NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. BENNETT; JUDITH D. BENNETT, Plaintiffs-Appellants, v. CITY OF KINGMAN, Defendant-Appellee.	No. 21-16105 D.C. No. 3:19-cv-08001-MTL MEMORANDUM*

Appeal from the United States District Court
for the District of Arizona
Michael T. Liburdi, District Judge, Presiding

Submitted January 4, 2023**

(Filed Jan. 6, 2023)

Before: HAWKINS, S.R.. THOMAS, and McKEOWN, Circuit Judges.

Robert E. and Judith D. Bennett appeal pro se the district court's orders denying mandamus relief and entering summary judgment, dismissing their action under 42 U.S.C. § 1983 alleging that the City of Kingman violated the Takings Clause, their due process rights, and state law by re-zoning their property and

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The panel unanimously concludes this case is suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

denying a third extension on their 2013 conditional use permit ("CUP") and their 2018 application for a new CUP. We have jurisdiction under 28 U.S.C. § 1291. We review de nova the district court's conclusions of law, including the application of the statute of limitations and whether summary judgment and mandamus relief are appropriate. *Avila v. Spokane Sch. Dist. 81*, 852 F.3d 936, 939 (9th Cir. 2017); *Samson v. City of Bainbridge Island*, 683 F.3d 1051, 1057 (9th Cir. 2012); *Kildare v. Saenz*, 325 F.3d 1078, 1082 (9th Cir. 2003). We review for abuse of discretion the district court's decisions whether to consider a new issue at summary judgment and to extend supplemental jurisdiction over state law claims. *See Kaplan v. Rose*, 49 F.3d 1363, 1370 (9th Cir. 1994), *overruled on other grounds by City of Dearborn Heights Act 345 Police &. Fire Rel. Sys. v. Align Tech., Inc.*, 856 F.3d 605 (9th Cit. 2017); *Arroyo v. Rosas*, 19 F.4th 1202, 1210 (9th Cir. 2021). We affirm.

The district court properly found that claims premised on the 2005 enactment of City Ordinance 1471, which re-zoned the Bennetts' property, are barred by Arizona's two-year statute of limitations. *See TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999). The Bennetts did not file suit until seven years after they first knew "knew] of the injury which is the basis of the action." *Id.*

To the extent the Bennetts' Takings Clause claim is premised on the denial of their 2018 CUP application, the district court properly granted summary judgment because they failed to raise a triable dispute as to whether they had a protected property interest at

stake. "Property interests . . . arc created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law[.]" *Bowers v. Whitman*, 671 F.3d 905, 912 (9th Cir. 2012) (quoting *Rd. of Regents of State Coils. v. Roth*, 408 U.S. 564, 577 (1972)). Arizona courts have declined to find a property interest where the applicant "was subject to the inherently unpredictable and often politicized process of seeking permission from a local legislative body to conduct certain activity on a piece of property." *Aegis of Ariz., L.L.C. v. Town of Marana*, 81 P.3d 1016, 1028 (Ariz. Ct. App. 2003).

To the extent that the Bennetts' Taking Clause claim is premised on the denial of a third extension on their 201.3 CUP, the district court properly granted summary judgment because they failed to raise a triable dispute as to whether the denial constitutes a taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). The Bennetts failed to provide evidence of the direct economic impact of the denial or of sufficiently concrete "investment-backed expectations" with which the denial interfered. *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 630 (9th Cir. 2020) (quoting *Penn Cent. Transp. Co.*, 438 U.S. at 124). Moreover, the denial did not resemble a physical invasion or unfairly require the Bennetts to bear a burden more appropriately borne by the broader public. *See Penn Cent. Transp. Co.*, 438 U.S. at 124.

The district court properly granted summary judgment on the Bennetts' procedural due process claim because they failed to raise a triable dispute as to

whether the City denied them any constitutionally required process. The Bennetts failed to establish a genuine dispute of material fact as to whether they were denied "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews v. Eldridge*, 424 U,S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

The district court properly granted summary judgment on the Bennetts' substantive due process claim because they failed to raise a triable dispute as to whether denial of the CUP was "substantial[ly] related] to the public health, safety, morals or general welfare." *Samson*, 683 F.3d at 1058 (citation omitted).

The district court properly denied the Bennetts' request for federal mandamus relief because they did not seek to compel any federal officer or agency to perform any duty. *See* 28 U.S.C. § 1361.

The district court did not abuse its discretion in declining to consider the Bennetts' equal protection claim, raised for the first time on summary judgment. The district court did not abuse its discretion in finding prejudice to defendants counseled against adding a new issue, *See Kaplan*, 49 F.3d at 1370.

Finally, the district court did not abuse its discretion in declining to exercise supplemental jurisdiction over the state-law claims. When all federal claims are dismissed before trial, "judicial economy, convenience, fairness, and comity [all] point toward declining to exercise jurisdiction over the remaining state-law

claims." *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 350 n.7 (1988).

AFFIRMED.[1]

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[1] We deny the Bennetts' motion for default judgment (Dkt. No. 15).

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

Robert E Bennett, et al., Plaintiffs, v. City of Kingman, Defendant.	No. CV-19-08001-PCT-MTL **ORDER** (Filed June 15, 2021)

Before the Court are Plaintiffs Robert and Judith Bennett's (collectively, the "Bennetts") Request for Writ of Mandamus Motion to Void Kingman City Ordinance 1471 (Doc. 40) and Motion for Partial Summary Judgment (Doc. 48), and Defendant City of Kingman's (the "City") Motion for Summary Judgment (Doc. 47). The Court now rules.[1]

I. BACKGROUND

The Bennetts own five acres of real property in Mohave County, Arizona (the "Property"). (Doc. 23 ("FAC") ¶ 1.) Storage units exist on the eastern portion of the Property; the remaining 3.4 acres of land are unimproved. (*Id.* ¶¶ 9-10.) The Bennetts intend to one day expand their storage business onto the

[1] The Court finds the pending motions appropriate to resolve without oral argument. *See* LRCiv 7.2(f).

unimproved portion of their land. (*Id.* ¶ 11.) That expansion, or lack thereof, is at the heart of this case.

The facts relevant to this case date back to 2003, when the Kingman City Council considered annexing certain unincorporated land, including the subject Property. The City obtained the Bennetts' written consent, which, according to the Bennetts, was conditioned on the City's verbal promise that they could someday build additional storage units on the Property. (*Id.* ¶ 17; Doc. 52 at 19.)[2] The City annexed the Property shortly thereafter. (Doc. 47-1 ¶ 6.)

The City Council then amended the Kingman Zoning Ordinance by establishing a C-2-HMR zoning district. (FAC ¶ 19; Doc. 26 ¶ 19.) Building storage units, like those on the Property, is not permitted on C-2-HMR property. (FAC ¶ 21; Doc. 26 ¶ 19.) In 2005, the City Council passed Ordinance 1471, which rezoned certain commercial land, including the Bennetts' Property, to C-2-HMR. (FAC ¶ 20; Doc. 47-1 ¶¶ 11-13.)

Seven years later, in September 2012, the Bennetts learned that Ordinance 1471 had been passed

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[2] The City asks the Court to take judicial notice of City Council's meeting minutes under Rule 201 of the Federal Rules of Evidence. (Doc. 58 at 2.) The Court may take judicial notice of facts that are "not subject to reasonable dispute" because they "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b)(2). The City Council's meeting minutes satisfy Rule 201 and judicial notice will be taken. *See Nasrawi v. Buck Consultants, LLC*, 713 F. Supp. 2d 1080, 1083 n.4 (E.D. Cal. 2010) (taking judicial notice of a public agency's board meeting minutes).

and that their land had been rezoned. (FAC ¶ 88.) In 2013, the Bennetts applied for a conditional use permit ("CUP") to build additional storage units on the Property. (*Id.* ¶ 25.) The Bennetts also asked the City to rezone the Property back to C-2 Commercial Community Business. (*Id.* ¶ 27.) The City Council denied the rezoning request but passed an ordinance allowing storage units to be constructed on C-2-HMR property if a landowner obtained a CUP. (*Id.* ¶ 30.) The Council then approved the Bennetts' CUP application. (*Id.*; Doc. 52 at 68-74.)

By the terms of the Kingman Zoning Ordinance, the Bennetts' CUP would expire if they did not receive a building permit one year from the date of approval. *See* Kingman, Ariz., Kingman Zoning Code § 29.410(1). This one-year expiration is common to all CUPs issued by the City of Kingman. *Id.* Due to engineering delays, the Bennetts sought, and the City approved, two one-year extensions of the CUP. (FAC ¶¶ 33-41.) In 2016, the Bennetts sought a third extension. (*Id.* ¶ 43.) The Planning and Zoning Commission held a public hearing on the Bennetts' request and unanimously recommended denying the extension. (Doc. 52 at 97-98.) On January 3, 2017, the City Council considered the request at a public hearing. (*Id.*) A Development Services Director gave a presentation on the issue, and the City subsequently allowed public comment. (*Id.*) Four residents addressed the City Council. (*Id.*) Each resident opposed the Bennetts' request, citing concerns of trash accumulation, increased traffic, negative impacts on surrounding property values, and threats to

neighborhood safety. (*Id.*) The City Council unanimously voted to deny the Bennetts' request for extension. (*Id.* at 99.) Two days later, on January 5, 2017, the CUP expired. The Bennetts applied for a new CUP in 2018. (FAC ¶ 51.) On November 6, 2018, after a public hearing, the City denied their application. (*Id.* ¶ 52; Doc. 52 at 100-02.)

The Bennetts initiated this action on January 2, 2019. (Doc. 1.) Their First Amended Complaint ("FAC") alleges six claims for relief: (1) violation of the federal Takings Clause; (2) violation of the Arizona Constitution's Takings Clause; (3) vested rights violation; (4) Due Process Clause violation under 42 U.S.C. § 1983; (5) taking without just compensation under 42 U.S.C. § 1983; and (6) breach of contract. (Doc. 23.) The Bennetts, who are now proceeding *pro se*, have filed a Request for Writ of Mandamus to Void Kingman City Ordinance 1471 (Doc. 40), to which the City filed a response (Doc. 54). The Bennetts have also moved for partial summary judgment. (Doc. 48.) The City moves for summary judgment on all claims. (Doc. 47.) The Court will first address the Bennetts' request for mandamus relief. An evaluation of the summary judgment motions follows.

II. WRIT OF MANDAMUS

The Bennetts request mandamus relief to void the City's annexation of the Property and Ordinance 1471. (Doc. 40.) The Bennetts do not clearly articulate whether they seek mandamus under federal or state

law. For purposes of evaluating the motion, the Court will first apply federal law.

The Federal Mandamus Act, 28 U.S.C. § 1361, "provides district courts with mandamus power 'to compel an officer or employee *of the United States or any agency thereof* to perform a duty owed to the plaintiff.'" *Indep. Mining Co. v. Babbitt*, 105 F.3d 502, 507 (9th Cir. 1997) (quoting 28 U.S.C. § 1361) (emphasis added). "Federal courts have no jurisdiction or authority"—under the Federal Mandamus Act—"to issue mandamus to direct non-federal entities or officials in the performance of their duties." *Andrade v. Cal. Dep't of Corr.*, No. 5:21-CV-00202, 2021 WL 412267, at *1 (C.D. Cal. Feb. 4, 2021) (citations omitted); *see also Clark v. Washington*, 366 F.2d 678, 681 (9th Cir. 1966) ("The federal courts are without power to issue writs of mandamus to direct state courts or their judicial officers in the performance of their duties. . . ."); *Fox v. City of Pasadena*, 78 F.2d 948, 950 (9th Cir. 1935) (concluding a district court has no jurisdiction to issue a writ of mandamus to transfer funds in a city's treasury from the general fund to the district fund); *Amisub (PSL), Inc. v. Colo. Dep't of Soc. Servs.*, 879 F.2d 789, 790 (10th Cir. 1989) ("No relief against state officials or state agencies is afforded by § 1361."). The City is neither an "officer or employee of the United States" nor an "agency thereof." *See* 28 U.S.C. § 1361. The Court therefore denies the Bennetts' request for mandamus relief to the extent it derives from the Federal Mandamus Act.

To the extent that the Bennetts seek relief under Arizona law, the Court declines to exercise supplemental jurisdiction. Federal courts "have supplemental jurisdiction over all other claims that are so related to [the original jurisdiction claims] that they form part of the same case or controversy under Article III of the United States Constitution." 28 U.S.C. § 1367(a). District courts may decline to exercise supplemental jurisdiction if "(1) the claim raises a novel or complex issue of State law, (2) the claim substantially predominates over the [original jurisdiction claims], (3) the district court has dismissed all claims over which it has original jurisdiction, or (4) in exceptional circumstances." *Id.* § 1367(c).

Grounds to decline supplemental jurisdiction over a mandamus action arising under Arizona law exist under factors one and four. Specifically, "[c]onsiderations of federalism and comity, not generally present with typical 'pendent' state claims, loom large in the case of state mandamus proceedings." *Clemes v. Del Norte Cnty. Unified Sch. Dist.*, 843 F. Supp. 583, 596 (N.D. Cal. 1994), *overruled on other grounds by Maynard v. City of San Jose*, 37 F.3d 1396, 1403-04 (9th Cir. 1994). "Mandamus proceedings to compel a state [or municipal entity] to act are actions that are uniquely in the interest and domain of state courts." *Id.* A federal court should not, through the exercise of supplemental jurisdiction, impose itself on such matters. *Id.*; *see also Tomlinson v. Cnty. of Monterey*, No. C-07-00990, 2007 WL 2298038, at *2 (N.D. Cal. Aug. 8, 2007) (declining supplemental jurisdiction over state

mandamus claim). And the Court will not do so here. Accordingly, the Court will dismiss the Bennetts' mandamus request without prejudice so that they may renew the claim, if they so choose, in state court.

III. SUMMARY JUDGMENT MOTIONS

Both parties have moved for summary judgment. The Bennetts move for summary judgment on their vested interest and Due Process Clause claims.[3] The City moves for summary judgment on all claims. As a threshold matter, the Bennetts argue that the Court should not consider the merits of the City's summary judgment motion because it was filed one day after the dispositive motion deadline expired. (Doc. 51.) The Court agrees that the City's motion was untimely but otherwise rejects the Bennetts' request. (*See* Doc. 37 at 2.)

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[3] The Bennetts also move for summary judgment on a newly alleged Equal Protection claim. (Doc. 48 at 1.) The Bennetts did not plead an Equal Protection claim in the Amended Complaint. (Doc. 23.) "To prevail on an Equal Protection claim, plaintiffs must show that a class that is similarly situated has been treated disparately." *Ariz. Dream Act Coal. v. Brewer*, 855 F.3d 957, 966 (9th Cir. 2017) (internal quotations and citations omitted). These elements are not common to constitutional Takings Clause claims, Due Process claims, or the state-law claims alleged by the Bennetts. Adding an Equal Protection claim at the summary judgment stage, and after the close of discovery, would prejudice the City who would be required to develop a different defense to oppose this newly alleged claim. *See Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292 (9th Cir. 2000). Accordingly, the Court will not allow the Bennetts to proceed on their newly alleged Equal Protection claim.

When a party fails to timely act, a court may extend the time to act—and thereby consider an untimely motion—for good cause if that party failed to act because of excusable neglect. *See* Fed. R. Civ. P. 6(b)(1)(B). "To determine whether a party's failure to meet a deadline constitutes 'excusable neglect,'" the Court "must apply a four-factor equitable test, examining: (1) the danger of prejudice to the opposing party; (2) the length of the delay and its potential impact on the proceedings; (3) the reason for the delay; and (4) whether the movant acted in good faith." *Ahanchian v. Xenon Pictures, Inc.*, 624 F.3d 1253, 1261 (9th Cir. 2010) (citing *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380, 395 (1993)). Rule 6(b)(1)(B), "like all the Federal Rules of Civil Procedure, is to be liberally construed to effectuate the general purpose of seeing that cases are tried on the merits." *Id.* at 1258-59 (internal quotations and citations omitted). "Mindful that a district court abuses its discretion if it does not consider each of the four *Pioneer* factors separately, . . . this court will do exactly that." *Gabaldon v. City of Peoria*, No. CV12-01612, 2013 WL 5428755, at *6 (D. Ariz. Sept. 27, 2013) (internal quotations and citations omitted); *see also Ahanchian*, 624 F.3d at 1261.

First, there is minimal to no prejudice to the Bennetts. The Bennetts responded to the substance of the City's summary judgment motion and had adequate time to do so. (Doc. 53.) Second, the length of the delay is minimal: the City filed its motion one day after the deadline expired. Third, counsel for the City has explained that her conduct in this case stems from,

among other things, the effects of a medical condition and caring for a sick family member. (Doc. 57.) And fourth, there is no evidence suggesting that the City acted in bad faith. Thus, based on the *Pioneer* factors, the Court finds that the City acted with excusable neglect. The Court will therefore evaluate the merits of the City's motion for summary judgment.

A. Legal Standard

Summary judgment is appropriate if the evidence demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). A genuine issue of material fact exists if "the evidence is such that a reasonable jury could return a verdict for the nonmoving party," and material facts are those "that might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). At the summary judgment stage, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [its] favor." *Id.* at 255. "[A] party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion, and identifying those portions of [the record] which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A party opposing summary judgment must "cit[e] to particular parts of materials in the record" establishing a genuine dispute or "show[] that the materials cited do not

establish the absence of . . . a genuine dispute." Fed. R. Civ. P. 56(c)(1).

Where, as here, "parties submit cross-motions for summary judgment, each motion must be considered on its own merits." *Fair Hous. Council of Riverside Cnty. v. Riverside Two*, 249 F.3d 1132, 1136 (9th Cir. 2001) (citations and internal quotations omitted). The summary judgment standard operates differently depending on whether the moving party has the burden of proof. *See Celotex Corp.*, 477 U.S. at 322-23. As the party with the burden of proof, a plaintiff "must establish beyond controversy every essential element" of its claims based on the undisputed facts. *S. Cal. Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9th Cir. 2003) (internal quotations omitted). A defendant, by contrast, is entitled to summary judgment where it shows that a plaintiff cannot establish at least one element of a claim considering the undisputed material facts. *Celotex Corp.*, 477 U.S. at 322-23.

B. Discussion

The Court will first assess the Bennetts' federal claims.

1. Federal Claims

The Bennetts assert two federal claims under 42 U.S.C. § 1983 for violations of the Takings Clause and Due Process Clause of the United States Constitution. (FAC ¶¶ 69-85.) In addition to the § 1983 claims, the

Bennetts assert a separate "Federal Takings Clause" claim. (*Id.* ¶¶ 53-57.) Because § 1983 "is not itself a source of substantive rights, but merely provides a method for vindicating federal rights elsewhere conferred," *see Albright v. Oliver*, 510 U.S. 266, 271 (1994) (internal quotations omitted), the Court will treat the Bennetts' "Federal Takings Clause" claim (Count I) and "Violation of 42 U.S.C. § 1983—Taking Without Just Compensation" claim (Count V) as a single cause of action. The City argues it is entitled to summary judgment on the Bennetts' federal claims on multiple grounds. The Court begins its analysis with the statute of limitations.

a. Statute of Limitations

The Court, at the outset, emphasizes that the Bennetts have not precisely articulated which acts give rise to their Takings Clause claim.[4] (FAC ¶ 56.) The Court has reviewed the First Amended Complaint and concludes that the Bennetts' federal Takings claim could stem from three different events. First, in February 2005, the City enacted Ordinance 1471, which rezoned the Bennetts' property. (*Id.* ¶ 20.) Second, in January 2017, the City denied the Bennetts' request to extend the CUP. (*Id.* ¶ 43.) Third, in November 2018, the City denied the Bennetts' renewed CUP application. (*Id.* ¶ 52.)

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[4] The City did not challenge the sufficiency of the First Amended Complaint at the pleadings stage of this case.

The facts forming the basis of the Bennetts' Due Process Clause claim are more precisely pled. The Bennetts allege that they have constitutionally protected property interests "in the Property and the CUP" issued by the City in 2013. (*Id.* ¶ 71.) They argue that the City "deprived [them] of due process of law" by "refus[ing] to extend the previously awarded CUP." (*Id.* ¶ 75.)

The City argues that the Bennetts' federal claims "must be based on conduct that occurred after January 2, 2017." (Doc. 47 at 16.) The Court agrees. "Section 1983 does not contain its own statute of limitations." *TwoRivers v. Lewis*, 174 F.3d 987, 991 (9th Cir. 1999); *see* 42 U.S.C. § 1983. Absent a federal limitations period, this Court must "borrow the statute of limitations for § 1983 claims applicable to personal injury claims in the forum state." *TwoRivers*, 174 F.3d at 991. Arizona is the forum, and Arizona courts "apply a two-year statute of limitations to § 1983 claims." *Id.*; *see also Marks v. Parra*, 785 F.2d 1419, 1420 (9th Cir. 1986) (citing A.R.S. § 12-542). Although Arizona law supplies the limitations period, "federal, not state, law determines when a civil rights claim accrues." *TwoRivers*, 174 F.3d at 991. "Under federal law, a claim accrues when the plaintiff knows or has reason to know of the injury which is the basis of the action." *Id.*

Here, a § 1983 claim arising from the City's adoption of Ordinance 1471 is barred by the statute of limitations. The City adopted the Ordinance in 2005. (FAC ¶ 20.) The Bennetts discovered their land had been rezoned in September 2012, and thus their claim accrued

at that time.[5] (Doc. 53 at 3.) *See TwoRivers*, 174 F.3d at 991. The limitations period expired two years later, in 2014. Because the Bennetts waited until January 2019 to initiate this case, their § 1983 claims are time barred to the extent they stem from Ordinance 1471.

As to the remaining alleged acts, the City declined extending the Bennetts' CUP on January 3, 2017. (Doc. 48 at 2.) The City denied the Bennetts' application for a new CUP on November 6, 2018. (FAC ¶ 52.) These events occurred within two years of this lawsuit, which the Bennetts filed on January 2, 2019. (Doc. 1.) Thus, the Bennetts' Due Process Clause claim—which stems only from the City's refusal to extend their CUP—survives the statute of limitations. Their Takings Clause claim survives to the extent it arises from the City's refusal to extend the CUP or the City's denial of the CUP application.

b. Takings Clause Claim

Only the City moves for summary judgment on the Bennetts' federal Takings Clause claim. (Doc. 47 at 11.)

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[5] The Bennetts offer two different accounts as to when they first learned that their land had been rezoned. On one hand, Mr. Bennett says he learned of the zoning change in September 2012. (Doc. 53 at 3.) On the other, he asserts that he "found out about this rezone in 2020." (Doc. 48 at 2.) Because the Bennetts submitted a rezoning request and a CUP application to the City in 2013, and City Council's October 15, 2013 meeting minutes, which are judicially noticeable, provide that the Bennetts sought "approval of a [CUP] to expand a mini-storage complex . . . on property zoned C-2-HMR," the Court takes Mr. Bennett's statement that he learned about the rezone in 2012 as true.

To be entitled to summary judgment, the City must show that the Bennetts cannot establish at least one element of their Takings Clause claim considering the undisputed material facts of the case. *Celotex Corp.*, 477 U.S. at 322-23.

In the Ninth Circuit, courts "use a two-step analysis to determine whether a constitutional 'taking' has occurred." *Bowers v. Whitman*, 671 F.3d 905, 912 (9th Cir. 2012). First, the Court "determine[s] whether the subject matter is 'property' within the meaning of the Fifth Amendment." *Id.* Second, the Court assesses "whether there has been a taking of that property, for which compensation is due." *Id.*

i. Property Interests

For Takings Clause purposes, property interests "'are created and their dimensions are defined by existing rules or understanding that stem from an independent source such as state law.'" *Bowers*, 671 F.3d at 912 (quoting *Bd. of Regents of State Coll. v. Roth*, 408 U.S. 564, 577 (1972)). To be cognizable under the Takings Clause, a constitutionally protected property right must be vested. *See id.* (citing *United States v. Sioux Nation*, 448 U.S. 371 (1980), and *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155 (1980), and then *Lynch v. United States*, 292 U.S. 571 (1934)). "To determine whether a property interest has vested for Takings Clause purposes, the relevant inquiry is the certainty of one's expectation in the property interest at issue." *Id.* at 913 (internal quotations omitted). As

noted, two alleged property interests could form the basis of the Bennetts' federal Takings Clause claim: (1) their interest in the CUP issued in 2013, and (2) their interest in having the 2018 CUP application granted. The Court will address each interest in turn.

The City argues the Bennetts do not possess a "constitutional right to the [CUP] because it was subject to the contingencies and discretionary character of [the Kingman Zoning Code]." (Doc. 47 at 14.) The City is correct that, if a "property interest is 'contingent and uncertain' or the receipt of the interest is 'speculative' or 'discretionary,' then the government's modification or removal of the interest will not constitute a constitutional taking." *Bowers*, 671 F.3d at 913 (quoting *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1002 (9th Cir. 2007), *aff'd*, 553 U.S. 591 (2008)). But, a property interest in a zoning permit, like a CUP, is analogous to a right to a particular land use. *Id.* at 915. An interest in a particular land use may constitute a protected property interest if it "has vested in equity based on principles of detrimental reliance." *Id.* at 915-16 (quoting *Lakeview Dev. Corp. v. City of South Lake Tahoe*, 915 F.2d 1290, 1295 (9th Cir. 1990)). The Bennetts assert, and the City does not dispute, that after the CUP was issued the Bennetts spent more than "fifty thousand dollars . . . for site plans[,] [b]uilding plans, septic system plans, soil reports, [and] surveys" and "receiv[ed] a grading permit to start [construction]." (Doc. 48 at 2-3; Doc. 48, Ex. 13.) Construing this evidence in favor of the Bennetts, as this Court must, the Court concludes that there is a genuine issue of material fact

as to whether the Bennetts' interest in the CUP vested in equity based on principles of detrimental reliance.

As to the second alleged interest—having their CUP application granted—the Bennetts' Takings Clause claim fails as a matter of law. Protected property interests do not arise from mere desires or unilateral expectations: there must be a legitimate claim of entitlement. *Roth*, 408 U.S. at 577. After submitting their CUP application, the Bennetts were "subject to the inherently unpredictable and often politicized process of seeking permission from a local legislative body to conduct certain activity on a piece of property." *See Aegis of Ariz., L.L.C. v. Town of Marana*, 206 Ariz. 557, 569, 81 P.3d 1016 (App. 2003). Given this uncertainty, the Bennetts could not have a "legitimate claim of entitlement" to having their CUP application granted. *See Roth*, 408 U.S. at 577; *Aegis of Ariz., L.L.C.*, 206 Ariz. at 569, 81 P.3d 1016 (concluding a plaintiff "had no protected property interest in having its CUP application granted"). Moreover, the Bennetts have not presented evidence to create a triable issue as to whether their interest in having the application granted vests in equity. The only alleged acts of reliance relate to the 2013 CUP. No acts of reliance stem from the 2018 application. Thus, the City is entitled to summary judgment on the Bennetts' federal Takings Clause claim to the extent it arises from the City's denial of their CUP application.

ii. Regulatory Takings Framework

Even though a genuine factual issue exists as to the Bennetts' property interest in the CUP, the City may nonetheless be entitled to summary judgment if no reasonable jury could find that the City's refusal to extend the CUP constitutes a compensable taking. *See Celotex Corp.*, 477 U.S. at 322-23. A taking, in its classic form, occurs when the "government directly appropriates private property or ousts the owner from his domain." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005). Because the act in this case is not a classic taking, the Court must assess whether the City's refusal to extend the Bennetts' CUP amounts to a regulatory taking. *See id.* The Supreme Court has recognized three types of regulatory takings. *Bridge Aina Le'a, LLC v. Land Use Comm'n*, 950 F.3d 610, 625 (9th Cir. 2020). The City contends that the Bennetts cannot "establish a taking under any of the recognized categories." (Doc. 47 at 14.) The Court agrees.

"Two types of regulatory action—*Loretto* and *Lucas* takings—are *per se* takings." *Bridge Aina Le'a, LLC*, 950 F.3d at 625. To constitute a *Loretto* taking, the government must "require[] an owner to suffer a permanent physical invasion of [his or] her property." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). The Bennetts did not suffer a permanent physical invasion of their property, and thus *Loretto* does not apply. A *Lucas* taking occurs when a regulation "completely deprive[s] an owner of '*all* economically beneficial us[e]' of [his or] her property." *Id.* (quoting *Lucas v. S.C. Coastal*

Council, 505 U.S. 1003, 1019 (1992)). *Lucas* takings are "relatively rare" and "confined to the 'extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'" *Bridge Aina Le'a, LLC*, 950 F.3d at 626 (quoting *Lucas*, 505 U.S. at 1017). The instant matter is not "the 'extraordinary case' in which a regulation permanently deprives property of all value." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 332 (2002). The Bennetts developed and continue to operate a storage business on the eastern portion of the Property. (FAC ¶ 9.) And the Kingman Zoning Ordinance permits other economically viable uses of the western portion of the Property. (Doc. 52 at 110-11.) Kingman, Ariz., Kingman Zoning Code § 14.600 (listing a variety of permitted land uses, including "[g]eneral offices," "[r]eal estate and title offices," and "[a]ntique shops"). Accordingly, *Lucas* is inapplicable.

In addition to the two types of *per se* regulatory takings, the Supreme Court has recognized a third category of regulatory takings, known as *Penn Central* takings. *See Bridge Aina Le'a, LLC*, 950 F.3d at 630. Under *Penn Central*, courts consider three factors: (1) "[t]he economic impact of the regulation on the claimant," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) "the character of the governmental action." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978). "The first and second *Penn Central* factors are the primary factors." *Bridge Aina Le'a, LLC*, 950 F.3d at 630. The "consideration of these factors aims 'to

determine whether a regulatory action is functionally equivalent to the classic taking.'" *Id.* (quoting *Guggenheim v. City of Goleta*, 638 F.3d 1111, 1120 (9th Cir. 2010) (en banc) (internal quotations omitted)).

Under the first *Penn Central* factor, courts "compare the value that has been taken from the property with the value that remains in the property." *Colony Cove Props., LLC v. City of Carson*, 888 F.3d 445, 450 (9th Cir. 2018). Put differently, the "economic impact" of a government action "is determined by comparing the total value of the affected property before and after the government action." *Id.* at 451. This comparison "aims 'to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owners from his domain." *Bridge Aina Le'a, LLC*, 950 F.3d at 631 (quoting *Lingle*, 544 U.S. at 539).

Here, the Bennetts provide no evidence as to the impact of City's refusal to extend the CUP on the total value of their land. The Court is mindful that the Bennetts would have likely received additional income had their businesses expanded. "But the mere loss of some income because of regulation does not itself establish a taking." *Colony Cove Props., LLC*, 888 F.3d at 451; *see also Laurel Park Cmty., LLC v. City of Tumwater*, 698 F.3d 1180, 1189 (9th Cir. 2012) ("A small decrease in value . . . falls comfortably within the range of permissible land-use regulations that fall far short of a constitutional taking."). Moreover, when, as here, "an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a

taking." *Colony Cove Props., LLC*, 888 F.3d at 450 (quoting *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). Accordingly, the Court finds that the Bennetts have not presented sufficient evidence to create a triable issue of fact as to the economic impact of the City's refusal to extend their CUP.

The Court turns to the second *Penn Central* factor: distinct investment-backed expectations. 438 U.S. at 124. "To form the basis of a taking claim, a purported distinct investment-backed expectation must be objectively reasonable." *Colony Cove Props., LLC*, 888 F.3d at 452. Such an expectation "implies reasonable probability." *Guggenheim*, 638 F.3d at 1120. "Thus, 'unilateral expectation[s]' or 'abstract need[s]' cannot form the basis of a claim that the government has interfered with property rights." *Bridge Aina Le'a, LLC*, 950 F.3d at 633-34 (quoting *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1005 (1984) (citation omitted)).

When the Bennetts purchased the Property, it was beyond the City's municipal boundaries and therefore not subject to the City's zoning laws. (FAC ¶¶ 7-8.) The Bennetts developed a portion of the Property into a storage business. (*Id.* ¶ 9.) The City's zoning laws now foreclose the Bennetts' ability to expand their business without first obtaining a CUP. (*Id.* ¶¶ 20-21.) In 2013, the Bennetts obtained a CUP allowing the expansion of their business. (*Id.* ¶ 30.) Although the Bennetts do not expressly connect the argument to their Takings Clause claims, they assert that they "spent in excess of $50,000 for the plans[] to expand the storage complex." (Doc. 48 at 3.)

The Bennetts' expectation of expanding their business is speculative. In addition to obtaining a CUP, expansion was contingent on the Bennetts' ability to, among other things, secure financing, procure site plans, and obtain necessary building permits. The Bennetts, in their First Amended Complaint, admit that they were initially "forced to request an extension for the CUP" because the engineering company they hired "did not have a satisfactory set of plans." (FAC ¶¶ 34-35.) The Bennetts further disclose that those "delays resulted in a loss of [] private financing." (*Id.* ¶ 40.) Considering these facts, the Court concludes that the expansion of the Bennetts' business was merely "a speculative possibility, not an 'expectation.'" *See Guggenheim*, 638 F.3d at 1120. Moreover, as the Supreme Court wrote in *Penn Central*, "'[t]aking' jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." 438 U.S. at 130. The Bennetts retain the ability to operate their storage business on the eastern portion of the Property. (FAC ¶ 9.) "[T]he submission that [the Bennetts] may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable." *See Penn Cent. Transp. Co.*, 438 U.S. at 130. Therefore, the Court concludes that the Bennetts have not presented sufficient evidence to raise a triable question of fact as to a distinct investment-backed expectation.

Finally, the Court considers the character of the City's action. *Penn Cent. Transp. Co.*, 438 U.S. at 124. "*Penn Central* instructs that [a] taking may more readily be found when the interference with property can be characterized as a physical invasion by government than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good." *Colony Cove Props., LLC*, 888 F.3d at 454 (internal quotations and citation omitted). No physical invasion by the City exists in this case. Instead, the alleged taking, as noted, is the City's refusal to extend the Bennetts' CUP. Before deciding to deny the Bennetts' extension request, the City "conducted a hearing, received input from the community and made a reasoned determination that a third renewal of the permit was not in the interest of Kingman or the health, safety and welfare of its citizens." (Doc. 47 at 17; *See* Doc. 52 at 97-98.) The Supreme Court has upheld "land-use regulations that destroyed or adversely affected recognized real property interests" when, as here, the relevant government entity "reasonably concluded that 'the health, safety, morals, or general welfare' would be promoted by prohibiting particular contemplated uses of land." *Penn Cent. Transp. Co.*, 438 U.S. at 125; *see e.g.*, *Village of Euclid, Ohio v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding a zoning ordinance even though the plaintiff-property owner who intended to use its property for industrial purposes was affected far more severely than its neighbors who wished to use their land differently). And "[a] claim brought under the federal Constitution charging the taking or deprivation of

property . . . cannot be premised solely on the charge that the government . . . revoked a once valid permit." *Lakeview Dev. Corp.*, 915 F.2d at 1295. Thus, the third factor does not support the Bennetts' claim.

Having construed the evidence in the light most favorable to the Bennetts, the Court concludes that no reasonable jury could find that the City's refusal to extend the CUP is a compensable taking under *Penn Central.* Accordingly, the City is entitled to summary judgment on the Bennetts' federal Takings Clause claim.

c. Due Process Clause Claim

Both parties move for summary judgment on the Bennetts' Due Process Clause claim. The Fourteenth Amendment's Due Process Clause provides that no State shall "deprive any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Bennetts invoke the Due Process Clause's procedural and substantive protections. (FAC ¶¶ 72-74.)

i. Procedural Due Process

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause. . . ." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Accordingly, procedural due process claims have two elements: "(1) a deprivation of a

constitutionally protected liberty or property interest, and (2) a denial of adequate procedural protections." *Brewster v. Bd. of Educ. of Lynwood Unified Sch. Dist.*, 149 F.3d 971, 982 (9th Cir. 1998).

Here, the Bennetts assert that they have a protected property interest in the CUP issued in 2013. (FAC ¶¶ 75, 80.) When analyzing the Bennetts' Takings Clause claim, the Court concluded that a genuine issue of material fact exists as to whether the Bennetts' interest in the CUP is a constitutionally protected property interest.[6] *Supra* Part III.B.1.b.i. Accordingly, because the Bennetts cannot, at this stage, "establish beyond controversy every essential element" of their due process claim, the Bennetts are not entitled to summary judgment. *See S. Cal. Gas Co.*, 336 F.3d at 888.

Despite this genuine issue of material fact, the City may nevertheless be entitled to summary judgment if no reasonable jury could conclude that the City deprived the Bennetts of the CUP without due process of law. *See Celotex Corp.*, 477 U.S. at 322-23. "The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews*, 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)). The

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[6] The Bennetts do not appear to allege that the City's denial of their CUP application violated their due process rights. To the extent the Bennetts do assert such a claim, the City is entitled to summary judgment because the Bennetts had no constitutionally protected property interest in having the application granted. *See supra* Part III.B.1.b.i.

City argues no due process violation exists because the City Council "conducted a hearing, received input from the community and made a reasoned determination that a third renewal of the permit was not in the interest of Kingman or the health, safety and welfare of its citizens." (Doc. 47 at 17.) The record indicates that the Planning and Zoning Commission held a public hearing on the Bennetts' request for extension on December 13, 2016 and unanimously voted to recommend denial of the extension. (Doc. 52 at 97-98.) On January 3, 2017, the City Council considered the extension request at a public hearing. (*See id.*) A Development Services Director gave a presentation on the issue, and the City subsequently allowed public comment. (*Id.*) Four residents addressed the City Council. (*Id.*) Each resident opposed the Bennetts' request, citing, among other things, concerns of trash accumulation on the Property and negative impacts on surrounding property values. (*Id.*) The Bennetts do not dispute these facts. Nor do the Bennetts present any evidence to substantiate their allegation that the City's refusal to extend the previously awarded CUP deprived them of due process of law. Instead, the Bennetts center their argument on the process the City provided when adopting Ordinance 1471. (*See* Doc. 53 at 8.) But a due process claim arising from Ordinance 1471 is barred by the statute of limitations. *Supra* Part III.B.1.a. The Court therefore finds that the Bennetts have not raised a genuine issue of material fact as to whether the City denied them adequate procedural protections when refusing to extend their CUP. Accordingly, the City is

entitled to summary judgment on the Bennetts' procedural due process claim.

ii. Substantive Due Process

The Bennetts also invoke the substantive protections of the Due Process Clause. (FAC ¶ 73.) Substantive due process affords "heightened protection against government interference with certain fundamental rights." *See Washington v. Glucksberg*, 521 U.S. 702, 720 (1997). Such rights are generally confined to "matters relating to marriage, family, procreation, and the right to bodily integrity." *Albright*, 510 U.S. at 272. When a fundamental right is not implicated, government action need only have a rational relationship to a legitimate state interest to survive a substantive due process challenge. *See Bowers*, 671 F.3d at 916. Here, the Bennetts do not assert that the City deprived them of a fundamental right. Rather, they only assert interests in the Property, itself, and the CUP. (FAC ¶ 71.) *See Lakeview Dev. Corp.*, 915 F.2d at 1295 ("[T]here is no federal Constitutional right to be free from changes in land use law."). The City's action is therefore subject to rational basis review. *See Nelson v. City of Selma*, 881 F.2d 836, 838-39 (9th Cir. 1989) (applying rational basis review to a city's zoning-related actions). That is, the City's decision to deny the Bennetts' extension request "should be upheld if it bears a rational relationship to a legitimate state interest." *Id.*

"The opposition of neighbors to a development project is [] a legitimate factor in legislative

decisionmaking." *See Nelson*, 881 F.2d at 839 (citations omitted). At a public hearing, four Kingman residents opposed the Bennetts' extension request. (Doc. 52 at 97-98.) They described the Bennetts' business as "an eye sore" and voiced concerns about added traffic, neighborhood safety, and diminished property values if the business was to expand. (*Id.*) The City proceeded to make "a reasoned determination that a third renewal of the permit was not in the interest of Kingman or the health, safety and welfare of its citizens." (Doc. 47 at 17.) The Bennetts have submitted no evidence to rebut this contention. Nor do the Bennetts offer facts to raise a triable issue as to whether the City's decision was rationally related to a legitimate state interest. Accordingly, the City is entitled to summary judgment on the Bennetts' substantive due process claim.

d. Conclusion

In sum, the City is entitled to summary judgment on each of the Bennetts' federal claims. Those claims formed the basis of this Court's subject-matter jurisdiction. (FAC ¶ 5); *see also* 28 U.S.C. §§ 1331, 1343. Because the City is entitled to summary judgment on the federal claims, the Court must now determine whether it will continue to exercise supplemental jurisdiction over the Bennetts' remaining state-law claims.

2. State-Law Claims

A district court has discretion to decline exercising supplemental jurisdiction over state-law claims if it "has dismissed all claims over which it has original jurisdiction." 28 U.S.C. § 1367(c). "The Supreme Court has instructed that the exercise of supplemental jurisdiction should be rare when"—as here—"all federal claims have been dismissed before trial." *Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1001 (9th Cir. 1997) (O'Scannlain, J., dissenting) (citing *United Mine Workers v. Gibbs*, 383 U.S. 715, 726-27 (1966)). When exercising its discretion, the Court considers the interest in "economy, convenience, fairness, and comity." *Acri*, 114 F.3d at 1001. "[I]n the usual case in which all federal-law claims are eliminated before trial, the balance of factors . . . will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988).

Having considered the applicable factors, the Court concludes it will not exercise supplemental jurisdiction over the Bennetts' remaining state-law claims. *See Van Dusen v. City of Oakland*, 678 F. App'x 582, 584 (9th Cir. 2017) (holding a district court acted within its discretion in declining to exercise supplemental jurisdiction over pendent state-law claims after dismissing all federal claims). Specifically, comity concerns weigh heavily against exercising supplemental jurisdiction. To resolve the state-law claims, the Court would be required to address the impact of the Private Property Rights Protection Act—a ballot initiative passed by Arizona voters—on A.R.S. § 12-821—which

supplies the statute of limitations for "[a]ll actions against any public entity"—with respect to claims for just compensation under the Arizona Constitution. (*See* Doc. 47 at 10; Doc. 53 at 2.) In addition, the Ninth Circuit recognizes that land use planning is a "'sensitive area of social policy' that typically falls within the purview of the state." *Meritage Homes of Cal., Inc. v. City of La Verne*, No. SA CV 18-929, 2018 WL 5928124, at *4 (C.D. Cal. Aug. 23, 2018) (quoting *Rancho Palos Verdes Corp. v. City of Laguna Beach*, 547 F.2d 1092, 1095 (9th Cir. 1976)). Land use planning is at the heart of the Bennetts' state-law claims. Therefore, and for the reasons stated, the Court declines to exercise supplemental jurisdiction. The Bennetts' state-law claims will be dismissed without prejudice.

IV. CONCLUSION

To summarize, the Court denies the Bennetts' motion for mandamus relief (Doc. 40) to the extent the request is premised on federal law. To the extent the mandamus request is premised on Arizona law, the Court declines to exercise supplemental jurisdiction. As to the summary judgment motions, the City is entitled to summary judgment on the Bennetts' federal Takings Clause and Due Process Clause claims (Counts I, IV, and V). The Court declines to exercise supplemental jurisdiction over the remaining state-law claims (Counts II, III, and VI).

Accordingly,

IT IS ORDERED denying the Bennetts' Request for a Writ of Mandamus Motion (Doc. 40) without prejudice to refiling in state court.

IT IS FURTHER ORDERED denying the Bennetts' Motion for Partial Summary Judgment (Doc. 48) as to their Violation of 42 U.S.C. § 1983—Due Process claim (Count IV) and newly alleged Equal Protection Clause claim. The Bennetts' Motion for Partial Summary Judgment (Doc. 48) is **denied as moot and without prejudice** as to their Violation of Vested Rights claim (Count III).

IT IS FURTHER ORDERED granting in part the City's Motion for Summary Judgment (Doc. 47) as to the Bennetts' Federal Takings Clause claim (Count I), Violation of 42 U.S.C. § 1983—Due Process claim (Count IV), and Violation of 42 U.S.C. § 1983—Taking Without Just Compensation (Count V).

IT IS FURTHER ORDERED denying in part the City's Motion for Summary Judgment (Doc. 47) as to the Bennetts' State Takings Clause claim (Count II), Violation of Vested Rights claim (Count III), and Breach of Contract claim (Count VI) **as moot and without prejudice**.

IT IS FURTHER ORDERED dismissing the Bennetts' State Taking Clause claim (Count II), Violation of Vested Rights claim (Count III), and Breach of Contract claim (Count VI) **without prejudice**.

IT IS FINALLY ORDERED that the Clerk of the Court shall enter judgment accordingly and close this case.

Dated this 14th day of June, 2021.

/s/ Michael T. Liburdi
Michael T. Liburdi
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

ROBERT E. BENNETT; JUDITH D. BENNETT, Plaintiffs-Appellants, v. CITY OF KINGMAN, Defendant-Appellee.	No. 21-16105 D.C. No. 3:19-cv-08001-MTL District of Arizona, Prescott ORDER (Filed Feb. 9, 2023)

Before: HAWKINS, S.R. THOMAS, and McKEOWN, Circuit Judges.

Judge Thomas has voted to deny the petition for rehearing en banc. Judge Hawkins and Judge McKeown so recommend.

The full court has been advised of the petition for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition, Dkt. No. 27, is **DENIED**.

AN INITIATIVE MEASURE

AMENDING TITLE 12, CHAPTER 8, ARIZONA REVISED STATUTES, BY ADDING ARTICLE 2.1; RELATING TO THE PRIVATE PROPERTY RIGHTS PROTECTION ACT.

Be it enacted by the People of the State of Arizona:

Section 1. Short title

This act may be cited as the "Private Property Rights Protection Act".

Sec. 2. Findings and declarations

A. The people of Arizona find and declare:

1. Article 2, section 17 of our State Constitution declares in no uncertain terms that private property shall not be taken for private use.

2. Our Constitution further provides that no person shall be deprived of property without due process of law.

3. Finally, our Constitution does not permit property to be taken or damaged without just compensation having first been made.

4. Notwithstanding these clear constitutional rights, the state and municipal governments of Arizona consistently encroach on the rights of private citizens to own and use their property, requiring the people of this State to seek redress in our state and federal courts which have not always adequately

protected private property rights as demanded by the State and Federal Constitutions. For example:

(a) A recent United States Supreme Court ruling, Kelo v. City of New London, allowed a city to exercise its power of eminent domain to take a citizen's home for the purpose of transferring control of the land to a private commercial developer.

(b) The City of Mesa used eminent domain to acquire and bulldoze homes for a redevelopment project that included a hotel and water park. After the developer's financing fell through the project was abandoned and the property left vacant.

(c) The City of Mesa filed condemnation actions against Randy Bailey, to take his family-owned brake shop, and Patrick Dennis, to take his auto-body shop, so that local business owners could relocate and expand a hardware store and an appliance store.

(d) The City of Tempe instituted an eminent domain action to condemn the home of Kenneth and Mary Ann Pillow in order to transfer their property to a private developer who planned to build upscale townhomes.

(e) The City of Chandler filed a condemnation action against a fast food restaurant in order to replace the fast-food restaurant with upscale dining and retail uses.

(f) In the wake of the Kelo ruling, the City of Tempe recently sought to condemn property in an

industrial park in order to make way for an enormous retail shopping mall.

(g) The City of Tempe told the owners of an Apache Boulevard bowling alley that the City intended to condemn their property and specifically instructed them not to make further improvements to the land. Heeding Tempe's advice, the owners made no further improvements and ultimately lost bowling league contracts and went out of business. The Arizona Court of Appeals refused the owners' request for just compensation.

(h) Courts have also allowed state and local governments to impose significant prohibitions and restrictions on the use of private property without compensating the owner for the economic loss of value to that property.

5. For home owners in designated slum or blighted areas, the compensation received when a primary residence is seized is not truly just as required by our state constitution.

6. Furthermore, even when property is taken for a valid public use, the judicial processes available to property owners to obtain just compensation are burdensome, costly and unfair.

B. Having made the above findings, the people of Arizona declare that all property rights are fundamental rights and that all people have inalienable rights including the right to acquire, possess, control and protect property. Therefore the citizens of the State of

Arizona hereby adopt the Private Property Rights Protection Act to ensure that Arizona citizens do not lose their home or property or lose the value of their home or property without just compensation. Whenever state and local governments take or diminish the value of private property, it is the intent of this act that the owner will receive just compensation, either by negotiation or by an efficient and fair judicial process.

Sec. 3. Title 12, chapter 8, Arizona Revised Statutes, is amended by adding article 2.1, to read:

Article 2.1. PRIVATE PROPERTY RIGHTS PROTECTION ACT

12-1131. PROPERTY MAY BE TAKEN ONLY FOR PUBLIC, USE, CONSISTENT WITH THIS ARTICLE

EMINENT DOMAIN MAY BE EXERCISED ONLY IF THE USE OF EMINENT DOMAIN IS AUTHORIZED BY THIS STATE, WHETHER BY STATUTE OR OTHERWISE, AND FOR A PUBLIC USE AS DEFINED BY THIS ARTICLE.

12-1132. BURDEN OF PROOF

A. IN ALL EMINENT DOMAIN ACTIONS THE JUDICIARY SHALL COMPLY WITH THE STATE CONSTITUTION'S MANDATE THAT WHENEVER AN ATTEMPT IS MADE TO TAKE PRIVATE PROPERTY FOR A USE ALLEGED TO BE PUBLIC, THE QUESTION WHETHER THE CONTEMPLATED USE BE REALLY PUBLIC SHALL BE A JUDICIAL QUESTION, AND DETERMINED AS SUCH WITHOUT

REGARD TO ANY LEGISLATIVE ASSERTION THAT THE USE IS PUBLIC.

B. IN ANY EMINENT DOMAIN ACTION FOR THE PURPOSE OF SLUM CLEARANCE AND RE-DEVELOPMENT, THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE SHALL ESTABLISH BY CLEAR AND CONVINCING EVIDENCE THAT EACH PARCEL IS NECESSARY TO ELIMINATE A DIRECT THREAT TO PUBLIC HEALTH OR SAFETY CAUSED BY THE PROPERTY IN ITS CURRENT CONDITION, INCLUDING THE REMOVAL OF STRUCTURES THAT ARE BEYOND REPAIR OR UNFIT FOR HUMAN HABITATION OR USE, OR TO ACQUIRE ABANDONED PROPERTY AND THAT NO REASONABLE ALTERNATIVE TO CONDEMNATION EXISTS.

12-1133. JUST COMPENSATION; SLUM CLEARANCE AND REDEVELOPMENT

IN ANY EMINENT DOMAIN ACTION FOR THE PURPOSE OF SLUM CLEARANCE AND REDEVELOPMENT, IF PRIVATE PROPERTY CONSISTING OF AN INDIVIDUAL'S PRINCIPAL RESIDENCE IS TAKEN, THE OCCUPANTS SHALL BE PROVIDED A COMPARABLE REPLACEMENT DWELLING THAT IS DECENT, SAFE, AND SANITARY AS DEFINED IN THE STATE AND FEDERAL RELOCATION LAWS, SECTION 11-961 ET SEQ. AND 42 USC 4601 ET SEQ., AND THE REGULATIONS PROMULGATED THEREUNDER. AT THE OWNER'S ELECTION, IF MONETARY COMPENSATION IS DESIRED IN

LIEU OF A REPLACEMENT DWELLING, THE AMOUNT OF JUST COMPENSATION THAT IS MADE AND DETERMINED FOR THAT TAKING SHALL NOT BE LESS THAN THE SUM OF MONEY THAT WOULD BE NECESSARY TO PURCHASE A COMPARABLE REPLACEMENT DWELLING THAT IS DECENT, SAFE, AND SANITARY AS DEFINED IN THE STATE AND FEDERAL RELOCATION LAWS AND REGULATIONS.

12-1134. DIMINUTION IN VALUE JUST COMPENSATION

A. IF THE EXISTING RIGHTS TO USE, DIVIDE, SELL OR POSSESS PRIVATE REAL PROPERTY ARE REDUCED BY THE ENACTMENT OR APPLICABILITY OF ANY LAND USE LAW ENACTED AFTER THE DATE THE PROPERTY IS TRANSFERRED TO THE OWNER AND SUCH ACTION REDUCES THE FAIR MARKET VALUE OF THE PROPERTY, THE OWNER IS ENTITLED TO JUST COMPENSATION FROM THIS STATE OR THE POLITICAL SUBDIVISION OF THIS STATE THAT ENACTED THE LAND USE LAW.

B. THIS SECTION DOES NOT APPLY TO LAND USE LAWS THAT:

1. LIMIT OR PROHIBIT A USE OR DIVISION OF REAL PROPERTY FOR THE PROTECTION OF THE PUBLIC'S HEALTH AND SAFETY, INCLUDING RULES AND REGULATIONS RELATING TO FIRE AND BUILDING CODES, HEALTH AND SANITATION, TRANSPORTATION OR TRAFFIC CONTROL,

SOLID OR HAZARDOUS WASTE, AND POLLUTION CONTROL;

2. LIMIT OR PROHIBIT THE USE OR DIVISION OF REAL PROPERTY COMMONLY AND HISTORICALLY RECOGNIZED AS A PUBLIC NUISANCE UNDER COMMON LAW;

3. ARE REQUIRED BY FEDERAL LAW;

4. LIMIT OR PROHIBIT THE USE OR DIVISION OF A PROPERTY FOR THE PURPOSE OF HOUSING SEX OFFENDERS, SELLING ILLEGAL DRUGS, LIQUOR CONTROL, OR PORNOGRAPHY, OBSCENITY, NUDE OR TOPLESS DANCING, AND OTHER ADULT ORIENTED BUSINESSES IF THE LAND USE LAWS ARE CONSISTENT WITH THE CONSTITUTIONS OF THIS STATE AND THE UNITED STATES;

5. ESTABLISH LOCATIONS FOR UTILITY FACILITIES;

6. DO NOT DIRECTLY REGULATE AN OWNER'S LAND; OR

7. WERE ENACTED BEFORE THE EFFECTIVE DATE OF THIS SECTION.

C. THIS STATE OR THE POLITICAL SUBDIVISION OF THIS STATE THAT ENACTED THE LAND USE LAW HAS THE BURDEN OF DEMONSTRATING THAT THE LAND USE LAW IS EXEMPT PURSUANT TO SUBSECTION B.

D. THE OWNER SHALL NOT BE REQUIRED TO FIRST SUBMIT A LAND USE APPLICATION TO REMOVE, MODIFY, VARY OR OTHERWISE ALTER THE APPLICATION OF THE LAND USE LAW TO THE OWNER'S PROPERTY AS A PREREQUISITE. TO DEMANDING OR RECEIVING JUST COMPENSATION PURSUANT TO THIS SECTION.

E. IF A LAND USE LAW CONTINUES TO APPLY TO PRIVATE REAL PROPERTY MORE THAN NINETY DAYS AFTER THE OWNER OF THE PROPERTY MAKES A WRITTEN DEMAND IN A SPECIFIC AMOUNT FOR JUST COMPENSATION TO THIS STATE OR THE POLITICAL SUBDIVISION OF THIS STATE THAT ENACTED THE LAND USE LAW, THE OWNER HAS A CAUSE OF ACTION FOR JUST COMPENSATION IN A COURT IN THE COUNTY IN WHICH THE PROPERTY IS LOCATED, UNLESS THIS STATE OR POLITICAL SUBDIVISION OF THIS STATE AND THE OWNER REACH AN AGREEMENT ON THE AMOUNT OF JUST COMPENSATION TO BE PAID, OR UNLESS THIS STATE OR POLITICAL SUBDIVISION OF THIS STATE AMENDS, REPEALS, OR ISSUES TO THE LANDOWNER A BINDING WAIVER OF ENFORCEMENT OF THE LAND USE LAW ON THE OWNER'S SPECIFIC PARCEL.

F. ANY DEMAND FOR LANDOWNER RELIEF OR ANY WAIVER THAT IS GRANTED IN LIEU OF COMPENSATION RUNS WITH THE LAND.

G. AN ACTION FOR JUST COMPENSATION BASED ON DIMINUTION IN VALUE MUST BE MADE OR FOREVER BARRED WITHIN THREE YEARS OF THE EFFECTIVE DATE OF THE LAND USE LAW, OR OF THE FIRST DATE THE REDUCTION OF THE EXISTING RIGHTS TO USE, DIVIDE, SELL OR POSSESS PROPERTY APPLIES TO THE OWNER'S PARCEL, WHICHEVER IS LATER.

H. THE REMEDY CREATED BY THIS SECTION IS IN ADDITION TO ANY OTHER REMEDY THAT IS PROVIDED BY THE LAWS AND CONSTITUTION OF THIS STATE OR THE UNITED STATES AND IS NOT INTENDED TO MODIFY OR REPLACE ANY OTHER REMEDY.

I. NOTHING IN THIS SECTION PROHIBITS STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE FROM REACHING AN AGREEMENT WITH A PRIVATE PROPERTY OWNER TO WAIVE A CLAIM FOR DIMINUTION IN VALUE REGARDING ANY PROPOSED ACTION BY THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE OR ACTION REQUESTED BY THE PROPERTY OWNER.

12-1135. ATTORNEY FEES AND COSTS

A. A PROPERTY OWNER IS NOT LIABLE TO THIS STATE OR ANY POLITICAL SUBDIVISION OF THIS STATE FOR ATTORNEY FEES OR COSTS IN ANY EMINENT DOMAIN ACTION OR IN ANY ACTION FOR DIMINUTION IN VALUE.

B. A PROPERTY OWNER SHALL BE AWARDED REASONABLE ATTORNEY FEES, COSTS AND EXPENSES IN EVERY EMINENT DOMAIN ACTION IN WHICH THE TAKING IS FOUND TO BE NOT FOR A PUBLIC USE.

C. IN ANY EMINENT DOMAIN ACTION FOR THE PURPOSE OF SLUM CLEARANCE AND REDEVELOPMENT, A PROPERTY OWNER SHALL BE AWARDED REASONABLE ATTORNEY FEES IN EVERY CASE IN WHICH THE FINAL AMOUNT OFFERED BY THE MUNICIPALITY WAS LESS THAN THE AMOUNT ASCERTAINED BY A JURY OR THE COURT IF A JURY IS WAIVED BY THE PROPERTY OWNER.

D. A PREVAILING PLAINTIFF IN AN ACTION FOR JUST COMPENSATION THAT IS BASED ON DIMINUTION IN VALUE PURSUANT TO SECTION 12-1134 MAY BE AWARDED COSTS, EXPENSES AND REASONABLE ATTORNEY FEES.

12-1136. DEFINITIONS

IN THIS ARTICLE, UNLESS THE CONTEXT OTHERWISE REQUIRES:

1. "FAIR MARKET VALUE" MEANS THE MOST LIKELY PRICE ESTIMATED IN TERMS OF MONEY WHICH THE LAND WOULD BRING IF EXPOSED FOR SALE IN THE OPEN MARKET, WITH REASONABLE TIME ALLOWED IN WHICH TO FIND A PURCHASER, BUYING WITH KNOWLEDGE

OF ALL THE USES AND PURPOSES TO WHICH IT IS ADAPTED AND FOR WHICH IT IS CAPABLE.

2. "JUST COMPENSATION" FOR PURPOSES OF AN ACTION FOR DIMINUTION IN VALUE MEANS THE SUM OF MONEY THAT IS EQUAL TO THE REDUCTION IN FAIR MARKET VALUE OE THE PROPERTY RESULTING FROM THE ENACTMENT OF THE LAND USE LAW AS OF THE DATE OF ENACTMENT OF THE LAND USE LAW.

3. "LAND USE LAW" MEANS ANY STATUTE, RULE, ORDINANCE, RESOLUTION OR LAW ENACTED BY THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE THAT REGULATES THE USE OR DIVISION OF LAND OR ANY INTEREST IN LAND OR THAT REGULATES ACCEPTED FARMING OR FORESTRY PRACTICES.

4. "OWNER" MEANS THE HOLDER OF FEE TITLE TO THE SUBJECT REAL PROPERTY.

5. "PUBLIC USE":

(a) MEANS ANY OF THE FOLLOWING:

(i) THE POSSESSION, OCCUPATION, AND ENJOYMENT OF THE LAND BY THE GENERAL PUBLIC, OR BY PUBLIC AGENCIES;

(ii) THE USE OF LAND FOR THE CREATION OR FUNCTIONING OF UTILITIES;

(iii) THE ACQUISITION OF PROPERTY TO ELIMINATE A DIRECT THREAT TO PUBLIC HEALTH OR SAFETY CAUSED BY THE PROPERTY IN ITS

CURRENT CONDITION, INCLUDING THE REMOVAL OF A STRUCTURE THAT IS BEYOND REPAIR OR UNFIT FOR HUMAN HABITATION OR USE; OR

(iv) THE ACQUISITION OF ABANDONED PROPERTY.

(b) DOES NOT INCLUDE THE PUBLIC BENEFIT'S OF ECONOMIC DEVELOPMENT, INCLUDING AN INCREASE IN TAX BASE, TAX REVENUES, EMPLOYMENT OR GENERAL ECONOMIC HEALTH.

6. "TAKEN" AND "TAKING" MEAN THE TRANSFER OF OWNERSHIP OR USE FROM A PRIVATE PROPERTY OWNER TO THIS STATE OR A POLITICAL SUBDIVISION OF 'THIS STATE OR TO ANY PERSON OTHER THAN THIS STATE OR A POLITICAL SUBDIVISION OF THIS STATE.

12-1137. APPLICABILITY

IF A CONFLICT BETWEEN THIS ARTICLE AND ANY OTHER LAW ARISES, THIS ARTICLE CONTROLS.

12-1138. SEVERABILITY

IF ANY PROVISION OF THIS ACT OR ITS APPLICATION TO ANY PERSON OR CIRCUMSTANCE IS HELD INVALID THAT INVALIDITY DOES NOT AFFECT OTHER PROVISIONS OR APPLICATIONS OF THE ACT THAT CAN BE GIVEN EFFECT WITHOUT THE INVALID PROVISION OR APPLICATION,

AND TO THIS END THE PROVISIONS OF THIS ACT ARE SEVERABLE.

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Carl Cooper

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Kingman, AZ 86401

PS Form 3800, August 2006
See Reverse for Instructions

Robert Bennett
c/o Havasu Management
2169 Swanson #1
LHC, Az 86403

4-04-2013

City of Kingman
Carl Cooper,
City Attorney
429 E. Beale Street
Kingman, Az. 86401

Re: 3442 Hualapai Mt Rd

When the city of Kingman wanted to incorporate my property at 3442 Hualapai Mt Road, the city attorneys office as well as community development requested that I co-operate in that incorporation.

I agreed to do so with the stipulation that it would not adversely effect my property.

The city employees where not honest: with me, the first thing I found out, was there was a 2% sales tax on my property.

The second thing I found out was they downgraded my zoning when they incorporated me into the city, so that I could not automatically build more storage units on my property.

When they did this and I inquired about it I was told I could apply for and get a special use permit, and that the city, was required under state law to zone my property as close as possible to county zoning.

I now wish to expand my storage complex, however, the city is now requesting I pay $1000.00 to rezone plus file for a special use permit.

The application for zoning use and special use permit requires me to give up all of the claims for diminution of value, if I don't get it zoned, to allow storage units. Where it was when the city incorporated my property

We respectfully request the city, address this problem.

We have tried hard to co-operate with the city of Kingman, and wish to continue to do so.

This application form that requires us to give up our rights, of diminution of value, before we even have a hearing, is fundamentally unconscionable.

I find it hard to believe the good people of Kingman would accept this type of conduct, from city government.

We appreciate your co-operation in addressing this matter.

Thanks

/s/ Robert Bennett
Robert Bennett
Cell 928-486-9031
Office 928-855-7368

CC: John Salem
Mayor
310 N. Fourth Street
Kingman, Az.
86401

CITY OF KINGMAN
MEETING OF THE COMMON COUNCIL
Council Chambers
310 N. 4th Street

5:30 P.M. **MINUTES** **Tuesday, September3, 2013**

Members:	**Officers:**	**Visitors Signing In:**
J. Watson, Mayor	C. Cooper, City Attorney	See attached list
R. Anderson	C. Osterman, Interim City Manager/Fire Chief	
L. Carver	D. Francis, City Clerk	
E. Cochran	S. Muhie, Deputy City Clerk	
M. Wimpee, Sr.	D. Richards, Budget Analyst	
C. Young	J. Clos, Information Technology Director	
	G. Jeppson, Development Services Director	
	G. Henry, City Engineer	
	M. Meersman, Parks and Recreation Director	

	R. DeVries, Chief of Police	
	R. Owen, Public Works Director	

CALL TO ORDER & ROLL CALL

Mayor Watson called the meeting to order at 5:30 p.m. and roll call was taken. All Council Members were present. The Invocation was given by City Attorney Carl Cooper after which the Pledge of Allegiance was said in unison.

THE COUNCIL MAY GO INTO EXECUTIVE SESSION FOR LEGAL COUNSEL IN ACCORDANCE WITH A.R.S.38-431.03(A) 3 TO DISCUSS ANY AGENDA ITEM. THE FOLLOWING ITEMS MAY BE DISCUSSED, CONSIDERED AND DECISIONS MADE RELATING THERETO:

1. **APPROVAL OF MINUTE**

The Regular Meeting Minutes of August 20, 2013.

Councilmember Wimpee Sr. made a MOTION to APPROVE the Regular Meeting Minutes of August 20, 2013. Councilmember Cochran SECONDED and it was APPROVED by a vote of 6-0.

2. **PROCLAMATION**

The Benevolent and Protective Order of Elks have requested Council proclaim the week of September 9th through 14th, 2013 as National Patriotism Week and urge all citizens to join them in

* * *

5. OLD BUSINESS

None

6. NEW BUSINESS

a. Public hearing and consideration of Ordinance No. 1767 to approve the rezoning of a 5 acre property located at 3442 Hualapai Mountain Road from C-2-HMR to C-2.

A request from Robert E. & Judith Bennett, applicants and property owners, for the rezoning of a S acre property from C-2-HMR: Hualapai Mountain Road Overlay District to C-2: Commercial, Community Business. The subject property is located at 3442 Hualapai Mountain Road at the southeast corner of Hualapai Mountain Road and Rosslynn Drive. The request is to allow for the consideration Conditional Use Permit CUP) to allow the expansion of a mini-storage complex on the site. The Planning and Zoning Commission met on August 13, 2013 and held a public hearing on this rezoning request. The Commission voted unanimously 6-0 to recommend denial of the rezoning request as the commission believes it is more appropriate to maintain the continuity of the current C-2-HMR zoning.

* * *

Slide 5 – This slide shows a photo of the vacant property that the Bennetts are requesting the rezoning for.

Slide 6 – This slide shows the adjacent property where the mini-storage facility is located.

[IMAGE OMITTED] [IMAGE OMITTED]

Slide 7 – Mr. Jeppson gave a summary of the slide. He stated that the site was excluded in a City initiated rezoning in October, 2004, after annexation. He said that the C-2-HMR Ordinance, which was adopted in December, 2004, applied to this property and all commercial properties along Hualapai Mountain Road in the Zoning District as of February, 2005.

Slide 8 – Mr. Jeppson gave a summary of the slide. He said that the property is flat and it is not located in the flood plane. He said that the property is accessible from both Hualapai Mountain Road and Rosslyn Drive. Notices were sent to all property owners in the area and one phone call was received supporting the request. The Planning and Zoning Commission received a public comment from the citizen in support of the rezoning. All of the necessary agencies have reviewed the request and the Kingman Fire Department has said that a fire hydrant will need to be installed on the Rosslyn Drive side of the property.

[IMAGE OMITTED] [IMAGE OMITTED]

Slide 9 – Mr. Jeppson said that the request for C-2 zoning is so that a mini-storage facility would be allowed through a Conditional Use Permit. Mini-storage facilities are currently not permitted in the C-2-HMR Zoning District. He said that access to the facility would be located on Rosslyn Drive, rather than Hualapai Mountain Road, where it is currently. He

said that if this zoning is approved the applicant need to seek a Conditional Use Permit.

Slide 10 – This slide shows the proposed site plan for the property. Access to the property would be located on Rosslyn Drive, not Hualapai Mountain Road.

[IMAGE OMITTED] [IMAGE OMITTED]

Slide 11 – Mr. Jeppson said that at this time the Council needs to hold a public hearing on the rezoning. He said that the Council can accept, modify or reject what the Planning and Zoning Commission has recommended. The Council could also return the matter to the Planning and Zoning Commission if it so desired. Anytime the zoning map is modified, which this request would do, you can do a reduction. but cannot expand upon the request without it going back through the planning process with the Planning and Zoning Commission.

Slide 12 – Mr. Jeppson gave a summary of the slide.

[IMAGE OMITTED]

Slide 13 – This slide was not specifically discussed.

Mayor Watson opened the floor for discussion of the proposed Ordinance.

Councilmember Cochran asked Mr. Jeppson why the Planning and Zoning Commission recommended denial of the request so strongly.

Mr. Jeppson said that in rezoning the property, all of the uses allowed in the C-2 zoning would be allowed on the property, which the Commission did not feel would be uniform. He said that the Commission felt strongly that the integrity of the C-2-HMR should be maintained in that corridor. He also said that the next agenda item discusses a text amendment to the C-2-HMR which would allow mini-storage facilities, through a Conditional Use Permit, in the Zoning District.

Robert Bennett, applicant for the rezoning, addressed the Council. He presented the Council with a short letter addressed to them. A copy of the letter has been attached to the minutes. Mr. Bennett said that he would like to keep his address as simple as possible because this is a simple scenario. He said that this property was finished and zoned for a mini-storage facility when the City asked him whether or not he would go along with being annexed into the City. He agreed to the annexation with the provision that doing so would not adversely affect his property. He said that downgrading his zoning has adversely affected his property. He said that he is not interested in creating problems and that he would like to build his storage units and move on. He said that it doesn't matter to him whether this change is accomplished through the rezoning or through the amendment to the current zoning. He said that he is doing this because he would like to expand his business.

Mayor Watson asked Mr. Bennett whether he had something in writing showing the promise that there would be no adverse affect to his property.

Mr. Bennett said that this was something that he was told. but that he does have a witness to the conversation.

Mayor Watson stated that zoning really is not a downgrade, but rather an upgrade.

Mr. Bennett stated that he does not agree with that. He said that this has changed the scenario of his property. He said that there is currently a property on Hualapai Mountain Road for sale because the zoning will not allow what Mr. Bennett wants to do. He said that he was a real estate broker for over thirty years and having storage units in the area is an asset to the neighboring properties. He said that he would not be a part of the City if someone had told him they the City was going to downgrade his property. He said that he gets emotional about this subject because it upsets him, but that he is trying to remain as calm as he can. Mr. Bennett said that all he wants is his zoning and he doesn't care how it is done. He said that this is the fair thing to do since the rezoning was done without his permission.

Mayor Watson asked City Attorney Cooper what his stance is on this subject.

Mr. Cooper said that he was not initially involved when this first started and has only

read the agenda packet on the topic. He said that he does not know what the zoning was when the property was first annexed, but that it has been upgraded to its current zoning. Mr. Cooper said that any claim on zoning should have been proposed at the time the property was initially rezoned ten years ago, rather than right now. He said that Mr. Bennett's letter states that this rezoning would eliminate any claims for diminished value, which there are no claims for at this time. Mr. Cooper said that Proposition 207 came into effect in 2006, two years after the rezoning was done. He said that Mr. Bennett's time for complaining was many years ago.

Mr. Jeppson said that when the property was under Mohave County's jurisdiction, the property was zoned C-2-H which was a Commercial Highway District. He said that when the property was annexed, the City zoned the property as Rural Residential and then C-2-HMR.

Mayor Watson asked if any public meetings were held when the annexation took place where property owners along Hualapai Mountain Road were advised and had the opportunity to ask about the status of their property.

Mr. Jeppson stated that he was not a part of the City when the annexation took place, but that yes there should have been per the City's procedures.

Councilmember Cochran stated that in Mr. Bennett's letter he said the City would have

the advantage of an increase to property taxes. She stated that the City of Kingman does not have a property tax.

Councilmember Carver asked Mr. Jeppson where the Overlay District stops.

Mr. Jeppson said that the overlay stops at 300 feet, on the eastern edge of the property.

Councilmember Carver asked if this was in line with Seneca Street.

Mr. Jeppson said that, yes, Seneca would be along the eastern side of the property and that properties east of this are zoned R-1-40.

Councilmember Carver asked where the proposed addition to the property would be.

Mr. Jeppson said that this would be to the west of the currently developed property on the vacant lot.

Councilmember Anderson asked Mr. Jeppson about the storage units which have already been built.

Mr. Jeppson said that these are under a non-conforming use.

Mayor Watson stated that the current units were there prior to annexation into the City.

Councilmember Anderson said that he was wanting clarification that the current units are under official use and that the property owner wants to expand his business on his property, within the HMR.

Mayor Watson asked what else is located on Rosslyn Drive.

Mr. Jeppson stated that there is a residential development taking place within the City on Rosslyn Drive.

Councilmember Carver asked for clarification between the two proposed items: that Ordinance 1767 would rezone the property from C-2-HMR to C-2. He asked whether mini-storage facilities were allowed with the C-2 zoning.

Mr. Jeppson stated that Ordinance 1767 would rezone the property to C-2 and that mini-storage facilities are allowed in the C-2 zoning with a Conditional Use Permit.

Councilmember Carver asked about Ordinance 1766 which is the proposed text amendment to the C-2-HMR. and whether a Conditional Use Permit would still be required if it were to be passed.

Mr. Jeppson said that a Conditional Use Permit would still be required, but would not permit the uses allowed in C-2 that are not allowed in C-2-HMR.

Councilmember Young asked if this property was rezoned to C-2 whether this will affect the rest of the C-2-HMR. She also asked if the Council approved the text amendment to the C-2-HMR, in which the storage facilities are allowed with a Conditional Use Permit, whether anyone within that corridor could apply for one as well.

Mr. Jeppson stated that is was correct.

Councilmember Carver stated that in rezoning the property to C-2, the property owner could build whatever is allowed in that zoning.

Councilmember Wimpee Sr. asked Mr. Bennett when he realized that the property had been rezoned.

Mr. Bennett stated that he realized this about a year ago when he had an architect and an engineer begin working on plans for the business expansion. He said that he would also like to point out, with regard to the diminished value claim, the law states, under G, 12-1134, that "an action for just compensation base on diminished value must be made forever or forever barred within three years of the effective date of the land use law or of the first date the reduction of the existing right to use, divide, sell, or possess property applies to the owners property, whichever is later". He said that this starts from the time the decision is made by the Council.

Mr. Cooper stated that this is not correct.

Councilmember Young asked Mr. Jeppson if notification was made when the zoning was changed to Rural Residential.

Mr. Jeppson said that he was not a part of the City at that time, but that he can only guess that the City did follow the statute for rezoning property, so yes, there should have been.

Mayor Watson stated that the Council is only considering Ordinance 1767, rezoning the property from C-2-HMR to C-2. She also asked, as this was a public hearing, whether any members of the public would like to speak on this matter.

Allen Mossberg, Vice Chair of the Planning and Zoning Commission, addressed the Council and said that he got the impression that going from the C-2-HMR to the C-2 that what they were trying to do is put Pandora back in the box by allowing all of the other options available with the C-2 zoning. He said that Ordinance No. 1766, which would allow the storage facility through a Conditional Use Permit, this would allow the City more control on what can be built in that corridor. He said that he feels that the Conditional Use Permit is fine, but that the Commission had a three to three tied decision on that topic. He said that he is against Ordinance No. 1767, as the Commission does not want to open the area up to that zoning and would like to restrict the allowable businesses to those that will be a good fit in that neighborhood.

No other public comments were made and the Public Hearing was declared closed.

Councilmember Wimpee Sr. made a MOTION to DENY the Ordinance No. 1767, the rezoning of a 5 acre property located at 3442 Hualapai Mountain Road from C-2-HMR to C-2. Councilmember Cochran SECONDED and it was DENIED by a vote of 6-0.

b. Public Hearing and consideration of Ordinance No. 1766 to amend Section 14.000: C-2HMR Overlay District of the Zoning Ordinance of the City of Kingman. The proposed text amendment would add "Mini-Storage" to the list of uses which may be permitted by Conditional Use Permit.

The Planning and Zoning Commission initiated the consideration of a Zoning Ordinance text amendment that would permit mini-storages in the C-2-HMR Zoning District under Uses Which May Be Permitted by Conditional Use Permit (CUP). This text amendment was initiated as an alternative to a rezoning request for a property located on Hualapai Mountain Road and Rosslynn Drive. An application was received to rezone a 5-acre property from C-2-HMR to C-2 in order for a CUP application to be considered for the expansion of an existing mini-storage development on the property. **The Planning and Zoning Commission met on August 13, 2013 and held a public hearing on this proposed text amendment. A motion to recommend approval of the text amendment to allow mini-storages by CUP in C-2-HMR was defeated by a tied vote of 3-3.**

Mr. Jeppson addressed the Council regarding the proposed text amendment to allow mini-storage facilities in the C-2-HMR Zoning District through a Conditional Use Permit.

[IMAGE OMITTED] [IMAGE OMITTED]

Slide 2 – Mr. Jeppson stated that this action was initiated by the Planning and Zoning Commission. The Commission held a public hearing last month, after which they deadlocked on a 3-3 vote for a recommendation to the City Council.

[IMAGE OMITTED] [IMAGE OMITTED]

Slide 3 – Mr. Jeppson said that there are currently two mini-storage facilities in the C-2-HMR Zoning District and both are considered to be non-conforming uses. He said that the General Plan shows that this area is a Community Commercial area.

Slide 4 – Mr. Jeppson gave a summary of the slide.

* * *

Slide 5 – This slide showed a map of the C-2-HMR Zoning District in purple.

Slide 6 – Mr. Jeppson stated this item is for Council consideration for amending the text so that all of the C-2-HMR areas could allow mini-storage facilities by Conditional Use Permit. He said that the Council's option tonight would be to adopt Ordinance No. 1766, which would allow the text amendment. He said that the Council could also deny the request and maintain the C-2-HMR as it was presently written.

Councilmember Young asked whether when the C-2-HMR was created, it was designed to

not allow mini-storage facilities in the Zoning District.

Mr. Jeppson stated that this was correct.

Councilmember Young ask if the two that had already been built were grandfathered into this. Mr. Jeppson stated that this was correct and that they were considered non-conforming uses.

Councilmember Cochran asked whether any complaints had ever been received on the specific mini-storage facility requesting the change.

Mr. Jeppson stated that there were none the he is aware of.

Councilmember Carver asked if Ordinance No. 1766 was approved whether any new buildings would have to conform to the standards of the Overlay District.

Mr. Jeppson stated that this was correct.

Councilmember Cochran asked Mr. Bennett how many customers access his current facility every day.

Mr. Bennett stated that there were very few.

Councilmember Cochran asked for clarification on how many units he wants to add.

Mr. Bennett said that he wants to add 200 additional units.

Councilmember Cochran asked how many vehicles he was expecting to enter the facility every day after the addition.

Mr. Bennett said he expects no more than ten to twelve per day. He stated that the facility is very low key and that he has received compliments on how well the property is maintained. He said that the neighbors are not unhappy with the facility and that they like it. He said that most of his tenants live in that area.

Councilmember Cochran asked Mr. Bennett if he currently owns the property that he would like to expand onto.

Mr. Bennett stated that the property is all one parcel and has been since its incorporation into the City. He said that he did not raise any objections to the annexation.

Councilmember Cochran stated that she was just trying to clarify that he does currently own the property.

Mr. Bennett stated that he does. as well as the five acres of property behind it.

Councilmember Carver asked for clarification that the new entrance to the facility will be on Rossiya Drive, rather than turning into where the current entrance is on Hualapai Mountain Road.

Mr. Bennett said that his long term plan is to block the access off of Hualapai Mountain Road and have the facility access on Rosslyn

so that tenants will not be crossing the high pressure gas line along Hualapai Mountain Road.

Councilmember Young asked if the facility has 24 hour access.

Mr. Bennett said that the facility currently has 24 hour access, though he is looking at limiting the access to more general hours of operation. He also stated that the new addition to the facility will have indoor access to the units, rather that outside as the facility is now.

Councilmember Young asked if the lights will be on 24 hours a day like they are now.

Mr. Bennett said that yes they will in order to be in compliance with the code. He stated that the design shows that there will be no garage doors opening from the outside and that the new addition will be entirely indoor, therefore there will be very few lights on the outside of the building.

Mayor Watson asked Mr. Jeppson if he has seen any plans that would change the facility access to Rosslyn Drive.

Mr. Jeppson said that this has not been discussed at this point, but that if this amendment is approved then this could be made a condition of the Conditional Use Permit and would be discussed at that time.

Mayor Watson asked if there were public comments on this matter.

Dwayne Patterson, owner of Remax Prestige Properties, addressed the Council. He said that he lives on Seneca Street. He said that he has never met Mr. Bennett, though his business utilizes a couple of units at the current facility. He stated that the property is always well kept and that he sees no issue with allowing this business to expand.

No other public comments were made and the Public Hearing was declared closed.

Councilmember Cochran stated that she has no issues with allowing this through a Conditional Use Permit since this allows the City, to deny a mini-storage facility if it does not fit the area. She said that the current facility is well kept and that if Mr. Bennett feels that he can expand, then he should be allowed to do so.

Councilmember Wimpee Sr. stated that the property was not finished prior to Mr. Bennett purchasing it, though now it is well kept. He stated that at the Planning and Zoning Commission meeting a neighbor, who did not know Mr. Bennett, talked about the difference from the prior owner to Mr. Bennett taking over the property. He said that he believes that Mr. Bennett's intention has always been to expand the property and that he is also in favor of this.

Councilmember Young stated that her concerns were the access due to the residential area, which Mr. Bennett said that he would limit, as well as the lighting.

Councilmember Anderson asked why there was a three-to-three vote from the Commission.

Mr. Jeppson said that one of the Commissioners was ill, causing the tied vote.

Councilmember Wimpee Sr. stated that the matter was discussed at length numerous times and that this was the final product of those discussions.

Councilmember Wimpee Sr. made a MOTION to APPROVE Ordinance No. 1766, to amend Section 14.000: C-2HMR Overlay District adding "Mini-Storage" to the list of uses which may be permitted by Conditional Use Permit. Councilmember Anderson SECONDED and it was APPROVED by a vote of 6-0.

* * *

09-1-13

Robert Bennett

Re: 3442 Hualapai Mountain Rd

We would like to give you a little background on this property.

This property was zoned for storage units and storage units already existed on the property when the city approached me, asking me to allow the property to be annexed into the city.

We agreed providing that there where no adverse effects to the property. We where assured by staff that there would not be.

This is not the first time that we have voluntarily cooperated with the city. When the city needed an easement for the water lines along Hualapai Mt Rd we gave it to them at no cost.

This expansion is a clean well planed expansion, with all doors opening to the inside. Lighting to be primarily within the drive areas.

There are many advantages to the City of Kingman in the expansion of these units.

1. Increased Sales Taxes
2. Increased property tax
3. Eliminates any claims for diminished value
4. Occupancy has been continuously at 100% and there is a need for more units.

The only objection that we have heard is that other property owners along Hualapai Mt Rd may want the same zoning and the staff does not want that.

However these other owners did not have zoning that allowed this use when they where annexed into the city. And they where not told, there would be no adverse effects to being annexed into the city. WE WERE

Again we do not wish to create problems, however we believe that it is only fair that the city approve this expansion.

CITY OF KINGMAN
MEETING OF THE COMMON COUNCIL
Council Chambers
310 N. 4th Street

5:30 P.M. **MINUTES** **Tuesday, October 15, 2013**

Members:	Officers:	Visitors Signing In:
J. Watson, Mayor	C. Cooper, City Attorney	See attached list
C. Young, Vice Mayor	C. Osterman, Interim City Manager/Fire Chief	
R. Anderson	C. Loyd, Finance Director	
L. Carver	G. Johns, City Clerk	
E. Cochran	S. Muhle, Deputy City Clerk	
J. Miles	J. Clos, Information Technology Director	
M. Wimpee, Sr.	G. Jeppson, Development Services Director	
	G. Henry, City Engineer	
	M. Meersman, Parks and Recreation Director	

	J. Dorner, Asst. Fire Chief	
	R. Owen, Public Works Director	
	m. prior, city engineering	

CALL TO ORDER & ROLL CALL

Mayor Watson called the meeting to order at 5:30 p.m. and roll call was taken. All Council Members were present. The Invocation was given by Steve McCall of the Desert Church of Christ after which the Pledge of Allegiance was said in unison.

THE COUNCIL MAY GO INTO EXECUTIVE SESSION FOR. LEGAL COUNSEL IN ACCORDANCE WITH A.R.S.38-431.03(A) 3 TO DISCUSS ANY AGENDA ITEM. THE FOLLOWING ITEMS MAY BE DISCUSSED, CONSIDERED AND DECISIONS MADE RELATING THERETO:

1. APPROVAL OF MINUTES

The Regular Meeting Minutes of October 1, 2013.

Councilmember Wimpee Sr. made a MOTION to APPROVE the Regular Meeting Minutes of October 1, 2013. Vice Mayor Young SECONDED and it was APPROVED by a vote of 7-0.

2. PROCLAMATIONS

Extra Mile Day

Kingman is a community that acknowledges that a special vibrancy exists within the entire community

when its individual citizens collectively "go the extra mile" in personal effort,

* * *

b. Public Hearing and Consideration of Resolution No. 4860 for the Approval of a Conditional Use Permit (CUP) to Expand a Mini-Storage Complex at 3442 Hualapai Mountain Road.

A request from Robert E. & Judith Bennett, applicants and property owners, for the approval of a conditional use permit (CUP) to expand a mini-storage complex at 3442 Hualapai Mountain Road on property zoned C-2-HMR: Hualapai Mountain Road Design Overlay District. The applicant is proposing approximately 210 mini-storage units of varying sizes as well as an office, a manager's residence and a garage. Access is proposed from Rosslynn Drive via a new driveway. The development will require the completion of street improvements, submittal of grading plans, new water service approval and the installation of a fire hydrant. Additionally it is recommended that storage unit doors do not face the streets, parapets have varied heights, parking, setbacks and landscaping are in compliance, and that access to the new mini-storage units only be permitted from Rosslynn Drive. The developer has not signed a Proposition 207 waiver, but has verbally indicated to staff his willingness to do so if the Council approves the CUP. Two letters in opposition to the CUP request have been received. The Planning and Zoning Commission met on September 10, 2013 and held

a public hearing on this rezoning request. The Commission voted 3-1 to recommend approval of the CUP request with the conditions included in Resolution 4860. **The Planning and Zoning Commission recommended approval of Resolution No. 4860. Staff does not recommend approval of the CUP unless the Proposition 207 waiver is signed by the applicant.**

Mayor Watson said that two people had signed up to speak on this item.

Development Services Director Gary Jeppson gave a presentation to the Council.

Slide 2 – Mr. Jeppson gave an overview of this slide.

Slide 3 – This slide showed a map of the property.

Slide 4 – This slide showed an aerial picture of the site with residential areas surrounding it.

Slide 5 – This slide showed pictures of the property.

Slide 6 – Mr. Jeppson said that the new addition will look similar to the existing buildings, but without the exterior garage doors.

Slide 7 – Mr. Jeppson gave an overview of this slide. He said that the property was initially developed in the County and was annexed into the City in 2004. He said that the City then adopted the C-2-HMR Zoning District which the property is a part of.

Slide 8 – Mr. Jeppson said that the site is flat and is outside of the flood plain. He said that utilities are accessible from both Hualapai Mountain Road and Rosslynn Drive. He said that his office has received one phone call in support of the expansion and have received several letters in opposition.

Slide 9 – Mr. Jeppson gave a synopsis of this slide. He said that the zoning for the property does not require a Conditional Use Permit for the proposed residence to be built with the extension.

Slide 10 – This slide showed the proposed site plan.

Slide 11 – Mr. Jeppson said that the applicant has not signed the Proposition 207 waiver and said that the applicant has refused to sign the waiver as he would like to sue the City if the Conditional Use Permit is not approved.

Slide 12 – Mr. Jeppson gave a synopsis of this slide and said that the conditions of the CUP were included in the Council Packets.

Slide 13 – Mr. Jeppson gave a synopsis of this slide, which listed the conditions of the CUP.

Slide 14 – This slide listed Council's options regarding the CUP. Mr. Jeppson said that Council could vote to send the CUP back to the Planning and Zoning Commission with new conditions.

Mayor Watson asked for copies of the letters that were received. She then called on the property owner to come forward.

Robert Bennett addressed the Council and said that he has no problem with signing the Proposition 207 waiver, but said that he has refused to sign the waiver as it requires him to give up his rights ahead of time. He said that he will sign the waiver if the CUP is approved. He said that he wants the correct zoning for his property before he gives up his rights by signing the waiver.

Mayor Watson stated that this would not be a rezoning, but approval of a Conditional Use Permit.

Mr. Bennett said that either way he would not give up his right to a claim against the City. He also said that he would be fine with Council making the Proposition 207 waiver a condition of the CUP.

Mr. Cooper said that Council could make this a condition in the motion stating that the Mayor will not sign off on the CUP until Mr. Bennett signs the waiver.

Mr. Bennett said that he is fine with the conditions and that he has heard the complaints, but that the design of the property was there when he purchased it.

Mayor Watson called upon Tyler Angle who had signed up to address the Council.

Tyler Angle addressed the Council. He said that he is a citizen of Kingman and that he grew up here. He said that he works for Angle Homes whom he is representing at this meeting. He also said that he lives 400 feet from Hualapai Mountain Road and doesn't think that this expansion will benefit the corridor as much as a business defined within the traditional C-2-HMR Zoning District. He said that the uses defined with that zoning would serve the neighborhood every day. He said that he shows homes in that area and doesn't feel that customers wanting to move into that area would be enthused by the expansion. He said that the area is a nice subdivision and that it would be better served by a traditional use of that property.

Mayor Watson asked how many houses are in the area.

Mr. Angle said that there are ten or eleven houses currently in the Boulder Creek Development with several lots available. He said that when customers want larger lots that's where his company takes them. He said that all of the lots are around an acre in size.

Councilmember Wimpee Sr. asked if all of the available lots are owned by Angle Homes.

Mr. Angle said that Angle Homes owns one house in the area that is currently for sale and does not own any other property in the area.

Councilmember Anderson asked for clarification that Mr. Angle was implying that if the

CUP is not approved the owner of the property should use it for something else.

Mr. Angle said that he feels that a business allowed by the current zoning district would better serve the area.

Mayor Watson called upon Doug Angle who had signed up to address the Council.

Doug Angle addressed the Council. He said that Tyler Angle was there to represent Angle Homes, but that he is there as a private citizen as he lives in the Hualapai Foothills and was opposed to the property when it was originally built. He said that he drives by the property every day and that he thinks it is an eye sore with the design. He said that Mr. Bennett has admitted that the property is ugly. He said that there are several ways that the property could look nicer. He said that Mr. Bennett should have to make the property more aesthetically pleasing if the CUP is approved. He also said that Mr. Bennett told him that he would sue the City and Mr. Angle if the CUP is not approved. Mr. Angle said that he wanted to stress his opinion without threat.

Vice Mayor Young asked what the devaluation of the properties behind the facility would be if the CUP is approved.

Mr. Angle said that he does not know as he does not own any land in the area.

Councilmember Miles said that when looking at the list of businesses allowed by the zoning

district there were many that would look worse in her opinion.

Mr. Angle said that he would like for the property to look better.

Mayor Watson read a portion of the list of businesses allowed in the C-2-HMR Zoning District and said that other options are available for the property. Mayor Watson then asked if any other members of the public would like to come forward to speak as this was a public hearing.

No other members of the public came forward and the public hearing was declared closed.

Mr. Bennett addressed the Council and said that the businesses listed within the traditional C-2-HMR Zoning District would be built a good fifteen years down the line. He said that expanding the storage facility makes economic sense at this time.

Vice Mayor Young asked if Mr. Bennett charges sales tax on the units' rental fees.

Mr. Bennett said that he does and that it is built into the rental fees.

Councilmember Wimpee Sr. asked if the plan shows closing the driveway along Hualapai Mountain Road.

Mr. Bennett said that it does and said that the main entrance will be on Rosslynn Drive. He also said that all of the storage unit doors will be on the inside of the building and that he bought the property with these plans in place.

Councilmember Wimpee Sr. asked if Mr. Bennett would seal off the access gate along Hualapai Mountain Road.

Mr. Bennett said that he would not and that he wants to keep that gate for emergency and fire access. Mr. Bennett said that the storage units will not be visible from Hualapai Mountain Road and that he wants the property to look good.

Councilmember Anderson asked for clarification that there will be no public access from Hualapai Mountain Road if that gate is not going to be sealed.

Mr. Bennett said that the Hualapai Mountain Road gate will be for emergency access only. He also said that there will be no structural changes though the design can be changed if the City so desires.

Vice Mayor Young asked if the design for the addition will be the same as the current structure.

Mr. Bennett said that City Code requires that the design be the same. He said that the architects would have to work with the City to make sure any design changes are within the Code requirements.

Councilmember Miles said that the old and new buildings should look cohesive.

Mr. Bennett said that the architects can work with the City on a design update and that he has no problem with changing the design.

Mayor Watson clarified that Mr. Bennett would not object to making the redesign a condition of the CUP.

Mr. Bennett said that the building closest to Hualapai Mountain Road will be the first to be constructed so the redesign can begin with that Building. He said that as long as he is allowed to expand, he has no problem with making the redesign a condition of the CUP.

Councilmember Wimpee Sr. asked for clarification on the fencing for the perimeter of the property noting that the plan shows that the back wall of the first building will serve as the exterior wall of the property.

Mr. Bennett said that his was correct. He said that the fence design will look better once it is completed.

Councilmember Wimpee Sr. asked how Mr. Bennett plans to make the property secure.

Mr. Bennett said that he could not build a solid brick wall due to the high pressure gas line that runs along the property. He also said that he has installed cameras and will have an onsite manager living in the residence on the property. He said that the driveway along Rosslynn Drive will be wider than normal and that he will expand the landscaping to make it look better. He also said that the open area between the buildings and Rosslynn Drive is more than 20 feet.

Councilmember Wimpee Sr. asked about the wall along Rosslynn Drive.

Mr. Bennett said that the wall will be in between the buildings.

Vice Mayor Young asked about the exterior lighting.

Mr. Bennett said that the exterior lighting will be on the ground. He said that he can't change the lighting on the existing building, but that the new buildings will have exterior lighting along the bottom.

Mayor Watson clarified that the exterior of the buildings will be the exterior of the property and asked how far away the new gate will be from Hualapai Mountain Road.

Mr. Bennett said that the exterior of the buildings will be the exterior of the property.

City Engineer Greg Henry said that the gate is required to be 30 feet from Hualapai Mountain Road.

Mr. Bennett said that the gate will be approximately 145 feet from Hualapai Mountain Road because of the gas line.

Mayor Watson asked if Mr. Bennett had considered doing the expansion in phases.

Mr. Bennett said that the expansion will be done in phases and that he will start with the building closest to Hualapai Mountain Road.

Mayor Watson asked where the residence will be located on the property.

Mr. Bennett said that it will be next to the entrance on Rosslynn Drive.

Vice Mayor Young asked Mr. Jeppson if notification of the expansion was given and if any residents had complained.

Mr. Jeppson said that notice was given in accordance with the public hearing requirements and that a letter was received from the Boulder Creek developer. A copy of this letter has been attached to these minutes.

Councilmember Anderson said that they had also heard the opposition of the two speakers from Angle Homes as well has having received several letters and emails.

Mr. Jeppson said that his office had received five letters of support for the expansion and four letters against. He said that he also saw an email from Dwayne Patterson.

Councilmember Cochran said that she had also received several emails about it.

Mayor Watson said that she did some research on this matter and believed that there was opposition from the City before the original storage facility was built. She said that when the property was annexed it was considered an acceptable use for the property along the corridor. She said that there are currently 132 units and that she thought that the number of units would double with the expansion. She said that seeing the site plan there will now be over 300 and that she sees the pros and cons with allowing this expansion.

Councilmember Cochran said that she appreciates that the applicant is willing go the extra step to redesign the current building. She also said that she has no problem with this project and said that several people have spoken previously that the property will well kept.

Councilmember Miles said that she sees the upside to both the expansion and the improvements to the current buildings. She said that the property will be secure and that the storage units are an improvement to some of the other businesses that could be allowed at that location. She said that given the applicants willingness to sign the Proposition 207 waiver she would be in support of approving the CUP.

Vice Mayor Young said that her concern is the lighting in the area and the additional traffic that the expansion will bring.

Mr. Bennett said that they are considering setting specific business hours and will possibly close the gates at night.

Mayor Watson referred to a map showing the zoning in the area. She said that the northeast corner of the property is zoned C-2 and said that the frontage is all the same. She said that the area will not be entirely residential as most of Hualapai Mountain Road is zoned commercial.

She also said that some residential yards in the area aren't as well kept as the storage facility. She also said that more commercial businesses will be coming in that area.

Councilmember Anderson said he agrees with the comments made by Councilmembers Cochran and Miles. He said that if the applicant is willing to improve the aesthetics of the property than he has no problem with approving the CUP. He also said that no one present could determine the effect this would have on property values which can be subjective.

Councilmember Wimpee Sr. said that the Planning and Zoning Commission looked extensively at this and had to problem with it.

Vice Mayor Young said that there is no guarantee that there will be greater revenue with the property being used for a different business and said that she can see both sides.

Councilmember Wimpee Sr. made a MOTION to APPROVE the Conditional Use Permit to expand the mini-storage complex at 3442 Hualapai Mountain Road with the added conditions of redesigning the building and the applicant signing the Proposition 207 waiver. Councilmember Anderson SECONDED. Councilmember Miles AMENDED the MOTION to ensure that the appearance of the old and new buildings be aesthetically pleasing. Councilmember Anderson SECONDED the amendment. The MOTION was APPROVED by a vote of 6-1 with Vice Mayor Young voting NAY.

(Resolution No. 4860)

* * *

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2. Article Number *(Transfer from service label)* 7004 1160 0000 0846 7228

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Carl Cooper

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HUALAPAI MOUNTAIN STORAGE
D/L STORAGE
3442 Hualapai Mt Rd.
Kingman, Az.
928-753-6990

October 25, 2013

Gary W. Jeppson
Development Services Director
310 N Fourth St.
Kingman, Az.
86401

Dear Mr. Jeppson,

Per our agreement we are enclosing the proposition 207 waver required for the conditional use permit. We do not see a need for a 207 waiver because we do not see our conditional use permit as detrimental to the property.

This conditional use permit establishes a method for the city to allow me to do what we what we had a right to do, by setting up a process for the city of Kingman to align with the rights we had for the property when we where in the county and before we where incorporated

into the city. We understand that this agreement accommodates the city's desire not to return to the county type property zoning because of what else might be allowed to be built on the property . This conditional use permit is a good thing and a step in the right direction.

We have always tried to be a good neighbor, co-operating with the city, when they wanted to have us incorporated into the city, we granted an easement (free of charge) to the city so they could access the water line on our property for Boulder Creek Estates, did not insist on reimbursement by anyone hooking up to that water line for the cost of tunneling under Hualapai Mountain Road. As a good neighbor, in the spirit of co-operation and in an effort to resolve any unfortunate misunderstandings or disputes we are happy to go along with this new procedure.

All we ever wanted was to be treated fairly, with recognition of our rights as property owners. We did not feel we had always been treated this way in the past, but the current action by both the city council and the planning commission is real progress in reestablishing a positive relationship.

We look forwards to being treated fairly, equitably and in good faith, with our rights as a citizen and taxpayer. The actions of the planning commission and the city council in resolving this issue has helped to restore my confidence in city government. We hope and anticipate that the good faith and confidence we have placed in you will be reciprocated, and to further demonstrate

the confidence we have placed in you, we confirm to you in this letter that upon completion of the storage units allowed by the use permit, we will realize full enjoyment and benefit of our property as we had under the county rules, and that the process established by this amendment helped to facilitate both of us in achieving the final goal of getting the units built

We believe this conditional use permit is mutually beneficial, the city avoided having a zoning change that would have allowed something to be built that they did not want, and we get to expand our storage as originally planned.

We fully recognize that the process of resolving this issue has been a strain on everyone involved, and wish to express our appreciation to the staff, the planning commission and the city council in making this agreement possible.

We look forward to mutual cooperation in getting these units built.

Thanks;

/s/ Robert E. Bennett
Robert E. Bennett

/s/ Judith D Bennett
Judith D Bennett

[Recorder Stamp Omitted]

CITY OF KINGMAN
RESOLUTION NO. 4860

A RESOLUTION BY THE MAYOR AND COMMON COUNCIL OF THE CITY OF KINGMAN, ARIZONA: AUTHORIZING A CONDITIONAL USE PERMIT TO EXPAND A MINI-STORAGE COMPLEX LOCATED AT 3442 HUALAPAI MOUNTAIN ROAD

WHEREAS, Robert E. and Judith Bennett, applicants and property owners, have requested a conditional use permit to allow the expansion of a mini-storage complex on property located at 3442 Hualapai Mountain Road, and

WHEREAS, the subject property is located along the south side of Hualapai Mountain Road east of Rosslynn Drive further described as: A Portion of the NE 1/4, NE 1/4 of Section 29, T.21N., R.16W. of the G&SRM, Mohave County, Arizona, as shownon a Parcel Plat recorded 3/17/98 at Fee No. 98-15094, and

WHEREAS, the subject property is zoned C-2-HMR: Hualapai Mountain Road Overlay District, and

WHEREAS, mini-storage facilities may be permitted by Conditional Use Permit in the C-2-HMR zoning district in accordance with the requirements of Section 14.700 as amended by Ordinance 1766, and

WHEREAS, this CUP request was reviewed by the Kingman Planning and Zoning Commission on September 10, 2013 and was recommended for approval by a vote of 3-1, and

WHEREAS, the Kingman Common Council held a public hearing on October 15, 2013 on the Robert E. and Judith Bennett's request for develop mini-storage facilities at 3442 Hualapai Mountain Road and has the authority to approve a Conditional Use Permit, pursuant to Section 29.000: Conditional Use Permits of the *Zoning Ordinance of the City of Kingman.*

NOW, THEREFORE, BE IT RESOLVED by the Mayor and Common Council of the City of Kingman, Arizona: That a Conditional Use Permit (CUP) is granted to expand a mini-storage complex located at 3442 Hualapai Mountain Road on property described as a Portion of the NE 1/4, NE 1/4 of Section 29, 1.21N., R.16W. of the G&SRM, Mohave County, Arizona, as shown on a Parcel Plat recorded 3/17/98 at Fee No. 98.15094, with the following conditions:

1. Street improvements will be required at the time of development along Hualapai Mountain Road and Rosslynn Drive per the Streets and Sidewalks Development Rules and Regulations.

2. Grading and drainage plans will be required at the time of development. Drainage retention is required in accordance with the Kingman Area Master Drainage Plan.

3. New water service to this unsubdivided parcel will need to be reviewed and approved by MUC and the City Council per Article 3.3(E) of the Municipal Utility Regulations.

4. A fire hydrant shall be installed on Rosslynn Drive at the proposed entrance to meet the required fire flow and fire hydrant spacing.

5. No storage unit doors shall directly face Hualapai Mountain Road or Rosslynn Drive.

6. Parapets for the buildings shall be varied in height. Any walls longer than 25 feet which face the streets and other properties shall have architectural features such as columns at least every 25 feet with contrasting but complimentary colors.

7. All structures shall be setback a minimum of a 20-foot setback from Hualapai Mountain Road and Rosslynn Drive, and a 10-foot setback will be required where the property abuts a residentially zoned property to the south. No structures shall be constructed within any existing utility easements.

8. Parking shall be in accordance with the requirements of Section 22.000: Off-Street Parking and Loading.

9. Access to the proposed mini-storage units shall be from one new driveway off of Rosslynn Drive. Vehicular access from Hualapai Mountain Road shall not be permitted.

10. Landscaping and screening shall adhere to the requirements of Sections 10.000 and 14.000 of the Kingman Zoning Ordinance.

11. The new and existing buildings will be constructed to comply with the general performance standards of the **Section 35.000 Overlay District: Design Review Manual for the Hualapai Mountain Road Area Plan** of the *Zoning Ordinance of the City of Kingman.*

PASSED AND ADOPTED by the Mayor and Common Council of the City of Kingman, Arizona this 15th day of October, 2013.

ATTEST:

/s/ Gabriel A. Johns
Gabriel Johns, City Clerk

APPROVED:

/s/ Janet Watson
Janet Watson, Mayor

APPROVED AS TO FORM:

/s/ Carl Cooper
Carl Cooper, City Attorney

[Stamp Omitted]