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March 3, 2021

Stevensville Town Council
c/o Jennelle Berthoud, Clerk
Town of Stevensville
206 Buck Street
Stevensville Montana

Re: Proposed Burnt Fork Estates Subdivision

Ms. Berthoud:

I represent the Creekside Homeowners Association with respect to the Town's consideration of the proposed Burnt Fork Estates subdivision. A number of homeowners from Creekside are submitting their own comments, both as individuals and on behalf of the Association. I wanted to write separately, however, to address an issue that, in Creekside's view, should preclude approval of the proposed subdivision at this time.

As the Council is aware, the Town's water rights do not include the site of the proposed subdivision within their place of use. The Town applied to the Montana Department of Natural Resources and Conservation in 2011 for a change in its place of use which would have included this area in the Town's water rights. This application was denied in 2015.

We have heard some rumors about this denial, and what can be done to get the approval the Town sought ten years ago. What Creekside wants to make clear, though, is that approval of a new application is not at all assured. From the DNRC's letter denying the application, it is clear that there were two types of concerns. First, there were some informational deficiencies, the sort of things that a new application could readily fix. Second, though, and nowhere near as easily fixable, was a problem that goes to the heart of the matter.

As decreed by the Montana Water Court, or, by statute for water rights established after 1973, a Montana water right is defined by a series of limits: a rate at

which water may be taken, at any moment, from a source; the total volume that can be taken over the course of a year; a period of time when the water right might be used; a description of the area where the water right may be used; and a place in the priority system that defines whether the water right is usable in times of shortage.

The Town's proposal to DNRC showed (or could show, if all the informational issues are cleared up) that the Town's contemplated use would fall within the limits imposed by the rate and volume restrictions. This is what Creekside understands the 2019 letter from Mayor Dewey to the developers referring to the views of the Town's lawyer to mean. However, as was made clear in the DNRC letter, this is not enough for the DNRC: when evaluating change applications, the DNRC also looks at consumptive use. That is, it assumes that most of the water diverted for municipal uses ends up back in the Bitterroot River system, but a certain amount does not, whether used by people, animals, or, for example, lawns. This is the problem that is most difficult to solve: how can the Town grow in terms of the number of users and yet not *consume* more water?

The solution here, as in other communities around the state, is mitigation. And the developers of Burnt Fork Estates have proposed a partial solution: they propose to transfer the modest water rights currently appurtenant to this land to the Town to offset the additional water that would be used by residents there. There are a few obvious problems with this: first, the flow rate of the water rights that would transfer is only about a third of the rate that the engineers propose that the Town system would need to provide to Burnt Fork Estates. The period of use is also an issue: an irrigation water right, like the rights proposed to transfer, is only valid from April to October, while municipal rights run the year around. So, the transfer is not enough water either in amount or in time. The key issue, though is consumptive use. The DNRC looks for detailed scientific studies to support the assertion that changing an irrigation right to expanding municipal uses will not lead to greater consumption. The lack of such a study – and adequate mitigation measures that the study would demonstrate are required – is why the Burnt Fork Estates property is not already included in the Town's water rights. A new study including the new residents, and newly acquired mitigation water rights is likely to be a prerequisite for gaining the right to serve this subdivision with Town water. And even if the water rights that the developer will transfer are enough to mitigate the new subdivision, this may still not be sufficient to bring the whole town into compliance, such that DNRC will approve a change.

Creekside hopes that the Town can resolve its water rights situation. Although Stevensville is the oldest town in Montana, a bureaucratic mishap in the 1980s led the

Town to lose its early priorities for nearly all the water rights it uses in its municipal system. These rights are now junior to nearly every water user in the valley, and to the hydroelectric rights further down river. This means that the Town is subject to a call when water is short, and is more or less at the head of the line for getting shut down in a serious water shortage.

Obviously, the current Council is not at fault for the 1980s loss of priority, or the 2015 denial of the change application. It can, and Creekside thinks it must, rectify the situation though, before approving even the first step of a proposed subdivision that will lead to a double-digit increase in Town population. This is an issue that should not be handwaved away.

The Council is not going to be able to give final plat approval until the applicant obtains necessary permits from the Montana Department of Environmental Quality. Creekside has been advised, however, that DEQ approval is likely to be contingent upon DNRC approval – that is that until the Town can legally supply water to Burnt Fork Estates, the DEQ will hold off on issuing the necessary permits. Creekside is also advised that several of the Town wells are not currently approved by DEQ. There is, in sum, a great deal of work that needs to be done here, and done by the Town. What this means, in practical terms, is that this development is not going to go forward unless and until a process that is in the hands of the Town, not the developer, is completed, the outcome of which is not guaranteed.

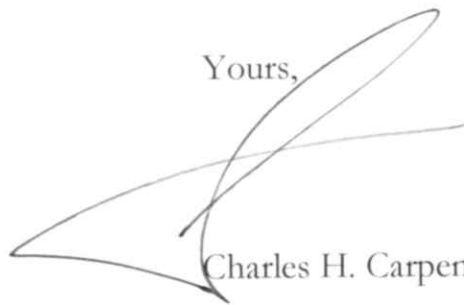
In Creekside's view, the responsible step with respect to the water rights and discharge permits is for the Town to (a) commission a study that will quantify the increase in consumptive use that has already been realized since the mid-1990s and for the future, including this development will cause; (b) identify measures that can be taken to mitigate this additional consumptive use – e.g., the Town may need to buy some additional irrigated land and take it out of production; and (c) begin, again, the long process of getting DNRC authorization for both the current system, and the system as it is contemplated to expand in the next decade. Only then, once water is legally available and the DEQ will approve discharge plans, should the Town approve substantial new housing developments within Town limits.

Approving a subdivision subject to getting such permits puts the wagon in front of the horse. It also obligates the Town to an expensive, years-long process, which may not end with the permits that the Town and the developer are waiting and hoping for. In the meantime, a developer must sit and wait, hoping that the economics of his development still pencil out years down the line. Creekside is not privy to the conversations between the Town and its lawyers, or between the lawyers and the DNRC. From the public record, though, what is evident is that prior

administrations tried and failed to get water rights matters resolved, that the Town is not currently operating in compliance with applicable laws, and that assurances that this would be easily rectified have so far not borne out. If this was easy, it would have been solved a decade ago. It was not, because the questions are more complicated than simply instituting metering, and staying within the flow and volume parameters.

Obviously, the developer of this proposed subdivision does not want to hear that the Town needs to solve its water rights and supply problems first. However, it just might be that the continuing interest in this development will provide the incentive the Town needs to pick up a process that has seemingly lain dormant for 5 years already, and move the Town into a position where it can grow responsibly, and within the law.

Yours,

A handwritten signature in black ink, consisting of several overlapping loops and a long horizontal stroke extending to the right.

Charles H. Carpenter