

BEFORE THE BOARD OF BINGHAM COUNTY COMMISSIONERS

In regards to: The Riverside Canal Company & Steve and Michelle VanOrden, the Applicants, Request for Reconsideration of the Board of County Commissioners Reason and Decision, with Conditions, for the Rose River Estates Subdivision

Board of County Commissioners Meeting Date: March 21, 2023

Property Owners & Developers: Steve & Michelle Van Orden

REQUESTED ACTION: During the reconsideration hearing requested and filed by the Riverside Canal and the Applicant's, Steve & Michelle VanOrden, the Board may affirm, reverse, or modify its Reason & Decision, after compliance with applicable procedural standards pursuant to Idaho Code Section 67-6535(2)(b).

Two separate reconsideration requests were filed, the first by Steve and Michelle VanOrden. The VanOrdens requested the Board reconsider two of the conditions the Board put on the original decision: the first condition dealing with wells and the second condition of mandating a fence. The Riverside Canal Company requested the Board reconsider the condition mandating a fence. Two separate meetings were scheduled; however, the Applicants had no objection to holding the meetings concurrent as one of the conditions to be reconsidered overlapped.

At onset of the meeting, Chairman Manwaring declared a conflict due to him being on the Board for the Riverside Canal. Therefore, Chairman Manwaring himself from the discussion and decision to be made.

With Commissioner Bair, as Acting Chairman, and Commissioner Jackson present, the Board held the hearing for the reconsideration request on the record in an open meeting, and determined if the Riverside Canal & Steve and Michelle VanOrden identified errors or specific deficiencies in the Decision for which the reconsideration was sought.

Legal Counsel stated that he believes the Applicants have met the specific deficiency standard in order to be reconsidered and reviewed the Idaho Code sections that will be referenced during the reconsideration meeting, which were as follows:

1) Idaho Code Section 36-601: Mr. Rogers stated Chapter 36 refers to traveling waterways and when approaching an obstruction, any individual may go around said obstruction, although it may be on private land. Therefore, Mr. Rogers stated that Section 36-601 is not relevant to this reconsideration.

2) Idaho Code Section 42-1102: Mr. Rogers stated this chapter could be relevant if there were more information from the Applicant pertaining to the amount of space needed to maintain and upkeep the waterways.

3) Idaho Code Section 42-1209: Mr. Rogers stated that this chapter is relevant to the discussion for reconsideration. Mr. Rogers stated the red flag he sees in the decision made previously is that pursuant to code, there is specific language that states that the easement or right of way cannot

materially interfere. For this decision, the fence could potentially materially interfere with maintenance or use of the easement on the canal, which would create an issue depending on the location of the fence, the type of fence, how it is managed and the size of the easement. Mr. Rogers stated in the court system, materially interference is usually defined as the inability to use the land.

Mr. Rogers stated placement of a fence around the canal was not discussed during the Planning & Zoning Commission Hearing and therefore, there is lack of information as to the location of the fence, type of fence and how it would be managed.

Mr. Rogers referred to another statement within the Reconsideration wherein Keith Salisbury, Riverside Canal Company President stated, "Lastly, the discussion of fencing a canal should have included the subject canal company". Mr. Rogers stated the canal company should have been given the opportunity to have testimony at some point. Mr. Rogers stated the best resolution would be to modify the decision to meet Idaho Code Section 42-1209, until it is further understood what "materially interfere" means. Mr. Rogers stated to the options are to uphold the decision and allow it to head to judicial review or remove the requirement to place a fence along the canal and look into what other counties do in this instance.

REASON

The reasons for which reconsideration is sought and the Boards deliberation was as follows:

Condition #1: A fence be placed along the canal.

Commissioner Jackson stated safety of the citizens was his intent, not to infringe upon the rights of the Riverside Canal. Commissioner Jackson added the logical way to cure this would be to have the fence moved away from the canal enough so that the canal has sufficient space and he agrees that input should have been received from the Riverside Canal Company.

Mr. Rogers stated the decision could be modified to mandate negotiations between the Developers and the Riverside Canal Company to place the fence, which could end in the decision not to place a fence if an agreement cannot be made.

Commissioner Bair stated there are no width restrictions mentioned and he is unsure of the footage of the easement. Mr. Rogers stated the issue is there was no testimony invited to be taken at the Planning & Zoning Public Hearing because it was unknown that this would be an issue.

Commissioner Bair confirmed that the Canal Companies were noticed for the Public Hearing, to which Tiffany Olsen, Planning & Development Director, explained as a subdivision there is one Public Hearing held before the Planning & Zoning Commission, wherein the Riverside Canal and the New Lavaside Ditch Company were both noticed and submitted testimony. Director Olsen stated there is no new testimony received when the recommendation comes before the Board of County Commissioners.

Commissioner Bair asked if there was testimony given in regards to possibly rerouting the canal, to which Director Olsen stated at the onset of the design process, the Applicants did have discussion with the both canal companies proposing to reroute and move the canal to the west,

which would follow along the interstate and join the New Lavaside Ditch and continue in a south easterly direction, wherein a resolution was not made on the movement of the canal. The Applicant's then went back to the design and reconfigured the subdivision layout accompanying that water feature through the subdivision. Commissioner Bair then asked if there was conversation in regards to possibly burying the canal, to which Director Olsen confirmed there was not.

Commissioner Bair stated he is firmly convinced that the canal needs to be fenced but as the ordinance does not address this issue, it cannot be required.

Commissioner Jackson stated the intention was for safety and consistency within the subdivision in requiring the fence but due to the lack of information before the previous decision was made, and the inability to require a fence, he does not want to hold up the subdivision any further. In the future, a meeting could be held with the canal companies to receive feedback. Commissioner Jackson stated the Board has done their due diligence in trying to provide safety and in the future the county ordinance may be changed but at this time the Developer should not be penalized. Commissioner Bair concurred with Commissioner Jackson.

Condition #2: There be a community well if a license is approved by the Idaho Department of Water Resources. If not, Director Olsen will draft a letter and each lot will have a private well.

Commissioner Bair asked Director Olsen if there was a letter received from Idaho Department of Water Resources stating that Community Well Applications will be held indefinitely, to which Director Olsen stated she had received an email from Cody Parker, Water Right Supervisor, indicating that Community Well Applications would not be processed until definition of consumptive versus non-consumptive systems have been fully litigated in the court system or clarified by the Director of Idaho Department of Water Resources.

Commissioner Bair stated it was not his intention to have this held indefinitely but to receive a letter from the Idaho Department of Water Resources stating the application is denied. At that time, Tiffany Olsen would issue a letter to the property owner allowing private wells. Commissioner Bair stated in his mind the letter received from the Idaho Department of Water Resources stating all Community Well Applications will be held indefinitely is the same as a denial.

Commissioner Jackson asked Director Olsen if the Department of Environmental Quality has a concern with placing a large number of private wells in the specific density of area within the flood plain. Director Olsen replied that she is not aware of any concerns and referred to the government agency comment received from the Department of Environmental Quality which encouraged a community connection if available, otherwise, provided development standards are their normal recommendations. Director Olsen confirmed there were no concerns addressed within the testimony received from the Department of Environmental Quality in regards to development within the flood plain.

DECISION

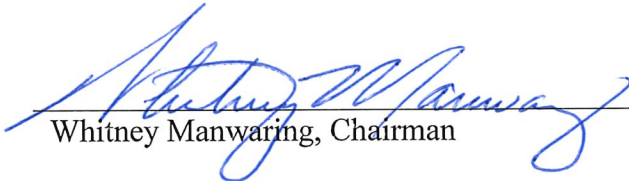
Commissioner Jackson moved to rescind the condition requiring a fence to be placed along the canal and allow the developers to move forward with the subdivision. Commissioner Bair seconded. Both voted in favor. The motion carried.

Commissioner Jackson moved to rescind the condition for the subdivision to have a community well and allow each lot to have individual wells. Commissioner Bair seconded. Both voted in favor. The motion carried.

A written decision shall be provided to the Applicant and/or affected person within sixty (60) days of receipt of the Request for Reconsideration or the Request is deemed denied. A decision shall not be deemed final for purposes of Judicial Review unless the process required Idaho Code Section 67-6535(2)(b) has been followed. The twenty-eight (28) day time-frame for seeking Judicial Review is tolled until the date of the written decision regarding reconsideration, or the expiration of the sixty (60) day reconsideration period, whichever occurs first.

Dated this 4th day of April 2023.

**Board of Bingham County Commissioners
Bingham County, Idaho**


Whitney Manwaring, Chairman


Mark Bair, Commissioner


Eric Jackson, Commissioner