

November 26, 2024

Courtney Weiche
Senior Planner
1001 E. Ninth St Bldg A
Reno, NV 89512

Lee Gardiner
7445 Bryan Canyon Road
Washoe Valley, NV
89704

Dear Courtney,

I am writing regarding case number WSUP24-0015, Bryan Canyon Road Pond and Restoration, to express my opposition to the dam and pond that is part of this proposal submitted by John J. Hurry of SC Advisors LLC, formally known as Scottsdale Capital Advisors LLC of Scottsdale Arizona. My objections are based on several issues with the application in relation to information provided, or lack thereof, but primarily to address the increased threat of flooding that would be possible with the presence of an approximately one acre pond retained by a berm located near the headwaters of Bryan Creek. I have spent many hours researching subjects addressed on this application but being neither an engineer or a lawyer, I may not possess the knowledge and understanding to fully appreciate the scope of the details within these subjects. Also some of my points have been based only on what information has been provided in the application.

In 2020, the applicant along with a hired construction company illegally attempted to construct a dam and pond on the proposed site without the required permits. Also at that time the applicant had a well drilled near the same location. After a almost 10 acres of illegal excavation work was done, Washoe County ordered him to cease work and issued him the code enforcement action WVIO-ENG 20-0015. The applicant claimed that he did not know he was required to have a Special Use Permit for the work being done even though most construction companies are well aware of work that requires a SUP. The applicant's illegal activities and response to the code violation enforcement action demonstrated to the residents on Bryan Canyon Road that he had no regard for the safety of their lives or their properties that are located downstream from his property. Also his response to the Code Enforcement Action showed he has little regard for the laws put forth by the Washoe County Planning and Building Division. It is my understanding that as part of the Code Enforcement violation, the applicant was ordered to restore the property to its original state which he had 30 days from that time to complete. Now, almost 5 years later, the dam and pond structure are still seen on the GIS maps that show the proposed site, and only now has the applicant made any effort to rectify the situation but still only under the condition that he be allowed to finish his previous illegal work though on a smaller scale in what appears to be a quid pro quo offer which again demonstrates the applicants lack of regard for Washoe County Planning and Building Division.

After reviewing the application, It is noticeable that the word dam is never used to describe the proposed structure, but instead is referred to only once as a “berm” that stands 16.4 feet high. The courtesy noticed sent out from the Washoe County Planning and Building Division referred to the berm as a “dam structure” so apparently in the eyes of Washoe County this is a dam, but this wording must be clarified in order for the residents downstream from the proposed project to know exactly what is being planned with this application and what standards will or will not apply to the construction of it. Also adding to the confusion is the wording as seen under NRS 535.010 subsections 4 and 8 which use the wording, “ Any dam”. The definition of a dam stated under NAC 535.040 “Means Any structure that stores or diverts water for a beneficial purpose. The term includes a dam that is proposed. the term does not include levee or embankment.” So it is questionable whether Any dam actually means Any dam, or only Any dam that is considered large enough in height or water retention size to be under the jurisdiction of the Nevada Revised Statutes and the Nevada Administrative Codes. Also, the definition of a berm in engineering terms is more closely related to a levee or embankment and is almost never considered as a dam for retaining water but more for keeping water out of areas so it seems deceitful of the applicant to not use the word dam in the application and it seems to be an attempt to mislead the public and Washoe County Planning and Building Division into believing that the pond would be as stated in the application, “almost naturally occurring”, which is obviously false judging from the almost 10 acres of illegal excavation work done in 2020.

The applicant claims that the pond is needed to maintain his water rights, but the water rights he claims to have are very much in question as is his argument that constructing a pond will achieve his goal of retaining those rights, especially since the rights he claims to own are for the beneficial use of irrigation. The question of water usage and water rights also needs to be addressed on several levels and it must be determined if the berm/dam and pond will meet the definition of a beneficial use of water which are defined as use for commercial, industrial, irrigation, mining, municipal power generation, recreation, stock watering or storage. The application states that the purpose of the pond is for fishing for the property owners private use which does not seem to meet the definition of a beneficial use, so what is really going on here as this does not make any sense? Reviewing the water right documents provided in the application package shows that the last date of any State Engineer approval was in 2009 for a well to be drilled, and on that approval it states the beneficial use of the water will be for irrigation. Also it states that the work must be completed on or before 8/21/2010 and the water must be placed to beneficial use with proof thereof by 8/21/2010 which I don’t think happened as to the best of my knowledge, there is no electricity at the site and there is nothing there to irrigate. This suggests that the water rights the applicant claims to own have possibly already been forfeited or abandoned due to lack of use during the last 15 years. Also NRS 534.050 Permit to appropriate water before sinking a well states, “Except as otherwise provided in subsection 2, every person desiring to sink or bore a well in any basin or portion therein in the state designated by the State Engineer as provided for in this chapter, must first make an application to obtain from the State Engineer a permit to appropriate the water, pursuant to the provisions of chapter 533 of the NRS.” The applicant did have a well drilled in 2020 as part of his attempt to construct a dam and pond but no permit from the State Engineer is shown in the exhibits included with the application. It

seems that before any permits are considered, the State Engineer must determine if the applicant still retains any water rights on the property as stated under NRS 533.045, The right to divert water ceases when necessity for use does not exist. “ When the necessity for the use of water does not exist, the right to divert it ceases. No person shall be permitted to divert or use the waters of the State except at times the water is required for beneficial use.” Also when the water has not been required for a beneficial use over a period of time. The following statute states, NRS 534.090, Forfeiture and Abandonment of Rights, 1) “Except as otherwise provided in this section, failure for five consecutive years after April 15,1967, on the part of the holder of any rights, whether it is an adjudicated right or un-adjudicated right or a right for which a certificate has been issued pursuant to NRS 533.425 and further whether the right is initiated after or before March 25, 1939 to use beneficially all or any part of the underground water for the purpose for which the right is acquired or claimed works a forfeiture of both undetermined and determined rights to the use of that water to the extent of the non use.” Considering that the last approval from the State Engineer the applicant gave evidence of in the SUP application was dated 2009, it appears that the water rights claimed by the applicant have been forfeited as the necessity did not exist and that the water right has not been in use for almost 15 years. So before Washoe County Planning and Building Division can consider issuing a Special Use Permit, the State Engineer must first determine if the applicant has a right to divert or use water at the proposed site since the necessity ceased approximately 15 years ago, and then if the applicant forfeited his rights due to not having used them for over five years. Even if the State Engineer does determine that the applicant still holds rights to the water, does using the water for an almost 1 acre pond for the applicants fishing desires fulfill the definition of a “beneficial use”?

Regarding the issue of increased flooding risk for the residents downstream from the applicants property, it would appear that having a one acre pond with an depth of 8 feet held back by a what the applicant refers to as a “berm”, located in the hills above Washoe Valley would fail to meet the objective of the Legislative Declaration NRS 543.170 put forth by the District for Control of Floods which states, 1) “Facilities to alleviate flooding in any district whether located in a city, an unincorporated town or other unincorporated area of the county benefit all residents and owners of property in that district.” And (2) “These facilities provide protection for life and property throughout the district and usually require planning throughout the drainage basin.” By planning to use a berm with no requirement of being inspected or maintained and no detention or retention facilities required and no modifications to the flood plain planned would seem contrary to a plan to control flooding.

The following are five other issues that demonstrate the permit application lacks information and contains outdated, misleading and incorrect information, all of which will compound the risk of flooding downstream along Bryan Creek and Bryan Canyon Road associated with having a nearly 1 acre pond held back by a berm located at the headwaters of Bryan Creek.

The first issue being, Appendix A is lacking in that item #2 included with the application package states, “Preliminary geological conditions including major rock outcroppings, slide areas

underlain with faults that have been active since during the Helocene Epoch of geological times.” It then states. “Seismic considerations are included in the Geotechnical Investigative Report provided in tab C of the application package.” There is no “Tab C” in the Geotechnical Investigative Report pertaining to seismic considerations at all. The map provided showing the location of the different types of soils is capable of showing faults, but that information was not included on the map. Also, the words seismic or fault were not mentioned anywhere else in the entire application.

In fact, this area is very seismically active and I have felt earthquakes here on my property several times since moving here from the east side of the valley in 2018. Also, according to USGS Fault and Fold Database of the United States which describes the Mount Rose Fault Zone #1647, as “Being relatively long consisting of a predominant range-front fault bounding the east flank of the northern Carson Range that is nearly continuous from near Musgrove Creek northward along the west edge of Washoe Valley, across an alluvial embayment near the mouth of Galena Creek and along the west side of Truckee Meadows to the north of Thomas Creek.” The Mount Rose Fault Zone is about 30 miles long and is considered a major earthquake hazard in Nevada. The chance of a damaging earthquake of magnitude 6 or greater within 30 miles of the Reno, Carson City area is between 60 and 75%. Also as recently as 12/05/2015, a magnitude 4.4 earthquake occurred in the Mount Rose Fault Zone in South Reno showing that the Mount Rose Fault Zone is an active fault. There are many more details regarding the seismic character associated with the Mount Rose Fault Zone but I will conclude with a quote from Ross Stein, CEO of Temblor regarding trench excavations done in the Washoe Valley area. “Evidence from trench excavations across some of the fault strands suggest that large slip events have occurred in the past several thousand years, with a slip of 2-4 meters, as would occur in magnitude 7 earthquakes. Thus the potential for larger earthquakes is quite real and important.” Temblor is a catastrophe modeling company specializing in seismic hazard and risk assessment.

This information is cited because Musgrove Creek is approximately 5,000 feet away from the proposed location of the dam and pond. An earthquake of a magnitude 7 as stated being possible would be a reason for concern over the berm/dam structure regardless of the size of the standpipe proposed as a device designed to only “reduce” the chance of overtopping the berm/dam. A catastrophic failure of the berm/dam in such an event would possibly cause serious flooding in Bryan Canyon.

The second compounding issue is approximately 5,000 feet downstream from the proposed berm/dam and pond site is a FEMA flood zone with the letter A designation indicating the area has a high chance of flooding. According to FEMA information, this flood zone has been determined by historical flooding in the past, but the information used to make that determination dates back to 2009 and does not include the more recent flooding in 2017. FEMA considers sources and locations of water as criteria for determining flood zones so the berm/dam and pond would be a new location of water which FEMA may take into consideration. This could lead to the existing flood zone being extended upstream towards the proposed dam and pond site and the extension of the flood zone would have a negative affect on property values along Bryan Canyon

Road, particularly the 4 homes located in close proximity to Bryan Creek. Additionally, according to the Flood Plain Management section of the Nevada Division of Water Resources Dams and Dam Safety, “Flood plain management aims to prevent or reduce flooding risk fostering resilient communities in Nevada. Minimizing and mitigating flood related risk, safeguard communities, enhance life safety and protect property, thus bolstering the state’s infrastructure.” The proposed berm/dam and pond would have the exact opposite affect as far as minimizing and mitigating flood risk and safeguarding the Bryan Canyon Road community.

On the application under Flood plain modifications it states that the project site is located in an unshaded flood zone as depicted with the letter X on the Flood Insurance Rate Map,(FIRM) dated March 16, 2009, for unincorporated Washoe County, but according to FEMA, the designation X translates to areas with a moderate to low flood risk, so flooding is already possible. At a point in time when FEMA does update the flood maps, that designation could change due to the proposed pond being a source of water located at the headwaters of Bryan Creek. In January, 2017, due to sheet flow run off mostly from the applicants property, the properties downstream did have flooding so the FEMA X designation is somewhat misleading, perhaps due to being outdated, as his property has slopes between 7,5% and 25% with some localized steeper slopes which already cause significant sheet flow runoff. The Application states that there are no modifications to the existing flood plain and also that because no detention or retention measures are required, that none are proposed. This means that if and when the berm fails, there will be no safety measures in place to prevent the water from heading down the existing water course being Bryan Creek, and down to the neighborhood below.

Regarding the FEMA information sited on the application, the date of the FEMA map referenced is March 6, 2009 and FEMA is required to update their information every 5 years but has not been diligent in this regard. In an article titled “FEMA’s Outdated and Backward Looking Flood Maps” written by Joel Scata, Senior Attorney for Environmental Health from the National Resources Defense Council dated 2017, who wrote, “A recent investigation by the Department of Homeland Security’s Inspector General revealed 58% of all FEMA maps are considered inaccurate and out-of-date. Inaccurate and out-of-date flood maps put communities at risk.” Also the article went on to say, “Climate change impacts like rising sea levels and more intense rain storms also influence flood risk. Climate change is loading the dice in favor of more frequent and severe floods.” Considering that the FEMA map cited is out-of-date brings up the question of what that map might depict in an updated form taking into account the floods which have occurred since 2009 and how that information might change the appearance of the information on the application, especially considering the damage caused by the 2017 flood.

The third compounding issue is an alarming problem found on the application being incorrect and misleading information is used in the supplemental information in Appendix B, and Appendix C. These calculations refer to NOAA Atlas 14, Point Precipitation Frequency Estimates and are based on the location of latitude 39.2257 longitude -119.8255 which is a location approximately 3500 feet north of the proposed site of the dam and pond, and approximately 500 feet lower at 5426 feet. The actual location of the proposed berm/dam and

pond is latitude 39.21637, longitude -119.82837 at 5930 feet elevation. The rainfall amount information used on the application shows 4.18 inches of rainfall for the 24 hour 100 year storm event but at the correct location at 5,930' elevation shows the number for the same event to be 4.39 inches of rainfall. Additionally, the rainfall numbers given on the application for the 24 hour 2 year event of 1.85" is actually 1.94" and the 10 minute 5 year number of 1.67" is actually 1.70" and 10 minute 100 year amount given of 3.98" is actually 4.03" based on the correct location for these figures according to NOAA atlas 14. This is proof that all the numbers used for calculations taken from NOAA Atlas 14 are incorrect and have been underestimated on the application.

The fourth issue relates to weather considerations. The flood of 1997 and the flood of 2017 both took place in January at which time there can be quite a bit of snow on the ground along with freezing temperatures. Often in winter Bryan Canyon Road is barely accessible as being a private road, the county does not plow it. The only access to the berm/dam and pond site is the approximately one plus mile long dirt and gravel road beginning at the end of Bryan Canyon Road which is also usually not accessible during the winter months. Also, the dirt and gravel road runs along the creek in some places and was washed out by flooding in 2017 and a reoccurrence of that situation could also make getting up to the berm/dam and pond location impossible. Also, it doesn't seem as though any consideration been given to the possibility that the pond and standpipe could be frozen during a storm event such as in 2017 and how that may affect the ability of the dam to withstand such storm conditions and not be compromised. Additionally, because the applicant presents an address located in Scottsdale, Arizona, on the application and that there is no requirement that the berm/dam be inspected, maintained or monitored at any time, it would seem that it is only a matter of time before a berm type of structure fails. The residents on Bryan Canyon Road will only know about it when the flooding hits the neighborhood and that entire scenario is contrary to the Legislative Declaration NRS 543.170 sited above.

The fifth issue relates to the applicants integrity. Question #6 on the application asks; "What are the anticipated negative impacts or affect your project will have on adjacent properties? How will you mitigate these impacts?" Answer; "No negative impacts are anticipated with this request." This again is shows blatant disregard for the neighbors downstream but the fact is that berm/dam failures are never anticipated until it is too late, but they still happen. Also, the question on SV.2.16 ask about the issuance of the permit being detrimental to the public health, safety and welfare or being injurious to the property or improvements of adjacent properties or detrimental to the character of the surrounding area. The applicant's answer is "The request would compliment the surrounding area and not be detrimental to the character of the surrounding area." The applicant fails address the health, safety and welfare or the injurious parts of the question which once again demonstrates blatant disregard for the residents of Bryan Canyon Road. Also, being that the applicant has submitted this application in a quid pro quo type of offer should be considered insulting and infuriating to Washoe County due to the fact that he has put the county off for all these years and now comes back with this proposal as a plan to get what he wants from the county is wrong and should not be allowed. Also, it is unfair that the residents of Bryan Canyon Road who have built or bought their homes here without having to worry about the

possibility of flooding as a result of a berm/dam and pond constructed with no safety measures in place, and located less than a mile uphill from the locations they found suitable for their homes now face a new unforeseen threat to the safety of their lives and property looming in the form of a berm or dam and one acre pond upstream. I would have certainly thought twice about buying a home here on Bryan Canyon Road had there been a berm/dam and pond located approximately 4,800 feet up hill from it. Due to the fact that the applicant's previous decision to illegally attempt to construct an even larger berm/dam and pond at the same location on his property intentionally chosen to be concealed from the public and officials only adds to my doubt that the application's omission of seismic information, use of out-of-date FEMA information and the use of misleading rainfall numbers based on an false location wasn't done intentionally in order to mislead as well as minimize the negative implications this information would have shown.

In conclusion, it is my opinion that Washoe County Planning and Building Division must deny the Special Use Permit application case # WSUP24-0015 because the applicant is attempting to use a tactic of conditionally offering to perform the county ordered restoration of the illegal excavation work done in 2020 only if he is permitted to construct his berm and pond project under the guise of maintaining his questionable water rights which require an accepted beneficial use. Also, the applicant is attempting to use water that he may not have rights to and even if he does, the right is for irrigation and not a pond which are issues to be decided by the State Engineer before the county can consider issuing the SUP. Further more, the following issues compound the threat of flooding posed by this proposal and show other problems with the application. The subject of earthquake threats was not covered even after revealing there are active earthquake faults at the location of the proposed berm/dam and pond which is approximately 5,000 feet away from the southern end of the Mount Rose Fault Zone and that the application stated it would discuss seismic considerations, but failed to do so. Also because the proposed site is approximately 5000 feet upstream from a pre-existing FEMA code A flood zone indicating an area of high flood risk, and that the applicant provided inaccurate and out-of-date FEMA map information to describe flood risk on the proposed site. Additionally because the application provides incorrect NOAA Atlas 14 information used to calculate important information in regard to estimated rainfall amounts for the site of the proposed berm/dam and pond resulting in understated calculations. Also due to the fact that the proposed berm/dam will be unattended and at times inaccessible in an area that has a history of flooding. Also a lack of integrity on the part of the applicant compounds the threat of flooding because the applicant through his previous illegal attempt to construct an even larger berm and pond, and now by submitting an application seeking a conditional approval that contains incomplete answers, missing information and false information has demonstrated that he is not trust worthy and lacks the integrity to show respect or regard for the requirements and regulations of the state and county as well as for the interest of the residents of Bryan Canyon Road regarding the threat of flooding posed by the applicants desire to construct a one acre pond contained by a berm with no other safety measures considered or planned. The fact is that the applicant stands nothing to lose and the residents downstream from his property have everything to lose and also the residents have no recourse in the event of a flood

Lastly, it is not fair to the existing home owners on Bryan Canyon Road and particularly the 4 in close proximity to Bryan Creek to introduce a new threat to their properties and well being which they had not been able to consider when they decided to purchase property there.

I appreciate you taking the time to read my comments and concerns which I would not have been able to voice otherwise in the time allowed at the public hearing.

Sincerely,



Lee K. Gardiner

Washoe County, NV

A new service request has been filed.

Service Request Details

ID 176663

Date/Time 12/3/2024 4:31 PM

Type Planning Commission/Board of Adjustment

Address 7335 Franktown Rd, Carson City

Origin Control Panel

Comments Special Use Permit Case Number WSUP24-0015

Per Exhibit A, page 15, paragraph n, the county states that "Prior to issuance of the first building permit, the Owner shall provide a hold harmless agreement to Washoe County, removing any liability held by Washoe County should any damages to any property or individual be caused by any failure of this dam." As the county is putting all liability as to property damages caused by the failure of this dam, I would request that the owner maintain a \$10,000,000 liability policy for the entire time the dam is in place.

John Carey
7335 Franktown Rd.

Submitter CAREY, JOHN A
7335 FRANKTOWN RD
CARSON CITY, NV

Washoe County, NV