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February 3, 2023

ATTN: Ingrid Richter

RE: Warehouse Ops Determination of Nonconforming Use

File: ADM-22-036

Parcel ID: 54050-00-050; 54050-00-055

To Whom It May Concern:

A request has been made for an interpretation regarding the above referenced parcels to confirm that the existing outside storage uses on the properties are considered nonconforming uses pursuant to the El Paso County Land Development Code (2022). A request has also been made for an interpretation regarding the applicability of stormwater permits for the properties.

**Parcel Legality Analysis**

The properties must first be confirmed as legal lots. Section 1.15 of the Code defines a "Legal Lot" as:

"A lot, parcel or tract of land created by a legal conveyance of the lot, parcel or tract prior to July 17, 1972; a lot, parcel or tract shown on a subdivision plat which was approved and recorded prior to July 17, 1972, according to the subdivision regulations in effect at the time of approval; a lot, parcel or tract created by legally prepared survey dated prior to July 17, 1972; a lot, parcel or tract created by approval of the County commissioners in conformance with the subdivision regulations in effect at the time of approval; a lot, parcel or tract created by a contract for deed or signed but unrecorded deed, each dated prior to July 17, 1972; a parcel exempted from subdivision by the Board of County Commissioners (BoCC), or any parcel of 35 acres or more, which, when created, did not cause a parcel of less than 35 acres to remain; a parcel created by any court pursuant to the law of eminent domain, operation of law, or by order of any court if the BoCC has been given timely notice and opportunity

to join in the action; a parcel modified or reduced in size due to land acquisition by a governmental entity.”

*Parcel No. 54050-00-050 (South Parcel)*

The property was created on January 20, 2006, by land sale and is therefore not a legal division of land due to the date of creation occurring after July 17, 1972. Due to the parcel being created after 1972, being less than 35 acres, and not created through the subdivision process, the parcel is not considered a legal division of land as defined in the Land Development Code.

*Parcel No. 54050-00-055 (North Parcel)*

The property was created on June 8, 1965, by deed. Due to the parcel being created before 1972, the parcel is considered a legal division of land as defined in the Land Development Code.

**Nonconforming Use Analysis**

*Compliance with Zoning Regulations:*

Both of the properties are currently being used for the purpose of outside storage.

Section 1.15 of the Code defines “Storage, Outside” as:

“Open air storage of vehicles, raw materials, supplies, finished or semi-finished products or equipment.”

In 1985, the properties were zoned PHID (Planned Heavy Industrial District). In 2007, due to nomenclature changes in the Code, the PHID zoning district was renamed as the I-3 zoning district. Outside storage is an allowed use within the I-3 zoning district; however, pursuant to Table 5-1 of the Code, a site development plan is required to initiate an outside storage use.

Section 1.15 of the Code defines a “Use, Nonconforming” as:

“Any legally existing use, whether within a structure or on a piece of land, which does not conform to the use regulations of the zoning district in which the use is located, either at the effective date of this Code or as a result of the subsequent amendments which may be incorporated into this Code.”

According to the applicant’s request letter, the outside storage use was initiated on the South parcel in 2000. The applicant has provided aerial imagery identifying that the use has remained uninterrupted since its initiation on the property. According to the applicant’s request letter, the outside storage use has been in place on the North parcel since at least 1999. The applicant has provided aerial imagery identifying that the use has remained uninterrupted on the property since 1999. Neither property has had an approved site development plan permitting the outside storage uses.

The applicable Land Development Code at the time of initiation of the uses on the properties identified site development plan requirements. The Code referred to a site development plan as a plot plan. Chapter 4, Section C of the Code stated the following:

“When required: A plot plan shall be required prior to the Planning Department’s authorization of the issuance of a building permit in all zones requiring said submittal.”

Due to the nature of the outside storage uses, building permits were not required to initiate the outside storage uses on the South parcel, and therefore, a site development plan was not required when the use was first initiated. The Code excerpt is included herein as Exhibit A.

### **Stormwater Determination**

For stormwater purposes, the outdoor storage use is considered development (any man-made change including grading and storage of materials) and the FEMA floodplain has been modified without permits or approvals. The applicable Drainage Criteria Manual Volume 1 (also referred to as DCM) at the time of initiation of the uses on the properties includes the following sections. Section 1.4.2 of the Drainage Criteria Manual states the following:

“DEVELOPERS IN AND ALONG A DRAINAGEWAY ARE REQUIRED TO IMPLEMENT THE PROPER MEASURES TO MAINTAIN OR CREATE STABLE CHARACTERISTICS OF THE DRAINAGEWAY. THE PRINCIPAL OBJECTIVE IS TO LIMIT EXCESSIVE EROSION IN AND ALONG THE CHANNEL. HISTORICAL CHANNEL RELOCATIONS/REALIGNMENTS SHALL NOT BE ALLOWED UNLESS ENGINEERING DESIGNS FOR STABLE SYSTEMS UNDER FLOOD FLOW CONDITIONS ARE ACHIEVED AND APPROVED.”

Section 1.6 of the Drainage Criteria Manual states the following:

“THE MANAGEMENT OF OVERALL WATER QUALITY OF STORM DRAINAGE WILL REQUIRE DEVELOPERS TO SUBMIT AN EROSION CONTROL PLAN FOR ALL DEVELOPMENT IN ACCORDANCE WITH CRITERIA SET FORTH IN THIS MANUAL.”

Section 4.8.4 Scope and Exclusions of the DCM states:

“These criteria shall apply to any land-disturbing activity undertaken by any person on any lands, except on minor land-disturbing activities, such as individual home landscaping and gardening, maintenance and repair work, and those land-disturbing activities which, in the judgement of the City/County, as set forth in writing, will not result in significant soil erosion or the movement of significant sediment into waters or onto lands off the project site.”

Section 4.8.5 Plan Implementation of the DCM states:

“No clearing, grading, excavation, filling, or other land-disturbing activities shall be permitted until approval of the Erosion Control Plan is received from the City/County Department of Public Works.”

Chapter 2, Section B of the applicable Land Development Code at the time of initiation of the uses on the properties identified that it is the policy of the County to:

“Preserve and protect water resources. To this end, it is the policy of the County that no land use be initiated which would adversely affect the quantity, quality, or dependability of the County’s water resources; or which would occur at the expense of established water dependent agricultural activities; or which would result in increased salinization of water, loss of minimum stream-flows, destruction of wildlife habitats, or entail future major expenditures on the part of the general public to reacquire or redistribute water resources.

Prevent the acceleration of the erosion of soil and rock in order to reduce or eliminate erosion related problems such as stream sedimentation, dust, gullying, alteration of drainage patterns, exacerbation of flood hazards, loss of natural vegetation, visual scars, leaching of minerals, destruction of animal habitats, and increased maintenance costs for roads and other facilities.

Preserve the integrity of existing and natural drainage patterns in order that the aggregate of future public and private development activities will not cause storm drainage and floodwater patterns to exceed the capacity of natural or constructed drainageways or to subject other areas to increased potential damage due to flooding, erosion, or sedimentation or to result in pollution to streams, rivers, and other natural bodies of water.”

The complete Section of the Code is incorporated herein as Exhibit B.

Chapter 5, Section 49.2 of the applicable Code at the time of initiation of the uses put forth performance standards for drainage. The complete applicable section is incorporated herein as Exhibit C.

Chapter 5, Section 51 of the applicable Code at the time of initiation of the uses put forth standards for erosion control reports and included the following language regarding the applicability of an erosion control plan (Section 51.B.5 Scope and Exclusions):

“These criteria shall apply to any land disturbing activity undertaken by any person on any lands, except minor land-disturbing activities, such as individual home landscaping and gardening, agricultural and related activities which, in the judgment of the County Department of Transportation as set forth in writing, will not result in significant soil erosion or the movement of significant sediment into waters or onto lands off the project site.”

The land disturbing activity that has occurred on both properties does not meet any of the above exclusions contained within Section 51 of the Code. The floodplain diversion has been determined to be affecting water quality, erosion and sedimentation and is causing a hazard on other owners' properties. The land use is causing potential erosion and sediment control issues that need to be analyzed. Since the site is not stabilized and land disturbance is ongoing, the County's MS4 permit requirements need to be met. The fact that the CWCB is doing a floodplain update study (referenced on page 8 of the ADM request letter) has no effect on the necessary engineering criteria for this development but may complicate after-the-fact reviews and corrective requirements for this site if the grading is not rectified prior to the CWCB study.

The easement agreements for the Sand Creek channel construction (referenced on page 7 of the ADM request letter) were for the channel segments that were constructed through the southeast side of the property; they have no effect on what needs to be provided by the developer for approvals of the subject land use.

Any development involving Sand Creek drainageways and the property containing them is subject to the Sand Creek Drainage Basin Planning Study (DBPS) including reimbursable regional improvements (reference mention of “regional drainage solution” on page 9 of the ADM request letter). The design of drainage improvements is of course reviewed under the current regulations at the time of submittal.

For reference, the NFIP/FEMA definition of “development” is as follows:

“Development means any man-made change to improved or unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials.”

### **Access**

Regarding access, since the City of Colorado Springs has taken over ownership of the Marksheffel Road right-of-way, documentation of approvals from the City need to be provided. Access to and construction of the proposed Colorado Tech Drive will be reviewed and approved through the County if it remains under County jurisdiction. For the North parcel, any change of use increasing traffic impacts from the time the agreements for Marksheffel Road right-of-way and access were completed

should be addressed. For the South parcel, approval of any access associated with development (including the current uses) is required.

The collateral called by the County for incomplete improvements in the Willshire development may be available for improvements to Colorado Tech Drive if needed; coordination with the County Attorney's Office is needed to verify this.

**Discussion and Conclusion:**

Pursuant to Section 5.6.4 of the Code, a nonconforming use may not be extended or enlarged. If the applicants wish to extend or enlarge the use in any way, a site development plan shall be required.

Due to the South Parcel being an illegal division of land, no permits may be issued on the property until the division of land is legalized through the subdivision process. Due to the North Parcel being a legal division of land, it may be eligible for permits without the need for a subdivision process.

In accordance with the County's MS4 permit requirements, an Erosion and Sediment Quality Control Permit (ESQCP), and all associated documents, is required for both the North and South properties based on the amount of land disturbance and the properties' proximities to a floodplain (see Engineering Criteria Manual (ECM) Appendix I.4.1 and Table I-2). The ESQCP Application should be prepared to cover all previous areas of disturbance and all future disturbance associated with the required erosion and floodplain repairs. In addition, stormwater quality (and potentially stormwater detention) will need to be addressed prior to any stormwater discharge offsite.

Any requests regarding the legality or legitimacy of access to the property across other properties are beyond the scope of an administrative determination, as this determination is an interpretation of the applicability of the provisions of the Land Development Code. It is recommended that the applicant seek legal counsel regarding any questions related to legal matters.

Any proposed new development shall comply with all other applicable County, State, and Federal Regulations.

If you have any questions or concerns regarding this determination, please contact myself or Ryan Howser, AICP Planner III, at (719) 520-6049, or [ryanhowser@elpasoco.com](mailto:ryanhowser@elpasoco.com).

Sincerely,



Justin Kilgore

Planning Manager

El Paso County Planning and Community Development Department

- 3) Other means of extra notifications which may be employed at the discretion of the Planning Director are the following:
  - enlarged notification sign,
  - notification of applicable homeowners' and neighborhood associations, etc., and
  - press releases.
- b. Items may be heard by the Minor Subdivision Committee, if, in the opinion of the Planning Director, they do not entail major land use changes.

C. PLOT PLAN

1. **When required:** A plot plan shall be required prior to the Planning Department's authorization of the issuance of a building permit in all zones requiring said submittal.
2. **Submittal Deadline:** A plot plan may be submitted at any time.
3. **Submittal Requirements:** The petitioner shall submit all required items as outlined in Section 4 (Submittal Requirements). A filing fee as outlined in Section 58 shall also be submitted.
4. **Action and Procedure of the Planning Department:**
  - a. The Planning Department shall review each plot plan to determine if said plan is consistent with the standards set forth in the Zoning Regulations and other applicable regulations of El Paso County.
  - b. If the plan is found to be in conformance with said Regulations, the plot plan shall be approved and signed by the Planning Director.
  - c. If the plot plan is not in conformance with said Regulations of El Paso County, the plot plan shall be disapproved by the Planning Director.
5. **Effect of Approval:** The approval of the plot plan shall constitute the Planning Department's authorization for the issuance of a building permit and/or other applicable permits. Plot Plan approvals granted for the purpose of obtaining a building permit shall only be valid and in effect for a one (1) year period commencing at the date of approval.

CHAPTER II. - LAND DEVELOPMENT GUIDELINES

It is the goal of El Paso County to provide for the physical development of the unincorporated portion of the County in a manner consistent with sound fiscal management, preservation of environmental quality, and adequate provision of necessary services and facilities. The following guidelines set forth general policies for realization of this goal within the framework of protection of the public health, safety and welfare.

A. FISCAL IMPACTS

1. It is the policy of the County to ensure that development will not result in reduction of the quality of services, public facilities, or programs provided to the residents of the County, and further, that development is consistent with the goal of provision of services, facilities, and programs without substantial increase in taxation levels. In order to implement this policy, the County shall:

Review proposed developments in light of the impact of the development on the current tax base and mill levy. The County may approve those developments which do not result in a substantial projected tax deficit to the County, or if it is determined that for social, economic, or other reasons, the development is in the long-range interests of the residents of the County.

B. ENVIRONMENTAL QUALITY

It is the policy of the County to:

1. Preserve the scenic quality of the County for the benefit of its residents and the continued growth of the tourist industry.
2. Encourage features in any development or activity proposal which will conserve energy resources and minimize the consumption of energy. To this end, it is the policy of the County to encourage orientation of structures to take advantage of the sun, to prevent structures or development from blocking direct sunlight to other structures, improvements, or uses; to encourage use of barriers as defense against wind; to promote the use of landscaping to maximize cooling in the summer and retention of heat in the winter; to promote construction and siting which conserves natural gas, electricity, and gasoline; and to encourage features which promote transportation alternatives to automobile use.



3. Preserve and protect its present water resources. To this end, it is the policy of the County that no land use be initiated which would adversely affect the quantity, quality, or dependability of the County's water resources; or which would occur at the expense of established water dependent agricultural activities; or which would result in increased salinization of water, loss of minimum stream-flows, destruction of wildlife habitats, or entail future major expenditures on the part of the general public to reacquire or redistribute water resources.
4. Prevent the acceleration of the erosion of soil and rock in order to reduce or eliminate erosion related problems such as stream sedimentation, dust, gullying, alteration of drainage patterns, exacerbation of flood hazards, loss of natural vegetation, visual scars, leaching of minerals, destruction of animal habitats, and increased maintenance costs for roads and other facilities.
5. Preserve the economic viability of agricultural lands and operations within El Paso County to ensure that large tracts now committed to or capable of agricultural uses shall be preserved, where practicable, as food resource areas. To this end it is the policy of the County to:
  - a. Exclude primarily agricultural areas from taxing districts which may be formed for purposes not of measurable benefit to agricultural operations.
  - b. Avoid development or development patterns that will require water to be taken out of agricultural uses.
6. Minimize the costs of constructing and maintaining structures and improvements which are designed in such a manner or located on such sites so as to make them susceptible to radiation hazards or to structural damage or failure resulting from soil or surficial geologic characteristics.
7. Preserve the integrity of existing and natural drainage patterns in order that the aggregate of future public and private development activities will not cause storm drainage and floodwater patterns to exceed the capacity of natural or constructed drainageways or to subject other areas to increased potential for damage due to flooding, erosion, or sedimentation or to result in pollution to streams, rivers, and other natural bodies of water.

CHAPTER V

SECTION 49.2 Performance Standards

A. DRAINAGE

As a general rule, standards set forth in El Paso County Design manuals for drainage and erosion control are acceptable to El Paso County. As part of the master planning process, El Paso County will develop "design manuals" for improvements within various areas of the County. These manuals will describe acceptable standards for the areas addressed.

The design and operation of the development proposal shall ensure that:

1. Historical flow patterns and runoff amounts will be maintained in such a manner that will reasonably preserve the natural character of the area and prevent property damage of the type generally attributed to runoff rate and velocity increases, diversions, concentration and/or unplanned ponding of storm runoff.
2. Runoff volumes and peaks within the development site and in areas affected by runoff will not exceed the runoff levels attributable to the site in its natural state.
3. The development will not impede the flow of natural water courses.
4. That all low points within the development area are ensured adequate drainage.
5. That any drainage system proposed as part of any development proposal is based on consideration of the drainage basin as a whole and is capable of accommodating not only runoff from the proposed development, but also, where applicable, the runoff from areas adjacent to and "upstream" from the development itself.
6. Provision exists in the design or operation of any proposed drainage facilities to ensure suitable provisions for maintenance.
7. Where development will cause the introduction of new pollutants into the runoff water, provision will be made for the storage, treatment and removal of such pollutants.

B. EROSION

The design and operation of the proposal shall ensure:

1. That any development is designed and executed in a manner which will minimize disturbance of natural vegetation and soil cover. Special attention should be paid to areas adjacent to streams, lakes, and reservoirs.