

KOOTENAI COUNTY

BOARD OF COMMISSIONERS

Meeting Minutes

Community Development

May 25, 2023

10:00 A.M.

451 N. Government Way, Administration Building, Meeting Room 1A/B

The Kootenai County Board of Commissioners: Chair Duncan, Commissioner Brooks, and Commissioner Mattare met to discuss the following agenda items.

Staff present were Director David Callahan, Planning Manager Ben Tarbutton, Planner III Vlad Finkel, Planner II Amy Hilland, Civil Deputy Prosecuting Attorney Pat Braden, Deputy Clerk Reba Grytness and Deputy Clerk Jennifer Conner.

- A. **Call to Order/Opening Remarks** – Chair Duncan called the meeting to order at 10:07 a.m. Chair Duncan stated that she will have to leave the meeting at 10:30 a.m. as she had a meeting conflict.
- B. **Changes to the Agenda** – Director Callahan asked that the Public Hearing of APP22-0003 be heard first.
- C. **Poll for Conflicts of Interest** – There were no conflicts of interest.
- D. **Deliberations** –
 - 1. **MSF22-0004, The Club at Rock Creek 4th Addition** – Planner III Vlad Finkel started with a PowerPoint presentation to confirm that the conditions of approval set forth in the preliminary decision have been satisfactorily met by the applicant based on the comments from the agencies with jurisdiction. There have been a number of decisions that predate the current request. The original development started out as Black Rock North PUD, and then it was converted to The Club at Rock Creek, approved back in 2005. The current owners are asking to amend the original PUD which was approved in 2016 as well as a preliminary major subdivision approval concurrently with that PUD amendment. The subdivision MSP16-0004 was approved in August of 2007. The plan comprises 935 acres with a total of 417 units. For this phase, the applicant is seeking the approval of 40 individual residential lots as well as one multi-family lot which will consist of five buildings and five units in each building. As a result of this final plan approval, there will be a total of 65 units platted on 41 lots. Additionally they are requesting to plot 11 tracts, with roads, utilities as well as open space tracts which

was all completed as part of the PUD approval in the 2016 amended order of decision. The applicant is asking for a lesser density within this area of the PUD which was determined to have a lesser impact and use it elsewhere within the PUD as a distribution of density. This application has been on the books for quite some time as the facilities master plan has not been updated to be in line with State standards. The applicant is working with DEQ and Black Rock Utilities (BRU) to help them address the update of the Master Plan. The compromise that has been made and reviewed by Community Development, County legal and DEQ is to allow for a conditional lifting of sanitary restrictions to record the plat; however, prior to seeking any building permits, the applicant will have to demonstrate that the Facilities Master Plan has been accepted and approved by DEQ.

Commissioner Mattare asked the question, if by allowing this, could the County be backed into a corner if the Facilities Master Plan has issues? Civil Deputy Prosecuting Attorney Pat Braden responded that the applicant has a very strong incentive to do right by DEQ in terms of making sure that master plan is updated. They stand to lose a lot of money if they don't. He is confident that it will get done or the County can hold out on issuing permits. Commissioner Mattare asked if this is a capacity issue with the facilities or a document that has to be updated. Mr. Finkel stated that it is the document that has to be congruent with the capacity that BRU has. The document the State agency has to approve has to accurately demonstrate how it is physically being done at the facility. Mr. Braden verified with Mr. Finkel that the BRU already has the capacity to provide water and sewage treatment service to this facility and it's just that the document has to be updated to reflect that. Mr. Finkel provided the Will Serve letter from Black Rock Utilities to verify this. Director Callahan commented to Commissioner Mattare's original question, that there is little chance that you could approve something that will be problematic. Pat Braden agreed.

Commissioner Mattare moved that MSF22-0004, The Club and Rock Creek 4th Addition, be approved. Commissioner Brooks seconded the motion.

Commissioner Brooks	Aye
Commissioner Mattare	Aye
Chair Duncan	Absent

2. **MSP22-0004 Lakestone Estates Continuation of Deliberations** – Director Callahan stated that Lakes Highway District is still of the opinion that they will not allow a gate as part of the approved subdivision. There are four possible outcomes; you can approve without the gate, you can state reasons why and deny, you could approve with the gate or you could consider opening another public hearing to hear new testimony. There are some options being discussed that weren't mentioned in the original public hearing. He suggests the Board speaks with legal counsel in an Executive Session because three of the four options mentioned could end up in a lawsuit.

Commissioner Brooks moved that the Board call an Executive Session with legal counsel at a time in the future to discuss this when Chair Duncan can be present. Commissioner Mattare seconded the motion with clarification that all the options can be discussed at the meeting.

Commissioner Brooks	Aye
Commissioner Mattare	Aye
Chair Duncan	Absent

E. Public Hearing – (Items 1 and 2 heard after the Public Hearing)

1. **APP22-0003, Appeal of MIN21-0043** – Director Callahan described this as an appeal of his approval of a minor subdivision that was based on advice from legal counsel. Our position is that the existing covenants allows this to go forth while the opposing side sees it differently. This is more of a legal issue than a planning one. Planner II Amy Hilland provided a PowerPoint presentation of the request for appeal of the administrative decision to approve Valley of Life minor subdivision. The applicant is Lyubov Kulchitskiy and the appellant is Mark Saul. Ms. Hilland described the order of presentation for this appeal. This is a request for a minor subdivision located north of the City of Post Falls located in the rural zone where the minimum lot size is 5 acres where each would have individual driveways, water hookup, septic and drain fields. On August 9, 2022, a notice of appeal was received by Mark Saul on the basis the parcel is subject to CCR's that restrict further subdivision. The Hearing Examiner recommended approval of the request for appeal and that there be a reversal of the Director's decision. There were 7 public comments submitted, three in support of the appellant and two opposed.

Appellant's Presentation – Appellant Representative, Attorney Casey Clifton, stated that this is a case of a disagreement over the term "Lot." The burden of proof is on the appellant to establish evidence that the Department's decision of approving this minor subdivision was erroneous. Mr. Clifton believes that Mark Saul has provided this evidence by bringing forth the CCR's with the prohibition on the further subdivision of any lot and agrees with the Hearing Examiner's recommendation. Clifton submitted an email from Planner Amy Hilland in which Civil Deputy Prosecuting Attorney, Pat Braden, concluded that the CCR's do apply to the subject property and the subdivision restriction and states if the applicant wants to continue forward as proposed they would need to remove the property from the CCR's. It also states the County's own policy that they don't approve subdivisions in direct conflict with CCR's to try and avoid civil disputes later. The County and Appellant disagree on the scope of the word "Lots" and whether it's ambiguous. The County's staff report states that ambiguity exists in how the CCR's defines the term "Lot" and sites a rule from a previous case, Pine Haven, in which provisions of restrictive covenants should go in favor of the free use of property and ones that aren't clearly expressed are not to be extended. In this case Mr. Clifton states that Staff concluded that restrictions on further subdivisions

contained in the CCR's only apply to those parcels which it was originally attached to. Mr. Clifton said the County did not take into account all the rules from the Pine Haven case and should have viewed the whole agreement and not just pull a single provision out. He said Kootenai County Code, 8.4.1107, requires the primary goal in any deed interpretation is the real intention of the parties that filed it. Mr. Clifton feels the County's narrow interpretation of "Lot" is inconsistent with the actual use of the word and CCR's when you view the agreement as a whole. Records of survey were displayed to show Mrs. Carlson's intent.

10:30 a.m. Chair Duncan stated she had to leave and asked that if she watches this later will she still be able to vote. Civil Deputy Prosecuting Attorney, Pat Braden, stated yes she would.

Attorney Casey Clifton then continued with reviewing the deeds and conveyances demonstrating the properties that are subjected to the CCR's. He states the property was purchased with notice of the CCR's with the inability to separate. He is asking that the Board apply the same standards from the previous appeal to this appeal. He states that Mark Saul has proven more likely than not that the approval of the minor subdivision is erroneous. As a result the Board should adopt the Hearing Examiner's findings and approve the appeal. If they don't approve the appeal he asks that the Board remand this back to the Director for further proceedings and choose to subject their remand to a determination of the applicability of the CCR's either by requiring the applicant to seek a court order demonstrating they don't apply or to hold a vote via the variance method that's included in the CCR's.

County's Presentation – Representative for Kootenai County, Civil Deputy Prosecuting Attorney Pat Braden started the presentation with the definition of "Lot" in the CCR's. The Appellant argues there is an annexation clause that uses the term "Lot" in a manner inconsistent with the definition of "Lot" elsewhere in the CCR's. That by itself is the very definition of ambiguity. When you talk about the intent of Mrs. Carlson, the Appellant made arguments of what that intent was, but the actual document was to apply the CCR's to another subdivision, Sundance Farms, which only received preliminary plat approval and was never given final approval by the Commissioners, and those parcels remain un-platted today. A portion of that original plat did receive final approval as Finneman Farms. Was the real intent of Mrs. Carlson to subject neighboring un-platted parcels to the CCR's as she sold them or was she intending to apply it to another subdivision that never received final plat approval causing the CCR's to not apply? He believes the CCR's don't apply because they were meant for another subdivision that never happened. That is in addition to the fact that the definition of "Lot" itself specifically refers to Finneman Farms. The ambiguity is whether the definition only applies to Finneman Farms or does it apply to the annexed properties. There is contradictory language. One says Finneman Farms only while the other says the CCR's can apply to annexed properties. The interpretation of the rule is that they should be in favor of the free use of property where documents restrict property rights and are

ambiguous or contradictory as in the case of Pine Haven referenced by the Hearing Examiner. The conclusion is that only the parcels within Finneman Farms would be subject to the CCR's. Mr. Braden agreed with the Appellant that these types of situations should be resolved in court. If the Board decides to reverse the Director's decision, he agrees that it should be remanded to Staff to allow the court process to play out. Because of the ambiguity or contradiction contained in these CCR's and the rule from Pine Haven, it should be construed in favor of the free use of that property as the only argument is with the CCR's and not the applicant's request for a minor subdivision. Mr. Braden recommends the Board affirms the decision on the Director.

Applicant Representative, Attorney Scott Poorman, described why the applicant is wanting to split the property into two five acre parcels. They are a multi-generational family living in one home. They wish to build a separate residence and keep the family together on the property but on two parcels. If this were to be approved it will have zero impact on the surrounding neighborhood and property owners. We are here on a legal question not a land use question. The real question is if the covenants actually apply to the Applicant. He believes they do not. There are no declarations of annexation adding these covenants to any other parcel. Mr. Poorman says these questions should be answered by a court if it matters enough to Mr. Saul to have a court answer that question. The Board can find out by upholding the Director's decision and allow the subdivision to be approved. The second option is the Applicant can take off the covenants because it has not been annexed into Finneman Farms. The Board does not have to decide if that is the right answer or not. What they have to decide is a land use question and this subdivision is a no brainer and should be approved. If it goes to court it isn't a problem to the Board. It does not impact anybody's property values or enjoyment of their land as this area is surrounded by five acre parcels. Ethel Carlson wrote her own covenants and she knew what they said but she didn't follow that process. If she had we wouldn't be here. Either way these covenants don't apply and if they did then they can be removed by the Applicant all by themselves. The Board can make that a condition of approval.

- F. **Public Comment** – There were no public comments regarding APP22-0003.
- G. **Appellant's Rebuttal** – Attorney Casey Clifton spoke of the judicial review mentioned. He feels it is the Applicant's burden to show that the CCR's do not apply. It should not be an action of the County to force the Appellant, who is trying to uphold a property right, to sue the applicant for this process to occur. If this subdivision is approved we are setting a precedence that could have an impact. If everyone else with ten lots could get approved for a subdivision it would affect the private road and the structure of the neighborhood. Mr. Clifton described the definition of declaration of annexation and cited a case, CNG INC., where the rule makes it clear a title of a document is not determined as to its effect. Mr. Clifton described the annexation process and believes there are several declarations of annexation that have occurred and the title doesn't matter. He states that 12 of the 17 parcels subject to these declarations have to

choose to approve an amendment allowing segregation or variance for this particular parcel to occur. It is not a unilateral move that can be made. He would argue that Sundance Farms is just a further description of the property. If you approve the Director's decision you're asking my client to have to go to court to prove that the CCR's exist which should be the burden of the Applicant to show that they can meet the requirements to allow it to occur. He reiterated the Hearing Examiner's opinion that the CCR's should be upheld. He is requesting approval of the appeal.

Commissioner Brooks moved that the public hearing for the appeal be closed. Commissioner Mattare seconded the motion.

Commissioner Brooks	Aye
Commissioner Mattare	Aye
Chair Duncan	Absent

- H. **Deliberations** – Commissioner Mattare moved that deliberations of the appeal, APP22-0003 be moved to a date certain, June 15, 2023 at the 9:00 a.m. Community Development meeting. Commissioner Brooks seconded the motion.

Commissioner Brooks	Aye
Commissioner Mattare	Aye
Chair Duncan	Absent

- I. **Adjournment** – Commissioner Mattare adjourned the meeting at 11:37 a.m.

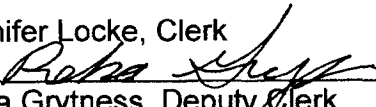
The meeting was re-opened at 11:38 for public comment.

Public Comment –

Tonya Osterson, 1919 N. 9th St. Coeur d'Alene, stated in March she sent the Board a flyer regarding the rights of citizens and the deployment of wireless infrastructure. Mr. Osterson is asking that the Board look at the ordinance that the City of Dalton Gardens is using and implement it in Kootenai County.

Rhonda Sand, 14325 South HWY 3, Rose Lake, Idaho, commended the Board on their position on the Potlatch Hill cell tower and is asking Kootenai County to adopt a current and protective telecommunications policy. She states the County is facing a freight train with the telecommunication industry. She is concerned with human health, soil, plant, water and wildlife.

Adjournment – Commissioner Mattare adjourned the meeting at 11:45 a.m.

Jennifer Locke, Clerk
By: 
Reba Grytness, Deputy Clerk




BOCC. Leslie Duncan, Commissioner - Signed 6/13/2023
Chairman, Leslie Duncan