Motion to Reconsider – Minor Land Division: MLD0059-22 – Wood View Acres

September 12, 2022

Bonner County Board of Commissioners
1500 HWY 2, Suite 308
Sandpoint, ID 83864

Subject: Motion to Reconsider
Bonner County Commissioner Appeal Hearing August 29, 2022
Action Item: Appeal File MLD0059-22 – Wood View Acres
Applicant: Jacob Gabell, Representative: Dan Provolt

In accordance with the Bonner County Code 12-623: Reconsideration, we are respectfully requesting the Bonner County Board of Commissioners reconsider the decision on August 29, 2022, that upheld the previous decision on August 10, 2022 to approve MLD0059-22 on the basis below.

This Motion to Reconsider includes all public records as defined I.C. §74-101(13) associated with file MLD0059-22, all documents received from past and future Public Records Requests in regards to this MLD0059-22, all documents associated with other MLDs or the MLD process recorded in this MTR, all Bonner County Administrative Appeals or other hearings referred to in this MTR, and all information stated within or pertaining to the BOCC public hearing on August 10, 2022, and the BOCC public hearing on August 29, 2022. Supporting documents for each section of this MTR are included and are titled accordingly.

1. MISINTERPRETATION OF BONNER COUNTY REVISED CODE (BCRC)

The decision to approve this file was an erroneous application of the law to the facts. In MLD0059-22, the applicant is requesting to divide one (1) ≈6.27-acre parcel into four (4) lots, one (1) 1.06-acre lot, two (2) 1.0-acre lots, and one (1) 3.49-acre lots. The proposed lots are in a rural area of unincorporated Bonner County, zoned Suburban (S), and designated as the Suburban Growth Area in the Comprehensive Land Use Plan. The property is not served by any urban services. The density requirement for this Minor Land Division is dependent upon having urban water.

A. Definition of Urban water

I. Density and Dimensional Standards/Definitions/Table - BCRC §12-412, Suburban, Commercial, Industrial, Rural Service Center, Recreation and Alpine Village Zones.

The density allowable in this code is entirely dependent on the availability of urban water and urban sewer. These requirements differentiate these standards from every other density and

dimensional standards in BCRC. To determine that an individual well, shared with three separate lots and households is urban water, is a gross abuse of the rules and intent of this code.

BCRC 12-412 Table 4-2

Standard	Zoning District				
	S	C	I	RSC	REC
Minimum lot size where all urban services are available	10,000 square feet (1), (2)	See standard (3)	See standard (3)	12,000 square feet (1), (2)	12,000 square feet (1), (2)
Urban water only (19)	1 acre (4)	1 acre	1 acre	1 acre	1 acre (4)
Urban sewer only	20,000 square feet (4)	20,000 square feet	20,000 square feet	20,000 square feet	20,000 square feet (4)
Community LSAS and urban water (19), (20)	1 acre (4)	1 acre	1 acre	1 acre	1 acre (4)
Community drainfield and individual well (19), (20)	1 acre (4)	1 acre	1 acre	1 acre	1 acre (4)
Minimum lot size where urban sewer and water services are not available (1)	$2^1/_2$ acres (2), (4), (5)	$2^1/_2$ acres (2), (5)	$2^1/_2$ acres (5)	$2^1/_2$ acres (2), (5)	$2^1/_2$ acres (2), (4), (5)

While county staff found the proposed division of land is consistent with BCRC 12-412, provided conditions of approval are met prior to the final plat being recorded, BCRC §12-412 dictates the minimum lot size in a Suburban Zone is **only** allowed when the parcel meets the conditions of Urban water only, Community LSAS and urban water, or Community drainfield and individual well. The MLD application states that the three 1.0-acre parcels are to be served by individual septic and drainfields on each lot. Therefore, the applicant must satisfy the requirement of Urban water. Urban water is not defined anywhere in BCRC.

At the August 10 hearing, county planner Chad Chambers stated "I do agree that urban water by itself is not defined in the code." (Time stamp 52:26).

According to Section 12-800: General Rules for use of Language: A.6.: Terms not defined within Title 11 of this code or this title [Title 12] shall have the meaning customarily assigned to them as defined in Webster's dictionary ("The Merriam-Webster Collegiate Dictionary", eleventh edition).

Webster's defines **urban: of, relating to, characteristic of, or constituting a city.**

The parcel in question is in unincorporated Bonner County, is not within City limits, does not have city services, and therefore is ineligible for 1-acre minimums.

Instead of following 12-800, Rules for Language, county staff isolated only one portion of §12-821 Urban Services definition, and used "privately maintained water supply and distribution system" to create a new definition for urban water used justify approval of this application.

II. 12-821: DEFINITIONS - U:

URBAN SERVICES: Publicly or privately maintained water supply and distribution systems; sewage collection, treatment and disposal systems (not to include individual septic tanks and drainfield systems or community septic tanks and drainfield systems, unless subject to an approved sewer management agreement); electric power and telephone utilities; **and** hard surfaced roads constructed to the standards set forth in title 2 of this code.

BCRC §12-800 11.a. in Rules of Language states:

> 11. Unless the context clearly suggests the contrary, conjunctions shall be interpreted as follows:
>
> a. "And" indicates that all connected items, conditions, provisions or events apply.

The "and" therefore indicates that all items following the colon after Urban Services are enumerations of conditions that are all connected. A new definition for Urban water cannot be created by isolating it from connected items.

III. BCRC §12-800 A.2.:

> 1. In any case of any difference of meaning or implication between the text of this chapter and any heading, drawing, table, figure or illustration, the more restrictive text shall control.

Given there is no definition for Urban Water, the more restrictive text for BCRC §12-412 Table 4-2 must be used. The more restrictive use, based on BCRC and the facts, is: "Minimum lot size where urban sewer and water service are not available in a Suburban Zone is 2 ½-acres" – BCRC §2-412 Table 4-2

Furthermore, according to the table in §12-412, if the three 1.0-acre properties were proposed to each have an individual well, the 1.0-acre proposed splits would be denied, because the county code mandates lower density 2.5-acre lots where urban services are not available. The code's intent is to limit density and water use in this land designation as described in the Bonner County Comprehensive Plan. **To approve a shared well as urban water means that an applicant is required to potentially provide LESS water to create smaller parcels.**

MLD0059-22 is not consistent with §12-421, nor §12-821, and all decisions based on this code should be voided.

B. Comprehensive Plan Use of Urban Services

While it may not be well defined within BCRC, the term "urban" is defined and used throughout the Land Use Component of the Bonner County Comprehensive Plan.

It is first used on pg. 6, Table 2.1 Land Cover Classification System 1000: Urban & Developed Land. Table 2.1 clearly provides the definition of Urban as "towns and cities."

Prior to 2005 (the last time the Comp Plan was updated) minimum lot size were revised to 1.0-acre parcels in Suburban and other zones. However, during the 2005 update to Section 5.6 Housing of the Plan concluded:

> "During comprehensive plan workshops, the Planning & Zoning Commission reviewed with the Panhandle Health District and the Division of Environmental Quality the constraints that individual systems place on residential homesite development. **The Commission had concluded that a 1-acre minimum is insufficient for adequate separation of individual wells and subsurface sewage disposal systems, and that the property rights of adjoining landowners can be affected by the proliferation of 1-acre parcels with individual wells/septic by limiting the neighbors' well construction or homesite development."**
>
> "**The Planning & Zoning Commission proposed a minimum 2½-acre site area where neither urban-like water nor urban-like sewer services is available, and a 1-acre minimum where either urban water or urban sewer services is available**." [Definition of Urban Services is included and is the same as §12-821]
>
> "Bonner County adopted an interim ordinance in **February of 2005 establishing a 2½-acre minimum standard for parcels not served by both urban water and sewer services.** Under the ordinance, a parcel served by a public or private, community water system, but served by individual septic tank/drainfield systems could be subdivided into lots of 1 acre each, provided they meet the remaining zoning and subdivision laws and are approved by Bonner County. Likewise, a parcel served by a public or private sewer collection, treatment and disposal system but individual wells would be entitled to 1-acre minimums. Service by neither "urban" water or sewer would mean 2½-acre minimums**.** Public or private water systems may include water districts, city water service or private well systems designed and operated to meet the public standards of the State of Idaho."

While BCRC has undergone many amendments that have left the code fragmented, and without clear definitions, this is not the case for the BC Comprehensive Plan. It is clearly the intention of the Comp Plan that "Urban services" mean those provided by a city or town, and that a 2 ½-acre minimum is prescribed where there are not BOTH urban water and sewer services.

C. Suburban Zone/Suburban Growth Area/City of Sandpoint ACI

In the Staff Memo – BOICC (Appeal – 08.29.22), county staff determined Suburban Zoning District is consistent with the goals and policies of the comprehensive plan insofar as the suburban zoning district is a zone "appropriate in areas designated by the comprehensive plan as transition, urban growth area, resort community or suburban growth area in the comprehensive plan where a network of hard surfaced roads provides good access to primary transportation routes or potential public transportation systems" per BCRC §12-324: Suburban District.

Appellant: Staff Memo page 13 fails to include the full portion of BCRC §12-324: Suburban District B that is underlined below, the full portion reads "appropriate in areas designated by the comprehensive plan as transition, urban growth area, resort community or **suburban growth area in the comprehensive plan** where a network of hard surfaced roads provides good access to primary transportation routes or potential public transportation systems. Urban Services may not be available immediately, but are capable of being extended or constructed in the area. (Ord. 501, 11-18-2008)"

When asked how many years it would take for the City of Sandpoint to expand into the Very Rural area with urban services, City of Sandpoint has stated, ***"We couldn't serve the area currently shown for decades, if ever."***

The Sandpoint Area of City Impact includes the Gabell parcel in an area considered "Context Area Very Rural". According to the City of Sandpoint Comprehensive Plan:

> "Sandpoint's rural, non-developed areas are well defined by existing land use arrangement. The majority of such lands are on the west and northwestern fringes of the ACI. On the comprehensive plan map, Very Rural designations have been applied to areas beyond CA-1 [Context Area] definitions with in the City's ACI. Very Rural areas are appropriate for designation as sending areas if a formal "TDR" (Transfer of Development Rights) program is implemented by the City. Very Rural lands represent an important component of the ACI. The rural character of these lands provides many benefits to residents including **undeveloped viewsheds, opportunity for direct recreational access and a clear boundary**, **limiting development** which contributes to our geographic authenticity and sense of place."
>
> "The community's objectives regarding the conservation of open space areas may also be served by the consideration of at least two alternatives that compensate owners of such lands: A Transfer of Development Rights (TDR) program, or a Purchase of Development Rights (PDR) program. These concepts influence the developed form by **relieving development pressures in areas where open spaces are encouraged** and increasing them where more intensity is desired."

It is clear the City of Sandpoint intends for Very Rural areas of the ACI to stay Very Rural. The MLD process of dividing land into less than 5 parcels, removes the opportunity for input by the City. MLD applications are approved administratively without notice to city ACIs, service providers, or the public. If a land division of 5 or more lots were created in the Sandpoint ACI, it would trigger review by the City of Sandpoint's Planning and Zoning. However, because the city does not receive notice, multitudes of MLDs could be approved by the county within the Very Rural areas. By interpreting the applicant's shared well as "Urban water privately maintained water supply and distribution system," it would allow for 1-acre parcels to become commonplace in suburban zones within the ACIs. This would allow for development of low-density sprawl that could create a fiscal nightmare to serve. The interpretation of MLD0059-22 dramatically affects how ACIs may be developed in the county.

Therefore, the MLD0059-22 is inappropriate land use per BCRC §12-324. Nor is it consistent with Minor Land Division BCRC §12-660 D. F.: "The lot size minimum shall be appropriate for the zone in which the division is located."

D. Application Discrepancy

In MLD0059-22, the applicant is requesting to divide one (1) ≈6.27-acre parcel into four (4) lots, one (1) 1.06-acre lot, two (2) 1.0-acre lots, and one (1) 3.49-acre lots.

The divided lots when totaled, equal 6.55 acres. The applicant is gaining approximately .28 acres through this division. This application should be vacated until the applicant can prove that all lots have been surveyed accurately.

E. Subdivision Design Standards/Services and Utilities

I. At the August 10th public hearing, planning staff, presented a slide of BCRC §12-623: Service and Utilities. Staff used BCRC §12-623 as a "gateway" slide. Chambers stated, *"As staff reviews this, and we look at these urban water services, it's important to make the distinction between what is all urban services and what is urban water, and how staff is interpreting that, we look at 12-623, A in particular, A. Where proposed lots are smaller than one acre in area, exclusive of any ingress or egress easements, all "urban services", as defined in section 12-821 of this title, shall be provided. Lots in conservation subdivisions shall be exempt from this requirement, provided all other requirements of this title are met. Then we look at B, this is in particular looking at water only… 2. Lots to be served by a new water system serving from two (2) to nine (9) lots: Documentation by an Idaho licensed professional engineer or professional geologist that the sources proposed for water supply have sufficient production capability to provide drinking water to the lots in the proposed subdivision."* (Time stamp 9:38)

BCRC §12-623 code is under the code for Subdivision Design Standards. Subdivisions are divisions of land into 11 or more parcels. The Subdivision process and applicable codes are not applicable to Minor Land Divisions, which is found under BCRC §12-660. Minor Land Division §12-660 does not reference §12-623, nor are MLDs required to adhere to any Design Standards. Therefore, any use of BCRC §12-623 should be void.

II. Staff used BCRC §12-623 A. to reference BCRC §12-821. Nowhere in BCRC §12-660 Minor Land Division Code does it refer to BCRC §12-821. County staff cherry-picked a non-applicable portion of code to route them to BCRC §12-821. Any use of BCRC §12-623 A. should be void.

Staff presented §12-623 A. on a slide at both the August 10 hearing (time stamp 10:26) and the August 29th Appeal hearing (Time stamp 27:59) in which §12-623 A was outlined in red.

During the appellant's presentation at the August 29 Appeal hearing, she also displayed a slide of §12-623 A. (time stamp 1:40:08) with it outlined in yellow and marked with text stating the section is only applicable to subdivisions and is not applicable to the MLD. Apparently staff agreed it wasn't applicable, because during rebuttal, in reference to the appellant's slide, planner Chambers stated,

"The appellant did highlight §12-623 A 'where proposed lots are smaller than 1-acre', if we go back to the request of the division, none of the properties are less than an acre, so this can't be how staff analyzes the services required on site." (Time stamp 1:40:408)

So not only is BCRC §12-623 A not applicable because it does not apply to MLDs, it is also not applicable because none of the proposed lots are less than 1.0-acres. Any use of §12-623 A. should be void.

III. Staff used BCRC §12-623 B.2: to reference a portion of code referring to "lots served by a new water system serving 2-9 lots."

> Lots to be served by a new water system serving from two (2) to nine (9) lots: Documentation by an Idaho licensed professional engineer or professional geologist that the sources proposed for water supply have sufficient production capability to provide drinking water to the lots in the proposed subdivision.

And BCRC §12-623 B.4:

> Lots to be served by connection to an existing public or private water system: A letter from the owner of the system indicating it has sufficient reserve production capacity to supply water to the lots in the proposed subdivision

Staff even went so far as to add the documentation as described in B.2. and the wording of B.4. in the Conditions of Approval for MLD0059-22. However, as in point II above, BCRC §12-623 B is for Subdivision Designs standards only and is not applicable code. Any use of BCRC §12-623 B should be void. Creating conditions for approval for the shared well based on the Subdivision Design Standards is nonsensical.

Furthermore, 12-623 B. 2. Referencing "2-9 lots" appears to be vestigial code, left from prior to 2016 when code changes were made. Prior to the 2016 code changes, a short plat was a land division up to 10 lots, and a subdivision was 11 or more. At that time, both Short Plats and Subdivisions were subject to design standards. Currently, MLDs are for creations of 2-4 lots, Short Plats, 5- 10, and Subdivisions 11 or more. There is no current land division category in BCRC where the language "lots to be served by a new water system serving from two (2) to nine (9) lots" would even be applicable.

Any use of BCRC §12-623, Subdivision Design Standards, for reference to 12-821 definitions, to referencing the archaic wording of "lots to be served by a new water system serving from two (2) to nine (9) lots," to create Conditions for Approval, or any other application are not justified, and all uses of BCRC §12-623 should be void.

F. Water supply

The MLD applicant must provide where "Water will be supplied by" on the MLD application form. The options provided are limited to: "Existing public or community system; Proposed Community

System – List type & proposed ownership, or; and Individual well." For the three 1-arce lots, the applicant chose Proposed Community System and entered "split well to serve lots, 1, 2, and 3."

The definitions within BCRC do not contain a definition of "Community Water System." However, it is used under Conservation Subdivisions BCRC §12-623: Services and Utilities.

> Prior to final plat, an approved water and fire hydrant system capable of providing one thousand (1,000) gallons per minute for a minimum of two (2) hours where a **community water system** exists or is proposed as part of the development and is capable of delivering the pressurized water supply necessary for delivering fire flows as prescribed by the international fire code, as adopted by the state fire marshal, and such later editions as may be so published and adopted by the state fire marshal, or as amended, modified or superseded, and incorporated herein by reference with a copy on file with the office of the clerk of the board of county commissioners, and hereinafter referred to as IFC.

While this section of code does not apply to MLDs, this and previous examples make clear that community water systems are tied to subdivisions. The BOCC Decision Letter for approval of MLD0059-22 listed no conditions requiring the shared well be "capable of delivering the pressurized water supply necessary for delivering fire flows."

Also appearing in BCRC§12-816 Definitions of Public Utility Facility:

> PUBLIC UTILITY FACILITY: A public, private or community utility facility, including, but not limited to, station houses or station grounds; pumping stations; power substations; dam structures; solid waste transfer stations; fire stations; telephone transmission stations; telegraph stations; sewage disposal, treatment or storage stations and subsurface sewage disposal systems serving ten (10) or more residential dwelling units or designed with a capacity of two thousand five hundred (2,500) gallons or more per day; public **community water systems** designed for fifteen (15) or more connections or regularly serves at least twenty five (25) year round residents; public libraries; railroad transportation lines or spurs; railroad classification lines; or structures used in interstate transmission of electricity, natural gas or fuel.

Again, community water systems are used in conjunction with code intended for urban areas.

Idaho Administrative Procedures Act (IDAPA) does define a community system. Under which, the Idaho Department of Environmental Quality regulates Idaho Rules for Public Drinking Water Systems:

> 15. Community Water System. A public water system which serves at least fifteen (15) service connections used by year-round residents or regularly serves at least twenty-five (25) year-round residents. See also the definition of a Public Drinking Water System in these rules. (3-24-22)

DEQ does not regulate for water quality until there are 15 or more hook ups in a community water system, therefore, anything under 15 should not be considered "urban."

It is clear by the application alone that "Community Water System" was not intended to be interpreted as a shared well. The application requires listing the "proposed ownership" of the community system. Ownership of a "Community Water System" implies the owner is responsible for the public health and safety provided by the water.

The conditions of the MLD approval require: sanitary lift from the Panhandle Health District; documentation from a professional engineer or geologist that the sources "proposed" for water supply have sufficient production capability to provide drinking water (this condition of approval has previously been proved inapplicable); and, that the final plat shall contain a space for the shared well agreement, demonstrating that water serving the three 1-acre lots "will be" provided. There is no requirement that the applicant actually *provide* the water, the applicant only needs to provide documentation it is capable, or that it "will be" provided. The lots can be legally platted and sold without the shared well being installed or producing said water supply. This creates the potential for lots that fall outside of the zoning and comprehensive plan objectives to be legally sold without required services and should not be allowed.

G. Precede

For part "G" Precedent, we left out that we reviewed the MLDs for Suburban Zones only. Since turning in the MTR, we were able to review all MLDs from Jan.1 2017 and still found no applications attempting to use a split well as urban water in a Suburban Zone. We were missing 2-3 files.. We did find several MLD applications in Suburban Zones where applicants were allowed to split below the required 2.5 acres for individual well and individuial septics. We assume they were granted varainces but we plan to look further into how that was allowed.

The applicant, county staff, and the BOCC have all argued that MLD0059-22 does not set precedent. However, all MLD files from January 1, 2020, until September, 9 ,2022, were reviewed and there was not one MLD application in that time frame, which consisted of 393 applications, that applied to use a shared well as a community water system. Allowing a shared well, overseen by a private layperson, as a community water system, makes all reference to the term "urban" and the standards under Density and Dimensions BCRC §12-412 meaningless.

At the August 10 hearing, during the rebuttal, the applicant stated (time stamp 1:02:17),

> *"As far as a well that doesn't count as an urban service, I'll point out that there are many public water systems that are wells, Oden water system, Sagle water system, those are wells, right?"*

Sagle Valley Water District is a Drinking Water Distribution Class 1 (DWD1), Southside Water and Sewer, and Oden Water Association are also classified as DWD1 by the IDEQ, which regulates drinking water.

At the August 29th appeal hearing, Commissioner Connolly stated (time stamp 20:21):

> *"I don't know the details of every water system in Bonner County but there's many, the few I know of is Diamond Heights, Old Town Priest River, it's a private system, Hoop Loop, has a private system on it that serves about 10 or 12, Riverview Lane has a private system, and Syringa, they buy water from the city of Sandpoint, and distribute out up the hill. It's pretty obvious that there are many and there are many sewer systems."*

It can't be certain which water systems Commissioner Connolly is speaking of given the vernacular, but it appears most of these are IDEQ classified as Very Small Water Systems, meaning they are still required to meet IDEQ requirements for health, safety, and operations.

"The Idaho Rules for Public Drinking Water Systems require that DEQ classify all community, nontransient noncommunity, and surface water public drinking water systems with a treatment and/or distribution classification based on indicators of potential health risk. Criteria used to determine the potential health risks include the system's complexity, size, and source water for treatment facilities; complexity and size of distribution systems; and other criteria deemed appropriate. Systems are classified by type (treatment or distribution) and class. Classifications range from Very Small to Class I, II, III, or IV. The rules also require that public drinking water systems be staffed by licensed operators based on the system classification."

A shared well to service three separate 1.0-acre parcels will not be required to meet public drinking water standards. Allowing a shared well to be classified as an urban water privately maintained water distribution system in a suburban zone will indeed set precedent.

H. Fire Suppression

According to the National Fire Protection Association, while underground wells can provide water for domestic use, they may not be sufficient for fire protection. In most urban and suburban areas there is a municipal water supply system that can provide the flows and pressures required for domestic, industrial, and wildfire protection.

Fire departments operating in rural areas need to develop pre-plans for water supply for fires. This might include identifying water sources that can be drafted from, as well as methods for delivering to the scene of the fire, either through long hose lays or possibly water tender relays.

The U.S. Fire Administration states that the **"adoption and implementation of hazard-resistant building codes is the most effective community mitigation measure against hazard risk."**

As stated above, to approve a shared well as "urban water" means that an applicant is required to provide LESS water to create smaller parcels than had he drilled individual wells. The creation of 1-acre parcels in a Suburban zone without a municipal water supply increases density in the Wildland Urban Interface (WUI) "where structures and human development meet or intermingle with undeveloped wildland or vegetative fuels." According to FEMA, "As the WUI continues to grow, these fires will become an increasing problem for fire departments across the country."

The MLD process already excludes fire departments from notification. Since January 2020, there have been close to 400 MLD's in Bonner County. To allow even smaller parcels with less water at a time when fire frequency in the West is increasing, is to guarantee increased risk.

2. COMPREHENSIVE PLAN

A. Bonner County Comprehensive Plan:

> "Impacts to other properties shall be taken into account when considering land use proposals, policies and codes." (Private Property Rights, Objectives & Policies pg. 12)

Possible impacts to the appellants' and other properties surrounding this MLD were not taken into consideration. The impacts can include, but not be limited to the following: decreased value of rural land, increased traffic to backcountry roads, loss of rural lifestyle, increased risk to above and below ground waterways, increased risk to native plant and animal habitat. Without sufficient proof from the planning department and the BOCC that these considerations were made, the approval of this MLD goes against the appellant's private property rights as defined in the Bonner County Comprehensive Plan.

B. **Other areas of the Comprehensive Plan**:

> "Bonner County intends to balance and integrate its land use policies and proposed land use map with the components of the comprehensive plan to encourage the community to grow while retaining its rural character and protecting its unique natural resources." – *Land Use, Goals*
> "Bonner County intends for new development to locate in areas with similar densities and compatible uses." – *Community Design, Objectives*
>
> *"*Bonner County intends for new development to minimize the adverse impacts on adjacent areas." – *Community Design, Objectives*
>
> "Future developments shall not adversely affect or destroy culturally or ecologically sensitive sites." – *Special Areas or Sites, Objectives*

There is insufficient proof from the planning department and the BOCC that the Objectives listed above were considered, and therefore the approval of this MLD goes against the county Plan.

3. PROCEDURAL ERRORS/VIOLATIONS

A. Violation of Open Meeting Law

At the August 10 hearing, the BOCC took a separate and non-agendized vote to amended BCRC in order to "amend the conditions of approval" of MLD0059-22.

Commissioner Bradshaw (time stamp 1:09:05):

> *"I make a motion to amend the language in A2 from Planning Director to planning staff, and BOCC."*

According to Idaho Code §74-204 4. a.:

> *An agenda item that requires a vote shall be identified on the agenda as an "action item" to provide notice that action may be taken on that item. Identifying an item as an action item on the agenda does not require a vote to be taken on that item.*

The BOCC did not have an action item to vote on "amend the conditions of approval" listed as an action item on the agenda. The action item/vote was also not noticed.

B. August 10 Hearing Noticing

I. Prior to May 2022, the county did not publish any information about Minor Land Divisions. After repeated requests, the county began publishing applications only on the county website. The applications are not listed by the applicant's name or street, but rather the made-up name the applicant choses to name his MLD. Hence, for a citizen to know if their neighbors were planning to divide using an MLD, they would have to regularly go to the county website and open each MLD application to determine who applied and for what location.

II. The county does not provide any other documents for the MLD applications, such as staff reports, surveyors reports, or approval dates. This puts any member of the public at a disadvantage because most often, the public is either unaware, or aware after the MLD receives approval. It unreasonably burdens the public who become subject to appeal fees before even being aware of an application. The county has been made aware of this issue as early as April 22 this year when Project 7B, a local planning advocacy group, sent a letter to the county stating this.

III. When BC attorney Bill Wilson decided that MLD0059-22 should be heard by the BOCC, it also became an action item on a BOCC agenda and should have been treated as other land use hearings going in front of a governing board. Instead, with just one week notice on the county's

Facebook page, citizens were left trying to prepare for a hearing when no documentation was made available to them other than the application. When inquiries were made to the BC Hearing Coordinator Jenna Crone, she pointed only to MLD code where no notification was required, when it was pointed out that this was an action item on the BOCC hearing agenda, Crone once again stated that MLD's:

> *"are administratively approved files and code does not require a notice to be sent out which is why I sent you the MLD section of the code. The agenda requirement is 48 hours and this agenda was posted a week ago."*

The county is therefore interpreting this MLD, which was an action item on a BOCC agenda, as eligible for only 48 hours noticing. Other land use files require that staff reports and supporting documents be posted 7 days prior to a hearing. With no time to have a PRR filled (the county is backlogged and rarely filling PRRs under the 10-day limit), the public is left with little recourse but to file for an appeal after the hearing.

IV. Since December 5, 2021, the county has received 6 appeal on MLDs, not including this one. The average time the appellant received between public notice and the appeal date is 11 days. File MLD0059-22 was given only 6 days. §12-261 A. Administrative Appeals:

> Any determination made by the Planning Director in the administration of the provisions of this title may be appealed to the Board by paying the required fee and notifying the Planning Director in writing of the intent to appeal within ten (10) working days from the date of the determination. Within ten (10) working days of receipt of an appeal, the Planning Director shall schedule a meeting with the Board to hear the appeal and shall provide written notice to the appellant of the time and place of the meeting.

In this case, the county is interpreting §12-621 A as the hearing needs to take place within 10 days. In the case of a MLD appeal, where an appellant has no choice to file a PRR for staff reports and affiliated documents, a 10-working day notice is insufficient. This rushed timing also does not support $380 worth of an appeal fee.

C. August 29 Appeal Hearing Noticing

The county sent an email to the appellant on August 23, time stamped 2:18pm that the appeal hearing was scheduled for the following Monday the 29th, at 11:00am, less than 7 days' notice. The appellant responded to the county that this was less than a weeks' notice and asked for postponement. Hearing Coordinator Crone replied that state open meeting law requires only 5 days' notice, and that it be scheduled in 10 days.

There was no public notice of the hearing and nothing other than the BOCC agenda posted on the County Facebook page on August 23, 2022 at 2:37pm.

D. Personal Gain

The county has no procedure in place that would prevent public servants from receiving personal gain from the MLD approval process.

At the August 10th hearing, Director Gabell stated (time stamp 59:45):

> *"My intent when I was working through this [MLD process] was to have Milton review it [Former Planning Director Milton Ollerton], as the Director. That had been a similar process to what other staff that had applied for land use actions in the past. It goes past, and goes right to the Director for review and approval."*

From this statement it is clear that previous county employees have been allowed to have "land use actions" administratively approved by the Planning Director. Furthermore, Director Gabell had been expecting this same treatment. Had Director Ollerton not resigned, this precedent setting land use file may not have seen the light of day.

Furthermore, Planner Chad Chambers, who reviewed the file, presented file, and rebutted the file at both the August 10 hearing and the August 29 appeal hearing is a direct report to Director Gabell. File MLD0059-22, and all other files from planning staff, that require Administrative Approval should have the files sent out for determination by external, uninfluenced planners.

4. BIAS/LACK OF DUE PROCESS

A. BOCC Aware of Potential Conflict of Interest

Project 7B, a local non-profit involved in land use planning, became aware of MLD0059-22 and sent a letter of concern to the applicant, BC attorney Wilson, and the BOCC on July 19, 2022. Gabell responded via phone call, and then via email stating his MLD application was consistent with BCRC, and that Wilson *"approved of how we are managing this process."*

B. August 10 Hearing Conflict of Interest I

At the beginning of the August 10 hearing, BOCC Chair called for conflict of interests among the BOCC. Commissioner Connolly, originally stated no conflict, but went on to state (time stamp 00:22):

> *"I was just contacted by Susan Drumheller and I was unaware that this MLD [Minor Land Division] would be coming before us and [that] we were going to be making the first decision instead of just approving it. So there was discussion about it was illegal and it*

was not following our plan and I told her that I didn't agree and that was about the end of the conversation."

The appellants understanding is this is an admittance that he had already decided upon this case. His statement that he "disagreed" that the MLD was illegal, is equivalent to stating he had already made up his mind about his decision on this file. His admittance should have alerted BC attorney Bill Wilson, who was sitting at the table with the BOCC, that Commissioner Connolly should have been recused.

C. August 10 Hearing Conflict of Interest II

At the beginning of the August 10 hearing, BOCC Chair called for conflict of interests among the BOCC. No Commissioner noted that they had just promoted the Applicant, now Planning Director Gabell, to the position just 22 days earlier.

From PRR2022_0720 regarding the promotion of Director Gabell:

June 12, 2022: Dates were set for 6 applicants to begin the interview process for the position of Planning Director. Applicants were ranked on whether they met the minimum required qualifications, and a series of questions were asked to each applicant. The minimum required qualifications as listed were:

1. Bachelor's degree in rural land use planning, regional planning, or related or equivalent required
1. Five years of progressively responsible experience in the field of current and advanced land use planning at a public agency or equivalent

Gabell's resume from his LinkedIn account shows:

- Bachelor of Arts in Business/Managerial Economics. A.S. Business Administration and Management, General
- 1-year experience in Planning as Assistant Planning Director at Bonner County (He was hired at Bonner County as an Accountant June 1st, 2021, and was promoted to Assistant Planning Director on June 27, 2021

June 29, 2022: Two candidates for the Planning Director position are notified they will move forward to second interviews. Candidate 1 has 22 years' experience in planning. Candidate 2 has 18 years' experience in planning.

June 30, 2022: Gabell is notified by Human Resources that he was not chosen for the position. The BOCC had reviewed the hiring committee's recommendations and HR sent an email to the committee stating:

"They [BOCC] decided not to interview Jacob after much discussion with seeing the credentials and experience of the other two."

July 5, 2022: Candidates 1 and 2 are re-interviewed and introduced to the planning department staff.

July 8, 2022: HR reaches out to Candidates 1 and 2, both are told:

> *"The BOCC has not yet made a decision. We have two excellent candidates, one which is you."*

July 8 – July 18, 2022: The PRR contained no documents for this time although all documents were requested.

July 19, 2022: HR reaches out to the hiring committee to tell them that Gabell was hired:

> *"Here is the final update on the position. The BOCC reconsidered their decision not to interview Jacob Gabell, and interviewed him today. They have offer Jacob the position and he accepted it."*

The BOCC hired Gabell despite not meeting the minimum requirements, not having received the highest rankings from the hiring committee and having interviewed more qualified applicants. Just 22 days after promoting him, the BOCC were asked to preside over his MLD file. The hiring process for Gabell shows inherent bias, whether intentional or not.

D. Commissioner Comments

The BOCC are aware that files before them can be appealed and come before them again. In spite of being aware that MLD0059-22 was under scrutiny and an appeal likely, Commissioner McDonald used language at the August 10th hearing, and with a journalist prior to the August 29th appeal hearing, that suggested the inability to preside over this file at an appeal hearing without bias.

During BOCC deliberations at the August 10 Hearing, Commissioner McDonald berated the public who opposed the MDL approval:

> *"This thing should have been a slam dunk. All the boxes are checked. Everything was done correctly, you meet the code. You could have divided this down to 10,000 feet if you could prove sewer or water, that gets closer to urban zoning than it does suburban zoning, a lot of urban zoning we see now days is 5000 square feet but we're talking about an acre so the whole calling it urban density is a ridiculous argument at the very least."* (Time stamp 1:04:52)

> *"I see nothing in this file that should have created this much drama quite honestly, and I find it a little disappointing."* (Time stamp 1:06:06)

In an article in the Bonner Daily Bee that was published on August 28, 2022, Commissioner McDonald is quoted:

"Commissioner Chair Dan McDonald said via Facebook Messenger that 'it will be interesting to see what issues they have come up with for the appeal as we really looked at every possible issue that could have possibly qualified for a denial and there just weren't any."

E. **Lack of Due Process: Appeal Timeline**

After the BOCC decision to approve MLD0059-22 at the August 10th hearing, Director Gabell, asked the BOCC, that in case of an appeal on the file, the BOCC wait to until he returned from fulfilling his National Guard duty abroad, specifically asking for it to be after Labor Day, the first week in September. (Time stamp 1:10:29) He was told by Commissioner McDonald:

"Yea, that's no problem you have a good reason."

Both Gabell and the appellants had reasonable expectations that an appeal hearing would not be held until after that time.

August 16, 2022: Attorney Bill Wilson responded to an inquiry about an appeal, instructing the neighbors to follow the "*ordinary appeal process for Administrative Decisions*" and that "*This means the file would go back in front of the Board for an additional hearing.*" In spite of Commissioner Connolly's pre-hearing announcement on August 10th that he disagreed that the MLD was illegal, and in spite of Commissioner McDonald stating the argument against the MLD was "ridiculous."

August 18, 2022: Liz Iha filed for appeal. Public Records Requests were submitted for MLD0059-22. The county acknowledged receipt of the PRRs, and responded it could take up to 10 days to fill.

August 23, 2022 - 2:18 pm: Iha was sent an email from the county that the appeal would be heard on August 29 at 11:00 am.

August 24, 2022: Iha responded to the county requesting a postponement. Crone responded that open meeting laws required only 5 days' notice and that code required it to be scheduled within 10 days.

August 25, 2022: Iha sent an email to the Planning Department, Wilson, and the BOCC Business Operations Manager an email requesting postponement. It enumerated reasons why a postponement should be granted, including that the applicant was out of the country, other appeals were given more time, and there was insufficient time to procure PRRs and prepare. The email requested confirmation, and response from BC counsel within 24 hours (August 25th was a Friday, and the hearing was set for Monday). The letter stated that failure to "respond by the stated time it will be assumed that the county approves of the bias against those appealing this MLD application."

August 25, 2022: Iha received confirmation of the email by planning department staff but did not receive a response to her request. The letter stated lack of response would be interpreted as the county's approval of bias against the appellant.

The Planning Department is closed on Friday's, and both Attorney Wilson and Attorney Marshall were off on Friday. With the hearing on Monday morning, the applicants were given only 2 business days with access to county staff to prepare for the hearing.

In the Title 12 schedule of fees, under appeals, there is line item to pay $100 for an extension. Iha and neighbors decide to pay the $100 fee for an extension. This payment would be in addition to the $350 charge to appeal, and the associated $30 technology fee. It was decided that Iha and neighbors would first attempt to get a response to their email from Wilson in person, at his office Monday morning at 9am, and if he failed to postpone, would pay the fee at the Planning Department. *Note: The appellants were aware of a same-day request for extension with payment occurred on August 18th at the Zoning Commission hearing.*

August 29, 2022: Iha and neighbors went to Wilson's office and were told he was in a meeting and unavailable. Iha then called into the office while standing outside and asked to speak to Wilson, she was told he was on a phone call. They proceeded to the Planning Department where planner Chambers and Administrative Assistant Janna Berard told them they were ineligible for an extension because the file was for a Minor Land Division. Upon hearing this, Reg Crawford called Chambers and left a voicemail stating the type of land use file was inconsequential, because the action item was for an Administrative Appeal, and the process followed should be that of an Administrative Appeal. Crawford called Chambers again, and he informed her that he had received the message, had spoken with Wilson, and Wilson had confirmed to him that the file was ineligible for an extension because it was for an MLD.

August 29, 2022 Hearing: Bill Wilson states it was his decision to hold the hearing on August 29th. Gabell was not present (although persons at the hearing saw his name as a Zoom caller). BOCC stated no conflict of interest.

August 29, 2022 Hearing: Neighbors brought up the potential for bias by the BOCC as part of their appeal. Commissioner Bradshaw stated:

> *"For somebody to implicate that favoritism went with it kinda agitates the hell out of me."*

Commissioner McDonald stated:

> *"This couldn't have been handled cleaner or better than it has…Just trying to claim there's an appearance of impropriety is pathetic and ridiculous, it really is."*

August 29 Hearing: BOCC denies appeal. Commissioner McDonald repeats his comments verbatim from August 10 hearing that the file:

> *"should have been a slam dunk."*

August 29, 2022 - post hearing: Crawford emails Bill Wilson asking where in code it states the appellant wasn't eligible for an extension. Wilson responded, *"Given the tenor of that hearing and the fact that the other speaker on your zoom call threatened to sue the county, I respectfully decline to provide you with advice. If you have legal questions you need help with, you may wish to seek independent counsel."*

The appellants were denied due process when given insufficient notice, insufficient time to have PRRs filled, insufficient access to county staff, and when denied eligibility filing for an extension.