

**GOETZ, GALLIK & BALDWIN, P.C.**

Attorneys at Law  
The Ketterer Building  
35 North Grand Avenue  
Bozeman, Montana 59715

(406) 587-0618

April 17, 2007

**BY HAND**

Bridger Canyon Planning & Zoning Commission  
c/o Gallatin County Planning Department  
311 West Main Street  
Room 208  
Bozeman, MT 59715

*RE: Bridger Canyon Partners= PUD and CUP Applications  
Thursday=s Hearing (April 12, 2007, at 9:00 a.m.)*

Honorable Members of the Bridger Canyon Zoning Commission:

This firm represents the Bridger Canyon Property Owners Association. Bridger Canyon Partners, LLC, has applied for a Planned Unit Development (PUD), and related Conditional Use Permits (CUP) for property located within the Bridger Bowl Base Area. As discussed below, my client objects to the proposed PUD and CUP applications for the following reasons, in addition to those set forth by it, and other consultants retained by it: (1) the Application is inconsistent with the comprehensive and base area plans which require strict adherence to that comprehensive plan; *see Bridger Canyon Property Owners Association, Inc., v. Planning and Zoning Commission*, 270 Mont. 160, 169, 890 P.2d 1268, 1273 (1995); (2) the proposed conditions set forth in the planning report do not adequately mitigate the impacts of this PUD proposal on the human environment; and (3) in light of the substantial testimony regarding the significant private benefit and little public benefit, the application before you constitutes illegal spot zoning. *See, Greater Yellowstone Coalition v. Board of County Commissioners* (2001), 305 Mont. 232, 25 P.3d 168.

## *I. Introduction.*

It is important for this Commission to remember that the Application before you concerns the issue of zoning B that is approval of potential uses of the property; potential development densities; and potential related impacts on the uses and densities on the human environment. This is not a subdivision application that looks specifically at the details of a proposed development. Thus, the applicant=s drawings of proposed improvements to the real property that could be constructed on the property by this applicant, if the PUD and subsequent subdivision applications are approved, are irrelevant to the issues before you today. Stated another way, when reviewing this application, and imposing conditions of approval, if made, this Commission must consider the maximum build-out and potential uses of the land, and resulting impacts to the human environment that could be achieved through approval of this PUD application.

Similarly, this Commission must remember that there is no guarantee that this Applicant will be the entity that implements the proposed PUD through subsequent subdivision. The entitlements to this property, through the PUD process, like the land to which it applies, can be sold to another developer who is not here before you today.

Third, the term PUD means Planned Unit Development, not “Phased Unit Development.” Thus, when considering this application, this Commission must consider whether the evidence before you establishes that the PUD, in its entirety (and not in phases) meets the intent and spirit of all aspects of the PUD regulations. For example, has this Applicant shown that it has all the water available that is necessary to meet the full build out of this PUD, if approved? Clearly it has not. Such a finding is critical, because the PUD cannot be considered in the phased vacuum proposed by this developer.

Thus, as explained below, it is well within the police power of this Commission to impose upon the applicant the burden of proving and addressing the identified concerns of the County, BCPOA and other impacted individuals, as conditions of approval of this Application. This includes, but is not limited to, a requirement that this Applicant apply for and receive approval for water rights applicable to the entire PUD properties (not individual phases); apply for and receive approval for all waste water permits necessary for the entire PUD properties (not individual phases); and address and mitigate all concerns related to increased traffic on Bridger Canyon Road as a result of this Application. If this application does not address or meet this burden, the Application is properly denied.

These, and related issues establishing why this Commission should deny this Application are discussed below.

**II. *The Give and Take of Planned Unit Developments And the Concern of Unlawful Delegation of the Commission=s Police Power to the Developer.***

As you know, the property at issue is currently zoned under the Bridger Canyon Zoning Ordinance, with uses and densities that differ from the PUD before you. The practical effect of creating a PUD is thus rezoning. A Planned Unit Development District, -- allowed under the Bridger Canyon Zoning Ordinance -- is intended to provide flexibility to development that is often unavailable under traditional Euclidean zoning: "The planned unit development designation is intended to provide for alternative forms of development which may include a density bonus in exchange for development quality that is of significant community benefit." Bridger Canyon Zoning Regulations, Section 31.1 at p. 28 (emphasis added).

This section of the zoning regulations under which this Application is reviewed thus makes clear that increased density is not allowed as a matter of right and that the Applicant must also prove, in addition to strict conformance with the comprehensive and base area plans, that there is a significant community benefit for the PUD. This later requirement dovetails with one of the concerns of spot zoning -- that the proposed change in allowed development under the zoning (essentially a change in zoning) benefits only the property owner at the expense of the surrounding landowners, the residents of the district or the general public. *See, Greater Yellowstone Coalition*, 305 Mont at 239, para. 29 ("The issued presented by the third prong is whether the zoning request is in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public").

However, the same flexibility which is the primary virtue of the PUD, also results in a loss of certainty and a concomitant concern with the misuse or abuse of discretionary authority. PUD=s open the door for situations where the homeowner could unexpectedly end up living next to uses that are inconsistent with the Master Plan. Moreover, the flexibility of PUD zoning may result in misuse by developers. As Rathkopf, in *The Law of Zoning and Planning* states: "[t]he flexibility of PUD zoning may result in misuse by developers and abuse of discretionary authority by a municipality's governing agency." 5 *The Law of Zoning and Planning*, Section 88:1 at 88-10.

Because of these risks, it is critical for this Board to incorporate standards to protect against arbitrary actions, and prevent developers from using the PUD ordinance to circumstance zoning regulations. The flexibility of PUD zoning will not be hindered by the imposition of such standards, instead, the standards will Aensure that a [commission=s ] discretion under a planned

unit ordinance will be guided by proper considerations, and that a benchmark for measuring the [commission=s ] action would be available in the case of subsequent judicial review. *See Tri-State Generation and Transmission Company v. City of Thornton*, 647 P.2d 670, 678 (Colo. 1982).

Not only should the Board impose such standards, courts generally require that standards be incorporated into a planned unit development ordinance, in order to protect against arbitrary state action in violation of the right to due process of law. *Tri-State Generation and Transmission Co. v. City of Thornton* (1982), 647 P.2d 670, 678 (Colo. 1982).

***III. The PUD Is Inconsistent With The Existing Master and Base Area Plans and Will Have an Adverse Impact on the Surrounding Area.***

***A. The Applicant Is Not Entitled, as a Matter of Right, to any Amount or Types of Development Under the PUD. The PUD Must Strictly Comply with the Master Plans.***

The primary goal of the PUD application process is to ensure that the proposed PUD will comply with specific standards and conditions and will not have a negative impact on the surrounding area.@ Rathkopf, ' 88.5, p. 88-25. A fundamental requirement is that the PUD complies with the general intent of the comprehensive master plan and the general zoning ordinance of the [area at issue]. *Id.* In the case of *Bridger Canyon Property Owners' Association, Inc. v. Planning and Zoning Commission*, 270 Mont. 160, 169, 890 P.2d 1268, 1273 (1995), the Montana Supreme Court held:

Once a General Plan (master or comprehensive plan), which is part of a development pattern is adopted, the Commission must substantially comply with the planning document. We further conclude that in order to effectively plan for the development of a planning and zoning district, the planning documents which comprise the development pattern must be internally consistent as well as consistent with companion planning documents.

*Id.* (emphasis added).

The *Bridger Canyon* standard of “substantial compliance,” according to land use authorities in the United States, “seems to call for fairly strict adherence to the dictates of the existing comprehensive plan. Rathkopf at 88-38.

As you know, not only is there a Bridger Canyon General Plan and Development Guide, but also a Base Area Plan. The Base Area Plan makes clear that the need for a plan to guide development in the Base Area was recognized as early as 1971. *See* ABridger Bowl Base Area Plan, @ at p. 3. In 1978, the ABridger Bowl Base Area Conceptual Plan @ was prepared, and was officially adopted in 1979. Thereafter, through the mid- to late nineties, the update was undertaken of the ABridger Bowl Base Area Plan @ at the request of the Bridger Canyon Planning and Zoning Commission. The purpose of the Plan, of course, is to provide information to guide your decision making, and to set forth policy direction to respond to the special needs, problems, and future development of the Base Area. The Bridger Canyon Zoning Regulations provide the framework for implementation of this Plan. In other words, the Zoning Regulations are subservient to and designed to implement the ABridger Bowl Base Area Plan. @ The ABridger Bowl Base Area Plan @ is, thus, an extension of the General Plan, and gives direction to the expansion of the ski area and accompanying development, while preserving the character of Bridger Canyon, and remaining consistent with the basic intent of the Bridger Canyon General Plan. As the Bridger Bowl Base Area Plan states: “A plan for the Bridger Bowl Base Area should reflect many of the same goals and objectives as the Bridger Canyon General Plan. In other words, this Plan should be an extension of the General Plan.” Bridger Bowl Base Area Plan at p. 6 (emphasis added).

The PUD Application before you must therefore be read in the context of the Zoning Regulations, the Bridger Canyon General Plan and Development Guide, and the Bridger Bowl Base Area Plan B land use documents that have been in existence for many years and are the product of thoughtful consideration and decisions B documents that cannot be ignored, but instead provide the framework for evaluation and consideration of this Application.

Turning now to those documents, the emphasis of the Bridger Canyon General Plan is to favor the conservation and natural resources, the preservation of open space and agricultural usages, and limited, controlled growth. ABridger Bowl Base Area Plan, @ at p. 5. To achieve this end, the Bridger Canyon General Plan sets forth development criteria for all types of development allowed within the Canyon.

For example, the Bridger Canyon Zoning District has been given a basic density right of one (1) unit for forty (40) acres. Increased density or an increase in permitted uses under a PUD is not allowed as a matter of right. Such changes and mixes of uses

may be allowed under the PUD district, only when the proposed development is consistent with the purposes of the district, is a significant community benefit, and is strictly complies with the comprehensive plans. *See* ' 13.1 (emphasis added).

To these ends, Section 13 of the Zoning Ordinance, which concerns Planned Unit Developments, states that the purposes of a PUD district include:

- < enhancement and preservation of open space and unique natural features;
- < preservation to the maximum extent possible of the natural characteristics of the land, including typography, vegetation, streams and tree cover;
- < protection of various important wildlife habitat;
- < prevention of soil erosion by permitting development according to the nature of the terrain;
- < encouraging development of more attractive sight designs;
- < reducing the cost and physical impact of public and private services;
- < lessening the visual impact of development for preservation of scenic vistas in a rural atmosphere; and
- < preservation of agricultural lands when providing economies in the provision of public service.

The “special definitions” in the PUD section of the Zoning Regulation, in turn make clear that while the uses permitted under the PUD Section of the Zoning Ordinance include “any use permitted in the underlying zone classification, including single family dwelling units, condominiums and townhouses,” the owner or developer of the proposed PUD is not entitled, as a matter of right, to development rights under the zoning regulations, including Section 13 or the Regulations concerning PUDs. Instead the Applicant has only development potential:

Development Rights: The **potential** for the improvement of a parcel of real property measured in dwelling units, existing because of the zoning classification of the parcel.

Zoning Regulations at p. 29 (emphasis added).

Read together, the comprehensive plan, zoning and base area plans constitute a broad delegation of authority to this commission to ensure that the proposed PUD strictly complies with the purposes of the master plans and zoning regulations and if it does not, to reject that Application. These same regulations also establish the authority to impose conditions reasonably necessary to protect the public health and welfare of the district, including the imposition of fundamental conditions that must be met for the PUD, in its entirety (and not piecemeal) before any portion of the PUD may be implemented.

The Regulations also required that the area of land within the PUD be contiguous or share a common boundary. As explained below, this Application fails on this fundamental requirement. Moreover, as the evidence provided to this Commission makes clear, this PUD application is contrary to many, if not most, of the purposes and policies of the comprehensive plans for the district and base area. Finally, it does not provide the significant community benefit that is required by the Zoning Ordinance. These and other issues are discussed below.

***A. All Parcels of Land Within the PUD Are Not Contiguous or Share a Common Boundary Thus Rendering the Application Void and Further Attenuating the Validity of the Transfer of Development Rights and the Proposed Phasing of this PUD.***

Not only must the PUD comply with the Master Planning Documents, it must meet the basic requirements of the Zoning Regulation, that allows consideration of the Application in the first place. The Zoning Regulations require that multiple parcels of land controlled by a landowner to be developed as a single entity under the PUD procedure, must be contiguous or share a common boundary. Section 13.2.f. states:

Planned Unit Development: An area of land, controlled by a landowner to be developed as a single entity for a number of dwelling units, the Plan for which may not correspond in lot size, bulk or type of dwelling, density, lot coverage and required open space to the regulations established in the underlying zone. Multiple parcels within a Planned Unit

Development must be contiguous or share a common boundary.”

(Emphasis added).

It is a fundamental canon of statutory and regulatory construction that the word *must* is mandatory and does not leave room for discretion. Clearly, this Application falls short of that standard, and no request for relief or a variance from the provisions of this requirement have been made.

This in turn raises the issue of the validity of the transfer of development rights. While the zoning regulations allow for the transfer of development rights within the boundaries of the Base Area, they can be transferred only with the procedures set forth in the zoning regulation. *See*, Base Area Plan at p. 9. Under Section 13.10 of the zoning regulations, development rights may be allocated or transferred through the application of the PUD process. *See* Sections 13.9.e. and 13.10.4. Thus, the efforts to transfer density rights from non-contiguous areas under the guise of a defective PUD is improper.

It is counsel's understanding that it was considered in the best interests of the overall project and the subsequent review process, to consider the Application as one (1) PUD, although the land at issue does not share a contiguous or common boundary. In this fashion, it is argued, the cumulative impacts of the entire PUD can be reviewed and conditions imposed for the entire project, and not separate PUD applications.

Without waiver of the objection regarding the lack of continuity in the PUD's property boundaries, the Staff's recommendations with respect to allowing review of the entire PUD application -- notwithstanding the clear defect -- could work only if this Commission (ignores the language of the zoning regulation and) imposes conditions that are commensurate with the entire project, and not allow the developer to circumvent the requirements of zoning through the PUD and then further circumvent the requirements through the *phased* development of the PUD that this Applicant proposes.

For example, a critical issue for this area (and Gallatin County and Montana in general) is that of water and wastewater disposal. While the PUD is intended to provide and allow for density bonuses as part of an overall comprehensive plan, the Planning Department's recommendations, with respect to conditions for the PUD approval in this case, fall short of ensuring that water is of sufficient availability to service the entire PUD at full build-out without having a detrimental effect on neighboring landowners, particularly if this Commission allows for the phased development this Applicant



proposes. The same is true with respect to wastewater systems.

The evidence at the hearing has shown that issues presently exist with respect to water quantity and quality. A number of streams in the Bridger Bowl area have been classified as Aimpaired streams.@ As stated, under the PUD process, the developer is given the opportunity to have increased density by having the density as part of an overall scheme. Here, of course, there are three (3) proposed phases to the proposed development, and it is criticalBif not essentialBthat this Commission (if it=s going to consider some version of this proposal) require that the DEQ review and approve a water rights application based upon the entire PUD, and not various phases of the PUD. Otherwise, the intent and purpose of the PUD, which is (in part) to provide an overall benefit to the community based upon the entire Planned Unit Development, not phases of a Planned Unit Development, will be thwarted.

It could be that there is sufficient water and wastewater facilities available for Phase I, but that Phases II and III, for example, cannot be supported by existing water, and, therefore, it is the developer who gains, and the community who loses. Keeping in mind the overall intent and purpose of a PUD, which is to provide flexibility, while at the same time providing a community benefit, the issue of water rights and wastewater treatment systems cannot be parceled out into phases, as this developer proposes to do. This applicant must be able to show that existing water is adequate for the entire PUD, not just Phases of the development.

Also, on the issue of phasing, the next issue is that of build-out of the various phases. Again, this Commission, in the proper exercise of its discretion, should condition approval of the PUD to require that the developer engage in proportional construction of all phases of the development, so as not to pick the lowest hanging fruit and then walk away. In other words, there needs to be assurances from this Commission, with significant conditions imposed to ensure that the developer will do as it proposes with the entire PUD, not simply one or two phases. The concern is that the Applicant will complete Phase I, where the most profit likely is, and then walk away, only to have a partially completed PUD, and leave the rest of the project to some other individual who may or may not follow through, or come in with a different plan.

In the book, *Planned Unit Development*, by Robert Burchell (available in the Library of the City of Bozeman Planning Office), the author notes that the tempo and sequence of development in a PUD are important issues, that impact not only the residents in the area, but also the governing agencies. He notes that controlling the tempo

of development can be accomplished through standards of how much of the development may be accomplished and the sequence of development may be controlled by setting specific percentages in the local PUD ordinance for the various residential, commercial and industrial land uses, and “requiring that the development for subsequent stage approval, continue to demonstrate a favorable local revenue-cost relationship. He cites, for example, to a PUD in New Jersey, that employed such an approach. In terms of both tempo and sequence requirements, taking a four-stage (25 percent increment) procedure, for example, if a developer wishes to construct 3,000 housing units, the municipality is assured that he must build self-contained sections of approximately 750 residential units each, while providing ample square footages of industrial and/or commercial facilities to generate sufficient taxable assets to cover the municipal and school costs of each of these land uses.” *Id.* at p. 92.

Section 13.7 of the Zoning Regulations addresses, in part this issue. It requires that if the “sequence of construction of various portions of the development is to occur in stages, then the open spaces and the recreational facilities proposed for the entire development shall be developed, or committed thereto, in proportion to the number of dwelling units constructed. At no time during the construction of the project shall the number of constructed dwelling units exceed the overall density per acre established by the Land Use Intensity Factor.” (Emphasis added).

The issue of phasing also raises the issue of traffic. As the planning documents for the area at issue make clear, a critical issue was the balancing of base area development with increased traffic on Bridger Canyon Road. A critical intent of the plans was to limit traffic on the road, by allowing for the construction of overnight accommodations and related facilities at the base. This Application does little to address the issue of traffic and by allowing the phasing of a complex PUD that will have a significant impact on the human environment, as well as traffic on the Road, there is significant potential for short term developer gain, and long term community (however defined) loss.

If the Commission does not feel it can craft sufficient conditions to address these concerns, then it must, in the proper exercise of its discretion, reject this PUD application because it cannot reasonably assure that the community benefit that is a requirement of a PUD is or may be met.

***B. The PUD Turns the Master and Base Area Plans on Their Heads.***

First, the goals and objectives for the Bridger Bowl Base Area that have been adopted by this Commission, are set forth at pp. 7-8 of the Bridger Bowl Base Area Plan. Attached as a map to the Base Area Plan is the suggested land-use legend. It is instructive to compare Map 8 of that Plan with the PUD proposed by this applicant. As you can see, the area intended for recreational use under the Base Area Plan is now intended for housing. In other words, the PUD has turned the Bridger Bowl Base Area Plan on its head.

Similarly, where it was previously determined, based upon geological studies, where housing should be constructed in the base area, including overnight and commercial development, the Applicant has, instead, designated that to be so-called open space, while, on the other hand, intensifying development in those areas that have been designated long ago as areas that should be preserved as open space and recreational property.

Again, while the PUD allows for flexibility, it is not a grant of authority to ignore the Planning documents under which the development must be reviewed.

The testimony of experts and the residents in the district also make clear that this Application is inconsistent with the Master Plan and Base Area Plan. This Application, at best pays lip service, to the comprehensive plan's development requirements and guidelines. Under the requirements of the Supreme Court decision, in *Bridger Canyon*, this Application is properly denied.

Finally, there is comparatively little evidence of community benefit. At best, we have an applicant who stands to benefit at the expense of the residents of Bridger Canyon, the final issue discussed below.

#### ***IV. The Proposal Constitutes Spot Zoning.***

Finally, the Application and presentation by the Applicant, viewed against the overwhelming opposition by the residents of the district, and their expert testimony, makes clear that the proposal before you constitutes illegal spot zoning. In *Little v. Board of County Commissioners*, 193 Mont. 334, 631 P.2d 1282, the Supreme Court adopted a three-part test for determining whether a land use constitutes illegal spot zoning:

1. Whether the requested use is significantly different from the prevailing use in the area;
2. Whether the area in which the requested use is to apply is small, although not solely in physical size. An important inquiry under this factor is how many separate landowners will benefit from the zone classification;
3. Whether the requested change is more in the nature of special legislation designed to benefit one or a few landowners at the expense of the surrounding landowners or general public. Under the third factor for spot zoning, the inquiry should also involve whether the requested use is in accord with a comprehensive plan.

193 Mont at 346-47, 631 P.2d at 1289-90, cited with approval in *Greater Yellowstone Coalition*, 305 Mont. at 236.

Addressing the first prong of the test, the evidence submitted to you makes clear that the density and uses allowed under the PUD differs significantly from the zoning designations currently in existence under the Bridger Canyon Zoning Ordinance and the prevailing residential use in the area. The evidence is clear that the PUD designation allows for a broader range of permitted activities, at higher densities than would be allowed under the existing zoning and significantly different from the prevailing land use in the area. Bridger Canyon is a predominantly rural area, with few commercial establishments. The existing zoning is, as stated, disbursed. This application fundamentally changes all of these facts, and does so within a very small piece of property.

The second issue is the size of the area in which the requested use is to apply. It also includes an analysis of the number of separate landowners who stand to benefit from the proposed change in zoning. *Greater Yellowstone Coalition* at para. 26. The area at issue is small and owned by a single entity. It is undisputed that it is only a single landowner that will clearly benefit from the proposed change. The second prong of the test is thus met.

Finally, the third prong of the test is whether the zoning request is in the nature of special legislation designed to benefit one or a few landowners at the expense of surrounding landowners or the general public. This inquiry should include an evaluation of whether the requested use is consistent with the comprehensive land use plan for the

area. *GYC* at para. 29.

The evidence submitted to this Commission overwhelming establishes that the zone change will harm the surrounding landowners, the residents of Bridger Canyon and the general public. The evidence is clear that the area at issue, as the Base Area Plan makes clear, includes areas of extremely sensitive wildlife habitat and wetlands. The waterways are critical and evidence already exists of some possible impaired streams that cannot stand this type of intense development.

The evidence is clear that the proposed change benefits one landowner – Bridger Canyon Partners, at the expense of the surrounding landowners, the residents of the district and the general public. These people will suffer significant adverse impacts if this proposed zoning is approved.

The evidence is also clear that the proposal is contrary to the goals of the General Plan and is inconsistent with many of the goals and objectives of the base area plan – both of which must be strictly complied with.

For these and the other reasons expressed during the public hearing, we respectfully request that this Commission deny the PUD Application.

Respectfully submitted,

GOETZ, GALLIK & BALDWIN, P.C.

Brian K. Gallik

BKG/pal