

**PROCEEDINGS OF THE COCHISE COUNTY BOARD OF SUPERVISORS
SPECIAL/EXECUTIVE MEETING HELD ON
Tuesday, February 27, 2018**

A special meeting/executive session of the Cochise County Board of Supervisors was held on Tuesday, February 27, 2018 at 2:30 p.m. in the Board of Supervisors' Executive Conference Room, 1415 Melody Lane, Building G, Bisbee, Arizona.

Present: Ann English, Chairman; Patrick G. Call, Vice-Chairman; Peggy Judd, Member

Staff Present: Edward T. Gilligan, County Administrator
Britt W. Hanson, Chief Civil Deputy County Attorney
Sara Ransom, Civil Deputy County Attorney
Paul Esparza, Planning Manager, Development Services Department
Arlethe G. Rios, Clerk of the Board

Attendees: Brad Fulk, Game and Fish Representative
Steve Scheumann, Citizen

Chairman English called the meeting to order at 3:03 p.m.

ANY ITEM ON THIS AGENDA IS OPEN FOR DISCUSSION AND POSSIBLE ACTION

PLEDGE OF ALLEGIANCE

THE ORDER OR DELETION OF ANY ITEM ON THIS AGENDA IS SUBJECT TO MODIFICATION AT THE MEETING

ACTION

Board of Supervisors

This executive session is authorized under A.R.S. § 38-431.03, Subsection (A)(3) and (4), the Board may go into executive session for legal advice with the attorney of the public body and to consider its position and instruct its attorneys regarding the public body's position in pending litigation.

1. Approve agreements for public recreational access easement to Whetstone.

Ms. Ransom said that she did not advise the Board to go into executive session at this time.

Ms. Ransom used a PowerPoint presentation to present this item.

She presented the history behind the access to the Whetstone Mountains:

- Coronado National Forest Lands, including Whetstone Mountains, are managed by National Forest Service
- Land surrounding the Whetstone Mountains is privately owned; access restricted by landowners

- Single access to the southern portion of the Whetstone Mountains is gated and locked; not dependable for recreational users
- No unrestricted access is available for the public on the northern side of the Whetstone Mountains
- Federal and State agencies, including the County, have tried for years to secure public recreational access to the Whetstone Mountains

She said that the easement agreement had already been signed by El Dorado, who was the property owner, to establish public access to the Whetstone Mountains.

She went over the highlights of the easement:

- Owner of property, El Dorado Benson, LLC (“Owner”), plans to develop land abutting the National Forest. Those plans include residential subdivisions with a public roadway connecting to a Forest Service Road inside the National Forest.
- Easement is a 400’ wide corridor of land along border of Owner’s property abutting National Forest.
- The County (or assignee) can, but is not obligated to, construct a single, unpaved road intended for high vehicle clearance, and a day use parking lot within the Easement.
- Agreements include terms allowing the Owner, at Owner’s expense and without interfering with public access, to upgrade the Easement and convert it to a public road over time.
- Forest Service intends build a connecting road, allowing motorists and other recreational users to continue into National Forest

She showed a map of the El Dorado’s property and the location where the easement would be. Ms. Ransom clarified that no cattle guard would be needed at this time. She added that an intergovernmental agreement (IGA) would need to be executed before any road maintenance or improvements could be done.

She went over the past easement possibilities:

Easter Mountain Proposal #1 -

- On the same land as the presently-proposed easement, but terminated at a designated roadless area
- Drawn without regard to contours of land—possibly cost-prohibitive to construct a road
- Forest Service did not have a road nearby, so no easy connection to the Forest Service road system
- No agreement was ever negotiated

Easter Mountain Proposal #2 –

- Same route as Proposal #1, but extended somewhat to terminate at an area of the forest land that was not designated roadless
- All other issues remained related to Proposal #1 remained

She then went over the impacts on Cochise County if the easement agreement was approved:

- Provides recreational access to the Whetstone Mountains that the public has been seeking and that governmental agencies have been attempting to establish for over a decade
- Promotes access to open spaces in furtherance of County’s Comprehensive Plan
- Easement location is safer than past possibilities presented to the Board—entry is at an apron off the Highway 90
- Easement location results in less traffic congestion than other options
- Flexibility of terms allows for cost-effective engineering and upgrades to the road over time

- Easement is near largest population centers of Cochise County—Benson and within 45 minutes from Sierra Vista
- Cost to County taxpayers is \$10.00

She stated that the County Attorney's Office recommended approval.

Vice-Chairman Call said that this option seemed better for public access.

Chairman English asked if this access would lead to an existing road.

Ms. Ransom explained that a road was nearby but not quite connecting to the access point.

Mr. Fulk stated that the road would be developed, but it would be a process.

Vice-Chairman Call moved to approve agreements for public recreational access easement to Whetstone. Supervisor Judd seconded the motion.

Vice-Chairman Call and Mr. Hanson both praised Ms. Ransom for her dedication and perseverance during this project and the positive outcome.

Chairman English called for the vote and it was approved 3-0.

2. Approve agreement settling Easter Mountain, LLC v. Cochise County, Case C2016 4853.

Ms. Ransom advised the Board to move into executive session for this agenda item.

Vice-Chairman Call moved to go into executive session at 3:26 p.m. Supervisor Judd seconded the motion and it carried unanimously.

The Board reconvened in open session at 3:41 p.m.

Mr. Hanson stated that the settlement agreement was a public document.

Chairman English stated that she would not be taking public comment at this time.

Ms. Ransom went over the zoning ordinance that had been approved by the Board and accepted by Easter Mountain. She noted that the original ordinance was approved for 11-13 years, but with the settlement Easter Mountain would get 15 years to complete the project from the time the final plat is approved by the County and condition four, which required that Easter Mountain provide legal access to federal lands, would be entirely removed.

She gave an overview of the litigation background: Easter Mountain LLC filed a lawsuit against Cochise County seeking approximately \$10 million in damages, plus attorneys' fees and costs. Easter Mountain alleged that the Board of Supervisors' wrongfully denied its tentative subdivision plat for a proposed development near the Whetstone Mountains. The Board denied Easter Mountain's tentative plat for failure to comply with a condition of rezoning that Easter Mountain had previously accepted; specifically, Condition 4, which required it to provide an easement for vehicular (and other) public access to the Whetstone Mountains.

Parties began discussing settlement in October 2017 when Court set hearings on a variety of motions.

She moved on to the potential settlement terms:

- Easter Mountain must dismiss all of its claims against the County with prejudice, thus conceding its claim of nearly \$10 million in damages,
- Both sides to bear their own attorneys' fees and costs.
- Easter Mountain will not supply legal access to the Whetstone Mountains. Condition 4 will

be removed from the Zoning Ordinance 11-13.

- Condition 3 in Zoning Ordinance 11-13 is modified from 10 years to 15 years—giving additional time for development. All other provisions of Zoning Ordinance 11-13 remain unchanged.
- The Board will approve Easter Mountain's tentative plat as previously submitted in 2015.
- The County retains an independent reviewer, Stantec Consulting Services, which will review Easter Mountain's Final Plat and Improvement Plans related to the first phase of development. Easter Mountain must pay half the costs of the independent reviewer.
- After the independent reviewer determines Easter Mountain has complied with all legal requirements, Easter Mountain will submit its final plat to the Board of Supervisors, which will confirm compliance before issuing any approval,
- Easter Mountain must pay the County \$10,000 within 10 days of the Board's consideration of the final plat; this money will be used to offset litigation costs and costs incurred by the County in securing legal access to the Whetstone Mountains
- Easter Mountain's Improvement Plans would be in effect for eight years, with an option for seven year renewal if the Board of Supervisors approves such renewal in its discretion

Then went over the Stantec Agreement:

- Stantec would fulfill the role of County Staff in reviewing all further submissions from Easter Mountain with respect to its Phase I Final Plat and Phase I Improvement Plans (first 42 lots);
- Stantec acknowledges that Easter Mountain must pay 50% of the invoiced costs, and is responsible for securing a separate agreement with Easter Mountain;
- Stantec agrees to indemnify the County for any negligence, gross negligence or intentional conduct by Stantec or its subcontractors related to the services provided as Plan Reviewer.

and the settlement considerations:

- Finality and resolution of litigation, which is inherently uncertain.
- Settlement avoids any damages or attorneys' fees award against the County. Instead, the party that was previously seeking approximately \$10,000,000 from the County is now paying the County to resolve the case.
- Costs of litigation are avoided, saving taxpayers tens of thousands of dollars in expert witness fees and other litigation expenses.
- Settlement fosters development in the County. Easter Mountain (or an assignee) can move forward with an acceptable Phase I final plat.
- Terms of the settlement, including independent reviewer, insulate the County from risk with respect to on-going dealings with Easter Mountain.

And finally the County Attorney's Office recommendation:

1. Approve and execute 2 originals of the Settlement Agreement;
2. Proceed to consideration and approval of the 2015 Tentative Plat;
3. As implied by Settlement, direct County Administrator to enter agreement with Stantec; and
4. Direct County Staff to send 30-day correspondence and amended Ordinance 11-13 to Easter Mountain for execution.

Chairman English wanted to clarify that only one development services employee would have contact with Stantec to avoid any perception of bias.

Mr. Hanson said that was the case and it was a highly suggestive procedure.

Supervisor Judd moved to approve the agreement settling Easter Mountain, LLC v. Cochise County, Case C2016 4853 and to authorize the County Administrator to enter into a contract with Stantec and other internal procedures as required. Vice-Chairman Call seconded the

motion.

Supervisor Judd said although she was happy with the outcome she could not approve the settlement agreement due to her citizen's concerns.

Chairman English called for the vote and it was approved 2-0-1 (Judd opposed).

3. Approve Docket S-12-10, a tentative plat for Conservation Subdivision J-6 Ranch, Lots 1-42, Block 1 and Common Areas A, B and C Subdivision (herein known as J-6 Ranch Lots 1-42).

Chairman English explained that one of the settlement agreement conditions was that the Board approve the tentative plat.

Mr. Hanson explained that it had only been denied because the applicant failed to meet condition 4.

Mr. Esparza stated that staff had reviewed the plat and it remained in conformance.

Vice-Chairman Call moved to Approve Docket S-12-10, a tentative plat for Conservation Subdivision J-6 Ranch, Lots 1-42, Block 1 and Common Areas A, B and C Subdivision (herein known as J-6 Ranch Lots 1-42). Supervisor Judd seconded the motion.

Chairman English called for the vote and it was approved 3-0.

Chairman English adjourned the meeting at 3:57 p.m.

APPROVED:

Ann English, Chairman

ATTEST:

Arlethe G. Rios, Clerk of the Board