



CITY OF NORMAN, OK STAFF REPORT

MEETING DATE: 03/06/2024

REQUESTER: Raven Investments, LLC

PRESENTER: Elisabeth Muckala, Asst. City Attorney

ITEM TITLE: City Attorney Staff Report for BOA-2324-10

BACKGROUND:

This appeal by Raven Investments, LLC (“Raven”) relates to Floodplain Permit Nos. 684 and 685, which were approved by the Norman Floodplain Permit Committee (“FP Committee”) on January 2, 2024. These two permits originated from one application submitted by NextEra Energy Transmission Southwest, LLC (“NextEra”) on December 14, 2023 (“December Application”).

Notably, NextEra has previously applied for a permit from the FP Committee in July 2023 (“July Application”) for the same project and was denied, which denial was appealed to this Board and heard on August 23, 2023. At the BOA meeting, protestors cited a number of issues with permit application, the primary argument being that NextEra lacked ownership/access (based on pending eminent domain actions).¹ At that time, this Board again denied the permit with a vote of 3-2, and NextEra filed its appeal of the BOA denial in the District Court in and for Cleveland County, Oklahoma, Case No. CV-2023-3288. Several protesting landowners were permitted to intervene in that action, and that appeal is still pending.

NextEra’s December Application contained much of the same project and floodplain calculation information as its July Application. In addition, NextEra provided supplemental tribal and environmental regulatory information, as well as detailed information regarding ownership and access, including easements, permits and court filings from related eminent domain actions for the subject parcels. The December Application also clearly identified the 37 different parcels implicated by its Application, as well as the specifics of record ownership for each parcel.

The City of Norman Public Works Director, who serves as the Floodplain Administrator and chair of the FP Committee, accepted the application for consideration and Public Works staff proceeded in evaluating the project and floodplain calculation information as well as the supplemental tribal and environmental regulatory information. City Public Works staff requested that City legal staff review and evaluate the information provided by NextEra regarding ownership and access for the 37 impacted parcels.

¹ Environmental concerns, project placement, and floodplain rise issues were also voiced at the August 2023 BOA meeting.

Upon review, City legal staff was able to identify two categories in which to place each of the 37 impacted parcels. The first category was those properties for which matters of NextEra's present right of access appeared to be satisfactorily confirmed. The properties placed in this category were subject to any one of the following: (a) an approved regulatory permit; (b) an easement signed by record owners and filed of record in Cleveland County; or (c) a Commissioners' Report filed of record in Cleveland County WHERE IT WAS ALSO DETERMINED THAT:

- i) The Commissioners' just compensation award amount had been deposited with the Court Clerk by Next Era; AND
- ii) No exceptions to the Commissioners' Report and no requests for Stay of Proceedings were filed and/or pending before the applicable court.

With respect to projects pursued by eminent domain authorities, Oklahoma statute provides that where said eminent domain authority "shall, at any time before it enters upon said real property for the purpose of constructing said road, pay to said clerk for the use of said owner the sum so assessed and reported to him as aforesaid, it ***shall thereby be authorized to construct and maintain*** its road over and across said premises." 66 Okla. Stat. § 53(C) (emphasis supplied).² Further, once the Commissioners' Report has been filed in county records, the condemning authority's right to the property interest is considered "without further acknowledgement or proof, in the manner and ***with like force and effect as is provided for the recording of deeds.***" *Id.* (emphasis supplied).

City Legal Staff confirmed this status for the following 23 of the 37 total impacted properties:

No.	Owner of Record	PIN	OK-CLE
1	Raven Investments, LLC	68780	OK-CLE-013
2	Comm'rs of the Land Office	68650	OK-CLE-018
3	West Franklin Sod Farm, LLC	191103	OK-CLE-028
4	Raven Investments, LLC	76360	OK-CLE-073
5	William L. and Jean Ann Baskett;	52528	OK-CLE-74
6		189834	OK-CLE-075
7		104269	OK-CLE-076
8		104268	OK-CLE-077
9	Oklahoma Dept. of Transportation	76353	OK-CLE-080
10	Moore Norman Technology Center	190590	OK-CLE-103
11	Moore Norman Technology Center; School District No. 17	190591	OK-CLE-104
12	Oklahoma Turnpike Authority	188042	OK-CLE-131
13	City of Norman	76290	OK-CLE-132
14	Shaz Investment Group, L.L.C.	76286	OK-CLE-133
15		76281	OK-CLE-138

² Though this title of Oklahoma Statutes applies to railroads and the applicable language refers to "roads," this process applies statutorily to eminent domain authorities which provide electrical power. See 27 Okla. Stat. § 7(A) ("... any ... corporation ... authorized to do business in this state, to furnish light, heat or power by electricity ... shall have and exercise the right of eminent domain in the same manner and by like proceedings as provided for railroad corporations by laws of this state.").

No.	Owner of Record	PIN	OK-CLE
16	Jennings Living Trust; Teresa and George Dotson; Jake J. and Mary Anne Tullius; Jeff and Ellen Tullius; Betty Jane Tullius and Jeffrey Rose; Jeannine Zachery	76282	OK-CLE-139
17	Mayhew & Buckmaster Living Trust	76284	OK-CLE-140
18	Jennings Living Trust; Teresa and George Dotson; Jake J. and Mary Anne Tullius; Jeff and Ellen Tullius; Betty Jane Tullius and Jeffrey Rose; Jeannine Zachery	76283	OK-CLE-141
19	Carl Gilbert Williams	191196	OK-CLE-145
20	James H. Little Trust; Janet Bradford Living Trust	66889	OK-CLE-149
21	Reneau Revocable Living Trust	118061	OK-CLE-154
22	Frank Lynn and Jannie Matlock	66881	OK-CLE-156
23	L.R. Ranch Operating Company, L.P.	66877	OK-CLE-159

For the remaining properties impacted by the December Application, it was determined that: a) NextEra had not produced a filed easement; AND b) exceptions to the Commissioners' Report and/or a Request for Stay had been filed or were pending before the applicable court.

City legal staff determined that for these properties, NextEra could only claim a "qualified" right of access, one that could later be affected by an adverse ruling of the court in that eminent domain action. These remaining 14 of the 37 total impacted properties are as follows:

No.	Owner of Record	PIN	OK-CLE
1	Louis Jean Farm LLC;	139438	OK-CLE-002
2	Dana Collins	68814	OK-CLE-003
3	Bird Ranch, L.L.C.	150714	OK-CLE-003.010
4		150166	OK-CLE-003.020
5	Allen Holdings LLC; Allen Farms, Inc.	147711	OK-CLE-003.030
6	Eisen-Sturmer I, LLC	68584	OK-CLE-020
7	Leo & Gloria Calvert Revocable Trust	68583	OK-CLE-023
8	Calvert Trust (Shirley Calvert)	68582	OK-CLE-024
9		159700	OK-CLE-025
10	Jerry Don Calvert and Belinda Sue Calvert Rev. Trust	159699	OK-CLE-026
11	Jeremy S. Calvert; Samantha A. Calvert	68580	OK-CLE-027
12	Franklin Business Park, LLC	188425	OK-CLE-081
13	O'Brien Farms, LLC	137123	OK-CLE-152
14	Don L. and Lentisa C. Wilkerson	101725	OK-CLE 155

City legal staff, utilizing the recommendation provided by City Public Works Staff in its Staff Report to the FP Committee, presented the following modified recommendations to the FP Permit Committee at its January 2, 2024 meeting:

- 1) With respect to **the twenty-three (23) identified** parcels with present and unqualified access, City Staff recommends approval **as Permit #684**.
- 2) With respect to **the fourteen (14) identified** parcels where NextEra's access is still qualified, City Staff recommends approval of a separate permit, **Permit #685**, subject to the following **conditions**:
 - a) The permit shall only become active for NextEra's utilization upon NextEra establishing to the satisfaction of City Staff, including legal staff, that its right of access is no longer qualified by outstanding legal impediments or other objections. **This proof of access may be established parcel-by-parcel**; and
 - b) If NextEra should be found to have entered any of these parcels for the purposes of this permit without first having established an unqualified right of access in an agreed-upon manner, **Permit #685 (and otherwise identified as a separate permit within other administrative City systems)** shall be subject to immediate revocation at the discretion of the Chair of the Floodplain Permit Committee.³

City legal staff's recommended modifications included: (a) a severance of the FP Committee's consideration of the application into two groups, to be issued with two separate permit numbers; (b) a specific identification of those parcels to which NextEra appeared to have unqualified rights of access under Oklahoma law, including Oklahoma eminent domain law, for inclusion in the first group where an unconditional permit could be granted; (c) a specific identification of those parcels to which NextEra had failed to establish unqualified access, for inclusion in a conditionally-granted permit.

City Public Works Staff, as well as City legal staff, presented analysis and recommendations to the FP Committee. Accepting both, a motion was made and seconded on the City's Staff's recommendations, as modified in the presentation by City legal staff. The motion passed with a vote of 5-2. As a result of the vote, permit #684 was approved and issued to NextEra for the 23 properties identified above. Permit #685 was conditionally approved, but not issued until such time as NextEra provided documentation of its unqualified rights of access to all or any of the 14 properties covered by that permit. As of the date Raven filed its appeal, no such documentation had been provided by NextEra.⁴

³ The language in **bold print** is that specifically added by City Legal Staff in order to modify the original recommendation by City Public Works Staff on the December Application.

⁴ An appeal of an administrative official or body (such as the FP Committee) "stays all proceedings in furtherance of the action appealed from...." NMC 36:570(f)(3). Therefore, no such issuance can now be considered or occur with respect to Permit #685.

DISCUSSION:

In its appeal, Raven poses several arguments, some of which specifically reference City legal staff's presentation to the FP Committee at its January 2, 2024 meeting, including the procedures applied in that consideration and decision. City legal staff hereby provides analysis and response to those arguments, as well as explanation of generally applicable standards in this proceeding.

A. BOA's Standard of Review

An appeal of a decision of the FP Committee is an appeal of an administrative decision, as addressed in NMC 36-570(c)(1) & (f). Generally, "[a]n appeal stays all proceedings in furtherance of the action appealed from" and the BOA is charged to "decide the same within a reasonable time." *Id.* at (f)(2)-(3). In exercising its administrative appeal power, the BOA:

[S]hall reverse or affirm, wholly or in part, shall modify the order, requirement, decision, or determination appealed from, shall make such order, requirement, decision, or determination as ought to be made, so long as such action is in conformity with the terms of this chapter, and to that end shall have the powers of an administrative official from whom the appeal is taken.

Id. The above standard allows the BOA broad authority in considering the administrative appeals before it. The BOA may make any decision about the application and permits that the FP Committee could have made. The BOA may approve, deny, request additional information, and send the permit back to the FP Committee with instructions (as has occurred with other FP appeals in the past). The BOA is permitted to look at the entire application afresh and "to that end shall have the power of" the FP Committee itself in considering the application.

B. Raven as Property Owner and Appellant

Raven owns two of the 37 parcels impacted by NextEra's application, parcels 1 and 4 on the first list. Because all acquisition portions of Raven's eminent domain action have concluded, Raven's parcels were included in Permit #684, those parcels in which NextEra had a present ownership interest. Raven was also included within the notice area for the application as a whole, and appeared through counsel to protest the December Application, and the FP Committee's consideration and grant of both Permit #684 and #685.

C. Stay Applicable to July Application and Pending District Court Appeal

Rather than jurisdiction, this argument by Raven actually speaks to the FP Committee's discretion, and this BOA's discretion, in considering permit applications. Raven argues that the FP Committee lacked jurisdiction to consider NextEra's December Application. Raven bases its argument upon Norman Municipal Code ("NMC") 36-570, the code provision establishing the parameters of the BOA's authority over all matters, including this appeal. Raven argues that NMC 36-570's application to the July Application prevents the FP Committee's consideration of the December Application due to the stay imposed by 36-570.

The stay upon which Raven bases its argument arose from the denied July Application. However, it is the substance of the December Application at issue, so a jurisdictional bar does not arise. However, the BOA's authority to evaluate and either accept or reject the December

Application is just as broad in this proceeding as was the FP Committee's in its own consideration of the December Application. Upon receipt and review of the December Application, the FP Committee (through its FP Administrator or otherwise) was free to deny or otherwise reject it – if it was indeed viewed as the same as the July Application the FP Committee previously denied. However, the FP Committee, in its discretion, opted to consider the December Application and grant two separate permits, #684 and #685. As set forth above, the BOA is endowed with the same breadth of discretion as the FP Committee in its consideration of this appeal.

D. Severance of December Application into Two Approved Permits

The FP Committee's decision to create two permits from the December Application⁵ was also within its administrative discretion. Raven argues that the FP Committee lacked the authority to separate the December Application, and the parcels impacted by the December Application, into two separate permits. First, Raven argues the separation exceeded the FP Committee's authority under NMC 36-570(f). As cited by Raven, this provision requires that the FP Committee "prior to rendering a decision thereon, obtain and study essential information..." *Id.* Importantly, and again, the BOA is vested with the same authority as the FP Committee, and thus is also subject to this requirement. In addition to appeal information, the entirety of the December Application, including all information regarding the 37 impacted parcels upon which Permits #684 and #685 were based, are before this BOA for its review and consideration. No substantive elements of the December Application were altered by administratively applying different conditions to the parcels affected by the application.

Further, the FP Committee (and by extension this BOA) may divide a motion into two for its consideration of a proposed action item. "When a motion relating to a single subject contains several parts, each of which is capable of standing as a complete proposition if the others are removed, the parts can be separated to be considered..." Henry M. Robert III, et al., Robert's Rules of Order § 27 (10th Ed., 2000). Here the FP Committee divided the proposed application within its motion relating to the December Application. To do so, no information outside the application was utilized or referenced and no properties were impacted that were not already included within the application, and to which notice had been sent (including Raven's parcels).

Secondly, the administrative assignment of the two permit numbers, rather than one, has no legal significance. The two permits may just as easily have been named Permit #684(a) and #684(b). The number 685 was assigned only to ensure the two groups of properties were appropriately handled by City staff according to the conditions imposed by the FP Committee. The authority to grant a FP permit subject to conditions is explicitly set forth in NMC 36-533(f)(6).

Raven also argues that the division of the application parcels under two permit numbers violates the Oklahoma Open Meetings Act by failing to identify "all items of business." Raven argues that the FP Committee "propose[d] an additional application." Raven Brief, p. 8. This did not occur. The December Application was properly noticed to the public for all affected properties and was publicly posted by the Norman City Clerk on December 15, 2023 at 8:35 a.m. The agenda stated that the following would be considered:

⁵ The December Application was identified in the 1/2/24 FP Committee Agenda as "Application No. 684."

“Floodplain Permit Application No. 684 – This permit application for the proposed installation of an electric transmission line across Norman through the Canadian River, Ten-Mile Flat Creek and Little River Floodplains.”

See *Attachment A*. As noticed, the FP Committee considered “Application No. 684,” the December Application, in exactly the form it was submitted. Based on its consideration, the FP Committee determined to grant the application under two permits - Permit Nos. 684 and 685. These actions are not at odds with the posted notice. The *Fraternal Order of Police, Bratcher/Miner Mem’l Lodge, Lodge No. 122* case (“FOP Case”) cited by Raven is not controlling here. The FOP Case involved amendments to the actual items considered, whereas here the matter considered was the same as stated in the notice: the December Application.

Further, the FOP Case, and the existence of two permits, assigned different numbers, does not impact this BOA’s authority and discretion to consider the matters raised by the December Application afresh, as provided by NMC 36-570.

E. Ownership of and Access to the Impacted Properties

Finally, Raven argues that NextEra lacks standing to file its application where it does not have an “ownership interest to all of the properties” implicated by the application. NMC 36-533 does not contain a requirement that an applicant own a property to which it seeks a regulatory permission. Certainly it is axiomatic that the applicant be able to gain legal access soon after applying for a floodplain permit because the permit itself does not grant legal access to a property and only lasts for two years beyond its issuance. See NMC 36-533(g). To protect property owners, including adjacent owners, and in some cases, the FP Committee has deemed it necessary to attach a condition of showing access prior to a permit becoming “active.” While such conditions are properly considered within the FP Committee’s authority, the applicant’s access is only one of many considerations that may go into the FP Committee’s consideration of a permit, and does not impact the FP Committee’s discretion to either deny or grant a permit.

Permit #684 was granted outright to properties to which it had been determined that NextEra had a present and unqualified right of access as of January 2, 2024. Among these properties are the two parcels (#1 and #4) owned by the applicant, Raven. Raven argues to this BOA that it “shall [not] be required to surrender possession of real property before the agreed purchase price is paid or deposited with the state court...” See Raven Appeal, p. 8; 27 Okla. Stat. § 13(4). In the relevant eminent domain action filed by NextEra against Raven, the Report of Commissioners was filed on September 1, 2023 awarding Raven \$2,470,000.00 for property implicated by the December Application. NextEra deposited the \$2,470,000.00 with the Court on October 6, 2023 and Raven withdrew it from the Court on November 13, 2023, more than seven weeks prior to the FP Committee meeting on January 2. Raven filed no exceptions to the Report of Commissioners and has requested no stay of proceedings in the applicable eminent domain action. To the extent Raven argues its property was improperly identified as one to which NextEra has present and unqualified access, and thus improperly included within Permit #684, City legal staff is unable to identify facts to support this position. Regardless, even if Raven was improperly included within Permit #684, the permit itself cannot grant NextEra access to or possession of Raven’s property. The same is true of any action taken by the BOA on this appeal.

CONCLUSION:

The BOA is vested with the same broad authority to consider and grant, subject to conditions and in the administrative format it deems proper, or deny, or even direct the FP Committee's reconsideration of the December Application at issue before it in this appeal.

[ATTACHMENT]