Matthew C. Parks
Stacey & Parks, PLLC
802 W Bannock St, Suite LP 110
Boise, ID 83702
mcp@splawidaho.com
208-917-7780

October 17, 2019

RE: CHF19-00055 & SUB19-00034
Response to Applicant Appeal
Central Foothills Neighborhood Association

Dear City Council Members & Honorable Mayor of Boise:

The Central Foothills Neighborhood Association ("**CFNA**") supports the decision of the Boise Planning and Zoning Commission (the "**Commission**") to deny application CFH19-00055 (the "**Application**") for a foothills development permit filed by Aerie Terraces, LLC (the "**Applicant**") and to recommend denial of application SUB19-00034. The Commission held a public hearing on the applications on September 16, 2019, at which time the Commission unanimously passed a motion to deny CFH19-00055 and to recommend denial of SUB19-00034. That motion incorporated the September 16, 2019, planning and zoning staff report as a basis for the denial and recommended denial. On September 16, 2019, the Commission issued a written decision that also incorporated the staff report and the reasons articulated therein for the denial and recommendation to deny the respective applications discussed by and deliberated upon by the Commission in open session at the September 16, 2019 meeting (collectively the "**Decision**"). The CFNA agrees with the Decision and writes this letter to counter the arguments raised in the Applicant's appeal of the denial of CFH19-00055 to the City Council.

I. Additional Relevant Procedural History[1]

The Applicant did not present a full picture of the complicated history of the project the Applicant wants to develop (the "Project"). That history bears on the ultimate denial of the Application and should be clarified for the record. The Applicant is Aerie Terraces, LLC, which is, based on the testimony of the Applicant's representatives and members of the public, owned and/or controlled by Colin Connell. Mr. Connell was involved in the development of the adjacent Eyrie Canyon subdivision.

In 2008, Mr. Connell, through Connell Development Company, submitted CUP08-00011 as part of a planned unit development application to develop Eyrie Canyon subdivision. During

[1] Rather than regurgitate additional history, CFNA will only be providing additional information not included by the Applicant in the appeal – though this information is included in the record before the Commission, notably the Staff Report.

that application process, Connell Development Company agreed that as a condition of approval, one of the lots in the proposed subdivision, which is now Lot 19, Block 4 of Eyrie Canyon No. 5 ("**Lot 19**"), would be designated as an "unbuildable lot" on the subdivision plat. The plat was approved by Mr. Connell and signed by him. The plat was recorded as Instrument No. 2011-111054165. One plat note reads that "Under the terms of CUP08-00011 Lot 19 shall be unbuildable." Another note reads that "[t]he development of this Property shall be in compliance with the Boise City Ordinance or as specifically approved by CUP08-00011." No one has ever challenged or objected to the plat note or the conditions of approval for CUP08-00011.

In 2013, Connell sought to amend the CUP08-00011 approval to account for a change in the road layout and to modify the construction timing. Out of concerns raised about Connell's expressed plans to use Lot 19 in the future as a way to access land to the west for development purposes, the Commission approved the requested amendment (CUP13-00006), but clarified the language applicable to Lot 19. The 2013 CUP approval was conditioned upon the following:

> ***No development is allowed on Lot 19, Block 1 of Eyrie Canyon 6, the unbuildable lot. This includes any site work related to roads. If the developer seeks application to provide a connection to the undeveloped property to the west then a publicly noticed zoning approval is required.***

This clarification of the condition of approval from 2008 made it clear that the intent of the 2008 plat note was to preclude the use of Lot 19 to build a road to connect Eyrie Canyon to the undeveloped land to the west due to the severe grading that would be required and the impact that would have on the adjacent property owners.

Mr. Connell, albeit through another development entity, now seeks to use Lot 19 to connect the property to the west of Eyrie Canyon to Winter Camp Drive so the property to the west can be developed.

While the Applicant is not technically Mr. Connell, he is the developer and is bound by his earlier contractual obligations. More importantly, the contractual obligation was memorialized in a recorded plat and runs with the land, no matter who owns Lot 19. Mr. Connell signed the recorded plat for Eyrie Canyon Subdivision No. 5 as an individual owner of the property platted, along with another property owner, SRS Properties LP. By executing the plat, Mr. Connell agreed that Lot 19 would be "unbuildable". He then agreed that the unbuildable nature of the lot included not being allowed to build a road over Lot 19 to provide access to adjacent property to be developed. This promise binds all future owners of Lot 19 – and by extension anyone with easement rights over Lot 19.

In marketing and selling the lots in Eyrie Canyon, Mr. Connell and his agents told prospective buyers and eventual purchasers of lots in the subdivision that nothing would be built on Lot 19 and it would be kept as open space. (*See* letter attached hereto – which was part of the record before the Commission but provided for convenience as an exhibit).

Lot 19 is currently titled in the name of SRS Properties, LLC. The record contains no evidence that the Applicant has an easement over Lot 19, though SRS Properties, LLC did

provide an affidavit of legal interest with the Application, seeming to demonstrate the necessary control over Lot 19. It also shows that SRS Properties and Connell are still working together.

II. Basis for Denial

The Commission correctly denied the Application for what can be reduced to three reasons:

1. The failure to demonstrate the Project complies with the requirements set forth in BCC 11-07-08

2. The failure to demonstrate the Project as planned meets the Boise City Fire Department Requirements

3. The Applicant's failure to demonstrate the Project has sufficient access to a public right of way.

III. Standard of Review

Per BCC 11-03-03.9(2)(a)(i)-(vi), the City Council may find the Commission erred if:

1. The decision is in violation of constitutional, state, or city law. An example would be that the review body's decision would be a taking.

2. The review body's decision exceeds its statutory authority.

3. The decision is made upon unlawful procedure. An example would be if notice of a required public hearing was inadequate. In such cases, the matter may be remanded to correct the error.

4. The decision is arbitrary, capricious or an abuse of discretion in that it was made without rational basis, or in disregard of the facts and circumstances presented. Where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration.

5. The decision is not supported by substantial evidence.

IV. Basis for Appeal

The Applicant argues the Decision:

1. Is arbitrary and capricious

2. Is not supported by substantial evidence

3. Erroneously considered whether the Project complies with the Comprehensive Plan

4. Does not contained a reasoned statement as required by Idaho Code § 67-6535

5. Does not contain a statement indicating what actions the Applicant could take to obtain approval as required by Idaho Code § 67-6519

6. Constitutes an unconstitutional taking

For the reasons discussed herein, the Applicant is wrong and the Decision should be affirmed by the City Council.

V. Analysis

A. THE COMMISSION CORRECTLY DETERMINED THE APPLICATION MATERIALS FAILED TO DEMONSTRATE THE LAND IS CAPABLE OF THE PROPOSED DEVELOPMENT

Applicant argues the Commission's determination that the "application materials fail to demonstrate the land is capable of the volume and type of development proposed" is not supported by substantial evidence and is arbitrary and capricious. Applicant's Memorandum, p. 3.

"Substantial evidence is more than a scintilla of proof, but less than a preponderance. It is relevant evidence that a reasonable mind might accept to support a conclusion." *Jensen v. City of Pocatello*, 135 Idaho 406, 412, 18 P.3d 211, 217 (2000).

> A city's actions are considered arbitrary and capricious if made without a rational basis, or in disregard of the facts and circumstances, or without adequate determining principles. This Court will not substitute its judgment for that of a city when it acts within the bounds of its discretion. A city's actions are considered an abuse of discretion when the actions are arbitrary, capricious or unreasonable.

Lane Ranch Partnership v. City of Sun Valley, 145 Idaho 87, 91, 175 P.3d 776, 780 (2007).

The Commission's determination was supported by substantial evidence and was not arbitrary and capricious. On August 20, 2019, Boise City Public Works engineer Jason Taylor clearly and unequivocally informed the Applicant that (1) "Public Works staff cannot recommend approval " and (2) "[t]he preliminary grading plan does not meet all the standards as outlined in the Hillside Technical Reports Requirements Manual." See August 20, 2019, Inter-Department Correspondence ("Public Works Memo").

Applicant proposed a project that will require grading that involves cutting and filling of up to 80-90 feet of materials. Yet, the Applicant only provided geological soil testing to a depth of 18 feet. And, in that small sample, the testing revealed expansive clay soils that would not be conducive to development. While the city engineer did note that it is typical for a preliminary testing to only include soil testing to a depth of 18 feet – likely due to the need for a well drilling permit to dig any deeper test holes, the Commission was well within its discretion to

find that the 18 foot test pits did not provide sufficient information for the Commission to determine that the project could support the extent of the grading and cutting and filling proposed by the Applicant. In light of the significant grading, the Applicant failed to provide adequate information. The following discussion between Commissioner Bratnober and the Applicant's engineer shows the lack of any information about the condition of the soil at the 80-90 foot depth of the proposed cuts into the foothills:

Commissioner Bratnober: Hi and thank you. A couple things, so, first of all, it looks like there were 15 test points dug. Is that correct?

Adrian Mascorro (Allwest Testing & Engineering, Inc): Correct.

Commissioner Bratnober: How many of those showed the expansion soils?

Adrian Mascorro (Allwest Testing & Engineering, Inc): Two in the area that we're talking about.

Commissioner Bratnober: Okay, and those were to a depth of 18 feet, right?

Adrian Mascorro (Allwest Testing & Engineering, Inc): Correct.

Commissioner Bratnober: So, I'm obviously not a soil expert. ***So, you got another 62 feet underneath that for some of these cuts. How confident are you that the soil structure is going to be acceptable as you go lower, and why?***

Adrian Mascorro (Allwest Testing & Engineering, Inc): So, I've got experience in the surrounding areas. The soils are very similar to what we've encountered in the other areas. Obviously, this was a preliminary report in nature, as is required. ***So, we will find out in the final investigation what those soils conditions will be.***

Commissioner Bratnober: Is the final investigation – does that mean after the cut is made?

Adrian Mascorro (Allwest Testing & Engineering, Inc): No, prior.

Commissioner Bratnober: Core samples or something like that? Is that –

Adrian Mascorro (Allwest Testing & Engineering, Inc): Correct. We will bore holes down deeper than 80 foot once all the final plans are developed. And it's just a process that we go through. This is preliminary in nature and this is the hillside requirement for the ordinance.

Commissioner Bratnober: Okay, and what happens if you find something amiss in those bore holes?

Adrian Mascorro (Allwest Testing & Engineering, Inc): Then recommendations are going to be made to make sure that the development occurs in such a manner that is safe.

Commissioner Bratnober: Okay, as regards to the places with expansion soils, how big an area – are there houses planned over top of that stuff? What's –

Adrian Mascorro (Allwest Testing & Engineering, Inc): So, the areas were one to two feet, max. So, any of that soil will be stripped off naturally, can be stripped off. So, there wasn't much of concern as far as expansive soils.

Commissioner Bratnober: ***Okay, we just don't know what's underneath it in the other 62 feet and we'll find that out.***

Adrian Mascorro (Allwest Testing & Engineering, Inc): ***Sure, we will, correct***.

Commissioner Bratnober: Thank you.

Boise City Planning & Zoning Commission, Hearing Minutes, September 16, 2019 ("Minutes"), pp. 23-24 (emphasis added).

The record shows the Applicant did not provide any information as to whether the soils at the depth of the cuts could sustain the development proposed.

The Commission's determination that the preliminary geotechnical report needed to provide additional information to account for the extreme cut and fill proposed is not arbitrary. The Boise City Code provides that "where there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration." BCC 11-03-03.9(2)(v) Here, the Commissioners directed questions to the Applicant, the Applicant's engineer, and the City engineer concerning whether or not the 18-foot test pits contained all the information needed to assess if the land could support the project. The Applicant's engineer and the City engineer each testified that there would need to be additional testing done before that was known. While that testing may be costly, the extent of the earthwork proposed triggers a corresponding need to provide more extensive geological testing to determine whether the land can support the project.

The Applicant erroneously stated that Public Works preliminarily "approved" the Project. Applicant's Memorandum, p. 5. Actually, Public Works, on August 20, 2019, made it clear that Public Works "cannot recommend approval" of the Project. Public Works engineer Jason Taylor testified at the September 16 hearing as follows:

> **Jason Taylor**: …. My recommendation is based off the Public Works Technical Guidance Manual for Preliminary Grading Plans, Geotech, and Hydrology. In this case, the preliminary grading plan had deficiencies. They had slopes steeper than two to one. Well, our manual doesn't allow that unless the geotech approves it. The geotech never got into that detail of work because this is a preliminary geotech. The grades, the grading – the grading didn't blend – or, I'm sorry, the cut and fills didn't balance. That's a requirement of our technical guidance manual. So, there was several little – as Cody said, there's things that

> can be done to remedy that very easily. It's just, it wasn't done with the plans that were presented to us.
>
> **Madam Chair Stevens**: And so, if I could, I'm just going to keep going here. If there was to be a recommendation for approval and we said, here's what you have to do, you have to be smaller than two to one. You have to be whatever the other things were you just said, then you would be okay with this.
>
> **Jason Taylor (Public Works)**: Yes, and essentially, I essentially did that with the follow-up of that sentence. It says, hey, these are the things that need to be fixed with the final grading plans and the final geotech and hydrology. I did list those out, ***but as was presented, they did not meet that for the preliminary***.

Minutes, p. 30 (emphasis added).

The Commission's determination the preliminary geological reports were inadequate is supported by substantial evidence and is not arbitrary and capricious. Public Works recommended denial of the Application because, among other reasons, the preliminary grading plan did not meet the standards as outlined in the Hillside Technical Report Requirements Manual.

B. EVEN IF THE COMPREHENSIVE PLAN IS INAPPLICABLE, THE COMMISSION'S CONSIDERATION OF THE COMPREHENSIVE PLAN WAS HARMLESS ERROR

Applicant contends the Commission's decision should be vacated because the Commission considered whether the Application and proposed development complied with the Comprehensive Plan. Applicant Memorandum, p. 4. However, even if the Commission erred in considering the Comprehensive Plan and whether the project complied with the plan, the error is harmless as the Commission denied the Application based on the failure to comply with the standards set forth in the Boise Foothills Development Standards, BCC 11-07-08.

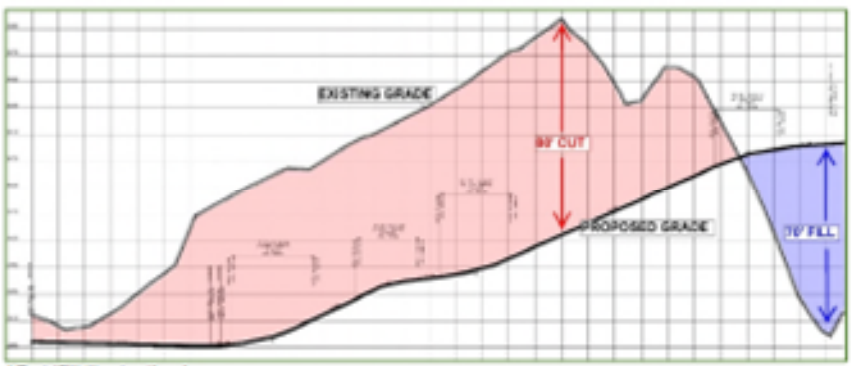
The Idaho Supreme Court's holding in *Urrutia v. Blaine Cty*., 134 Idaho 353, 2 P. 3d 738 (2000) does not support reversal of the denial in this case. In *Urrutia*, the land use application met the requirements in Blaine County's subdivision and zoning ordinances but was denied solely based on a lack of compliance with the Comprehensive Plan. In this case, the Application was denied for a multitude of reasons unrelated to the Comprehensive Plan. If it was error for the Commission to rely on the Comprehensive Plan, the error was harmless.

C. THE COMMISSION CORRECTLY DETERMINED THE PROJECT DOES NOT COMPLY WITH THE BOISE FOOTHILLS DEVELOPMENT STANDARDS (BCC 11-07-08)

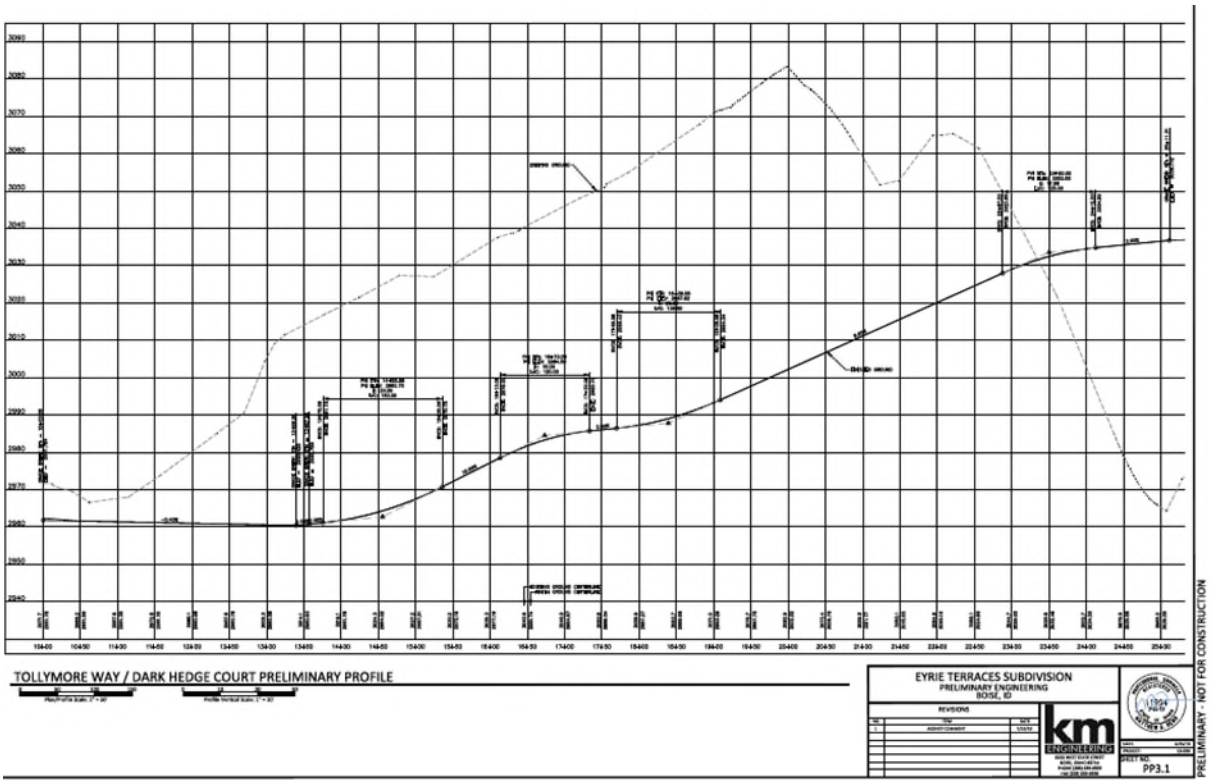
The Commission specifically identified several criteria of the Hillside and Foothills Development Standards that the Project failed to meet. During deliberations, the Commissioners specifically identified the following technical requirements:

- Planning of development shall account for the topography, soils, geology, vegetation, outstanding features such as outcropping and cliffs, hydrology and other conditions existing on the proposed site. BBC 11-07-08.5.A(1)
- Development shall be oriented on the site so that grading and other site preparations are kept to a minimum. BBC 11-07-08.5.A(2)
- Essential grading shall be completed during site preparation, rather than left for future lot owners so that:
    - Shaping shall blend in with existing topography to minimize the necessity of padding or terracing of building sites; and
    - Building pads and terracing shall be graded to blend into the natural contours. BBC 11-07-08.5.A(3)
- Areas not well suited for development because of soil, geology, vegetation, or hydrology limitations shall be reserved for open space. BBC 11-07-08.5.A(5)
- Disruption of existing plant and animal life shall be minimized. BBC 11-07-08.5.A(6)
- Innovative methods of slope and soil stabilization, grading, and landscaping are encouraged. BBC 11-07-08.5.A(7)
- Multiple access points and street grades that meet requirements of the Fire Department and ACHD shall be provided. BBC 11-07-08.5.A(8)

The following diagrams included in the staff report provided to the Commission (the last three were provided by the Applicant) clearly show the proposed project requires extensive regrading of the Boise Foothills and does not account for the topography, soils, geology, or outstanding features. It shows the Project entails the opposite – cutting and filling the existing grade to make it developable. The Commission correctly determined the project failed to meet BBC 11-07-08.5.A(1), (2), (3), and (7) based on the excessive and severe grading.



(Cut/Fill Illustration)


TOLLYMORE WAY / DARK HEDGE COURT PRELIMINARY PROFILE
EYRIE TERRACES SUBDIVISION
PRELIMINARY ENGINEERING
BOISE, ID
REVISIONS
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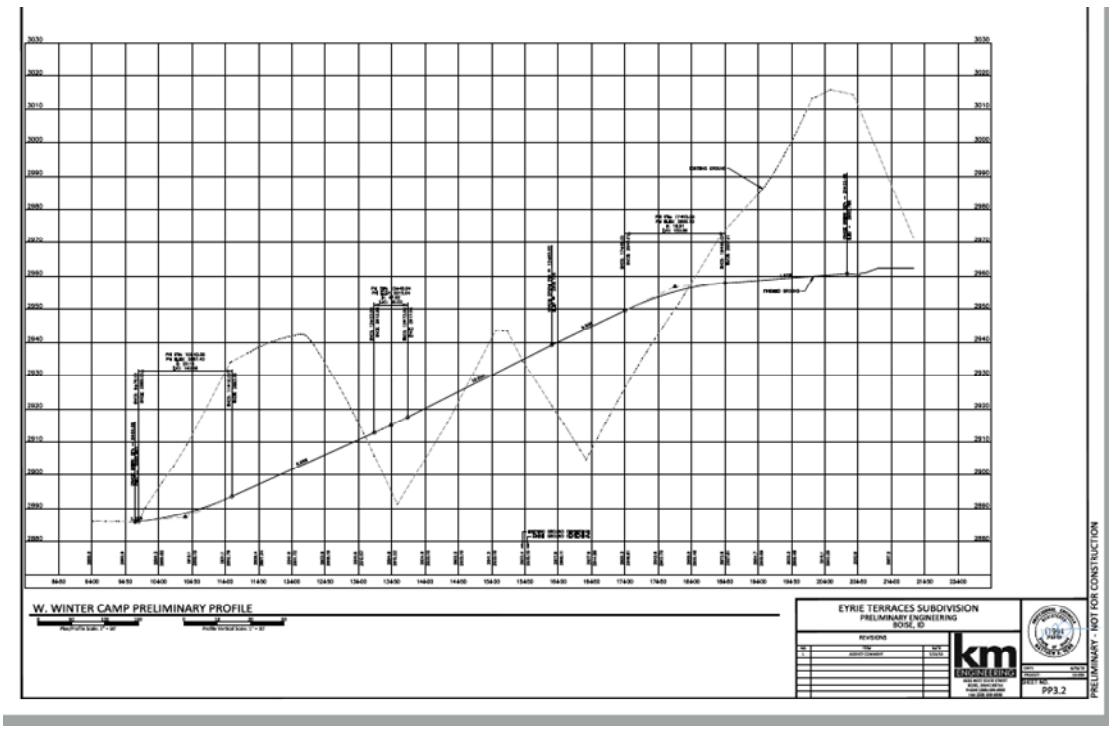
PP3.1
PRELIMINARY - NOT FOR CONSTRUCTION


W. WINTER CAMP PRELIMINARY PROFILE
EYRIE TERRACES SUBDIVISION
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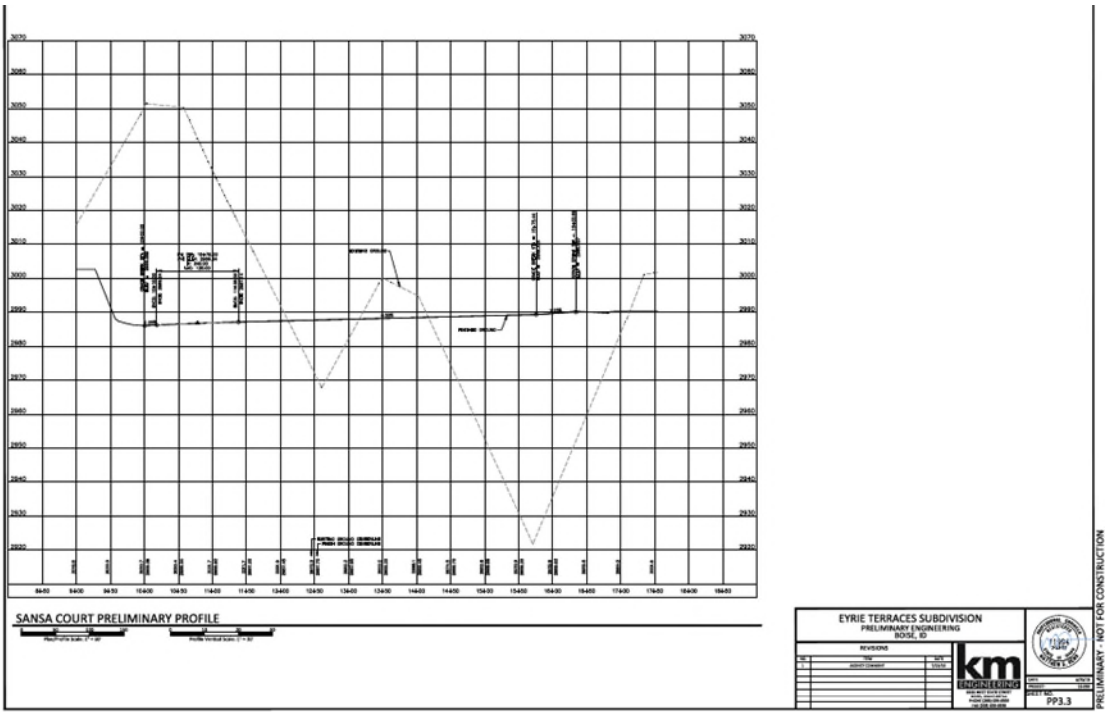
PP3.2
PRELIMINARY - NOT FOR CONSTRUCTION



According to the report prepared by the Boise Public Works Department Engineer, the project will require moving 1,028,015 cubic yards of cut and fill material. Rather than attempt to account for the natural topography, the proposed project involves the destruction of the existing topography. Grading is extensive and is not kept to a minimum nor is the project shaped to blend into the existing topography.

Rather than suggest some innovative methods of grading, the Applicant proposes completely flattening the foothill ridges and filling in the gulches. The Commission correctly denied the Application based on the extensive proposed earth work that does not comport with the Boise Hillside and Foothills Development Standards.

There is substantial evidence to support the determination that the proposed project does not meet the requirements of the Hillside and Foothills Development Standards, including but not limited to:

1. Project Data and Facts prepared by Boise Planning and Zoning Staff
2. The Inter-Department Correspondence dated August 20, 2019, prepared by Boise Public Works and provided to Planning and Zoning Staff
3. The extensive public testimony pointing out the extent of the proposed grading and earthwork
4. The Application itself, which clearly shows the proposed project involves significant and extensive grading and earthwork.

Rather than try to find fault with the opinions of the Commission on the finding the project does not comply with BCC 11-03-03.5.A, the Applicant argues that through the miracle of engineering, any potential problems with the engineering issues can be solved. But, the

developer's ability to solve engineering issues does not take away from the fact that this proposed project essentially cuts off the tops of foothill ridges, will significantly impact the natural grading of the property and does not meet the requirements of BBC 11-07-08.5.A.

The Applicant has not addressed how the Commission erred in determining the Project failed to meet these ordinance based criteria. The failure to address these criteria is sufficient grounds to reject the appeal. But, even if the City Council were to consider whether the Commission erred in determining the proposed project simply did not meet the Hillside and Foothills Development Standards, the City Council is constrained by the standard of review, which, as noted above, unequivocally provides that, "[w]here there is room for two opinions, action is not arbitrary and capricious when exercised honestly and upon due consideration." BCC 11-03-03.9(2)(v). The Commission's opinion that the Project does not meet the requirements of BBC 11-07-08.5.A is supported by substantial evidence and was a decision made after honest and due consideration of the evidence. *See* Minutes, pp. 61-66 (discussing reasons for denying the Application during deliberations on the motion by the Commissioners).

D. THE COMMISSION CORRECTLY DETERMINED THE PROJECT FAILED TO MEET THE REQUIREMENTS OF THE BOISE CITY FIRE DEPARTMENT

The Commission correctly denied the Application due to the failure to comply with BCC 11-03-08.5.A(8), which required the Applicant to demonstrate the proposed development would have "[m]ultiple access points and street grades that meet the requirements of the Fire Department and ACHD…."

According to Applicant, the Commission's determination that the project will create a hazardous situation from a fire and emergency services perspective is not supported by substantial evidence and is arbitrary and capricious. Applicant Memorandum, p. 9. However, the Commission clearly was concerned with the fire apparatus access roads and how that would create a potentially hazardous situation, not whether the development of the property would create a fire hazard.

The Commission correctly and appropriately considered the Boise Fire Department's position on the access points to the development and whether the access points met the Fire Department's requirements. The testimony of the Fire Chief, Ron Johnson, and the August 22, 2019, letter from Mr. Johnson to Planner Riddle, which is part of the record, are more than substantial evidence in support of the determination that the proposed project does not meet the Boise Fire Department requirements for access points for fire apparatus due to the single access point and the very long dead end streets.

The Commission appropriately considered the roadway layout and whether the roads met Fire Department requirements. *See* BCC 11-03-08.5.E (listing ordinance-based criteria for "Roadways and Circulation" for Hillside Development Permit applications); *see also* BCC 11-03-08.5.A(8) (noting the project access points must meet Fire Department requirements). The Commission also correctly considered the streets at issue to be dead-end streets that would need to meet the IFC requirements for dead ends.

Boise has adopted the International Fire Code (IFC). The IFC dictates the access road requirements. Applicant argues the streets in question are not "dead-end" streets based on the definition of dead-end streets in BCC 11-012-05. However, the IFC contains its own definitions section. Although the term "dead-end" is not in the listed definitions, the IFC indicates that "[w]here terms are not defined ***through the methods authorized by this section***, such terms shall have ordinarily accepted meanings such as the context implies. Merriam Webster's Collegiate Dictionary, 11th Edition, shall be considered as providing ordinarily accepted meanings." *See* International Fire Code, at https://codes.iccsafe.org/content/IFC2018/CHAPTER-2-DEFINITIONS?site_type=public.

The IFC does not indicate that definitions for undefined terms in the IFC can be found in municipal codes – rather it reads that "[w]hen terms are not defined in this code and are defined in the International Building Code, International Fuel Gas Code, International Mechanical Code, or International Plumbing Code, such terms shall have the meanings ascribed to them as in those codes." None of those codes have a definition of dead-end, so the Fire Department appropriately looked to the Merriam Dictionary for the common understanding of the term dead-end. Even without looking to the dictionary, the common understanding of a dead-end street is one without an exit.

The Boise Fire Department correctly followed the IFC direction to use the ordinarily accepted meaning of a "dead-end" street by referring to the Merriam Webster Collegiate Dictionary, 11th Edition, as testified by Fire Chief Ron Johnson before the Commission. Minutes, p. 19-21 (discussing the Fire Department's reasons for recommending denial of the Application). Merriam Webster's defines a "dead-end street" as "an end, as of a street, without an exit." *Id*.

The Commission correctly agreed with the Fire Department that the IFC should be used to determine whether or not the streets at issue are "dead-ends". When it comes to issues of fire safety, the Commission should not second-guess the Fire Department. The proposed street layouts contain dead-end streets that exceed 2000 feet in length – far longer than any other approved dead-end streets in Boise in recent years. Each street in the proposed development exceeds the 750-foot threshold that triggers a need for a special approval from the Fire Department per the IFC. Based on the extraordinary length of the dead ends (which are site-specific conditions), the Fire Department recommended denial of the Application. The Commission acted appropriately in deferring to the Fire Department's expertise.

Applicant argues it has been treated differently from other developers with respect to the treatment of dead ends and Fire Department approval, which violates Applicant's equal protection rights under the United States Constitution. Applicant's equal protection rights have not been impacted by the unsupported allegation that this Application was treated differently than other projects with respect to the determination that the roads do not meet the Boise Fire Department requirements for fire apparatus access roads. Applicant has not provided any legal authority to support its contention that its equal protection rights have been impacted.

In the context of zoning, the Idaho Supreme Court, in addressing a similar argument that a landowner's land use application had been treated differently than others, which violates

equal protection rights, held that, "to the extent that Applicants have asserted an equal protection claim, it appears that they assert that they are a 'class of one.' As such, Applicants need only allege and prove that they have intentionally been singled out and treated differently based on a distinction that fails the rational basis test." *Terrazas v. Blaine County ex rel. Bd. of Com'rs*, 207 P.3d 169, 173-74, 147 Idaho 193, 197-98 (2009).

There is no evidence or argument to the effect that the Commission and Boise Fire Department intentionally singled out the Applicant when considering the dead-end streets at issue and whether to use the IFC definition or the zoning code definition – nor is there any discussion about the lack of any rational basis for doing so. Rationally, when considering whether the streets that are to be used as fire apparatus access roads are "dead-ends", it is rational and logical to use the methods laid out in the IFC. "Under the `rational basis test,' a classification will withstand an equal protection challenge if there is any conceivable state of facts which will support it." *Bint v. Creative Forest Prod*., 108 Idaho 116, 120, 697 P.2d 818, 822 (1985) (citations omitted).

Boise Fire Department's decision, adopted by the Commission, to follow the IFC's guidance on defining a dead end, determining the streets in the project did not meet IFC standards, and refusing to provide a special waiver passes muster under the rational basis test. Ron Johnson testified that the dead ends proposed by Applicant were far longer than those that exceeded 750 feet but were approved in the past. At some point, enough is enough and a dead-end that exceeds 1600 feet in the Boise foothills, an area prone to devastating fires, is too much for the Boise Fire Department to approve. That determination is logical and meets the rational basis test.

E. THE APPLICATION MUST BE DENIED DUE TO THE LACK OF ACCESS

The Site cannot be developed because it lacks any access at all to a public right of way. According to the Applicant, access to the site will be through Lot 19 via an easement to be granted by the owner of that lot. However, this is insufficient access for several reasons.

First, SRS Properties, LLC (the owner of Lot 19) cannot grant more than it owns through an easement. An easement would be subject to the plat notes. The Idaho Supreme Court has held that a property owner cannot "convey any interest in the property greater than its own possessory interest." *Bedard and Musser v. City of Boise City*, 162 Idaho 688, 403 P.3d 632, (2017). Here, SRS Properties, LLC – if it were to grant an easement, can only grant it subject to (1) the plat note declaring that Lot 19 is unbuildable and (2) subject to the equitable servitudes.

Second, the conditions agreed to by the owner of Lot 19 in CUP08-00011 as modified in 2013 makes it clear that Lot 19 cannot be used for an access road to the Site without a "publicly noticed zoning approval." While the CUP does not define a publicly noticed zoning approval, any modification of the conditional use permit would need to follow the City's CUP modification process. *See* BCC 11-03-04.6 (concerning conditional use permit approvals and modifications). Any modification to the condition concerning Lot 19 would be a major modification that must be considered by the Commission in accordance with a properly submitted application.

Notably, the request to modify the conditional use permit would open the matter to considering whether the modification would be consistent with the Comprehensive Plan.

In any event, even if the CUP was modified – the Applicant would still need to apply pursuant to Idaho Code § 50-1306A to vacate the plat note indicating that the proposed access lot is "unbuildable." Applicant has not addressed why it has not requested a vacation of the plat note prior to submitting the Application, other than to argue the extensive grading and road construction does not require a building permit, so the plat note does not apply. Applicant ignores the plat note requiring compliance with CUP08-00011 (as amended). In light of the plat note, the CUP conditions of approval that were never challenged, and the promises made by Mr. Connell about Lot 19, the Application was properly denied.

The plat note is a negative covenant encumbering Lot 19 that cannot be ignored. The City Council does not have the jurisdiction to determine the extent of the equitable servitude created by the plat note and cannot approve the Application until the Applicant litigates the extent and meaning of the plat note and the nature and extent of the property rights created by the equitable servitude. *See Rural Kootenai Org., Inc. v. Bd. of Comm'rs*, 133 Idaho 833, 842, 993 P.2d 596, 605 (1999) (holding questions of property ownership rights must be decided by a court).

The plat note and subsequent sales of lots in the subdivision created enforceable negative covenants (equitable servitudes) that are binding on the Applicant. The City has no legal authority to determine whether or not the planned access through the unbuildable lot would violate the equitable servitudes attached to Lot 19.

It is clear that in 2008 and again in 2013, the owner of Lot 19 agreed to the imposition of a prohibition on developing Lot 19. In 2013 it was made clear that the prohibition covered exactly what the Applicant wants to do now – build a road to an adjacent property to the west for development. Not only is this prohibited by the plat note, it is prohibited by the promises Mr. Connell made to those who bought a lot in Eyrie Canyon. Those lot owners purchased a lot and built a home in reliance on Mr. Connell's covenant that Lot 19 would remain untouched and would remain open space.

Until the access issue is resolved, the conditional use permit modified, the plat note vacated, and a court weighs in on the property rights stemming from the equitable servitudes encumbering Lot 19, the Application cannot be approved. The Commission correctly denied the Application due to the lack of access.

F. REQUIRING THE APPLICANT TO ADHERE TO THE PLAT NOTE IS NOT A TAKING.

The Applicant is attempting to revive a challenge to the imposition of the CUP condition in 2008 and the modification in 2013 and argue that the plat note requirement was an exaction that constitutes a taking. The alleged takings claim began to accrue in 2009, when CUP08-00011 was approved with the condition the Applicant now finds abhorrent. Setting aside whether the Applicant (based on the interconnection to Connell) waived the takings claim by agreeing to the condition in 2008 and receiving a benefit from the treatment of Lot 19, the 2 year statute of

limitations applicable to inverse condemnation claims set forth in Idaho Code § 50-219 expired long ago. Also, Applicant failed to meet the requirements under the Idaho Tort Claims Act to provide a notice of intent to sue within 180 days of the alleged violation of rights. Any inverse condemnation claim is time barred.

Applicant incorrectly points to the 2013 CUP modification as the "taking" – and ignores the fact that the condition of approval at issue was a condition of the approval of CUP08-00011, in 2008. Applicant provides no argument concerning why the 2008 CUP condition is illegal or lacks a nexus to the impacts of the project approved in 2008. Applicant does not explain why it ignores the 2008 imposition of the condition on development (and the lack of any objection at that time).

Applicant also mischaracterizes the plat note as taking away access that the Applicant has right now. First, the Applicant has no access to a public right-of-way from the property – since there does not appear to be any easement of record over Lot 19. Second, as discussed above, the owner of Lot 19 cannot grant a right of access over Lot 19 that is not subject to the plate note, the CUP conditions, and the equitable servitudes. The owner of Lot 19 cannot give more than it owns – and it owns Lot 19 subject to these restrictions and negative covenants.

The fact that Applicant cannot access its property does not mean that the City is required to remedy the Applicant's problem. The property does not have access. The City, by denying the Application, is not taking anything from the Applicant. If the property does not have access, there is no taking if the City refuses to trample the rights of others to remedy the access problem that the Applicant and/or the owner of Lot 19 created.

G. Planning and Zoning Informed the Applicant of Steps that Could be Taken to Obtain Approval

In the Staff Report dated September 16, 2019, the Applicant was provided with information on how the Application could be approved in compliance with Idaho Code § 67-6519.

VI. Conclusion

For the reasons stated herein and in the Decision, CFNA requests the City deny the appeal.

Sincerely,

Matthew Parks

Matthew C. Parks
Attorney for the Central Foothills Neighborhood Association

9/5/2019

Boise City Planning and Zoning Commission
Attn: Cody Riddle
City Hall
PO Box 500
Boise, ID 83701-0500

Mary Ann Helton
2231 W. Winter Camp Dr.
Boise, ID 83703

RE: Eyrie Terraces CFH19-00055 and SUB 19-00034. 2317 W Winter Camp Drive Development

Dear Mr. Riddle,

I am writing this letter to document my strong opposition to the above referenced development application.

In February 2014 my husband and I entered in a contract to purchase a home residing at 2231 W. Winter Camp Dr. This home resides directly to the East of Lot # 19 (2317 W. Winter Camp Dr). We had one stipulation on the purchase, that we must first confirm from the City of Boise and the developer (Colin Connell) that this land would not be developed in the future.

I proceeded to have a phone conversation with Mr. Connell confirming this fact. Mr. Connell stated, " There is no way I can develop that property; it is too steep".

My husband had another conversation with Pattie Dubie (Colin Connell's real estate agent listing his lots) asking if there were intentions to build on Lot # 19. She confirmed by saying " No, you are safe, we can't develop that".

Again, prior to closing on our home, my husband called the Planning Department of the City of Boise to confirm these facts stated by Mr. Connell and his representative. The department confirmed that the plat note states "un-buildable" and this lot was set aside as "open space" as a condition of the approval of the PUD.

Given this information from the three parties my husband and I purchased our home. We as homeowners relied on the parties and city agencies with intimate knowledge of the situation to

provide factual information. In no possible scenario would we have purchased our home if we knew the information provided to us was not true.

It is clear from the 2008, 2009 and 2013 P&Z minutes regarding the PUD in which our home resides that the intent of the council was that Lot#19 was to remain open space and a condition of approval. Otherwise Commissioner Barker and rest of the P&Z council would have granted Mr. Connell's request to label it as a buildable lot. Approval was granted based on this lot remaining open space.

Boise City Planning & Zoning Commission Minutes – December 1st, 2008

Commissioner Barker – I will certainly throw in my support to the conversation regarding our ability to establish open space under the conditional use and I would like to see us consider backing off of those lots at the top of the ridge. I appreciate the neighborhoods willingness to compromise and to maintain that as a usable open space. I don't see that there is usable open space in the remainder of this development. I'm not even sure I would see it as available open spaces in terms of what you might expect. I also think that the commission has the opportunity to establish our intent regarding the lot two, Block four. Is it buildable, or not buildable? Is there a tax advantage or not? It seems clear to me that the developer hopes to keep that as a buildable area, with potential development in the future, and I would like to see us establish that as not buildable and to leave it clearly as an open space. I think under the Conditional Use Permit, as a Commission, we have the opportunity to establish that intent. Commissioner Wilson – Right now, that is part of our conditions of approval as provided by Josh. We have the conditions of approval in the staff report and then we also have the memo that he gave us this evening and right now it establishes Condition 2F, lot 2, Block 4 designated as non-buildable. If we wanted to accept the conditions as proposed by staff, it would include that. I

Boise City Planning & Zoning Commission Minutes – January 12, 2009

"COMMISSIONER BARKER MOVED TO APPROVE CUP08-00011, CFH08-00008 & CFH08-00003, SUBJECT TO THE FINDINGS OF FACT AND CONDITIONS OF APPROVAL WITH THE FOLLOWING MODIFICATIONS TO THE MOST RECENT CONDITIONS; ITEM #2; PLANNING. ITEM #2D; THAT WE ADD THE WORDS, REGARDING SHAMAN PLACE AND SHAMAN WAY, ADD THAT THEIR DEVELOPMENT ALONG THESE TWO ROADWAYS CAN NOT INCLUDED DAYLIGHT BASEMENTS. ITEM #2E; RESTRICT ANY FUTURE DEVELOPMENT OF LOT 2, BLOCK 4, AND SHOW THAT AREA OF THIS DEVELOPMENT AS UNBUILDABLE. ITEM #2F; REQUIRE THE APPLICANT TO PROVIDE A NATURAL SURFACE PATH AND THE DESIGN OF THAT PATH BE IN CONJUNCTION WITH STAFF FROM THE RIDGE TO RIVERS AGENCY. AN EASEMENT TO BE PROVIDED TO RIDGE TO RIVERS FOR THE PATH THAT WILL BE DEVELOPED AND THE TIMING OF THAT PATHWAY TO BE COMPLETED DURING PHASE ONE OF THE DEVELOPMENT. WE WOULD LIKE TO SEE DEVELOPMENT AND ACCESS TO THE PARK"

Undoing this compromise to the benefit of one individual (who does not live in the neighborhood) would negate years of efforts, negotiations and compromises that the City of Boise, developer and residents made to allow an equitable exchange so that all parties win.

Approving this subdivision would set a dangerous precedent for future developments and would lead to distrust in the consistency and validity of any previous ruling by our local agencies.

I am asking the Planning and Zoning Commission to uphold the previous decisions from your agency, re-confirm that Lot#19 is “un-buildable” as the current plat note states (condition for ultimate approval of the PUD) and deny this application.

Plat Note:

“No development is allowed on Lot 19, Block 1 of Eyrie Canyon 6, the unbuildable lot. This includes any site work related to roads. If the developer seeks application to provide a connection to the undeveloped property to the west then a publicly noticed zoning approval is required.”

Sincerely,

Mary Ann Helton

Mary Ann Helton