



**COLORADO**  
Department of Transportation

Transportation Systems  
Management & Operations  
Access Management Unit  
4201 E Arkansas Avenue, 3<sup>rd</sup> Floor  
Denver, CO 80222

## MEMORANDUM

Date: October 4, 2017

To: Transportation Commission

From: Ryan Rice - Director  
TSM&O - Access Management Unit

RE: State Highway Access Permit Denial, Appeal & Request for Administrative Hearing

We have received a letter from Foster Graham Milstein and Calisher ("FGMC") on behalf of the Town of Erie, requesting an administrative hearing regarding the Department's denial of an Access Permit Application onto Town's property located on the east side of US 287 between Arapahoe Road and Lucerne Drive, in the southeast quadrant of the US 287/SH7 (Arapahoe Road) intersection (the "Property").

On May 22, 2017, the Town submitted an application for a State Access Permit for access to the Property. The Application was accepted for review by the Department's Region 4 Access Management Unit. The application requested a new full movement, signalized access to the property to serve a 130,000 sq. ft. superstore, 130,000 sq. ft. home improvement store, 18 fueling station gas station, and 35,800 sq. ft. of retail/restaurants.

On July 6, 2017, the Town received a letter from the Region 4 Permit Manager, dated June 30, 2017, stating CDOT had denied the Application, and providing four (4) grounds for the Denial:

1. Colorado Revised Statutes 43-2-147, Paragraph (1)(a) declares all state highways to be controlled access highways in order to protect the public health, safety and welfare, to maintain smooth traffic flow, to maintain highway right-of-way drainage and to protect the functional level of public highways. The allowance of this access would counter the Transportation Commission's regulation pursuant to statutory authority.
2. The access would create a substandard design with the installation of necessary auxiliary lanes and signalization less than 320 feet from an already permitted signalized intersection.
3. An Access Management Plan for this section of state highway identified a full movement/signalized access across from the existing Lucerne Drive.
4. The property has other reasonable access available from the city street on the north property boundary.

Attached as Exhibit A, is the letter from Foster Graham Milstein and Calisher ("FGMC") on behalf of the Town of Erie requesting a hearing before the Transportation Commission to appeal CDOT's denial of this access permit application. In accordance with Section 43-2-147(6)(C), C.R.S. and Section 2.9 of the State Access Code, 2 CCR 601-1, the Transportation Commission may conduct the formal hearing itself or delegate it to an administrative law judge.

If the hearing is delegated to an administrative law judge, the hearing will be held in accordance with article 4 of title 24, C.R.S. and also in accordance with the Rules of Procedure, Department of Administration, Division of Administrative Appeals, 1-CCR-104-1, and section 24-4-105, C.R.S.

**Staff Recommendation:**

Based on applicant's request for a formal appeal/hearing and the Transportation Commission's history on similar requests, CDOT staff recommends to the Transportation Commission to delegate this appeal hearing request to an administrative law judge with the Colorado Department of Personnel and Administration, The Office of Administrative Hearing.

The purpose of this memo is to assist in the Transportation Commission's decision in this matter. The resolution submitted to the Transportation Commission delegates the hearing and directs the Colorado Office of the Attorney General to make arrangements to have this hearing held before an administrative law judge from the Department of Personnel and Administration, Office of Administrative Hearings.

Thank you for your assistance in this matter.

**Attachments:**

Resolution

FGMC Letter

CDOT Denial of Permit Letter

**Resolution #TC-17-10-XX**

Delegation of Access Permit Appeal to the Department of Personnel and Administration, Division of Administrative Hearings.

**Approved by the Transportation Commission on (Insert Date).**

**WHEREAS**, The Town of Erie (the Town) through its representatives, Foster Graham Milstein and Calisher ("FGMC"), the owner of property located on the east side of US 287 between Arapahoe Road and Lucerne Drive in Boulder County, Colorado ("Property"), have requested a hearing before the Colorado Transportation Commission to appeal the Colorado Department of Transportation's (CDOT) decision to deny the Town's access permit application for this Property; and

**WHEREAS**, in considering access permit appeals, the Transportation Commission in accordance with §43-2-147(6)(c), C.R.S., may choose to hold an appeal hearing or delegate the hearing to an administrative law judge; and

**WHEREAS**, CDOT staff has recommend to the Transportation Commission that the Commission delegate this appeal hearing request to an administrative law judge with the Colorado Department of Personnel and Administration, Division of Administrative Hearings.

**NOW THEREFORE BE IT RESOLVED**, the Transportation Commission acceptsthe CDOT staff recommendation and hereby directs the Chief Transportation Counsel, or her delegate, to arrange to have the Town's appeal hearing held before an administrative law judge from the Department of Personnel and Administration, Division of Administrative Hearings.

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Herman Stockinger, Secretary  
Transportation Commission of Colorado

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Date



360 South Garfield Street  
6th Floor Denver, CO 80209  
T 303-333-9810 F 303-333-9786

DENVER - BOULDER  
fostergraham.com

August 29, 2017

Transportation Commission of Colorado  
4201 East Arkansas Avenue  
Denver, CO 80222-3400

*Re: Town of Erie - State Access Permit Application Denial –Notice of Appeal and  
Request for Administrative Hearing*

Dear Commissioners,

Foster Graham Milstein and Calisher ("FGMC") represents the Town of Erie (the "Town") regarding the Town's State Access Permit Application (the "Application") for access to the Town's property located on the east side of US 287 between Arapahoe Road and Lucerne Drive, and the Colorado Department of Transportation (the "Department" or "CDOT") denial of the Application (the "Denial"). By this letter, the Town is appealing the Denial and requesting an administrative hearing by the Transportation Commission of Colorado (the "Commission") as to the Denial.

On May 22, 2017, the Town submitted an application for a State Access Permit for access to the Town's property located on the east side of US 287 between Arapahoe Road and Lucerne Drive, in the southeast quadrant of the US 287/SH7 (Arapahoe Road) intersection (the "Property"). The Application was accepted for review by the Department's Region 4 Access Management Unit. On July 6, 2017, the Town received a letter from Ms. Gloria Hice-Idler, the Region 4 Permit Manager, dated June 30, 2017, stating CDOT had denied the Application, and providing four (4) grounds for the Denial.

Specifically, the Denial provided the following grounds (1) the allowance of the access would "counter" the Commission's regulatory authority to control highways in order to protect public health, safety and welfare, to maintain smooth traffic flow, to maintain highway right-of-way drainage, and to protect the functional level of public highways pursuant to Colorado Revised Statutes (C.R.S.) § 43-2-147(1)(a); (2) the access would create a substandard design due to the installation of necessary auxiliary lanes and signalization less than 320 feet from an already permitted signalized intersection; (3) An Access Management Plan for this section of US 287 identified a full movement/signalized access across from the existing Lucerne Drive; and (4) the Town's property has other reasonable access available from the city street on the north property boundary.

It is the Town's position that all four grounds for the Denial are based on an invalid amendment to the US 287 Access Control Plan (the "Amendment") requested by the City of Lafayette ("Lafayette"), and for which Lafayette and the Department entered into an Intergovernmental Agreement on December 30, 2011 (the "IGA"), but which did not include the proper notice to, or involvement of the Town. Therefore, the Town specifically rejects and is appealing all of the grounds stated by the Department as the basis for the Denial.

Under C.R.S. §43-2-147(1)(a), "[t]he department of transportation and local governments are authorized to regulate vehicular access to or from any public highway under their respective jurisdiction for or to property adjoining a public highway in order to protect the public health, safety, and welfare, to maintain smooth traffic flow, to maintain highway right-of-way drainage, and to protect the functional level of public highways". The State of Colorado State Highway Access Code (the "Code") provides guidance and criteria for the development of Access Control Plans in Section 2.12.

Code §2.12(1) provides "[e]ither the Department or *the appropriate local authority* may, at its discretion, develop an access control plan for a designated portion of [a] state highway." (emphasis, added). Code §1.5 defines "appropriate local authority" to include "the governing body of the municipality if the driveway is to be located within an incorporated municipality." "Driveway" is defined as "an access that is not a public street, road or highway". Any access to the Property from US 287 would necessarily be via a driveway, not a public street, road or highway, therefore, the Town, is the incorporated municipality within which the Property is located, and is the "appropriate local authority" for purposes of the development of any access control plans for the designated portion of US 287 that provides access to the Property. It is the Town's position failure of the Department and Lafayette to include the Town in the Amendment process and as a signatory to the IGA renders the Amendment and the IGA invalid.

Code §2.12(2) provides "[a]t least one advertised public meeting shall be held during the development phase of the plan. *All property owners of record abutting the state highway within the plan limits shall be notified by the Department or the appropriate local authority of the proposed plan and afforded the opportunity to submit any information, data and agreements regarding the proposed plan.*" (emphasis, added). The Town has no record of receiving any notices regarding the Amendment, despite the fact that the Town was an abutting property owner at the time of the Amendment. On behalf of the Town, FGMC submitted requests to Lafayette and the Department under the Colorado Open Records Act (C.R.S. § 24-72-203) for any records related to the Amendment, specifically including any notices to abutting property owners, including the Town. Neither Lafayette nor the Department could produce any evidence that the Town was provided the proper notice, therefore, it is the Town's position, the Amendment and the IGA are invalid.

In light of the above evidence, and since all of the grounds in the Denial are based at least in part on the invalid Amendment, it is the Town's position the Denial is not proper and the Town respectfully requests the Commission overturn the Denial. Further, the Town requests the Department suspend any access permits and vacate any notices to proceed issued under the invalid Amendment for which construction has not yet commenced as of the date of this appeal.

In the interest of allowing the Department the opportunity to review the conditions under which the Amendment and the IGA were entered into for purposes of reconsidering the Denial, contemporaneously with this appeal to the Commission, the Town is requesting a review by the Department's internal administrative review committee pursuant to Code §2.10.

The Town and FGMC look forward to the Department's response and a timely resolution to this appeal by the Commission. If you have any questions concerning this notice of appeal and request for administrative hearing, please don't hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read "Michelle L. Berger". The signature is fluid and cursive, with the first and last names being the most prominent.

Michelle L. Berger, Esq .  
Partner

Cc: A.J. Krieger, Town Administrator, Town of Erie



## COLORADO

Department of Transportation

Region 4

10601 W. 10th Street  
Greeley, CO 80634  
(970) 350.2148 (Fax) 350.2198

June 30, 2017

AJ Krieger  
Town of Erie  
645 Holbrook Street  
Erie, CO 80516

RE: Denial of State Highway Access Permit Application

Dear Mr. Krieger:

On May 22, 2017, your Application for Access Permit was accepted for review by this office. The application requested a new full movement, signalized access to your property to serve a 130,000 sq. ft. superstore, 130,000 sq. ft. home improvement store, 18 fueling station gas station, and 35,800 sq. ft of retail/restaurants. The property is located on the east side of US 287, between Arapahoe Road and Lucerne Drive, in the southeast quadrant of the US 287/SH 7 (Arapahoe Road) intersection.

1. Colorado Revised Statutes 43-2-147, Paragraph (1)(a) declares all state highways to be controlled access highways in order to protect the public health, safety and welfare, to maintain smooth traffic flow, to maintain highway right-of-way drainage and to protect the functional level of public highways. The allowance of this access would counter the Transportation Commission's regulation pursuant to statutory authority.
2. The access would create a substandard design with the installation of necessary auxiliary lanes and signalization less than 320 feet from an already permitted signalized intersection.
3. An Access Management Plan for this section of state highway identified a full movement/signalized access across from the existing Lucerne Drive.
4. The property has other reasonable access available from the city street on the north property boundary.

We have given careful consideration to the application submitted and for the reasons listed above, we are denying your request for new access at this location because the access request complies with neither the statute nor the State Highway Access Code (2 CCR 601-1).



Enclosed are copies of the materials that you submitted. Also enclosed is a copy of Section 2. 9 explaining your rights concerning this denial, Section 3.10 of the State Highway Access Code and a copy of the Access Statute.

If you have any questions, please contact Mr. Tim Bilobran, Permit Manager at (970) 350-2163.

Sincerely,

++ -{ cJ \_\_\_\_\_

Gloria Hice-Idler  
Region 4 Permit Manager

Enclosures

- Xe: Karami
- Milan, OAG
- Olson, RTD
- Nguyen

