

**MINUTES  
OF THE BOARD OF COMMISSIONERS OF WEBER COUNTY**

Tuesday, February 12, 2013 - 10:00 a.m.

2380 Washington Blvd., Ogden, Utah

*In accordance with the requirements of Utah Code Annotated Section 52-4-7(1)(d), the County Clerk records in the minutes the names of all citizens who appear and speak at a County Commission meeting and the substance "in brief" of their comments. Such statements may include opinion or purported facts. The County does not verify the accuracy or truth of any statement but includes it as part of the record pursuant to State law.*

**COMMISSIONERS PRESENT:** Kerry W. Gibson, Chair, Jan M. Zogmaister and Matthew G Bell.

**OTHERS PRESENT:** Ricky D. Hatch, Clerk/Auditor; Chris F. Allred, Deputy County Attorney; and Fátima Fernelius, of the Clerk/Auditor's Office, who took minutes.

**A. WELCOME** – Chair Gibson

**B. PLEDGE OF ALLEGIANCE** – Todd Ferrario

**C. THOUGHT OF THE DAY** – Chair Gibson

**D. CONSENT ITEMS:**

1. Purchase Orders for \$131,419.14
2. Warrants #294798 - #294975 for \$778,653.63
3. Minutes for the meetings held on January 29 and February 5, 2013
4. Retirement Agreements with the following:
  - Patricia J. Collinsworth – Contract C2013-49
  - Dean L. Morreale – Contract C2013-50

Commissioner Bell moved to approve the consent items as listed; Commissioner Zogmaister seconded, all voting aye.

**E. ACTION ITEMS:**

- 1. REQUEST FOR DISCUSSION AND/OR ACTION ON AN APPEAL FROM THE OGDEN VALLEY PLANNING COMMISSION'S DECISION REGARDING CUP 2011-07 FOR DIGIS WIRELESS INTERNET TRANSMISSION SITE LOCATED ON TOP OF THE WATER STORAGE TANK WITHIN LEGENDS AT HAWKINS CREEK**

Sean Wilkinson, of the County Planning Division, noted that in November 2011, Digis (a wireless internet company) applied for a building permit for an electrical upgrade at an approximate address within The Legends at Hawkins Creek, an Ogden Valley subdivision (Subdivision). The County Building Inspection Division inspected the site, and upon finding the transmission tower and all of the equipment already in place, informed the contractor that Digis would need to obtain the necessary Planning Commission approvals before the electrical upgrade could be considered. He showed various photos of the top of the water tank, of Lot 20R, of the water line easement that runs through that lot up to the water tank, approximately to where the electrical line now runs.

Mr. Wilkinson said that Digis contacted the County Planning Division to discuss the requirements and submitted a Conditional Use Permit (CUP) Application, signed by the Legends at Hawkins Creek Home Owners Association (HOA) managing member on 11/29/2011. The application was for a 56 sq. ft. wireless internet transmission site located at the top of the subdivision's water storage tank consisting of a steel frame (weighed down by cinder blocks), four 10-ft. tall antennas, two transmission dishes, a control cabinet and an electrical hookup. The submittal also included a lease agreement with the HOA and statements indicating that the transmission site complied with zoning requirements and produced no detrimental effects on the surrounding community. The transmission site is in an FV-3 Zone which allows a public utility substation as a conditional use—this transmission site is in the same category as a cellular tower. Digis selected the location because it is high above the valley floor and provides adequate visual line of site, a requirement for wireless transmission to work properly. This site enables Digis to provide better wireless internet service to its Ogden Valley customers.

On 1/3/2012 the Ogden Valley Planning Commission unanimously approved CUP 2-011-07 for a wireless internet transmission site located on top of the water storage tank within the Subdivision, subject to the stipulations outlined in the staff report, which refers to staff's recommendations: 1) that the white transmission dishes be painted camouflage and 2) that the dead landscaping around the water tank be replaced by the end of 7/2012. On 1/5/2012 a Notice of Decision was emailed to Dennis Watt, Digis agent, informing him of the Planning Commission's decision and of the two conditions of approval. The email also informed Mr. Watt that the Planning Division had received a telephone call from Brett LaSorella, manager of HC20, LLC, and owner of Lot 20 in the Subdivision, with concerns that the transmission site might block the view of a home that would be built on the lot. A formal appeal of the Planning Commission's decision was filed by HC20, LLC on 1/19/2012. On 1/24/2012 the Planning Division issued the CUP for Digis to begin operating the transmission site, however, the permit stated that "Weber County in no way guarantees approval of access to the site or the location of electric transmission lines for this site." Digis informed the Planning Division that it would not sign the CUP or operate the transmission site until the appeal was resolved. The CUP remains unsigned and it was the understanding of Planning Division until yesterday that the transmission site was not in operation. However, this is incorrect—Digis began operating the site without signing the CUP or fulfilling the conditions of approval.

The appeal hearing was first scheduled to occur on 4/2012 but Mr. LaSorella and Digis requested that it be postponed in an effort to resolve the issues without the need for the appeal hearing. This postponement was requested on several occasions throughout 2012, with the last extension coming in November, at which time the Planning Division sent notice to both parties that the appeal would be heard by the County Commission on 1/2013 because it had been a year since the appeal had been filed (although it was postponed until today).

Chapter 22C of the Zoning Ordinance allows for the decision of the Planning Commission to be appealed to the County Commission within 15 days after the written decision of the Planning Commission, which HD20 LLC fulfilled, and as the appellant, it has the burden of proving that the Planning Commission erred in its decision to approve the CUP.

After reviewing HC20's appeal, the Planning Division provided the summarized appeal statements with the following responses:

1-HC20 did not receive notice of the 1/3/12 meeting until 1/4/12.

Proper notice procedures were followed and the same followed for all CUPs. Notice was mailed 12/28/2011. (A property owner in California received this notice prior to the meeting and contacted the Planning Division.)

2-The CUP failed to comply with Zoning Ordinance, Chapter 26-4, that requires each public utility substation be located on a lot with adequate access from a street, alley, right-of-way, or easement.

While the staff report did not specifically mention access to the transmission site, the Planning Division relied on the representation from Digis and the Subdivision's HOA that access was approved in the Lease Agreement, prior to recommending approval of the CUP. Digis represented that access to the site was on the 15 foot waterline easement that runs through Lot 20 to the water tank, and this access was used when staff was given a tour of the transmission site by Digis. The Planning Division's recommendation of approval, which the Ogden Valley Planning Commission accepted, was based on the representations and the language of the Lease Agreement, Section 6, which clearly states that an easement for ingress, egress, access and passage to the transmission site was granted, and is adequate as required by Chapter 26-4.

3-The CUP failed to comply with Chapter 22C-4 because there are significant detrimental effects on Lot 20 caused by unauthorized use of HC20's property in conjunction with the Digis transmission site.

The Planning Commission considered potential detrimental impacts caused by the transmission site and recommended that the dishes be painted camouflage and new landscaping be installed around the water tank. Claims of trespass or private property damage associated with the electrical transmission line are not applicable for the Planning Commission to consider. If private litigation determines that the electrical transmission line that runs through Lot 20 is not allowed, Digis will have to work with the HOA to find a new location.

4-The Planning Commission's conditions of approval have not been met and the CUP should have been revoked.

The Planning Division's understanding was that Digis had never acted on the approval that the Planning Commission granted them but now understand that the site is in operation and that Digis never fulfilled the conditions for approval, therefore they will have to go back to the Planning Commission, which may revoke the CUP or reconsider it. However, this information does not apply directly to this appeal.

5-The Lease Agreement between Digis and the Subdivision's HOA did not grant access over HC20's property.

The Planning Division relied on the representation from Digis and the HOA regarding that access as previously discussed.

6-The transmission site is located on land designated as common area and the Subdivision bars commercial use of common areas.

The Planning Commission cannot enforce or interpret the CC&Rs of a private subdivision to determine whether the use should be allowed. The transmission site is located on a parcel that is designated as common area but Digis and the HOA have represented that the transmission site is allowed on this site. If private litigation determines that it is not an allowed use, Digis will have to work with the HOA to find a different location.

Mr. Wilkinson noted that the County Commission may uphold or reverse the decision of the Planning Commission and impose any additional conditions that it may deem necessary in granting the appeal by HC20. The decision of the County Commission is final; they need to determine if the Planning Commission correctly applied the Zoning Ordinance criteria in making its decision. The Planning Division recommends that only items 2 & 3 listed above be considered as part of the appeal because they relate directly to the Zoning Ordinance criteria, which the Planning Commission used to make its consideration. Items 1, 4, 5, & 6 do not relate to the criteria and are outside of the Planning Commission's consideration. He said that if the County Commission finds that the Planning Commission decision was incorrect and the use does not meet the applicable Zoning Ordinance criteria, then HC20's appeal should be granted and the CUP would be denied or the County Commission can find that the Planning Commission correctly applied the Zoning Ordinance criteria in making its decision and the appeal should be denied and the Planning Commission's decision will stand as the county's final decision and Digis will be required to go back to the Planning Commission to update the conditions of approval. Chris Allred, Deputy County Attorney, stated that the party that is appealing usually addresses the Commission first, then the responding party is given an opportunity to address the Commission and finally the appealing party has another opportunity to speak.

Carl Barton, legal counsel for HC20, showed some pictures of the lots in the Subdivision, including a blowup of Lot 20's approximate boundaries, the water tank on top of which the Digis tower is located and the parcel designated for the common areas of the Subdivision. His client has appealed because he feels 1) that the use is illegal under the county ordinance—the equipment was installed without a conditional use permit, 2) that the CUP should not have been approved. Mr. Barton said that they now know that county staff and the Planning Commission may not have been aware of some of the information, 3) that there have been detrimental affects to his client—there is now about 1,000 feet of electrical service that

runs somewhere through the lot that will affect the development of the lot and there is access through the lot without notice to his client. Mr. Barton said that they prefer not to sue Digis or the HOA but to come before the County Commission to try working out this issue in part because the county's building permit and CUP approvals have given rise to the dispute. They believe that to allow the CUP to remain, even with more conditions or to send it back to the Planning Commission would allow an illegal use to continue and would be arbitrary and capricious behavior by the county.

Mr. Barton outlined the following reasons as to why they feel approval of the CUP was inappropriate:

-Digis and the HOA worked together on installation of the broadband equipment on the HOA common areas without approval. He said they acknowledge it is not the county's job to enforce the CC&Rs (which do not allow commercial use in the common areas). The installation included the electrical service. Mr. Barton's understanding is that there was a county restriction requiring HOA common areas to remain green space but it was not considered (or at least not mentioned) in the CUP approval.

-The building permit application lists his client's lot as the address for the installation for the electrical service and identifies the owner of the lot not as his client, but as the HOA, which is not correct. Planning staff approved the installation of the temporary electrical service despite the Engineering Department's reports that identified it as an illegal use. Digis met with Rocky Mountain Power and the latter made it clear (from the emails) that a right-of-way was needed from the owner of Lot 20. No right-of-way has been granted.

-HOAs are nonprofit corporations and there is no apparent proof that Pineview Properties had any right to control the HOA. Mr. Barton said that Planning staff should have required verification of authority. HOA bylaws state that when more than 51% of the lots are sold, the developer or declarant of the Subdivision had to turn control of the HOA to the lot members, which occurred when his client purchased lot 20 but the turnover never occurred and the members have never held elections. The lack of authority has affected those purporting to act on behalf of the HOA. He noted that the HOA is not represented today at this hearing. The HOA is the named permittee on the CUP, not Digis.

-The Digis lease contains no exhibit that shows what property is covered by the Digis lease. The HOA leased some property and also gave them the right to access landlord's property but apparently no exhibit exists. If it covered the HOA common areas, the landlord did not have the right to give access over landlord's property, which occurred over his client's property, since they did not own it.

5) The language in the CUP application states that if no substantial action has occurred on the permit within a year after issuance that it will expire. It was issued on 1/24/2012 and the only conditions were the camouflage paint and the landscaping, neither of which has occurred. Mr. Barton showed a picture of the tower/site taken yesterday. The permit required that these two items be completed by 7/31/2012, and if not that the item be placed on the Planning Commission's agenda for revocation, which did not occur.

-Mr. Barton said that they do not feel the county made enough effort to insure adequate access and that the CUP states that the Planning Commission did not consider access or the electrical service.

He summarized that they feel Digis, in conjunction with the HOA, engaged in a series of actions without approval from the county or private property owners which constitute a violation of the county ordinance and include installing equipment on the tower, an illegal use (without approval from the county, without notice to his client for the access or the electrical service), and the county has never approved the electrical service in final form (it's being used in temporary form). Mr. Barton said his client has been damaged by this and it affects the property value. He agrees that county procedures were followed for noticing. He said that the Weber County Zoning Ordinance is one of the only ordinances in the State that does not require notice and participation from private property owners. He believes the county has a duty to its citizens to insure their involvement before the county makes a detrimental decision.

Commissioner Gibson referred to Mr. Barton's last comment that notices were mailed out but that the county had additional responsibility and Mr. Barton responded that there was no violation of the county ordinance. He said that Salt Lake City will not have a CUP hearing unless there is proof that the owner of the private property involved has received notice and has a chance to comment and that this is consistent with many of the cities and counties in Utah.

Mr. Barton said that presumably both the HOA and Digis would state that the Subdivision declaration gave them the right to use his client's property for access and to install the electrical service but the CC&Rs prohibit commercial use on the HOA common areas. He said that the CC&Rs gives the HOA authority to create utility easements but the right to create those types of easements is so they can bring water, electrical and other utilities to each lot and to the Subdivision.

Jeremy Johnson, legal counsel for Digis, stated that the central issue is access but commenced by addressing standard of review. He noted that the County Commission is an appeal authority and they need to look at the information that the Planning Commission looked at—it is limited to the evidence presented to the Planning Commission. He said that Mr. Barton in his letter and also today acknowledged that the Planning Commission may not have had some of the information that Mr. Barton is presenting, and as such, that information cannot be considered. He said he would address the information anyway so that it is understood it is not a matter of a technicality upon which this appeal needs to be denied. He referred to the arbitrary and capricious standard argued up by Mr. Barton and to a book written by attorney Craig Call about land use regulations in Utah whereby he describes it as impossible to find a single case in Utah, or any other jurisdiction, where a zoning issue had been overturned by a decision that was arbitrary and capricious, that the arbitrary and capricious standard is impossible to be met. He said there has to be not a scintilla of evidence upon which the Planning Commission could have relied on and that Mr. Wilkinson identified that it was the representation of Digis and the HOA upon which they relied—this is a reasonable basis upon which to make a decision, therefore it is not arbitrary nor capriciously made.

Mr. Johnson said that HC20 has noted that it did not give a right-of-way across its property, however, the declarant did. He explained that when a development and an HOA begins there is a declarant who is typically the developer, and the declarant entity is different than the HOA entity, and sometimes the declarant entity during the early period controls the HOA entity, but they are in fact separate. He said that the declarant entity has the right, under the CC&Rs of the Subdivision to grant the easement that they granted. He read the amendment to the CC&Rs stating it was prior to any of the dates that Mr. Barton was talking about, "Amendment to Article IX, Easements and Reserved Rights, Section 9.3 is replaced by the following: Section 9.3, Utility Easements-Declarant and the Association hereby reserve the right to grant non-exclusive easements at any time for utilities, Digis irrigation and drainage purposes including without limitation for the installation, relocation, operation, maintenance, repair, replacement of water and sewer mains, utility lines, pumps, pipes, transformers, towers, tanks, wires and conduits, culverts, ditches, ponds, and other necessary facilities or systems and for ingress and egress to and from the same over and across any portion of the Subdivision including any home site except across any development envelope." Mr. Johnson noted that the easements are not just for water and sewer as was represented by Mr. Barton. He said that in Mr. Wilkinson's first picture he showed the development envelope and that the access did not go across it. Mr. Johnson said that according to the HOA documents clearly the declarant and the HOA had the right to grant the easement that they gave Digis to go across the property, put up their utility wireless tower and be able to access it from thereon. The letter by HC20 mentioned that the declarant entity voluntarily dissolved and Mr. Johnson said that is not exactly correct. There was a declarant entity that did voluntarily dissolve (the Hawkins Creek Estate), after the declarant rights had transferred to Pineview Properties, thus the power to control the declarant rights had been passed to Pineview, which is the party that gave Digis the easement across the property. He stated that Digis did have access and had it from the party that had the right to grant it. He said it is true that Digis has not fulfilled the two conditions of approval yet because there is an appeal but as soon as it is either granted or denied, Digis is happy to act immediately.

Mr. Barton said that there were two ways that the County Commission could grant their appeal—if the use was illegal or if the county’s actions were arbitrary and capricious, and he said the latter did not mean that the county was being dishonest but rather that it was not sufficiently careful. He agrees that the declarant and the HOA were separate entities. He said that there is no easement recorded, that there is the right to do some of those easements, but the only document recorded on lot 20 is a waterline easement. He said that Pineview purchased many lots but buying the lots is different than buying ownership of the declarant entity and they have not seen any document under which the declarant developer rights in the HOA were signed to Pineview. Mr. Barton referred to Mr. Wilkinson’s comment to consider only the two reasons in making the decision but felt that all the reasons should be considered.

Commissioner Zogmaister said that it has been difficult to sort through all of the information between both parties. She asked how it had been determined that there was sufficient access to the electrical service and Mr. Wilkinson responded that, based on the lease agreement that was provided to the county and also a site visit conducted by Digis to show the location of their electrical line and how they had access to their equipment. Commissioner Zogmaister asked when the CUP was issued and Mr. Wilkinson said that it was on 1/24/2012 and that it was never signed by Digis. She asked when this appeal was filed and Mr. Wilkinson responded that it was on 1/19/2012, before the CUP was issued. Commissioner Zogmaister stated that from all that she has reviewed and from what she has heard she feels that the Planning Commission acted properly with the information that they had. The two other commissioners concurred.

Commissioner Bell moved to accept the Planning Commission’s decision and to deny the appeal regarding the Ogden Valley Planning Commission’s decision relating to CUP 2011-07 for Digis wireless internet transmission site located on the water storage tank within Legends at Hawkins Creek; Commissioner Zogmaister seconded for discussion. Mr. Allred said that Mr. Barton is not only challenging that it was arbitrary or capricious but is claiming that it was illegal because, in his opinion, there was no legal access, which would give legitimate grounds to challenge the CUP issuance. Mr. Allred said that if lack of legal access were undisputed, it would be appropriate to find that there is no access and to revoke the permit but the problem Mr. Allred sees and, which bears discussion, is that the access issue is disputed. He said that if in the commissioners’ minds it is completely clear that there is no access then it would be appropriate to find that it was illegal, otherwise the issuance of the CUP does not grant Digis or the HOA any rights they do not already have nor preempt the CC&Rs or any rights that the owners have on their properties nor grant Digis any right to put anything on their property if they do not have that right already, which is the reason Mr. Wilkinson indicated on the permit itself that the county is not making any representations that they in fact have that access, only that they have alleged and provided some indication that they do have that access, and why Mr. Wilkinson indicated the parties should sort that out among themselves and the CUP does not grant any extra rights. Mr. Allred said the CUP does not create the problem that it only acknowledges that if they have the access it does meet zoning. He noted that legal access is required by county ordinance. He reiterated that if it is sufficiently evident to the commissioners that there is no evidence that they have access then it is appropriate to revoke the CUP but as of right now Digis has provided some evidence, which albeit is in dispute, which meets the zoning requirements. Commissioner Zogmaister reiterated that the Planning Commissioners acted appropriately. Chair Gibson called for the vote and all voted aye.

**2. CONTRACT WITH DMW INDUSTRIES, INC. (OGDEN MUSTANGS) FOR A FIVE YEAR AGREEMENT ON FACILITY (ICE SHEET) RENTAL COST, INCLUDING ICE TIME, TICKET REVENUES AND CONCESSION REVENUES – CONTRACT C2013-51**

Todd Ferrario, with the County Ice Sheet, noted that two provisions were added to this agreement—the early termination clause (includes a 60-day written notice clause) and the lease provision (which incorporates all provisions of the original lease).

Commissioner Zogmaister moved to approve Contract C2012-51 with DMW Industries, Inc. (Ogden Mustangs) for a five year agreement with the facility (Ice Sheet) rental cost, including ice time, ticket revenues and concession revenues; Commissioner Bell seconded, all voting aye.

**3. RESOLUTION APPOINTING TWO MEMBERS TO THE BEN LOMOND CEMETERY MAINTENANCE DISTRICT – RESOLUTION 3-2013**

Brooke Stewart, with the County Commission Office, stated that two member terms expired and the Commission Office advertised for the positions as required by law. Two applications were received.

Commissioner Bell moved to adopt Resolution 3-2013 reappointing Leonard Call to serve a 4-year term beginning immediately and ending 12/31/2016 and appointing Craig Dearden to serve a 4-year term beginning immediately and ending 12/31/2016 to the Ben Lomond Cemetery Maintenance District; Commissioner Zogmaister seconded.

Roll Call Vote:

Commissioner Zogmaister..... aye  
Commissioner Bell ..... aye  
Chair Gibson..... aye

**4. CONTRACT WITH BATTLE ARTIST AGENCY FOR BELLAMY BROTHERS TO PERFORM AT THE 2013 WEBER COUNTY FAIR – CONTRACT C2013-52**

Jan Wilson, with the Weber County Fair, presented this contract for \$10,000.

Commissioner Bell moved to approve Contract C2013-52 with Battle Artist Agency for Bellamy Brothers to perform at the 2013 Weber County Fair; Commissioner Zogmaister seconded, all voting aye.

**5. CONTRACT WITH UTAH DEPARTMENT OF TRANSPORTATION (UDOT) FOR PAVEMENT DESIGN WORK RELATED TO THE OLD SNOWBASIN ROAD - CONTRACT C2013-53**

Michael Tuttle, of County Engineering, stated that this is a contract modification with UDOT and includes RB&G as the consultant, which will be providing pavement design. This increases the county's match by \$703.00.

Commissioner Zogmaister moved to approve Contract C2013-53 with the Utah Department of Transportation for pavement design work related to the Old Snow Basin Road; Commissioner Bell seconded, all voting aye.

**F. ASSIGN PLEDGE OF ALLEGIANCE & THOUGHT OF THE DAY FOR TUESDAY, FEBRUARY 26, 2013, 10 A.M.**

**G. PUBLIC COMMENTS:** None

**H. ADJOURN**

Commissioner Bell moved to adjourn at 11:19 a.m.; Commissioner Zogmaister seconded, all voting aye.

Attest:

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Kerry W. Gibson, Chair  
Weber County Commission

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Ricky D. Hatch, CPA  
Weber County Clerk/Auditor