



Pursuant to Rule 22.203(b), the applicant must provide “specific geographic site approval from the government(s) of jurisdiction” when the government has “adopted restrictions on sites in conjunction with a comprehensive county-wide land use plan.” Under Rule 22.203(e), when the approval or denial of the local government is required (because it has adopted restrictions on sites in conjunction with a comprehensive county-wide land use plan) it must be in writing and state “the basis for the approval or denial with reference to the specific requirements of the local jurisdiction and this rule.”

It is plainly evident that the applicant’s demonstration of compliance with 22.203(b) and 22.203(e) is a pre-application procedure. The pre-application in this matter was submitted on July 6, 2018. The applicant needed only to demonstrate compliance with 22.203(b) at that time, if compliance was necessary. The trigger for compliance is the existence of a comprehensive county-wide land use plan that places restrictions on sites. By its own admission in a letter of March 15, 2018, the City of Tontitown knew that its “current Comprehensive Land Use Plan did not provide the use of the existing Facility, even though the landfill was in existence when the plan was adopted.” The March 15, 2018 letter from the City is incorporated herein and attached as Exhibit A. This letter was included in the pre-application packets as Exhibit B.8. The City expressed that it was working on a way to include the landfill in the plan. *See* Exhibit A. This admission goes to the root of the 22.203(b) and 22.203(e) issue. If there is no regulation of the landfill in the City’s land use plan at the time of the pre-application, there is no requirement for local approval, and thus no need for a written approval or denial under rule 22.203(e). It was not until May 4, 2021, that the City adopted any zoning restrictions on the proposed landfill site. This was well beyond the pre-application process. As for the application process, no provision, statute, or rule mandates that DEQ shall revisit the issue of Rule 22.203(b) and (e) compliance at

the time of the application, so DEQ made no error by continuing with the processing and issuance of the permit.

No legal analysis is required during this pre-application process. Resolutions are not included in the actual permit. Rule 22.203(e) is one factor that enables an applicant to apply to DEQ for a permit. When looked at as a whole, Rule 22.203 involves local authority approval at the local level. Petitioners state in their motion that “summary judgment is appropriate as [ADEQ] fails to properly state the basis for its permitting decision relating to APC&EC Rule 22.203 in its final decision documents.” Second Motion, unpaginated, paragraph 2 a. DEQ does not have to state its basis via Rule 22.203 in its final permitting decision because there would be no final permitting decision without Rule 22.203 having been satisfied during the pre-application process. But, in this matter at hand, Rule 22.203 was satisfied, and Eco-Vista was deemed able to submit a landfill expansion permit modification application.

Therefore, Petitioners’ second motion should be denied because they misapply Rule 22.203 in regards to the permitting process.

**B. Tontitown resolutions 2022-11-1017R and No. 2023-01-1027R were not in compliance with 22.203(e) and were offered past the pre-application deadline for consideration.**

While the City presented DEQ with two new ordinances in November of 2022 (No. 2022-11-1017R) and January of 2023 (No. 2023-01-1027R), there is no process in place for DEQ to consider the effect of these resolutions after the pre-application. Even if DEQ could consider these resolutions, neither complies with Rule 22.203(e) because neither references “the basis for the approval or denial with reference to the specific requirements of the local jurisdiction and this rule.” Emphasis added.

**C. Tontitown Resolution 2023-08-1071R is irrelevant at this stage in the permitting process.**

Permit No. 0290-S4-R2 was issued on March 20, 2023. Resolution 2023-08-1071R was issued on August 21, 2023. Unlike the previous resolutions noted in Section B, supra, this resolution appears to state bases for the City's denial in an attempt to adhere to Rule 22.203(e). While DEQ could more closely examine whether or not the City's latest resolution does in fact adequately recite some basis for denial under the City's zoning and land use plan, doing so is moot. Due to the late date of this resolution being five years past pre-application and months after the issuance of the permit, this resolution can have no bearing on the permitting process currently under review. There is no process in administrative law or in the Arkansas environmental laws that requires, or even allows, the prior local geographic site approval to be re-examined, much less retracted at this stage in the permitting process. Geographic site approval was at issue in the pre-application phase, and DEQ legally began processing the permit once Eco-Vista submitted a complete application package. Therefore, Petitioners' joint motion should be denied. The pre-application process is not on appeal.

WHEREFORE, DEQ prays that the ALJ deny Petitioners' joint second motion as untimely and irrelevant to the current proceeding.

Respectfully submitted,

Arkansas Department of Energy &  
Environment,  
Division of Environmental Quality

By: 

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**CERTIFICATE OF SERVICE**

I, Lisa M. Thompson, do hereby certify that a true and correct copy of this pleading was served upon the parties listed below via email pursuant to the Arkansas Rules of Civil Procedure Rule 5 at the email address listed below on the 28<sup>th</sup> day of August, 2023.

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3/15/2018

Robyn Reed  
Boston Mount Solid Waste District  
11398 Bond Rd.  
Prairie Grove, AR 72753

Re: **Proposed Expansion of the EcoVista Landfill, City of Tontitown, Arkansas**

Dear Ms. Reed,

The City of Tontitown has been made aware that Eco Vista, LLC has begun the process of seeking approval for the expansion of the existing Class 1 and Class 4 landfill operation of its Eco Vista Landfill (the "Facility") located within the corporate limits of the City of Tontitown. Through this process, it is our understanding that Eco Vista, LLC must petition for the issuance of a Certificate of Need from the Boston Mountain Solid Waste District. This petition, in accordance with ADEQ Reg 22.205(b)(2), must establish that the Facility does not conflict with the existing comprehensive land-use plans of any local government entity. I am writing you in regards to this requirement as the Facility expansion is within the city limits of the City of Tontitown.

Last year, before the City became aware of the proposed expansion of the Facility, the City of Tontitown instituted a process to update and replace its current Comprehensive Land Use Plan. The Comprehensive Land Use Plan was adopted by the Tontitown City Council on January 16th, 2009 and since that time, the City of Tontitown has experienced tremendous growth and change. The process to update and replace the City's Comprehensive Land Use Plan requires extensive work with the city's Planning Commission, Public Works Department, the City Council and the public. The City of Tontitown has been performing this work and is on track to adopt the new Comprehensive Land Use Plan later this year.

The current Comprehensive Land Use Plan did not provide for the use of the existing Facility, even though the landfill was in existence when the plan was adopted. The City is now working on the appropriate way to include the use of the Facility in the new Comprehensive Land Use Plan and fully expect the new Comprehensive Land Use Plan will provide for this use in a manner so that there is no conflict.

Please therefore have this letter serve as a statement from the City of Tontitown with regard to the petition for the issuance of a Certificate of Need for Eco Visa, LLC.

If there are any questions or concerns, please do not hesitate to contact me.

Sincerely,

Mayor Paul Colvin, Jr.



BEFORE THE ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

IN THE MATTER OF: )  
 )  
 ) Consolidated Docket No: 23-008-P  
FINAL PERMIT DECISION FOR )  
ECO-VISTA, LLC, CLASS 4 LANDFILL )  
PERMIT NO. 0290-S4-R2 )

**ECO-VISTA, LLC’S RESPONSE TO SUPPLEMENT  
TO PETITIONERS’ MOTION FOR SUMMARY JUDGMENT**

The Petitioners’ arguments regarding Rule 22.203 suffer from two key problems. First, they are not consistent with the plain language of the rule, which is not as complicated as Petitioners have tried to make it. Second, Petitioners forget who has the burden of proof in their permit challenge. Petitioners did not raise any argument with respect to Rule 22.203(e), so they cannot fault the Arkansas Department of Energy and Environment Division of Environmental Quality (“DEQ”) or Eco-Vista, LLC, for not addressing it sooner.

**I. THE REGULATORY FRAMEWORK**

The requirements of Arkansas Pollution Control and Ecology Commission (“APCEC”) Rule 22.203 are not complicated. The rule addresses, as its name states, “Local Authority Approval of Site Selection and Expansion.” The rule first has an “Applicability” section that explains it applies to all new permitted facilities and to expansions of the permitted acreage of existing facilities. APCEC Rule 22.203(a). The rule then identifies only two scenarios under which some sort of local approval is required:

- 22.203(b) – if the site is in a municipality that has adopted restrictions on the site in conjunction with a comprehensive county-wide use plan; or



- 22.203(c) – if the site is in a regional solid waste management district that has restrictions on sites.

With respect to both (b) and (c), the approval only applies to “geographic site approval” for a “proposed solid waste facility site.”<sup>1</sup>

The rule then clarifies in 22.203(d) that the requirements in (b) and (c) are in addition to, and do not replace, any requirements of Rule 22.204. The rule then provides that the approvals or disapprovals “of solid waste site selection” contemplated in (b) and (c) must be writing and identify the “specific requirements of the local jurisdiction and this rule” relied on by the local government. APCEC Rule 22.203(e). Finally, in 22.203(f), the rule concludes that unless (b) or (c) applies, then “no specific geographic site approval by the local government entity” is required apart from what is required by Rules 22.204 and 22.205. Rule 22.203(e) is therefore not a separate requirement, it merely imposes restrictions on how a municipality must exercise any approval/disapproval rights under (b) or (c), both of which apply at the pre-application phase if they apply at all.

## **II. DEQ’S DECISION IS NOT UNDERMINED BY RULE 22.203**

DEQ’s decision to proceed on Eco-Vista’s pre-application was rational, lawful, and consistent with the undisputed facts. The City asserted in Resolution 2018-07-797-R (the “2018 Acceptance of Location”) only that it was a host community under Rule 22.204. Ex. 2 to Pets.’ Supp. Mot., 2018 Acceptance of Location. The City of Tontitown was asked in discovery if it contended that the 2018 Acceptance of Location was unlawful and responded that, “Mayor Russell

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<sup>1</sup> “Site selection” is not the same thing as “expansion,” and the approval rights under (b) and (c) expressly apply to site selection, not expansion. Furthermore, the Eco-Vista site at issue has been a solid waste facility for many years and cannot reasonably be considered a “proposed” facility, it *is* a facility.

and the City of Tontitown do not contend the 2018 resolution was unlawful, but do state it is now superseded.” Mayor Russell and the City of Tontitown’s Response to Eco-Vista’s First Interrogatories, Interrogatory No. 22 (attached hereto as Exhibit 1). The City cannot challenge in this proceeding DEQ’s decision to accept at the pre-application phase the City’s admittedly lawful 2018 Acceptance of Location asserting authority under Rule 22.204 but not Rule 22.203(b).

The reasonableness of DEQ’s reliance on the City’s representations is underscored by the City’s position in 2018 that the location of the landfill did not conflict with the City’s land-use plan. *See* Ex. 2 to Pets.’ Supp. Mot., 2018 Acceptance of Location (“WHEREAS, the City of Tontitown has adopted a comprehensive land use plan . . . and is in the process of revising its comprehensive land use plan in order to provide for . . . the appropriate location of a landfill operation . . . .”). Rule 22.203(b) could not apply unless at the pre-planning stage there was an existing restriction on the site adopted in conjunction with a comprehensive county-wide (not city-wide) land use plan, and the City’s adoption of the 2018 Acceptance of Location demonstrated that no restrictions existed in 2018.

The City’s later resolutions purportedly revoking site approval, on the other hand, entirely fail to comport with either the plain language or the spirit of Rule 22.203(b) or (e). There is no dispute that, at all times since October 6, 2020, the landfill site has been zoned “EU-L (Exclusive Use Landfill).” *See* City of Tontitown Ordinance No. 2020-10-900 (Oct. 6, 2020) (attached hereto as Exhibit 2); Tontitown City Code at § 153.086. None of the City’s resolutions—including the resolution passed after the August 15, 2023 hearing—point to a conflict between the landfill’s location and a land-use plan. *See* Ex. 1 to Pets.’ Supp. Mot., Resolution No. 2022-11-1017R (Nov. 2, 2022); Ex. 2 to Pets.’ Supp. Mot., City of Tontitown Resolution No. 2023-01-1027R (Jan. 3,

2023); Ex. 4 to Pets.’ Supp. Mot., City of Tontitown Resolution No. 2023-07-1071R (Aug. 22, 2023) (“Post-Hearing Resolution”).<sup>2</sup> They cannot, because no such conflict exists.

### **III. PETITIONERS’ ARGUMENTS CANNOT SAVE THEM FROM SUMMARY JUDGMENT**

Petitioners nonetheless assert that they are entitled to summary judgment because the “2018 Acceptance of Location” does not meet the Rule 22.203(e) standard by sufficiently referencing “the specific requirements of the local jurisdiction” or referencing Rule 22.203 by name. *See* Pets.’ Br. at p. 4.<sup>3</sup> As a preliminary matter, Petitioners did not make this argument in their requests for hearing. The City of Tontitown asserted only that DEQ should have considered the impact of later resolutions that purportedly revoked prior approvals, while the Individual Petitioners did not raise Rule 22.203 at all. *See* City of Tontitown’s Req. for Hearing at p. 3; *see also* Ind. Pets.’ Req. for Hearing (failing to cite Rule 203). The sufficiency of the 2018 Acceptance of Location is therefore not lawfully at issue here. *See* APCEC Rule 8.603(C)(1)(c) (providing that a petition for hearing must include a “complete and detailed statement identifying the legal and factual objections to the permit action”); Ark. Code Ann. § 8-4-205(b)(3) (same).

Petitioners also are wrong on the facts. The 2018 Acceptance of Location does specifically reference the City of Tontitown’s zoning regulations, including pending changes “to provide for

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<sup>2</sup> The Post-Hearing Resolution, like the prior resolutions, does not and cannot state that the geographic location of the landfill conflicts with any land use plan because it does not. Petitioners try to gloss over that by pointing to parts of the Tontitown Code of Ordinances that have purportedly been violated due to the manner in which the landfill has been operated. None of this has to do with siting the landfill. Indeed, some of the cited ordinances are not even zoning related. *See* Pets.’ Br. at pp. 6-8; Tontitown City Code at §§ 93.01, 93.02, 130.03.

<sup>3</sup> To the extent that Petitioners also argue that the 2018 Acceptance of Location fails to comply with Regulation 22.203(b) because it does not comprise “specific geographic site approval,” Eco-Vista understands this argument to be outside the scope of the supplemental briefing but notes that the ordinance specifically states that “the City of Tontitown hereby sets forth its approval of the geographic location of the Landfill.” *See* 2018 Acceptance of Location.

the appropriate development and growth within the City of Tontitown, including the appropriate location of a landfill operation.” *See* Ex. 3 to Pets.’ Supp. Mot., 2018 Acceptance of Location. It also states that—subject to a large-scale development permit and development of a zoning designation for landfill use, both of which were later accomplished—the City approves the geographic location of the Landfill. *Id.* These statements encompass both the City’s zoning regulations and the geographic site approval required by Rule 22.203(e) if it applied via Rule 22.203(b), which it did not.

Notably, Petitioners do not argue that the resolutions passed in November 2022 and January 2023 meet the Rule 22.203(e) standard. Instead, they rely on a resolution passed on August 21, 2023. But DEQ could hardly have erred in issuing the permit by failing to consider a resolution that did not exist at the time of its permitting decision, let alone at the pre-application stage. As explained above, Rule 22.203(e) is not a separate approval requirement, it directs that an approval or disapproval under Rule 22.203(b) at the pre-application stage be in writing and include certain findings. A resolution passed years after the pre-application is complete simply has no legal bearing on whether this regulatory process was adhered to years ago. And in any case, Petitioners did not cite this yet-to-be-passed ordinance in their petition for hearing. *See* Rule 8.603(C)(1)(c) (providing that a petition for hearing must include a “complete and detailed statement identifying the legal and factual objections to the permit action”); Ark. Code Ann. § 8-4-205(b)(3) (same). It is far too late, nearly two months after the close of discovery, for Petitioners to produce new evidence that they believe supports the denial of the permit.

Petitioners’ assertion that Rule 22.203(e) should not be applied because it is a “post-hoc rationalization” for the issuance of the expansion permit turns the burden of proof on its head. Petitioners never claimed in their petitions that Rule 22.203(e) was violated, so neither DEQ nor

Eco-Vista can be faulted for not addressing the issue. Furthermore, the cases petitioners cite relate to review of final agency decisions by appellate courts, not to the administrative process itself. *See Ark. Dept. of Human Svcs. v. Haen*, 81 Ark. App. 171, 177 (2003) (focusing on the findings of the Administrative Law Judge decision under review and declining to consider other arguments by appellate counsel that supported the ALJ's decision); *Comms. of SW, Inc. v. Ark. Public Svcs. Comm'n*, 40 Ark. App. 126, 136 (1992) (focusing on the findings in an Arkansas Public Service Commission determination and disregarding other arguments by appellate counsel that supported the decision). Here, a final administrative decision has not been reached, and it is the Commission's determination, not that of DEQ, that may eventually be subject to judicial review. Ark. Code Ann. § 8-4-205(c)(7).

The ALJ should therefore grant Eco-Vista's and the DEQ's motions for summary judgment, dismiss the Petitioners' claims, and grant Eco-Vista and DEQ all other relief to which they are entitled.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Michael B. Heister, hereby certify that a copy of the foregoing has been served by first-class regular mail and email to the following parties of record this 28<sup>th</sup> day of August, 2023.

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/s/ Michael B. Heister

BEFORE THE ARKANSAS POLLUTION CONTROL  
AND ECOLOGY COMMISSION

IN THE MATTER OF: )  
 ) Docket No: 23-009-P  
FINAL PERMIT DECISION FOR )  
ECO-VISTA, LLC, CLASS 4 LANDFILL )  
PERMIT NO. 0290-S4-R2 )

**MAYOR RUSSELL AND THE CITY OF TONTITOWN'S**  
**RESPONSE TO ECO-VISTA'S FIRST**  
**INTERROGATORIES AND REQUESTS FOR PRODUCTION OF DOCUMENTS**

**INTERROGATORY NO. 1:** Identify each person you believe may have discoverable information relating to the claims and allegations in your Petition.

**RESPONSE TO INTERROGATORY NO. 1:** Objection. This request is unduly burdensome and overly broad. It is virtually impossible to know everyone with discoverable information relevant to this docket. Subject to this objection, Mayor Russell and the City of Tontitown identify all ADEQ employees working on this permit, all individuals submitting public comments on the record, and refer to and incorporate their response to Interrogatory No. 3.

**INTERROGATORY NO. 2:** For each person identified in your response to Interrogatory No. 1, briefly summarize the information believed to be known to that person relating to the claims and allegations in the Petition.

**RESPONSE TO INTERROGATORY NO. 2:** See response to Interrogatory No. 1.

**INTERROGATORY NO. 3:** Identify each person whom you intend to call as a lay witness at the trial or any hearing in this matter. For each person identified, state the substance of the testimony you expect each to give.

**RESPONSE TO INTERROGATORY NO. 3:** Mayor Angie Russell. Tontitown's withdrawal of local approval of the permit at issue here. Impacts to the community, odor, nuisance, and related issues pertaining to the community and operation of the Eco-Vista facility.

your contention including, but not limited to, all tests, analyses, reports, literature, or other material said witness will rely on to support the witness's testimony.

**RESPONSE TO INTERROGATORY NO. 19:** It is Petitioners position, as stated in their request for hearing, ADEQ has not performed the analysis necessary to protect surface and groundwater. Petitioners identify the dye testing conducted at the site. Petitioners make no statement regarding legal conclusions and proposed leachate collection requirements. As for witnesses, Mayor Russell and the City expect to call ADEQ employees to demonstrate failure to fully consider issues raised in the public comment period, including Jarrod Zweifel.

**INTERROGATORY NO. 20:** Do you contend that Eco-Vista's Class 4 facility has received any non-Class 4 material? If yes, please identify each date on which you contend non-Class 4 material was placed in the Class 4 area of Eco-Vista's facility and identify each witness who will testify as to those facts including the day, time, and location of the placement of such material and how the witness came to have personal knowledge to which the witness will testify.

**RESPONSE TO INTERROGATORY NO. 20:** Yes. For example, a lithium battery is listed as a possible source of a fire in March of 2023. Petitioners reference the pictures of inspections performed by ADEQ, and the fire records previously produced.

**INTERROGATORY NO. 21:** Was your rezoning conducted in 2020 unlawful in any way? If yes, please identify the law that was violated.

**RESPONSE TO INTERROGATORY NO. 21:** Mayor Russell and the City of Tontitown do not contend the 2020, resolution was per se unlawful, but do state it is now superseded. Mayor Russell further states that she has information that several members of the city council at that time voted under duress in favor of the 2020 resolution, but makes no statement as to the legal implications of that duress.



**INTERROGATORY NO. 22:** Was your enactment of City of Tontitown Resolution 2018-07-797-R unlawful in any way? If yes, please identify the law that was violated.

**RESPONSE TO INTERROGATORY NO. 22:** Mayor Russell and the City of Tontitown do not contend the 2018 resolution was unlawful, but do state it is now superseded.

**INTERROGATORY NO. 23:** If you contend any portions of the Permit's Operational Plan (Appendix F to the Permit's application) are not sufficient to meet legal requirements for Eco-Vista's Class 4 facility, please identify the portions that you contend are not adequate and the legal requirement that they fail to satisfy.

**RESPONSE TO INTERROGATORY NO. 23:** It is Petitioners position, as stated in their request for hearing, ADEQ has not performed the analysis necessary to impose permit conditions necessary to control litter, odor, fire, and other conditions onsite and offsite. Petitioners make no statement regarding legal conclusions and Appendix F. As for witnesses, Mayor Russell and the City expect to call ADEQ employees to demonstrate failure to fully consider issues raised in the public comment period, including Jarrod Zweifel.

**INTERROGATORY NO. 24:** Please confirm that you will consider these Interrogatories and Requests for Production to be continuing and that you will supplement them in a timely fashion should your answers change in any way.

**RESPONSE TO INTERROGATORY NO. 24:** Yes.

**INTERROGATORY NO. 25:** Please identify every witness you will call to testify that Eco-Vista started any fire at its facility in violation of any permit requirement. For each such witness, please provide the day, time, and location of each fire about which the witness will testify and the basis for the witness's personal knowledge about each such fire.

ORDINANCE NO. 2020-10-900

CITY OF TONTITOWN, WASHINGTON COUNTY, ARKANSAS

**AN ORDINANCE REZONING APPROXIMATELY 417.1 ACRES OF REAL PROPERTY LOCATED AT 2210 WASTE MANAGEMENT DRIVE, IN THE CITY LIMITS OF TONTITOWN ARKANSAS FROM R-MH, A, AND R-1 TO EU-L, EXCLUSIVE USE LANDFILL.**

**WHEREAS**, a rezoning application was submitted and filed with the City of Tontitown on or around the 1<sup>st</sup> day of September 2020, on behalf of Eco-Vista, LLC, requesting the City of Tontitown to rezone approximately 417.10 acres of real property located at 2210 Waste Management Drive, within the city limits of the City of Tontitown, Arkansas from R-MH, A, and R-1 to EU-L, Exclusive Use Landfill; and

**WHEREAS**, after due notice as required by law and a public hearing, the City of Tontitown, Arkansas, Planning Commission has heard all those who wish to be heard regarding the rezoning application and voted to recommend the proposed rezoning; and

**WHEREAS**, the City Council of the City of Tontitown, Arkansas, has determined that said rezoning complies with the adopted plans and criteria of the City of Tontitown which are designed to protect the health, safety, and welfare of the citizens; and

**WHEREAS**, it is the desire of the City Council that the application be approved as submitted and said property be rezoned to EU-L, Exclusive Use Landfill.

**NOW, THEREFORE, BE IT ORDAINED** by the City Council of the City of Tontitown, Arkansas:

Section 1: The City of Tontitown hereby changes the zone classification from R-MH, A, and R-1 to EU-L, Exclusive Use Landfill for certain real property located on at 2210 Waste Management Drive, located inside the City Limits of the City of Tontitown Arkansas, more particularly described as:

[See Exhibit "A" attached hereto]

Section 2: That the official Zoning Map of the city of Tontitown, Arkansas, shall be amended to reflect this change within thirty (30) days of the date of this ordinance. Any ordinance or parts thereof in conflict with this ordinance is hereby repealed and declared invalid.

Section 3: That the Clerk-Treasurer shall cause this document, and any other documents needed to accomplish the intent of this ordinance, to be properly filed as required by law.

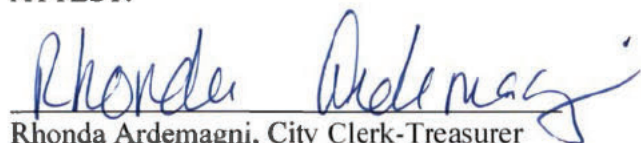
PASSED AND APPROVED this 11<sup>th</sup> day of October, 2020

APPROVED:



\_\_\_\_\_  
PAUL COLVIN, JR., Mayor

ATTEST:



\_\_\_\_\_  
Rhonda Ardemagni, City Clerk-Treasurer  
(SEAL)