

October 3, 2019

TO: Albany County & Prosecuting Attorney Peggy Trent
Albany County Board of County Commissioners

DELIVERED BY email with copy mailed via U.S. Postal Service, return receipt requested

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RE: Tumbleweed Express/AKAL Travel Center

We appreciate Albany County & Prosecuting Attorney Trent's prompt email reply to our September 26, 2019 letter. In that letter we suggested that Albany County consider filing a revised Verified Complaint for Injunction to enforce the Albany County Zoning Resolution with regard to re-activation of the former Tumbleweed Express, now known as the AKAL Travel Center.

We respectfully disagree with her new argument that because the state did not bring an enforcement action against Tumbleweed for failing to maintain valid Weights and Measures and Motor Fuel licenses, Albany County is somehow prevented from enforcing its own zoning resolution. A determination by the County that a continuing use must be a lawful one is not dependent on whether the state has taken an enforcement action against that use, nor does the absence of County enforcement at any of many past opportunities estop the County from acting now.

The County Attorney's current argument also is contrary to her previous determination as stated in paragraph 35 of the April 23, 2019 Verified Complaint for Injunction, filed on behalf of the Albany County Board of County Commissioners:

“As of the date of the filing for this action, the County has determined that any sales of fuel at the Subject Property between March 31, 2009 and January 22, 2018, an approximate nine (9) year period, would have been sold illegally and without the proper permits that the Subject Property is required by the State for retail sales of gas. Therefore, the Subject Property is no longer a pre-existing non-conforming use due to discontinuance of the active and continuous operation of the pre-existing non-conforming use for a period of twenty-four (24) consecutive months and the APOZ regulations would preclude retail sale of gas on the Subject Property.”

Moreover, we believe that the plain language of the zoning resolution makes clear that any claim of grandfathering for Tumbleweed has been extinguished not only by its lack of required licenses to do business, but also by its erratic on-again, off-again operation. The zoning resolution reads as follows:

“If active and continuous operation of a non-conforming use is discontinued for a period of twenty-four (24) consecutive months, all subsequent uses shall be in compliance with the scope and intensity of the uses for the district in which the use is located.”

[Chapter 3, Section D.2.a, Albany County Zoning Resolution]

It does not say that *all* operation must cease for a period of 24 consecutive months, but rather that cessation of *active and continuous operation* for 24 months brings an end to the grandfathered status. There is no provision in the zoning resolution recognizing “seasonal operation.”

However, even assuming that Tumbleweed/AKAL Travel Center has established a grandfathered status – an assumption with which we do not agree – the Albany County Board of County Commissioners has not voted to approve or disapprove AKAL Energy, LLC’s expansion of the Tumbleweed Express gas station from a purported pre-existing nonconforming use.

As you know, pursuant to Chapter 3, Section 3, and Paragraph D Section 9 (a) and (b) of the Albany County Zoning Resolution, Pages 3-18 and Page 3-19,

a. A pre-existing nonconforming use may be expanded if the following conditions are met:

1) A Site Specific Investigation, done in accordance with Paragraph 6 of these regulations, is completed showing no increased hazard to the aquifer;

2) Control technology built in to the expansion will prevent any increased risk to the aquifer because;

3) Substitution is made of one (1) hazardous material for another provided the substituted material is used for the same function and in equal or lesser amounts as the original material;

4) Substitution of equipment or process for equipment or process provided that the substituted equipment or process performs the same function as the original equipment or process, without increasing the storage volume of hazardous materials stored at the subject business or facility;

5) Expansion of wholesale or retail sales volume which increases the use of hazardous materials but which does not increase the storage capacity for hazardous material;

6) The APOZ [Aquifer Protection Overlay Zone] Development is approved by the governing body.

In paragraph (a) above, the word “conditions” is plural, indicating that all six conditions must be met.

According to the County Attorney,

“New uses, expansions of existing uses, conditional uses, or changes of use are required to get a zoning certificate pursuant to W.S. § 18-5-203. A site plan shall accompany all zoning certificate or conditional use permit applications, as prescribed by the Planning Director. See Chapter 5, Section 4 of the Albany County Zoning Resolution, Page 5-1. All applicants for a zoning certificate must complete, sign, and submit to the Albany County Planning Office an application on a form prescribed by the Planning Office. Planning staff shall make the determination of when an application is complete. See Chapter 5, Section 3 (A) of the Albany County Zoning Resolution, Page 5-1.”

[Verified Complaint, Albany County Board of County Commissioners, April 23, 2019, paragraph 20]

As described below, AKAL Energy, LLC asserts the Tumbleweed Express is a grandfathered use, but it has not sought nor obtained approval to upgrade and thereby expand its alleged grandfathered use, and has not applied for, nor received, the zoning certificate mandated by W.S. § 18-5-203.

According to AKAL Energy, LLC and the County’s representatives, the Tumbleweed gas station has undergone, and is still undergoing significant “upgrades” - an expansion of its purported pre-existing nonconforming use status. As AKAL Energy, LLC’s consultant, CGRS, explained earlier this year:

“Based on our understanding of the system requirements and site conditions, the following generally outlines the proposed fueling system, utilizing the existing underground storage tanks (USTs).

- Tanks - The existing USTs will be utilized to supply unleaded, premium, and diesel fuel.
- Pumps - The existing submersible turbine pump (STPs) will be reused on the unleaded and premium tank's USTs. The Diesel tank submersible turbine pump (STP) will be upgraded from a suction system to a pressure system.
- Piping and Containment - The existing 2" single-wall steel piping will be removed and replaced with double-wall fiberglass piping and fiberglass under dispenser containment (UDC). The STP sumps will be Bravo fiberglass with bottoms.
- Fueling Dispensers - The new dispensers will be supplied and installed by site owner. The site will be equipped with three 3 +1 dispensers after upgrade is completed.
- Leak Detection - Site will be equipped with mechanical leak detectors
- Fuel Islands and Concrete - Fuel Islands, concrete and backfill materials will be supplied and installed/finished by site owner.”

[CGRS to AKAL Energy, LLC, February 8, 2019]

In addition, in a May 29, 2019 letter from Amandeep Pandher, President, AKAL Energy, LLC, to Albany County, Mr. Pandher explained,

“AKAL has paid significant moneys **to upgrade the gas station** for the purpose of continuing to legally and safely operate a gas station. The scope of work for the upgrades included replacing the old fuel supply lines, replacing the old dispensing stations, repositioning the eastern fuel dispenser, adding continuous statistical leak detection devices and equipment and installing emergency shutoff functions.”

Both the County Attorney and the Albany County Planning Director have concluded that the more than \$86,000 in upgrades performed at the Tumbleweed facility, including the installation of three new fueling islands, is neither a continuation of an alleged grandfathered use, nor damage repair of an alleged grandfathered use, but rather is *an expansion of an alleged grandfathered use*. Expansions of grandfathered uses must provide a Site Specific Investigation (SSI) report and be approved by the County Commissioners.

According to Albany County's Planning Director,

“This property has pre-existing nonconforming use status, but because of the expansion of use they are required to meet specific standards specific to the pre-existing nonconforming use requirements. The requirement

specific to this report is found in Chapter 3, Section 3, D, 9, a, 1) of the Albany County Zoning Resolution which necessitates, 'A Site Specific Investigation, done in accordance with Paragraph 6 of these regulations, is completed showing no increased hazard to the aquifer'."

[Email from David Gertsch to WWC Engineering, May 29, 2019]

The Albany County Planning Director also related,

"In my discussions with Peggy, we determined that because this upgrade is not being done due to damage of the use and that the work will be an upgrade in anticipation of an increase in fuel sales, this is an expansion and that language [applicable to the repair of damage] does not apply."

[Email from David Gertsch to WWC Engineering, May 30, 2019]

AKAL Energy, LLC hired a consultant to prepare an SSI and submitted it to Albany County. The County then budgeted \$1,500 for a consultant to review the SSI. This money could only have been offered and paid by the County if AKAL Energy, LLC's "upgrades" were deemed by the County to reflect an expansion. An SSI is not required for the continuation of an alleged grandfathered use, nor for damage repair work performed on an alleged grandfathered use. [Chapter 3, Section 6, Paragraph D, and Section 6(a)(1) and (2) of the County Zoning Resolution, Page 3-23; Chapter 3, Section 3, Paragraph D, Section 9 (a) of the County Zoning Resolution, Pages 3-18 and Page 3-19]

Nevertheless, AKAL Energy, LLC continues to expand its operation. We respectfully request that the Albany County Board of County Commissioners take immediate action to enforce the Albany County Zoning Resolution, either to find that Tumbleweed/AKAL Travel Center is not grandfathered, or to enforce all six requirements – including a vote to approve or disapprove the expansion of the facility as a grandfathered use. If no action is taken, we intend to pursue the legal remedies available to us.

(continued on page 6)

Sincerely,

Albany County Clean Water Advocates

<signed original>

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