



KOOTENAI COUNTY

BOARD OF COMMISSIONERS

MINUTES

COMMUNITY DEVELOPMENT PUBLIC HEARING FEBRUARY 9, 2023 6:00 P.M.

The Kootenai County Board of Commissioners, Chairman Leslie Duncan, Commissioner Bruce Mattare and Commissioner Bill Brooks, met to discuss the following agenda items.

Also present were Community Development Director David Callahan, Civil Deputy Prosecuting Attorney Pat Braden, Planning Manager Ben Tarbutton, Planner II Amy Hilland, and Administrative Manager Reba Grytness.

- A. **CALL TO ORDER** – Chairman Duncan called the meeting to order at 6:00 p.m.
- B. **CHANGES TO THE AGENDA** (Action) – None
- C. **POLL FOR CONFLICTS OF INTEREST** (Action) – None
- D. **PUBLIC HEARING** (Action) – **ZON21-0002, Kellner Zone Change, Request for Reconsideration**

1. Introduction

Planner II Amy Hilland started with a brief introduction explaining the procedures for a reconsideration hearing and the order in which the hearing will be presented. The County's Case in Chief portion will be presented by Amy Hilland and Civil Deputy Prosecuting Attorney, Pat Braden.

2. Appellants' Presentation

Mischelle Fulgham, land use attorney, cites previous reconsideration cases. Kootenai County Code section 8.8.503 provides reconsideration or appeal of Board decisions which stems from Idaho Code section 67-6535(2)(b). When there is non-compliance with the standards there is a "do-over" before it goes to District Court. She stated that the Board is not bound by previous decisions but will hear this case fresh and new. Reconsideration in this case is to correct errors before the matter is appealed to District Court. Ms. Fulgham cited the following deficiencies that render the denial invalid:

a. Due Process violations:

Decision was based on a predetermined outcome. Ms. Fulgham described the case of *Eacret vs. Bonner County*, where a Commissioner announced that he was going to approve the variance regardless of what the evidence said. The District Court and the Supreme Court agreed that a hearing body can't predetermine the outcome and reversed the decision. In this case a County Commissioner stated, "I'm not going to approve anything along Highway 97. I don't care if there is future development or not, I won't approve it." This is not an unbiased decision, and is therefore grounds for reversal.

Failure to consider the evidence. Pursuant to Idaho Code, in a previous hearing a Commissioner stated on the record that part of the reason for the vote to deny is because "I haven't heard anything different than I heard the first time." There was new evidence presented by Sandy Young regarding the Agricultural use and showed it was improper in the first place. Assessor's Records were submitted stating this parcel should have never been zoned agricultural.

Unnoticed Site Visits. County Commissioners are obligated to avoid personal or independent site visits. Cited the case of *Noble vs. Kootenai County*, where there was an improper site visit by the Commissioners without allowing the applicant or the opposition to be present. The Supreme Court stated that it needs to be a publicly noticed site visit depicting what the Commissioners are looking at, what they are observing, and what they are relying upon, with all parties present. In this case, a Commissioner in a prior proceeding specifically, as a basis to deny, referenced their personal knowledge of the site, saying that they were familiar with the property and the road and based upon their personal, private knowledge voted for a denial.

Ex-parte Communications. Commissioner Fillios committed a due process violation when on March 24, 2022, he sent an email to a representative for the opposition, Bev Twillman, on his official County email attaching a petition suggesting that she and her group of neighbors along Highway 97 do a similar petition to the one he had attached. Ms. Fulgham stated that this is improper ex parte conduct. This email was admitted into the record as Exhibit B-1001. Pursuant to Idaho Code section 67-5279, subsection 3, reconsideration and reversal is warranted when you have any of these violations.

- b. Arbitrary & Capricious, Unreasonable Standards: In this case, the deciding vote, as there were only two Commissioners present, was when the Commissioner stated he personally found the highway atrocious and dangerous, and he was voting against this application. Ms. Fulgham stated these are capricious, vague and unknown standards.

Sandy Young, representing Verdis, the land use planners for Pines Partners, touched on the fact that this is just a zone change and can't take future applications into consideration. This is approximately 50 acres zoned agricultural, with rural all around it. This is simply a zone change from Ag to Rural with no future plans in the works. This will consist of three five acre parcels and a 35 acre parcel. Individual septic, drain fields and well for water with no public services. Complies with the Country Designation in the comp plan. Both the Hearing Examiner and Staff reports suggest approval. The owners are willing to construct wildlife corridors.

Commissioner Mattare asked if there was going to be a golf course on the 35 acre parcel. Sandy Young responded that it was originally proposed but is not in the plans at this time and in the future it would have to go through the Conditional Use Permit process. At this time the 35 acres are to be kept as open space to enhance the three homes that will be there. Commissioner Mattare asked what is stopping them from changing their plans as soon as the zone change was approved. Ms. Young stated that a zone change does open the door for a larger request for a subdivision but a conditional zoning development agreement could be an option to limit that from happening.

Mr. Kellner, via Zoom, stated he felt the three households was an appropriate use of the land and would love to have a little golf course on the other part of the parcel, but it is a long ways away from a reality. The neighbors are in full support of this zone change.

3. County Presentation

Planner II Amy Hilland recounted that the original decision for denial was made on a non-consensus. She reviewed the history of the public and agency comments and recommendations, and the major discussion points made by the Board during deliberations. There was a second hearing because the Board intended to go against the Hearing Examiner's recommendation for approval. For the second hearing, Commissioner Fillios was not present, so it resulted a non-consensus denial on a 1-1 vote.

Civil Deputy Prosecuting Attorney Pat Braden spoke of the requirements for site visits. He is not sure that Commissioner Brooks said anything about visiting the actual site but had talked about driving on Highway 97. He then stated that the Idaho Supreme Court has determined that a prehearing statement, even if made in public, taking a position on a policy issue related to an application that comes forward before the governing board will not be fatal to the validity of the zoning determination as long as the statement does not preclude the finding that the decision maker maintained an open mind and continued to listen to all the evidence presented before making the final decision. This is from *Eacret vs. Bonner County*, 139 Idaho 780 at pages 785 to 86, and 86 Pacific Third 494 at pages 499 and 500. The question is one of bias or prejudice and the reason for reading this passage verbatim from the opinion is in part to caution and admonish each of the Commissioners to make sure they have an open mind and are considering the evidence in the record and the 11 criteria for determining whether to approve or deny the zone change. Ms. Young brought up the idea of a Conditional Zoning Development Agreement

and this might help in the Board's decision. It could be remanded back to the Hearing Examiner and Staff for consideration of the zone change with an agreement which would limit development on the property.

Commissioner Mattare wanted confirmation that they could require as a condition of rezoning that an owner or developer make a written commitment concerning the use or development of the subject parcels. Pat Braden confirmed that this is what the agreement would do.

4. Public Comment: 2 in Favor, 7 opposed.

In Favor of Reconsideration:

Mischelle Fulgham: Attorney Representative

Sandy Young: Representative

Opposed to Reconsideration:

Bev Twillman: 15143 S. Asbury Rd., Harrison, Idaho 83833. Opposed due to road conditions and traffic. Submitted into the record Exhibit B1002. Feels site visits are very important.

Barbara Darell: 7153 S. Eddyville Rd., Harrison, Idaho 83833. Opposed. The Gozzers used to have cattle out on the land. The cows ate all her corn. Two groups live out there, lowlanders have the summer homes and up-landers that live on rural land with one house and acreage. There is no reason to for the Kellners to change what they have.

Deborah Stone: 5321 S. Freedom Lane, Harrison, Idaho 83833. Opposed. Bill Brooks did not make arbitrary and capricious comments regarding the road; it's based on facts. He didn't perform an unnoticed site visit because he didn't visit the site, he was on Highway 97 and the site is on Gozzer Road. Original request by the applicant was for 3 rural lots and a golf course. This would not meet the Country Designation or County land use codes. Roads and water are a concern.

Carlene Cada: 20621 S. Highway 97, Harrison, Idaho 83833. Opposed. Read a statement from a friend, Jo Moncrief, asking why the site hasn't been visited? Should not allow this land to be developed as it does not contribute to the wellbeing of residents, neighborhood and shared community. Concerns for wildlife, water and draining of natural resources and lack of infrastructure.

Thomas Little: 1427 Gotham Bay Rd., Harrison, Idaho 83833. Opposed. Concerned about the road. He and his family have almost been killed due to people passing on the road.

Myra Rega: 5595 E Catamaran Dr., Harrison, Idaho 83833. Opposed.

Norb Twillman: 15143 S. Asbury Rd., Harrison, Idaho 83833. Opposed.

All the names of those at the meeting were read into the record.

5. Appellants' Rebuttal

Mischelle Fulgham stated this is just a zone change that alters the color of the property on the map. It's not creating traffic or development. This application meets all the zoning requirements and she is on board with the use of a conditional zoning development agreement. It is prejudicial and unfair to deny the landowner the zone change that he is legally entitled to because of other factors outside his control. The neighbor is in favor of this zone change.

Commissioner Mattare asked if the land owner would consider the residential property split be at 16 acres per residence and not have the open space. Ms. Fulgham said that could be written into the contract and then there would be a negotiation to see what terms are agreed to. Sandy Young mentioned that they could just state it's a minor subdivision and not mention the acreage because it can't be any more than 4 parcels. The owner might want to change the acreage to be eligible for a forestry exemption. It's to the benefit of the county to keep the zone change broad and not put to many stipulations on it.

Chairman Duncan asked that if this is approved does it still have to go through the Hearing Examiner again for the Conditional Zoning Agreement. Pat Braden said it would have to go back to the Hearing Examiner for consideration of the agreement that's been negotiated and then back to the Board for to see if it should be approved.

6. Motion to Close Public Testimony

Commissioner Mattare moved that public testimony be ended and move into deliberations. Bill Brooks seconded the motion.

Commissioner Brooks	Aye
Commissioner Mattare	Aye
Chair Duncan	Aye

E. DELIBERATIONS (Action)

Bill Brooks said that he had heard nothing to change his mind from his former decision.

Commissioner Mattare said that he was in favor of an agreement for a maximum of three residences. It is the time to make this a permanent situation and not risk the property being sold and a different board changing it and allowing for more development.

Chairman Duncan reiterated that it is just a request for a zone change. They could have asked for restricted residential but they didn't. They could have applied for a major subdivision that would have had a maximum of ten residences. Any of these would trigger a conditional use permit and would come back before the Board for a ruling. The criteria

for this zone change has been met and that is what we are voting on tonight. She does not believe there is a need for a Conditional Zoning Development Agreement.

Commissioner Mattare said that the applicant is here ready to discuss three residences in exchange for the zone change and he thinks we should entertain that. He suggest to remand it back to the Hearing Examiner.

Chairman Duncan asked if they can still have their 3 five acre parcels and then leave the 35 acres with the main house? How detailed do you want this agreement to be?

Commissioner Mattare responded that in a perfect world, the owner would be open to the 16 and two-third acre lot sizes because the golf course is nothing more than a dream at this point and there probably isn't enough funds or water to develop it anyway.

Chairman Duncan reminded him that this is not the issue before them tonight.

Commissioner Mattare said he would like to send it before the Hearing Examiner with options to see what the owner is willing to do. Pat Braden states that negotiation would happened after the decision was made tonight and suggests that the acreage splits be left open for the negotiations.

Bill Brooks agreed to leave it at three residence on the 50 acres and let it get figured out in negotiations.

Commissioner Mattare moved that the zone change be remanded back to the Hearing Examiner to come up with a solution for three residences on 50 acres. Bill Brooks seconded the motion.

Commissioner Brooks	Aye
Commissioner Mattare	Aye
Chairman Duncan	Nay

F. ADJOURNMENT – Chairman Duncan adjourned the meeting at 7:27 p.m.

Jennifer Locke, Clerk

By: 
Reba Grytness, Deputy Clerk

BOCC: _____
Leslie Duncan, Chairman



Bruce E. Mattare, Commissioner - Signed 3/10/2023

