row" atmosphere.

The location of several adult uses in the same neighborhood tends to attract an undesirable quantity and quality of transients, a circumstance which adversely affects property values, causes an increase in crime and encourages residents and businesses to move elsewhere. Concern for, and pride in, the orderly planning and development of a neighborhood should be encouraged and fostered in those persons comprising residential and business segments of that neighborhood.

~~(e) (d) Definitions. Terms used in this section, that are not specifically defined below, may be found in Section 27-201 BMCC. Where other definitions are necessary and are not defined in this Section or Section 27-201, the dictionary may define such terms.~~

(1) Adult Arcade means 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 (1) time, and where the images so displayed are distinguished or characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."

(2) Adult Book Store or Adult Video Store means a commercial establishment which, as one (1) of its principal business purposes, offers for sale or rental for any form of consideration any one (1) or more of the following:

- a. Books, magazines, periodicals or other printed matter, or photographs, films, motion pictures, video cassettes, video reproductions, slides, or other visual representations which are characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas"; or
- b. Instruments, devices, or paraphernalia which are designed for use in connection with "specified sexual activities."

(3) Adult Cabaret means a commercial establishment which regularly features:

- (a) Persons who appear nude or in a state of nudity or semi-nudity; or
- (b) Live performances which are characterized by the exposure of specified anatomical areas or by the exhibition of specified sexual activities;

~~(3)-(4) Adult Motel means 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, video cassettes, slides, or other photographic reproductions which are characterized by an emphasis on 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;
- b. Offers a sleeping room for rent for a period of time that is less than ten (10) hours; or
- c. Allows a tenant or occupant of a sleeping room to sub-rent the room for a period of time that is less than ten (10) hours.

~~(4)-(5) Adult Motion Picture Theater means a commercial establishment where, for any form of consideration, films, motion pictures, video cassettes, slides, or similar photographic reproductions are regularly shown which are characterized by an emphasis on the depiction or description of "specified sexual activities" or "specified anatomical areas."~~

~~(5)(6) Church or Other Place of Worship means a building which is used primarily for religious worship and related religious activities, including but not limited to churches, convents, monasteries, shrines, and temples.~~

~~(6)(7) City means the City of Billings, Montana.~~

~~(7)(8) County means Yellowstone County, Montana.~~

(8) 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 additions of any sexually oriented business to any other existing sexually oriented business; or
- d. The relocation of any sexually oriented business.

(9) Nudity or a state of nudity means (a) the appearance of a human bare buttock, anus, male genitals, female genitals, or areola or nipple of the female breast, or (b) a state of dress which fails to opaque and fully cover human buttocks, anus, male or female genitals, pubic region or areola or nipple of the female breast.

(9)(10) Sexually Oriented Business means an "adult" arcade, "adult" book store, "adult" cabaret, "adult" video store, "adult" motel, or "adult" motion picture theater.

(10)(11) Specified Anatomical Area means the male genitals in a state of sexual arousal and/or the vulva or more intimate parts of the female genitals. Specified Sexual

(11)(12) Activities means and 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 above (a) through (c).

(12)(13) Transfer of Ownership or Control of sexually oriented business means and includes any of the following:

- a. The sale, lease, or sublease of the business;
- b. The transfer of securities which constitute a controlling interest in the business, whether by sale, exchange or similar means; or
- c. The establishment of a trust, gift, or other similar legal device which transfers the ownership or control of the business, except for transfer by bequest or other operation of law upon the death of the person possessing the ownership or control.

(d) (e) Classification. Sexually oriented businesses are classified as follows:

- (1) Adult Arcades;
- (2) Adult Book Stores or Adult Video Stores;
- (3) Adult Cabarets
- (3) (4) Adult Motels; and
- (4) (5) Adult Motion Picture Theaters.

(e) (f) Location of Sexually Oriented Business.

(1) No person, whether as a principal or agent, clerk or employee, either for himself or any other person, or as an officer of any corporation, or otherwise, shall place, maintain, own, or operate any sexually oriented business within one thousand (1,000) feet of the following residential zones:

- a. Agricultural Suburban (A-S) Zone;
- b. Agriculture Open-Space (A-1) Zone;
- c. Residential 15,000 (R-150) Zone;
- d. Residential 9,600 (R-96) Zone;
- e. Residential 8,000 (R-80) Zone;
- f. Residential 7,000 Restricted (R-70R) Zone;

- g. Residential 7,000 (R-70) Zone;
- h. Residential 6,000 Restricted (R-60R) Zone;
- i. Residential 6,000 (R-60) Zone;
- j. Residential 5,000 (R-50) Zone;
- k. Residential Multi-Family (RMF) Zone;
- l. Residential Multi-Family - Restricted (RMF-R) Zone;
- m. Residential Manufactured Home (RMH) Zone; ~~or~~
- n. Entryway Mixed Use (EMU) Zone; or
- o. Any Planned Development Zone

(2) No person, whether as a principal or agent, clerk or employee, either for himself or any other person, or as an officer of any corporation, or otherwise, shall place, maintain, own, or operate any sexually oriented business within one thousand (1,000) feet of the following land uses:

- a. Public library;
- b. Public playground or park (for purposes of this section, publicly owned multiuse trails shall be deemed to be a park);
- c. Public or private school and its grounds, from pre-school kindergarten through twelfth grade;
- d. A state licensed community residential facility, family day care home, group day care home, or day care center; ~~or~~
- e. Church or other place of worship; or
- f. A cemetery.

(3) No person, whether as a principal or agent, clerk or employee, either for himself or any other person, or as an officer of any corporation, or otherwise, shall place, maintain, own or operate any sexually oriented business within six hundred (600) feet of another sexually oriented business.

(4) For purposes of this section, specified distances will be measured in a straight line, without regard to intervening structures, from the property line of the sexually oriented business to the property line of the preceding land uses or zoning districts.

(5) In addition to the preceding requirements, sexually oriented businesses are permitted in the following zones only:

- a. ~~Central Business District (CBD) Zone;~~
- b. ~~Highway Commercial (HC) Zone;~~
- c. ~~a. Controlled Industrial (CI) Zone; or~~
- d. ~~b. Heavy Industrial (HI) Zone.~~

(f) Nonconforming Use - Amortization period established. (Refer to BMCC Section 27-405(G))

Section 5. That the Billings, Montana City Code be amended by revising Section 27-405(g) to delete certain language and add new language to read as follows:

SEC. 27-405. NONCONFORMING USES OF STRUCTURES.

(g) Any sexually oriented business, located within the limits of the City of Billings, existing upon passage of this chapter and Section 27-611 which does not comply with the requirements established herein shall be deemed a legal nonconforming use. All existing legal nonconforming sexually oriented businesses, as of the effective date of this chapter

and Section 27-611, or any amendment hereto, shall comply with the provisions of this chapter and Section 27-611 within four (4) years from the date of the enactment of this section or any amendment thereto. (Refer also to BMCC Section 27-611)

Section 6. REPEALER. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 7. SEVERABILITY. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provisions or application, and, to this end, the provisions of this ordinance are declared to be severable.

Section 8. EFFECTIVE DATE. This ordinance shall be effective from and after final passage and as provided by law.

PASSED by the City Council on first reading October 27, 2008.

PASSED, ADOPTED AND APPROVED on second reading November 10, 2008.

CITY OF BILLINGS:

BY: _____
Ron Tussing, Mayor

ATTEST:

BY:
Cari Martin, City Clerk



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Public Hearing and First Reading for Zone Change #849: Master Site Plan Review Process for Condominiums and Multi-Unit Developments – Amending Section 27-201, Section 27-310 (b), and Section 27-622 BMCC

DEPARTMENT: Planning and Community Services

PRESENTED BY: Wyeth Friday, AICP, Planning Division Manager

PROBLEM/ISSUE STATEMENT: Section 27-622 of the Unified Zoning Regulations specifies how condominium developments are reviewed and approved within the Unified Zoning Jurisdiction. The main intent of this section of the code is to ensure that condominium developments are in compliance with the zoning regulations in place on the property where the condominium project is proposed. However, condominium developments also must meet all applicable site development, building code, and fire safety regulations as per Sections 6-1200 and 14-300 of the Billings Municipal Code, and coordination for compliance must occur between all City departments. This same department coordination issue occurs with new multi-unit developments in the City. Multi-unit developments may be commercial or residential condominium developments, or large commercial or residential projects on a single lot that include common, private facilities shared by buildings or lots. This text amendment aims to coordinate City review of these multi-unit projects to make the review and permitting process more efficient. The City Zoning Commission held a public hearing on the amendment to the zoning regulation on October 7, 2008, and voted 5-0 to recommend approval to the City Council.

ALTERNATIVES ANALYZED: The City Zoning Commission held a public hearing on the proposed text amendment on October 7, 2008. The City Zoning Commission is forwarding a recommendation of approval. The City Council may choose to approve, deny or delay action for thirty (30) days on the proposed text amendment.

FINANCIAL IMPACT: There should be no direct financial impact to the City as a result of the new zoning regulation. A fee for this service will be brought to the Council separately.

RECOMMENDATION

The Zoning Commission on a 5-0 vote recommends that the City Council approve Zone Change #849.

Approved by: City Administrator City Attorney

ATTACHMENTS:

INTRODUCTION

Section 27-622 of the Unified Zoning Regulations specifies how condominium developments are reviewed and approved within the Unified Zoning Jurisdiction. The main intent of this section of the code is to ensure that condominium developments are in compliance with the zoning regulations in place on the property where the condominium project is proposed. However, condominium developments also must meet all applicable site development, building code, and fire safety regulations as per Sections 6-1200 and 14-300 of the Billings Municipal Code, and coordination for compliance must occur between all City departments. This same department coordination issue occurs with new multi-unit developments in the City. Multi-unit developments may be commercial or residential condominium developments, or large commercial or residential projects on a single lot that include common, private facilities shared by buildings or lots. This text amendment aims to coordinate City review of these multi-unit projects to make the review and permitting process more efficient. The City Zoning Commission held a public hearing on the amendment to the zoning regulation on October 7, 2008, and voted 5-0 to recommend approval to the City Council.

PROCEDURAL HISTORY

- The ICC Building Department Operations Appraisal completed in late 2007 had several recommendations to improve the permit review process and conduct pre-application meetings (Division Management, Section VII (3); and Development Review Process, Section IX (6). This Master Site Plan Review process is in response to these recommendations.
- The City Council on June 9, 2008, approved the Planning Division FY2009 Budget. The budget included this Master Site Plan Review process as one component.
- In the last several months, planning staff took the Master Site Plan Review process proposal to Billings Home Builders Association representatives and to the City's Development Process Review Board.
- On October 7, 2008, the City Zoning Commission conducted the public hearing.
- The City Council will hold a public hearing and 1st reading of the ordinance on October 27, 2008, and make a decision on the changes to the zoning regulations.
- If the Zone Change ordinance is approved on first reading, the City Council will consider it for second reading on November 10, 2008.
- If adopted on 2nd reading, the new ordinance will go in to effect on December 10, 2008.

ALTERNATIVES ANALYSIS

The City Council may approve, deny, or delay the adoption of the changes to zoning regulations to implement a Master Site Plan Review process.

BACKGROUND

In conjunction with implementation recommendations of the ICC Building Department Operations Appraisal and to follow the adoption of the FY2009 Planning Division Budget approved by City Council that included a proposed Master Site Plan Review Process, the Planning Division is presenting these amendments to the Unified Zoning

Regulations to initiate a Master Site Plan Review Process for certain new condominiums and multi-unit developments.

Building division staff in cooperation with Planning staff and other departments currently offers an informal master plan review process for large projects. The Building Division charges a nominal fee of \$100.00 for this service. This text amendment would formalize this process, provide a definition of the types of projects that would be subject to the review, and aims to help expedite the building and site development review for some larger projects by having City staff approve of a master plan in advance of building permit submittal and/or approval. This is expected to minimize the individual issues that arise as a developer goes from one City Department to the next trying to bring a project into compliance after building permits are submitted and under review.

This Master Site Plan Review Process is designed to provide information to large, multi-unit project developers prior to submission of a building permit for review. This process would bring the developer and City staff together to review draft site and building plans prior to building permit submittal and/or approval. Like Pre-Application Meetings for subdivisions, this process would bring all of the reviewing departments in the City together before a project has been finalized to work out issues and clarify requirements for developers. The Planning Division has worked for the last several months with the Building Division, Engineering Division, and Fire Department staff to draft this text amendment and initiate a Master Site Plan Review Process. The Planning Division proposes to manage this Master Site Plan Review that would require plan approval prior to building permit approval for certain projects.

Planning staff has estimated that it will take Planning staff about 5 hours on average to process and conduct a Master Site Plan Review and meeting. Staff time, supervisory time, and overhead costs for 5 hours totals \$240.00 for Planning Division Master Site Plan Review process management, meetings and document review. Other Departments, including Public Works and Fire, are reviewing costs to provide this service and a fee for the Master Site Plan Review process will be brought to the City Council for consideration through a separate resolution within the next month.

STAKEHOLDERS

The Zoning Commission held a public hearing on October 7, 2008, on the proposed master Site Plan Review process. Planning Staff explained the proposed changes to the Zoning Commission. No one testified in favor or in opposition to the amendment. No written testimony was received by the Planning Division. The Zoning Commission members did have some comments and questions regarding the proposed amendment.

Zoning Commission Chairman Leonard Dailey, Jr. asked whether the Master Site Plan Review Meeting described in the Master Site Plan Review Application was required or optional. Planning staff explained that the meeting is an option but the submittal of a Master Site Plan was required. Staff explained that some developers are fairly familiar with the development process and may choose to submit a master site plan directly for staff review while others may want to meet with City staff first before submitting a

master plan. Chairman Dailey also asked if builders and developers had been informed of this proposal. Staff explained that the concept had been taken to the Billings Homebuilders Association representatives and to the City's Development Process Review Board (DPARB). Staff explained that the Homebuilders Association representatives and DPARB members did not have any objections to the proposal. Several Homebuilders Association representatives said that using a master site plan as the basis for building permits was a good idea because it could expedite the building permit review process. Continued improvement in communication between the City staff and developers during the early stages of projects also could be a positive outcome, according to some DPARB members.

Zoning Commission Member Ed Workman asked whether this amendment was just adding another layer of bureaucracy and expense to the development process. Staff explained that the current process for development review can be frustrating and complicated for developers. A developer who submits a building permit now for a project may receive comments from three or four different City departments. In responding to comments from the Fire Department, the developer may unknowingly change something that is out of compliance with requirements of the Public Works Department. If City staff and the developer are all involved in a master plan review at the beginning of the process, building permit review and approval can run more smoothly and potential issues can be worked out in advance.

Zoning Commission Member Michael Larson said he could see the logic and value in the new master plan process to try and reduce the building permit review time and problems later. Larson did state that the fee structure for this new process should be carefully thought through. He said that it is not always true that larger projects are more complicated and smaller ones are less complicated. He said that often experienced firms are involved in the large projects and sometimes less experienced developers are involved in the smaller projects. This situation can lead to more staff work on smaller projects than larger ones, Larson stated. He suggested that it might make sense to create a fee schedule that supports this idea. Zoning Commission Member Ed Workman agreed that in formulating a fee schedule, it is important to see if there is a way to scale the fee to address size and scope of projects. Staff agreed to consider this in formulating a fee schedule.

RECOMMENDATION

The Zoning Commission on a 5-0 vote recommends that the City Council approve Zone Change #850.

ATTACHMENTS:

- A: Ordinance
- B: Draft Master Site Plan Review Application

Attachment A – Draft Ordinance ZC #849

ORDINANCE NO. 08-

AN ORDINANCE OF THE CITY OF BILLINGS, PROVIDING THAT THE BILLINGS, MONTANA CITY CODE BE AMENDED BY REVISING SECTIONS 27-201, 27-310 (b), and 27-622; AMENDMENTS TO CHAPTER, MASTER SITE PLAN REVIEW PROCESS FOR CONDOMINIUMS AND MULTI-UNIT DEVELOPMENTS, ADOPT THE REVISIONS AS AN AMENDMENT TO THE ZONING REGULATIONS AND SET A TIME PERIOD FOR THE REGULATION TO BE EFFECTIVE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF BILLINGS, MONTANA:

Section 1. RECITALS. *Title 76, Chapter 2, Part 3, MCA, and Section 27-1502, BMCC, provide for amendment to the City Zoning Regulations from time to time. The City Council initiated the amendment to the City Zoning Regulations and the City Zoning Commission and staff have reviewed the proposed zoning regulations hereinafter described. The recommendations of the Zoning Commission and staff have been submitted to the City Council, and the City Council, in due deliberation, has considered the proposed amendments to the City Zoning Regulations.*

Section 2. DESCRIPTION. The zoning regulation shall apply to all land within the City of Billings.

Section 3. That the Billings, Montana City Code be amended by revising Sections 27-201, 27-310 (b), and 27-622 to add new language to read as follows:

SEC. 27-201. AMENDMENTS TO CHAPTER.

MULTI-UNIT DEVELOPMENTS:

- Condominium or Commercial development projects that include common, private facilities shared by buildings or lots.
- Residential developments that have more than two dwelling units and include common, private facilities shared by buildings or lots.

SEC. 27-310 (b). AMENDMENTS TO CHAPTER.

Section 27-310. Supplemental Area, Yard and Height Restrictions

(a) Building Groups. In any residential or agricultural district, more than one (1) principal structure housing a permitted use may be located on a single lot or combination of lots provided that:

- (1) Area requirements are met for each structure as though it were on an individual lot;
- (2) A minimum of ten (10) feet is maintained between principal structures;
- (3) Side yard setbacks are provided between adjacent properties as required in the district;
- (4) Principal structures are setback from alleys a minimum of twenty (20) feet; and
- (5) Front yard setbacks as required in the district are provided on side streets when a side street frontage exceeds one hundred and fifty (150) feet.
- (6) The requirements of Section 27-622 are met where applicable for condominium and multi-unit developments.

SEC. 27-622. AMENDMENTS TO CHAPTER.

Sec. 27-622. New Condominiums and Multi-Unit Developments.

New Condominiums and Multi-Unit Developments are allowed in all zoning districts if they meet all applicable zoning district requirements, and supplementary general provisions, site development, building and fire safety regulations as per Sections 6-1200, 14-300, 27-622 and 27-623 of the Billings Municipal Code. Projects subject to these regulations include condominium or commercial development projects that include common, private facilities shared by buildings or lots, and residential developments that have more than two dwelling units and include common, private facilities shared by buildings or lots.

Prior to filing a condominium Declaration of Unit Ownership with the County Clerk and Recorder, or applying for building permits for the multi-unit development, the owner(s) shall submit to the Zoning Coordinator Planning Division:

- (1) A City approved master site plan showing the dimensions of the lot(s) containing the condominium units or multiple commercial units and the location and dimensions of all buildings containing the units. or an approved building permit.
- (2) A master landscape plan or approved building permit..
- (3) (2) A copy of the Declaration of Unit Ownership if creating a condominium.

Only after determining that the condominium or multi-unit development project has a City approved master site plan, as required in Section 1 above, that complies with the applicable zoning district requirements, and supplementary general provisions, site development, building and fire safety regulations as per Sections 6-1200, 14-300, 27-622, and 27-623 of the Billings Municipal Code will the zoning coordinator Planning Division issue a condominium Certificate of Compliance or approve a building permit.

For condominiums, the Certificate of Compliance will be filed with the County Clerk and Recorder prior to recording the Declaration of Unit Ownership. The Certificate shall state:

1. The legal description of the property.
2. The condominium units are exempt from 76-3-203, MCA because they comply with zoning, or in the case of new development, comply with zoning based on the City approved master site plan and landscaping plans.
3. Any changes to the City approved Master Site Plan or landscaping plans must be reviewed by the City through the Planning Division Department.

Section 4. REPEALER. All ordinances or parts of ordinances in conflict herewith are hereby repealed.

Section 5. SEVERABILITY. If any provision of this ordinance or the application thereof to any person or circumstances is held invalid, such invalidity shall not affect the other provisions of this ordinance which may be given effect without the invalid provisions or application, and, to this end, the provisions of this ordinance are declared to be severable.

Section 6. EFFECTIVE DATE. This ordinance shall be effective from and after final passage and as provided by law.

PASSED by the City Council on first reading, October 27, 2008.

PASSED, ADOPTED AND APPROVED on second reading, November 10, 2008.

CITY OF BILLINGS:

BY: _____
Ron Tussing, Mayor

ATTEST:

BY:
Cari Martin, City Clerk

(ZC #849 – Text Amendment Master Site Plan Review Section 27-201, 27-310(b) and 27-622)

ATTACHMENT B



**Planning Division
510 North Broadway, 4th Floor
Billings, MT 59101
Phone: (406) 657-8246 Fax: (406) 657-8327**

MASTER SITE PLAN APPLICATION

Master Site Plan Application: To ensure that condominium and certain multi-unit, residential and commercial development projects in the City of Billings occur in accordance with the applicable zoning, site development, building and fire safety regulations, approval of a master site plan is required as per Sections 6-1200, 14-300, 27-622, 27-623 of the Billings Municipal Code. Projects subject to these regulations include condominium or commercial development projects that include common, private facilities shared by buildings or lots, and residential developments that have more than two dwelling units and include common, private facilities shared by buildings or lots. This application and materials shall be submitted to the Planning Division as per Section 27-622 of the Billings Municipal Code.

Review and Approval of Master Site Plans by all City Reviewing Departments may take up to 4 weeks for City processing. Resubmittal reviews take no more than 2 weeks. Upon approval by all City Reviewing Departments through the Planning Division, Building Permits may be submitted and/or approved.

Master Site Plan Review Meeting is recommended but not required prior to submission of a **Master Site Plan Application for City review and approval. A Master Site Plan Review Meeting may be scheduled through the Planning Division at no charge. Meetings are conducted on Thursday afternoons unless an alternate time is necessary. This application and materials shall be submitted at least one week in advance of the Master Site Plan Review Meeting.**

Application Date: _____

Project #_____

Fee _____ Receipt#_____

Name of owner: _____ Phone: _____

Address: _____

Architect/Builder/Engineer: _____ Phone: _____

Address: _____

Property Legal Description: _____

Property Address and Location: _____

Parcel Size: _____

Number of Units Proposed: _____

Existing Zoning: _____

Existing and Proposed Use: _____

All materials submitted must be a minimum 11"X17" Size. Electronic copies delivered via email or CD of all materials are encouraged in .pdf, .jpg or .tiff formats

Materials included with this application should include **6 copies** of each of the following:

- Site Plan (includes parking, accesses) Building Elevations
- Storm Drainage Plan Landscaping Plan

NOTE: Review and Approval of Master Site Plans by all City Reviewing Departments may take up to 4 weeks for City processing. Resubmittal reviews take no more than 2 weeks. Upon approval by all City Reviewing Departments through the Planning Division, Building Permits may be submitted and/or approved.



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: 2008 CTEP Project Applications
DEPARTMENT: Planning and Community Services Department
PRESENTED BY: Scott Walker, Transportation Planner

PROBLEM/ISSUE STATEMENT: Each year Billings submits projects to the Montana Department of Transportation for funding from the Community Transportation Enhancement Project (CTEP) program. These projects typically represent construction of pedestrian and/or bicycle facilities in the community. The Technical Advisory Committee (TAC) is recommending two projects be funded for the 2008 CTEP cycle. The projects include the completion of the Swords Park trail connection and landscaping for a portion of the Shiloh Road project. Council must formulate a recommendation to the Policy Coordinating Committee (PCC) to complete the local approval process for these projects.

ALTERNATIVES ANALYZED:

- Approve the CTEP applications for submission as recommended by TAC.
- City Council formulate its own project list.
- Do not approve the CTEP applications for submission. This would result in the loss of CTEP funding for this year.

FINANCIAL IMPACT: These projects were budgeted and planned to utilize CTEP funding. Failure to approve the applications would result in the loss of the CTEP funding. As a result, the projects would not be fully funded, and additional funding would need to be secured and allocated locally in order to proceed with construction.

RECOMMENDATION

Staff recommends that Council formulate a recommendation on the 2008 CTEP projects so the Council representative can bring it to the Policy Coordinating Committee (PCC) meeting.

Approved By: **City Administrator** _____ **City Attorney** _____

INTRODUCTION

Each year, projects are submitted for Community Transportation Enhancement Project (CTEP) funding to supply significant portions of the project construction costs. These projects are typically pedestrian and/or multi-modal transportation projects that include construction of sidewalks, bike lanes and bike paths.

Other categories eligible for CTEP funding include:

- Acquisition of scenic easements
- Landscaping, rehabilitation of historic buildings
- Establishment of transportation museums
- Historic preservation
- Archeological planning and research
- Mitigation of water pollution due to highway runoff
- Preservation of abandoned railroad corridors
- Control and removal of outdoor advertising
- Educational and safety programs.

In order for CTEP funding to be authorized, an application must be submitted and each application must go through a local selection process. This process includes a recommendation from the Technical Advisory Committee (TAC), and recommendations from the Planning Board, County Commission and City Council that are brought to a vote at the PCC. Projects are then submitted to the Montana Department of Transportation (MDT) for final approval. TAC has made a recommendation to complete the Swords Park trail connection and provide funding for landscaping for a portion of the Shiloh Road project.

PROCEDURAL HISTORY

- Completed Items
 - 8/1/08; CTEP project applications received
 - 9/25/08; Technical Advisory Committee (TAC) reviews applications and makes recommendation to Planning Board, City Council and Board of County Commissioners on which projects to fund and their priority
- Future Items
 - 10/20/08; Council receives information and presentation of CTEP projects at Work Session
 - 10/27/08; City Council reviews applications makes recommendation
 - 10/28/08; Planning Board reviews applications and makes recommendation
 - 10/28/08; County Commissioners reviewed applications and makes recommendation
 -
 - November (Date to be set); Policy Coordination Committee reviews the applications and action taken by the other groups and votes on final recommendation and prioritization
 - The final recommendation and prioritization are reviewed by

- MDT forwards the recommendation and prioritization to the Highway Commission for final approval
- Highway Commission approves the recommendation and prioritization
- MDT creates the project specific agreements and forwards them to the City
- City Council accepts and executes the project specific agreements
- The executed agreements are returned to MDT
- The Highway Commission approves the project agreements
- MDT authorizes the City to begin project development
- Project development and design
- Project construction
- Project close-out

BACKGROUND

Each CTEP project must follow an established approval procedure before funding is allocated. The first step of the process is the submission of project applications. All the applications are reviewed and prioritized through a previously approved process. The process includes a review by Council. The applications are consistent with previous CTEP project agreements accepted and executed by Council.

If Council does not approve the submission of the applications, then no CTEP funding can be allocated from this year's allocation for these projects. It would be a full year before CTEP applications could be submitted again. This could cause lengthy project delays or require Council to allocate additional funding to the projects in order to remain on schedule.

CONSISTENCY WITH ADOPTED POLICIES OR PLANS

Council has previously approved the recommended projects during the approval of the Capital Improvement Plan. All the projects will proceed through the established CTEP project approval process for the City of Billings and Yellowstone County.

BACKGROUND

It should be noted that project requests this year total \$2,226,233, and CTEP funding available is \$1,003,000. Current projects and recommendations are as follows:

F.Y. 2008 CTEP PROPOSALS

- **Broadwater Connection**

This project would construct a hard surface bike/pedestrian path from the existing path along the east side of Zimmerman Trail Road to the existing path at Lillis Park, less than one mile.

The path will be constructed along the north side of Broadwater in the Arnold Drain right of way.

CTEP Funds: \$335,291 City of Billings/Local Match: \$51,970 Project Cost:
\$387,261

- **Earl Guss Park Trail**

This project would construct a hard surface bike/pedestrian path between the new Main Street underpass to the existing Dutcher Trail at Metra Park, less than 1 mile.

CTEP Funds: \$101,072 City of Billings/Local Match: \$24,102 Project Cost:
\$179,600*

* This total includes \$54,426 in additional local funding.

- **25th Street Bridge**

The 25th Street Bridge will be a bike/pedestrian bridge across the Montana Rail Link (MRL) railroad in line with North 25th Street in the downtown “old historic” district of Billings. The bridge will provide a direct connection from the south-side neighborhoods to downtown business district at the historic Billings Depot.

CTEP Funds: \$535,616 City of Billings/Local Match: \$83,021 Project Cost:
\$618,638*

* This total includes \$98,643 in additional local funding.

- **Shiloh Road Landscaping**

This project will landscape Shiloh Road in various locations from Poly Drive south to Zoo Drive.

CTEP Funds: \$649,350 City of Billings/Local Match: \$101,650 Project Cost:
\$751,000

- **Swords Park Trail - Phase II**

This project would construct approximately 1 mile of hard surfaced path extending the existing trail connection that was built from the west side of Swords Park to where it currently ends at the fork in the Black Otter Trail Road. Phase II will continue the trail access to the east end of Swords Park and eventually make the connection to the north to the pedestrian underpass that will be built as part of the Airport Road project.

CTEP Funds: \$604,904 City of Billings/Local Match: \$68,761 Project Cost:
\$698,665*

* This total includes \$25,000 in additional local funding.

** Preliminary Engineering costs of \$71,749 were requested and approved through the 2007 CTEP allocation process.

F.Y. 2008 CTEP APPLICANT REQUESTS

\$ 2,226,233

F.Y. 2008 CURRENT CTEP DOLLARS AVAILABLE

\$ 1,003,000

TAC RECOMMENDATION

PROJECT FUNDING	CTEP REQUEST	RECOMMENDED
1. Swords Park	\$604,904	\$500,000
2. Shiloh Road	\$649,350	\$500,000
TOTAL	\$1,254,254	\$1,000,000

ISSUES

The TAC felt the continuation of the Swords Park project was important due to the Airport Road project that is scheduled to start this fall. Also, making the connection from the Rims to the River is a high priority. TAC also felt that the Shiloh Road Landscaping would be a good choice due to the landscaping budget cuts in the original project. The City Council members will need to determine which projects are its priority.

RECOMMENDATION

Staff recommends that Council formulate a recommendation on the 2008 CTEP projects so the Council representative can bring it to the Policy Coordinating Committee (PCC) meeting.



CITY COUNCIL AGENDA ITEM
CITY OF BILLINGS, MONTANA
Monday, October 27, 2008

TITLE: Public Hearing for Special Review #868 - 1251 South 32nd Street West

DEPARTMENT: Planning and Community Services

PRESENTED BY: Dave Green, Planner I

PROBLEM/ISSUE STATEMENT: This is a special review request to allow the location of an All-Beverage Liquor License with gaming on an 84,806 square foot parcel of land in a Controlled Industrial (CI) zone, on Lot 4C and Lot 4D1, Studer Acreage Tracts. The lot is south of Cel Avenue on South 32nd Street West and is the current location of Doc & Eddy's West. George Frank is the owner and Design Lab Architects is the agent. The Zoning Commission held a public hearing on this request on October 7, 2008, and is forwarding a recommendation of conditional approval to the City Council on a 5-0 vote.

ALTERNATIVES ANALYZED: Before taking any action on an application for a Special Review use, the City Council shall first consider the findings and recommendations of the City Zoning Commission. In no case shall the City Council approve a special review use other than the one advertised. The Council shall take one of the following actions:

- Approve the application;
- Conditionally approve the application;
- Deny the application;
- Allow withdrawal of the application; or
- Delay the application for a period not to exceed thirty (30) days.

FINANCIAL IMPACT: The special review, if approved, should increase the City's tax base.

RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #868 on a 5-0 vote.

Approved By: **City Administrator** _____ **City Attorney** _____

ATTACHMENTS

- A: Zoning/Location Map.
- B: Site Plan

INTRODUCTION

This is a special review request to allow the location of an All-Beverage Liquor License with gaming on an 84,806 square foot parcel of land in a CI zone, on Lot 4C and Lot 4D1, Studer Acreage Tracts. The lot is south of Cel Avenue on South 32nd Street West. The property is addressed as 1251 South 32nd Street West and is the current location of Doc & Eddy's West.

PROCEDURAL HISTORY

- A special review to allow the location of an All-Beverage Liquor License with gaming on an 84,806 square foot parcel of land in a CI zone was submitted on September 1, 2008.
- The City Zoning Commission held a public hearing on October 7, 2008, and is forwarding a recommendation of conditional approval.
- The City Council will conduct a public hearing and consider this application on October 27, 2008.

BACKGROUND

License with gaming at 1251 South 32nd Street West and is legally described as Lot 4C and Lot 4D1, Studer Acreage Tracts. The property is zoned CI. The lot is south of Cel Avenue on South 32nd Street West. The site is the current location of Doc and Eddy's West. The applicant is changing the license from a beer and wine license with gaming to an all-beverage license with gaming. The applicant states in the application letter that it is his intention to remodel the interior of the building to accommodate a lounge/dining area and then lease the building to LME Inc. The new business will continue to operate under the name of Doc & Eddy's West and will include gaming, a microbrewery and cocktail lounge with food service. The All-Beverage License will be provided by LME, Inc. The use of the building and the exterior of it will remain the same. The applicant will remodel the inside to accommodate the food service. The applicant feels that this will be a good use of the property and "and will continue provide jobs and recreation facilities for residents and motel patrons in the area".

Development to the west of this parcel is residential and is the Golden Meadows manufactured home park. All other surrounding development is commercial in nature. The subject property is Doc & Eddy's West Casino, constructed in 2005. Special Review #788 granted conditional approval to this property for a beer and wine license with gaming on June 27, 2005.

There are several casinos in the surrounding area. To the north of the subject property is a proposed All Aboard Casino. Special Review #863 granted conditional approval to this property for a beer and wine license with gaming on July 28, 2008. Property about one mile south of the subject property at 3178 Gabel Road, on the southeast corner of the intersection of South 32nd Street West and Gabel Road, received special review approval for an all beverage license with gaming and a restaurant as Special Review #854 on February 25, 2008. To the north of the subject property on the southeast corner of the intersection of King Avenue West and South 32nd Street West, there is a Town Pump gas station/convenience store/casino. Special review #784 granted conditional approval for an

all-beverage liquor license with gaming on June 27, 2005 for the Town Pump gas station/convenience store/casino. To the north east is Johnny Carino's on King Avenue West Special Review #757 granted conditional approval for a beer and wine license with gaming on May 24, 2004. Also north east of this property is Western Empire Emporium which opened before the special review requirement for alcohol sales and gaming went into effect.

There are no schools, churches, or playgrounds with equipment within 600 feet of the proposed location.

ALTERNATIVES ANALYSIS

Section 27-1503(D) specifies that all Special Reviews shall comply with the following three (3) criteria:

1. Complies with all requirements of this Article (27-1500).
This application does comply with the requirements of the zoning regulations.
2. Is consistent with the objectives and purposes of Chapter 27 and the Growth Policy.
This application is consistent with the purposes of Chapter 27 and the 2003 Growth Policy. The application is appropriate in this particular zoning district. The application does encourage predictable land use decisions that are consistent with the neighborhood character and land use patterns. This is an existing location of a Beer and Wine License with gaming and will continue with a similar use.
3. Is compatible with surrounding land uses or is otherwise screened and separated from adjacent land in such a way as to minimize adverse effects.
The zoning regulations adopted by the City Council require separation of uses and also include requirements for landscape and fencing to provide separation from non-compatible uses. There is an existing residential development immediately west of this property across South 32nd Street West. The residential development has a screen of evergreen trees along South 32nd Street West.

Further, the City Council shall consider and may impose modifications or conditions concerning, but not limited to the following:

1. Street and road capacity;
2. Ingress and egress to adjoining streets;
3. Off-street parking;
4. Fencing, screening and landscaping;
5. Building bulk and location;
6. Usable open space;
7. Signs and lighting; and/or
8. Noise, vibration, air pollution and similar environmental influences.

Based on the above criteria, the Zoning Commission is forwarding a recommendation of conditional approval of Special Review #868 on a 5-0 vote.

CONDITIONS OF APPROVAL

1. The special review approval shall be limited to Lot 4C and Lot 4D1, Studer Acreage Tracts located at 1251 South 32nd Street West.
2. Development of the site shall be in substantial conformance with the site plan submitted with this application and shown in this staff report. Deviations from the approved site plan that show the addition of outdoor patio areas, parking lot access or parking areas will require additional special review approval.
3. No outdoor seating, outdoor music or outdoor public announcement systems will be allowed with this application.
4. Any lighting on the building or within the parking lot shall have full cut-off shields so light is directed to the ground and not onto adjacent property. Lighting of signs shall be as allowed within the City Sign Code (Section 27-701 BMCC).
5. The additional parking shown on the drawing submitted with this application must meet landscaping requirements of Section 27-1100 of the Unified Zoning Regulations.
6. The additional parking shown on the drawing submitted with this application must meet the current storm water management requirements of the City of Billings on their site.
7. These conditions of special review approval shall run with the land described in this authorization and shall apply to all current and subsequent owners, operators, managers, lease holders, heirs and assigns.
8. The proposed development shall comply with all other limitations of Section 27-613 of the Unified Zoning Regulations concerning special review uses, and all other City of Billings, regulations and ordinances that apply.

****NOTE**** Approval of this Special Review does not constitute approval of a building permit, sign permit or fence permit. Compliance with all applicable local codes will be reviewed at the building permit or zoning compliance permit level. This application is for a Special Review as noted above and no other request is being considered with this application. The use and development of the property must be in accordance with the submitted site plan.

STAKEHOLDERS

The Zoning Commission conducted a public hearing on October 7, 2008, and forwarded a recommendation of conditional approval to the City Council on a 5-0 vote. The applicant was not present at the Zoning Commission meeting and there was no one present to speak for or against the special review application. There was no further discussion from the zoning commission; a motion to forward a recommendation of conditional approval to the City Council was made and seconded, followed by a vote of 5-0 to approve.

CONSISTENCY WITH ADOPTED PLANS AND POLICIES

In addition to the above discussion in the Alternatives Analysis section, this application does conform to the goals of the 2003 City of Billings/Yellowstone County Growth Policy, specifically:

- New Development that is compatible with the character of adjacent City neighborhoods.
- The project does encourage predictable land use decisions that are consistent with the neighborhood character and land use patterns.

RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #868 on a 5-0 vote.

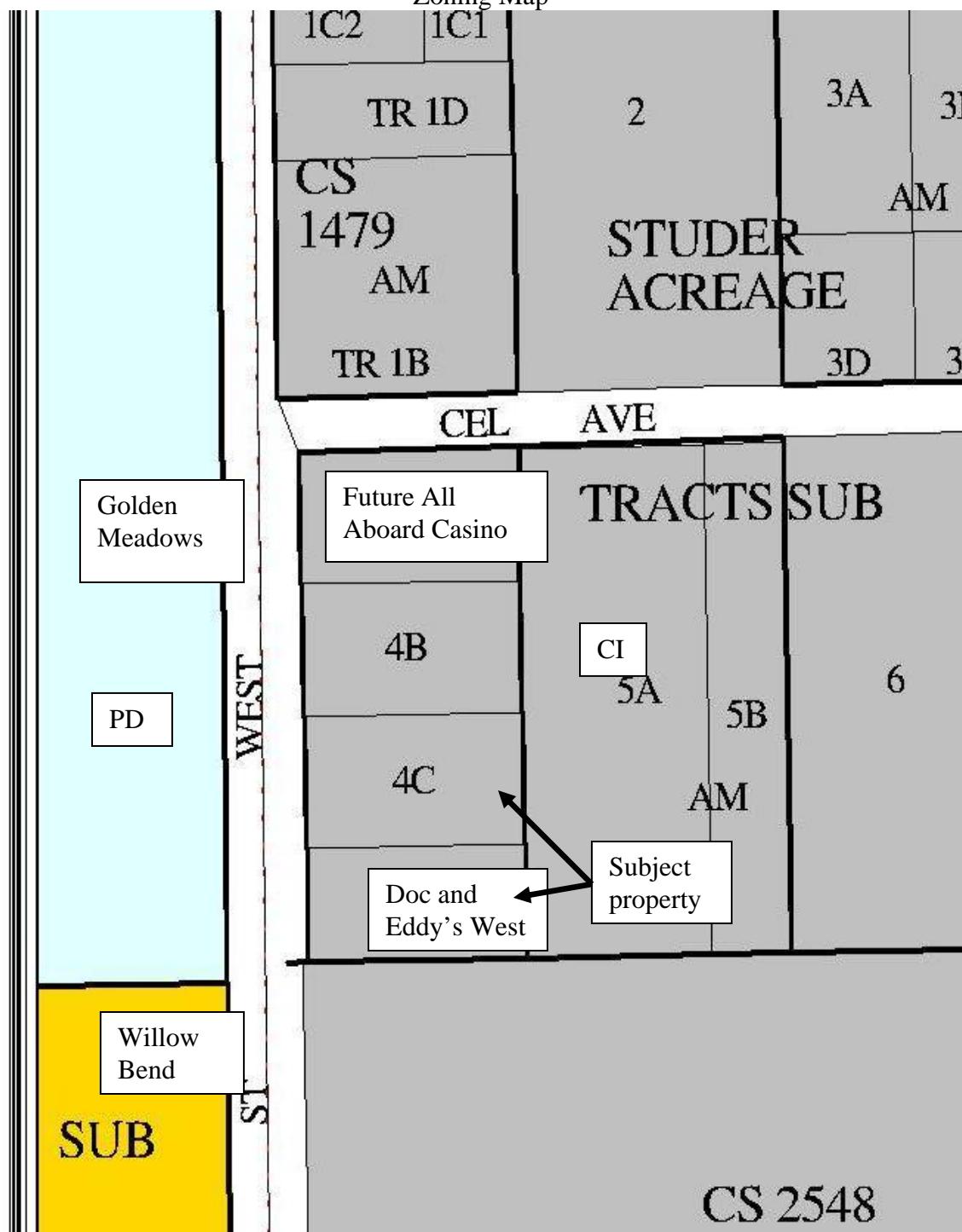
ATTACHMENTS

A: Zoning/Location Map.

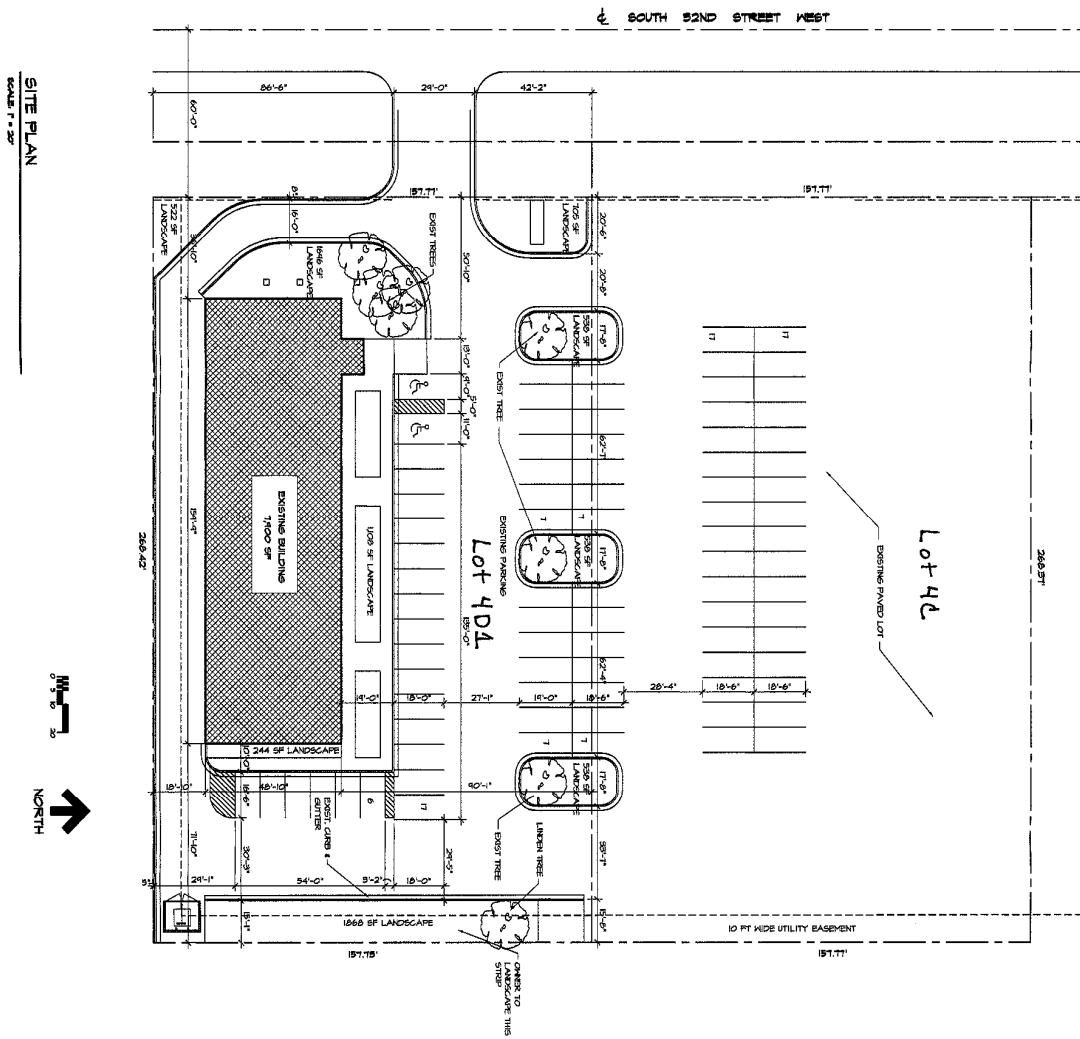
B: Site Plan

ATTACHMENT A

Zoning Map



ATTACHMENT B
Site Plan





CITY COUNCIL AGENDA ITEM

CITY OF BILLINGS, MONTANA

Monday, October 27, 2008

TITLE: Public Hearing for Special Review #869 – 414 Lincoln Lane
DEPARTMENT: Planning and Community Services
PRESENTED BY: Dave Green, Planner I

PROBLEM/ISSUE STATEMENT: This is a special review request to locate a Beer & Wine Beverage License with gaming for a new 3,039 square foot building to be constructed on a portion of a 93,494 square foot parcel of land in a Highway Commercial (HC) zone, on Lot 3, Block 1, Citizens Center Subdivision. The property is addressed as 414 Lincoln Lane; the subject property is currently vacant land. The property owner is Kreitzberg Rentals, LLC, and Darrell Kreitzberg is the agent. The Zoning Commission held a public hearing on this request on October 7, 2008, and is forwarding a recommendation of conditional approval to the City Council on a 5-0 vote.

ALTERNATIVES ANALYZED: Before taking any action on an application for a Special Review use, the City Council shall first consider the findings and recommendations of the City Zoning Commission. In no case shall the City Council approve a special review use other than the one advertised. The Council shall take one of the following actions:

- Approve the application;
- Conditionally approve the application;
- Deny the application;
- Allow withdrawal of the application; or
- Delay the application for a period not to exceed thirty (30) days.

FINANCIAL IMPACT: The special review, if approved, may increase the City's tax base.

RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #869 on a 5-0 vote.

Approved By: _____ **City Administrator** _____ **City Attorney** _____

ATTACHMENTS

A: Zoning/Location Map.
B: Site Plan

INTRODUCTION

This is a special review request to locate a Beer & Wine Beverage License with gaming for a new 3,039 square foot building to be constructed on a portion of a 93,494 square foot parcel of land in a Highway Commercial (HC) zone, on Lot 3, Block 1, Citizens Center Subdivision. The property is addressed as 414 Lincoln Lane. This property is behind CVS Pharmacy on Main Street, and north of Target.

PROCEDURAL HISTORY

- A special review application to locate a Beer & Wine Beverage License with gaming for a new 3,039 square foot building to be constructed on a portion of a 93,494 square foot parcel of land in a Highway Commercial (HC) zone was submitted on September 1, 2008.
- The City Zoning Commission held a public hearing on October 7, 2008, and is forwarding a recommendation of conditional approval.
- The City Council will conduct a public hearing and consider this application on October 27, 2008.

BACKGROUND

This is a special review request to locate a Beer & Wine Beverage License with gaming for a proposed 3,039 square foot building to be constructed on a portion of a 93,494 square foot parcel of land at 414 Lincoln Lane in a Highway Commercial (HC) zone.

The lot is legally described as Lot 3, Block 1, of Citizens Center Subdivision.

Surrounding development is commercial in nature with a mix of retail sales, eating establishments with the exception of the area to the north east. The property to the north east is developed as a mobile home park.

The applicant states in the application letter that this will be part of a master planned development. The applicant states in the letter that it is his intent to 'Construct thirty-two one bedroom apartments with single garages and two individual commercial buildings, one building for office use and the other building for gaming with a beer and wine license'. The applicant also states in the letter 'This new development will convert a lot that has been an eye-sore for many years; to eye-catching, well landscaped homes for people that can pay \$650 to \$700 monthly rent.' The access to the apartments will be from Lincoln Lane, the commercial access from the Target Center as well as Main Street.

There are no schools, churches, or playgrounds with equipment within 600 feet of the proposed location.

ALTERNATIVES ANALYSIS

Section 27-1503(D) specifies that all Special Reviews shall comply with the following three (3) criteria:

1. Complies with all requirements of this Article (27-1500).

This application does comply with the requirements of the zoning regulations. There are no schools, churches, or playgrounds with equipment within 600 feet of the proposed location.

2. Is consistent with the objectives and purposes of Chapter 27 and the Growth Policy.

This application is consistent with the purposes of Chapter 27 and the 2003 Growth Policy. The application is appropriate in this particular district based on all the circumstances of the location. The application does encourage predictable land use decisions that are consistent with the neighborhood character and land use patterns. The application does encourage land uses that are sensitive to and compatible with the character of the surrounding neighborhood, which is predominately commercial in nature.

3. Is compatible with surrounding land uses or is otherwise screened and separated from adjacent land in such a way as to minimize adverse effects.

The zoning regulations adopted by the City Council require separation of uses and also include requirements for landscape and fencing to provide separation from non-compatible uses.

Further, the City Council shall consider and may impose modifications or conditions concerning, but not limited to the following:

1. Street and road capacity;
2. Ingress and egress to adjoining streets;
3. Off-street parking;
4. Fencing, screening and landscaping;
5. Building bulk and location;
6. Usable open space;
7. Signs and lighting; and/or
8. Noise, vibration, air pollution and similar environmental influences.

Based on the above criteria, the Zoning Commission is forwarding a recommendation of conditional approval of Special Review #869 on a 5-0 vote.

CONDITIONS OF APPROVAL

1. The special review approval shall be limited to Lot 3, Block 1, Citizens Center Subdivision, located at 414 Lincoln Lane.
2. Development of the site shall be in substantial conformance with the site plan submitted with this application and shown in this staff report. Deviations from the approved site plan that show additional square footage on the outdoor patio, parking lot access or parking areas will require additional special review approval.
3. As shown on the site plan submitted with the application there shall be no outdoor patio. The addition of an outdoor patio would require an additional special review.

4. The solid waste storage area shall be enclosed on three (3) sides by a sight-obscuring fence or wall and by a sight-obscuring gate on the remaining side. This enclosure shall be constructed of normal fencing materials. Chain link or wire fencing cannot be used for sight-obscuring enclosure.
5. Landscaping shall be provided as required by Section 27-1100 of the Unified Zoning Regulations.
6. All exterior lighting with the exception of sign lighting shall have full cut-off shields so light is directed to the ground and not onto adjacent property.
7. These conditions of special review approval shall run with the land described in this authorization and shall apply to all current and subsequent owners, operators, managers, lease holders, heirs and assigns.
8. The proposed development shall comply with all other limitations of Section 27-613 of the Unified Zoning Regulations concerning special review uses, and all other City of Billings, regulations and ordinances that apply.

****NOTE**** Approval of this Special Review does not constitute approval of a building permit, sign permit or fence permit. Compliance with all applicable local codes will be reviewed at the building permit or zoning compliance permit level. This application is for a Special Review as noted above and no other request is being considered with this application. The use and development of the property must be in accordance with the submitted site plan.

STAKEHOLDERS

The Zoning Commission conducted a public hearing on October 7, 2008, and forwarded a recommendation of approval to the City Council on a 5-0 vote. The applicant, Darrel Kreitzberg, was present at the Zoning Commission meeting. Mr. Kreitzberg stated he could answer any questions about the application and had aerial photos of the site and surrounding businesses that he passed out to the Zoning Commission members.

Jim Monnel, a neighbor to the property stood and spoke in opposition of the application. Mr. Monnel stated that there was a real traffic problem at the intersection of Bench, Main and Lake Elmo that needs to be corrected. The light does not function properly for people to get off of Bench so at peak traffic times drivers may have to sit through the light two or three times before getting onto Main Street. Mr. Monnel also stated he was 'not excited' about another casino.

Staff also received a phone call from Karl Backman, another neighbor to the property. Mr. Backman stated that we do not need more casinos in the City of Billings and that there are already too many. Mr. Backman felt that the use of the space as a professional office would be fine but not another casino.

Staff also received another phone message from a neighbor; they did not identify themselves, opposed to another casino in Billings.

Mr. Kreitzberg stood to speak in rebuttal of the comments in opposition. He stated that the proposed casino is another Doty's casino and that they do not produce much traffic. There will be 20 machines inside and there may be 4 or 5 machines being used at the peak times. Mr. Kreitzberg didn't believe the casino would contribute anything to the traffic problem but most of the problem at Bench and Main was from the Target shopping center.

Commission Member Leonard Daily asked about the time frame for completion. Mr. Kreitzberg stated that it is the company's intent to begin construction in April 2009.

Commission Member Ed Workman stated he felt the intersection of Bench, Main and Lake Elmo would be a good location for a roundabout.

Commission Member Michael Larson stated that he agreed that traffic at the intersection of Bench, Main and Lake Elmo was bad and that something needed to be done, but the problem was money and Main Street is a state road.

A motion was made and seconded to conditionally approve Special Review #869. The zoning commission voted to forward a recommendation of conditional approval to the City Council with a vote of 5-0 to approve.

CONSISTENCY WITH ADOPTED PLANS AND POLICIES

In addition to the above discussion in the Alternatives Analysis section, this application does conform to the goals of the 2003 City of Billings/Yellowstone County Growth Policy, specifically:

- New Development that is sensitive to and compatible with the character of adjacent City neighborhoods.
- The project does encourage predictable land use decisions that are consistent with the neighborhood character and land use patterns.

RECOMMENDATION

The Zoning Commission is forwarding a recommendation of conditional approval of Special Review #869 on a 4-0 vote.

ATTACHMENTS

A: Zoning/Location Map.

B: Site Plan

ATTACHMENT A
Zoning Map - Special Review #869

