



**Minutes of the
Millcreek Planning Commission
October 7, 2021
5:00 p.m.
Special Meeting**

The Planning Commission of Millcreek, Utah, met in a special public meeting on October 7, 2021 at Millcreek City Hall, 3330 S 1300 E, Millcreek, UT 84106. The meeting was conducted electronically and live streamed via the City's website.

PRESENT:

Commissioners

Shawn LaMar, Chair
Victoria Reid, Vice Chair (excused)
David Allen
Scott Claerhout (virtual)
Skye Sieber
Tom Stephens (excused)
Ian Wright (excused)
Christian Larsen
Aryel Cianflone (excused)

City Staff

Francis Lilly, Planning & Zoning Director
John Brems, City Attorney
Kurt Hansen, Facilities Director
Alexander Wendt, Deputy Recorder

Attendees: Jordan Cullimore, Marv Poulsen, Rob Keller

Minutes by Alexander Wendt.

**SPECIAL MEETING – 5:00 p.m.
TIME COMMENCED – 5:07 p.m.**

1. Discussion with the Office of the Property Rights Ombudsman

Chair LaMar welcomed Jordan Cullimore, Property Rights Ombudsman. Chair LaMar first asked an emailed question from Commissioner Stephens who was not in attendance. "The eminent domain process (in this case to remove a billboard) requires the determination of the "fair market value" of the billboard, including a valuation as to the degree it is part of a "bundle of billboards" that advertisers want to advertise on. By what means does the City determine the fair market value as its starting point in the valuation process -- third party, neutral appraisal, or some other means? Mr. Cullimore explained first he is from the Ombudsman's Office which is a neutral, non-partisan, state funded agency. The way fair market value is determined is the same way two individuals in a transaction would determine it. The most common way is an appraisal, there is not necessarily a requirement for an appraisal, but the condemning entity must disclose how they come to their number. If there is a disagreement between parties, then an appraisal is done. You can pay things other than money; you can exchange property or exchange other forms of consideration. There are appraisers who specialize in this sort of thing to

determine fair market value. Commission Allen asked if the City needs to do an appraisal. Mr. Cullimore said the City can approach an owner of an asset and make an offer. If they cannot reach a value, the next step is condemnation. Nothing prevents the City from determining what fair market value is the normal way a buyer and seller would. Commissioner Allen asked if the City were to swap an acre of land for a billboard would the City have an obligation to go through valuations. Mr. Cullimore said that as a mediator sometimes there are swaps or exchanges of properties. If the City officials make the decision and the property owner determines it is a fair exchange, it is allowed. Commissioner Larsen asked if an administration compensation estimate requires proprietary information, like ad revenue. Mr. Cullimore said he did not know; an appraiser would know. Mr. Cullimore said he has never dealt with a billboard condemnation in his office so he would ask appraisers questions.

Rob Keller, partner with firm of Snow Christensen and Martineau, said he represents municipalities where city attorneys need additional expertise, often in the condemnation context. In his experience, usually both parties want appraisals involved to come to fair market value. This does not prohibit the parties from doing an exchange or taking a creative approach to negotiations. The vast majority do rely on appraisals. There are wide variations in appraisals. The City is required to get fair market value for the exchange. They cannot simply say give us property in return for something. The City would need to prove they got fair exchange for what they are giving up. Mr. Keller said the issue is evaluating the value of a billboard. Staff recognizes that an appraisal is important and has asked for an appraisal from Phil Cook, one of the most reputable appraisers in the State. City legal counsel has received an appraisal in draft form. It does not have the information about Reagan's income stream. The appraisal does give some indication of value, but the question is how the City can share the appraisal with the Planning Commission and City Council and keep attorney client privilege, and work product privilege while the report is still not finalized. They cannot disclose value this early in the process because it is not necessarily the value. The City Council is going to meet in closed session to disclose the appraisal without waiving attorney client privilege. There is not the ability to hold a closed session with the Planning Commission. Mr. Keller is going to ask the City Council to decide on waiving their attorney and work privilege to disclose the appraisal to the Planning Commission. The City Council recognized the interest of the Planning Commission.

Commissioner Allen asked if a city or state decided they wanted property in 30-90 days, how fast could they make the condemnation process. Mr. Keller said it depends on how the two sides get along. When there is a final appraisal, a state statute requires a period of negotiation with the property owner and there is a 30-day period for negotiation. At that point a city council could pass a condemnation resolution. After this point the City can file an action and seek an order of immediate occupancy. Depending on the dynamics between the parties this can happen in 30 days and then the Court calendar determines the speed. The fastest this can happen is 45-60 days or up to 120 days depending on litigation dynamics. If the Court must grant an order of occupancy, it can take 45-120 days. Mr. Cullimore said there is an obscure provision in state law that talks about ways that local government can obtain a billboard. If a municipality commences an eminent domain action immediate occupancy does not apply. A municipality may not take possession of the billboard, or the billboards associated rights until all appeals, or all judgment is

complete. This allows the municipality to take possession and the owner receives just compensation. Mr. Cullimore said that based on the state law if it takes 20 years to get a billboard then it takes 20 years. One way to obtain a billboard is by eminent domain but the immediate occupancy provision is not available. Filing eminent domain is a condemnation action. Mr. Keller said you would have to resolve the value before you obtain the billboard. Chair LaMar asked if the owner decided that as soon as they are ready, and the City is ready then they would not need to play out longer than they wanted to. Mr. Keller said as soon as the two parties agree the good faith negotiation period can end. Chair LaMar asked what happens if the City gets an appraisal and Reagan does not agree with the appraisal, how is the fair value determined. Mr. Keller said the Ombudsman offers a mediation service. The Ombudsman could order the City to get another appraisal, then there would be three appraisals, one for the City, one for Reagan and one ordered by the Ombudsman. If none of that worked, it would be an issue for the courts. A jury would decide what the value is when two parties cannot come to an agreement. Chair LaMar asked how long it takes to get an appraisal. Mr. Keller said the appraiser the City is using is in high demand, they are a very good appraiser, and it would take them more than a month. It would take an appraiser several months on a complex issue.

Chair LaMar read a question from Commissioner Stephens. "The fair market value of the billboard cannot be determined in the absence of knowing the lease cancellation or lease termination provisions. If the next opportunity for the termination of the billboard land lease is in 2031, for example, ten years, then the fair market value of the billboard should be based on a revenue stream to not exceed ten (10) years (plus the value of the billboard as part of a "bundle of billboards" that is part of an advertising package). Question: are the lease cancellation / termination provisions in the land lease public information and available to the planning commission for its review?" Mr. Cullimore said he does not know a situation where two parties must disclose this. If it is a private lease, a party would not have to disclose the information if they do not want to. Mr. Keller said Reagan would probably want to disclose this to the appraiser. They can disclose this to the City appraiser or their own appraiser. Commissioner Allen said that in the absence of this it would probably go to court. Mr. Cullimore said that the way this question is phrased is, can the planning commission require this, in which case probably not.

Commissioner Sieber said her questions had been answered. Commissioner Allen said it sounds like there is a draft appraisal out there that may have been done yesterday but it is out there. Chair LaMar asked for clarification, once the draft appraisal comes to the City Council, they can review that in a closed session because it fits the criteria for a closed meeting. Then, can the City Council bring the Planning Commission into closed meeting to determine fair market value. Mr. Keller said if the appraisal is disclosed to the Planning Commission at this point it is a draft and not a final number. Mr. Keller said he did not know if the Council can invite a member of the Commission into the closed session. Absent that, if the Planning Commission finds out the value and talk about it in a public meeting then anyone can find out the value even though the value is not final. The City Council wants to discuss this in a closed meeting and discuss if they would like to disclose the information at that point. If they disclose it, they cannot protect the information. Commissioner Allen said the challenge is if the Planning Commission could go into the closed meeting. Chair LaMar asked if other Commissioners wanted to hear

from Mr. Brems. Mr. Brems explained that the City Council will decide on whether to disclose the value or not and waive their attorney client privilege. Chair LaMar asked if the Planning Commission could come into the closed meeting. Mr. Brems said he did not think that meets the criteria for attorney client privilege. If they decide to not waive the privilege the Commission cannot use it. If the Planning Commission were in there it might lose attorney client privilege. Mr. Keller said that the Planning Commission deliberations are always public. If the Commission received the information, they could not share it otherwise attorney client privilege is waived. Chair LaMar said it does seem like under the closed meeting act that the acquisition or sale of property that the Planning Commission could have a closed meeting. Commissioner Allen said that the argument would then be is this information relevant to the Planning Commission or not.

Chair LaMar brought up process and timeliness. He asked what a good way would be to determine whether something is timely or not timely. Mr. Cullimore said he is unaware where a Utah court has defined timely. If this were to be litigated, people would make arguments based on the circumstances. Chair LaMar asked if past timeliness could be used as an argument. Mr. Cullimore replied yes, it sounds like a reasonable argument. Chair LaMar asked who decides what is timely when the City Council and Planning Commission disagree on if something is timely. Mr. Cullimore explained, the City Council decides if something has been timely, they make the laws. If there was a dispute, it would be decided in court. Mr. Cullimore said it would be hard to find someone who has standing or claim because of a council decision. If the City Council decided that something has been timely there is not a way to appeal this determination. Commissioner Sieber expressed that when a city is changing their code, this is different from a land use application. Therefore, the reasonable period does not apply. Mr. Cullimore said that these terms are in the code to direct people, but they do not always have a specific definition. Commissioner Allen noted that because the Commission is not sure what to do that taking a few months was not a strong argument. Perhaps the issue has changed enough that the Commission can ask for more public process. Chair LaMar asked how the Commission could be confident that this was a fair swap because it would change the ordinance in the City Center.

Chair LaMar read an emailed question from Commissioner Reid who was not present. "Since the City Council recommended our use of the Ombudsman, does the City Council have an obligation to participate in our process with the Ombudsman and to wait for this process to play out before taking action?" Mr. Cullimore said not that he is aware of. Commissioner Allen said in other discussions it sounds like staff has been working on this project and the City Council has been aware of all of this for some time. Then Commissioner Allen asked why one option was being presented to them. Commissioner Allen added it seems like the City Council has been avoiding the public process and the council is being asked individually. The Council is aware of what is going on and has been giving correction. He asked if this violates the Utah Open Meetings Act because it seems like a de facto decision has been made not in the public process. If you assume the City Council has been directing this, was it a reasonable action by the City Council, Mr. Cullimore said what you described is not outside the realm of conducting city business. Staff is working on this as their full-time job, they speak to members of the council or the mayor individually, this is the normal business of a city. Then when the City Council decides they convene with a quorum and hold a public meeting. Commissioner Allen said

he thinks the public process so far is based on inaccurate information. Four community councils have given their recommendations. Commissioner Allen would like to see the process start over especially if the community councils are giving their recommendation based on inaccurate information. Mr. Cullimore replied it depends on the information and whether it is relevant to the situation. Chair LaMar asked if there is a process in case information was inaccurate, if that can be remedied. Mr. Cullimore said that is the question of the public forum in general, this is philosophical. The reality is we all get information and determine credibility. It is through the court of public opinion that you give credibility to facts or not.

Chair LaMar said in this proposal there are billboards selected for removal. Certain parcels may benefit from having the billboard removed. He is curious about fairness. This is the direct result of this agreement, but what about a landowner that would like their billboard taken down. He asked if it was fair. Mr. Cullimore explained that what is fair and what is legal does not always overlap. Neighbors do things all the time to devalue their neighbor's property. There is no action in the law to obtain a remedy unless it raises to the amount of a nuisance. Someone can put up a flag or paint their house orange. This may make it difficult for a neighbor to sell their property. Regarding fairness, there is nothing illegal about what you describe. Chair LaMar asked if it was fair if the City relieves a landowner of their billboard lease. Mr. Cullimore said he is not aware of anything in the law that would lead someone to the conclusion that the City violated someone's rights.

Chair LaMar read a comment from Commissioner Stephens. "The memorandum of understanding (MOU) agreement is attempting to limit the type of advertising to be displayed on the digital billboards (political, sexual, and alcoholic beverage advertisements are prohibited). The City appears to think that it and Reagan can sidestep free speech / First Amendment Right issues because the billboards will be owned by the City and that the lease agreement with Reagan will be immune to First Amendment challenges. Is this a safe, legal bet on the part of the city and Reagan?" Mr. Cullimore explained there are different kinds of speech. Pleasant Grove City had a case that went to the US Supreme Court about whether their city can decide what types of monuments are displayed on public property. Someone sued and said, if you allow one you must allow them all. The United States Supreme Court said no, the City can determine what they allow on their property. Mr. Cullimore said beyond that he does not have a definitive answer. Chair LaMar read another question from Commissioner Stephens. "Government officials are prohibited from using their office/title for endorsements. Although the city center isn't a person, 60% of the ads will appear on city property and within a framework that current illustrations show a city logo or name "Millcreek Common." Is this a conflict?" Mr. Cullimore said that government does this all the time and provides ad space. Utah Transit Authority does this with ads on busses. Mr. Cullimore does not see these challenged. Mr. Cullimore said this is a policy question not a legal question.

Commissioner Allen said if the City has 40% of the ads, then the City needs to establish a fair and reasonable process to determine who gets those ads. The Planning Commission should ask about this. Chair LaMar read another question from Commissioner Stephens. "The MOU appears to be missing (or is vague or inadequate) a number of critical components that would normally be part of an MOU, such as dispute resolution liability,

term, notice, governing law, assignment, amendment, severability, cancellation. What is the ombudsman's view as to adequacy of this MOU, insofar as its construction and adequacy?" Mr. Cullimore said this is up to the parties at hand and how they want the agreement to look. There is not a statute that says what must be in the contract. He asked if the agreement was appropriate to the situation. Mr. Brems said that the MOU was a nonbinding memorandum of understanding, it says non-binding in it. Commissioner Larsen said that public safety has been brought up multiple times by the public because these are lit billboards. He asked if someone crashes into the billboard, would the City be liable for that accident because they have been distracted by the billboard. Mr. Cullimore said it is difficult to comment without an exact scenario, but he struggles to see where the City would be liable for that. If the City follows standard practices in how any billboard like this is operated, then they would not be liable.

Chair LaMar asked about ex-parte conversations. Mr. Cullimore said he does not have a lot of experience with this. Mr. Cullimore replied that the Planning Commission members should follow the rules that govern the Planning Commission. Chair LaMar asked if the Planning Commission may conduct interviews with the media. Mr. Cullimore said appointed and elected officials do have those kinds of conversations and it is up to their discretion about what they should or should not share. Chair LaMar said that he understands if he spoke to an interested party that would be a violation of ex-parte rules. However, if a member of the Planning Commission did a site visit and reports back to the Planning Commission it would be allowed. Mr. Cullimore said that if there are questions about the rules of order and procedure, he should consult the City's legal counsel. Commissioner Larsen commented about how ex-parte communication could sway a vote, then it would only apply to a pending application and a vote. He asked if there is not a specific application and no parcel or applicant to point to, if there would be any restriction on any discussion. Commissioner Larsen said that he considers ex-parte communication when there is a specific application that has not been voted on. Commissioner Allen said that the rules encourage the Commission to talk about matters. This kind of conversation happens when your neighbor asks questions. If the discussion is with a party that shows up at your house regarding an application that is clearly a no-no. Commissioner Larsen said expanding on this, if the Commission has voted and the issue is now with the City Council then there is not a restriction on communication. Mr. Brems if there is not a pending application it is not ex-parte. If the decision has been made it is not ex-parte.

Chair LaMar thanked Mr. Cullimore for coming to this meeting and thanked staff for helping this meeting happen.

Commissioner Allen moved to adjourn. Commissioner Larsen seconded. Chair LaMar called for the vote. All Commissioners voted yes. The meeting adjourned at 6:22 pm.

APPROVED: _____ **Date**
Shawn LaMar, Chair

Attest: _____
Elyse Sullivan, City Recorder