

EL PASO COUNTY



OFFICE OF THE COUNTY ATTORNEY
CIVIL DIVISION

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July 12, 2011

Kevin Moore
Ban LLC
1816 N. Marksheffel Road
Colorado Springs, CO 80951

WAYNE W. WILLIAMS El Paso County, CO

10/03/2011 04:39:18 PM

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Re: 1816 N. Marksheffel Road, Colorado Springs, CO 80951

Development Services Department File Number: File No. ADM 11-002, Administrative Determination of Zoning Compliance

Relates to: File No. EXBL-11-002, Subdivision Exemption--Boundary Line Adjustment
File No. PPR 11-013, Site Development Plan

Dear Mr. Moore:

This letter is an Administrative Determination Letter prepared in accordance with the requirements of that certain Vacant Land Exchange Agreement dated December 14, 2010, between El Paso County by and through the Board of County Commissioners of El Paso County, Colorado (hereinafter "Board" or "County") and Ban LLC, a Colorado Limited Liability Company (hereinafter "Ban"), approved by the Board in Resolution No. 10-538 recorded on December 27, 2010, at Reception No. 200131837, which Vacant Land Exchange Agreement was also recorded separately on December 27, 2010, at Reception No. 210131838 (hereinafter "Ban Agreement"), both in the records of the El Paso County Clerk and Recorder's Office. This Determination Letter addresses whether the County's acquisition of right-of-way and easements for the Marksheffel Road Improvement Project pursuant to the Ban Agreement from property owned by Ban, LLC on the west side of Marksheffel Road located at 1816 N. Marksheffel Road, Colorado Springs, CO 80951, Tax Schedule No. 54050-00-006 ("the Property" or "the lot") for road and drainage improvement purposes impacts the lot, , and thereby causes land use problems in the future should Ban or its successors decide to subdivide or change the use of its Property.

Pursuant to the Ban Agreement, the County is acquiring from Ban approximately 14,735 square-feet or 0.3383 acres +/- for right-of-way by a Special Warranty Deed and a Temporary Construction Easement consisting of 6,748 square-feet or 0.1549 acres +/- . The County, also is

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obtaining a Non-Exclusive Permanent Easement for the use and benefit of Mountain View Electric Association consisting of 6,748 square-feet or 0.1549 acres +/- (hereinafter "NEPE"). Ban will continue to have exclusive ownership over the easement areas and may use said easement property as long as it does not interfere with the County's use or Mountain View Electric Association's use in accordance with the NEPE. The right-of-way and easements will be used for ingress, egress, construction, replacement, repair, and maintenance of road, drainage facilities, and utilities associated with Marksheffel Road improvements.

ZONING AND SUBDIVISION COMPLIANCE

The County's acquisition of right-of-way for its Marksheffel Road Improvement Project and NEPE for Mountain View Electric Association will not result in violation of County zoning or either State or County subdivision regulations as to the Property.

The Property is approximately 4.7369 acres before the conveyances and the boundary line adjustment required by the Ban Agreement, and will be approximately 4.8799 acres after the conveyances and adjustment; therefore, there will be a net gain of approximately 0.143 acres. The Property is zoned "I-3" Heavy Industrial District. This zoning district is intended to accommodate manufacturing and industrial uses, which may include related outside storage of raw or finished materials. The Property is currently used as a commercial nursery operating under the name of Homestake Nursery. The Property has a one-story office building built in 1980, temporary greenhouse structures, areas for tree and plant stock, and storage bins for planting and landscaping materials. Minimum lot size in the I-3 zone is 1.0 acre. Table 5.5, Land Development Code ("Code").

Section 5.4.3(F)(2)(d) of the Code discussing Lot Area for Nonconforming Lots states in part "Lots conforming to the minimum lot area requirements of the zoning district that are subsequently reduced in land area due to land acquisition by a governmental entity shall be considered conforming to the minimum lot area requirements." Section 7.2.2(B)(1) of the Code states in part ". . . any parcel created by the right-of-way taken or acquired by federal, state or local government, shall be considered an exemption provided that the parcel being divided was not created illegally."

The lot was created by deed recorded at Book 2077, Page 332, dated June 8, 1965, prior to Senate Bill 35, which was enacted in 1972 and created a subdivision process that applies to any division of property resulting in parcels less than 35 acres. Therefore, because the lot was created before Senate Bill 35, it is an unplatted lot that was created legally, and thus is a legal conforming lot as to creation.

The lot is a legal conforming lot as to area for the following reasons: 1) since the lot is approximately 5 acres in size it meets the minimum 1 acre requirement before the County acquisition; 2) the amount of property being taken by easement and right-of-way and as revised per the boundary line adjustment transaction will leave approximately 4.8799 acres, so the size of the remaining lot will increase and therefore still will be greater than the 1 acre requirement;

and 3) since the Property is a conforming lot and a portion is being taken by the government—the County—for right-of-way, the acreage taken would not count against the minimum lot size. Based on this analysis and on the Code, because the right-of-way and easements are being taken by a government entity—the County—for road and drainage purposes, the resulting lot area after the transactions required in the Ban Agreement conforms to the minimum lot area requirements of the zoning district since the I-3 Zone only requires a minimum of 1 acre.

ADMINISTRATIVE RELIEF FROM SETBACK STANDARDS

Front, rear, and side setbacks are each 30' in the I-3 Zone. On information and belief, the setbacks for the Property conformed to the setback requirements prior to the conveyances of right-of-way and NEPE pursuant to the Ban Agreement. Once the conveyances occur, through no fault of Ban's but by the County's acquisitions for public purposes, at least one structure, the Existing Building as identified on the Site Plan, attached hereto at **Exhibit 1** and incorporated herein by this reference, will no longer meet the front setback requirement on Marksheffel Road, and thus will be rendered a nonconforming building. The setback requirement does not apply to the encroachments of the Asphalt Parking and Temporary Structure/Covered Area, which are allowed. Side and rear setbacks remain in compliance after the acquisitions.

The Code allows for administrative relief from dimensional standards, including setbacks. § 5.5.1.B. The DSD Director may approve administrative relief “. . . to provide limited flexibility to lot standards when it is determined that no substantial detriment to the public good nor harm to the general purpose and intent of this Code will be caused by the administrative relief granted. *Id.* That relief can be granted for a maximum of 20% reduction in setbacks from the amount required in the zone district. § 5.5.1.B.1. While the Code provides that minimum lot area is considered conforming to requirements when the land area is reduced by acquisition by a governmental entity, i.e., for right-of-way as in this case, there is no such similar express provision for setbacks; therefore, administrative relief is necessary and appropriate in this case.

Pursuant to the analysis below, the DSD Director makes the following findings to support his determination that administrative relief is hereby granted for the front setback (the side and rear setbacks conform to the minimum 30' requirement):

Based on information provided by the Public Services Department, the front setback will be approximately 18'-20', which is approximately a 33% reduction; therefore, the administrative relief from setback requirements referenced above and expressly provided in § 5.5.1.B.1 of the Code cannot be applied because the reduction in the setback requirement exceeds the maximum 20% allowed; however, there are criteria under § 5.5.1.D.1 which in and of themselves will provide further support for this determination. It is a canon of statutory construction that statutes *in pari materia* must be construed together. *In pari materia* means upon the same matter or subject. Black's Law Dictionary 711 (5th ed. 1979). Therefore, the regulatory provisions of the Code dealing with the same or similar matter—in this case lot adjustments due to government acquisition for public purposes—must be construed together. It does not make sense to allow a

lot area reduction caused by the County's action to be considered conforming under §§ 5.4.3.F.2.d and 7.2.2.B.1, but then not allow a setback reduction within the same lot area caused by the same County action just because § 5.5.1.B.1 does not expressly provide for such a similar finding of conformity. Therefore, the Director applies the rules of statutory construction and analogizes the provisions in §§ 5.4.3.F.2.d and 7.2.2.B.1 of the Code regarding minimum lot area compliance after acquisition of property by the County to the reduced setback resulting from the same County acquisition and finds that as a result of said acquisition, the reduced setbacks are hereby declared to be in compliance pursuant to this grant of administrative relief.

Although the 20% setback reduction requirement for administrative relief under § 5.5.1.B.1 of the Code does not apply, the criteria under § 5.5.1.D.1 related thereto is met and supports this administrative determination. Therefore, again applying the *in pari materia* canon, the Director makes the following additional findings based on the criteria under § 5.5.1.D.1:

The strict application of the standard in question is unreasonable or unnecessary given the development proposal or the measures proposed by the applicant because the County, through its project acquisition requirements, is causing the reduction in setbacks. Ban, through no fault or action of its own, has no control of the resulting setback distances from the property or right-of-way lines because of the County's acquisition of right-of-way and NEPE from the lot. Alternatively, if Ban did not agree to convey to the County, the County could condemn the necessary portions of the lot, the identified existing structure would not comply with the setback requirements for the zone, and because the reduced setbacks would be the result of the court action, no administrative relief would be required or sought.

The intent of this Code and the specific regulation in question is preserved because the purposes of setbacks, including promoting and protecting public health, safety, and welfare, protecting property values, and protecting the public from damage or injury attributable to improperly situated buildings or structures are met through the considerations of the overall Marksheffel Road Improvement Project as it relates to this lot. The construction plans and acquisition requirements were arrived at after consideration by County and consulting engineers that would have taken into account that Ban's resulting lot configuration, including the resulting setbacks, would not harm the public and would not impede vision of, or distract, the public. Requiring relocation of the existing structure to meet setback requirements would increase project costs and expenditure of public funds, which is not reasonable in this situation.

The granting of the administrative relief will not result in an adverse impact on surrounding properties because the property to the front is Marksheffel Road and the property to the south side setback also will eventually be a public roadway. The setback to the north is adjacent to property owned by Marksheffel Business Center, who is a party to an associated Land Exchange Agreement and has not objected to the resulting setback distances. Finally, as noted previously, the side and rear setbacks remain in compliance after the acquisitions.

The granting of the administrative relief will not allow an increase in the number of dwelling units on a parcel is inapplicable because this is a commercial property.

This Determination and administrative relief for setbacks does not address any issues related to any commercial signs on the Property. There is an existing sign in the right-of-way area to be acquired by the County. When it becomes necessary to relocate the sign, Ban or its successor will have to submit an application to DSD for a permit, and the sign will have to be relocated in compliance with the Code then in effect, including setback requirements. DSD will waive the application fee for such sign relocation permit application. Additional development of the Property or construction of structures thereon will be required to meet the setback requirements of the zone district.

SUBDIVISION EXEMPTION-BOUNDARY LINE ADJUSTMENT

The County applied for a Subdivision Exemption--Boundary Line Adjustment in File No. EXBL-11-002, which was approved on May 26, 2011; however, pursuant to § 7.2.2.E.5.d of the Code, the adjustment, and thus the approval, will not be completed and effective until the deeds conveying the applicable portions of the Property are recorded. This Determination Letter incorporates by reference that file and review. The Property is approximately 4.7369 acres before the proposed boundary line adjustment and acquisition of right of way, and will be approximately 4.8799 acres after the adjustment. This results in an increase of approximately 0.143 acres to the size of the lot. The lot will be reconfigured as a result of the Ban Agreement requirements to convey right-of-way along Marksheffel Road to the County, a NEPE to MVEA, and to add additional acreage along the southern boundary of the lot. The purpose of the acquisition and adjustment are not to trigger or evade the definition of "subdivision" in § 30-28-101(10)(a), C.R.S., and applicable subdivision requirements of either the State of Colorado or El Paso County, and as a result of this subdivision exemption action, do not trigger the definitions or requirements of subdivision. Therefore, the Property is in compliance with applicable State and El Paso County subdivision regulations now and will not be in violation of either State or El Paso County subdivision regulations as a result of the transactions in the Ban Agreement.

SITE PLAN

The County submitted information for a Site Plan that addresses the relocation of uses and structures on the lot (*see, Exhibit 1* attached hereto). The Site Development Plan was approved administratively on May 26, 2011, in association with the Subdivision Exemption--Boundary Line Adjustment.

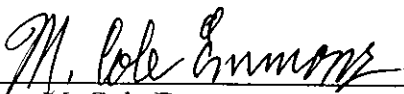
This Determination does not exempt either the Property or future subdivided lots thereon from compliance with the administrative site plan review provisions under the zoning and subdivision provisions of the Code if the configuration of the property or the uses or structures thereon change from those in the Site Development Plan approved in conjunction with the Subdivision Exemption--Boundary Line Adjustment. Compliance with such zoning and

subdivision provisions would be a prerequisite before any building permit may issue as a result of any reconfiguration of the lot. Conveyance of right-of-way to the County and easement to Mountain View Electric Association shall not adversely impact the Property's zoning compliance as currently improved or to be improved pursuant to the approved Site Development Plan, and Ban has the ability as a property owner to pull a building permit as a matter of right for all permitted uses allowed under the Code for the Property's zoning classification; however, this Determination Letter shall not preclude the County's ability to require Ban or its successors to submit a plat or Site Development Plan as required under the Code for any proposed new or expanded land use on the lot.

This Determination Letter is an open and public record that will be recorded in the records of the El Paso County Clerk and Recorder's Office. You may disclose it to any person that you may deem appropriate. Furthermore, this Determination Letter shall permanently remain in the records of the Development Services Department; however, before any other person relies upon this Letter in the process of determining whether to accept any instrument pertaining to the subject Property, it is advisable for all parties to consult with legal counsel. The reason for such consultation is that this Determination Letter may not be insulated from the effect of any changes to Colorado law as may be enacted from time to time by the Colorado General Assembly or from any subsequent changes to the El Paso County Land Development Code.

This Determination constitutes an administrative decision of the Director of the Development Services Department and is a final determination. By your signature below, Ban agrees to the contents of this Determination Letter. Your signature constitutes both Ban's acknowledgement that it has had the opportunity to participate in the development of this Determination Letter and Ban's express written consent to this Determination pursuant to the requirements of the Ban Agreement. In addition, while an appeal of an Administrative Determination directly to the Board of County Commissioners is available, by your signature below on behalf of Ban, Ban hereby indicates that it will not appeal this Determination and is expressly waiving such right.

OFFICE OF THE COUNTY ATTORNEY

By: 
M. Cole Emmons
Assistant County Attorney

I have read this letter and concur with the statements and conclusions set forth herein, and agree this letter constitutes my administrative decision as the Development Services Department Director regarding the issues set forth herein.

DEVELOPMENT SERVICES DEPARTMENT

By: Max Rothschild PE
Max Rothschild, Director

I have read this letter and concur with the statements and conclusions set forth herein and my representations herein.

BAN, LLC,
A Colorado Limited Liability Company


By: Kevin Moore, Manager
Kevin Moore, Manager

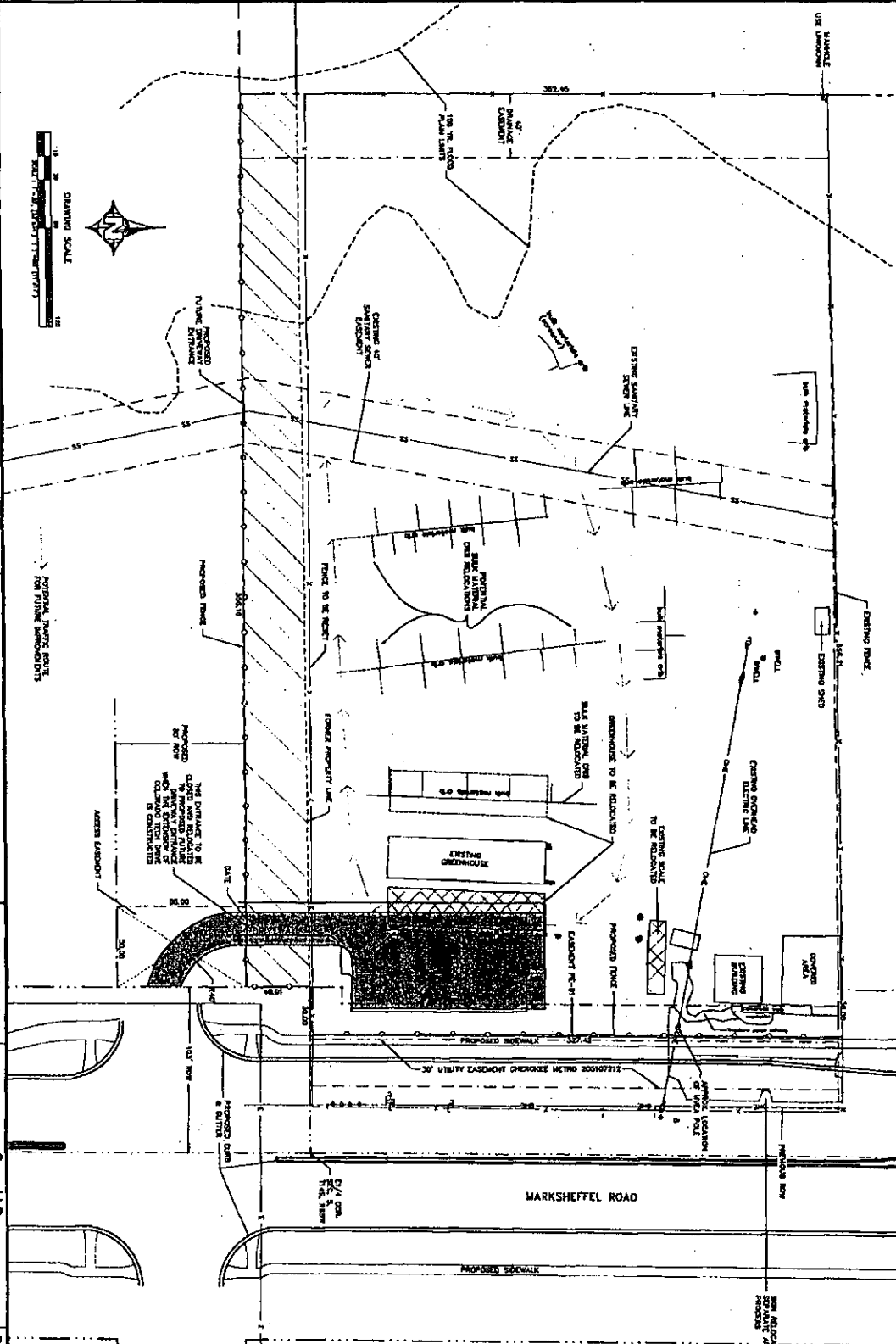
cc: William H. Louis, County Attorney
Mark Gebhart, Planning Group Manager, Development Services Department
Tasha Norman, Project Manager I, Development Services Department
Raimere Fitzpatrick, Planner II, Development Services Department
Dennis Barron, Project Manager, Public Services Department

BESQCP Not Required
by AKA on 5/26/2011

ANY APPROVAL GIVEN BY EL PASO COUNTY DOES NOT OBLVIATE THE NEED TO COMPLY WITH APPLICABLE FEDERAL, STATE, OR LOCAL LAWS AND/OR REGULATIONS

CALL UTILITY NOTIFICATION CENTER OF COLORADO 1-800-822-1987 CALL 3 BUSINESS DAYS IN ADVANCE BEFORE YOU BE SHOWN OR EXCAVATE FOR THE MARKS OF UNDERGROUND MEMBER UTILITIES.

Computer File Information	
Creation Date: 12/7/2010	Author: RWD
Last Modification Date: 5/28/2011	Editor: RWD
File Path: P:\Proj-CO30-2011\Bon LLC Site Survey	
Drawing File Name: Bon LLC-pppd-1.dwg	
Scale: AS SHOWN	Units: Feet
Index of Revisions	
	
El Paso County Public Services Department 3275 Avea Pike Colorado Springs, Colorado 80922-1547 Tel: 719-580-9400 Fax: 719-580-1878 Division of Transportation	
As Constructed	No Revisions
Boundary Line Adjustment	
Bon LLC	
Homestead Nursery Exhibit	
Project No./Code	



APPROVED
BY AKA DATE 5/26/2011
FOR SITE PLAN
NOTES ASSOCIATED
WITH BOUNDARY LINE ADJUSTMENT
EL PASO COUNTY
DEVELOPMENT SERVICES

DENIED
EXBL 11-002
ADM 11-002
PPR 11-013

Development services are provided on a contingent basis upon compliance with all applicable notes on the recorded plat.

An access permit must be granted by the Development Services Engineering Division prior to the establishment of any driveway onto a County Road.

Division of blockage of any drainageway is not permitted without the approval of the Development Services Engineering Division.