Legal & Procedural Issues in PUD Applications

For Discussion
BCPOA, November 29, 2007

BCPOA and BCP have agreed that it would be beneficial to all concerned to resolve the legal and procedural issues surrounding the Bridger Mountain Village application prior to the resumption of public hearings. Toward that end, we present our views regarding some of the past areas of disagreement, and ask what we think are the outstanding questions surrounding this and future PUDs in Bridger Canyon. We hope that this will further discussions leading to a joint road map for the approval process. We use the May 15 Staff Report, "Staff Response to Public Hearing Issues…" as a framework. We have documented concerns about density transfers separately, and will raise any other remaining issues as soon as possible. We are hopeful that discussions with BCP will continue fruitfully, resulting in an improved application and withdrawn CUP, rendering some of these points moot. Until such time as that occurs, we believe it prudent to raise these questions now.

We understand that it is BCP's ambition to implement all changes to the application via conditions, avoiding the review and noticing delays inherent in amending or withdrawing and resubmitting the application. We have shared with BCP our discomfort in this approach, but so far we have been willing to at least entertain the idea, which remains untested until conditions are actually written. Our overarching concern is that implementation of extensive revisions by condition will create a confusing document that is difficult to interpret and enforce, particularly if the project is sold to a third party. We also worry that such an approach would require a loose interpretation of the zoning regulation (as in items 2, 4, 6, 7 and 9 below), setting bad precedents for future PUDs.

1. Spot zoning. As we understand the staff report argument, a spot zoning challenge has to address a revision to the zoning regulation, not a project application. However, the circumstances surrounding this project are unique, because the applicant has proposed a novel interpretation of the regulation that, if accepted, would newly create the conditions for spot zoning. Specifically, in rebuttal testimony on April 17th, BCP counsel argued that the PUD does not need to provide community benefits, because it does not seek a density bonus. The argument hinges on the lack of a specific definition for density bonus in the regulation and an alternative parsing of the introductory sentence in 13.1. It seems to us that the ambiguity must be resolved in favor of a required benefit; under any other interpretation, BCP would benefit from extraordinary density in a small area at the expense of surrounding landowners, and spot zoning would arise by virtue of the facts of the proposal rather than by amendment of the zoning regulation.

- *Must the Bridger Mountain Village PUD demonstrate "significant community benefits" (Bridger Canyon Zoning Regulation, 13.1, Purpose)? More generally, must any PUD demonstrate compliance with the purposes in Section 13.1 and the goals and objectives of the Base Area and General Plans?*

- *If the project does not need to demonstrate benefits, would the Base Area zoning constitute spot zoning?*
- *If the project does need to demonstrate benefits, what kind of information should BCP provide to demonstrate such benefits?*

2. Contiguous parcels. The staff report argues that the PUD is contiguous because it (a) transfers development rights from properties that connect the parcels, (b) includes ski runs on connecting parcels, (c) is connected by roads, and (d) is connected by sewer and water lines.

We understand the county's desire to minimize the fragmentation of plans in the base area. However, the rationale above is at odds with the definition of a PUD as "An area of land, controlled by a landowner" (Bridger Canyon Zoning Regulation, 13.2.f). The intervening parcels are not controlled by the same landowner, and the owners of "connecting" land and infrastructure (Bridger Bowl, Forest Service, Lachenmaiers, etc.) are not parties to the PUD application. Density transfers can occur over any distance, involving parcels that are clearly noncontiguous in any practical sense.[1] If remote parcels may be considered contiguous through legal or infrastructure connections, it stands to reason that the same rationale could be used by future PUDs to skirt the very intent of the 1997 amendment to 13.2.f.

- *What alternative approach, like amending the zoning regulation, could avoid fragmented applications without skirting the letter of the law and opening loopholes for future PUDs?*

3. 660ft. continuous boundaries. As above, we understand the desire to minimize fragmentation, but prefer a solution that conforms to or amends the letter of the zoning regulation.

We are puzzled by the statement that 13 of the 18 Base Area parcels share boundaries shorter than 660ft. Excepting the small lots in Bridger Pines and three or four other very small lots, it appears to us that all of the Base Area parcels, particularly the northern group held by BCP, share boundaries much longer than 660ft.

- If a general standard references an AE-zone number or other requirement, does that automatically preclude application of the standard in other zones? If so, are 660ft continuous boundaries also inapplicable in the RF zone?

4. Approval criteria. We agree that, "The method for considering a Planned Unit Development shall be the Conditional Use Permit procedure." (Bridger Canyon Zoning Regulation, 13.8.a.). Whether a PUD requires a CUP, or is in itself a conditional use, strikes us as unimportant, as long as it is recognized that the administrative procedures of CUPs under 17.3, including expiration, revocation and enforcement, also apply to PUDs, as 13.8 requires. It is evident that this is the intent of the regulations, as 17.3.8.a.(4)(d)

[1] Our analysis of Base Area and Ross Peak Ranch development transfers indicates that the notion of contiguity has been abused in the past to double density transfers from property not involved in a PUD.

specifically mentions planned unit developments as a special case. We note also that past Bridger Canyon PUD applications we have reviewed were presented as "CUP for a PUD".

The approval criteria for a PUD include section 13.5 (Standards for Development), as cited in the staff report, and section 13.10 (Base Area PUD, containing "additional" standards for B-2, B-3, and B-4 zones). 13.10.1.c requires a variety of information which to our knowledge was provided for the Phase 1 CUP but is lacking in the full PUD application. 13.10.3, Use of Reserve Development Rights, includes further standards which we believe have not been met, and perhaps cannot be met until regular development rights have been exhausted. Most importantly, 13.10.1.c references 13.6.a, Procedure, which requires design information that has not been provided for the full PUD. For example, (7)(b) and (7)(f) require "Location, size, spacing, setbacks, and dimensions of all existing and proposed buildings, structures, improvements and utilities" and "Existing access to the project, proposed roads, and parking layout, all with dimensions". Building and site detail is critical for evaluation of impacts and benefits.

Since the Base Area PUD requirements in 13.10 are described as "additional", specifically reference 13.6, and rely on definitions in 13.2, it is hard for us to imagine how a base area PUD can be understood without reference to 13.1, Purpose.

We recognize that it is difficult to provide the level of detail required for a project of this scale. We are discussing with BCP the possibility of providing a general specification of building and site design standards, rather than specific locations and dimensions, but it is not yet clear how to implement such standards in a way that is consistent with the existing regulation, avoids creating loopholes for future PUDs, and provides adequate opportunity for public input.

- *Does 13.10 apply to this project, and does the current PUD application comply?*
    - *Have the criteria in 13.10.3, particularly water and sewer plans, been met?*
- *Does 13.6 apply to this project, and does the current PUD application comply?*
    - *What level of detail regarding roads, buildings, and other items listed in 13.6 is sufficient under the current regulation?*
    - *What kind of design information might serve as an alternative to the building and road specifications required in 13.6.a, and what is the best means of providing for an alternative specification in the district regulations and plans?*
- *Does 13.1 apply to this project?*

5. Benefits to whom? A narrow reading of the statutes cited, 76-2-103 and 107, requires that the *creation of regulations* for a zoning district be beneficial to the county. The language does not require that every individual action of a district specifically benefit the county. If the county saw the creation of a district with language promoting the welfare of Bridger Canyon as a benefit to the county, there is nothing in the statutes to preclude that. A quick internet search of Montana zoning regulations indicates to us that language

promoting the welfare of districts is present in other zoning regulations, including Bozeman Pass. It seems to us that using the enabling legislation for the creation of districts to subject every project to a county-wide benefits test, contradicting the letter of the zoning regulation itself, flies in the face of the spirit of local control embodied in the creation of districts by citizen initiative.

We view this as a matter of principle more than practice. In our minds the county's interests are aligned with those of Canyon residents. We both have a compelling interest in the success of Bridger Bowl, traffic mitigation on Bridger Canyon Road, water quality, and the preservation of the natural features that provide outdoor recreation and tourism revenue.

- *Does the enabling legislation for 101 zoning districts preclude consideration of benefits to the district?*
- *If so, is PUD review the appropriate venue for de facto revision of the regulation, or should the commission first amend the regulation?*

6. Insufficient submittal. See item 4 above.

- *Does the presence or absence of a simultaneous CUP application somehow render some or all of the PUD standards and procedures in 13.5, 13.6 (especially a.(7)(b)), and 13.10 inapplicable?*

7. Accessory uses. So far as we can determine, the description of accessory uses still does not meet the level of detail required in 13.6.a(7)(b) and elsewhere. In any case the description of accessory uses provided in the February 13 Prugh and Lenon memo attached to the May 15 staff report was not available in the application file when BCPOA sought it in April, preventing timely review for public comment. The accessory uses described are not insubstantial; a 500 square foot detached garage is larger than most hotel rooms and many rental cabins.

- *What level of detail is required for accessory uses, and when must it be provided?*

8. Construction timing. BCPOA's concern is not that BCP will illegally begin construction work in absence of permits. Our concern is that BCP will subsequently apply for approval for water and sewer capacity in phases. As the original application was designed, Phase 1 (not desirable by itself) could be approved in isolation, then subsequent applications for Phases 2 and 3 (more desirable) could be denied because Phase 1 consumed all available water and sewer capacity. The original phase design is especially problematic because the bulk of regular overnight density units are consumed in undesirable phases, while the most desirable parts of the project use only reserve overnight density units, and thus are most at risk.

We are currently discussing with BCP ways of specifying phase sequence constraints that could mitigate this problem. Another possibility that we discussed with Randy Johnson in

April would be to make it a condition of approval that BCP apply for water and sewer permits for the entire project prior to proceeding with any phase.

- *Are there other ways, consistent with subdivision and state regulatory procedures, that we might establish beneficial phasing?*

9. PUD modifications. Removal of density is not automatically benign. First, an applicant could easily remove high density accommodations or commercial amenities that are at the heart of provision of benefits. Second, BCP stated in testimony that the 21 units eliminated from the meadow might be moved to another phase or location, without providing any details as to their destination.

- *What constitutes a significant modification to the application, deserving of review and public comment?*