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REPLY TO: Spearfish Office

*From the offices of Thomas E. Brady
e-mail address: tbrady@lynnjackson.com*

June 17, 2020

Via Email

Lawrence County Commissioners
commissioners@lawrence.sd.us

Lawrence County Auditor
bmcgrude@lawrence.sd.us

Re: Black Hills Forest Acres, LLC Petition

Dear Lady & Gentlemen:

I continue to represent Whitewood Forest Acres Road District. I submit this written information and comments because I am unable to personally appear at your June 23, 2020 Commission meeting.

At the June 9 meeting, I made inquiry as to whether there was a profile and cross section design for the proposed 24 foot road to be constructed pursuant to Lawrence County specifications and typical detail. At the June 16, 2020 viewing, I again made comment about the need for centerline profile and road cross sections but was advised by Black Hills Forest Acres (BHFA) that the "details" would be worked out later. That appears to me and I trust appears to you that BHFA has their cart ahead of their horse by asking the Lawrence County Commission to open this isolated portion of a section line without providing to you the engineering information that we believe will demonstrate the construction of a road at that location cannot be accomplished within the 66 foot section line right of way. Such are "details" that should be known in advance before sending all of the affected parties to retain attorneys, to review legalities, to attend meetings, and to evaluate options that will need to be pursued should this section line be opened by the Commission without anyone knowing with certainty that a road could ever be built at this

location. The Road District requested BHFA to provide this information and BHFA decided to file the Petition instead of providing this essential information.

Upon reviewing the site, it is readily apparent that to construct an intersection with Aspen Way will require substantial excavation so that the proposed road will meet the elevation of the existing road. This is all within the jurisdiction of the Whitewood Forest Acres Road District.

Not only would a road need to be built within the 66 foot right of way, but water drainage would also need to be addressed. Obviously, when you construct a road surface and roadway, significant additional runoff and collection of water will be generated that would otherwise be absorbed into the existing undisturbed soils. The runoff from a significant portion of the west side of the proposed road will end up in Mr. Fred Bourne's back yard. It does not appear that a road grade would allow the water to be carried all the way to Aspen Way on the west side. On the east side, the additional drainage water can be carried all the way to Aspen Way. But the problem then is the drainage structures that will need to be constructed to get the balance of the water from the west side and all of the east side water either combined before it crosses Aspen Way or for it to cross Aspen Way and to deal with it afterwards. This creates numerous problems to include whether or not there is a need for a detention pond and if so, where? Obviously, additional easements beyond the road right of way will be required to deal with water drainage. If this road is built on this proposed section line, water that does not go on Fred Bourne's property is going to end up on Whitewood Forest Acres Association property. No one, even including BHFA, has the right to change or alter water drainage or the flow of drainage from their property to property at a lower elevation without appropriate drainage easement rights being acquired.

BHFA claims that a portion of their 1,200 acres is isolated and cannot be accessed from any other location of their 1,200 acres. Yet, BHFA represents that this access will serve 1,200 acres. It cannot be both. If this access serves their entire 1,200 acres, then they must have access somewhere else to their property. The Lawrence County GIS maps clearly show trails all over their property. If there are trails, then roads can be built, albeit maybe a longer route and maybe a more expensive route. That does not make the property isolated.

There is obviously a dispute between BHFA and their neighbor, the Rath family. Upon information, the Rath family acquired the adjoining parcel of property from Tommy Thompson prior to the time BHFA acquired their holdings from Tommy Thompson. Thus, they both had a common prior owner, Tommy Thompson. The existing and partially improved road grade located to the east of the section line is a far more practical location for a road, which road has existed before acquisition by Rath and BHFA of their respective properties. The Raths have a drawing where there is a proposed 66 foot wide easement at that very location which, upon information, is actually agreeable with the Raths subject only to fair and equitable considerations. Further and upon information, BHFA terminated negotiations with Raths and elected to file this Petition instead.

I do not represent the Rath's nor BHFA, but as Deputy Bruce Outka advised the Commissioners, with which I totally concur, when there is a common prior owner and the property is divided, there are legal concepts of implied easements and easements by necessity which may well apply to the existing road to provide access to the BHFA property. Also, and upon information, Clarence Rath (now deceased), who originally bought the property from Tommy Thompson was a 19% owner in BHFA. Upon information, that existing road was intended by Clarence Rath and BHFA to be the access route to BHFA property. There is an apparent dispute between those neighbors. They have not litigated their disagreement to determine the status of access.

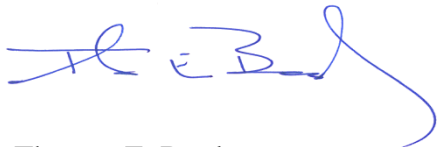
It seems inappropriate that BHFA should draw the County Commission into their dispute with the Rath's; and certainly, BHFA should not be allowed to impose economic hardship or damages upon the Whitewood Forest Acres Road District, the Whitewood Forest Acres Association or any of its members, to include Fred Bourne, who bought Lot 1 from BHFA to solve BHFA's problem that BHFA created.

In due respect, I would suggest it would be improvident on the part of the County Commission to open this few feet of a section line that will not be acceptable to any of the adversely affected parties who will then have to look at their respective legal options.

This is especially true when BHFA cannot demonstrate that a road with drainage can actually be built at the proposed location. BHFA cited SDCL 31-22-1 to claim that their property is not an isolated tract because their property adjoins a section line. But the last sentence of that statute provides that a passable road must be able to be built within the adjoining section line. BHFA needs to first prove such a road can be built. If not, then their property is "isolated" if they cannot access it from their own property or pursuant to easements that exist across the Rath or other property.

Respectfully submitted,

LYNN, JACKSON, SHULTZ & LEBRUN, P.C.



Thomas E. Brady

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