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**From:** [Ted L. McBride](#)

**To:** [councilgroup@rcgov.org](mailto:councilgroup@rcgov.org)

**Sent:** Wednesday, March 30, 2005 10:52 AM

**Subject:** Layout Plat and Variance Request for Fitzgerald and Miller/ April 4 Meeting

My name is Ted McBride and I represent Jonna Fitzgerald and Teena Miller, two women who grew up in Rapid City as Jonna and Teena Whalen. Their father, John Whalen, purchased a tract of land more than forty years ago, consisting of just under forty acres that lies on the west edge of the City of Rapid City. My clients became the owners after their father's death.

This parcel is south of South Canyon Road, west of Berry Pine Road, and east of Westberry Trails. It borders the city limits on its north, east and west sides. A spectacular canyon running from the west to the east bisects the tract, making the approximately 9.96 acres on the north inaccessible from the southern portion of the tract. Neither the northern nor the southern portion of the property currently has access to it.

Over five years ago Jonna and Teena began the process of attempting to gain access. The property is touched by section lines, but the ruggedness of the area makes these approaches impracticable. Pursuant to the South Dakota Isolated Tract statutes they went to the County Commission to seek access. The County's decision was appealed and reversed. The second decision was appealed and a settlement reached on the morning of trial with regard to access to the northern tract. The agreement was signed by Jonna and Teena, Pennington County, and Owen Emme and Dr. Arnio, the owners of the land over which access to the northern portion of the tract will be provided. The access is limited to three single family homes, is to follow an existing road to the section line, and be maintained by my client's or their successors. The Circuit Court Judge issued an order incorporating the terms of this agreement.

It is this Court order that we are seeking to implement by requesting approval of a layout plat and a variance to the Subdivision Regulations to waive the requirement to install curb, gutter, sidewalk, street light conduit, water sewer and pavement. (The staff recommended that the request to waive pavement be denied, and we have no problem with that requirement.) The Layout Plat proposes that the northern tract be divided into three lots of just over three acres each. The Staff Report recommended that the Layout Plat be approved with a number of stipulations. All of the stipulations are acceptable, except for #9 which recommended that an Exception to allow an easement to serve as access to eleven lots in lieu of four lots as per the Street Design Criteria Manual be denied. The Planning Commission adopted the Staff Report, leaving my client's back where they were over five years ago, with no access to the northern part of their property.

We are requesting that the Council adopt the Staff Report except for the provision denying use of the Court approved easement. Without approval of this easement serving these lots, we are back to square one. In fact, if the Council will not approve the use of the easement, we would ask that nothing be approved of this proposal because it is worthless with this exception. The Staff correctly noted at the Planning Commission meeting that the Street Design Criteria Manual would indicate that the easement rather than public right of way is not the approved method of access. Staff further was correct in noting that their technically correct recommendation was not binding on the Commission or, of course, the Council. For the following reasons we request that the Council alter the Commission decision to approve use of the easement for access to the three proposed lots:

1. If the planning process had been as vigilant forty or fifty years ago as it is now, this tract probably would never have been allowed to become isolated. But it is isolated and after years of discussion, dispute, litigation, and, finally, agreement by the Pennington County Commission, the Circuit Court, a sizeable squad of lawyers, and the landowners most involved, this is the best resolution available. The section line that runs to the

northwestern edge of the tract crosses the large canyon and is not traversable on the southern end. This section line is not passable from the north off of South Canyon Road due to cliff and the fact that a half of it coming off of South Canyon has been vacated and has a structure on it. Obtaining or utilizing public right of way is not possible if only the section line is considered.

2. Owen Emme and Dr. Arnio understandably did not want a public right of way over their land and fought hard to prevent that from happening. The easement is limited to providing access to one existing house, (formerly owned by Dr. Corwin and now owned by James Rowenhorst), and the three proposed lots on the Layout Plat. We do not have the luxury of a public right of way without returning to court and attempting to force one on people who don't want it. This is not consistent with the isolated tract statute, as it encourages resolution of these issues.
3. The three acre lot size is consistent with the City's Future Land Use Plan for this area. Park Forest is also consistent with the other development in the area. There are those who wish, and they may address the Council, that this land should be maintained as a preserve. They have not offered to buy it for this purpose. The Layout Plat, however, comes as close to preserving this land while not depriving the land owner of all beneficial use of their property.
4. We have agreed to all of the other recommendations of the Staff. These include paving, turn around, and development of a Wild Fire Mitigation Plan.

I apologize for the length of this e-mail, but I hope it will save some of your time Monday night. If any of you have any questions, please contact me on my cell phone at 484-1664. Thank you for you time. Ted L. McBride