

August 18, 2020

Storey County Commission
Attn: Chairman Marshall McBride
Storey County Courthouse, District Courtroom
26 South B St.
Virginia City, NV 89440

RE: Stericycle Supplemental Information for County Commission Meeting August 18, 2020, Agenda Item #21

Dear Chairman McBride, and County Commissioners Carmona and Gilman:

Stericycle, Inc. respectfully submits this letter in connection with Agenda Item #21 on the August 18, 2020 Board of County Commission agenda and to supplement the information and arguments being presented by Stericycle at the hearing. The purpose of this letter is to provide additional information for the record and guidance to the County Commission with respect to the special use permit entitlement being requested and to address certain legal arguments made by opponents of the application.

The application at issue is governed by the unique land use entitlements governing the TRI Center in Storey County. The TRI Center is a 107,000 acre industrial park located in the northern portion of the County the entirety of which is zoned I-2 Heavy Industrial (as described under Chapter 17.37 of the 1999 Code) with a master plan designation of Industrial (I). Pursuant to NRS 278.0201 through 278.02053, development on the property is governed by a Development Agreement and Development Handbook adopted by Storey County in February 1, 2000 and the Storey County Zoning Ordinance adopted July 1, 1999 (“1999 Code”).

The Development Agreement and Development Handbook grant vested rights to develop the Property in accordance with the master site plan, 1999 Code and the agreement, and establish the permitted uses of the Property, the density and intensity of uses, and the standards for design and construction. *Development Agreement, Sec. 5.1.* The express purpose of the Development Agreement is to “provide for public services, public uses, and urban infrastructure, to promote the health, safety, and general welfare of the County and its inhabitants, and to provide the Developer with certain safeguards and rights”. *Development Agreement, Sec. 2.3.*

The Development Agreement requires the County to “cooperate with and assist Developer to the fullest extent permitted by law to implement this Agreement”, including “processing and checking of any and all permits . . . and the issuance of all Subsequent Development Approvals (which includes special use permits) necessary for the construction, use and occupancy of the Property. *Development Agreement, Sec. 7.1* The Development Agreement further states the Developer will be permitted to carry out and complete the entire Project on the Property”, and that there are “no Existing Rules that would prohibit or prevent the full completion and occupancy of the Project in accordance with the Master Site Plan, the CIP, the Existing Development Approvals

and this Agreement”. *Id.*, *Sec. 7.2*. The County further agreed “it will not unreasonably withhold or unreasonably condition or delay any such Discretionary Action or Discretionary Approval”, which must be processed to develop the Project. *Id.*

As you are aware, the County is prohibited from applying any rules or standards adopted after the Development Agreement which conflict with its terms, including rules which prevent an owner from obtaining a special use permit, among other things, in the manner the Developer would otherwise be entitled to secure under the land use regulations in effect on February 1, 2000. *See Development Agreement 5.2(a) and 7.4; NRS 278.0201*. Thus, development in the TRI Center is governed by the County’s 1999 Code.

A. Special Use Permit Procedures

NRS 278.315 provides that the governing body of the County may by ordinance provide for the granting of special use permits. To preserve the validity of the zoning ordinance in its application to the community in general, special use permits “function as an ‘escape valve,’ so that when regulations which apply to all are unnecessarily burdensome to a few because of certain unique circumstances, a means of relief from the mandate is provided.” Coronet Homes, Inc. v. McKenzie, 84 Nev. 250, 256, 439 P.2d 219, 224 (1968). We note that the staff report references SUP findings that differ from those identified in the 1999 Code, so a preliminary question exists as to whether the special use permit procedures and findings in this case are governed by the 1999 Code, current code (SCC 17.03.150) or those cited by staff in the July 16th staff report. While staff has recommended approval and believes the findings under either process are easily satisfied, we believe that given the limitations of the Development Agreement and NRS 278.0201 review of this application should be limited to the findings under by the 1999 Code.

Pursuant to NRS 278.0201, the “ordinances, resolutions or regulations” in effect at the time of the Development Agreement apply, unless otherwise provided by the Development Agreement or unless the subsequent ordinances, resolutions or regulations “do not conflict with” those in effect at the time of the development agreement and do not prevent the development of the land as set forth in the agreement. The Development Agreement states that the 1999 Code shall govern, with the exception of “Subsequent Rules that are not in conflict with the Existing Rules”, defined in relevant part as rules that i) do not prevent Developer from obtaining permits under circumstances otherwise entitled under the 1999 Code; ii) do not modify the permitted land uses, intensity of use; and iii) do not impose restrictions, requirements, conditions or standards which are more burdensome, more expensive or more onerous to satisfy than those in the 1999 Code. *See Development Agreement, Sec. 5.2; Sec. 7.4 (County will process applications “in accordance with Existing Rules”)*. If the special use permit findings in current code are more burdensome and more

onerous than those in the 1999 Code (as we believe they are), the procedures and standards in the 1999 Code should govern¹. *See Section 17.03.150*

In short, the County is prohibited from applying any procedures, findings, rules or standards which conflict with the 1999 Code, including findings which make it more onerous for an owner to obtain a special use permit in the manner otherwise entitled under the 1999 Code.

Section 17.12.018 of the 1999 Code states that “uses permitted subject to a special use permit” are considered “special exceptions within a zone where such use should only occur when such permit is demonstrated by the applicant to be in the best interest of the general public and would not be incompatible with or detrimental to the surrounding area.” Under Section 17.37.040 “incinerators, of any type and used for any purpose” are permitted uses in the I-2 zone subject to a special use permit. As incinerators are “uses permitted subject to a special use permit”, the findings to approve a special use permit for an incinerator in the I-2 zone appear to be established by Section 17.12.018, namely: 1) the applicant demonstrates the use is in the best interest of the general public; and 2) the use is not incompatible with or detrimental to the surrounding area.

¹ Under current code (Section 17.03.150), the following findings would otherwise apply to approve a special use permit:

1. Complies with the general purpose, goals, objectives, and standards of the county master plan, this title, and any other plan, program, map, or ordinance adopted, or under consideration pursuant to official notice by the county.
2. The proposal location, size, height, operations, and other significant features will be compatible with and will not cause substantial negative impact on adjacent land uses, or will perform a function or provide a service that is essential to the surrounding land uses, community, and neighborhood.
3. Will result in no substantial or undue adverse effect on adjacent property, the character of the neighborhood, traffic conditions, parking, public improvements, public sites or right-of-way, or other matters affecting the public health, safety, and general welfare, either as they now exist or as they may in the future be developed as a result of the implementation of the provisions and policies of the county master plan, this title, and any other plans, program, map, or ordinance adopted or under consideration pursuant to an official notice, by the county, or other governmental agency having jurisdiction to guide growth and development.
4. The proposed use in the proposed area will be adequately served by and will impose no undue burden or any of the improvements, facilities, utilities, or services provided by the county or other governmental agency having jurisdiction in the county. Where improvements, facilities, utilities, or services are not available or adequate to service the proposed use in the proposed location, the special use permit applicant must, as part of the application and as a condition of approval of the proposed special use permit, be responsible for establishing ability, willingness, and binding commitment to provide the improvements, facilities, utilities, infrastructure, and services in sufficient time and in a manner consistent with the county master plan, this title, and all plans, programs, maps, and ordinances adopted by the county to guide its growth and development. The approval of the special use permit must be conditioned upon the improvements, facilities, and services being provided and guaranteed by the applicant.

However, Section 17.37.040 (which identifies incinerators as uses permitted with a special use permit) also states that the special use permit required thereunder must be secured “as provided for in Chapter 17.62”. Chapter 17.62 of the 1999 Code sets forth certain criteria and procedures for “special uses” which may be permitted by the Board of County Commissioners “in zones in which they are not permitted by this ordinance where such uses are deemed essential or desirable for the public convenience or welfare.” Section 17.62.010 (emphasis added). Section 17.62.020 then sets forth a specific list of uses that “may be permitted only in in zones that allow” such uses with a special use permit, and a separate list of uses that may only be permitted with a special use permit in zones specified in Chapter 17.62. See Section 17.62.020 and 17.62.030. Chapter 17.62 creates a separate process for the Board to allow those limited, specific uses described in Chapter 17.62 (of which does not include incinerators or other I-2 Zone specific uses) to be operated in zones in which they are not otherwise permitted where deemed essential to public convenience. As incinerators (among others) are expressly permitted in the I-2 zone with a special use permit, the plain language of Chapter 17.62 as well as the separate schedule of uses identified therein is reasonably construed as creating a separate process for other types of special use permits not described in 17.12.018 or 17.37.040. *City Council of Reno v. Reno Newspapers*, 105 Nev. 886, 891, 784 P.2d 974 (1989) (When language of statute is plain and unambiguous, court should give that language its ordinary meaning).

Chapter 17.62 does not set forth specific findings for approving special use permits for “special uses”, but rather states that the process, findings and appeals for such special use permits “is the same as provided for variances in Chapter 17.60.” *Sec. 17.62.010*. Section 17.60.010 (which governs applicability) states that variances are exceptions from strict applications of the zoning regulations, that “such relief from strict application of the regulations of this title, however, may only be granted without substantial detriment to the public good and without substantially impairing the intent and purpose of any ordinance or resolution and under such conditions as the board may deem necessary to assure that the general purpose and intent of this title will be observed, public safety and welfare secured and substantial justice done.” The reference to “such relief” in Section 17.60.010 clearly applies to the “relief from strict application of the regulations” represented by variances described in the preceding sentence. Thus, a plain reading of the section would limit the subsequent “findings” (use does not substantially detriment to the public good or substantially impair intent and purpose of ordinance) to variances and special uses, as both represent deviations from code².

That being said “it is a well-recognized tenet of statutory construction that multiple legislative provisions be construed as a whole, and where possible, a statute should be read to give plain meaning to all its parts.” *Gilman v. Nevada State Bd. of Veterinary Medical Examiners*, 89 P.3d 1000, 1006 (Nev. 2004). Moreover, statutes should be construed in a manner to render them compatible and avoid absurd or unreasonable results. *Meridian Gold Co. v. State ex rel.*

² Variances are exceptions to development ordinances to authorize uses which are not otherwise allowed. By contrast, special use permits are special procedures providing for heightened review of uses allowed by ordinance

Department of Taxation, 81 P.3d 516, 518 (Nev. 2003). Based on these tenets, the 1999 Code requires findings to approve a special use permit for a use in the I-2 Zone that include both the findings in Section 17.12.018 and those “findings” in 17.60.010. Thus, the Board would be required to make the following findings under the 1999 Code to approve the incinerator special use permit:

1. The proposed use must be demonstrated by the applicant to be in the best interest of the general public.
2. The proposed use must be demonstrated by the applicant to not be incompatible with or detrimental to the surrounding area.
3. The proposed use does not substantially impair the intent and purpose of any ordinance or resolution.
4. The proposed use does not substantially detriment the public good.

In making these findings, the Board may impose such conditions “necessary to assure that the general purpose and intent of this title will be observed, public safety and welfare secured and substantial justice done.” *1999 Code, 17.60.010*. However, any conditions must be consistent with applicable law and constitutional limitations on equal protection, and the Board could not afford this application equal protection of laws by, for example, treating it differently than similar uses previously approved.

B. Blockchains Objection Letter

As a preliminary matter, all of Blockchains allegations and attacks against the manner in which Stericycle may have operated similar uses in other jurisdictions are legally irrelevant and must be disregarded by the County. Zoning decisions alter the permitted uses of land and authorize those uses to be conducted in perpetuity, whether by the applicant or a successor owner. Zoning decisions are not concerned with the operational bona fides of an applicant (such as may occur with a privileged business license), but instead focus solely on the compatibility of the use at the location proposed understanding that once the use is authorized any person may operate it at that location. In other words, a special use permit authorizes a use, not an operator. By analogy, a decision on whether land is appropriately located to be zoned for medical office uses has absolutely nothing to do with whether any given doctor that may practice there is competent.

Furthermore, regulatory bodies with jurisdictional oversight over operations will independently regulate and enforce compliance with any applicable operational laws, including air quality. In fact, County Staff has proposed conditioning the approval with a requirement that the operator (whomever it may be) separately secure and maintain NDEP permits, comply with all applicable state and local environmental and air quality regulations and incorporates into the permit all standards, objectives, terms and requirements of all operating plans, safety plans, etc., to be submitted in support of the use. *See Recommended Conditions B, C and M*. These conditions directly address and obviate all objections raised by Blockchains with respect to this finding.

Blockchains then focuses on three “findings”, only two of which exist in code. First, Blockchains alleges the proposed use will pose a substantial detriment to the public good contrary to the “finding” required under Section 17.60.010. However, the arguments Blockchains makes in this regard have nothing to do with the proposed use, instead improperly making baseless and factually unsupported arguments about the how the applicant will operate the facility. Again, the purpose of a special use permit is to determine whether the nature and intensity of the specific use is compatible with the surrounding area, not whether any particular user may or may not be qualified to operate that use. We respectfully submit that it would be arbitrary and capricious and unlawful for the County to consider such arguments, let alone rely on them in any material manner.

Second, Blockchains alleges the proposed use “substantially impairs the purpose and intent of the zoning code and master plan.” While elements of this “finding” are found in the 1999 Code, in support of the position Blockchains improperly cites and relies on SUP findings under the current code to argue the incinerator use is incompatible and will cause a substantial negative impact on adjacent land uses³. As discussed above, findings under current code are not applicable to Stericycle’s application. To the contrary, Stericycle must merely demonstrate the incinerator use will not “substantially impair the intent and purpose of” any ordinance or resolution in effect prior to adoption of the Development Agreement.

With respect to that finding, the Development Agreement (which was adopted by ordinance) is clear that development of the authorized industrial uses “will further the planning objectives contained within the Master Plan, and provide public benefits.” Chapter 17.37 of the 1999 Code expressly recognizes that by designating the project with I-2 Heavy Industrial zoning, TRI Center “is intended to provide areas for the development and operation of industrial and manufacturing uses which, by nature of their intensity, may be incompatible with other types of land use activities.” Permitted uses include petroleum products storage, gas transmission stations, electric substations, salvage yards, blast furnaces, cement and lime manufacturing, mining and milling operations, petroleum products manufacture, ammunition or explosive manufacture or storage, dumps, fertilizer manufacture, rocket fuel manufacture, testing and storage, sewer farms, “incinerators of any type and used for any purpose”, chemical manufacture, cyanide manufacture and storage, excavating, and other similar heavy industrial uses clearly compatible with the incinerator use proposed. The County further clarified by Resolution adopted May 3, 2005 that the permitted uses in the I-2 Heavy Industrial Zone are intended to be consistent and compatible with “heavy industrial” uses described as “production processes which should not be located near residential or commercial uses due to the intensive nature of the industrial activity and/or the scale of operation” such as textile dyeing, hazardous chemical production, petroleum refining, metal processing, production of explosives. Regarding Blockchains’ assertion that the type of incineration (medical waste) is problematic, again, Section 17.37.040 expressly authorizes incinerators “of any type and used for any purpose” rendering the type of incineration legally

³ Blockchains erroneously cites Sec. 17.62.010 of the current code, when in fact the language it quotes is from Sec. 17.03.150 of the current code.

irrelevant for purposes of compatibility with the intent of the 1999 Code and Development Agreement.

Blockchains then asserts the incinerator use is incompatible with the technology based live/work environment planned in the future by Blockchains on its adjoining property. The argument is legally irrelevant, however, compatibility with “surrounding area” is a requisite finding under the 1999 Code. Compatibility analyses focus on all land uses permitted by zoning, not anticipated plans of one owner to change the uses on adjoining land. In other words, compatibility is determined by looking at permitted land uses in the I-2 Heavy Industrial zone. If Blockchains intends to *change that zoning* at a future date to permit less intense residential uses, then Blockchains will be required to demonstrate at that time how its proposed modification to the industrial master plan and industrial base zoning is compatible with the I-2 Heavy Industrial uses already entitled. There is no legal basis to contend an applicant must demonstrate compatibility with an unauthorized potential future use that itself is incompatible with surrounding land uses. As discussed above, it is clear incinerator uses are identified as a compatible special industrial use in TRI Center.

Blockchains next asserts concerns over “nuisances” from 24/7 operations, traffic from 10-15 trucks/day, and need for increased infrastructure. The assertions are not tied to any specific finding and are incorrect. The hours of operation and truck traffic seem well within and entirely compatible with truck traffic planned and authorized for this massive industrial project. With respect to infrastructure, the Development Agreement imposes obligations on the Master Developer to construct public infrastructure to service the Project at Developer’s cost, including streets, sidewalks, flood control and drainage, storm drains, county buildings and public safety facilities and public parks, water, sewer, gas, electric and other utility infrastructure, so any concerns regarding infrastructure are already addressed on a Project wide basis through the Development Agreement.

Blockchains next asserts that air pollutants from incinerator operations would harm wild horses in the area, which somehow renders the use incompatible with the intent and purpose of the Development Agreement and 1999 Code. Blockchains offers no legal argument in support of the position, and to the contrary, nothing in the Development Agreement or the 1999 Code suggests any restrictions or limitations on industrial development in the I-2 Heavy Industrial Zone relative to wildlife. Again, focusing strictly on the 1999 Code and Development Agreement (as the findings require), the intent and purpose of those provisions is clear: that heavy industrial development anywhere with the TRI Center is appropriately located and compatible with adjacent heavy industrial uses.

In short, the express intent and purpose of the Development Agreement and designation of the entire project with I-2 Heavy Industrial Zone entitlements was to recognize that the TRI Center project is intended and entitled to be developed with the most intensive heavy industrial uses allowed by code, and that all of such uses are compatible with all adjoining land uses within the TRI Center.

Blockchains then asserts the incinerator use is incompatible with the 2016 Master Plan. As a matter of law, the 2016 Master Plan is irrelevant to this application, as only the Master Plan in effect at the time the Development Agreement was adopted applies. With respect to that Master Plan, TRI Center is master planned for industrial use and the Development Agreement expressly states that development of heavy industrial uses authorized in the I-2 Zoning district “will further the planning objectives contained within the Master Plan, and provide public benefits” and facilitate “implementation of the Master Plan”. *Development Agreement, Sec. 2.5*. Moreover, Blockchains misconstrues the purpose and effect of a master plan. A master plan is a standard that commands deference, but it is “not a legislative mandate from which no leave can be taken.” *Sustainable Growth Initiative v. Jumpers*, 122 Nev. 53 (2006). A zoning ordinance need not be in perfect conformity with every master plan policy. The relevant inquiry is not whether there is a direct conflict between a master plan's provision and an ordinance, but whether the ordinance “is compatible with, and does not frustrate, the [master] plan's goals and policies. *Id.* Blockchains does not provide substantial evidence demonstrating the proposed (and authorized) incinerator use frustrates the goals or objectives of even the 2016 master plan excerpts cited by Blockchains.

Blockchains next asserts that the incinerator use creates an unacceptable risk to the public health, safety and welfare of Storey County citizens. In support of the argument, Blockchains erroneously contends 17.62.010 requires the Planning Commission “assure that the general purpose and intent of this title will be observed, public safety and welfare secured and substantial justice done.” However, the language Blockchains cites is not a finding requirement by 17.62.010, rather, it is permissive language in 17.60.010 that gives the Board the discretion, as it “may deem necessary”, to impose *conditions of approval* on a special use permit to assure those elements are satisfied. In other words, these are not regulatory impediments than applicant must satisfy in order to secure a special use permit. Instead, they are enabling provisions that grant the Board broad discretionary authority to facilitate approval of special use permits by imposing conditions, where necessary, to assure that objections (such as those raised by Blockchains) are appropriately mitigated. There is no legal basis in the 1999 Code or Development Agreement to support Blockchains assertion that the Planning Commission “must determine whether risks to the public health, safety and welfare of Storey County citizens are acceptable before approving the SUP Request.”

Stericycle has provided in the record, including in its public presentations ample evidence demonstrating that the use of a medical waste incinerator will not substantially detriment the public good, and will be in the best interest of the general public, including generally why incineration of medical waste at this location is in the best interest of the general public. Based on the information provided as well as staff's recommendations, we respectfully submit there is substantial evidence supporting the approval of the special use permit application in this matter and it should be approved.

Should you have any further questions regarding this matter please contact me directly at Michael.Faris@stericycle.com

Sincerely,



Michael J. Faris
VP & Assistant General Counsel - Litigation

CC: Vanessa Stephens – Storey County Clerk – Treasurer
Austin Osborne – Storey County Manager
Ann Langer – Storey County District Attorney
Keith Loomis – Storey County Deputy District Attorney