

**BEFORE THE IDAHO TRANSPORTATION BOARD**

**STATE OF IDAHO**

<b>IN THE MATTER OF THE APPEAL</b>	)	
<b>OF THE DENIAL OF APPLICATION</b>	)	<b>APPLICATION: 6-19-126</b>
<b>FOR ACCESS PERMIT MADE BY:</b>	)	
	)	<b>PROPOSED FINDINGS OF FACT,</b>
	)	<b>CONCLUSIONS OF LAW, AND</b>
<b>CREEKSIDE MEADOWS, LLC.</b>	)	<b>ORDER OF REMAND</b>
	)	
<b>APPLICANT.</b>	)	

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THIS MATTER came on for hearing on November 21, 2019 and involves the appeal of the Idaho Transportation Department’s (the “Department”) denial of an application for a Right-Of-Way Encroachment permit. Witnesses for each of the parties testified and Applicant’s Exhibits 1-14 were offered and admitted into evidence as were Department Exhibits A through M.

The hearing officer, was appointed by the Director of the Idaho Transportation Department to preside at this matter, conduct a hearing, take evidence, and submit proposed findings of fact, conclusions of law, and a preliminary order to the Director. The hearing officer having now reviewed the exhibits admitted, heard and evaluated the testimony presented in person and reviewed the transcripts of the same, and having considered the issues in the matter herein and being fully advised in the premises and the law, makes the following proposed:

**FINDINGS OF FACT**

**I.**

The Right-Of-Way Encroachment Application (ITD Form 2109) filed in this matter was filed by Creekside Meadows, LLC (Herein, “Applicant”) a corporation which is involved in property development and which was the developer of the Creekside Meadows subdivision in Driggs, PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER-1

Idaho. (Herein, “Creekside”) Applicant plans to construct a public roadway to be designated “Chokecherry Avenue” providing access to Creekside from Idaho State Highway 33 (SH 33).

## **II.**

In December of 2018 representatives of the Applicant met with representatives of the Department’s District Six in Rigby, Idaho to discuss the Applicant’s plans for the development of Chokecherry Avenue as part of the Creekside planned unit development. The testimony established that there is a significant disagreement between the parties as to what was said and agreed upon at the meeting. On January 14, 2019 ITD District Six Traffic and Materials Engineering Manager Brian Young issued a letter to Creekside which included the statement that “At this time, ITD will not grant additional access onto State Highway 33 (SH 33).” Mr. Young’s letter cited the Department’s efforts to improve safety and mobility on the state highways as per IDAPA 39.03.42 as the basis for the Departments position on the proposed Chokecherry Avenue access.

## **III.**

Mr. Young, and Assistant District Engineer, Ms. Hyatt, testified that the standard procedure in considering a request for a new encroachment on a state highway is for the Department to meet with the developer’s engineers to review a proposal before it is formally filed and then enter into informal discussions with the applicant regarding any concerns or questions the Department staff have about the application or the need for engineering studies. Once those discussions are held and any concerns, questions, or deficiencies in the proposal have been dealt with, the Department notifies the applicant that the application and any supporting engineering studies are complete and acceptable and to go ahead with the formal filing of the application and the preparation and submittal of construction drawings. The standard procedure was not followed in this matter.

## **IV.**

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On March 28, 2019 after receiving the initial written response from Mr. Young dated January 14, 2019, and, apparently, without further informal discussion or consultations between the Applicant, or its engineers, and the Department, the Applicant, formally submitted to the Department an application for a proposed full movement approach off of SH-33 for a new local street to be designated as Chokecherry Avenue. The timing of the submittal of the formal application and the lack of informal discussions prior to the filing started a chain of deviations from the standard procedures for access permit application review.

#### V.

The application was submitted on ITD Form 2109 and included several attachments. Among the attachments was a photocopy of a portion of the 2001 Master Plan Plat for Creekside Meadows showing the location of the proposed Chokecherry Ave. approach onto SH 33. The type of approach sought by the application was designated as “subdivision” and “commercial” on the application. According to the application the requested Chokecherry Ave. approach would enter/exit on the east side of SH 33 approximately midway between existing streets named Clubmoss Lane (formerly Teton Vista Avenue) and Creekside Meadows Avenue.

#### VI.

Creekside is a residential subdivision containing a few commercial lots within its boundaries. The testimony and exhibits entered into the record at the hearing established that the 2001 Creekside plat included approximately 222 residential units, approximately 100 of which are currently developed. There are currently two permitted approaches off of SH 33 to the Creekside development. One is Clubmoss Lane located approximately 800 feet to the north of the proposed Chokecherry access and the second is Creekside Meadows Avenue which is located approximately 700 feet to the south of the proposed approach. Both existing approaches are permitted and

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unsignalized full movement intersections.

## **VII.**

SH 33, at the location of the proposed approach, is a regional route, located in an urban area. The posted speed limit on the section of SH 33 at the location of the proposed access is forty-five (45) miles per hour.

## **VIII.**

The Applicant filed a Speed Study with the application which was prepared by engineering firm HLE Inc. and was dated June 18, 2018. The speed study addressed the appropriate speed limits on SH 33 in the vicinity of the Creekside development, but did not address the proposed new approach in any way. The Applicant did not file a file a Traffic Impact Study or other engineering report or analysis projecting traffic counts or flows, or evaluating potential impacts of the proposed approach.

## **IX.**

Although not depicted or described in any of the documents filed with the Application<sup>1</sup> a county road known locally as South Bates Road, or 75 South, enters and exits via a full movement approach on the west side of SH 33 approximately 375 feet to the north of where the Chokecherry Ave. approach would be located. The evidence in the record established that So. Bates Road is a lightly traveled gravel county road that has been in existence for many years. It primarily provides access to a few farms and ranches and a fishing access spot. It is used more frequently during the harvest season. So. Bates Road, and its location with respect to the two existing approaches into Creekside and to the proposed new approach, became a serious topic of discussion and

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<sup>1</sup> The two maps contained in the HLE Speed Study showing the locations of the counters placed for the study do include So. Bates Road.

disagreement between the Applicant and the Department only after the application was denied. However, there was no documentary evidence presented, and only minimal testimony offered, to establish that either of the parties put much thought or analysis into the potential impacts of So. Bates Road upon the safety of proposed approach and/or compliance with IDAPA standards. The record establishes that despite its long standing existence, So. Bates Road was essentially ignored by the parties until well into the course of this appeal.

#### **X.**

The evidence established that there is approximately 375 feet between the proposed new approach and the existing So. Bates Rd. Under current conditions, this would not appear meet the IDAPA standards set forth in IDAPA 39.03.42.400. The Department acknowledges that it was initially focused only on the two existing approaches on the east side of the highway and did not immediately recognize the conflict with So. Bates Road. The evidence presented established that there was significant disagreement between the parties regarding the issues surrounding So. Bates Road and the manner and timing with which it arose in the application review process. There was no evidence presented of a thorough engineering review or analysis by either party of the issue of approach spacing or of potential alternatives to achieve compliance with IDAPA standards.

#### **XI.**

On April 25, 2019, by means of a letter from Mr. Brian Young addressed to Bruce Simon, the Department denied the Applicant's application. The denial letter stated: "ITD will not grant additional access onto State Highway 33. As part of ITD's efforts to improve safety and mobility on the state highways, we encourage developers to use existing local roads for travel and for entrances to properties as per IDAPA 39.03.42. As Creekside Meadows Ave and Clubmoss Ln already provide reasonable access from SH 33 into the development. The developer should seek

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to use local roads for travel within the development and for access to future commercial and residential development therein. ITD recognizes the concerns of residents of the subdivision, however we maintain that in order to preserve the safety and mobility of the traveling public along SH 33, no new accesses will be granted into Creekside Meadows.” The Department’s April 25, 2019 letter contained no mention of So. Bates road, nor did it include any specific concerns regarding spacing of approaches.

## **XII.**

An appeal to the District Engineer of the April 25, 2019 decision of the Department was filed by the Applicant by means of a letter from its attorney dated May 23, 2019. In the letter of appeal the Applicant’s attorney cited to the 2001 plat for the Creekside Meadows Planned Unit Development which included Chokecherry Avenue and Sage Avenue as additional points of access from SH 33 to Creekside. The letter also referred to a 2006 Transportation Access Plan (TAP) which included references to the proposed access. The basis for the appeal was stated as “...the Application is in compliance with ITD applicable codes and regulations, no facts or evidence support the conclusory statements that an access point at Chokecherry Avenue would impact the safety and mobility of the traveling public, and such denial is contrary to ITD’s prior agreements and findings, including the TAP. As such, the denial of the application (a) exceeds the agency’s statutory authority; (b) is made upon unlawful procedure; (c) is not supported by substantial evidence; and (d) is arbitrary, capricious and an abuse of discretion.”

## **XIII.**

The Applicant’s May 25, 2019 letter of appeal included a copy of a May 23, 2019 letter from HLE Engineers in which the engineering firm noted that under the 2006 TAP the minimum spacing requirements between approaches to SH 33 was 400 feet, and that under the IDAPA standards for

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the relevant portion of SH 33 the minimum spacing for access points was 660 feet. HLE opined that: “Chokecherry Avenue should be an approved access point as previously *approved* through the TAP agreement between ITD and the City of Driggs.” (Emphasis added) The letters from Applicant’s attorney and HLE contained no mention of So. Bates Road.

#### **XIV.**

The Board finds that the assertion by the Applicant, and its engineers, that the inclusion of the Chokecherry Avenue access point in the 2001 plat of the Creekside development and in the 2006 Transportation Access Plan (TAP) constitutes “approval” of an approach at that location, and of evidence of the safety of an approach at that location, is misplaced. By the clear language of the TAP approaches included in the TAP require an application and formal approval under IDAPA standards by the Department before they can be constructed.<sup>2</sup>

#### **XV.**

In 2003The Applicant applied for and was granted encroachment permits under the standards of the then existing IDAPA standards for the two existing approach off of SH 33 into Creekside. The Board finds that the same process is now required under current IDAPA standards for the proposed Chokecherry access.

#### **XVI.**

On June 11, 2019 the Department’s District Six Engineer responded to the Applicant’s appeal of the Department’s April 25, 2019 decision. In the letter denying the appeal the District Engineer stated: “The Idaho Transportation Department (ITD) has reviewed your appeal for additional

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<sup>2</sup> Applicant’s reliance, in its evidence and briefing, upon the inclusion of the Chokecherry Ave. approach in the 2007 City of Driggs Transportation Plan, and the 2008 Driggs SH-33/Main Street Conceptual Design Plan, as evidence of the approval and safety of the proposed approach is similarly misplaced.

accesses into the Creekside Meadows development at Chokecherry Ave. The appeal for access into Creekside Meadows has been denied in accordance with IDAPA 39.03.42 section 003.03. As per IDAPA 39.03.42 to section 400.08b ‘Traffic Movements into and out of a business shall be designed, whenever possible to utilize existing local roads.’ There are currently 2 entrances already into Creekside Meadows Sub Division.” The District Engineer’s denial letter does not mention So. Bates Road or any Departmental concern(s) about approach spacing or safety.

#### **XVII.**

The Board finds that the District Engineer’s letter denying the appeal lacks the indicia of a thorough, thoughtful or informed review of the Department’s April 25, 2019 decision. The letter gives the Applicant no specifics as to the legal basis for the denial, or the facts and circumstances upon which the denial is made. It lacks reference to the applicable standards, and cites to standards that are wholly inapplicable to the current application for a local road approach. The Board finds that while the District Engineer’s response on appeal does make it clear that the appeal is being denied, thus opening the way for the Applicant to seek review by the Board, it is essentially non-responsive and without value or meaning.

#### **XVIII.**

The Board finds that the Department’s pre-application denial on January 15, 2019 and the subsequent post-application denials on April 25, 2019 and June 11, 2019 each constitute ineffective attempts at communication of the legal basis for its denials or an exposition of underlying facts or data, supporting its position that the proposed Chokecherry access presented safety or mobility concerns. The Board finds however, that such ineffectiveness does not rise to the level of a due process violation and that the Department did minimally comply with its own rules contained in IDAPA 39.03.42.003.003.01 and .03 which require that applicants receive a PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER-8



“written notification of the denial or grant of the permit” and that “notice of the decision of the district engineer shall be issued by certified mail within seven days of the ruling”

**XIX.**

The Board further finds that despite ineffectively communicating the legal and factual basis for its position in denying the application the Department has acted in this matter within the its statutory and regulatory authority and within its own rules. Further the Board finds that the Department’s decision is not arbitrary, capricious or an abuse of its discretion.

**XX.**

On July 1, 2019 the Applicant, through its attorney, appealed the Department’s decision to deny the application for encroachment permit to the Idaho Transportation Board, thus commencing the current proceedings. By agreement of the parties, these appellate proceedings were held in abeyance while negotiations were held to see if an agreeable resolution could be reached. While the attempts to reach agreement were not successful, the informal discussions did focus the parties on clarifying and defining their own positions and on the specifics and basis for the positions of the opposing party. The existence and location of So. Bates Road and the potential approach spacing and safety issues it could create were finally discussed, although no additional engineering analyses or reports were developed or requested.

**XXI.**

In the course of the hearing on this matter evidence was offered by the Applicant that it was in the process of pursuing the approval of an amended plat for the Creekside development with the City of Driggs which they referred to as “Phase Five.” The representatives of the Applicant testified that they had a preliminary amended plat prepared that had already been approved by the City of Driggs and that they were working on completing the City’s conditions for the approval of the

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final amended plat. The testimony established that amended plat for the Creekside involved at a minimum the creation of approximately 29 new residential lots and the realignment or vacation of one or more of the internal streets within the Creekside development. The Applicant's witnesses testified that it had satisfied all of the conditions for the approval of the final amended plat except for obtaining the approval of the Department for the approach at Chokecherry Ave. The Applicant testified that because of Department delays in approving the proposed approach, it had been required to seek and obtain from the City two one-year extensions of the deadlines imposed for the removal of the conditions for the approval of the final amended plat. The Board finds that it is absolutely remarkable that Phase Five and/or the amended plat were not mentioned at all in the encroachment application or in the review process. The only plat submitted by Applicant with the application was the original 2001 Plat. Applicant's plans for Creekside involve new plat information and drawings that differ significantly from what was submitted with the permit application and that are different from the exhibits presented for the record on appeal.

## **XXII.**

The Board finds that Applicant's failure to provide the Department with complete documentation of its intentions for the future development of Creekside and the plat amendment it had in process since 2016 or to communicate to the Department the existence, scope, and nature of the changes contemplated by Phase Five, as well as its lack of engineering consultation regarding the potential impacts of the plat amendments upon traffic nature, volumes, or flow patterns is inexcusable. Ultimately the failure of the Applicant to be forthcoming with the Department about its Phase Five plans led to a significant amount of confusion and wasted effort on the review of the application and in this appeal. Had the failure to disclose this information been known at the time, it would have been a valid basis for the Department to deny the Application.

### **XXIII.**

The Board finds that the application and review processes in this matter were characterized by a significant amount of miscommunication. The miscommunication began with the informal meeting in December of 2018, when the parties came away with very different understandings of what had taken place and agreed upon. It continued with Applicant's failure to disclose its plans for Phase Five. Each of the parties then contributed to the problem by the manner in which they proceeded. Both parties bear responsibility for the case having reached this stage without either of them having a clear understanding of what the application actually seeks to establish and what impacts the encroachment sought would have, if approved.

### **XXIV.**

The Board finds that: (a) The standard processes and procedures for review of an application for an encroachment permit were not followed in this matter; (b) There was a significant amount of miscommunication between the Department and the Applicant regarding the application and appeal processes; (c) The applicant failed to disclose in its application its plans to amend the Creekside plat; (d) Both the Department and the Applicant failed to recognize the existence and location of So. Bates Road, and (e) Both the Department and the Applicant failed to recognize, evaluate and study the potential impacts of So. Bates Road upon traffic volumes, flow and safety at the location of the proposed approach. As a result, the Applicant's application did not represent what the Applicant was actually seeking to accomplish with Creekside and the application filed did not receive a thorough review and full consideration by the Department, The Board finds that there is insufficient evidence in the record upon which the Board can make a rational decision supported by substantial evidence on the validity of the Department's denial of the application.

### **CONCLUSIONS OF LAW**

## **I.**

Idaho Code Section 40-312 gives the Idaho Transportation Board the authority to promulgate rules and regulations pertaining to state highways and to enforce compliance with those rules and regulations.

## **II.**

The Idaho Transportation Board adopted rules under the authority of Idaho Code Section 40-312 designated as IDAPA 39.03.42, “Rules Governing Highway Right-of-Way Encroachments on State Rights-of-Way,” IDAPA 39, Title 03, Chapter 42. The purpose of these rules is to establish standards and guidelines for encroachments on state highway rights-of-way. (IDAPA 39.03.42.001.02.)

## **III.**

An encroachment is any authorized or unauthorized use of highway right-of-way. An approach is an encroachment consisting of a connection between the outside edge of the shoulder or curb line and the abutting property at the highway right-of-way line, intended to provide access to and from said highway and the abutting property. An approach may include a driveway, alley, street, road or highway. An encroachment permit is written authorization from the Department to use highway right-of-way under the conditions set forth in the permit. (IDAPA 39.03.42 010.06, .29, and .30.)

## **IV.**

The Department has retained the exclusive authority to issue all encroachment permits on the State Highway System. (IDAPA 39.03.42.100.01.a.). The state highway system consists of the principal highway corridors in the state including connections and extensions through cities as approved by the Board. A statewide route is a state highway that provides the highest level of mobility and speed over long distances. Access from a statewide route to communities and major activity centers

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should be by way of public roads with spacing that supports mobility and speed. (IDAPA 39.03.42.010.70 and .71)

#### **V.**

All new or additional approaches require an approved State highway right-of-way use permit and must meet all access control requirements that correspond to the state highway being affected. Requests for approaches shall be reviewed and considered for approval based on the needs of the total development, regardless of the number of individual parcels it contains. The location, design, and construction of all approaches shall comply with Department standards. (IDAPA 39.03.42.300.01, .02, and .04.)

#### **VI.**

Approaches are to be located where the highway alignment and profile meet approved geometric standards, where they do not create undue interference with or hazard to the free movement of normal highway or pedestrian traffic, and where they do not restrict or interfere with the placement or proper function of traffic control signs, signals, lighting or other devices. Failure to comply with the Department requirements for approaches may be sufficient cause for the Department to deny an approach application. (IDAPA 39.03.42.300.05 and .06.)

#### **VII.**

The location of all approaches shall comply with current Department standards and design principles. Approaches should be designed for current and future property access requirements; and to reduce conflicts associated with access points through the application of channelization, auxiliary lanes, joint-use approaches, frontage and other local roads, restricted on-street parking and off-street traffic circulation. (IDAPA 39.03.42.400.01 and .02.)

#### **VIII.**

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In order to maintain system capacity, safety and efficiency, maximize signal progression and minimize delays to the traveling public, all approaches and signals shall be spaced in accordance with the Department standards established by rule. The minimum recommended distance between unsignalized full movement approaches on a regional route, in an urban area, where the speed limit is in excess of 35 miles per hour is 660 feet. (IDAPA 39.03.42.400.03.c. at Table 1).

**IX.**

The Board finds and concludes that there is insufficient reliable evidence in the record to adequately determine whether the encroachment proposed by the Applicant in application number 6-19-126 would meet the standards set forth in the Conclusions of Law numbered VI., VII., and VIII. above.

**X.**

All applications for encroachment permits are reviewed and evaluated for current access control requirements, deed restrictions, safety and capacity requirements, design and location standards, or an approved variance of these standards, environmental impacts, location conflicts, long-range planning goals, and the need for an appraisal. (IDAPA 39.03.42.200.09)

**XI.**

The Board finds and concludes that as a result of miscommunication, lack of focus, and failure to provide sufficient information or detailed analysis during the application review process, on the part of both parties to this appeal, the Applicant's application for an encroachment permit was not adequately considered, reviewed, and evaluated for current access control requirements, safety and capacity requirements, design and location standards, location conflicts, and long-range planning goals.

**XII.**

Applications for encroachments not allowed shall be verbally denied. If the applicant insists on proceeding with the application, the non-refundable fee shall be accepted and a permit denial issued by certified letter. Upon receipt of the denial letter, the applicant can appeal the Department's action. (IDAPA 39.03.42.200.09 and .13.) The Board finds and concludes that neither the Department nor the Applicant followed these procedures in this case.

### **XIII.**

Applicants may appeal denied permits, in writing to the Department's District Engineer. Notice of the decision of the District engineer is issued by certified mail within thirty (30) days of the ruling. (IDAPA 39.03.42.003.01)

### **XIV.**

The Board finds and concludes that the District Engineer's review of the Department's denial of the Applicant's application complied with the specific language of IDAPA 39.03.42.003.01 but did not provide the thorough, thoughtful and impartial review intended by the rule.

### **XV.**

When the District Engineer upholds the original denial by Department staff the applicant may initiate an appeal to the Idaho Transportation Board. (IDAPA 39.03.42.003.03)

### **XVI.**

Based upon the statutes and rules applicable to regulation of access to public highways under the jurisdiction of the Department as well as the totality of the evidence adduced at the hearing of this matter on appeal, the Board finds and concludes that the record does not contain sufficient evidence upon which the Board can determine whether, or not, the Department's reasons for denying the application as stated in the April 25, 2019, and June 11, 2019 letters to the Applicant are supported

by substantial credible evidence and constitute valid and sufficient bases for the denial of the Applicant's application.

#### **XVII.**

The Board finds and concludes that the record does not contain sufficient credible evidence upon which the Board can determine whether, or not, the Department's denial of the Applicant's application for an encroachment at the proposed location was in violation of constitutional or statutory provisions, exceeded the statutory authority of the agency, was made upon unlawful procedure, was arbitrary, capricious, or an abuse of discretion, or was supported by substantial evidence on the record as a whole.

#### **XVIII.**

If at any time during the appeal process it is determined that insufficient documentation was submitted with the appeal all parties shall be notified that the appeal process is placed on hold until the necessary documentation is supplied. See IDAPA 39.03.42.003.02. The Applicant urges the Board to use this "Process Hold" at this stage of the proceedings to allow the Applicant to "cure any deficiencies perceived by ITD in its application that came to light during the appeal." The Board finds that the "Process Hold" procedure is intended only to assure that the appellate record can be made complete. The "process hold" is not something to be used by the Board on appeal to redo the application stage of the proceedings. The Department does have the authority to place the application review process on hold in order to request additional documentation under IDAPA 39.03.42.200.09, but the Department did not follow that procedure in this case.

#### **XIX.**

The Board is cognizant of the time, effort and expense that the Department and the Applicant have invested in this matter up to this point in the proceedings. A clear and definite decision upon the PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW, AND PRELIMINARY ORDER-16



which the parties can chart their future course is always the preferred result of proceedings such as this. However, where, as here, there is not sufficient reliable evidence in the record upon which the Board can make a reasoned and supportable determination of whether, or not the Department's denial was in violation of constitutional or statutory provisions, exceeded the statutory authority of the agency, was made upon unlawful procedure, was arbitrary, capricious, or an abuse of discretion, or was supported by substantial evidence on the record as a whole, the only recourse for the Board is to remand the matter for further proceedings.

### **PRELIMINARY ORDER**

Based upon the proposed Findings of Fact and Conclusions of Law set forth above the hearing officer enters the following preliminary order subject to the terms and conditions set forth in Appendix A, which is attached and made a part of this preliminary decision:

1. It is ordered that the decision of the Department's District Six Traffic and Materials Engineering Manager dated April 25, 2019, and the decision of the District Six Engineer dated June 11, 2019 denying the Applicant's application are hereby vacated, and that this matter be remanded to the Department for further proceedings on the Applicant's application.

2. It is further ordered that the parties shall meet within 30 days of the date of this order becoming final to establish by written stipulation, a mutually agreeable schedule for the further review of the application. The schedule shall include an opportunity, within an agreed upon time, for the Applicant to amend the application if it chooses to do so.

3. It is further ordered that if at any time during the review process on remand the Department determines that there is insufficient documentation to process the application, it shall,

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in accordance with IDAPA 39.03.42.200.09, in writing, place the process on hold until such documentation has been received.

DATED this 3rd day of January 2020.



STEPHEN A. BYWATER  
Hearing Officer

**CERTIFICATE OF SERVICE**



I HEREBY CERTIFY that on the 3rd day of January 2022, I caused to be served a true and correct copy of the foregoing by the method indicated below, and addressed to the following:

Applicant:

CREEKSIDE MEADOWS  
C/O FREDERICK J. HAHN, III  
HAWLEY TROXELL  
[fhahn@hawleytroxell.com](mailto:fhahn@hawleytroxell.com)

U.S. Mail –  
 Hand Delivered  
 Overnight Mail  
 Fax  
 E-Mail

The Department:

GARY LUKE  
DEPUTY ATTORNEY GENERAL  
IDAHO TRANSPORTATION  
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U.S. Mail  
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STEPHEN A. BYWATER  
Bywater Law Office  
P.O. Box 170399  
Boise, Idaho 83717

## APPENDIX A

**THIS IS A PRELIMINARY ORDER OF THE HEARING OFFICER.** It can and will become final without further action of the Hearing Officer unless any party petitions for reconsideration to the Hearing Officer issuing this Preliminary Order or petitions for review to the Director.

Any party may file a petition for the Hearing Officer's reconsideration of this Preliminary Order within fourteen (14) days of the service date of this Order. The Hearing Officer issuing this Preliminary Order will dispose of the petition for reconsideration within twenty-one (21) days of its receipt, or the petition will be considered denied by operation of law. See section 67-5243(3), Idaho Code. (Parties should not combine a petition for reconsideration to the Hearing Officer with a petition for review to the Director. If a party wishes to petition the Director after receiving a ruling from the Hearing Officer on a petition for reconsideration, the petition to the Director should be filed according to the following provisions.)

Within fourteen (14) days after:

- (a) The service date of this Preliminary Order,
- (b) The service date of the Hearing Officer's denial of a petition for reconsideration from this Preliminary Order, or
- (c) The failure within twenty-one (21) days of the Hearing Officer to grant or deny a petition for reconsideration from this Preliminary Order, any party may in writing petition for review or take exceptions to any part of this Preliminary Order and file briefs in support of the party's position on any issue in this proceeding to the Director. Otherwise, this Preliminary Order will become a Final Order of the Department.

If any party petitions for review before or takes exceptions to this Preliminary Order to the Director, opposing parties shall have twenty-one (21) days to respond before the Director to the petition for review or exceptions. Written briefs in support of or taking exceptions to this Preliminary Order shall be filed with the Director. The Director may review this Preliminary Order on its own motion.

If the Director reviews this Preliminary Order, the Director shall allow all parties an opportunity to file briefs in support of or taking exceptions to this Preliminary Order and may schedule oral argument in the matter before issuing a Final Order. The Director will issue a Final Order within fifty-six (56) days of receipt of the written briefs or oral argument, whichever is later, unless waived by the parties or for good cause shown. The Director may remand the matter to the Hearing Officer for further evidentiary hearings if further factual development of the record is necessary before issuing a Final Order.

Pursuant to sections 67-5270 and 67-5272, Idaho Code, if this Preliminary Order becomes final, any party aggrieved by the Final Order or Orders previously issued in this case may appeal the Final Order and all previously issued Orders in this case to district court by filing a petition in the district court of the county in which:

- (a) A hearing was held,
- (b) The final agency action was taken,
- (c) The party seeking review of the Order resides, or
- (d) The real property of personal property that was the subject of the agency action is located.

The appeal must be filed within twenty-eight (28) days of this Preliminary Order becoming final. See section 67-5273, Idaho Code. The filing of an appeal to district court does not itself stay the effectiveness or enforcement of the Order under appeal.