

Received Notice of Appeal

Re: Zoning Compliance Permit
for 5005 Highway 3

PLNX-23-00886 (attached)

Shelley
PLNX-23-00111 5/31/23



Monica will contact you re: is appeal in time.

Michelle Cronwell

Justin Harkins
Jade Solvason
490 N. 31st Street, Suite 500
P.O. Box 2529
Billings, MT 59103-2529
Telephone: (406) 252-3441
Facsimile: (406) 256-0277
jharkins@crowleyfleck.com
jsolvason@crowleyfleck.com

May 25, 2023

Yellowstone County Board of Adjustment
Miller Building 1st Floor Conference Room
2825 3rd Avenue North

RE: *Notice of Appeal of Permit PLNX-23-0886*

To whom it may concern:

This office represents Bradley, Thomas, and Monica Witten (collectively, the “Wittens”), property owners at 5001 U.S. Highway 3, Billings, MT 59106 (the “Witten Property”). Please consider this letter be notice of appeal of residential project permit PLNX-23-00886, issued to Bryan M. White at 5005 U.S. Highway 3, Billings, MT 59106 (the “White Property”).

This permit was granted in error. The permit provides for approval to build a steel storage building 15 feet from the Witten Property. Pursuant to Yellowstone County Zoning Code (the “Zoning Code”) Table 27-900.1, the required setback for the front property line, where this building is situated, is either 35 feet or 20 feet, depending on the type of building. The 15-foot setback pertains to side property lines, which the germane property line is not.

Evidently, County Planning determined that the White Property has no front property line at all because it is separated from Highway 3 by the Witten Property. That is an incorrect interpretation of the Zoning Code. Pursuant to Zoning Code §§ 27-1802(A)(3)(a), (A)(4)(b), and (A)(6)(a), the germane lot line is a front lot line because it is the lot line where the public or private right-of-way intended for general public use to provide access to the White Property is located. Furthermore, Zoning Code § 27-1802(A)(4) lists the potential “lot types,” including a corner lot, an interior lot, and a through lot or double frontage lot. There are no other options, which means a given lot must be one of these three types. All of these types describe at least one frontage, meaning there is no such thing in Yellowstone County as a lot that has no front.

Because there can be no lot without frontage and because the boundary line here at issue indisputably is the front line of the White Property, County Planning effectively has granted Mr. White a variance to build within the proper setback boundary without going through any of the procedures required of a variance request, including particularly proper notice to impacted property owners such as the Wittens. Pursuant to Zoning Code § 27-1626, the variance process

requires published, mailed, and posted notice of the variance request and a determination by the Board of Adjustment, none of which the County has done in this case.

We request that the Board of Adjustment correct permit PLNX-23-00886 and adjust the setback requirement to 35 feet or 20 feet, depending on the contemplated building, or otherwise go through the proper procedure to consider what essentially is a variance request.

Regarding the timing of this appeal, permit PLNX-23-00886 was issued March 22, 2023, meaning the 60-day appeal period prescribed in Zoning Code § 27-1615(C)(2)(a) presupposed an appeal deadline of May 22, 2023 (May 21 being a Sunday). The Wittens did not learn of the date the permit was granted until May 24, 2023, following a call from the undersigned counsel to County Planning for that particular information. The Board of Adjustment should not refuse to hear this appeal based on any argument that it is tardy by three days.

First of all, Yellowstone County has known for many weeks that the Wittens disapprove of Mr. White building within the setback as they spoke to several County employees about this very issue in March 2023, ultimately culminating in the letter attached hereto as **Exhibit A**, in which County code enforcement officer Mike Schieno informed Mr. White of the correct setback requirements. County Planning apparently approved permit PLNX-23-00886 with a 15-foot setback – contrary to Mr. Schieno’s stated interpretation – two days after Mr. Schieno’s letter, though nobody informed the Wittens of this permit approval or of the fact that the County had deviated from the interpretation it provided to the Wittens.

Then, after noticing that Mr. White had begun construction closer than 20 feet from the property line, the Wittens called County Planning on May 19, 2023, to discuss this permit and to request a copy of it. County Planning did not inform the Wittens at that time that the appeal deadline was set to run the following Monday and told the Wittens they would need to deliver a public records request in order to receive a copy of the permit. The undersigned counsel then called County Planning on May 22, 2023, to discuss this permit and also was not informed that the appeal deadline was about to run. The undersigned delivered on that date a public records request seeking information relating to the permit. **Exhibit B**.

Any attempt to enforce the 60-day appeal deadline under these circumstances will constitute a violation of the Wittens’ right to due process of law due to the County’s failure to notify the Wittens that it had granted permit PLNX-23-00886 in contravention of the interpretation of Zoning Code Table 27-900.1 that it had already provided to them. *See Mont. Media, Inc. v. Flathead County*, 2003 MT 23, ¶ 65, 314 Mont. 121, 63 P.3d 1129 (“Due process requires both notice of a proposed action and the opportunity to be heard.”). The Wittens had the right to rely on the County’s assurance that it would enforce the 20-foot or 35-foot setback requirements, and the County was obligated to inform the Wittens if and when it determined otherwise.¹ The

¹ The variance issue looms large here because the Wittens – as property owners within 150 feet of the exterior boundaries of the White Property – are entitled to mailed notice of any requested variance.

Wittens acted with diligence as soon as they discovered that a permit had been issued contrary to the interpretation of the Zoning Code the County previously provided them. The Board of Adjustment should hear this appeal.

Sincerely,

CROWLEY FLECK PLLP

A handwritten signature in blue ink, appearing to read 'John W. Harkins IV', is written over the printed name below.

JOHN W. (JUSTIN) HARKINS IV
JADE T. SOLVASON

CITY-COUNTY PLANNING DIVISION

2825 3RD AVENUE NORTH, 4TH FLOOR
BILLINGS, MT 59101

Office: (406) 657-8246

Fax: (406) 657-8327

www.co.yellowstone.mt.gov/planning

www.ci.billings.mt.us/planning

Job Address: HIGHWAY 3

Subdivision/Block/Lot: 3668/000/002

Owner: bryan M white

Contractor: OWNER

Project Information: 5005 US Highway 3

Description of Work: Steel storage building

Specific Information Requested

SPECIAL CONDITIONS/COMMENTS:

Approved building at 15 feet from adjacent neighbor property line. Per Section 27-900, for property adjacent.

FEES:

PLN-ZONING COMPLIANCE - RES:

\$77.00

TOTAL FEES:

\$77.00

**PLNX-COUNTY ZONING COMPLIANCE PERMIT -
RESIDENTIAL
PROJECT # PLNX-23-00886**

Issue Date: 03/22/2023

Expiration Date: 09/22/2023

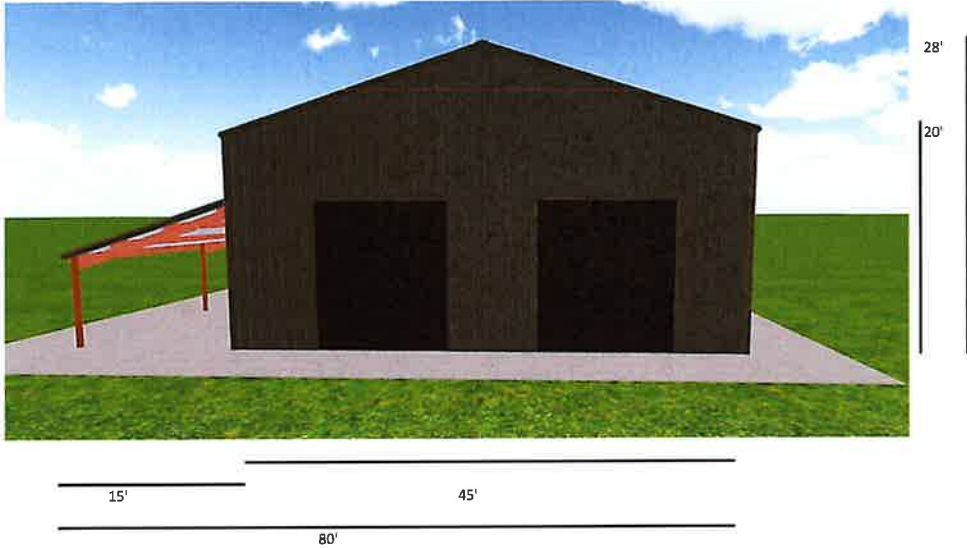
Issued By:



Disclaimer: The applicant hereby agrees that the proposed work shall be done in accordance with the plans and specifications and statement herewith submitted and in conformity with the provisions of the Unified Zoning Regulations pertaining to such project. This permit becomes null and void if permitted activity is not commenced within 180 days from the date such permit is issued. If activity authorized by such permit is suspended or abandoned for 180 days any time after activity is commenced, a NEW permit must be obtained before activity can be recommenced. Separate permits are required for electrical installations and hookups. By accepting this permit, I agree to observe all existing easements whether apparent or not and understand that it is my responsibility to determine the location and extent of any and all easements. Incomplete, erroneous, or misrepresented information (whether intentional or not) may result in permit revocation and enforcement actions.

By accepting this permit, the applicant hereby acknowledges the following statements:

- 1) That he/she is authorized to make this application;
 - 2) That all information provided by the applicant is true and correct, including all information on any attachments hereto;
 - 3) That he/she will comply with all regulations of the City of Billings and Yellowstone County which are applicable hereto;
 - 4) That he/she will perform no work on the above property not specifically described in this application;
 - 5) That he/she grants City and County officials the right to enter onto the property for the purpose of inspecting the work permitted and posting notices.
- Many subdivisions in the City of Billings and Yellowstone County have private deed restrictions or covenants regulating land uses. City-County Planning Division staff will not determine whether or not the work covered by a permit satisfies these covenants. Obtaining a permit does not relieve the homeowner or agent of their responsibility for determining the nature of applicable covenants and private deed restrictions and complying with covenants



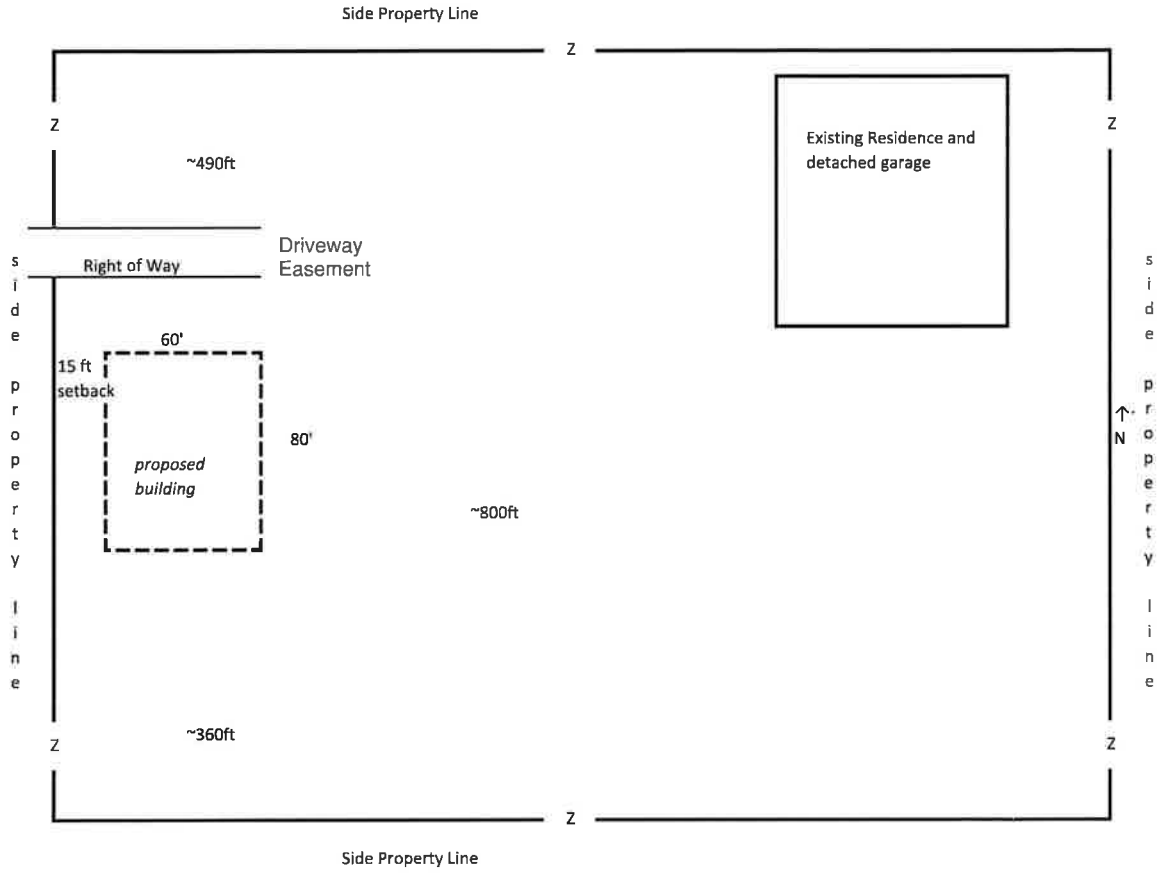
590

WITTEN,
THOMAS
W



WHITE,
BRYAN &
MARIAH







PHONE: (406) 652-2050
CELL: (406) 208-0549

YELLOWSTONE COUNTY CODE ENFORCEMENT

"PROTECTING QUALITY OF LIFE IN YELLOWSTONE COUNTY"



1200 SHILOH RD
BILLINGS, MONTANA 59106

EMAIL: mschieno@yellowstonecountymt.gov

March 20, 2023

Bryan White
5005 Highway 3
Billings, MT 59106

Dear Bryan,

I have received information that you are in the process of building a structure near the property line of the concerned caller.

The zoning for this area is A-Agriculture. Accessory structures such as, pole barns, garage and carports may be built 20 ft from the property line.

Barns, houses, hay barns and horse barns must be 35 ft from the property line. I have enclosed a zoning compliance permit for you to complete and send to City County Planning for review.

If you have any questions, please call me at (406) 208-0549. Thank you for your immediate attention in this matter.

Sincerely,

A handwritten signature in cursive script that reads "Mike Schieno".

Mike Schieno
Yellowstone County Code Enforcement Department



CROWLEY | FLECK
ATTORNEYS

Justin Harkins
490 N. 31st Street, Suite 500
P.O. Box 2529
Billings, MT 59103-2529
Telephone: (406) 252-3441
Facsimile: (406) 256-0277
jharkins@crowleyfleck.com

May 22, 2023

Monica Plecker
Planning Division Manager
Yellowstone County Planning Division Via US Mail and Email: pleckerm@billingsmt.gov
2825 3rd Avenue North, 4th Floor
Billings, MT 59101

RE: *Public record request regarding building permit granted to Bryan and/or
Mariah White at 5005 U.S. Hwy 3, Billings, MT 59106*

Dear Ms. Plecker:

I hope this letter finds you well. I represent Bradley, Monica, and Thomas Witten (collectively, the "Wittens") who own real property at 5001 U.S. Hwy 3, Billings, MT 59106. As you may be aware, Yellowstone County recently granted a permit (the "Permit") for the construction of an outbuilding at 5005 U.S. Hwy 3, Billings, MT 59106, which property borders the Wittens' property to the northeast. I hereby request under the Montana Public Records Act, Mont. Code Ann. § 2-6-1001, et seq., that you produce to this office at your earliest convenience copies of the following records and all records of any kind containing the following information:

1. The Permit;
2. Any draft copies of the Permit;
3. The Permit application;
4. Any previous ungranted applications for construction of the same or similar outbuilding;
5. Any decisions, letters, memoranda, etc., denying any previous applications for construction of the same or similar outbuilding;
6. All correspondence between the Yellowstone County Planning Division ("County Planning") and Bryan White, Mariah White, and/or any of their representatives relating in any way to the Permit;

Ms. Monica Plecker
Re: *Witten FOIA Request*
May 22, 2023
Page 2 of 2

7. All correspondence between County Planning and anyone else relating in any way to the Permit;
8. All correspondence between or among County Planning personnel relating in any way to the Permit; and
9. All other documents of whatever kind related to the Permit.

I'm able to receive these records electronically or in hard copy, whichever is easier for you. If you would prefer to send hard copies, please direct them to address provided above. If there are any fees charged for locating, reviewing, or copying the records, please supply the records without informing me of the cost if the fees do not exceed one hundred dollars (\$100.00), up to which amount we agree to pay without further conversation. If the fees do exceed that amount, please let me know prior to fulfilling this request so that I can discuss the fee with the Wittens.

I appreciate your time and consideration. If you have any questions regarding this request, please do not hesitate to contact me at the phone number and/or email addresses provided above. I look forward to working with you.

Sincerely,

CROWLEY FLECK PLLP



JOHN W. (JUSTIN) HARKINS IV

structures and facilities. The term includes, but is not limited to, photovoltaic power systems, solar thermal systems, and solar hot water systems.

Solar Thermal System – also known as solar hot water systems; an SEF that absorbs solar energy as heat which is then used to heat structures and water.

Solid waste facility: A facility principally or solely used for the processing or disposal of solid waste and subject to compliance with all applicable federal, state, and local regulations including:

Transfer Stations: Facilities at which solid waste collected from any source is temporarily deposited to await transportation to another solid waste facility. All activities associated with a Transfer Station shall be done within an enclosed structure including but not limited to sorting, reducing, compressing, shredding, compacting, composting, and storage of waste materials, equipment or vehicles.

Solid Waste Processing Facilities: Facilities at which solid waste is sorted, reduced, compressed, shredded, compacted or composted for purposes of volume reduction or preparation for burning or land-filling.

Waste Burning Facilities: Any incinerator, boiler, percolator or other solid waste facility at which solid waste, including previously processed solid waste is burned for the purposes of volume and weight reduction or steam heat, power or energy generation.

Sanitary Landfills: Facilities employing a method of disposing of solid wastes on or into land by various forms of excavation, placement, burial, compaction, or covering.

Recycling Processing Facilities: Facilities at which the primary function is to extract useful materials from the solid waste, and all processing activities are conducted within a completely enclosed building.

Spectrum Act (Wireless Communication Facilities): The “Middle Class Tax Relief and Job Creation Act of 2012” (Public Law 112-96; codified at 47 U.S.C. § 1455(a)).

Stable, private: A detached accessory building in which horses or other beasts of burden owned by the occupant of the premises are kept, and in which no such animals are kept for hire, remuneration or sale, and are kept for the owner's private use only.

Stable, commercial: A stable other than a private stable.

Stay: The act of temporarily stopping or suspending an action, such as the processing of a permit application.

Stealth Communication Facility (Wireless Communication Facilities): Any WCF that is integrated as an architectural feature of a structure or the landscape so that the facility and its purpose to provide wireless services is not visually apparent or prominent.

Streets:

Street: A public way for vehicular traffic, whether designated as a street, highway, thoroughfare, parkway, throughway, road, avenue, boulevard, land, place, or however otherwise designated which has been dedicated to or acquired for public use and which extends the full width between right-of-way lines, which includes areas acquired or prescribed through an easement.

Alley: A minor way which is used primarily for vehicular service access or for utility lines to the back or the side of properties otherwise abutting on a street.

EASE

3824820

08/23/2017 01:38 PM Pages: 1 of 2 Fees: 14.00
Jeff Martin Clerk & Recorder, Yellowstone MT



Return to:
Zachary Taylor
5005 US Highway 3
Billings, MT 59106

DECLARATION OF EASEMENT

FOR VALUABLE CONSIDERATION, receipt of which is hereby acknowledged, the undersigned owner, ZACHARY J. TAYLOR, does, on this 19th day of July, 2017, hereby grant an easement through and across certain real property located in the SE1/4 of Section 17, T. 1 N., R. 25 E., P.M.M., Yellowstone County, Montana, described as Tract 1 of Certificate of Survey No. 3668, on file in the office of the clerk and recorder of said County, under Document No. 3824817; said easement center line being as shown on the attached Exhibit "A".

The Owner does hereby create this PRIVATE ACCESS EASEMENT for the purposes of maintaining, repairing, improving, replacing, and using an existing asphalt driveway and any necessary fixtures and appurtenances through and across said real property, together with the right of free ingress and egress for said purposes.

This easement is created for the benefit of the owner of Tract 2 of said Certificate of Survey, their heirs, executors, successors, administrators, and assignees and shall run with the real property and is binding on all parties having any right, title, or interest in said Tract 1 or any part thereof, their heirs, executors, successors, administrators, and assignees, and shall bind each owner thereof.

The existing asphalt driveway currently provides access to said Tract 2. This easement is created to also provide access to one additional tract should said Tract 2 is subdivided in the future.

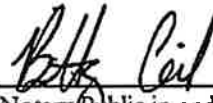

ZACHARY J. TAYLOR

STATE OF MONTANA)

:ss

County of Yellowstone)

On this 19th day of July, 2017, before me, the undersigned Notary Public for the State of Montana, personally appeared ZACHARY J. TAYLOR, known to me to be the persons who signed the forgoing instrument and acknowledged to me that he executed the same. Witness my hand and seal the day and year herein above written.


Notary Public in and for the State of Montana

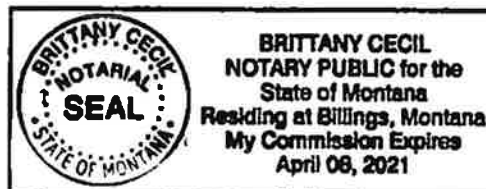




EXHIBIT A

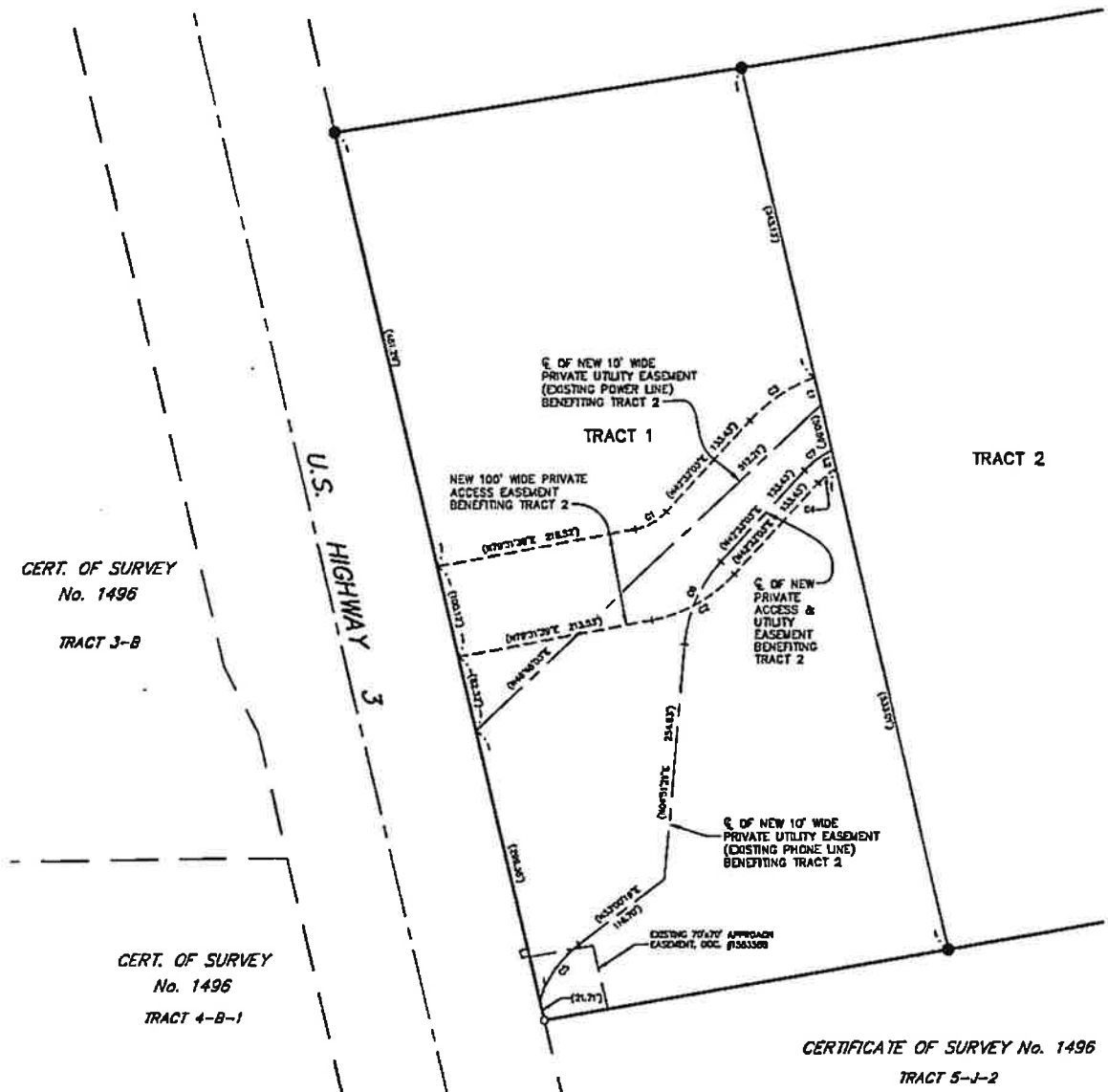
EASEMENTS WITHIN TRACT 1 OF CERTIFICATE OF SURVEY No. _____

PREPARED FOR : ZACHARY TAYLOR

JULY, 2017

PREPARED BY : SANDERSON STEWART

BILLINGS, MONTANA



CERT. OF SURVEY
No. 1496
TRACT 3-B

CERT. OF SURVEY
No. 1496
TRACT 4-B-1

CERTIFICATE OF SURVEY No. 1496
TRACT 5-J-2



Line #	Bearing	Distance
L1	N 13°19'28" W	30.39'
L2	N 13°19'29" W	20.52'

Curve #	Delta	Radius	Length
C1	36°59'36"	60.00'	38.74'
C2	36°59'36"	180.00'	103.30'
C3	27°43'34"	175.00'	84.68'
C4	19°01'48"	75.00'	24.91'
C5	35°43'31"	120.00'	74.89'
C6	37°40'42"	180.00'	88.64'
C7	22°15'50"	85.00'	38.91'

Justin Harkins
Jade Solvason
490 N. 31st Street, Suite 500
P.O. Box 2529
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May 25, 2023

Yellowstone County Board of Adjustment
Miller Building 1st Floor Conference Room
2825 3rd Avenue North

RE: *Notice of Appeal of Permit PLNX-23-0886*

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requires published, mailed, and posted notice of the variance request and a determination by the Board of Adjustment, none of which the County has done in this case.

We request that the Board of Adjustment correct permit PLNX-23-00886 and adjust the setback requirement to 35 feet or 20 feet, depending on the contemplated building, or otherwise go through the proper procedure to consider what essentially is a variance request.

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First of all, Yellowstone County has known for many weeks that the Wittens disapprove of Mr. White building within the setback as they spoke to several County employees about this very issue in March 2023, ultimately culminating in the letter attached hereto as **Exhibit A**, in which County code enforcement officer Mike Schieno informed Mr. White of the correct setback requirements. County Planning apparently approved permit PLNX-23-00886 with a 15-foot setback – contrary to Mr. Schieno’s stated interpretation – two days after Mr. Schieno’s letter, though nobody informed the Wittens of this permit approval or of the fact that the County had deviated from the interpretation it provided to the Wittens.

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Wittens acted with diligence as soon as they discovered that a permit had been issued contrary to the interpretation of the Zoning Code the County previously provided them. The Board of Adjustment should hear this appeal.

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CROWLEY FLECK PLLP

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JOHN W. (JUSTIN) HARKINS IV
JADE T. SOLVASON



PHONE: (406) 652-2050
CELL: (406) 208-0549

YELLOWSTONE COUNTY CODE ENFORCEMENT

"PROTECTING QUALITY OF LIFE IN YELLOWSTONE COUNTY"



1200 SHILOH RD
BILLINGS, MONTANA 59106

EMAIL: mschieno@yellowstonecountymt.gov

March 20, 2023

Bryan White
5005 Highway 3
Billings, MT 59106

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Mike Schieno
Yellowstone County Code Enforcement Department



CROWLEY | FLECK
ATTORNEYS

Justin Harkins
490 N. 31st Street, Suite 500
P.O. Box 2529
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Telephone: (406) 252-3441
Facsimile: (406) 256-0277
jharkins@crowleyfleck.com

May 22, 2023

Monica Plecker
Planning Division Manager
Yellowstone County Planning Division Via US Mail and Email: pleckerm@billingsmt.gov
2825 3rd Avenue North, 4th Floor
Billings, MT 59101

RE: *Public record request regarding building permit granted to Bryan and/or
Mariah White at 5005 U.S. Hwy 3, Billings, MT 59106*

Dear Ms. Plecker:

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Ms. Monica Plecker
Re: Witten FOIA Request
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Page 2 of 2

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Sincerely,

CROWLEY FLECK PLLP



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