



CASCADE CITY COUNCIL
SPECIAL MEETING
September 19, 2019
6:00 PM
Cascade City Hall
AGENDA

CALL TO ORDER AND ROLL CALL

PUBLIC COMMENT

Public comment is limited to three (3) minutes per person, per item, unless additional time is permitted by the presiding official

PUBLIC HEARING

- ~~ZON 19 01, PUD 19 01, SUB 19 01 Cascade River, LLC (River District)~~
TABLED

NEW BUSINESS ACTION ITEMS

- River District Application Process

Posted in Public Notice Board – Wednesday, September 11, 2019

Heather Soelberg, Clerk

NOTICE TO PERSONS WITH DISABILITIES: Members of the public who are disabled and require special assistance or accommodations at the meeting are requested to notify the City Clerk at (208) 382-4279 in advance so that arrangements may be conveniently made.

WHITE PETERSON

ATTORNEYS AT LAW

WM. F. GIGRAY, III
KIRK J. HOUSTON
MATTHEW A. JOHNSON
JAY J. KIIHA **
WILLIAM F. NICHOLS *
BRIAN T. O'BANNON *

WHITE, PETERSON, GIGRAY & NICHOLS, P.A.
CANYON PARK AT THE IDAHO CENTER
5700 E. FRANKLIN RD., SUITE 200
NAMPA, IDAHO 83687-7901

TEL (208) 466-9272
FAX (208) 466-4405

EMAIL: mjohnson@whitepeterson.com

PHILIP A. PETERSON
WILLIAM L. PUNKONEY

TERRENCE R. WHITE **
OF COUNSEL
WILLIAM F. "BUD" YOST
OF COUNSEL

* Also admitted in OR
** Also admitted in WA

September 12, 2019

To: Mayor and Councilmembers, City of Cascade

Re: Cascade River District ANNEX/ZON/PUD/SUB Process

Dear Mayor and Councilmembers,

This memorandum is to advise you as to a noticing issue that has been found with respect to the Cascade River District development applications, and as background for a decision as to process options available to cure and remedy the issue. The September 19, 2019 Special Meeting agenda is being amended for the Council to address these process issues only. Until the process issues are resolved, the City is unable to move forward on a public hearing and deliberation on the merits. While this noticing issue is unfortunate, it is good that the ambiguity was identified now with opportunity to still cure via process instead of creating an opening for possible legal challenge.

On September 9, 2019, the City received a letter from Steven Millemann, attorney representing certain interested parties. The Millemann letter included presentation of a concern about ambiguity on legal descriptions on documents (whether the proposed project constituted 121 acres or 310 acres). Also on September 9, 2019, during discussion at the City Council meeting, it was commented to the City by Phil Davis, one representative of the Applicant, that the draft annexation ordinance in this matter contained an error on the legal description.

Upon further review of these comments and concerns, we have determined that there has indeed been an issue with the legal description in this matter. The issue originates with the original application form where the Applicant used a short township/range and lot description to describe the Subject Property (Short Description). That application form also references an attached metes and bounds description (Dunn Description #1). There is also a later different legal description (Dunn Description #2), although it just appears it describes the same property as the Dunn Description #1 using a different method. It is important to note that the Short Description by itself describes an area constituting over 300 acres while the Dunn Description #1 and #2 describe just over 121 acres.

As the Council is aware, this application was initially rushed into process without having been fully vetted for completeness. In the initial rush of process, the City staff member handling at that time used the Short Description from the application form on noticing documents. The use of that Short Description has carried through numerous other notices and documents

throughout the process to date.

After that initial rush, and in part on advice of legal counsel, the process was reset and a contract planner hired to help conduct a full review and evaluation on the application and to assist in the processing. However, unaware of the discrepancy, the Short Description continued to be used on many documents as it was copied over from the application and the noticing documents used at the start. Despite that, all substantive discussions and staff reports continuously reference the project as around 121 acres. There is no record of discussion that would suggest the applicant, any staff member, or any appointed or elected official contemplated that the project under review was anything other than the 121 acres.

While the record does not suggest any actual confusion or harmful impacts from the description discrepancy, it is undisputed that the use of the Short Description does create an ambiguity. The Millemann Comment Letter shows that at least one interested party is concerned about that ambiguity creating a noticing issue and confusion for public review.

As previously discussed, land use applications such as these are considered quasi-judicial matters before the City. For that reason, procedural due process is of particular importance to ensure that the process rights of all parties to have notice and an opportunity to be heard are protected. A noticing issue, such as this description ambiguity, opens the door for an argument that such process was not fully available.

For that reason, and upon reviewing this situation, our legal recommendation is that the City takes steps to remedy and cure the potential ambiguity caused by this noticing issue. There are at least two viable cure options depending on how the City Council feels it is best to balance the perceived/actual harm, additional time requirements on process, transparency, and the risk tolerance for potential legal challenge.

Option A: Repeat P&Z and City Council Steps

Under Option A, the whole set of applications would be remanded back to the start of the process before Planning and Zoning. This option is the most protective legally as there would be complete re-noticing with a corrected description throughout all steps. It would provide the maximum defense against any argument about a procedural due process violation due to this noticing issue.

However, it also would require more process time as the noticing, hearings, and meetings would all be re-done at both the Planning and Zoning and City Council levels. Note the bulk of materials (staff reports, draft findings, etc.) are already prepared and would not likely require substantial changes at this point, which means there should be minimal additional time impacts for staff (or further time requirements due to applicant submission and staff review needs).

Option B: Repeat and Re-Start City Council Steps

Under Option B, the whole set of applications would be re-started in process only before the City Council. The Planning and Zoning steps and recommendations to date would still be deemed as sufficiently valid, with a finding that any descriptions discrepancy was minor, caused no actual harm, and had no substantive impact on their deliberations. The descriptions ambiguity would be corrected, clarified, and cured via the City Council steps.

Option B has a little higher risk of legal challenge, as it does not clearly repeat and re-

notice all steps in the process. However, this slightly higher risk may be offset by the finding and argument that the noticing issue was a minor ambiguity that caused no actual confusion or harms in the Planning and Zoning process and deliberations, and further was cured by the opportunities before City Council.

Under Option B more process time will be required due to re-noticing, but a fair amount less than under Option A. The Applicant, having been informed of this issue, has indicated their request is for Option B.

Legal counsel and staff respectfully request the Council deliberate on the above options (or other options the Council may identify), and provide direction with respect to the next step in the process.

I will be present at the September 19 City Council meeting so as to answer questions on this matter as needed. As always you are welcome to individually contact me as well.

Respectfully submitted,



Matthew A. Johnson