



PLANNING AND DEVELOPMENT SERVICES

MAYOR: David H. Bieter | DIRECTOR: Mark Lavin

TO: Mayor and Boise City Council
FROM: Cody Riddle, Deputy Planning Director
DATE: November 19, 2019
RE: CFH19-55 (Appeal) & SUB19-34 (Preliminary Plat) / 2317 Winter Camp Drive

The applicant is appealing the Planning and Zoning Commission's denial of a hillside development permit associated with a preliminary plat for a residential subdivision comprised of 30 buildable lots on 21.12 acres located at 2317 W. Winter Camp Drive.

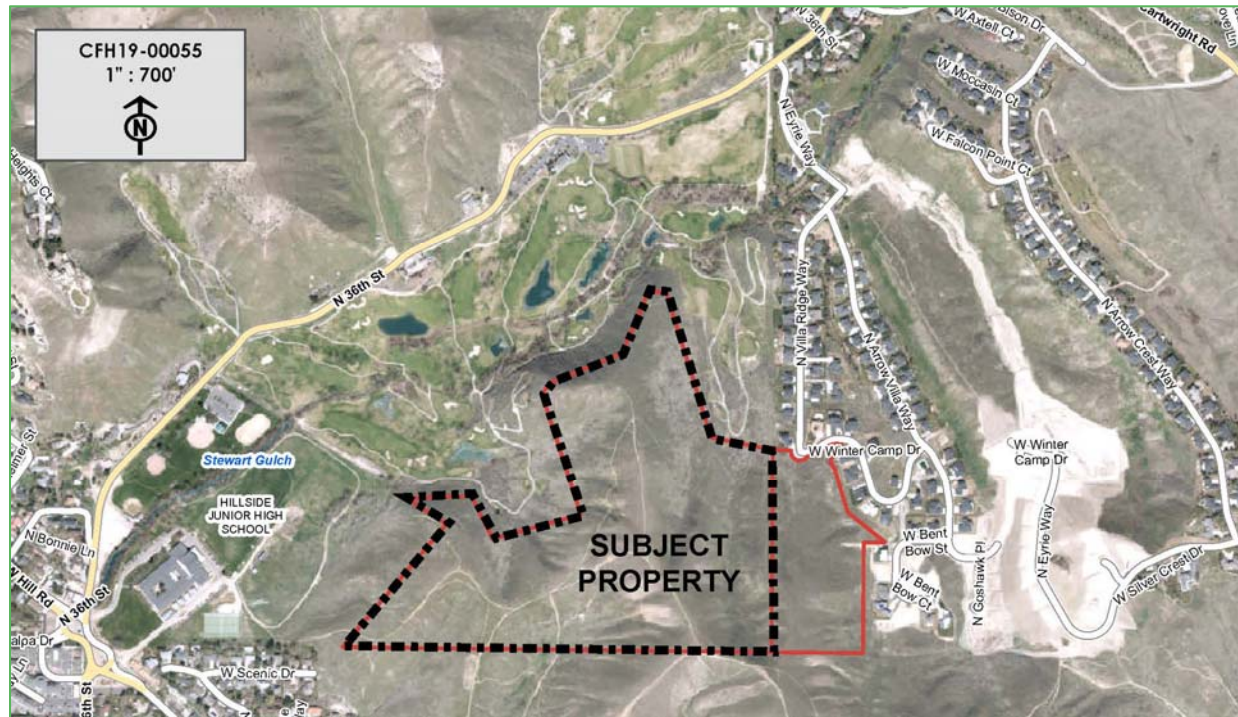


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BACKGROUND & SUMMARY OF PLANNING & ZONING COMMISSION ACTION

On September 16, 2019 the Planning and Zoning Commission conducted a hearing on a hillside development permit and preliminary plat for a single-family residential subdivision comprised of 30 buildable lots on approximately 21 acres located at 2317 W. Winter Camp Drive in an R-1A (Single Family Residential) zone.

After reviewing substantial written information and hearing public testimony, the Commission unanimously denied the hillside permit and recommended denial of the preliminary plat, based on the following reason statement:

As further detailed in the attached report, the project does not comply with the approval criteria of BCC 11-03-04.17.B(7) or the technical requirements of the Hillside Ordinance (11-07-08). The purpose of this ordinance is to ensure development is consistent with the Comprehensive Plan and provide protection from hazards due to slope, unstable soils, earth movement and other hazards. The application fails to meet these standards. While the property has residential zoning, development potential is restricted by severe slopes and limited access. The majority of the site exceeds 25-percent slope and the geotechnical analysis confirms the presence of expansive (clay) soils. BCC 11-07-08.4 indicates these areas should not be subjected to development unless the project engineer satisfactorily demonstrates the conditions can be mitigated. The application materials fail to demonstrate the land is capable of the volume and type of development proposed. The project includes more than 80' of cut and 70' of fill in certain locations. The geotechnical analysis only studied soil conditions to a depth of 18'. This is inadequate given the depth and volume of earthwork proposed. This is reflected in the August 21, 2019 comments from Public Works that included a list of additional information/studies to confirm the land could support the project.

The project will create a hazardous situation from a fire and emergency services perspective. The property includes a single point of access that exceeds the maximum length allowed by Fire. The access is proposed through an adjacent parcel, that was designated unbuildable by a previous conditional use permit and subdivision. Safety concerns are exacerbated by the proposal to install a divided roadway throughout much of the project. This effectively creates a one-way circulation pattern that would be especially problematic in emergency situations.

Policies for the Foothills Planning Area focus on controlled development that protects the natural environment and minimizes impacts on other properties. The design does not respond to the natural topography of the site. The conventional design will adversely affect surrounding properties. The visual impact of moving more than one million cubic yards of earth to accommodate only 30 single family dwellings is excessive. The application fails to prove there will not be impacts associated with settling, erosion, drainage, and fire.



APPEAL

The applicant included nine grounds in their appeal of the Commission's decision. Several of the items are closely related. As a result, the responses below have been grouped into five categories (technical evaluation, applicability of the Comprehensive Plan, fire and emergency service standards, site access, and the adopted reason statement).

TECHNICAL EVALUATION

- 1. The site is capable of the volume and type of development proposed, and the decision's conclusion to the contrary is arbitrary and not supported by substantial evidence.**
- 2. The decision's conclusion that the preliminary Geotech report was inadequate is arbitrary and capricious.**
- 3. The Commission arbitrarily, and without supporting evidence, concluded the project does not comply with applicable technical requirements.**

Response: The appellant contends evidence in the record demonstrates the site is capable of the volume and type of development proposed. They specifically reference the preliminary geotechnical report provided by the applicant, and the overall evaluation of the proposal by Boise City Public Works. The appellant suggests that because Public Works did not object from a technical perspective, the project should have been approved. [Public Works provided a detailed evaluation of the project in an official memo dated August 20, 2019.](#) The memo concludes with the following statement:

"However, the grading proposed on per-lot basis dramatically exceeds that of comparable hillside developments as detailed in the Preliminary Grading Plan review and Appendix A. Additionally, Public Works staff cannot conclude the proposed development does not create a potential hazard of increased risk of fire due to the applicant not satisfying the Fire Department's access requirements for the development." Therefore, Public Works staff cannot recommend approval or conclude that the proposed development is in general compliance with the technical requirements of the Hillside and Foothills Area Development Ordinance."

The appellant relies heavily on Public Works evaluation of the proposal. While certainly experts in their field, they are not the decision makers for Category II Hillside Permits. That discretionary authority lies exclusively with the Planning and Zoning Commission, who, after a careful evaluation of the record, and listening to substantial testimony, concluded the project failed to demonstrate compliance with the technical requirements.

The site includes slopes exceeding 25% slope, and the applicant's own geotechnical analysis noted the presence of expansive (clay) soils. *BCC 11-07-08.4* indicates these areas should not be subjected to development unless the project engineer satisfactorily demonstrates the conditions can be mitigated.



Public Works did include a series of conditions to apply should the project be approved. This extensive list requires significantly more testing, including drilling and groundwater monitoring. This was based in part on the fact that preliminary exploration included test pits to a depth of only 18 feet where portions of the site include up to 70 feet of cut and nearly 100 feet of fill.

The appellant notes that they agree with Public Works requirements for additional testing, and that it is common practice to approach projects this way. They are correct, the Hillside Ordinance is structured to allow preliminary and follow-up testing/reports to demonstrate technical compliance. Public Works staff acknowledged this in testimony at the public hearing.

After an extensive series of questions of staff and the applicant team, and after considering roughly three hours of public testimony, the Commission concluded the application materials failed to adequately demonstrate the site is capable of the volume and type of development proposed. *BCC 11-03-03.09.C(2)* is clear, a decision is not arbitrary, capricious, or an abuse of discretion if made on a rational basis, and in consideration of the facts and circumstances presented. The fact that the appellant is of a different opinion does not demonstrate an error in the Commission's decision.

APPLICABILITY OF COMPREHENSIVE PLAN

4. Compliance with the comprehensive plan is not a hillside development permit approval criteria.

Response: The appellant suggests the Commission erroneously relied on the comprehensive plan in denying the permit. The adopted reason statement does reference the plan as follows:

"As further detailed in the attached report, the project does not comply with the approval criteria of BCC 11-03-04.17.B(7) or the technical requirements of the Hillside Ordinance (11-07-08). The purpose of this ordinance is to ensure development is consistent with the Comprehensive Plan and provide protection from hazards due to slope, unstable soils, earth movement and other hazards. The application fails to meet these standards."

The reference to the comprehensive plan in the reason statement was provided for context, and not cited as approval criteria to justify denial of the permit. The plan was also referenced later in the report in evaluating impacts on surrounding properties as follows:

"This project design is counter to Goal FH-CCN4 of Blueprint Boise, that encourages the preservation and enhancement of the natural scenic qualities of the Foothills. The plan encourages clustered projects that allow for the preservation of natural features, open space, and wildlife habitat (Goal SHCC12 & Principles GDP-N.8 and N.10). These general policies are expanded upon in Chapter 4, that provides more specific guidance for each distinct Planning Area."



Policies for the Foothills Planning Area (listed on page 3 of this report) focus on controlled development that is protective of the natural environment and constructed in a way that minimizes impacts on other properties. The project design does not respond to the natural characteristics and topography of the site as encouraged by Blueprint Boise. The result would be a negative impact on surrounding properties."

BCC 11-03-04.17(B)(7) requires the Commission to find *"The proposed development, if it complies with all conditions imposed, will not adversely affect other property in the vicinity."* Adverse impact is not clearly defined. It requires the Commission to evaluate each proposal based on its own unique merits and the facts and evidence presented. The comprehensive plan was used only as a guide in evaluating impacts associated with the project. This does not demonstrate an error on the part of the Commission.

FIRE & EMERGENCY SERVICE STANDARDS

5. The decision's conclusion that the hillside permit will create a hazardous situation from a fire and emergency service perspective is arbitrary and not supported by substantial evidence.
6. The overall project, as designed, complies with the applicable access standards from Boise City Code and the IFC.

Response: The appellant contends the project complies with the applicable fire and emergency access standards and that the project will not create a hazardous situation. The record includes substantial evidence, both in writing, and verbal testimony, demonstrating otherwise. This includes an official [memo from the Boise Fire Department dated August 22, 2019](#) denying the project. In short, Fire denied the project due to the length of three dead-end roadways that originate from a single point of access.

The appellant suggests the determination regarding emergency services was made when the property was annexed in 1982. They are correct, the City acknowledged the ability to serve the property at that time. However, that was simply confirmation that adequate access and a water supply was available to serve the property as it was configured at the time. After annexation the property was subdivided. The appellant believes Fire Department comments for Nibbler Subdivision, recorded in 1992, provide further evidence that emergency access requirements have been met. Agency comments from a nearly 40-year old annexation or almost 30-year old subdivision do not demonstrate compliance with current standards for emergency services. Things have changed dramatically in the community since then, and the current proposal for a 30-lot subdivision is an entirely different scenario than that considered years ago.



The appellant also believes none of the streets within the subdivision are dead-ends. They accurately cite a definition from the development code that indicates a dead-end is only a street that lacks a vehicular turnaround at its terminus. The definition, and more importantly the regulations, regarding dead-end roadways are very different from a fire and emergency service perspective. From a planning perspective, regulations have more to do with general circulation and neighborhood connectivity. Fire and emergency services are obviously focused on the life safety issues that arise with dead-end roads. In the simplest terms, they are concerned with streets that end without an exit. As illustrated below, the project includes three.

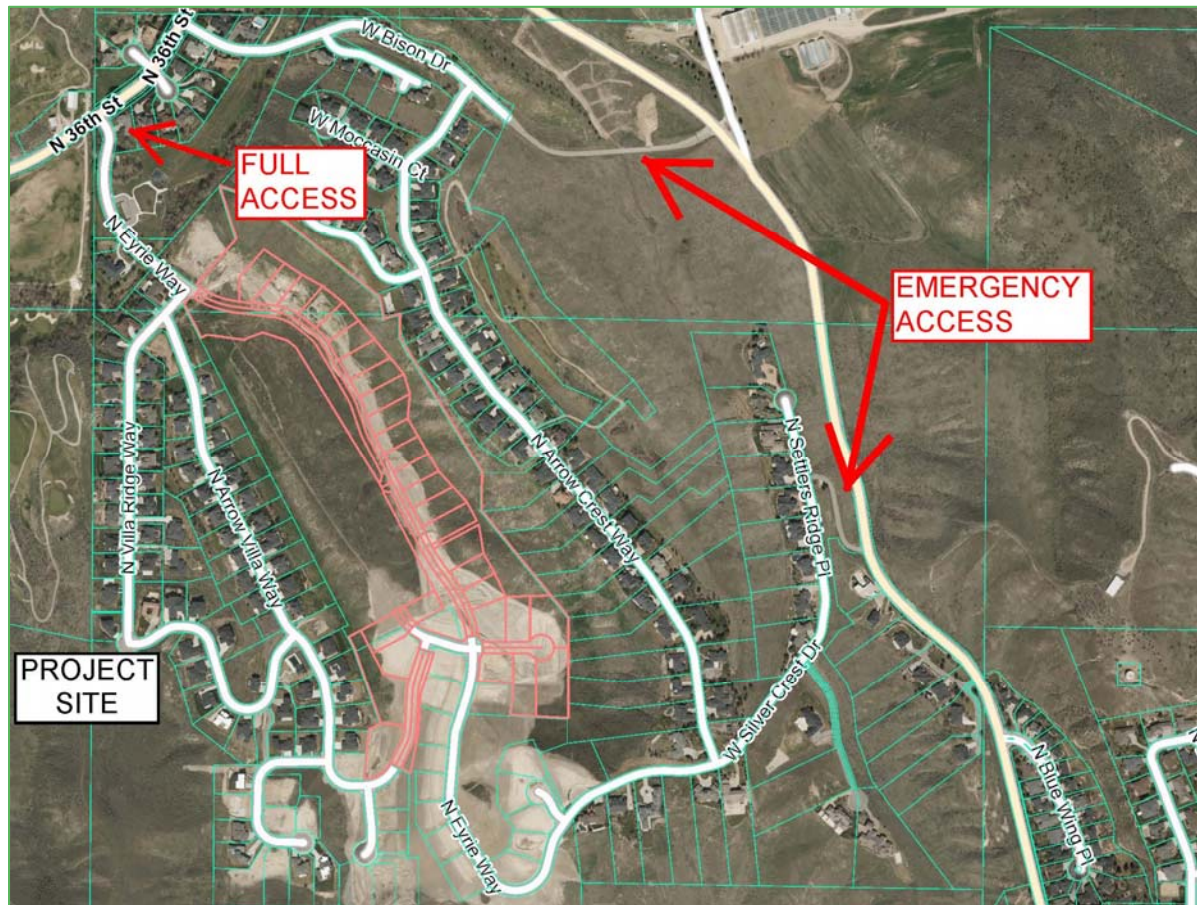


(Dead-End Road Illustration)

The International Fire Code requires special approval for dead-end roads exceeding 750 feet in length. The three roadways in the project are approximately 1,440, 2,090, and 2,230 feet long. The appellant contends that because each home would include sprinklers, the project should have been approved. They cite other foothills projects that were approved with dead-end roads exceeding 750 feet, because they included sprinklers, and suggest the Fire Department denial of this project is a violation of the applicant's equal protection rights under State and Federal law.



The appellant is correct, projects with dead-end streets exceeding 750 feet have been approved. Every project is different and presents its own unique set of circumstances. In addition to the three dead-end roads, as illustrated below, the proposed subdivision, and surrounding area, are served by a single point of access on 36th Street and two emergency access roads more than a mile away.



(Emergency Access)

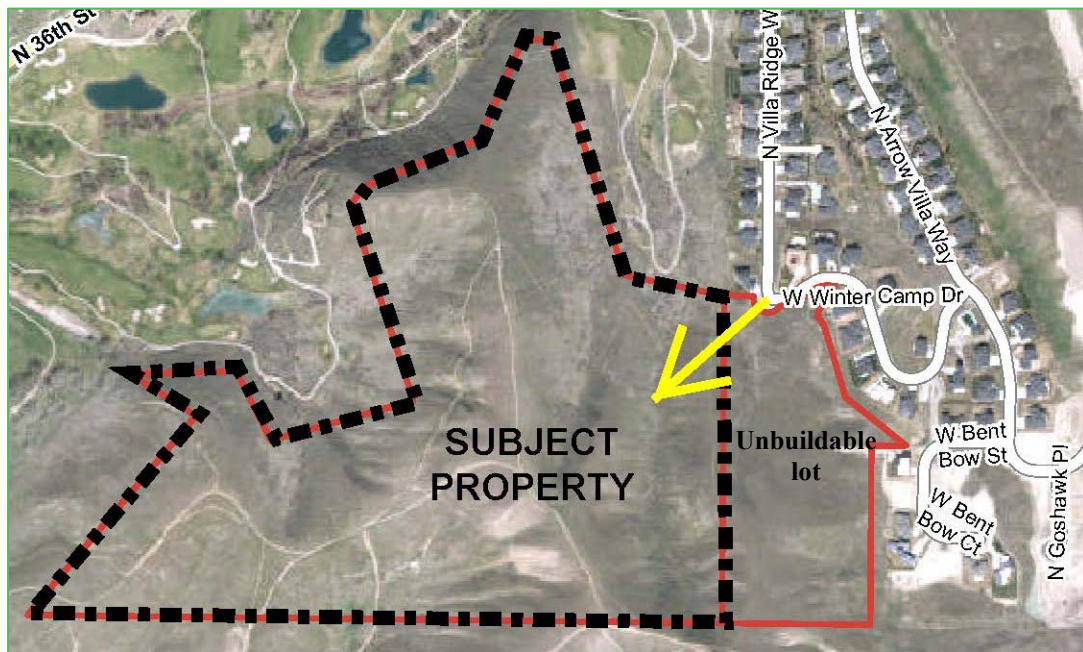
The combination of dead-end roads and limited access to the site resulted in the Fire Department's recommendation of denial. The record demonstrates the Commission carefully considered both verbal and written testimony regarding life safety concerns with the project. Based on the facts and evidence presented, including testimony from the Boise Fire Department, they determined the project would create a hazardous situation. This ground does not demonstrate an error in the Commission's decision.



SITE ACCESS

7. Denial of the proposed access, through an adjacent property, is an unconstitutional taking.

Response: The appellant contends the Planning and Zoning Commission's decision, as it relates to access, amounts to a taking of the owner's property rights. They believe the Commission exceeded their statutory authority by denying access to the property. As illustrated below, the property does not abut a public street. The applicant is proposing to extend Winter Camp Drive, through an adjacent property, to serve the project.



(Site Access)

Development, including any road work, is prohibited on the adjacent parcel. It was included in a larger planned unit development, originally approved in 2008 (CUP08-0001). That approval identified the parcel as "unbuildable". Changes to the phasing and layout of the project were approved in 2013. That approval included Condition 2b, that reads:

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.

The restriction on development was also reflected in Note 10 on the Plat for Eyrie Canyon Subdivision No. 5. It reads:

Under the terms of CUP08-00011, Lot 19 shall be unbuildable.



The appellant provides several arguments regarding access. First, they believe the “unbuildable” designation does not apply because no building is proposed on that lot. They also quote the definition of “buildable parcel” from the development code. This definition does not apply, as the condition of approval in effect clearly indicates road work is also prohibited.

The appellant argues the 2013 condition is illegal. They contend it deprived the owner of the subject property of access to an existing public street without compensation. This is not the case. The property did not abut a public street in 2013, and still doesn’t.

The appellant also claims the conditions of approval for the unbuildable lot only applied to the developer at the time. A narrow reading of the condition might suggest that. However, like virtually any condition, this restriction runs with the land, not an individual. This is reinforced by the fact that the condition was also reflected on the recorded subdivision plat.

Finally, the appellant questions the City’s authority to deny access to a public street. The City did not deny access to the subject property. As previously stated the property does not abut a public street.

This ground does not demonstrate an error in the Commission’s decision. They did not deny access to the property and provided the applicant with specific direction on how it might be obtained. That same guidance was included in the Planning Team’s original project report. As it relates to the legality of the conditions imposed on the adjacent project years ago, the applicant had opportunities to remedy their concerns. They did not appeal the 2013 conditional use permit, nor did they request reconsideration. Similarly, they could have objected when the parcel was designated unbuildable on the subdivision plat. They signed, and recorded that plat, and have since constructed homes based on the approval.

REASON STATEMENT

8. The Commission arbitrarily and without supporting evidence concluded the project does not comply with the hillside development approval criteria.

Response: The appellant suggests the Commission was arbitrary in their decision. The record demonstrates otherwise. The Commission was provided with volumes of written evidence and heard significant testimony from City staff, the general public, and the applicant team themselves, before making a decision.

9. The decision is in error because it violates Idaho Code §§ 67-6519(4).

Response: The appellant correctly cites a requirement that the denial of any permit be accompanied by a statement that includes what actions an applicant could take to obtain approval. This statement was included in the September 16, 2019 report that was adopted as part of the Commission’s decision. It was also discussed by staff and the Commission at the hearing. However, it was inadvertently omitted from the final written decision issued to the applicant.



CONCLUSION AND RECOMMENDATION

The Commission's unanimous decision only occurred after a careful review of the written facts and evidence presented by staff, applicant, and neighborhood residents, as well as consideration of considerable testimony. Except for item #9, the applicant has not identified an error in the decision. The Planning Team recommends Council **deny** the appeal. To remedy the clerical error, the final written decision should include the statement that was inadvertently omitted from the September 16, 2019 written decision:

To obtain approval, the applicant could file a new, complete application package that includes a hillside development permit, preliminary plat, and a conditional use permit for a planned unit development. The conditional use permit should include a request to modify the adjacent project to allow access through the "unbuildable" lot. Finally, an application to vacate the plat note designating Lot 19, Block 1 of Eyrie Canyon No. 5 as "unbuildable" should be provided.

Any revised submittal should cluster development on a smaller portion of the site to reduce disturbance and minimize grading. This could require a reduction in lot sizes and/or density. It could also dictate the need for shared/common driveways rather than a conventional design.

In exchange for an allowance in reduced lot sizes, any planned development should include dedicated open space and a plan for trail access as appropriate. Finally, a provision for access acceptable to the Fire Department, ACHD, and Public Works would need to be provided.

Standards of Review for Appeals

Section 11-03-03.09.C(2) of the Boise Development Code provides Council with the following options when acting on an appeal:

- (a) Because the review bodies are recognized as having expertise in their substantive areas, the Council shall give due consideration to their decisions.
 - i. The Council may find error on the following grounds:
 - ii. 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.
 - iii. The review body's decision exceeds its statutory authority.
 - iv. 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.
 - v. 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.
 - vi. The decision is not supported by substantial evidence.
- (b) If error is found, the review body decision may be reversed or modified.
- (c) If no error is found the appeal shall be denied and the decision upheld.

