DATE: 7/1/2021

Permanent Right-of-Way Closure Questions

The purpose of this document is to provide a list of questions that the members of the Multimodal Transportation Commission (MMTC) asked during the meeting on April 28, 2021 (and Jessica's initial answers) in response to the draft Permanent Right-of-Way Closure policy. The policy was provided, and a presentation on the various components was shown. The presentation also included a number of examples of recent ROW closure requests that have come before the MMTC in order to show the diversity of types of requests.

Staff is requesting legal to review the questions and assist in providing answers that we will then take back to the MMTC for further discussion and subsequently use to refine the draft Permanent Right-of-Way Closure Policy.

Question 1: Michael Stratton asked if there is a statute of limitations on how long the city can go without accepting that initial dedication? If the unopened ROW was platted in the 20's, but we didn't end up accepting it then, but we want to accept it now, could that happen?

Jessica Answer: Jessica Morriss indicated that she doesn't believe there is a statute of limitations and she believes that if the city wanted to accept an unopened ROW we could. There are times when we would potentially do that. She explained that a lot of times when we deny a closure request there is a likelihood that the city is going to need it for something i.e. greenway, bikelane, etc., so at that time we would accept it and take over the responsibility for maintaining it.

City Legal Answer: There is no current statute of limitations in which the City must accept a pending dedication. However, many unaccepted dedications can be rescinded by the dedicator at any time prior to acceptance. After several years, a dedicated ROW can also be closed through a judicial process. Therefore, the City may lose the option to accept a dedication at some point, but there is no automatic expiration.

Question 2: Dennis Wencel asked regarding the example of the alley behind the proposed Create 72 mixed-use project on Broadway, if the alley was never accepted by the city?

Jessica Answer: Jessica Morriss explained that she thinks so. She said that her recollection was that the alley was privately owned and privately maintained, but was actively used by adjacent property owners and the City for operations, but that it was never accepted by the City.

City Legal Answer: I'm not currently aware of the ownership status of this alley. The City would need to conduct a thorough title search in order to determine the City's authority here.

Question 3: Maggie Ullman asked what would be an example that would be contrary to the public interest?

Jessica Answer: Jessica Morriss explained that it would be blocking access or future connectivity. Removing all opportunities for a needed connection. It may not be important to the adjoining property owner, but overall the public interest could be damaged if it were closed.

City Legal Answer: The phrase, “public interest” in this context can refer to many things. Generally, the effect must touch the public as a larger whole instead of one or a small group of individuals or properties. Some additional examples where this is often the case is when a closure would negatively affect connectivity, emergency access, circuity of travel, or specific future public plans for the ROW.

Question 4: Joe Archibald asked if you can require a development plan? The draft ordinance states they need to submit a development plan. He suggested that there needs to be a development plan. The development plan and RoW closure work together.

Jessica Answer: Jessica Morriss indicated that she is going to have a conversation with the city Legal staff. Her understanding is that we can ask, but we can’t require, but at the same time if they don’t give us anything then how do we show it is not contrary to the public interest? So our approach the last 6 months has been that if we don’t receive a development plan then we don’t make a recommendation to approve the requested closure at TRC on the grounds that we don’t have enough information. But, she would like to clarify.

City Legal Answer: North Carolina law only requires a showing that the closing would not be adverse to the public interest and that no property owners in the vicinity would lose all reasonable access to their property. As Jessica points out, the law doesn’t permit the City to require a development plan. However, in some or perhaps many of the cases, it may be difficult or impossible to determine if the closure will be adverse to the public interest without such a plan. Therefore, the City will continue to request it. In some cases, a determination may be possible without a plan, but an applicant is far more likely to receive a recommendation if one is provided.

Question 5: Dennis Wencle asked if the closures can be contingent based on a specific development plan and do they expire if the plan does not happen?

Jessica Answer: Jessica Morriss stated that she would like to get clarification. Her understanding is that we can’t make a closure contingent on development plan approval. So if you close it, it is closed. She doesn’t think we can condition right of way closures. She doesn’t think we can say if this isn’t built per the approved plan then it gets reversed. That’s why the need for a development plan is important, but it is also difficult because per the law we are not supposed to lay a judgement upon the development plan. So we have to be careful to say here’s your plan and I’m going to look at it strictly with respect to the criteria in the policy and we are not going to place judgement on whether it is an affordable housing project, a hotel, a gas station, etc. We have to suspend any kind of judgement about the product and look at the pieces of it.

City Legal Answer: North Carolina law does not permit local governments to impose such contingencies on ROW closures. Therefore, we must either make a decision to close or not to close. Once closed, the decision is final.

Question 6: Maggie Ullman asked if we can and should charge more than the fees for processing the request? As in can we charge them for the land if we close an unopened ROW? Land is extremely valuable in Asheville and we are giving it away. Could any extra funding that is collected go toward something like Transit? Or affordable housing? She said that she also understands there is a lot of development that we need like affordable housing and more dense housing and when you charge more fees to developers you make it more challenging to provide affordable housing. She asked Joe if we were to encourage staff to look at just raising those fees or approaching market value with the fees, how influential are the RoW closures in making projects happen and the type of projects our community wants and needs?

Jessica Answer: I am not sure if we are able to charge fees in addition to what is supposed to cover the cost of the processing of the request. If we are, I will find out if we are able to waive additional fees for certain types of projects that are benefiting the community, like affordable housing.

City Legal Answer: The State statutes governing the process for ROW closures makes no mention of charging additional fees to provide for additional public uses. In North Carolina, local powers of this type must be specifically delegated to a City in order to provide the necessary legal authority. I believe that charging fees over and above that which is necessary to review and process the request could be beyond the City's authority.

Question 7: Michael Stratton stated that pens he thinks we should get compensation for the RoW's, but he wonders if we are legally allowed to "sell" the land, particularly for an unopened, unaccepted ROW that the City doesn't technically own? He stated that he doesn't think it would be fair to expect compensation for land that the City never accepted. Joe Archibald said that he thinks we should be able to "sell" the land because the City has the authority to decide whether or not a ROW can be closed.

Jessica Answer: Right now our fee is $4,000 and half of the cost goes to the required public advertising, because we have to put in the Asheville Citizen Times, and the other half is cost recovery for staff time. She will consult with legal on whether we can charge additional fees, perhaps based on the market rate of the land, and also whether these collected fees could be dedicated to anything, of if they would have to be allocated to something related to land use (i.e does there have to be a nexus between the fee collected and how it is used)? Example: Transportation is probably easier to make an argument for, but taking it and spending it on Parks and Recreation probably is not.

City Legal Answer: See the previous response on this type of fee.

Question 8: Joe Archibald asked if a development proposal came through like a CZ, and there is a list of conditions and they have to meet the conditions and they become part of that zoning for that particular property, then could we include the ROW closure as a condition of approval. Maybe there is some mechanism to say if the development doesn't go through or changes does that mean that the RoW reverts back. Maybe somehow in that whole idea of conditions in the conditional zoning the RoW's can legally bind it?

Jessica Answer: Jessica Morriss explained that her understanding is that we can't condition a RoW closure, but she can ask to make sure. Maybe with a conditional zoning there is more of a legal possibility.

City Legal Answer: The State statute on closures doesn't contemplate such becoming a condition that would permit reversion to the City. I would also consider a closed ROW to be permanently closed unless re-dedicated in the future.

Question 9: Dennis Wencel asked about whether in terms of fees, if we could perhaps have a reduced fee if they provide a development plan, and a higher one if they do not? Or some kind of incentive to do so?

Jessica Answer: Jessica Morriss said that she would inquire with legal.

City Legal Answer: It may be possible to permit a reduced fee, but only if this was based upon reduced staff review time. If, as an example, a development plan allowed staff to avoid additional review time, then a lower fee would be justified. I would caution against this, however, as development plans can always change.