

Petition Protesting 7/13 Planning Commission Recommendation

As explained below, the decision of the Planning Commission to recommend approval of ZON-23-01 was so wide of the mark that its unreasonableness lies outside the realm of fair debate.

Character of the Neighborhood.

- Jay Cook, Director of Planning and Development conceded at the July 13, 2023 (7/13) hearing that major highways like K254 serve as boundaries for zoning decisions. At the May 11, 2023 and July 13, 2023 hearing, Commissioner Jordan specifically and candidly pointed out that the M-1 zoning to the east of the property is not “character” because nothing has been built on it yet, and because zoning is specifically considered in Golden Factor 2. No commissioners voiced disagreement with this characterization by Commissioner Jordan.
- Thus defined, the “character of the neighborhood” is predominantly agricultural and residential, with one high school, one medical office, and some multi-family housing thrown in. In fact, zero percent of the neighborhood that interacts via a common road (i.e., N. Rock Rd) is zoned M-1. This is the case from the northern and southern border of Bel Aire, KS on N. Rock Rd.
- Bel Aire Zoning Ordinance 18.7.1 recognizes that Rural Residential Districts are appropriate “where a neighborhood character of single-family dwellings on large lots has been established,” and the Agricultural (AG) district “is intended to maintain and enhance agricultural operations and preserve agricultural lands utilized for crop production or the raising of livestock.” Those neighborhood characters are simply not compatible with an M-1 District. In fact, they are at nearly opposite ends of the density spectrum, as Bel Aire has consistently recognized - including Commissioner Jordan’s statements at the 7/13 hearing. None of the other commissioners expressed disagreement with Commissioner Jordan’s comments.
- Properties to the northwest of the subject property are not part of the Bel Aire Planning Area, as recognized by the 2014 Comprehensive Plan: “The

"Bel Aire Planning Area" as delineated for this Plan includes the City and ONLY properties to the North and East of the current developed land in the City limits of Bel Aire as illustrated in the "Vision" Future Land Use Map."

- This factor clearly weighs in favor of denying the application for rezoning.

Zoning and Uses of Properties Nearby

- The City's presentation included properties that are north of 254 and west of Rock Road, and thus not "nearby." Jay Cook, Director of Planning and Development, conceded at the 7/13/2023 hearing that major highways like K254 serve as boundaries when making zoning decisions. The presentation also focused on property that has been "zoned" M-1" but never "used" as M-1 on the east and part of another neighborhood that interacts on a common road (N. Webb Rd) that is more mixed use zoning and more consistent with M-1 zoning standards. In addition, the M-1 rezoning of the property that *is adjacent east and* nearby the subject property is entitled to little weight because it is very recent (April of 2022), and the approval of that zoning change was based in part on four factors that do not exist for the current proposed rezoning.
1. First, as noted in the April 15, 2022 Bel Aire Staff Report, when the Commission applied the Golden Factors, it was apparently with the understanding that traffic would come from Webb Road - already a four-lane road, and that "intersection plans [were] in the works with KDOT" for a "a proposed interchange at K-254 and Webb Road." No similar plans have been identified as "in the works" for an interchange at K-254 and Rock Road. Also, Webb Road is already a four-lane road with shoulders on both sides. Rock is a two-lane road with no shoulders.
 2. Second, the April 15, Bel Aire Staff Report indicated that "the requested M-1 zoning is about as far away from rural residential as one can get." That is not the case for the current proposed rezoning, which is "about as close to rural residential as one can get." The Staff Report did say that "you can't expect that this area will stay rural forever -especially with it being this close to a city and with the intersection plans in the works with KDOT" - but it was obviously referring to plans for the intersection at 254 and Webb, not the intersection at 254 and Rock.

3. Third, the approval of the zoning change was apparently based in part on the recommendation in the Staff Report that, through the PUD process, the “Planning Commission will have the opportunity to ensure that a buffer is created between the residential area to the west and the school to the south.” In other words, a property that is “generally located about ¼ mile east of Rock Road” would require a buffer between it and the rural residential district that is east of Rock Road, and the high school that is south of the annexed property. It would be illogical and irrational to suggest a buffer in 2022 between M1 and Rural Residential properties that are separated by a quarter mile, but then use that zoning change the very next year to justify rezoning to M-1 the property that is immediately adjacent to the Rural Residential properties.

4. Lastly, the 2022 Staff Report points out that “No interested parties, other than the agent for the applicant showed up to speak either for or against the proposed rezoning.” that is certainly not the case here, where there is significant opposition to the proposed rezoning. [April 2022 Minutes.pdf](#)

- The proposed zoning change would be contrary to Goal 1, Objective 1 of the 2014 Comprehensive Plan: “Encourage congruent land uses that are compatible and developed in a lowest-impact method to adjacent properties.”

This factor weighs in favor of denying the requested zoning changes - the existing uses favor denial, and the adjacent M-1 zoning was approved in 2022 based on the premise that the site would use 254 and Webb for access, and that the property rezoned in 2022 would include a buffer to the Rural Residential property, and that the property that is currently requesting rezoning would also act as a buffer between M-1 and Rural Residential.

Suitability of the Subject Property for the Uses to Which it Has Been Restricted

- The Staff Report recognizes that the land is zoned as AG, which “is intended to maintain and enhance agricultural operations and preserve agricultural lands utilized for crop production or the raising of livestock.” (Emphasis added). The Staff Report doesn’t say anything about why the property is no longer “suitable” for that use, and there is no explanation of why the land is unsuitable for “raising of livestock.” In fact, Mr. Cook conceded at the hearing that the subject property *is suitable* for agricultural use. Mr. Cook

argued that AG is not the *most suitable* use for the subject property - but both the Zoning Regulation and the *Golden* case refer to "suitability" - not "most suitable."

- The Staff Report claims that "The holding zone" for newly annexed land in the city is Agricultural." But Zoning Regulation 18.6.3. says: "All land which is hereafter annexed into the City shall be zoned AG – Agricultural until such classification shall have been changed by an amendment to the zoning regulations as provided by this Code. A written agreement with the landowner prior to such annexation to designate a specific zoning district designation other than AG may be approved as part of the Annexation process." The Staff Report does not mention any such written agreement. Also, if newly annexed land starts as AG, the rezoning still must meet all the requirements of the Zoning Regulations. In other words, starting as AG in annexation does improve the justification for changing the zoning classification - contrary to the City's argument at the hearing.
- Also, land that is annexed does not automatically fall into a "holding zone." Instead, under 18.7.0, "Agricultural District may serve as a "holding zone" for land where future urban expansion is possible, but not yet appropriate due to the unavailability of urban level facilities and services. (Emphasis added). The Staff Report says nothing about the unavailability of urban level facilities and services when Bel Aire annexed and zoned the land in May of 2003. No evidence was presented at the hearing that "urban level facilities and services" were not available when the property was annexed in 2000. In fact, Mr. Cook's statement at the hearing that those facilities "may not" have been available in 2000 is a tacit admission that those facilities *may have been* available in 2000.
- To summarize, it does not appear that this land really is a "holding zone", and even if it were, that would not help satisfy this "suitability" factor.
- The subject property was used by Bel Aire for agricultural purposes from the time Bel Aire bought the land in 2003, until it sold the land in 2023. Nothing in the Staff Report suggests that Bel Aire had a written agreement with the prior owner that designated the land as something other than an Agricultural District. The City has never designated the land as a "holding zone" or as temporary commercial or industrial special uses. There was no evidence of unavailability of urban level facilities and services when Bel Aire annexed and zoned the land in May of 2003. There is nothing about the subject property that makes it "unsuitable for the uses to which it has been currently restricted" - i.e., Agricultural.

This factor weighs in favor of denying the application for rezoning.

Extent to Which Removal of the Restrictions Will Detrimentially Affect Nearby Property

- Mr. Cook conceded at the hearing that the city does not know whether the zoning changes will increase the value of neighboring properties, or decrease those values. Statements from Dr. Donnis McPhaul cited from research and expert knowledge indicate that additional noise and traffic would decrease those values, and the city offered no evidence to rebut that research.
- On 7/13, Mr. Cook conceded at the hearing that the zoning change will bring additional traffic, and the applicant asked Matt Cortez to address that concern. Mr. Cortez indicated that he has been actively working with KDOT and explained that KDOT's current plans are to eliminate the K254-Rock interchange but conceded that the timetable for that is uncertain. Nobody from KDOT spoke at the hearing, but a KDOT representative has told neighbors that the K254-Rock flyover will not be completed in time to alleviate traffic that the zoning change will cause. There is evidence from current Bel Aire/KDOT road construction projects on N. Woodlawn that progress is very slow and highly disruptive to the neighborhood. This presentation was a tacit admission by Staff that "we don't know yet what the traffic impact will be on nearby properties, but we are hoping for something good from some unnamed "studies and engineering." If the City Council is placing *any* reliance on this paragraph, it should table the vote on the rezoning until it can review the "studies and engineering" that might mitigate the increased traffic.
- The Bel Aire Master Plan states: specifically, the first sentence of the "Basic Land Use Concepts" provides that: "The activities of higher intensity land uses tend to negatively impact lower intensity uses. For example, a manufacturing plant typically has a fairly high level of activity, which may produce noise and traffic that affect nearby homes." Similarly, the 2016 Bel Aire Master Growth Plan requires "Maximiz[ing] compatibility between land uses to preserve community character" by "allowing adjacent land uses to be separated by no more than one intensity level." The difference in intensity

levels between the proposed M-1 rezoning and all of adjacent properties would be greater than one.

- It is undisputed that the zoning change, without any mitigation, will increase traffic on Rock Road, and drastically increase the risk of accidents at 254 and Rock Road. The Commission lacks the necessary facts to quantify or even estimate this detrimental effect until it receives results from any studies and engineering that might currently be underway along Hwy 254, Rock Rd., and Webb Rd. to mitigate negative impact of added traffic.
- Other potential detrimental effects to nearby properties include: light pollution, environmental pollution, water usage, obtrusive utility lines, encroachment on property by widening Rock Road, noise, and hours of operation. The commission lacks the necessary facts to quantify or even estimate these detrimental effects until it receives results from any studies and engineering that might currently be underway.

This factor weighs in favor of denying the application for rezoning.

Length of Time the Subject Property Has Remained Vacant as Zoned

- On 7/13, Mr. Cook's presentation to the Planning Commission treated the subject property as "vacant." But land that is being used for agricultural is not "vacant" - it is agricultural. And "not purchased" does not mean "vacant."
- *Golden v. City of Overland Park*, 224 Kan. 591 (Kan. 1978) created the eponymous Golden Factors, and that case makes it clear that the question for this factor is whether the subject property remained vacant because the applicant for the zoning change "was unable to make any economically feasible use of his property under the existing zoning." *Id.* at 599. In that case, the applicant presented evidence that a glut in the market for office space made it impossible for him to make any economically feasible use of his property under the then-existing zoning that limited the land use to commercial office buildings.
- In the current rezoning application, no facts have been presented to show that the current or former land owners have been unable to use the land for "raising livestock" or the other permitted uses under the existing AG zoning. Instead, the subject property has been used for "raising livestock" during the entire time that Bel Aire owned property, and the current owner has

presented no evidence to show that they would be unable to make any economically feasible use of the property under the existing Ag zoning. Unlike in *Golden*, there has been no showing that there is a glut on the market for agricultural land. It is not enough for the property owner to show that they could make *more* money if the rezoning is approved.

This factor weighs in favor of denying the application for rezoning.

Relative Gain to the Public Health, Safety, and Welfare by Destruction of Value of the Applicant's Property as Compared to the Hardship on Other Individual Landowners [sic].

- This factor focuses on the “gains” achieved by denying the zoning change, compared to the hardship upon the owner that applies for the zoning change. The Staff Report and the City’s presentation to the Planning Commission pulls this factor from 18.5.2.E.10, which is apparently pulled from page 598 of *Golden v. City of Overland Park*, 224 Kan. 591 (Kan. 1978). But both the Staff Report and the 7/13 presentation to the Commission incorrectly inserted the word “other” before the words “Individual Landowner.” The Kansas Supreme Court described this factor in *Golden* this way: “the relative gain to the public health, safety, and welfare by the destruction of the value of plaintiff’s property as compared to the hardship imposed upon the individual landowner.” (Emphasis added).
- The City’s replacement of “the” with “other” in the Staff Report confuses the meaning of this factor. As written by the Kansas Supreme Court, this factor is intended to compare the gain to public health, safety and welfare that would be achieved by denying the request, with the hardship that denial would impose on the “individual landowner” that requested the zoning change. This is how the Kansas Court of Appeals interpreted this factor at pages 1272 and 1276 of *R.H. Gump Revocable Trust v. City of Wichita*, 131 P.3d 1268 (Kan. Ct. App. 2006).
- The “facts” included in the Staff Report and at the 7/13 hearing do not address either the gain that denial would bring to public health, safety, and

welfare, nor the hardship that denial would cause the owner of the subject property.

- Denial of the proposed zoning change would benefit the public health, safety, and welfare because it would avoid a drastic increase of traffic through the dangerous intersection of 254 and Rock Road and would avoid the additional drain on resources and potential environmental hazards that a large industrial site might create - as compared to the current agricultural uses.
- At the 7/13 hearing, the Planning Commission speculated that the Planned Unit Development (PUD) might mitigate these risks. But neither the property owner nor the city provided any details or explanation of how a PUD could mitigate risks that are inherent in adjacent land uses with dramatically different density levels. It is inappropriate to speculate at this point about what might be in the PUD.
- Turning now from the “gains” that denial would bring to the “hardship” that denial would bring, the landowner has not presented any facts to show that denial of the proposed zoning change would impose any undue hardship on them. It is not a “hardship” when all that the property owner can argue is that they could make *more* money if the rezoning is approved. This is especially true here, where the property owner bought the land with full knowledge that it is adjacent to agricultural land and a rural residential district. Any “hardship” in this case is self-inflicted.

This factor weighs in favor of denying the application for rezoning.

Conformance With the Comprehensive Plan

- The Bel Aire Comprehensive Plan does not show ANY of the subject property as M-1. Instead, the greatest density for the subject property is a portion of it that is shown as commercial.
- The Staff Report and the Staff's presentation at the hearing pointed out that the Comprehensive Plan supports maximizing revenue for the City and using the periphery for industrial and commercial, but neither the report or the presentation informed the Commission about parts of the Comprehensive Plan and Master Plan support denial of the proposed zoning change.
- 18.5.2.E.12 refers to the “master plan” - not the Comprehensive Plan. The proposed rezoning does not conform with the adopted or recognized master

plan being utilized by the city. Instead, the proposed rezoning violates fundamental protections in the Bel Aire Master Plan, which are protections that are intended to protect nearby properties from detrimental effects.

- The Master Plan states that “higher intensity land uses tend to negatively impact lower intensity uses.” It is the most undisputed concern for Golden Factor 6. That is, the proposed rezoning of M-1 (Level 6) is in fact the highest density re-zoning change (Figure 3.5: Bel Aire Master Plan) than the current AG zoned land use of the subject property (Level 1) and the Rural Residential land use (e.g. Level 2) that is immediately adjacent to the west. Adjacent to the south include the multi-family housing that is to the south and the high school that is to the south, and to the southwest, the more agricultural land. Thus, according to the City’s own Master Plan, approving the zoning change will negatively affect nearby properties. There is nothing stated in the Master Plan that a PUD will prevent a negative impact.
- The Bel Aire Master Growth Plan requires avoiding this detrimental impact by: “[allowing adjacent land uses to be separated by no more than one intensity level.” The Plan does not provide an exception to this requirement where there is PUD. The intensity levels between the proposed M-1 district and the adjacent properties in every direction are separated by more than one intensity level.
- The first sentence of the “Basic Land Use Concepts” provides:

“Land uses are planned and regulated according to intensity, which describes the level of activity and density of a use, along with the associated impacts. The activities of higher intensity land uses tend to negatively impact lower intensity uses. For example, a manufacturing plant typically has a fairly high level of activity, which may produce noise and traffic that affect nearby homes.”
- This is exactly the situation created by the proposed zoning change. The proposed change is from agricultural - the lowest density - to industry/manufacturing - second in density only to Utility/Infrastructure. And it is directly adjacent to Rural Residential density and Agricultural density.
- A comparison of 18.7.0 (AG) to 18.7.13 (M-1) shows that virtually none of the Permitted Uses or Accessory Uses that rezoning to M-1 would allow are allowed under the AG District. So, virtually all of the AG restrictions would be “removed.”

- 18.1.3 explains that the purpose of the zoning regulations is “To establish a variety of zoning district classifications according to the use of land and buildings with varying intensities of uses and standards whose interrelationships of boundary zones form a compatible pattern of land uses and buffer areas which enhance the value of each zone.” If the zoning change were approved, there would be no buffer zone between Rural Residential and the incompatible M-1 uses that are proposed by the requested zoning change. The applicant has presented no facts to show that the proposed zoning change would “enhance the value of each zone” - especially the adjacent Agricultural and Rural Residential zones. Nor has the applicant presented evidence that the proposed rezoning would “enhance the value of” the high school, the apartment complex, the medical office, or the agricultural land on the west side of N. Rock Rd.
- Section 18.1.5 provides that “Where any nonconformity with the Comprehensive Plan or other planning policy may be perceived, the provisions of these regulations shall control.”
- Objective 1 for Goal 1 strives to: “Encourage congruent land uses that are compatible and developed in a lowest-impact method to adjacent properties.” The proposed M1 zoning would not be compatible with the adjacent agricultural or rural residential uses.
- Objective 2 for Goal 4 includes: “Avoid development that would create a negative impact on the quality of residential life.” The proposed zoning change would be counter to this objective.

This factor weighs in overwhelming favor of denying the application for rezoning.

Property Owner Opinions

- The protest petition filed on May 24 includes opinions of other property owners that are opposed to the proposed rezoning. Property owners spoke against rezoning at both the May 11 and July 13 hearings.
- Although three Bel Aire residents spoke in favor of the rezoning, they offered no explanation for how the rezoning would impact their properties - only that they favored the rezoning because it would benefit Bel Aire as a whole.
- Those opinions may help the City with the Golden Factor that addresses public welfare, but they have no bearing on the Golden Factor that addresses property owner opinions, because their statements had no logical connection

to their status *as a property owner*. Similarly, the emails that Mr. Cook read to the commission add nothing to this Golden Factor because the authors were not available to answer any questions, and their comments were written from the perspective of a Bel Aire resident, and not a property owner.

- Some of these Bel Aire residents stated, without citing any supporting evidence, that Bel Aire's intention since it bought the subject property in 2020 was always to convert it to industrial property. But Rural Residential (including Heritage Hill) and Agricultural uses were here *before* 2020. In other words, "we were here first"! If Bel Aire truly bought the subject property with the intention of converting it to industrial uses, then it shouldn't have bought the property in the first place, and it would have avoided its current predicament: A rezoning that would violate fundamental precepts of zoning and of its own master plans.

This factor weighs in favor of denying the application for rezoning.

Recommendation of Professional Staff

Because the staff recommendation is based on a misinterpretation or misapplication of the Golden Factors and 18.5.2.E, the staff recommendation is entitled to little weight. But comments at the hearing suggest that at least one commissioner - Commissioner Roths - made their decision based *entirely* on the staff recommendation.

This abdication of the commission's quasi-judicial function was made worse by the extremely late delivery to the commission of the Alternative Proposed Findings of Fact for 7/13/23 Planning Commission Meeting, which staff delivered to the commission a few short minutes before the commission approved the zoning change - leaving no time for the commission to even review, much less independently consider facts and factors that weigh in favor of denying the zoning change. Instead, the commission heard a one-sided presentation in favor of the zoning change, and recommended the zoning change without meaningful access to key facts and factors that favor denial of the zoning change.

1. PRINT YOUR ADDRESS HERE: 7625 E Oak Tree

PRINT YOUR NAME HERE: Lon Dunham

SIGN YOUR NAME HERE: Lon Dunham

2. PRINT YOUR ADDRESS HERE: Louis Ryan Hendricks
PRINT YOUR NAME HERE: 7620 E. Oaktree Lane
SIGN YOUR NAME HERE: J. Ryan Hendricks
3. PRINT YOUR ADDRESS HERE: MERLIN MARSHALL
PRINT YOUR NAME HERE: _____
SIGN YOUR NAME HERE: Martin Marshall
4. PRINT YOUR ADDRESS HERE: 7730 E. OAK TREE LN
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5. PRINT YOUR ADDRESS HERE: 7901 E. Oaktree Ln
PRINT YOUR NAME HERE: Donnis McPhaul
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6. PRINT YOUR ADDRESS HERE: 7900 E Oak Tree Ln
PRINT YOUR NAME HERE: Jessica Conkling
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7. PRINT YOUR ADDRESS HERE: 7735 E OAK TREE LN
PRINT YOUR NAME HERE: ANNE KUCKELMAN Dean Kuckelman
SIGN YOUR NAME HERE: Anne Kuckelman Dean Kuckelman
8. PRINT YOUR ADDRESS HERE: 7900 E. MILL STREAM
PRINT YOUR NAME HERE: LARRY WEIS
SIGN YOUR NAME HERE: Larry Weis

9. PRINT YOUR ADDRESS HERE: CHUC HOANG
PRINT YOUR NAME HERE: 7620 E. MILL STREAM RD, KETCHI
SIGN YOUR NAME HERE: C Rudolph Hoang
10. PRINT YOUR ADDRESS HERE: 7735 E MILL STREM RD
PRINT YOUR NAME HERE: CARA SHERWICK
SIGN YOUR NAME HERE: Cara Sherick
11. PRINT YOUR ADDRESS HERE: 7901 MILL STREET
PRINT YOUR NAME HERE: STEVE MC CORMY
SIGN YOUR NAME HERE: Steve McCormy
12. PRINT YOUR ADDRESS HERE: 7730 E. Mill Stream Rd
PRINT YOUR NAME HERE: Gary Hawley
SIGN YOUR NAME HERE: Gary Hawley
13. PRINT YOUR ADDRESS HERE: 7625 E. Millstream Rd.
PRINT YOUR NAME HERE: Cathy Frack
SIGN YOUR NAME HERE: Cathy Frack
14. PRINT YOUR ADDRESS HERE: Travis Solomon
PRINT YOUR NAME HERE: 7525 E Millstream Rd
SIGN YOUR NAME HERE: Travis Solomon
15. PRINT YOUR ADDRESS HERE: 7420 E Oak Tree
PRINT YOUR NAME HERE: Brian Boeding
SIGN YOUR NAME HERE: Brian Boeding

16. PRINT YOUR ADDRESS HERE: 7320 E. Oak Tree Lane

PRINT YOUR NAME HERE: Elizabeth Stonebrook

SIGN YOUR NAME HERE: Elizabeth Stonebrook

17. PRINT YOUR ADDRESS HERE: 7200 E. OAK TREE LN

PRINT YOUR NAME HERE: CARLA HAMILTON

SIGN YOUR NAME HERE: Carla J. Hamilton

18. PRINT YOUR ADDRESS HERE: 7425 Oak Tree Ln

PRINT YOUR NAME HERE: Lisa Brummer

SIGN YOUR NAME HERE: Lisa Brummer

19. PRINT YOUR ADDRESS HERE: 7520 E Oak Tree Ln

PRINT YOUR NAME HERE: Roger Schurter

SIGN YOUR NAME HERE: Roger Schurter

20. PRINT YOUR ADDRESS HERE: 6030 Heritage Hill Ln

PRINT YOUR NAME HERE: John D. Hunt Jr

SIGN YOUR NAME HERE: John D. Hunt Jr

21. PRINT YOUR ADDRESS HERE: 7320 E. Mill Stream Rd

PRINT YOUR NAME HERE: Erik Breckenridge

SIGN YOUR NAME HERE: Erik Breckenridge

22. PRINT YOUR ADDRESS HERE: 7425 E Millstream Rd

PRINT YOUR NAME HERE: Orpha Eyres

SIGN YOUR NAME HERE: Orpha Eyres

23. PRINT YOUR ADDRESS HERE: 7420 E MILA STREET

PRINT YOUR NAME HERE: JOHN GERLACH

SIGN YOUR NAME HERE: John B. Gerlach

24. PRINT YOUR ADDRESS HERE: ~~MARK LEBER~~ 7201 OAK TREE LN

PRINT YOUR NAME HERE: MARK LEBER

SIGN YOUR NAME HERE: Mark Leber

25. PRINT YOUR ADDRESS HERE: ~~Stan Bergkamp~~ 5601 N ROCK RD

PRINT YOUR NAME HERE: Stanley Bergkamp

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26. PRINT YOUR ADDRESS HERE: _____

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JUL 24 2023

City Clerk