

CONTINUED SPECIAL MEETING of the ROSS TOWN COUNCIL
TUESDAY, FEBRUARY 15, 2022
Held by Teleconference

1. 8:30 a.m. Commencement.

Mayor Elizabeth Robbins; Mayor Pro Tem Beach Kuhl; Council Member Elizabeth Brekhus, Council Member Bill Kircher, Jr., and Council Member Julie McMillan; Town Attorney Benjamin Stock, Attorney Michael Biddle.

2. Posting of agenda.

Town Clerk Lopez reported that the agenda was posted according to government requirements.

3. 39 Fernhill Avenue, Branson School Use Permit Amendment and Town Council consideration of adoption of Resolution No. 2233.

The Branson School, 39 Fernhill Avenue, A.P. Nos 073-082-01; 073-082-12; 073-141-03; 073-151-05; 073-072-04; Zoning: R-1: B-A, General Plan: QP (Quasi-public Institutional), Flood Zone: X (Minimal risk area).

Project Summary: The Branson School is requesting approval to amend the existing Use Permit to increase the maximum student enrollment of the school from 320 to 420 as authorized by Measure F in 2020. The school proposes to increase enrollment by 25 students per year over the course of four years.

Mayor Robbins asked, and Council Members disclosed their ex-parte communications. She provided a background of meetings to date, discussions held, and said the Council will discuss conditions of approval.

Town Attorney Ben Stock gave a brief staff presentation on the matter, noted the Town received a letter from Branson School with additional proposed changes and Mr. Biddle will describe current conditions and a set of conditions should the Council wish to move forward with Branson's suggested amendments.

Michael Biddle, Attorney, described the direction given from the last Council meeting, revisions were made to Condition Nos. 11 and 12 which he displayed regarding use of athletic facilities per Branson's January 25th proposal, revised Condition No. 13 regarding utilization of amplified sound for non-athletic events, specifically subset A, limiting no more than 10 events to end no later than 7 p.m. and 3 events ending no later than 10 p.m. He then referred to Condition No. 19 which is new as a result of direction provided from the Council regarding the Town being reimbursed by Branson for costs the Town incurs in relation to its oversight for TMP monitoring.

Mr. Biddle then referred to Condition No. 3 relating to the TDMP which was developed in response to a comment of Council Member McMillan wanting to have everything in one place. Staff went through the TDMP and modified subsection A; the Executive Summary to eliminate language related to "a subsequent review after 10 years". In subsection B, language was added regarding wanting to make sure the neighborhood partnership group was open to residents,

households and neighboring streets having Town representatives there. In subsection C to identify areas that might need to be modified, and he described the modification relating to the single student drop-off. The Council gave direction to the second item focused on the afternoon pickup. In discussions with Branson, their attorney, Board member and staff, they received input that Branson would like a similar type of language for the morning drop-off so it reads "there would be no solo student drop-offs one-half hour before and one-half hour after the regular school day." Branson had also asked that the language for the afternoon be one-half hour before and one-half hour after the end of the regular school day. The Council had indicated a desire that those single student pickups be also prohibited not just for one-half hour but to an hour after the regular school day.

He then referred to subsection D and Chapter 4 of the TDMP is where all monitoring and enforcement was provided. This was deleted and replaced to state, to the extent monitoring is going to be governed by Condition of Approval No. 18, and to the extent there is a violation covered by Condition of Approval No. 1.

Regarding Condition No. 18, it outlines monitoring. There will be a fall monitoring period and a spring monitoring period. Each of those periods will encompass 40 days, which would not include Saturdays, Sundays, holidays, or time when the school is on break. The report that gets prepared is not going to include 5 days with the highest trip rates and 5 with the lowest trips. This is a means to avoid inclusion of any outlier days for whatever reason they were extremely high or low. Essentially, the annual report is going to look at 60 days of monitoring and generate the average daily trip rate. Then, there will be a report that compares the average daily trip rate against the average daily trip limit in the TDMP, which is 912 trips per day. The very last sentence in Condition No. 18 acknowledges that for the first annual monitoring port it is only going to include the fall monitoring period of this calendar year.

Mr. Biddle then referred to Condition No. 1 and said based upon the feedback from Branson by virtue of their letter from yesterday and exchange early this morning with Branson's counsel, his understanding is that Branson's only issue with the conditions relate to Condition No. 1. Yesterday, Branson submitted a letter on February 14th and the propose that to the extent there is a violation of the average daily trip limit, instead of just a reduction in enrollment, once Branson has reached their 420 students and they have operated without a trip limit violation enrollment reduction for one year, in the event they do violate, that violation will be accounted for as follows:

1st violation and all subsequent odd numbered violations: Branson would be subject to a fine of \$100,000. That fine is only paid if then the subsequent annual report indicates they are still in violation and then the fine would be paid.

Mayor Robbins asked if this is the spring monitoring period, and Mr. Biddle said no, the annual monitoring period.

Mayor Robbins clarified that there are two monitoring periods and there is a fine assessed every other year if traffic is not net neutral. Mr. Biddle said the first violation, Branson would be subject to a penalty. If the next following annual monitoring shows they are still in violation that penalty

would be due to be paid. This would then be the second annual monitoring period showing they are in violation, so therefore, under Item II which states "For the second violation as indicated in annual monitoring report and all subsequent even numbered violations, we will impose the trip limit violation enrollment reduction." So, for the penalty if there is a first violation the school is subject to the penalty and the subsequent year if they violate again they must pay the penalty. And, because it is now a second violation they are also still subject to the enrollment reduction.

Assuming there is a first violation, they are subject to a penalty, and the next annual monitoring shows they are back in compliance, they would not pay the penalty. Then, the next time there is an annual report that shows they have violated the trip cap, this would now be the second violation and the school would be subject to the enrollment reduction.

In subsection II, if there is a second violation such that there is an enrollment reduction that enrollment reduction will carry over to subsequent academic years. If Branson continues to violate, the enrollment reduction will stay in place and any other subsequent reductions required in a "even numbered violation year", those will be cumulative.

There could be an enrollment reduction of 25 one year and they are still in violation for a third violation, so they become subject to the penalty. If another annual report shows they are still in violation and for example, they lose another 5 students, that loss of student enrollment accumulates until such time there is an annual report that shows they are not in violation. At that point, the enrollment maximum resets to the maximum allowed. So, if they keep violating there is a possibility that the enrollment can ratchet down. However, they would never go below 320 students which is what they have currently.

Mr. Biddle said this language is in response to Branson's letter. He noted once he received the letter he began drafting language yesterday evening to try to respond to that in the event the Council would be interested in it. Early this morning he received some draft language from Mr. Hurd on behalf of Branson. He took that language he had developed and his language and combined them, and he shared that combined language with Mr. Hurd about 30 minutes prior to this meeting and assumes he shared it with his client.

Mayor Robbins stated once the school gets to 100 and there is a year of net neutral traffic, then the enforcement Branson is proposing kicks in where, one year it is a fine and one year it is a student enrollment reduction. The enrollment reductions are cumulative over time if there is continued excess traffic, anytime there is an annual monitoring report that shows none, then the student limit gets reset back to the maximum it was. Mr. Biddle confirmed.

Mayor Robbins said as far as the year of the fine, if it shows no excess traffic, the fine gets cancelled. Mr. Biddle confirmed.

Mayor Robbins said as long as it takes the school to get there, if the school starts with 25 and if traffic is excessive the first year, then it looks like there is a student reduction proportional to the traffic of 2.69 vehicle trips this starts 2023/24. Mr. Biddle confirmed.

So, next year the school will start in the fall with 25 students and there will be the fall monitoring. If that shows excess traffic then the school will not be able to add the next 25 students that year and they may have to cut back a few students. Mr. Biddle confirmed.

Then, until their proposed monitoring kicks in when they are at 100 students, this does not kick in until there are 100 students and one year of net neutral traffic. But, in the interim, once they get to 100 the Town is still using this method of enforcement so every year there is a reduction in students proportional to the excess traffic until they get to 100 with a year of no excess traffic and then their alternating kicks in. Mr. Biddle confirmed and said the school must hit 100 and have a year without any violations before going to the alternating.

Council Member McMillan said she was unsure about the proposed alternating fines and ability to cure and not pay a fine. Once the school has an overage then she asked if the fine kicks in, but it does not have to be cured. If it is cured, she asked if they are automatically qualified to get the enrollment reduction.

Mr. Biddle explained there is going to be an annual report. Generally, other than this first report it will be spring data and fall data. If one of those annual reports shows that they have exceeded the average trip cap of 912 trips, that would be the first violation. At that point, they become subject to the imposition of a potential penalty of \$100,000. Then, whether they have to pay that penalty or not will depend on the results of the subsequent year's or next fall's annual report. If that annual report shows they are in violation then the \$100,000 penalty would become due. It just so happens that the second report is now the second violation because they did not cure. So, under Subsection II, that is a second violation and the school would then be subject to an enrollment reduction.

If the second annual report shows they are fine, the penalty would not have to be paid. If the next annual report shows a violation it would then be the second violation and would then be subject to the enrollment reduction in that case but they would not have to pay the penalty because they would have to have two back to back annual monitoring reports showing a violation.

Council Member McMillan said this makes sense but it strikes her that if the Town is going to make them pay a fine and have an enrollment reduction it is a double penalty.

Mr. Biddle said because of the way it is drafted if the Council does not want to have that effect he would have to do some further revisions.

Mayor Robbins asked and confirmed that if every other year if violations occur, it would be either a fine or enrollment penalty.

Council Member Brekhus said one way to read the proposal is that it allows Branson to be out of compliance with the traffic plan 50% of the time as long as they cure. No penalty ever accrues if they continue that pattern.

Mr. Biddle said no; if they violate it and cure it. The next time there is a violation that is now a second violation, so there is an enrollment reduction under subsection II. The enrollment reduction stays in place as long as the school continues to violate. But, if the next year they cure then the enrollment goes back up to the cap.

Council Member Brekhus said if they cure, enrollment goes back up to the cap and asked what happens the next year. Mr. Biddle said if they violate the next time they are subject to the penalty. The second violation they would be subject to enrollment, third would be a penalty, fourth would be enrollment, etc.

Council Member Brekhus commented that since being on the Council for 10 years she has never seen instances where the Council has invited comments on Conditions of Approval for any applicant, nor the applicant allowed to propose their own conditions. She understands there was a meeting, but her understanding is this is not staff's recommendation as to an alternative condition.

Mr. Biddle agreed, and said the Council could revise it to the extent the Council is inclined to go along with the school's broadly worded requests from yesterday. He reviewed this, knew they were going to be presenting something to the Council. The draft language was received at 2 a.m. this morning and he spent time early this morning to go over it versus language he had worked on yesterday afternoon in response to the letter thinking the Council might want to entertain this. Then, he merged the two concepts together and this is what he presented this morning.

Attorney Stock said staff is not making a recommendation for this language. It is language that, if the Council wishes to move forward, this would be the language staff would propose.

Town Manager Johnson said Mr. Biddle did not go through what Condition No. 1 as presented in the staff report from Saturday, and she wondered if it would be helpful for him to walk through that as published in the packet.

Mr. Biddle said it is essentially what they have been talking about without the provision related to the penalty. To the extent there is a trip violation there is corresponding or proportional reduction in enrollment.

Mayor Pro Tem Kuhl asked if the proposed language in the redlined version is not what staff is recommending. Mr. Biddle said he would recommend what is in the redlining if the Council was so inclined to entertain the proposal Branson submitted in its letter yesterday. It had some broad language about what they would like to see. This language is specific to what staff would recommend based on language Mr. Hurd presented to him this morning in which he has since revised consistent with ideas he developed yesterday. If the Council does not want to go along with the Branson proposal, the Council can consider the language before them, minus the redlining.

Mayor Pro Tem Kuhl said he is not clear on how the school makes up its loss due to violations if it loses enrollment under the Branson plan. Mr. Biddle said if the school is suffering in enrollment

reductions and then they have a subsequent year where they show they are no longer in violation then their enrollment goes back up to their cap.

Council Member McMillan asked if Mr. Biddle can explain why Branson is proposing the alternating penalty and then a potential enrollment reduction. Mr. Biddle said he was not sure, other than it gives them the opportunity to cure and get things back in order before they are potentially subject to an enrollment reduction. He also suggested being mindful of the fact that the loss of 1 student enrollment based on current year's tuition is fairly significant in revenue. If that continues it is not just \$50,000 a year, but it keeps going year after year until they cure things. He thinks they want to stem the tide and try to fix things before getting into the potential enrollment reductions.

Mayor Robbins referred to whether this has an effect of a year of compliance and a year without compliance. She asked if there could be a hybrid such it could go on a three-year cycle; first violation a fine, second violation enrollment rollback, third violation enrollment rollback, and then another three year cycle.

Mr. Biddle said the Council can do that but he would have to redraft this to make that work. He shared that it is often much easier to say things in verbal words than to put it down on paper so it makes sense from here to eternity. His reading of these proceedings is the Council is not so interested in the money but making sure the traffic stays net neutral. He thinks when they appreciate the potential financial penalties to Branson in the event they are violating and are at risk for enrollment reductions, those reductions and the financial hit are significant enough that they have enough incentive as a result to ensure they continue to monitor and implement TDM measures to keep their program within the confines of the trip limit.

Mayor Robbins said based on how she read Branson's letter yesterday, her understanding is that if the fine is not assessed, it could be canceled if the cure is in the next semester which would be the spring. She asked if this is a better option because it is faster.

Mr. Biddle said he thinks this is overly complicated. They would then have to require a separate monitoring report for spring. If they stay on an annual reporting cycle, it is easier.

Mayor Robbins opened the public comment period.

Quoc Tran, Branson School Board Chair, said they are grateful to be part of the community and hopes that with the Council's help more students will be able to benefit from a Branson education. Yesterday, the Board convened a special meeting to discuss the proposed conditions. The Board and prior Boards have been grappling with their inability to grow, cited the process as complicated and their goal is to find a solution for the Town and for Branson. They are seeking one change to the proposed conditions of approval which is the enrollment rollback. They are asking the Council to consider the human toll impact if they were to violate their traffic count. If Branson is over limit by 10 trips, they must reduce their enrollment in the next year by 4 students which is the equivalent of over \$200,000 in lost tuition revenue. This represents 2 senior level teacher salaries or 4 full scholarships which could result in teacher layoffs and reduce financial

aid. Reducing enrollment from one year to the next would create a constant threat to their operations.

Branson proposes that after the school reaches 420 students and operates for one full year without a violation the Council consider the following framework: 1) A \$100,000 penalty for the first violation to the average daily trip limit monitoring period that is not cured in the next semester's monitoring period; and 2) a trip limit violation enrollment reduction for its second violation of the average daily trip limit. This amendment creates a more portioned penalty structure that would hold Branson accountable but also help them address any negative traffic impacts on neighbors. They ask the Council make this one amendment as they seek to achieve a compromise. Lastly, on behalf of the Board they take the execution of their plan at the highest level with the utmost seriousness.

David Parisi, Parisi Traffic Consulting, said the school asked him to review the latest staff recommendations including the recommended rollback provisions and to reiterate his comments of last week, in his 25 years of experience he has never seen a TDMP with an immediate student rollback revision upon a school trip violation. In fact, he has only seen on TDMP with a rollback provision which was done after a cure and correct period and after implementation of 5 consecutive fines. They are pleased to see this new proposed condition this morning that would first implement a cure period and then a fine if there is a violation. A student enrollment rollback would come after that and would be continued in an alternating fashion over time. This new provision is closer to the universally accepted standard and more acceptable to the school. It would allow the school to run its operations more predictably.

He also offered the school is willing to accept the proposed unprecedented level of traffic monitoring. His firm and W-Trans concurred that two weeks of monitoring each fall and each spring would be more than adequate and would meet or exceed the industry standard. Nonetheless, Branson is willing to accept the 80 day monitoring which is a total of 4 months. Honestly, this would be very expensive for the school to install and maintain and will be subject to counting non-Branson traffic trips.

Peter Nelson said Circle Drive is not listed as one of the streets in the neighborhood organization list. His house and three other homes are also on Hillgirt but there are three houses on Circle Drive that are not owned by Branson and are not listed. Secondly, if there is a dissatisfied student or neighbor of Branson that wants to cause the school grief, they could use their vehicles to generate trips that are not associated with the school. He asked that the Council consider language to address this because while most neighbors support the school, there are those that do not and could manipulate the numbers.

David Peterson congratulated staff and the Council for coming up with a good plan. He finds it difficult to believe that Branson will be able to add 100 students and keep traffic net neutral. He reminded the Council that it is 51 extra trips they can cause, which is an increase in traffic before anything kicks in. To drag this out over several years with fines, no fines, etc. it gets complicated. The fact is a reduction in enrollment proportionate to the amount of overage traffic is very appropriate to the violation. Branson has a fall period where they will receive feedback from

monitoring, and if they are over they will have to get drastic changes made by the spring so they can average out. He thinks it is a good plan and if more changes are made he asked that the item be continued. He also agreed with Council Member Brekhus; that applicants typically do not get to negotiate what the conditions are. He has a commercial building where his tenants are subject to conditions for their use permit and the Town places these conditions without feedback so Branson should be very happy with what the Town arrives at.

Chris Mazzola, Head of School, thanked staff for working with them these last weeks in trying to finalize a proposal. She urged the Council to accept the conditions Mr. Biddle proposed this morning because it will allow them to continue to operate their school, remain excellent, continue to serve local students and operate the school in a way that works.

Tom Byrnes asked what is the 4 year provision because he said it seems if Branson has 4 years of compliance all of this goes away.

BREAK

Mayor Robbins called for a recess at 9:30 a.m. and thereafter, resumed the meeting at 9:43 a.m.

Council Member McMillan said her view is that she is hoping they can reach a decision this morning that signals the Town and Branson will work together cooperatively in the future. This has been unprecedented to negotiate with an applicant, but this whole process has been unprecedented and she feels they need to compromise on one final point—to help Branson succeed while they are still ensuring net neutral traffic. The latest Branson proposal is basically moot because the Council has been assured their TDMP will be met.

She thinks the Council needs to make things work for Branson, the Town and the neighborhood. In stepping back, she thinks it helps all of them to look at how they got here. Five years ago, after Branson's efforts to move to Strawberry, the community recognized Branson's desire to expand and remain in Ross. At the same time, many recognized the needs of the neighborhood as the school which began 100 years ago as a small girls' boarding school in a quiet residential neighborhood accessed by narrow, winding roads. In March 2020, 60% of the voters approved Measure F, but this was not a mandate for Branson to increase by 100 students despite what so many have repeatedly claimed. Rather, it allowed Branson to submit an application to expand from 320 students up to 420 which put the Council in the extremely difficult position of determining adequate conditions.

Measure F actually gave the Council broad leeway. They could have capped enrollment at 320 if they believed there were no adequate safeguards to protect the neighborhood. After Branson submitted its application in spring 2021 staff worked with Branson until the end of 2021 but received absolutely no input from the Council or the public. In hindsight, there should have been interim check-in's along the way for the Council and the public to provide feedback to staff and Branson. She sincerely regrets this was the process. Branson has understandably felt frustrated by it as has the Council.

A little over a month ago, the Council had its first opportunity to consider the application and conditions. At the January 13th meeting the Council decided the project was exempt from CEQA and did not fall into a CEQA exception based on no net increase in traffic and agreed Branson would be able to increase its enrollment from 320 to 420. The Council then began to consider various conditions to ensure there was no net increase in traffic or other adverse effects from a 100 student increase. The process over the last month has been extremely difficult. While she appreciates some members of their community are fierce advocates for Branson, it was not constructive to attack certain members of the Council individually or question their motives or integrity, create a Branson versus the rest of the Town atmosphere, distort the facts or provide only certain facts to support an argument, create a situation where those who yell the loudest may get their way.

For example, at their special meeting last week she was very shocked when one resident said the Council was an embarrassment and an example of government out of control. In fact, they were performing their duty to all residents of Ross, tedious as that may be. One resident complained they were trying to extract “another pound of flesh”. Instead, the Council was trying to ensure the situation would work for the short-term and the long-term. So many other things have been said about the Council, including that they are not prepared, are biased, are cruel, not inclusive, are acting in bad faith. Our town is better than that. The Council knows not every resident is in favor of this expansion. They received many letters expressing grave concerns, as well as many phone calls from residents unwilling to make formal comments, feeling grief from Branson and their neighbors.

The Council is volunteers and they take these and all Town matters very seriously. Many Council Members have spent countless hours trying to make this workable and fair to Branson, the neighborhood and the Town. Last Tuesday at their special meeting, one resident wisely observed that their work with Branson should be a partnership and not a transaction. She agrees. In addition, Council Members need to work together with respect and not undermine each other’s views or staff’s work. Until January, she had never seen this happen on the Council and it is extremely disappointing to her. The Council needs to re-establish a respectful partnership with Branson. Branson needs to re-establish a respectful partnership with its neighbors and the Town. The remarks today from Branson’s Board Chair demonstrate its willingness to re-establish a partnership and for this, she is heartened.

Today, while they are all exhausted by the process they need to step back and recognize how fortunate they are. These issues have been challenging and COVID probably has served to exacerbate them, but they are not nearly as difficult as what so many other cities and towns in Marin are facing. The Town, including Branson, will face even bigger challenges ahead. It is crucial to re-establish our sense of community and rebuild partnerships at all levels and she hopes they can do so and move on from here by accepting Branson’s revised conditions based on Mr. Biddle’s drafting of their language.

Mayor Robbins said there is an almost obsessive focus about net neutral traffic, but the Town is obliged to focus on this because it was the keystone of Branson’s entire project to increase enrollment through the Measure F and ballot documents promised. In addition, the CEQA

exemption for the project was based on net neutral traffic. So, it is not the Council trying to be hard on Branson, but rather they are obliged to ensure there is net neutral traffic. Given the work over the last year and month, they are close to having agreements that achieve that and allow everyone to move forward. She asked if there were any other questions for staff.

Council Member Brekhus said she would appreciate if legal counsel can speak to what Branson previously said was a nexus lacking in support of the findings.

Mr. Stock said Branson at the last meeting submitted a memo outlining the legal authority for conditions of approval. He noted that while there is a requirement that conditions attached to land use entitlement such as this must be reasonably related to the use of the property for which the permit is issued. The nexus proportionality test referenced in the memo really deals with exactions and fees which is not an issue of the land use conditions the Town is imposing. So, the courts would look at whether or not the condition is reasonably related to the use of the property and whether there are findings to support that. He thinks the resolution before the Council sets that out.

Council Member Kircher said he just wants to join in Council Member McMillan's comments. He thinks it was very well said, hopes everyone can take her comments to heart and that they can move on with a final decision. He hopes it is one everyone will be able to carry forward in the spirit of preserving their community and the best outcome for everyone. Also, he added that although he agrees with Council Member McMillan, in retrospect, perhaps a different process would have worked better. He thinks staff has worked very hard on this and complemented them for all of the work that has gone in with this, particularly in recent days. As an attorney, he was very impressed with Mr. Biddle's turn-around.

Council Member Brekhus said she also appreciated Council Member McMillan's statements. She does not think people intended things this way, but she knows the Council heard from a number of residents that were very concerned about speaking out about this issue because they felt so many in the community were so stringently expressing their support that it left no room to raise concerns. If someone comes on the Council and thinks they are going to have the ear of one group and totally ignore the others, this is not the right job. The easiest thing to do would be what the vocal proponents want. The harder thing and the thing they are trying to achieve is the balance they believe is necessary to make everybody walk away from this and feel there was a balance.

If it is appropriate, she has some questions about the language in the new version they were reading over the break. She read the changes seconds before they opened the meeting, kept reading them over and over and is confused by them. She thinks the language is confusing. She does not understand how the first paragraph mixes with the other paragraphs. She is concerned and maybe it is that she needs more time with it, but she also would say generally, she does not like the precedent set of negotiating these conditions. She feels they need to be true to the environmental pass they are giving on CEQA based upon no net enrollment. As was mentioned, there are already built-in rights to go above it. What they were trying to do by having a rolling

review of the trip counts which sounds like that could happen is that they can review their impact and then make corrections, even during a monitoring period.

So, she does not believe that is appropriate. If they felt they could modify it in some way “on the fly” because sometimes you orally make a condition and it does not work. The only language she thought about and wrote up is on page 7, paragraph beginning with “Commencing with the 2023/24....” If they wanted to merge something, she thought at the end of that they could give Branson an option to pay first a \$100,000 violation and thereafter go into what they have as enrollments. She wondered if they could say something like, “For the first violation, Branson may pay a \$100,000 fine, but thereafter, the trip limit violation enrollment reduction applies.” This is going back to what the Council had proposed and she thinks it sounds like a cleaner, one-sentence addition than the entire procedure the school put in place which is confusing.

Mr. Biddle asked where the language is proposed to be added.

Council Member Brekhus said it is Exhibit A, page 7 which has amended and restated conditions of approval. After the bolded word in parenthesis--(trip limit violation enrollment reduction) they could add, “For the first violation, Branson may pay a \$100,000 fine but thereafter, the trip limit violation enrollment reduction applies.”

Mr. Biddle said he thinks what Council Member Brekhus is asking for is essentially what they have here. He clarified that they got the letter and in anticipating that the Council might be interested in this, he spent several hours last night drafting language and exchanging thoughts with Mr. Stock and coming to some language he thought could be responsive to their request. The language he had initially developed was much more extensive than what is here, in part, because he was trying to understand what they were asking for and he was making assumptions about that.

Then at 2 a.m. this morning he received much more concise language from Mr. Hurd when they put forth their proposal which is fairly simple which is, the first violation they get a fine and second violation they get an enrollment rollback. But it did not get into anything else past that. So, he took language he had already developed and melded it together and put forth what is here so it is clear; that it is not just the first violation but sort of an alternating provision violation, enrollment, violation, enrollment reductions. He would also say he does not make it sound as if they were negotiating with Mr. Hurd or with Branson. He took language they had presented and he would agree that in the context of his practice over many years, there is interaction with the applicant on conditions. The Council can certainly consider and take in their comments. Often times, they are quite constructive because they have a sense about their operations, but it is ultimately the decision of the Council as to what the language and conditional language is imposed. He feels confident and comfortable with the language he presented that it does, in fact, provide for this alternating set of results in the event there is a violation.

Council Member Brekhus said she would be happy to go into the language of that proposal. She finds there is ambiguity. She wanted to clarify what she was saying with that one sentence, that that was a totally different proposal. Her proposal with that one sentence add-on was doing

something different does something different. It says for the first violation Branson can elect to pay \$100,000 fine instead of reduced enrollment. Thereafter, years 2, 3, 4, 5, 6, 7 to eternity the reduction applies.

Mr. Biddle apologized and said this is a completely different proposal.

Council Member Brekhus said if other Council Members want to discuss the language they just saw minutes before the Council meeting then she would like to explain where she sees it being ambiguous and conflicting, but maybe they should go around and see where Council Members are.

Mr. Biddle confirmed with Council Member Brekhus that she is proposing that once they start the monitoring, the first violation would be a penalty and thereafter it is just enrollment reductions and no penalties.

Council Member Brekhus said this would begin in 2023/24 which is what it states in the beginning.

Mayor Robbins asked if it would begin even when they are ramping up to get to 100 students. Council Member Brekhus and Mr. Biddle confirmed.

Mayor Robbins said in year one if they have 25 students and the traffic is exceeded, there would be a penalty of \$100,000 and she asked if they would go up to 50 students. Right now, every year they need net neutral traffic in order to go up, and this was in Branson's initial plan. What is on the table is that is a requirement, and if traffic is not net neutral they do not keep the 25 for the second year and go down proportionally. To her this seems like a more reasonable way of addressing the requirement to have net neutral traffic even in the ramp up.

Mayor Robbins then referred to Branson's wording of II where the second violation is indicated in the annual monitoring report. She cited "enrollment reductions for the 4th, 6th, 8th, etc. violations" which states "It is imposed against the maximum enrollment cap". To her, it seems like the maximum enrollment cap is being used to mean two things—in the beginning of this document it means the maximum allowed or 25, 50, 75, 100 and 100 thereafter. But then, once there are enrollment deductions the maximum enrollment cap seems to be referring to the current enrollment. She wondered if they should delete "maximum enrollment cap" and say "current enrollment within the cap" because they are applying reductions to the current enrollment and not to the cap. So, it cannot mean two things.

Mr. Biddle said the maximum enrollment cap potentially means four things; 345 students, 370 students, 395 students and 420 students. So, they use that term so that it is whatever the then applicable enrollment allowed. Those figures apply specifically to certain academic calendar years. This is why that term is used. That term has particular meaning in the first four years or first component of this condition where there is a possible effect from a violation of the trip cap on allowable, or what they call "annual enrollment maximum." So, that term refers to whatever the maximum enrollment cap is which could be 345, 370, 395, or 420 and that amount, less

whatever may have been reduced as a result of a violation which they have called a “trip limit violation enrollment reduction”. You take those two figures and that gives you the annual enrollment maximum.

Mayor Robbins said she still does not understand how the wording can be that the enrollment reduction is imposed against the maximum enrollment cap because it is not. There are 5 different enrollment caps but in any given year, the enrollment reduction is going to be applied to that year’s enrollment and not to the cap. Otherwise, they would go back to 420 every year and drop down three. It states it is cumulative in that wording, but it is not clear where you impose the reduction against the cap because it is not.

Mr. Biddle said yes it is. It states, “II. The maximum enrollment cap shall apply cumulatively.” The enrollment reduction is a number somewhere between 1 and 25 and you will apply that against whatever the maximum enrollment cap is at that time. But, if there is reoccurring violations, it is those reductions of 5, 10, 15, etc. students that will apply cumulatively against whatever the cap is. Of course, at this point in time where this condition is getting kicked in, they are at 420 students. Just trying to maintain consistency within this condition he is continuing to use that term.

Mayor Robbins said he is saying the first time this fits for the first time because it is against the maximum enrollment cap, but as written, it does not kick in until 420 and subsequent ones do not, so she is fine with that.

Mr. Biddle said you get to 420 and they must be violation-free for a year before they get used to this, but at that time it will be 420.

Mayor Robbins asked if violation-free for a year could be year 4. Mr. Biddle said no, it must be for a full year after they have reached 420. If all goes well, they will reach 420 in 2024/25. At the end of 2025, they will wait a year after that point and must operate without a violation.

Mayor Robbins said year 4 is the year the school is at 420, so year 6 is the earliest this kicks in.

Mr. Biddle said unfortunately it is a bit confusing because they are talking about academic calendar years as opposed to calendar years.

Mayor Robbins said the calendar year the school is at 420 or year 4 is 2025/26.

Council Member McMillan said she thinks Council Member Brekhus’s proposal would fit better after the paragraph, “Once the Branson School has reached an enrollment of 420 students” they would get a one-time penalty of \$100,000. If they cannot cure thereafter, any penalty after payment of the \$100,000 would be an enrollment reduction in subsequent classes.

Mr. Biddle said as he understands it, she is proposing to eliminate the alternating component, and Council Member McMillan agreed.

Council Member McMillan said in the spirit of getting this done and in the spirit of compromise, she would be happy to accept what has been drafted by Mr. Biddle and move on.

Council Member Brekhus said she does not want to go into nitty gritty details of all of the provisions she is confused by because this would be a laborious conversation, but if there are 3 people prepared to go along with that proposal she would like to talk about those concerns.

Council Member Kircher said he is also in favor of Mr. Biddle's red-line proposal. He thinks it strikes a fair balance and also addresses two concerns he had which is that he was not convinced that the monitoring protocol was all that reliable. Also, because it was not that reliable he was concerned about the automatic enrollment cutbacks. This builds in a little more breathing room, but not a lot. He thinks it is still very restrictive and it allays some of his concerns about the monitoring period. He appreciates it has been shortened and tweaked and discussed and better than what they had before in Alternative 2. But, there are still some concerns with a lengthier monitoring period about the difficulty of getting some clean figures. So, again, he thinks the most recent language or the insertion in Condition No. 1 is appropriate and he supports it.

Mayor Pro Tem Kuhl said he is still very much against what the Council is doing because he thinks they are undertaking micromanagement that they will regret in trying to make this work. It is not the Council's job to run a school or even to run a school's traffic program. However, seeing that some form of what is now being talked about is going to pass, he supports what Council Members McMillan and Kircher have suggested.

Mayor Robbins said she thinks they have come a long ways and thinks they can pass something today so they can move forward. In response to Council Member Brekhus's concerns it seems like it is on a 3-year cycle which did not seem to fit well. She does not know it is qualitatively different. If the school can succeed with their traffic plan she does not see them paying to abandon it one year and coming back the next year with it. That implies bad faith on their part and she does not see that happening. She thinks what is on the table now as a way to keep traffic net neutral is effective.

Council Member McMillan said in light of Council Member Kuhl and Kircher as well as Brekhus, she thinks they should hear Council Member Brekhus's concerns about the language because they want the language to be as tight and clear as possible.

Mayor Robbins said this is detailed and she agreed it is risky reading and approving something the last minute to ensure it says what they want.

Council Member Brekhus said it seems like what she understands in the paragraph that is not bolded or the prior language is that the school has to comply as they go forth in the first 4 years. Then, once they have reached an enrollment of 420 students without a violation for one year, she does not like the language "Pursuant to an annual monitoring report prepared for the calendar year preceding the calendar year in which the academic calendar year at issue commences." This is an ambiguity and worries that is confusing.

Mayor Robbins agrees and suggested it state “the following spring and fall monitoring” that gets a result by December and then a decision is made for the next school year.

Mr. Biddle said if they are looking at 2025/26 academic calendar year, that academic calendar year starts in calendar year 2025. The monitoring report they would have received by February 1, 2025 will be for monitoring conducted in calendar year 2024. Therefore, we are looking at an annual monitoring report preparing for the calendar year preceding 2024, preceding the calendar year 2025 in which the academic calendar year 2025/26 is at issue.

Mayor Robbins suggested a clarifying statement to indicate this as an example.

Council Member Brekhus said she is concerned this is a very complicated process which is subject to multiple interpretations. The Council is reading this for the first time and now they are going to bog down another Councils trying to interpret this into the future as well as other Branson leaders and lawyers. She thinks it is complicated, not said well, and does not think the example even makes sense to her because he was using a 2025 year but this is not even when this happens. As she understand it, they do not even start this process until they get 420 students which might be out further.

Then, you go down to Item I and it states, “For the first violation as indicated in an annual monitoring report.” Above, they are trying to say you got to 420 students which is 4 years later or more. They could have a first violation in an annual monitoring report which triggers only after they have increased to 420 students. So, already this is 4 years from there. This seems very conflicting. She just thinks this is a complicated procedure being put into place and she went through it and thought there were 3 or 4 ambiguities. At a minimum, they should consider coming back on the Consent Agenda after they all have been able to carefully review it. There are 4 lawyers on the Council and they do not do this for their clients, getting something very complicated and give it a review for 10 minutes and accept it. She personally does not like the procedure, but if the Council wants to go ahead with it, they should do a more thorough job of reading it and thinking about the different ways people could interpret it.

Mr. Biddle noted that the paragraph preceding Item I qualifies what comes after that by saying “Once the Branson School has reached an enrollment of 420 students and operated without a trip limit violation enrollment for one year, in the event there is a violation, the violation is accounted for as follows: 1) there is the fine provision and 2) there is the enrollment reduction provision.” This is when those Items I and II come into effect. It is once they have achieved 420 students and they have operated without a violation for a year. And, the paragraph prior to this is still applicable so there is an annual reduction based on traffic when this starts and after the school has one year of 100 students and the year after with no excess traffic it will then alternate.

Council Member Brekhus said if they have a violation, they pay the \$100,000, then they have a violation and the trip limit violation enrollment reduction kicks in. The third year they violate and it seems like they would go back to being subject to a fine and then the next violation there is a second rollback. The third violation would then be a fine.

Mr. Stock said it is not necessarily the year. It is alternating by fine, enrollment, fine, enrollment.

Mayor Robbins said she thought on odd years there is a fine and on even years it is an enrollment rollback. Mr. Biddle said it is not 'even' years but 'even numbers of violations.' The violation could occur in any calendar year being odd, even or indifferent. It goes by violation and not by year.

Council Member McMillan said she was going to propose to make this more clear they need to have a small "a" and "b". So "a" would be before "Commencing with the 2023/24 and the "b" would be put before "Once the Branson School has reached" and then you go into all those other things so there are different consequences when ramping up versus after you reach the full 420 students.

Mr. Biddle confirmed putting a subsection or "a" before "Commencing with the 2023/24 calendar year" and then "b" goes before the paragraph right below it which says "Once the Branson School has reached..." He clarified for Mayor Robbins that Council Member McMillan's point is to separate these out so the provisions are what are applicable once they get to 420 and a year of no violations. Subsection "a" is the starting point until such time that "b" provides that they have reached 420 and they have operated without a violation for a year.

Council Member Brekhus said she continues to be confused about subparagraph II and asked what that paragraph means. She gets lost at the end where it states "...prepared for a subsequent calendar year" and then the final phrase, "at which time the annual enrollment maximum shall reset to the maximum enrollment cap." She asked what those terms mean.

Mr. Biddle said if there is a second violation, for all subsequent even numbered violations there will be a trip limit violation enrollment reduction to be imposed against the maximum enrollment cap. This is where the school has achieved 420 students and have not been in violation, so the maximum enrollment cap is always 420 here. The enrollment reduction will carry over to subsequent academic calendar years, so they are at 420, lose 5 students, and that loss would carry over to the following year. Any subsequent trip violation enrollment reductions to that maximum enrollment cap shall apply cumulatively. Therefore, this is getting imposed as a second violation and then in order for this to work cumulatively they would have had another violation right after that and for that one they would be subject to a fine and then if they had another violation right after that, this is the 4th violation and now they are going to apply an enrollment reduction. For example, this time if they lose 10 they are down to 415 and then another 10 to 405. The initial 5 lost will stay in place as well as any cumulative until such time that the school has not violated the trip limit set forth in the TDMP pursuant to a monitoring report. So, once they finally comply with the trip limit then whatever reductions have been imposed go away at which time the annual enrollment maximum (which uses a maximum enrollment cap less the trip limit violation enrollment reductions), any enrollment reductions that had been imposed reset and go back up to the maximum enrollment cap of 420.

Council Member Brekhus said under that scenario, they violated initially and get a penalty. Then, they violated and get a reduction, violated again and get a penalty, violated again get a reduction, successfully accomplish it and it resets. She is concerned with that.

Mr. Biddle said if the TDMP says they need to meet net neutral traffic at 420 students, if they show they are operating in compliance with that, then they have shown they can operate and return to the maximum allowable enrollment.

Council Member Brekhus said in a 10 year window, they can violate it for 5-8 years and then keep going up they really have not accomplished the net neutrality. Instead, they have just bounced back and forth between various provisions. So, they could not succeed the majority of the time and still keep their operations at 420. This is where she is concerned.

Mr. Biddle said no, they cannot. If they keep violating they do not get to stay at 420. They will pay a penalty and will roll back.

Council Member Brekhus said if they violate for 5 years in a row and then if they successfully meet the traffic one year then they can go back to 420 students. Mr. Biddle said this is correct.

Mayor Robbins said the school does get reductions for 2 or 3 of those 5 years in a row. She does think the Council's plan is so much simpler.

Council Member Brekhus said the language is confusing, the concept is confusing, and if they want to merge the two plans then proposing the school pays a \$100,000 fine for the first violation and thereafter the numbers go down with an opportunity to cure. There is always a cure. She just thinks the language is very cumbersome and they could end up in a situation in 5 years where someone comes and says Mr. Biddle said at the meeting it states this, but it also is susceptible to another meeting and they passed it and now they are able to argue about it. So, she thinks it is very problematic.

Council Member McMillan proposed the Council pass this but allow Mr. Biddle to come up with a couple of examples to include in the conditions and approve the examples on a Consent agenda in March. This way, people will understand through the examples when they are no longer on the Council, when Branson leadership changes, into the future it will be clear.

Mayor Robbins then read her understanding that for the first 4 years or as long as it takes to get to 100 students, enrollment increases by 25 per year if there are no traffic violations. If there is a violation then the next group of 25 students do not get enrolled and the enrollment is reduced proportional to the excess traffic. The fall counting determines the enrollment number for the second year. Combined with spring and fall counting is used afterwards to determine whether traffic is net neutral. Enforcement then is based on combined spring plus fall monitoring. Once the school is at 100 students and after a full year of no violations, enforcement for traffic violations alternates first with a fine of \$100,000 alternating with an enrollment rollback. The enrollment rollbacks remain and are cumulative if traffic remains excessive. With any year that there are no violations, enrollment can go back up to 420. After 100 is reached and until net

neutral traffic is reached for those 2 years, enforcement continues per the policy for the initial ramp-up of enrollment at 25 at a time. If traffic is not net neutral then there are enrollment rollbacks each year proportional to the excess traffic. Finally, the violation assessed a fine, the fin can be canceled if the spring plus fall monitoring shows no violation.

She asked if all of those statements are correct, and Mr. Biddle said it sounds very accurate, and

Mr. Stock added that it was the same thing Mr. Biddle began the meeting with which was accurate. In getting back to Council Member McMillan's suggestion if they did something like that, they would not be approving the permit today. They cannot add text to the conditions at a subsequent meeting. They would continue this to the next meeting. If they want to take a longer recess to provide some language into the examples, the Council could do that as an option.

Council Member McMillan said she does not think the Council is hung up on the ramp-up part. She thinks they are hung up on what happens once they reach 420 students. Therefore, she would not include the "a". She thinks an example could be helpful to illustrate how this would work under "b" and she suggested picking some date as a hypothetical example as 4 bullet points.

Mr. Stock said this seems reasonable and doable, but the Council will have to take about an hour break to accomplish this.

Mayor Robbins suggested and Mr. Biddle confirmed the Council could recess until 11:30 a.m. initially and then resume the meeting then and break again as needed.

BREAK

Mayor Robbins called for a recess at 10:52 a.m. and reconvened the meeting at 11:30 a.m., then Mayor Robbins announced the need to continue the recess to 12:00 p.m.

Town Attorney Stock said they found a typo in the amended and restated conditions under Condition No. 1 for the academic year which should be 2025/26. Then Council Member McMillan's suggestion of "a" and "b" is new to the conditions. At the end of "b" they have included a footnote that states "An example of the application of subsection 1.b.i and 1.b.ii to a hypothetical set of assumptions is attached as Attachment 1 to these amended and restated conditions of approval. The only other edit they made was raised in public comment where they add Circle Drive to that section.

Regarding the examples, he displayed the screen for Council Members and the public to read.

Mayor Robbins said this looks very clear and she wondered if there should be one last paragraph at the end where it states, "If, instead calendar year 2032 identifies another violation of the average daily trip limit based on the annual monitoring report, a proportional reduction in the enrollment of 410 students would be undertaken." This makes clear that any subsequent reduction starts from the most recent enrollment number which is 410.

Mr. Biddle agreed and said this makes it clear if there is another violation in the 2033 annual report, and he asked for another break.

BREAK

Mayor Robbins called for a recess at 12:15 p.m. and resumed the meeting at 12:25 p.m.

Mr. Stock displayed the additional language added for the Council and public to read.

Mayor Robbins asked and confirmed that after the third violation, they would pay the fine, lose students, and lose from the previous level and not 420 students. She then questioned violations that are assessed the fine where the fine is canceled. If this is the case, in the next calendar if there are no violations, Branson would not have to pay the fine. Two years later if there is a violation, this is the second violation which is a student reduction. Mr. Biddle and Mr. Stock confirmed and this is what the condition states.


Council Member Brekhus thanked the attorneys for doing such a great job drafting this quickly, thinks adding the examples help, and while she prefers a simpler concept she also likes the Council getting to consensus on this, and she would be prepared to support it as is.

Mayor Robbins asked for a motion.

Council Member Brekhus moved and Council Member McMillan seconded, to adopt Resolution No. 2233, approval of Branson School, 39 Fernhill Avenue Use Permit Amendment, incorporating conditions of approval as amended this date with the attachment examples. Motion carried (5-0).

4. Adjournment.

Mayor Robbins adjourned the meeting at 12:53 p.m.


Elizabeth Robbins, Mayor

ATTEST:


Linda Lopez, Town Clerk