



WASHOE COUNTY

Integrity Communication Service

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STAFF REPORT

BOARD MEETING DATE: April 11, 2023

DATE: February 10, 2023

TO: Board of County Commissioners

FROM: Trevor Lloyd, Planning Manager, Planning and Building Division,
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THROUGH: Kelly Mullin, Division Director, Planning & Building Division,
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SUBJECT: Public hearing: Appeal of the Washoe County Board of Adjustment's approval of:

1. Administrative Permit Number WADMIN22-0025 Ormat Geothermal Exploration to approve the construction and drilling of up to 13 geothermal test wells northwest of Gerlach, NV.

The applicant for the administrative permit is ORNI 26 LLC, who hold federal geothermal leases on APN's 071-150-09, 071-220-18, 071-220-19, and 071-220-23. The entirety of the project is on federal land administered by the Bureau of Land Management (BLM)

There are two appellants: (1) Burning Man Project, represented by Natalie Nicol, Esq. and (2) the applicant, ORNI 26, LLC, represented by Garrett Gordon, Esq. The Board of County Commissioners (Board) may affirm, reverse, or modify the decision of the Board of Adjustment. The Board's analysis may also include a finding on the issue of standing to bring the appeal in the first place. If the Board modifies or reverses, it may remand the matter back to the Board of Adjustment with instructions. (Commission District 5.)

SUMMARY

There are two appellants:

1. Burning Man Project, represented by Natalie Nicol, Esq. Ms. Nicol is seeking to overturn the Washoe County Board of Adjustment's approval on January 5, 2023 of WADMIN22-0025. Ms. Nicol contends that the Board of Adjustment's decision is void because proper notice was not provided to the Gerlach/Empire Citizen Advisory Board. Ms. Nicol also states that the notifications sent for the proposed development were sent two days prior to Christmas and required public comments to be submitted two days after the New Year's holiday, which limits public participation. Finally, Ms. Nicol contends that the Board of Adjustment incorrectly found that the proposed project meets the findings required in WCC 110.808.25 (a)-(d).

AGENDA ITEM # _____

2. ORNI 26, LLC, by and through Garrett Gordon, the applicant's representative. Mr. Gordon is seeking to preserve the applicant's rights for judicial review pursuant to NRS 278.3195(4). Mr. Gordon is asking the Board of County Commissioners to uphold the Board of Adjustment Approval.

PREVIOUS ACTION

On January 5, 2023, the administrative permit was considered, in a public hearing, before the Board of Adjustment. The Board of Adjustment approved the administrative permit, with four Members voting to approve and one dissenting.

NEIGHBORHOOD MEETING

On, July 19, 2022, the proposed project was presented at a neighborhood meeting via Zoom. A total of 93 notices were sent out to community members adjacent to the project area. The applicant provided a presentation and then answered questions from attendees for approximately 40 minutes.

BACKGROUND

The Board of Adjustment approved an administrative permit for the construction and drilling of up to 13 geothermal test wells. The construction will involve improvements and grading of an access road and the grading of up to 13 well pads that are 2.1 acres. The project will have a maximum potential of 32 acres of ground disturbance including the access road improvements.

An administrative permit is required for geothermal projects per WCC Table 110.328.05. The policy states, "The provisions of this article shall apply to all geothermal projects within the unincorporated areas of the County. All geothermal development for commercial, industrial, residential, and private domestic uses shall require an administrative permit pursuant to Article 808, Administrative Permits, unless otherwise specified in the provisions of this article. A geothermal development project consists of all wells, access roads, surface equipment, facilities, pipelines, and electric transmission lines on one parcel or two or more contiguous parcels." The applicant currently holds geothermal leases on the associated parcels through the Bureau of Land Management. Since the project is located on federal land, it has also gone through the NEPA process. A Finding of No Significant Impact based on an environmental assessment (EA) was issued on October 21, 2022.

The application was reviewed by various departments and agencies. Conditions were received from the Washoe County Planning and Building Division, the Washoe County Engineering and Capital Projects Division, the Washoe County Water Management Planner Coordinator, the Washoe County Air Quality Management District, the Truckee Meadows Fire Protection District, Nevada Division of Water Resources, and Nevada Department of Wildlife which are included in the Conditions of Approval. Other agencies had comments but no specific conditions. Noticing was sent per 110.808.40 and all noticing requirements were met including, "All owners of real property within five hundred (500) feet of the property which is the subject of the administrative permit application."

The Board of Adjustment staff report provides more details concerning grading, viewshed analysis, water resources, and wildlife impacts. Staff also identified several Master Plan – High Desert Area Plan policies that must be met as part of the application (Attachment C).

After hearing this item, the Board of Adjustment approved the applicant's request for the administrative permit, finding that the following findings required by WCC 110.808.25 were met:

- (a) Consistency. That the proposed use is consistent with the action programs, policies, standards and maps of the Master Plan and the High Desert Area Plan;
- (b) Improvements. That adequate utilities, roadway improvements, sanitation, water supply, drainage, and other necessary facilities have been provided, the proposed improvements are properly related to existing and proposed roadways, and an adequate public facilities determination has been made in accordance with Division Seven;
- (c) Site Suitability. That the site is physically suitable for type of development, i.e., geothermal exploration, and for the intensity of such a development;
- (d) 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;

Please see the Board of Adjustment Staff Report (Attachment C) for a discussion of these items and the Board of Adjustment Signed Action Order (Attachment B).

APPEALS

The Board has two appeals before it for consideration. In analyzing each appeal, the Board may consider the threshold issue of “standing.” Standing is essentially the legal right to bring a challenge in the first place. It is the burden of each appellant to establish standing. NRS Chapter 278 limits appeals of Board of Adjustment decisions to “aggrieved persons.” *See* NRS 278.3195(1) and NRS 278.328. For counties with populations less than 700,000, NRS Chapter 278 does not define an “aggrieved person”, but rather, leaves it to the local governments to enact ordinances defining what it means to be aggrieved. Washoe County has enacted such an ordinance in the Development Code, Chapter 910. *See also* WCC 110.912.20(a)(1) [allowing aggrieved person to appeal Board of Adjustment decision to Board of County Commissioners].

WCC 110.910.02 defines “aggrieved person” as a person or entity who has suffered a substantial grievance (not merely a party who is dissatisfied with a decision) in the form of either:

- (a) The denial of or substantial injury to a personal or property right, or
- (b) The imposition of an illegal, unjust or inequitable burden or obligation by an enforcement official, the Board of Adjustment or an administrative hearing officer.

If the Board finds there is standing, it must then analyze the merits of the appeal. If the Board finds no standing, the Board may deny or dismiss the appeal without analyzing the merits. Alternatively, even if the Board finds no standing, in the interest of completing the

record in the event of a future legal challenge, the Board may nonetheless indicate what its findings on the merits of the appeal would be if standing did exist.

Regarding the appellants' substantive positions, the appeal from Burning Man Project lists the following specific actions and Board of Adjustment findings he wishes to contest:

1. The noticing was in violation of WCC 110.808.40 (c)(1)(ii)

Staff Comment: Citizen Advisory Boards are created by Washoe County Code. WCC 5.425 states that CABs may be established to assist the BCC with issues of concern in designated areas. WCC 5.427 states that the BCC may establish CABs by resolution, and the resolution must specify the specific purposes for the CAB's creation. Accordingly, the CABs only have the powers and jurisdiction conferred upon them by the BCC.

On August 17, 2021 in Item #9, the BCC voted to disband all then-existing CABs as the decision was made that CABs would no longer be utilized for development review. Rather, proposed planning and building projects would be reviewed through the neighborhood meeting process, which has its own noticing requirements. Immediately, after disbanding the CABs in Item #10, the BCC voted to establish new CABs for the purpose of providing direction to the County Manager staff on a commissioner support initiative and future use of the CABs.

Because the CABs no longer have jurisdiction over development review pursuant to the BCC's action of August 17, 2021, Planning and Building Division no longer provides noticing pursuant to WCC 808.40(c)(1)(ii).

2. The findings of the Board are consistent with WCC 110.808.25 (a)-(d).

The appeal from ORNI 26, LLC, by and through their representative, Garrett Gordon, states that their appeal was submitted to preserve the applicant's rights pursuant to NRS 278.3195(4). *See Kay v. Nunez*, 122 Nev. 1100, 146 P.3d 801 (2006).

Please see the appeal applications, included in Attachment A, for further information about Burning Man Project and the applicant's respective appeals.

FISCAL IMPACT

No fiscal impact.

RECOMMENDATION

There are two appeals for the Board to address, however, the applicant's appeal has only been filed to preserve their rights pursuant to NRS 278.3195(4). With that understanding, it is recommended that the Board of County Commissioners review the record and take one or more of the following actions:

1. Dismiss one or both of these appeals for a lack of standing.

AND/OR

2. Affirm the decision of the Board of Adjustment and approve Administrative Permit Case Number WADMIN22-0025 (Ormat Geothermal Exploration)

POSSIBLE MOTIONS

Standing:

Should the Board find that one or both of the appellants lack standing, staff offers the following motion:

“Move to dismiss and/or deny [X] appeal, having found that the appellant lacks standing.”

Administrative Permit:

Should the Board find that one or both of the appellants have standing, and should the Board agree with the Board of Adjustment’s approval of Administrative Permit Case Number WADMIN22-0025 (Ormat Geothermal Exploration), staff offers the following motion:

“Move to deny the Burning Man Project appeal and affirm the decision of the Board of Adjustment to approve Administrative Permit Case Number WADMIN22-0025 (Ormat Geothermal Exploration). The affirmance is based upon the ability to make the findings required by WCC Sections 110.808.25, Findings.”

or

Should the Board disagree with the Board of Adjustment’s approval of Administrative Permit Case Number WADMIN22-0025 (Ormat Geothermal Exploration), staff offers the following motion:

“Move to reverse the decision of the Board of Adjustment and deny Administrative Permit Case Number WADMIN22-0025 (Ormat Geothermal Exploration). The reversal is based on the Board’s inability to make all the findings required by WCC Section 110.808.25, Findings.”

All the attachments, which have been included for the Board’s consideration at the request of appellants, constitute the Record on Appeal:

Attachments:

Attachment A: Appeal Applications

Attachment B: Board of Adjustment Signed Action Order

Attachment C: Board of Adjustment Staff Report

Attachment D: Board of Adjustment Minutes dated 1/5/23

Attachment E: Board of Adjustment Presentations - Washoe County Staff and Applicant

Attachment F: Recording of Board of Adjustment Meeting dated 1/5/23

Cc:

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