

Community Services Department
Planning and Building
APPEAL TO BOARD OF COUNTY
COMMISSIONERS (BCC)
APPLICATION



Community Services Department
Planning and Building
1001 E. Ninth St., Bldg. A
Reno, NV 89512-2845

Telephone: 775.328.6100

Washoe County Appeal of Decision to Board of County Commissioners

Your entire application is a public record. If you have a concern about releasing personal information please contact Planning and Building staff at 775.328.6100.

Appeal of Decision by (Check one)	
Note: Appeals to the Washoe County Board of County Commissioners are governed by WCC Section 110.912.20.	
<input type="checkbox"/> Planning Commission	<input type="checkbox"/> Board of Adjustment
<input type="checkbox"/> Hearing Examiner	<input type="checkbox"/> Other Deciding Body (specify) <div style="border-bottom: 1px solid black; width: 100%; margin-top: 5px;"></div>
Appeal Date Information	
Note: This appeal must be delivered in writing to the offices of the Planning and Building Division (address is on the cover sheet) within 10 calendar days from the date that the decision being appealed is filed with the Commission or Board Secretary (or Director) and mailed to the original applicant.	
Note: The appeal must be accompanied by the appropriate appeal fee (see attached Master Fee Schedule).	
Date of this appeal: <div style="border-bottom: 1px solid black; width: 100%;"></div>	
Date of action by County: <div style="border-bottom: 1px solid black; width: 100%;"></div>	
Date Decision filed with Secretary: <div style="border-bottom: 1px solid black; width: 100%;"></div>	
Appellant Information	
Name:	Phone:
Address:	Fax:
	Email:
City:	State: Zip:
Cell:	
Describe your basis as a person aggrieved by the decision:	
Appealed Decision Information	
Application Number:	
Project Name:	
State the specific action(s) and related finding(s) you are appealing:	

Appealed Decision Information (continued)

Describe why the decision should or should not have been made:

Cite the specific outcome you are requesting with this appeal:

Did you speak at the public hearing when this item was considered?

☐ Yes
☐ No

Did you submit written comments prior to the action on the item being appealed?

☐ Yes
☐ No

Appellant Signature

Printed Name:

Signature: *Garrett Gordon*

Date:



Lewis Roca Rothgerber Christie LLP
One East Liberty Street
Suite 300
Reno, NV 89501

775.823.2900 main
775.823.2929 fax
lrrc.com

Garrett Gordon
Partner
Admitted in Nevada
(T) 775-321-3420
(F) 775-321-5569
GGordon@lrrc.com

September 14, 2020

VIA HAND DELIVERY AND EMAIL

DCahalane@washoecounty.us

Dan Cahalane
Washoe County Community Services Department
Planning and Building Division
1001 East 9th Street, Building A
Reno, Nevada 89512

**Re: Appeal of Planning Commission Decision
North Valley Geothermal Development Project Special Use Permit
Case No. WSUP20-0013 (Ormat Geothermal) (the “Application”)**

Dear Mr. Cahalane:

This Firm represents Orni 36, LLC (the “Applicant”) in regards to the Application that was denied by the Washoe County Planning Commission on September 1, 2020 (the “Denial”). The purpose of this letter is to appeal the Denial and respond to the Planning Commission Action Order dated September 4, 2020 which concludes:

“Notice is hereby given that the Washoe County Planning Commission denied the above referenced case number based on the inability to make the findings required by Washoe County Code Section 110.820.30 and the additional findings required by Washoe County Code Section 110.810.35, 40 & 42.”

Please accept the enclosed appeal form, appeal fee, the Applicant’s presentation,¹ and supporting information described below as the basis of our appeal of the Planning Commission’s decision on the Application.

I. Summary of the Planning Commission Hearing on September 1, 2020

During consideration of the Application, Washoe County Community Services Staff (“Staff”) and the Applicant provided compelling testimony consistent with the Application materials and the staff report dated August 13, 2020 (the “Staff Report”). The Staff Report provided to the Planning Commissioners consisted of a thorough analysis of the Application, as it pertains to Washoe County Code and other reviewing agencies (Staff noted that twenty-seven outside departments/agencies were contacted, with twelve providing comments). Additionally, Staff provided, for informational purposes, a link to the Draft Environmental Assessment (“Draft EA”) that is currently under review by the Bureau of Land Management

¹ The Applicant’s presentation at the Planning Commission was based on the Application (including all resubmittals, supplemental responses and revisions, reports, studies and responses to agency comments) and Staff Report.

(“BLM”) for the project. The Staff Report outlined the necessary findings that the Planning Commission must make in order to approve the Application. Washoe County Staff concluded that the Application did in fact meet all necessary findings and recommended:

“After a thorough analysis and review, Special Use Permit Case Number WSUP20-0013 is being recommended for approval with conditions.” (Staff Report, Page 21)

During the course of the hearing, Planning Commissioners asked only a few questions (unrelated to the applicable findings), which included:

- Commissioner Donshick began with a question to Staff regarding the Pyramid Indian Tribe’s comments that were contained in the Draft EA that had been provided by reference. Staff (Dan Cahalane) responded that the Tribe’s comments would be addressed through the Draft EA process with the BLM and pointed Commissioner Donshick to the table in the Draft EA that addressed these concerns. It was noted during the discussion between Staff and Commissioner Donshick that the Tribe’s concern that there may be conflicts between the ground water systems (the San Emidio system associated with the project and the Pyramid Lake basin associated with tribal land system) are not interconnected.
- Commissioner Phillips questioned Staff regarding whether an archaeological study was conducted for the project and who conducted it. Staff (Dan Cahalane) pointed Commissioner Phillips to the portions of the Draft EA that addressed the archaeological study.
- Commissioner Chvilicek asked a question of the Applicant regarding construction timeframes. Representatives for the Applicant (Andy Durling, Wood Rodgers and Ben Orcutt, Ormat) addressed the question with an overview of the drilling and construction schedules that are anticipated.
- Commissioner Chvilicek asked Staff about the hyperlinks that were referred to in the Staff Report, namely the Draft EA. Staff (Dan Cahalane) responded that a link was provided to save printing since the Draft EA was provided for reference only and is not a part of the Application materials, as it is a separate process through the BLM.

Additional public comment was received and included comments from the Pyramid Indian Tribe, Burning Man Project, and Pyramid Associates (an adjacent property owner). All of the comments centered around the geothermal water resources in the area and the Draft EA. After the completion of public comment, there were no additional questions from the Planning Commissioners and the above summary represents all of the questions that were asked of Staff and the Applicant during the hearing. Further, when asked by Chairman Chesney if there were any discussion amongst the Planning Commissioners, there was none. A motion was then made to approve the Application (Commissioner Peyton), which failed 2-4. A subsequent motion to deny the Application was made (Commissioner Donshick) passed 4-2. During their voting, Staff urged the Planning Commissioners to discuss which specific findings they could not make. Following is a summary of the dissenting Commissioners’ comments:

- Commissioner Chvilicek stated that she could not make finding 4, yet provided no detailed discussion of how the finding could not be made, nor any aspects of the Application which led her to this decision.

- Commissioner Donschick state that she could not make findings 4 and 6, yet provided no detailed discussion of how the finding could not be made, nor any aspects of the Application which led her to this decision.
- Commissioner Bruce did not provide any findings or discussion, simply stating that he was a “nay”
- Commissioner Phillips stated that she did not wish to disclose why she had voted “nay”

II. Planning Commission’s Decision was Arbitrary and Capricious and an Abuse of Discretion

The Planning Commission abused its discretion when denying the Application. The Planning Commission did not conduct a thorough review of this Application and the applicable findings, but rather made an arbitrary and capricious decision without relying upon the abundance of substantial evidence that was included in the Application, Staff Report and presentation. Given the Planning Commission failed to adequately enumerate any specific concerns and failed to identify any legal justifications for not making the specific findings, the Planning Commissioner’s decision should be reversed by the Washoe County Board of County Commissioners.

As the Planning Commission failed to provide a detailed discussion of their inability to make specific findings (in this case findings 4 and 6), nor asked any specific questions associated with these findings, the Applicant is left to assume their intentions. The Planning Commission’s decision appeared to be based on an overarching concern about the contents of the Draft EA and the concern raised in Public Comment regarding underground water resources. It was completely arbitrary and capricious that the Commission based their decision on these facts given:

1. The Draft EA was provided for reference and is not the purview of the Planning Commission. The Draft EA process is dictated by the Federal Government and managed by the BLM for this project. The BLM, in their sole discretion, is the deciding entity for the Draft EA and their decision is independent and completely unrelated to that of the Washoe County Planning Commission.
2. Concerns relative to underground water resources and, more specifically underground geothermal resources, are not the purview of the Planning Commission. Rather, as it pertains to this project, the BLM is tasked with evaluating environmental impacts for usage of the ground water and geothermal systems and the Nevada Division of Minerals is responsible for regulating the use of geothermal resources. As such, it is completely outside of the scope of the Washoe County Planning Commission to base their decision on these matters. The Planning Commission’s responsibility is to review and assess the physical development of the project based on specific findings. In this case, the Planning Commission is limited to the grading roads and well pads, and the vertical construction of wells and the power plants. There was no testimony provided, nor questions asked by the Commission relative to the physical development of the project, thus the Planning Commission abused its discretion when denying the Application.

The Applicant shares the same opinion as Staff, that based upon thorough review of the Application by Washoe County and other reviewing agencies, **all of the applicable findings can be affirmed** and specifically those that were noted by the Planning Commission (Findings 4 and 6) are discussed below:

4. Issuance Not Detrimental – *That issuance of the permit will not be significantly detrimental to the public health, safety or welfare; injurious to the property or improvements of adjacent properties; or detrimental to the character of the surrounding area.*

- “The proposed conditions of approval and remaining state and federal permitting requirements mitigate the negative effects associated with operating the proposed facilities to the point of not being significantly detrimental to the public health, safety, or welfare.” Staff Report, Page 20
- The questions raised by the Planning Commission that we assume informed their inability to make this finding centered on contents of the Draft EA, specifically underground water and geothermal resources. The Draft EA was provided for reference only, as the contents and decision regarding the Draft EA are the sole responsibility of the BLM. Staff noted this in their response to specific Planning Commission questions. Washoe County Code does not address environmental review, as they are detailed within the Draft EA. The contents of the Draft EA, are outside of the discretion of the Planning Commission’s decision to make specific findings, so should not have provided the basis for their decision.
- Questions raised by the Planning Commission relative to underground geothermal resources are not regulated by Washoe County, nor are they germane to the findings associated with a special use permit. Washoe County Code does not address geothermal resource management. Rather, geothermal resources are regulated by the Nevada Division of Minerals and are outside of the purview of the Planning Commission.
- The contents of the special use permit reviewed by the Planning Commission contains the physical development and improvements to the land, as they pertain to Washoe County Code. The special use permit addresses the physical improvements, such as grading of roads/well pads, vertical construction of wells, transmission lines and power plants, and the overall operational parameters of the power plants (i.e. hazardous materials used in the operations of the plant). The special use permit does not address the underground geothermal resources, as this is a matter reserved to be regulated by other agencies, namely BLM and Nevada Division of Minerals.
- No public testimony, nor questions or discussion (there was no discussion on this matter) by the Planning Commission disputed the physical development characteristics contained within the special use permit. Rather, the denial was based on topics outside of the Planning Commissions’ discretion. As such, this finding can be made in the affirmative, as outlined in the Staff Report and supporting special use permit application materials.

6. Development of Natural Resources: *That the proposed development is not unduly detrimental to surrounding properties, land uses and the environment in general.*

- “The applicant will provide revegetation to mitigate the impacts of dust and erosion from the construction of this facility. There will be no unduly detrimental effects to the surrounding environment.” Staff Report, Page 20
- Similar to Finding 4 discussed above, the Planning Commission appeared to make their decision based upon contents of an Draft EA and comments associated with the underground geothermal resources that are outside of the Planning Commissioner’s discretion and are the sole responsibility of other State and Federal agencies.

- As noted by Staff, mitigation measures relevant to revegetation and dust/erosion control are addressed with the special use permit. These aspects are relevant to the physical development of the project (i.e. grading associated with roads/well pads and construction of the wells and power plant facilities) and not associated with the underground geothermal resources that were the basis of the Planning Commission's decision.
- No discussion by the Planning Commission disputed the physical development and associated appropriate conditions to mitigate impacts on surrounding properties. Rather, the denial was based on information and/or project characteristics (i.e. geothermal resources) that are outside of the Planning Commission's discretion when deliberating on the Application. As such, this finding can be made as outlined in the Staff Report and supporting special use permit application materials.

III. Conclusion

Based on the complete record of the Application and the failure of the Planning Commission to consider any of the substantial evidence put into the record by the Applicant and Staff, the Denial (i) lacked support in the form of "substantial evidence", (ii) was "arbitrary and capricious", and (iii) was an "abuse of discretion"² and, therefore, should be reversed by the Washoe County Board of County Commissioners.

Given the Planning Commission improperly based the Denial on portions of the Draft EA (that Staff had only included in the Staff Report for informational purposes), the Applicant respectfully requests the Board of County Commissioners appeal hearing is scheduled for November 2020. The Applicant anticipates completion of the Draft EA process by the end of October and, notwithstanding the fact that the Draft EA is unrelated to any specific legal findings, it will likely be helpful to have a completed Draft EA when presenting the Application and appeal to the Board of County Commissioners.

Sincerely,

Garrett Gordon

Garrett D. Gordon, Esq.

Enclosures

cc: Client
Andy Durling, Wood Rogers

² Stratosphere Gaming Corp. v. City of Las Vegas, 120 Nev. 523, 528, 96 P.3d 756, 760 (2004)