

cc: DPW
LL

COUNTY OF NEVADA

(Attach pages if needed)

APPEAL TO BOARD OF SUPERVISORS

(Per Article 5 of Chapter II of the Land Use and Development Code)

Any applicant or interested party may file an appeal with the Board of Supervisors requesting review of any final action taken by Various County Agencies. Such appeal shall be filed with the Clerk of the Board of Supervisors within **ten (10) calendar days** from the date of the decision, except for recommendations on general plan amendments which by State law are subject to a **five (5) calendar day** appeal period. Filing shall include all information requested herein and shall be accompanied by the appropriate filing fee. The statements (required below) must contain sufficient explanation of the reasons for and matters being appealed in order to facilitate the Board of Supervisors initial determination as to the propriety and merit of the appeal. Any appeal which fails to provide an adequate statement may be summarily denied. The filing of such an appeal within the above stated time limit shall stay the effective date of the action until the Board of Supervisors has acted upon the appeal.

I. APPEAL: I/We, the undersigned, hereby appeal the decision/recommendation of the

Community Development Agency, Department of Public Works
Agency Name

Floriston Avenue/Iceland Road, Encroachment Permit 9541 April 27, 2016
Agency File No. Date of Decision

PLANNING AGENCY DECISIONS:

- Airport Zoning
L-III Airport Zoning; Truckee-Tahoe Airport, 2.12 Appeals; Nevada County Air Park, 3.10
- Environmental Impact Report
L-XIII California Environmental Quality Act; County CEQA Guidelines and Procedures, 1.20 Appeals of the Adequacy of the EIR
- Floodplain Management Regulations (Floodplain Administrator)
L-XII Floodplain Management Regulations; 1.4 Administration
- Historic Preservation Combining District
L-II Zoning Regulations; Zoning Districts; 2.7.2 HP Combining District
- Inoperable Vehicles
L-II Zoning Regulations; Administration and Enforcement, 5.20 Abatement and Removal of Inoperable Vehicles
- Land Use Applications
L-II Zoning Regulations; 5.12 Administration and Enforcement
- Negative Declaration
L-XIII California Environmental Quality Act; County CEQA Guidelines and Procedures, 1.12 Negative Declaration

_____ Rules of Interpretation
L-II Zoning Regulations; 1.4 Rules of Interpretation Regarding:

PUBLIC WORKS DECISIONS:

 X Roadway Encroachment Permit
G-IV General Regulations; 4.A Regulating Roadway Encroachments;
15.1 Appeals

FIRE AGENCY DECISIONS:

_____ Fee Assessments (Fire Protection District)
L-IX Mitigation and Development Fees; Fire Protection Development
Fees; 2.6 Appeal from Fee Assessment

_____ Fire Safety Regulations; General Requirements (Fire Safety Reg. Hearing Body)
L-XVI Fire Safety Regulations; General Requirements; 2.7 Appeals

_____ Fire Safety Standards (County Fire Marshal or Fire Chief)
L-V Buildings; 5.8 Fire Agency Appeals

ENVIRONMENTAL HEALTH DECISIONS:

_____ Sewage Disposal (Sewage Disposal Technical Advisory Group)
L-VI Sewage Disposal; 1.18 Appeals

_____ Water Supply and Resources (Health Officer)
L-X Water Supply and Resources; 5.1 Appeal Procedures

List All Agency Action(s) Taken That Are Being Appealed: See Attached

II. STATEMENT OF THE REASONS FOR THE APPEAL:

 See Attached

III. STATEMENT OF THE SPECIFIC PROVISIONS WHICH ARE BEING APPEALED:

See Attached

IV. STATEMENT OF THE CHANGES OR ACTION REQUESTED OF THE BOARD OF SUPERVISORS: See Attached

V. SUMMATION OF THE ARGUMENTS TO BE RAISED BY THE APPELLANT(S):

See Attached

VI. IDENTIFICATION OF THE APPELLANT(S):

Larry and Cheryl Andresen
(Name) (Mailing Address) (Telephone)

PO Box 34047, Truckee, CA 96160

(530) 587-7965



COUNTY OF NEVADA
COMMUNITY DEVELOPMENT AGENCY
 950 MAIDU AVENUE, SUITE 170, NEVADA CITY, CA 95959-8617
 (530) 265-1222 FAX (530) 265-9854 <http://www.inynevadacounty.com>

Planning Department Environmental Health Building Department Department of Public Works Agricultural Commissioner

**AGREEMENT TO PAY
 LAND USE APPEAL**

Nevada County Community Development Agency (NCCDA) Appeal fees are based on Board of Supervisor approved fee schedules. Hourly fees and fees for services by departments not included in the original appeal fees are billed to the applicant based on the Board approved fee schedule in effect at the time services were performed and once the final appeal decision has been rendered by the Board. This *Agreement To Pay* form must be signed and original signatures submitted to the Clerk of the Board along with the completed forms and the initial payment of fees. Copy of current fee schedule is attached to the appeal packet.

I/We understand that the NCCDA may bill for services not included in the original appeal fee, and I/We agree to pay such billing within thirty (30) days of the mailing of such billing. All fees must be paid prior to the granting of any permits, approvals, or any land use entitlement for which services are required. The collection of fees, however, will have no effect upon the decision of the appeal by the Board of Supervisors.

Appellant Information:

Invoices and/or notices to be mailed to:

Project: Floriston Ave/Iceland Rd	Name: Larry and Cheryl Andresen
Encroachment Permit 9541	Address: PO Box 34047
	Truckee, CA 96160
	Telephone: (530) 587-7965

NCCDA staff is authorized to consult with necessary governmental agencies concerning this project. They are also authorized to consult with the following individuals concerning this appeal:

Greg Gatto, Stoel Rives LLP

I certify under penalty of perjury that I am the party authorized to enter into this fee agreement. I have read the conditions concerning Nevada County Community Development Agency fees and I understand that in the event that the billing party I have indicated does not pay required fees, I will be responsible for payment. I further agree to advise the department in writing should I no longer be associated with the above referenced project/property, rendering this agreement invalid as of the change of the date the letter is received by the Nevada County Community Development Agency.


 Signature

Date 5-6-16

DL# 03225327

Larry Andresen

PH# (530) 587-7965

Printed Name

List All Agency Action(s) Taken That Are Being Appealed:

Appellants are appealing the April 27, 2016 decision by the Director of Public Works (the "Director") to deny Appellants' encroachment permit application (Floriston Avenue/Iceland Road, Encroachment Permit 9541), the request that Appellants remove the fence and boulders located on their private property and outside of any public right of way, the determination that the application is inconsistent with Public Resources Code section 4290, and any finding or determination, express or implied, that there is a legal right-of-way over Appellants' property, located at 10953 Floriston Avenue.¹

II. STATEMENT OF THE REASONS FOR THE APPEAL:

Appellants are appealing the Director of Public Works decision to deny Appellants' encroachment permit application (Floriston Avenue/Iceland Road, Encroachment Permit 9541) on the basis that the decision is an abuse of discretion, arbitrary, capricious, lacking in evidentiary support, and/or because the Director failed to follow the procedure and give the notices required by law.

In addition, the decision violates Appellants' substantive and procedural due process rights (U.S. Const. amend XIV, §1; Cal. Const. art. 1, §7), constitutes a taking of Appellants' property rights (U.S. Const. amend. V; Cal. Const. art. 1, § 19), and singles Appellants out for disparate treatment without any rational basis and in a wholly arbitrary manner in violation of the constitutional guarantees of equal protection under the law (U.S. Const. amend. XIV; Cal. Const. art. 1, § 7). By failing to require removal of the encroachments within the dedicated right-of-way, the County has also illegally gifted public resources.

III. STATEMENT OF THE SPECIFIC PROVISIONS WHICH ARE BEING APPEALED:

The specific provisions of the April 27, 2016 decision by the Director of Public Works appealed are as follows:

- (1) The decision by the Director denying Appellants' encroachment permit application (Encroachment Permit 9541).

¹ Appellants also bring this Appeal pursuant to County Code Section G-IV.A.36 on the basis that adjacent property owners have installed and/or maintained encroachments within the County right-of-way on Floriston Avenue, which create an obstruction to the sight distance of users of Floriston Avenue, and which create unsafe conditions to the users of Floriston Avenue. Appellants are beneficially interested in the County's enforcement of Section G-IV.A.36, as they own three residences on Floriston Avenue and/or accessed off of Floriston Avenue, and therefore, are subject to the unsafe conditions resulting from the illegal and unpermitted encroachments. Accordingly, Appellants appeal fee must be waived. (Nevada County Code Section G-IV.A.36(E).) Appellants reserve all rights to claim a refund of any appeal fee paid.

- (2) The Director's request that Appellants remove the fence and boulders located on their private property and outside of any public right of way.
- (3) Any determination by the Director that a historic path of travel has been established over Appellants' property or that any portion of Appellants' property has been impliedly dedicated or otherwise established as a public roadway.
- (4) The Director's failure to take action to abate any public nuisances within the dedicated right of way of Floriston Avenue, failure to require removal of any unpermitted structures within the dedicated right-of-way of Floriston Avenue, and failure to require relocation of any utility poles within six feet (6') of the edge of the traveled way within the dedicated right-of-way of Floriston Avenue.
- (5) The Director's determination that the encroachment permit application is inconsistent with Public Resources Code section 4290.
- (6) The Director's determination that the encroachment permit application does not serve the safety or convenience of the community.

IV. STATEMENT OF THE CHANGES OR ACTION REQUESTED OF THE BOARD OF SUPERVISORS:

Appellants are requesting that the County approve the encroachment permit and associated Floriston Avenue improvement plans. Appellants also request that the County take appropriate action, including but not limited to initiation of enforcement and nuisance abatement actions, to: (1) require removal of all encroachments which obstruct the free passage of the dedicated right of way over Floriston Avenue and/or which violate County Code sections G-IV 4.A.35, G-IV 4.A.33, and G-IV 4.A.36; (2) abate all public nuisances within the dedicated right of way of Floriston Avenue²; (3) require removal of unpermitted structures within the dedicated right-of-way of Floriston Avenue; (4) pursuant to County Code section G-II 4.5, require relocation of any utility poles within six feet of the edge of the traveled way within the dedicated right of way of Floriston Avenue (County Code Sec. L-XVII 3.4(J)).

V. SUMMATION OF THE ARGUMENTS TO BE RAISED BY THE APPELLANT(S):

There is no legal or factual basis for the Director to deny the Appellants' application for an encroachment permit. The Director's determination is based on an alleged path of travel that has been followed "for decades", which the Director claims is shown on Record of Survey Book 15 Page 185. The Record of Survey, which was recorded on February 19, 2015, is not evidence of any decades long travelled pathway, but rather, depicts an "existing travelled way," at the time

² To the extent that parking and/or storage of vehicles and recreational items (boats, etc.) in the dedicated right-of-way obstructs traffic, it is a violation of the public nuisance statutes, and Appellants therefore request that no parking signs be installed on Floriston Avenue as detailed in the Improvement Plans. (*See People v. Jones* (1988) 205 Cal.App.3d Supp. 1.)

the survey was conducted. Moreover, the record of survey was prepared at the direction of one of the property owners who has illegally constructed and maintained encroachments in the right-of-way, without any permits.

Based on the Director's repeated allegations that a historic path of travel exists over Appellants' property, on February 12, 2016, Appellants submitted Public Records Act requests to the Clerk of the Board of Supervisors and the Community Development Agency³, requesting, among other things:

- All communications, documents and electronically stored information in the files and records of the County relating to any historic path of travel over Floriston Avenue.
- All communications, documents and electronically stored information in the files and records of the County relating to any path of vehicular travel over the property located at 10953 Floriston Avenue; and
- All communications, documents and electronically stored information in the files and records of the County relating to any right of way or other easement rights claimed by the County over the property located at 10953 Floriston Avenue.

The County responded to these requests, but provided no evidence of any historical use of Appellants' property, much less the decades long use alleged by the Director. If the County had any evidence of an implied dedication⁴ over Appellants' property, it was required to produce it pursuant to Appellants' Public Records Act request. As there was no evidence produced that would establish any County right to use Appellants' private property for road purposes, there is no basis for public use of Appellants' property for a road. Accordingly, the County must process Appellants' encroachment permit application on the basis of the existing legal right-of-way.

Second, the Director claims that Floriston Avenue does not meet the minimum road width standards established pursuant to Public Resources Code § 4290 because of a fence built by Appellants on their private property and outside of the legal right of way. Public Resources Code Section 4290 requires the State Board of Forestry and Fire protection to, among other things, adopt regulations relating to road standards for fire equipment access. (Public Resources Code § 4290(a)(1).) The regulations implementing Section 4290 regarding minimum road width apply only to new construction requiring a building permit, and expressly do not apply to building construction on a parcel that was formed from a parcel map or tentative map approved

³ The Community Development Agency is comprised of five Departments, including the Department of Public Works.

⁴ On February 8, 2016, Appellants sent the Board of Supervisors a letter summarizing the law relating to implied dedications. For the reasons set forth in that letter, the County cannot establish an implied dedication over Appellants' property. The County's response to Appellants' Public Records Act request confirmed there is no evidentiary basis supporting an implied dedication. Appellants' February 8, 2016 letter is hereby incorporated by reference into the record on this Appeal.

prior to January 1, 1991, to the extent that conditions relating to the perimeters and access to the buildings were imposed by the parcel map or final tentative map approved prior to January 1, 1991. (14 Cal. Code Regs. § 1270.02.) The fence constructed by Appellant did not require a building permit, and Appellants' lot was created by a map predating January 1, 1991, so the minimum road width standards do not apply to the Appellants' fence.⁵

Further, there is nothing in Section 4290, or the implementing regulations, that require a property owner to dedicate their private property for use as a roadway, when adequate width for fire access exists within a dedicated public right-of-way. If Floriston Avenue does not meet minimum road width, it is because the County has allowed adjacent property owners to illegally construct and maintain encroachments in the dedicated right-of-way, and has refused to exercise its enforcement authority to preserve the public right-of-way; not because Appellants have constructed a legal fence within the boundary of their private property and outside of any right-of-way. Thus, there is no basis in Section 4290 or any of the fire safe regulations to deny the encroachment permit.

Third, the Director claims that the encroachment permit would adversely affect the convenience or safety of the public. There is absolutely no evidentiary support for this statement.⁶ The Director bases this determination on the allegation that the path of travel over Floriston Avenue has intermittently encroached onto the Appellants' private property, and that by offering their private property for dedication to the public, Appellants can remedy any safety issues resulting from illegal encroachments in the right-of-way. Such a conclusion is illogical and entirely arbitrary and capricious. The encroachment permit application seeks to restore the legal right-of-way to a standard width, and remove unsafe and obstructing encroachments. Appellants' application has been designed to increase road width, curve radius, and line of sight, and to mitigate multiple pre-existing road deficiencies, all at no cost to the County. While this may impact the convenience of a single property owner who has attempted to usurp public property for his own private use, an encroachment permit cannot be denied on that basis. It is incontrovertible that removing illegal encroachments within a County right-of-way, and restoring the dedicated road to a standard width, will benefit the convenience and safety of the community

⁵ The Appellants met with Troy Adamson, Battalion Chief of Cal Fire Truckee-Tahoe, who stated he supported Appellants' road improvement plans. Jeff Dowling, of Cal Fire, also sent Supervisor Anderson an email on September 28, 2015, acknowledging that the "State does not have the ability to ask [Appellants] to remove the fence...."

⁶ At the February 9, 2016 Board of Supervisors hearing, several neighbors spoke against a related grading permit application. However, based on the content of the comments made, it is apparent that the neighbors had not reviewed the Improvement Plans. One comment specifically referred to two homes that would have to be removed. Under the plan submitted, no homes would be removed. In fact, the design of the proposed road improvements has purposefully aligned the road to the westernmost portion of the dedicated right-of-way, allowing for additional parking space on the eastern side of the right-of-way.

and public at large, including all residences adjacent to the proposed road improvements. The Director's determination to the contrary is untenable.⁷

For the reasons summarized in this letter and other correspondence with the County, Appellants also contend that the denial of the encroachment permit application and the requests made therein constitute a taking of Appellants' property, and violates their due process and equal protection rights.

Finally, Appellants hereby object to and request disqualification of the Board of Supervisors from hearing this appeal due to unlawful bias. "In an administrative action, procedural due process entitles a party to a hearing 'before a reasonably impartial, noninvolved reviewer.'" (*Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 812 (quoting *Williams v. County of Los Angeles* (1978) 22 Cal.3d 731, 736).)

When a board of supervisors hears an appeal of a building or land use permit, it is acting in an adjudicatory capacity. (*Woody's Group, Inc. v. City of Newport Beach* (2015) 233 Cal.App.4th 1012, 1021.) When functioning in such a capacity, the board must be "neutral and unbiased." (*Ibid.*) "[A]llowing a biased decision maker to participate in the decision is enough to invalidate the decision." (*Id.* at 1022.) Here, the Board of Supervisors has an incontrovertible bias, having previously voted to initiate a lawsuit against Appellants arising out of the same facts at issue in this appeal. In *Nasha LLC v. City of Los Angeles* (2004) 125 Cal.App.4th 470, the court found an unacceptable probability of bias had been shown, violating applicant's due process right to fair hearing, where a planning commissioner wrote a newspaper article attacking a development project before hearing. The bias here extends well beyond a newspaper article, where the Board has decided to initiate litigation against Appellants. This also raises another issue of procedural fairness in that the Board is acting simultaneously as both a prosecutor and a decisionmaker. Such a conflict is patently unlawful. (See *Quintero v. City of Santa Ana* (2003) 114 Cal.App.4th 810, 812 (prosecutory aspects of administrative matters must be adequately separated from the adjudicatory function).)

Appellants hereby incorporate by reference the complete administrative record of proceedings in this matter, including but not limited to all prior correspondence between Appellants and the County (including, without limitation the October 18, 2013 letter to Supervisor Anderson and September 27, 2015 email to Supervisor Anderson) and documents produced by the County in response to Appellants' Public Records Act requests, or which are otherwise responsive to those requests. Appellants also reserve the right to submit additional information/justification in support of this appeal.

⁷ The Director's claim that an alignment based on encroachments and illegally parked vehicles, which at times forced vehicles off of the publicly dedicated roadway and onto the Appellants' private property, "adequately served the community for years" is belied by the record. Numerous complaints and reports based on conflicts with the Floriston road encroachments have been filed with the County, Sheriff's office, and Highway Patrol over the past several years.