

Town of Hideout
Planning Commission Meeting
February 7, 2019
6:00 p.m.

SPECIAL MEETING

The Planning Commission of the Town of Hideout, Wasatch County, Utah, met in **Special Meeting** on February 7, 2019, in the Council Chambers located at 10860 N. Hideout Trail, Hideout, Utah,

Present: Jerry Dwinell, Chair
Ralph Severini, Vice Chair
Sara Goldkind, Member
Vytas Rupinskas, Member

Excused: Kurt Shadle, Member
Judi Fey, Member
Jeff Bawol, Member

Also Present: Mayor Philip Rubin, via telecommunication
Dan Dansie, Town Attorney – via telecommunication

Others in Attendance:

Roll Call: Chair Dwinell called the Special Planning Commission meeting to order. Planning Commission Members Dwinell, Severini, Goldkind and Rupinskas were present. Chair Dwinell noted that Mayor Rubin and Mr. Dansie were attending via electronically.

Chair Dwinell state the Planning Commission had been working through an ordinance to help them in their transition and goal of brining high speed Internet to the Town of Hideout. He went on to say they want to do it in a way that they think is fair to developers and potential franchisees so they get the best of both worlds.

Chair Dwinell noted that their Intent was to walk through the document and get it into a form that they think would be acceptable to the Town Council. He went on to say he thought Mr. Dansie had some comments to make on the revisions that had been made.

Mr. Dansie, Town Attorney, said the thought the Town’s and Planning Commission’s goal of facilitating access to broadband Internet to the Town was a worthwhile goal and the effort the Planning Commission had spent in trying to facilitate that goal through an ordinance was admirable. He went on to say he had a lot of respect the Planning Commission dedicates to the Town.

Mr. Dansie indicated with respect to the ordinance, which the Planning Commission has been working on, he had concerns with almost every concept and for a number of reasons. He doesn’t think the concepts that have been identified are ready to be placed into an ordinance. He said he could talk about his concerns, and it would be easier if they discussed the big picture, talk about some of his concerns, and then go to the specific provision that are in the ordinance.

Mr. Dansie outlined the big picture. He stated that the concept of a telecommunications infrastructure is heavily regulated at the federal level. When they talked about it last month, when they introduced the idea, he eluded to the fact that it may be federally regulated and it was the case. Mr. Dansie explained

1 under federal law, telecommunication providers have the right to access public right-of-way, and local
2 governments are preempted from imposing any ordinance, rule or law that would prohibit any
3 telecommunication company providers from providing any telecommunication services or would have the
4 practical affect of providing that service.

5
6 Mr. Dansie went on to explain when they look at the statutory framework and cases that interpret the
7 statutory framework, the concepts they come away with are local government can impose reasonable,
8 non-discriminatory regulations on the manner, in which a telecommunications provider access the right-
9 of-way. In addition, they can charge fees associated with that and monitor and regulate that in a way that
10 preserves the well-being of the community. However, once you get past regulating the manner in which
11 the telecommunications provider accesses the right-of-way, then you run into the risk of having
12 regulations preempted by federal law, which essentially means invalid and un-enforceable.

13
14 Chair Dwinell questioned if Mr. Dansie looked at the Boston case study and what they did. Mr. Dansie
15 indicated he looked at the Boston, Chicago, Nevada, and Illinois' studies; in addition, to what UDOT is
16 doing. He went on to say Boston has a big one, type ordinance, which they have had for a number of
17 years. He explained there is no dig once or telecommunications cost sharing framework at the federal
18 level. He noted that he reviewed the material that Shanetelli Dwinell sent him, and those materials
19 indicate at the federal level, there are best practices and policies that have been adopt to encourage the
20 access and spread of telecommunications and minimize disturbance in public rights-of-ways. However,
21 the United States Department of Transportation and Federal Highway Administration do not have any
22 type of dig once ordinance or statute in effect.

23
24 Chair Dwinell stated they are not asking for a dig once. He went on to say the Boston case study talks
25 about a primary company in a cost-sharing model, which was the language they want to utilize. He
26 inquired how Boston was getting away with doing that.

27
28 Ms. Dansie stated there is a mechanism that the Boston statute utilized, in which they provide for a cost-
29 sharing framework. He went on to say he thought there were significant differences between the Boston
30 model and what the proposed ordinance tried to do.

31
32 Mr. Dansie noted that in looking at the materials, they spent a lot of time discussing with the Utah
33 Department of Transportation (UDOT) what their model had been. Mr. Dansie indicted Chair Dwinell
34 indicated to him in e-mail and in the sited materials referenced UDOT's experiences; however, UDOT
35 does not have a formal dig once or cost-sharing model. The Utah Department of Transportation partners
36 with telecommunication providers. In addition, they operate their own fiber network. He went on to say
37 when UDOT was putting in state funded roads, they will often, not always, install conduit in those
38 projects. Frequently, UDOT will engage in a trade or a reciprocity arrangement with telecommunications
39 provider where they would provide access to the conduit they have laid to the telecommunications
40 providers in exchange for reciprocal access for UDOT network and conduit that had been laid by private
41 parties.

42
43 Mr. Dansie stated a couple of distinctions between what UDOT does and what they are trying to achieve
44 was the requirement that conduit be laid in new projects by private parties; that was not a model UDOT
45 followed. He noted that UDOT puts the conduit in when they are constructing state funded roads.

46
47 Chair Dwinell said to be clear in the reference to UDOT, it was not to imply their trade model was like
48 the proposed ordinance. They are trying to say in terms of pubic conduit and what UDOT used is what
49 they want to use – in terms of physical conduit.

50
51 Mr. Dansie said UDOT works very closely with a branch of the Lt. Governor's office that is a broadband

1 coordinator with the state. He said UDOT works with that office and collaborates closely with the
2 telecommunication provides, and they exchange the materials / wish lists of what they would like to see
3 and vice versa. He said was not aware of the actual conduit they are utilizing, but the model is
4 significantly different.

5
6 Mr. Dansie noted that the individual that is the point person for UDOT on dig once ordinances is Lynn
7 Yoakum. He said they spoke with Ms. Yoakum several times, and she discourages cities from adopting
8 dig once type ordinances. She pointed out that no municipality or county in the State of Utah had
9 ordinances of this type. Her advise in working with these various issues, was to adopt a form of best
10 practices. He said he would go through some of the specific objections she had when they go through the
11 ordinance.

12
13 Mr. Dansie stated that Ms. Yoakum said, based on her experience, UDOT doesn't have an ordinance and
14 does not require certain requirements, which gives them the flexibility that is beneficial to UDOT and
15 their partners when they are doing project. Her concern with having a formal dig once ordinance was it
16 imposes restrictions, which decreases the flexibility that the town had in terms of having alternative
17 models of getting conduit and broadband in the town. In addition, it imposes burdens on towns, which
18 could be significant.

19
20 Mr. Dansie indicated as they go through the proposed ordinance, he would point out some of the concerns
21 he had in regard to unintended burdens the town wouldn't want or need to take on at this point. He said he
22 could go through the proposed ordinance point by point, or he could respond to any questions.

23
24 Chair Dwinell noted it sounded like Mr. Dansie's issues are with the telecommunication franchise portion
25 of the ordinance not with the developer portion. Mr. Dansie indicated that was what he articulated at this
26 point. However, he said he had significant concerns with the developer portion as well.

27
28 Commissioner Goldkind expressed that it sounded like Mr. Dansie was concerned with the language
29 related to requirements rather than words such as recommended and encouraged. Mr. Dansie concurred;
30 he stated he had concerns with requirements on several levels. He indicated on a big-picture level,
31 imposing requirements on broadband providers that go beyond simple access requirements, potentially
32 preempts federal law. He said with respect to the requirement that developers put in broadband conduit as
33 part of any development they are doing, concerns him, which is referred to as an exaction standpoint.

34
35 Mr. Dansie went on to say, there is the concept that governments can and do require developers to do
36 certain things all the time when they are developing a subdivision, i.e., roads and utilities. However, those
37 requirements are strictly limited. The concept in Utah is whenever a government is going to require a
38 developer to do something to convey a benefit to the public at the developer's expense, absence from the
39 agreement on the developer's part, then it becomes an exaction for which there has to exist a specific and
40 legitimate public need of the exaction and it has to be closely tailored to meet that specific need.

41
42 Mr. Dansie stated that was kind of a nuance argument or concept, which was unlike when the government
43 tells a developer, they have to put in power lines or sewer lines because people need heat and water to
44 live. He noted with respect to broadband, the town has to demonstrate that having broadband serves some
45 important and legitimate public function that the town needs to supports.

46
47 Mr. Dansie was not sure if that requirement would withstand that type of scrutiny. He said it might;
48 however, he had significant questions about imposing that as a requirement. He explained in connection
49 with a development, the best way to insure they got the conduit in the community where they wanted the
50 conduit in the development would be part of a development agreement. He said if developers came and
51 wanted a benefit from the town, then the town could say they are not obligated to do that, but they would

1 like the developers to consider conduit and it could be a point of a mutual agreement of the parties as
2 opposed to an imposition by the town on the developer.

3
4 Commissioner Severini said the way it sounded to him was there should not be an ordinance at all for
5 this. Mr. Dansie said he thought there was one section of the ordinance that could be helpful. However,
6 with respect to the imposition to install broadband and with respect to the franchisee issues, particularly
7 the cost sharing and the dig once components, he thought it was much better for the town to pursue by
8 developer's agreement or adopt a best practice items with respect to opening the trenches, giving notice
9 and only digging once.

10
11 It was clarified if Mr. Dansie meant a franchise agreement at well. Mr. Dansie indicated it could be either.
12 He noted with respect to developers, some issues could be addressed in a developer's agreement or with
13 respect to a franchisees; it could be addressed in a franchise agreement.

14
15 Commissioner Severini inquired what other towns were doing or have they done anything in Utah. Are
16 they taking on a sole practice where they were the only town taking this approach? What are other towns
17 doing to create a standard with developers and telecommunication providers? What was Mr. Dansie's
18 idea of the best approach?

19
20 Mr. Dansie said a lot of the data they are getting was from Ms. Yoakum. He noted that her
21 recommendation was followed by several municipalities. Her recommendation was to give notice to the
22 community, the telecommunication providers could come in, and request to be notified when a trench was
23 opened, and then the telecommunication providers could have access at that time and have the
24 opportunity to utilize the conduit at that point.

25
26 Mr. Dansie indicated as far as limiting the time, opportunity and ability after that point, the only
27 ordinance he was able to find was if the developers were put on notice and they didn't take the
28 opportunity; they had to wait for a period of time, which was San Francisco's ordinance and it had a five
29 or six year moratorium. He noted that model had been criticized because it limits opportunities and
30 flexibility for other providers that offer a different service or technology.

31
32 Mr. Dansie indicated the best practice would be that the town creates a list serve, and if someone wants
33 notice, they have to sign up for notice, which elevates the problem of having to notice everyone and not
34 noticing properly.

35
36 Chair Dwinell said he wasn't sure if he was seeing a difference in doing a public notice the same way a
37 regular public notice was done, or was it if someone was interested in being notice, let the town know –
38 they both start with a public notice that someone could have issue with.

39
40 Mr. Dansie indicted the difference in the situation where they would be making a list was they are
41 providing a courtesy to the community. If they miss someone, they missed providing a courtesy to
42 someone. However, if they adopt an ordinance that says they will give notice to the entire world, by virtue
43 of that ordinance, everyone is entitled to receive a notice. It's not just a matter of giving a courtesy notice,
44 now the town has some potential liability because of their own ordinance.

45
46 Chair Dwinell questioned if it wasn't as simple as defining "notice". Mr. Dansie indicated there were
47 several ways to define notice in an ordinance.

48
49 Chair Dwinell pointed out in the model they currently have drafted, it doesn't lock out anyone. What it
50 says is whoever the primary company is, if someone else said they were interested, they would work
51 together in a cost-sharing model. The issue he sees is conduit is not always laid in open trenches; there are

1 multiple ways to install it. Just having an open trench and someone coming behind someone else and
2 dropping in their own conduit isn't always the best option for making sure all companies involved can
3 take advantage of the economy of scale.

4
5 Mr. Dansie said some of the concerns that have been raised with the model Commissioner Dwinell
6 outlined are: in the event, "Company A" comes along, and they are the first company to make contact
7 with the town, and they want to dig for conduit. "Company B" comes along, and they want to do it as
8 well. Company A and B cannot come to terms of what the best cost sharing is. What is the recourse; does
9 the town become the arbitrator? Does the town adopt a formula?

10
11 Mr. Dansie said an additional concern was: it was a huge disincentive to be the lead company. Mr. Dansie
12 explained if the first company comes in and assumed all the costs and obligation, and no one else wants to
13 cost share at that time. But, later on down the road, Company B comes in and says now that the conduit is
14 in, they want to take advantage of that conduit. The model they have says they will pay a fee or one-time
15 charge. Mr. Dansie indicated it was completely unclear how that benefited anyone except for the town.
16 Would the fee go back to pay Company A? He pointed out that Company A did all the legwork, putting in
17 an oversize trench and dedicated it to the town. Mr. Dansie reiterated there was no incentive for anyone to
18 come in and be the first company. There was only incentive to be the second company and pay a nominal
19 fee and the fee goes to the town, not Company A, as it is currently drafted. However, if the fee did go to
20 Company A, what would the formula be how does it work. In addition, would there be more companies
21 than Company A and B? Do they assume there will be more companies and what would the pro-rate
22 allocation of those costs be if they are trying to do it after the fact?

23
24 Mr. Dansie said the concerns were: the windfall to the town; in addition to, the problems that he sees with
25 the model as it stands now saying you guys go duke it out.

26
27 Chair Dwinell said he thought some of the concerns could be tightened up, but it sounded like Mr. Dansie
28 had greater concerns than just tightening up language. Mr. Dansie indicated that he did. Chair Dwinell
29 proposed the model go back to committee to have the language tightened up and get it to a state that Mr.
30 Dansie felt comfortable moving forward with.

31
32 Mr. Dansie said some of the things were not language; they were conceptual. He acknowledged it was the
33 Planning Commission's prerogative of what they think is in the best interest of the town; and he respected
34 that.

35
36 Mr. Dansie commented on another concern. He noticed there was a lack of standards, which could be a
37 good thing or a bad thing. In some ways, they could delegate the drafting of the applicable standards of
38 conduit to a town engineer, and they have been authorized to do so. His advice was to be all in or all out.
39 In his opinion, the better way is all out and let the engineer create them and publish them.

40
41 Mr. Dansie indicated the bright spot of the ordinance that he saw was in respect to Telecommunication
42 Equipment, which he thought would be better called Above Ground Equipment. He informed the
43 Commission that the town could adopt reasonable regulations on above ground telecommunications much
44 the same way as any other kind of design and building standards so long as those design standards do not
45 have the practical effect of prohibiting telecommunication providers from providing the services they
46 provide. Mr. Dansie referenced some of the standards in the model, and he said he thought some might
47 question where those standards came from. Mr. Dansie indicated that he thought it would be fine if they
48 could demonstrate if the size they designated would not interfere with the telecommunications company's
49 ability to provide their services.

50
51 Chair Dwinell said his follow-on question was if they had five providers in the area and two of the

1 providers have technology that is completely underground and the other three do not. He inquired if the
2 model said they wanted everything underground, would that be locking out the three that do not have
3 services underground. Mr. Dansie indicated that might be a step too far, and he explained why he thought
4 it would not be acceptable in the ordinance. He went on to say there needed to be standards for the town –
5 not on an agreement-by-agreement basis.
6

7 Commissioner Rupinkas said he thought the comments Mr. Dansie made are for protecting the provider.
8 He went on to inquire, isn't there another side to this? He questioned what would happen if the provider
9 wanted to put in something aesthetically not acceptable to the town residents. He inquired if the town
10 didn't have an opportunity to push back. Mr. Dansie said they do. The opportunity to push back is to say,
11 you can put your communications facility in, but here is how we are going to mitigate that impact. As
12 long as the burden isn't unreasonable, he thought they would be okay.
13

14 Discussion followed un-aesthetically equipment, and how it would impact the town. Commissioner
15 Rupinkas indicated that 8-foot towers every 50 feet was not acceptable and there had to be something
16 that was within reason.
17

18 Mr. Dansie said that was an extreme situation. The situation today would be some can go all the way
19 underground and some cannot. If it is the case, they have the technology to go underground that could be
20 one thing. However, if they don't have the technology, and it would be cost prohibitive, and they have a
21 tariff from the State of Utah to provide telecommunication services, the town can't say they want
22 unreasonable standards. If the state has already evaluated them and the technology they are utilizing, then
23 the town has to make accommodations for them.
24

25 Commissioner Rupinkas questioned by definition, didn't public conduit mean the town had to pay for it
26 and own it. Mr. Dansie said that was correct, and it was a concern of his that they had not yet discussed.
27 The concept of public conduit, it's something you could try to do, and meet the exaction test. He
28 questioned if that was something the town really wanted to do. Does the town want to take on the burden
29 of managing it and leasing out space? Mr. Dansie stated it didn't seem to him that the town currently had
30 the infrastructure to be able to manage that type of project.
31

32 Mr. Dansie addressed private telecommunication providers. He said they would come in and they would
33 put in conduit that meets the town's specification on the town's timeframe. He said that maybe something
34 that goes along the lines of what is preempted federal law. Mr. Dansie said they would come in and put in
35 their conduit, and at the same time the town would want them to install another conduit at the town's
36 expense. It seemed to him, it was a different story to have a provider come in, install their own conduit at
37 their charge, and then give it to the town. That seems to be one step further of requiring it of a developer.
38 He didn't think there was a mechanism for allowing a public utility to come to town then requiring them
39 to give their conduit to the town.
40

41 Chair Dwinell stated an earlier version of the ordinance had a model where if the franchisee put in conduit
42 that cost \$1 a foot and the town wanted additional conduit installed that cost \$2 a foot, the town would
43 pay the difference to have the franchisee install the cable. He inquired if that would that past mustard. Mr.
44 Dansie said probably. He explained he thought it had a much better chance because they were not
45 imposing an addition burden on the provider as long as putting in the additional cable doesn't
46 unreasonably delay the provider to get their project completed and commence providing services.
47

48 Chair Dwinell inquired if any Commissioners had any more questions about any specific item in the draft.
49 He said the ordinance did have to go back to committee. He noted tonight was a public hearing, and they
50 do have a member of the public present.
51

1 Commissioner Goldkind said she thought the ordinance was very clear, and Mr. Dansie's comments were
2 very helpful; she thought the ordinance needed to go back to committee. Commissioner Rupinkas
3 agreed. Commissioner Severini said he agreed as well. He inquired if they should be taking an ordinance
4 or a non-ordinance approach. Is the approach they are taking even the best approach?
5

6 Chair Dwinell agreed; that is why they needed to take the whole concept back to committee to say, does
7 the ordinance address guidelines for developer's agreements and franchise agreements, or is it stronger
8 than that. Commissioner Severini agreed, there is no sense of having an ordinance that would be struck
9 down by federal or state statute.
10

11 Chair Dwinell opened the public hearing for public comment.
12

13 There was no public comment forth coming.
14

15 Chair Dwinell closed the public hearing.
16

17 Chair Dwinell indicated it was his recommendation to send the ordinance back to the committee to be
18 worked out between the Town Attorney and committee, and then they would re-present the ordinance.
19

20 **Motion:** Chair Dwinell moved to send the ordinance back to the committee to be worked out between
21 the Town Attorney and committee. Commissioner Rupinkas made the second. The motion
22 passed unanimously.
23

24 With no further business coming before the Planning Commission at this time, Commissioner Goldkind
25 moved to adjourn the meeting. Commissioner Rupinkas made the second. The motion passed
26 unanimously.
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Lynette Hallam, Town Clerk