

4/9/2013

To: Bridger Canyon Zoning District commissioners and officers

From: Bridger Canyon Property Owners Association

Tom Fiddaman, Chairman;

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With Deb Stratford, Zoning Committee, and Richard Lyon, for the BCPOA Board of Directors, representing over 200 Bridger Canyon households

Re: Petty Permitting & Enforcement

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The BCPOA board unanimously requested that we detail our serious concerns about the handling of the Petty projects.

We recognize that we did not appeal the closure finding in the Petty complaint; it would have been nearly impossible to do so, as the 5-day appeal period, designed for applicants who would be notified immediately, leaves almost no time to formulate a response after written notice is received by mail.

However, we fear that if not corrected, the faulty reasoning and procedures leading to the current state of affairs will permanently undermine the Commission's authority and respect for zoning generally, and cause problems with future projects. We believe that the people of Bridger Canyon are entitled to consistent application of the zoning regulation, and to an explanation where the actions of the Commission do not appear to conform to the law.

There is no disagreement about the facts of this matter. Referring to our timeline below, in September and October the Pettys presented plans for residential conversions of their barns. The Planning Department advised them multiple times *in writing* that permits, including CUPs, were needed for these projects. Nevertheless, the Pettys commenced extensive renovations of the structures without any approvals.

Therefore we pose the following questions:

- On what grounds can a structure remodel be exempted from the requirement that, "No structure shall be built, moved or structurally altered until a building permit has been issued"?
- If the grounds for the exemption is the agricultural lands provision of MCA 76-2-109,
  - How can an accessory building to a residence be considered "agricultural lands"?
  - How can the barns be considered ag exempt, when the Commission, with BCPOA, argued in the Theken case that barns accessory to a residence were not exempt on that basis, winning its case before the Montana Supreme Court?

- If such agricultural exemptions exist, why did the Commission issue a fine for repairs to an accessory building on the Hamlin property, used as a hay shed, when no conversion to residential use was sought?
- Assuming (counterfactually) that ag exemptions might apply, why did the Planning Department not follow its Administrative Policy 2003-01, determining agricultural status on the basis of taxation?
- How can a project, explicitly submitted to the Planning Department as a residential improvement, be retroactively considered agricultural?

We do not believe that any of these questions can be given an answer that renders the course of action to date legal. However, if the Commission believes that we are wrong, we request a clarification, in writing, of the basis upon which it deems us in error.

The Pettys ignored or openly defied the County’s written advice and began renovation of the two barns without permits. Allowing construction to continue on a pretext known by all to be untrue is an open invitation to others to commence construction, later presenting the result to the Commission as a *fait accompli*, and to evade the Commission’s oversight required by the zoning regulations. It encourages disrespect for the Commission and zoning generally. And it does applicants such as the Pettys no favors, rather it may encourage them to take risks they didn’t anticipate or weren’t properly advised about, and for which Gallatin County could ultimately be liable.

The Commission is required by its authorizing statute to apply its regulations as written. BCPOA recently praised the Commission for its adherence to this fundamental principle in its decision in the barn below the M. [Bozeman *Daily Chronicle*, Dec. 14, 2012] Please know that BCPOA expects the Commission to continue this vigilance and similarly to require staff to conduct investigations and render recommendations fully in accordance with the text and intent of the zoning regulations in place.

We elaborate on some of the legal points and document the facts in the Appendix.

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In the future, BCPOA believes that many problems will be avoided if a few simple practices are followed:

- Assume that all significant changes to structures, footprints or uses require permits, per 17.2.
- In cases where there may be an agricultural exemption, require the applicant to demonstrate agricultural tax status and that the structure is accessory to a bona fide agricultural use, and make clear that an accessory structure to a residence is in no way agricultural.
- In cases where structures are nonconforming, consider the restrictions on such projects in Section 14 of the regulation.
- Where multiple or complex projects are planned, conduct a site visit before any construction to identify and prevent any problems that might arise.
- Do not combine multiple structures into a single permit.
- In all cases, where applicants ignore or flout regulations and acts of the Commission’s agents, take nontrivial enforcement actions that deter future infractions.

We thank the commission for its careful consideration of these matters.

A handwritten signature in blue ink that reads "Tom Fiddaman". The signature is written in a cursive style with a large, stylized 'T' and 'F'.

Tom Fiddaman

Chairman, BCPOA

## **APPENDIX - Examining the legal rationale for the Petty complaint**

As we understand it, the logic behind the closure of BCPOA's complaint, with a finding that no violation occurred and no permits are required, is that,

1. Prior to the commencement of construction, the structures were barns
2. Barns are not "residential buildings" and therefore are exempt from setbacks under 6.5.b.
3. Since setbacks do not apply, the barns were not nonconforming
4. Since they were not nonconforming, the limitation of construction and maintenance to 10% of value and prohibition against enlargement do not apply
5. The barns are exempt from permitting because they are agricultural structures

There are a number of problems with this reasoning.

### **Agricultural exemptions do not apply**

Starting at the end with #5, 17.2 specifies that "No structure shall be built, moved or structurally altered until a building permit has been issued by the Planning and Zoning Commission or their agent." There is no exemption for any particular type of structure, residential or agricultural.

In the past, exemptions have been granted in Bridger Canyon for ag buildings on the basis of County Attorney Opinion 1993-17. That opinion only applied to agricultural lands, which may not be regulated per MCA 76-2-109.

More importantly, Judge Salvagni's Decision and Order in Botz/Theken vs. Bridger Canyon P&Z Commission & BCPOA supersedes County Attorney opinion 1993-17, at least in circumstances such as this, where the barn is not on agricultural land and is instead an accessory building to a residence. Judge Salvagni ruled that the MCA 76-2-109 exemption does not apply to accessory structures on residential parcels. He states,

"The application for a CUP characterizes the barn at issue as an 'agricultural accessory structure.' Whether the structure is considered agriculture or recreational, it is not entitled to any special status. It is an accessory to a residence under the Regulations. This does not constitute an illegal regulation of agricultural land under 76-2-109 MCA, because the lands are not agricultural."

See extensive discussion, pages 29-33 (Exhibit 11).

Based on the decision and order in Botz/Theken vs Bridger Canyon P&Z Commission & BCPOA, the exemptions under MCA 76-2-109 for agricultural lands (and therefore County Attorney Opinion 1993-17) do not apply; barns on residential lands are residential accessory structures.

## **Barns that are accessory to a residence are not agricultural**

The basis for Judge Salvagni's determination can be seen in the AE district regulation, 6.2, in which "Barns, corrals and other out buildings and structures accessory to the foregoing uses" are a matter of right. The "foregoing uses" are agricultural or residential. "Accessory" in the zoning (3.1) means "subordinate to" a principal use, conducted in a principal building (3.8). On the Petty parcel, there is no evidence of agriculture, and the principal use is clearly residential. Therefore, as Judge Salvagni reasoned in the Theken case, because the principal (indeed the only) use on the property is residential, the Petty barns are residential accessory buildings. So again, there is no basis for an "ag exemption."

Even if the barns were once agricultural rather than residential accessory structures, such use has expired, per 14.3.c, because there has been no agricultural use on the property for far more than 180 days. Judge Salvagni pursued a similar line of reasoning in his decision, citing *Doull vs. Wohlschlager*.

## **Taxation identifies the Petty property and structures as residential**

Gallatin County has relied on property tax status as proof of bona fide agricultural use, per GCPD Administrative Policy 2003-01. Since the Petty parcel is taxed as residential, and there has been (and can be) no other demonstration of ag use, this exemption cannot apply in this case. This provides further evidence that the barns on the Petty property are not agricultural structures; rather they are residential accessory structures.

## **Setbacks, nonconforming structure restrictions, and other standards in the zoning do apply**

Because there is no agricultural exemption, and no other exemptions to permit requirements exist, 17.2 does in fact apply to these barns, and the extensive structural work underway does require (and from their inception should have required) permits.

Because the barns are residential accessory buildings, point #2 [Barns are not "residential buildings" and therefore are exempt from setbacks under 6.5.b.] also does not hold. Therefore the barns are subject to setbacks. In turn, #3 [Since setbacks do not apply, the barns were not nonconforming] does not hold, and the barns are nonconforming. This means that point #4 [Since they were not nonconforming, the limitation of construction and maintenance to 10% of value and prohibition against enlargement do not apply] does not hold, and hence the barns are limited to their current use, and may not be enlarged (14.4.a) or maintained in excess of 10% of value per year (14.4). Since the work underway surely exceeds 10% of value, it would not be possible to issue a permit for it without a variance.

### **Other, similar situations have been met with enforcement and fines**

On the Hamlin property, in Aspen Meadow, the Commission found that an accessory building, used for hay storage, was in violation, due to roof repairs that were conducted without permits. A fine was imposed [Exhibit 10].

On the Petty property, staff found that the greenhouse foundation had been poured, prior to an issuance of a permit. A fine was imposed [Exhibit 6].

Neither of these cases involved conditional uses, structures that violated setbacks, or were otherwise nonconforming or illegal. Even so, one can hardly fathom how the trivial fines issued have any deterrent or punitive effect.

Yet when major renovation of the Petty barns, non-conforming residential accessory structures, commenced without permits, with announced intent to convert the structures to detached living space, and in spite of written notice from the Planning Department detailing permit requirements, the Commission found no violation.

This juxtaposition of strict enforcement in comparatively benign circumstances with inaction in response to blatant disregard for zoning and the Commission's authority in a complex and consequential situation defies understanding.

## Timeline

- July 6, 2012 Mrs. Petty contacted D. Stratford regarding their plans to incorporate a Guest House and Caretaker Residence on their property. Exhibit 1.
- July 14, 2012: Septic permit # 16628 is approved for 6 bedrooms, including unfinished basement; approved system and drain field per plans moving drain field to approved location. Exhibit 9.
- August 9, 2012: the Pettys apply for permits to remodel the main residence and several outbuildings, adding 2 story 2 car garage (2 bedrooms & Bath 2<sup>nd</sup> floor per plans in file) to main house, a greenhouse and a deck on a barn (L013-023)
- September 7, 2012: PD approves the 2100 sq ft home addition but informs the Petty's the other structures need LUP's to add the greenhouse and deck on the barn. Exhibit 2
- September 10, 2012: Pettys present the application for a "site improvement", the plans include adding a greenhouse to a single car detached garage (shed), renovating barn #1 to include a mud room, bath and laundry on the first floor, and recreational room on second floor, ground floor deck and 2nd floor balcony; barn #2 renovated and converted to guest house with new porch and stone patio (L013-038)
- Mid-September / early October 2012: the Pettys begin construction on the existing buildings and new addition (per a neighbor's email, Notification of change in contractor dated 9-25-2012 and based on what had been accomplished - date range is best estimate). Exhibit 3 & 3A
- October 10, 2012: the Pettys provide written purpose for the proposed outbuildings that includes a definition for Guest House and Caretaker Residence, not consistent with BC Zoning Regulations. Exhibit 4.
- October 11, 2012: The Planning Department advises the Pettys in writing that permits cannot be issued without a CUP. PD sends a letter correcting the Guest House and Caretaker Residence definitions provided by the Pettys and indicates that each needs a CUP; PD also requests more information and the intended use for both barns. ***There is no indication that the Pettys stopped construction upon receipt of this directive.*** Exhibit 5
- November 1, 2012: BCPOA files a complaint for commencing construction without the appropriate permits.
- November 2, 2012: the Code Compliance Officer initiates a complaint and notifies the Pettys in writing

- November 7, 2012: Chris Scott and Nicole Olmsted, GC Planning Department, make a site visit to the Petty property Exhibit 6
- November 15, 2012: Pettys apply for CUPs to legalize construction that was already substantially complete and request variances to encroach into stream setback requirements.
- November 16, 2012: the Pettys remit fine of \$50 for beginning construction on the greenhouse addition without permits; applied to L2013-038 app from Sept 10, not yet approved.
- November 28, 2012: a septic permit is approved to incorporate the greenhouse, rec room bath/laundry and detached dwelling with 1 bedroom/bath/kitchen, supplementing previous permit with adding a dose tank and lifting pump, drain field remains as previously approved. Exhibit 8. Note that, while the septic relocation was presented as a benefit of the CUP, in fact it was a separate project, driven by the addition to the house, and therefore confers no additional benefit to offset the incursion into the stream setback.
- November 29, 2012: the Code Compliance Officer closes the filed complaint and sends written notification to BCPOA indicating that, aside from the greenhouse addition having been started without a permit, the other construction on existing buildings is in compliance with Section 5 of the Zoning Regulations. Exhibit 7.