



Zoning Board of
Adjustment

The City-County of
Butte-Silver Bow
Council Chambers
Room 312
May 21, 2020

5:30 P.M. Thursday

Members

David Wing - Chair
Joel Arnoldi
Loren Burmeister
Todd Collins
Julie Jaksha
Tyler Shaffer
Franki Weitzel

A G E N D A

APPLICANT OR REPRESENTATIVE MUST BE PRESENT FOR THE VIRTUAL MEETING

- I. Call to Order.
- II. Approval of the Minutes of the meeting of January 16, 2020.
- III. Hearing of Cases, Appeals and Reports:

Variance Application #16521 – A variance application by Western States Equipment Co., owner, and David McKinnon, agent, to expand an existing nonconforming use by expanding the existing rental equipment yard and constructing a 40 foot by 60 foot maintenance shop for servicing rental equipment, per Section 17.48.030-A of the BSBMC. The property is located in a "C-2" (Community Commercial) zone, legally described as a portion of Tract 1 and Tracts 2-6 of Block 1, Sub 1, Section 6, T 02N, R 07W, P.M.M., commonly located at 4005 Harrison Ave., Butte, Montana.

- IV. Other Business.
- V. Adjournment.

BY:



Lori Casey, Planning Director

**BUTTE-SILVER BOW
ZONING BOARD OF ADJUSTMENT
STAFF ANALYSIS**

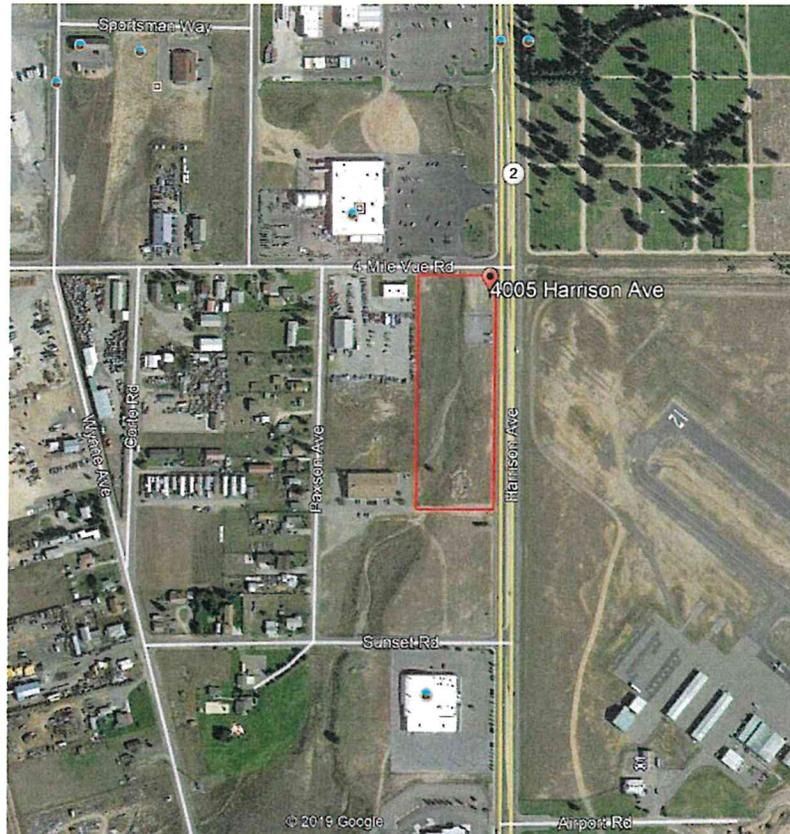
ITEM: **Variance Application #16521** - An application to expand an existing nonconforming use by expanding the existing rental equipment yard and constructing a forty foot (40') by sixty foot (60') maintenance shop for servicing rental equipment, per Section 17.48.030-A of the Butte-Silver Bow Municipal Code (BSBMC).

APPLICANT: Western States Equipment Co., 500 E. Overland Road, Meridian, ID 83642, owner, David McKinnon, 3858 N. Garden Center Way, Boise ID 83705, agent.

DATE/TIME: Virtual Meeting, Thursday, May 21, 2020, at 5:30 P.M. from the Council Chambers, Third Floor, Room 312 of the Butte-Silver Bow Courthouse.

REPORTED BY: Dylan Pipinich, Assistant Planning Director

**VICINITY
MAP:**



LOCATION/

DESCRIPTION: The property is located in a "C-2" (Community Commercial) zone, legally described as Sub 1, Section 6, T2N, R07W, POR TR1, All TR2, TR3, TR4, TR5, and TR6 of the City and County of Butte-Silver Bow, State of Montana, commonly known as 4005 Harrison Ave., Butte, Montana.

**PROPOSAL/
HISTORY:**

Western States Equipment Co. applied for a use variance in February of 2018. Use Variance Application #15736 was reviewed by the Zoning Board of Adjustment (Board) on February 15, 2018. After hearing public testimony for and against the proposed use of the property, the Board approved Use Variance Application #15736 with twenty (20) conditions of approval. Those conditions are:

1. The applicants shall install an eight foot (8') screened (privacy) fence around the rental equipment storage yard. No part of this fence shall encroach into the Sand Creek 100-year floodplain.
2. Prior to receiving an excavation permit, the applicants shall obtain an Elevation Certificate (FEMA Form 086-0-33), that shows that the structure and parking lot would be located above the Base Flood Elevation of Sand Creek at this particular location. The Elevation Certificate shall be completed and signed by a licensed surveyor or engineer and then filed with the Butte-Silver Bow Planning Department.
3. Prior to receiving to an excavation permit, a licensed surveyor or engineer shall mark the limits of the floodplain. Best management practices shall be implemented for working around a designated floodplain including but not limited to construction vehicles or construction equipment shall not

encroach upon the Sand Creek 100-year floodplain. No construction equipment shall be parked inside the floodplain.

4. Prior to receiving a building permit, the applicants shall submit the required documentation for review and secure written approval from the Butte-Silver Bow Public Works Department for the following public infrastructure:
 - a) Compliance with all sections of Chapter 13.04, Wastewater Treatment System, of the Butte-Silver Bow Municipal Code.
 - b) Compliance with all sections of Chapter 13.20, Water System Regulations, of the Butte-Silver Bow Municipal Code, including Chapter 13.24, Main Extensions and Material Specifications.
5. Prior to receiving an excavation permit, the applicants shall submit an engineering plan and analysis to address on-site storm water drainage in compliance with all sections of Chapter 13.32, Storm Water Management, of the Butte-Silver Bow Municipal Code, including the Butte-Silver Bow Municipal Storm Water Engineering Standards and receive a Storm Water Management Permit or variance. This engineering plan shall also show in detail the processing of water from the sump located in the equipment yard.
6. Prior to the issuance of a building permit, the applicants shall submit to the Butte-Silver Bow Public Works Road Division for review and approval a detailed engineering plan (including asphalt paving) of the improvements to the driveway approach off of Four Mile Road. The applicants shall submit a cost estimate for the installation of the approved approach.

This cost estimate will be used as the paving bond plus ten percent (10%) to secure the installation of the above approach.

This bond may be in the form of cash, letter of credit, surety bond, or other guaranteed negotiable instrument.

7. Prior to the issuance of an excavation permit, the applicants shall obtain an approach permit from the Montana Department of Transportation for the proposed driveway approach off of Harrison.
8. The surface of the rental equipment yard, including the driveway approach from Harrison, shall be maintained and coated with a magnesium chloride compound on a regular basis to ensure that gravel, mud, dust and other debris are not carried out onto Harrison Avenue.
9. Prior to the issuance of a building permit, the applicants shall present the parking plan for review and approval. At a minimum, the plan shall meet the parking requirements of Chapter 17.40.900 – Off-street parking – Table of minimum standards.

The applicants shall submit a cost estimate from a licensed contractor for the materials and installation of the approved parking plan. This cost estimate will be used as the paving bond amount plus ten percent (10%).

This bond can be in the form of cash, letter of credit, surety bond, certified check or other guaranteed negotiable instrument.

10. Prior to receiving a building permit, the applicants shall install or bond for curb/gutter and sidewalk adjacent to Four Mile Road, per the requirements of Section 17.38.050. Prior to receiving an excavation

permit, the applicant shall submit a detailed sidewalk plan to the Butte-Silver Bow Public Works Department for review and secure written approval. At a minimum, the design shall meet the Americans with Disabilities Act. The applicants shall submit a cost estimate for materials and installation of the approved curb/gutter and sidewalks from a licensed contractor.

This cost estimate will be used as the sidewalk bond plus ten percent (10%) to secure the installation of the above stated curb/gutter and sidewalks.

This bond may be in the form of cash, letter of credit, surety bond, or other guaranteed negotiable instrument

11. Prior to the issuance of a building permit, the applicants shall submit a detailed landscaping plan to the Planning Department staff for review and approval. The landscaping plan shall comply with the landscaping provisions described by Chapter 17.38, Special Provisions of the BSBMC. This landscaping plan shall also incorporate a line of trees to provide screening between the east property line of the subject parcel and the east fence line of the rental equipment yard.

The applicant shall submit a cost estimate from a licensed landscape contractor for the materials and installation of the approved landscaping plan. This cost estimate will be used as the landscaping bond amount plus ten percent (10%).

This bond can be in the form of cash, letter of credit, surety bond, certified check or other guaranteed negotiable instrument.

12. Prior to receiving a sign permit, the applicants shall submit to the Planning Department for review and

approval, a detailed sign plan and drawings that meet the Butte-Silver Bow sign regulations for the "C-2" zone

13. The office trailer, as submitted at the hearing by the applicants, shall be utilized for the facility for a maximum of two (2) years (February 20, 2020). On or before February 20, 2020, a brick and mortar structure shall be constructed to be utilized as the office for the rental facility.
14. The applicants shall maintain the unimproved portion of the property and keep it devoid of weeds.
15. The applicants shall be required to secure all applicable permits that may be necessary to make improvements in or near designated wetlands or surface water bodies, including but not limited to: storm water discharge construction permit from Montana Department of Environmental Quality (MDEQ) Storm Water Program, a floodplain development permit from Butte-Silver Bow County, a 310 permit (streambed and land preservation) from the Mile High Conservation District, and a 404 permit (Clean Water Act) from the U.S. Army Corps of Engineers.
16. Any future business expansions that are not accessory to the approved business will require further review and approval from the Zoning Board of Adjustment.
17. Prior to the issuance of a building permit, the applicants shall complete, submit, and receive approval of FAA form 7460 to ensure that proposed structure heights meet all applicable FAA requirements. The form is available from the FAA website and can be submitted online.

18. Prior to the approval of an excavation permit, the applicants shall submit to the Butte-Silver Bow Fire Marshal a set of fire protection engineered plans for the 1,000 gallon above-ground fuel storage tank. At a minimum, the plans shall include tank design, distances of the fuel storage tank from property lines, roadways and other structures, tank protection from accidental collisions, fire hydrant availability and distance and spill containment. A written approval from the Butte-Silver Bow Fire Marshal stating that all requirements of the Butte-Silver Bow Fire Prevention Bureau for this facility have been met will need to be provided to the Butte-Silver Bow Planning Department.

Any additional fuel storage tanks placed on the subject property will require further review and approval from the Zoning Board of Adjustment and the Butte-Silver Bow Fire Prevention Bureau.

19. The applicants shall ensure that the construction of or placement of all facilities on the subject property, including but not limited to the office structure, the washing and repair pads and the 1000 gallon fuel storage tank are completed in compliance with all applicable building, electrical, mechanical and fire codes. The applicants shall secure all necessary permits from Butte-Silver Bow and shall abide by all other regulations of the Zoning Ordinance. Any electrical and/or plumbing work must be inspected and permitted by the Butte-Silver Bow Electrical Inspector and also by the Building Official. The electrical permit must be purchased and the electrical service be installed by a licensed electrician. All plumbing work must be performed by a licensed plumber.
20. At no time shall the wash water from the sump be discharged to adjacent surface water drainages. A detailed sump disposal plan will need to be reviewed

and approved by the Butte-Silver Bow Public Works Department Metro Sewer Division.

In January of 2020, the applicant applied for a six (6) month extension to Condition #13 above to extend the time frame to construct a permanent office facility on-site. The Board granted the extension and amended the condition of approval to allow an additional six (6) months to construct a permanent office facility.

At this time, the applicant is proposing to expand the equipment yard and construct a maintenance facility on the property directly south of the existing facility. The applicant is also proposing to expand the equipment yard to the west side of the Sand Creek floodplain in the future.

STAFF FINDINGS: In this particular case, the applicant's equipment rental facility is a legal nonconforming use within the "C-2" zone, permitted by Use Variance #15736. Increasing the size of the rental yard and constructing an additional building is considered an expansion of a nonconforming use of land. The BSBMC, Section 17.48.030-A – Uses of Land does not allow a nonconforming use to be enlarged or increased. Also, Condition of Approval #16 above requires further review from the Zoning Board of Adjustment (Board) for any expansions. Therefore, a variance from the Board is required.

Planning Department staff will review the three point criteria established by the Montana Supreme Court for the granting of variances.

1. A variance must not be contrary to the public interest.

The public's interest in segregating land uses, such as commercial and industrial, is to prevent conflicts between incompatible land uses. Zoning districts are established to separate uses that are not easily integrated and to combine uses that are compatible.

In this particular case, the applicant's equipment rental business, which is a permitted use within the "C-M" (Commercial and Light Industrial), "M-1" (Light Industrial), and "M-2" (Heavy Industrial) zones, is considered a legal nonconforming use permitted by Use Variance #15736. During the February 2018 Zoning Board of Adjustment hearing, the Board heard testimony both for and against the proposal and granted conditional approval of the variance as stated above.

In zones where equipment rental yards are permitted, the yards are required to be screened from view when adjacent to commercial or residential zones. The applicant has proposed fencing along the Harrison Avenue frontage, as well as landscaping in the form of grass, trees and shrubs to screen the visual impacts of the equipment rental yard. The applicant is proposing fourteen (14) trees along the Harrison Avenue frontage, as well as two (2) gallon shrubs adjacent to the fence as shown in the attached renderings. The frontage is approximately 728 feet in length. On average, the applicant is proposing to install a coniferous tree on every fifty feet (50') of frontage. Staff does not believe this adequately screens the industrial use from the commercial corridor. It should be noted that per Section 17.38.047 Landscaping Requirements – tree and shrub minimum sizes requires shrubs planted in a commercial or industrial zone to be a minimum of a three (3) gallon shrub.

In regards to the expansion of the equipment rental yard, it should be noted that since the adoption of the Zoning Ordinance in 1978, there have been no applications to amend the Zoning Ordinance to add equipment sales and rental yards as permitted uses to the "C-2" zone.

Because of this, staff believes that segregating this land use from others permitted in the "C-2" zone is in the public interest. Increasing the size of the yard increases the industrial feel of this Harrison Avenue corridor. Harrison Avenue is Butte's major commercial arterial street. The recent commercial development in the area, the construction of the new terminal at Bert Mooney Airport, as well as any undeveloped commercial property in the area should be protected from land uses that are viewed as incompatible in the Zoning Ordinance. Staff believes that increasing the size of the equipment rental yard, especially with inadequate landscaping, would increase the impact of the incompatible land use and would be contrary to the public interest.

In addition, because of the proximity of this property to the airport height restrictions for structures, equipment and trees are in place. It is imperative that these items do not encroach into this air space. A general guide is that the equipment, structures and trees cannot be taller than the light poles on Harrison Avenue. Planning staff has been advised by the Airport Manager that the extension of the equipment has exceeded the height of the poles on occasion and the manager has had to request that this equipment be lowered. Planning staff has concerns that the inability of the applicant to regulate and abide by the height requirements is a direct public safety issue and is contrary to the public interest.

In regards to the proposal for the future expansion area, as the Board is aware, staff does their analysis and recommendation based on what has been submitted. The applicant has not proposed any landscaping, screening, or fencing for this area but states that they will follow any conditions of approval. Asking for an approval of a future expansion is not only contrary to the public interest but does not give

the public the opportunity to comment on a proposal to expand a nonconforming use.

In regards to the construction of maintenance facility on-site, it should be noted that the applicant's original proposal was to maintain the equipment outdoors. Since then, the applicant has constructed a metal building for the maintenance of equipment. It is important to note that the applicant did not obtain any of the necessary permits to construct this metal building and subsequently, the expansion of use was not considered by the Board. That being said, while the construction of an additional building would be an expansion of the use, having a building to maintain the equipment indoors would increase the conformity of the facility. The "C-2" zone does not allow auto repair activities to be completed outdoors. The maintenance of equipment outdoors would have greater impact on the surrounding properties than the maintenance of automobiles, therefore, conducting maintenance activities within a closed structure instead of outdoors would increase the conformity of the industrial use.

Based on the above discussion, it would appear that the expansion of the equipment yard area and the proposed future expansion area would be contrary to the public interest. However, the construction of a maintenance structure would increase the conformity of the site and, therefore, not be contrary to the public interest.

2. A literal enforcement of the Zoning Ordinance must result in unnecessary hardship owing to conditions unique to the property.

Unnecessary hardship, as defined by the Montana Supreme Court, must result from a condition unique to the property, such as a unique property shape, topographical feature or geological trait. This quality

must preclude the applicants' ability to place a structure on the property in compliance with the Zoning Ordinance. The hardship may not result from a condition created by the applicants.

The subject property is bisected by the Sand Creek floodway, which does reduce the amount of land on the subject property that is able to be developed. Also, a significant portion of the property is within the flight path at the Bert Mooney Airport. However, while this presents challenges to the development of the property, it does not preclude uses that are permitted outright in the zone to be developed. In fact, height and space restrictions may have more of an impact on industrial uses than commercial uses. Especially, given that equipment has the ability to be expanded above the height restrictions.

The property does not exhibit any topographical conditions or unique property shape or size that would provide a hardship and is currently being utilized in part by uses that are considered commercial, i.e. office and maintenance shop purposes.

3. The spirit of the Zoning Ordinance must be observed and substantial justice done.

It is the intent of the Zoning Ordinance to permit the reasonable use of private property while restricting practices which may infringe on the rights of adjacent landowners and the public in general.

Public health, safety and general welfare must be protected and weighed against the rights of the applicant to develop a property in a way that may be suitable. If public interest can be protected pertaining to these issues, a variance may be appropriate.

First, as stated above, the proposed development is immediately adjacent to the flight path at the Bert Mooney airport. There have been several instances where the existing rental yard has extended equipment implements above the required height restrictions. These airport height restrictions are in place for the protection and safety of the public.

The applicant has stated that the construction of structures on the site will be underneath the maximum allowable height as dictated by the airport and the Federal Aviation Administration (FAA). However, staff does have concern that the expansion of the yard area will increase the potential safety concerns. With more equipment stored on-site, the potential to encroach above the maximum allowable height increases.

Second, as stated previously, the Sand Creek regulated floodplain and floodway traverses the site. The applicant's site plan has delineated the floodplain, but it is also important that the floodplain be marked in the field to ensure that any development occurring on the site does not encroach into the floodplain. The proposed future expansion area is located on the west side of the floodplain, and due to the lack of detail regarding this proposal, it is unclear how this area will be accessed. Therefore, it is hard to determine if there will be any associated impacts to the floodplain at this location.

It should be noted that any expansion or construction of buildings and approaches related to this development or any other development are subject to Storm Water Management Plan requirements and approach permits by the Butte-Silver Bow Public Works Department and the Montana Department of Transportation, as well as all building, plumbing, mechanical, and fire codes to ensure general public safety of the development.

As stated above, the applicant is proposing the install a fence and landscaping to screen the equipment yard from Harrison Avenue (see attached rendering). It is the intent of the Zoning Ordinance to screen industrial uses from commercial and residential zoned properties. Although the applicant's landscaping plan slightly exceeds the minimum requirements for landscaping, as required by Section 17.38 of the BSBMC, staff has a concern that the plan does not adequately screen or mitigate the impact of the industrial use. The applicant is proposing fourteen (14) trees along with a fence adjacent to Harrison Avenue. This equates to approximately one (1) tree per 50 feet of street frontage. Staff does not believe this adequately screens the industrial use. Although staff is in full agreement that landscaping with trees provides a great visual buffer, it is important to note that trees are also subjected to the airport height restrictions. As such, staff is reluctant to accept trees as a visual buffer without assurance by the applicant that the trees provide a visual buffer without encroaching into the height restrictions.

Bases on the above discussion, it appears that the expansion of the equipment yard and the proposed future expansion may not be consistent with the spirit of the Zoning Ordinance. However, the construction of a maintenance structure may be reasonable use of the private property.

CONCLUSION: As discussed within the report, the requested variance to expand the equipment rental yard and the proposal for a future expansion area does not meet any of the Montana Supreme Court's criteria for a variance. The construction of a maintenance facility, while an expansion, increases the conformity of the existing use. Therefore, staff recommends that the Board deny the proposal to expand the rental yard

and proposed area for future expansion for equipment storage but approve the construction of a maintenance structure on-site, subject to the following conditions:

1. The applicants shall ensure that the construction and remodel of any facilities on the parcel are completed in compliance with all applicable building, electrical, mechanical and fire codes. The applicants shall secure all necessary permits from Butte-Silver Bow and shall abide by all other regulations of the Zoning Ordinance. All plumbing and electrical work must be completed by a licensed plumber or electrician.
2. Prior to the issuance of a building permit, the applicants shall submit a detailed landscaping plan to the Planning Department staff for review and approval that meets the requirement of Section 17.38 – Special Provisions and the airport height restrictions.

The applicants shall submit a cost estimate from a licensed landscape contractor for the materials and installation of the approved landscaping plan. This cost estimate will be used as the landscaping bond amount plus ten percent (10%). This bond can be in the form of cash, letter of credit, surety bond, certified check or other guaranteed negotiable instrument.

3. Prior to the issuance of a building permit, the applicants shall submit a detailed parking plan to the Planning Department staff for review and approval. The plan shall comply with the parking provisions described by Chapter 17.40, Off-Street Parking of the BSBMC.

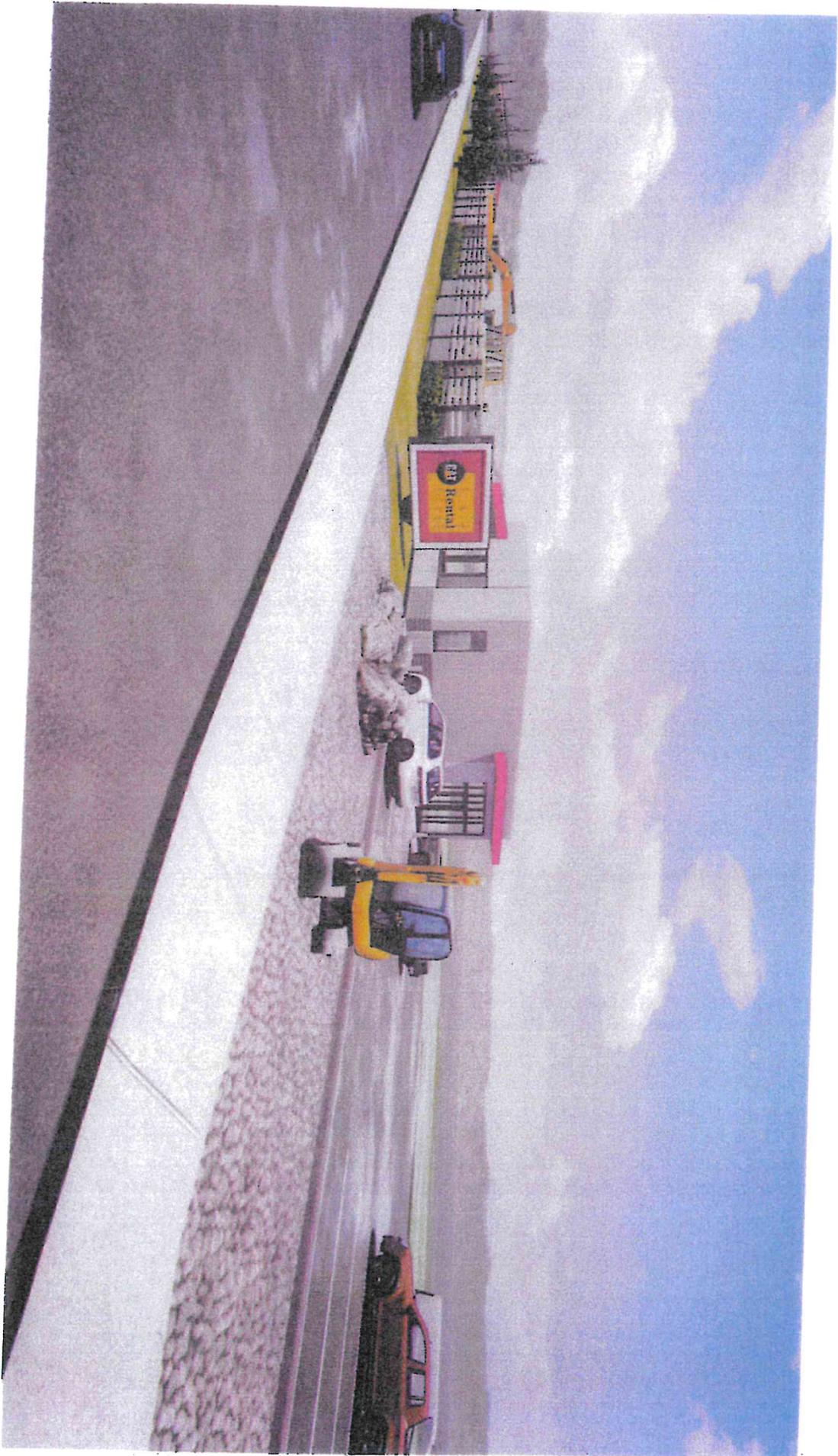
The applicants shall submit a cost estimate from a licensed contractor for the materials and installation of the approved parking plan. This cost estimate will be used as the bond amount plus ten percent (10%). This bond can be in the form of cash, letter of credit, surety bond, certified check or other negotiable instrument.

4. Prior to receiving a building permit, the applicants shall submit an engineering plan and analysis to address on-site storm water drainage in compliance with all sections of Chapter 13.32, Storm Water Management, of the Butte-Silver Bow Municipal Code, including the Butte Silver Bow Municipal Storm Water Engineering Standards and receive a Storm Water Management Permit or receive a variance from the Butte-Silver Bow Public Works Department.
5. Prior to receiving any sign permits, the applicants shall submit to the Planning Department for review and approval, a detailed sign plan and drawings.
6. The applicants shall submit a new site plan depicting the location of a maintenance facility and no additional equipment storage yard area. The site plan shall conform to all other sections of the Zoning Ordinance. Any approaches require approval from the BSB Public Works Department and/or the Montana Department of Transportation.
7. The applicants shall be required to secure all applicable permits that may be necessary to make improvements in or near designated wetlands or surface water bodies, including but not limited to: storm water discharge construction permit from the Montana

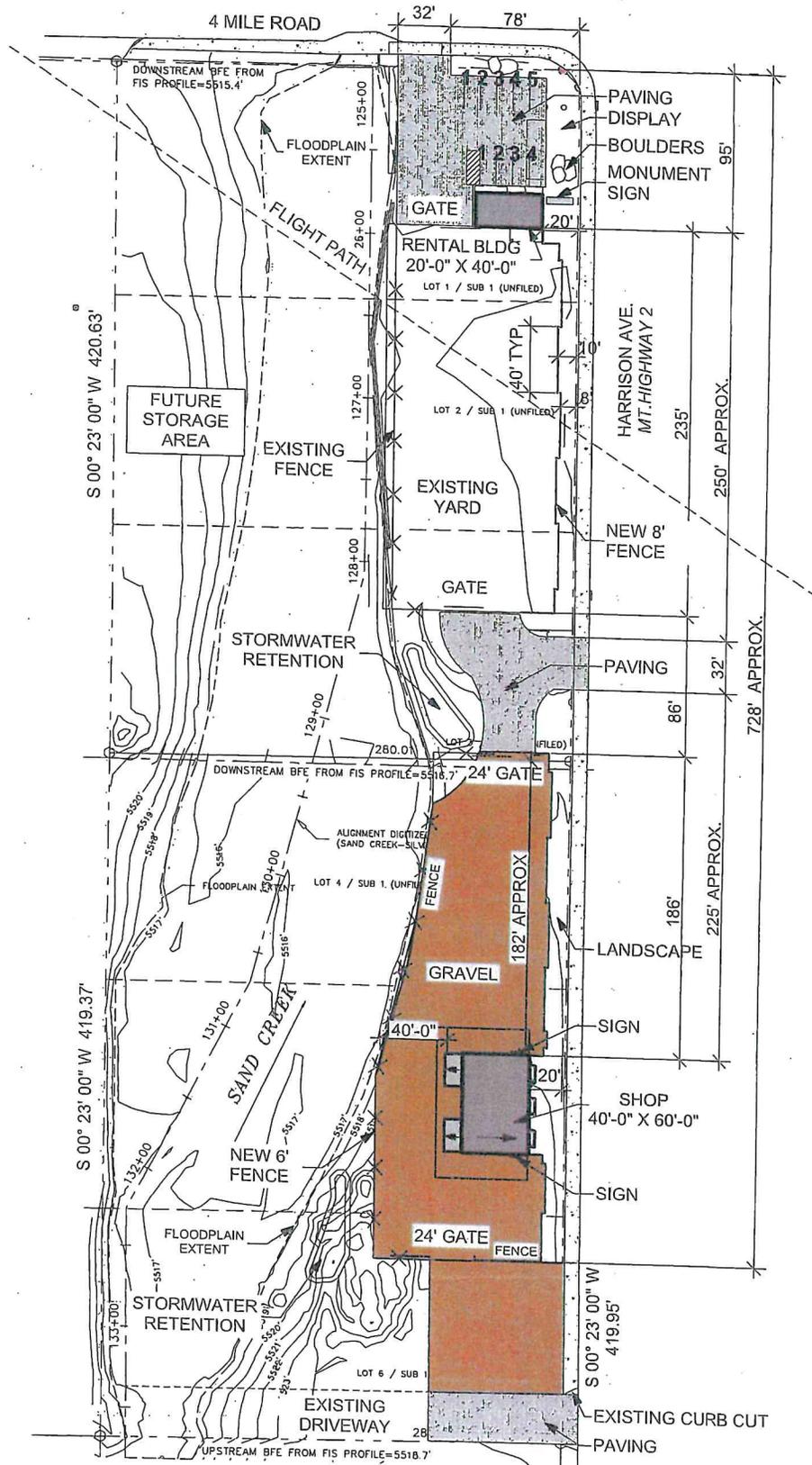
Department of Environmental Quality (MDEQ) Storm Water Program, a floodplain development permit from Butte-Silver Bow County, a 310 permit (streambed and land preservation) from the Mile High Conservation District, and a 404 permit (Clean Water Act) from the U.S. Army Corps of Engineers.

8. Prior to the issuance of a building permit, the applicants shall complete, submit and receive approval of FAA form 7460 to ensure that proposed structure heights meet all applicable FAA requirements. The form is available from the FAA website and can be submitted online.









CAT RENTAL STORE

1/31/2020

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