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To: Bridger Canyon Zoning District commissioners and officers

From: Tom Fiddaman, BCPOA Chairman
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Deb Stratford, Zoning Chair, Richard Lyons, Kent Madin & Chuck Broughton, Directors, BCPOA

Re: Petty CUP and Variance

We would like to express some concerns and comments regarding the pending Petty CUP and variance application, 10600 Bridger Canyon Road:

The complaint, and legality of proceeding without permits

The present discussion is premature, because the complaint was closed in error.

- Staff found that the buildings were structurally altered, and 17.2 clearly requires a permit in that event. No permits have been issued.
- The closure finding did not examine the situation in light of the nonconforming structure provisions of Sections 14 of the zoning regulation.
 - Those provide for minimal maintenance (10% of structure value) only, clearly exceeded by the current construction.
 - They do not provide for change of use from agricultural to residential.
 - The extensive demolition required for remodeling of the structures may exceed the 75% criterion in 14.4.b, forbidding reconstruction, except in conformance.
- If the finding relied on the “agricultural lands” exemption in 76-2-109, that exemption does not apply to accessory structures on residential parcels, nor do permit requirements for agricultural structures constitute an illegal regulation of agricultural lands. See extensive discussion in Judge Salvagni’s Decision and Order in Botz/Theken vs. Bridger Canyon P&Z Commission & BCPOA, pages 29-33. “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.” (Additional excerpt attached.) Note that this decision supersedes and reverses an earlier county attorney opinion upon which the commission has relied in the past, which exempted agricultural structures from permitting (GCA Opinion No. 93.17 Aug 23, 1993). Demonstration of agricultural use would also be required, per GC Planning Dept Policy #2003-01, but has not been provided, to our knowledge.

This was a knowing violation, because owners were made aware of zoning by BCPOA representatives. Perhaps we should first be discussing sanctions. By proceeding without sanctions, we are operating under the bizarre pretense that this project began as a legal repair, and only now has become a

guesthouse/rec room. In fact this has been a major residential project all along, as indicated by the issue dates of the architectural drawings (June/July 2012). Approval would set a precedent that applicants need not seek permits until projects are framed in.

Standard of review

Because the applicants proceeded without permits, it is essential that the application be reviewed de novo, without regard for sunk costs in the project to date, consistent with the commission's opinion in the Theken barn case.

The variance

As the Staff Report notes, a precondition for approval is acquisition of a variance. Therefore we presume that the variance application will be heard first, though the agenda indicates the opposite order.

17.3.1 Variances. Variances from the terms of this Zoning Regulation shall be granted only if it is found that because of special circumstances applicable to the property, including size, shape, topography, location or surroundings, the strict application of this Zoning Regulation deprives such property of privileges enjoyed by other property in the vicinity and under identical zoning classification.

The property contains over 3 acres of accessible level ground between the setbacks from Bridger Canyon Road and Bridger Creek. Therefore circumstances, particularly setbacks, do not deprive the property of any reasonable development opportunity, and there are no grounds for a variance.

The application is for a Conditional Use, not a use as a matter of right, so there is no possibility of deprivation of an entitlement, even in principle.

Apparently the barns were lifted to enable pouring of new foundations, in which case it would have been possible to move them to conforming locations at modest cost, had permits been sought before construction began. Any argument concerning cost, apart from being irrelevant grounds for a variance under 17.3.1, is therefore moot, as the applicant took that risk by proceeding without permits.



Applicant property, showing setbacks from Bridger Creek and Bridger Canyon Road. Undeveloped, level, accessible area between setbacks, west of Bridger Creek, is approximately 3.4 acres.

The CUP

A second precondition for CUP approval is absence of harm or risk, under 17.3.2, “Such permit may be granted only if it is found that the establishment, maintenance, or operation of the use or building applied for will not under the circumstances of the particular case, be detrimental to health, safety, peace, morals, comfort and general welfare of the Bridger Canyon Zoning District.” This application fails that test.

Allan English, representing the Gallatin Local Water Quality District, writes in part, “that the two barns are existing structures associated with agriculture, but the application indicates that the barns will be almost completely rebuilt, or already have been. This could result in a significant increase in the potential for property damage during flooding events, and if all the proposed changes are made, potential for new sources of contamination in the creek during flooding events.” He goes on to say “The proposed rebuilding of the two barns will include installation of a septic/dose tank, sewer lines, propane line, water lines, power line, fencing, a zip-line tower and a new asphalt-gravel driveway, all

within or very close to 100 ft from the creek and potentially within the flood plain. I recommend that a floodplain delineation be required prior to granting the CUP.”

These possible serious consequences are exactly the reason for the existence of setbacks. Preservation of water quality is an explicit goal of the General Plan. It would be irresponsible to set aside the regulations without any evidence of the safety of doing so, nor any measures to mitigate impacts.

The 100ft setback in the zoning regulation is conservative compared to Gallatin County subdivision requirements and best practices identified by Montana FWP, which recommends total setbacks of 300 feet from rivers, with vegetated buffers of 150 feet. FWP recommendations are based on scientific study of actual streamside development. Studies showed, for example, that 90% of vegetative buffers around streams were negatively altered following land use changes, and that smaller buffers suffer more. All drafts of the zoning regulation prepared by BCPOA, GCPD, and the Zoning Advisory board will increase stream setbacks.

The application drawings indicate a fenced yard in the riparian corridor, 15 to 25 feet from the bank of Bridger Creek. This would restrict wildlife movement and encourage disturbance very close to the bank. This means that the actual setback in this project would be at best a little more than half the current zoning requirement, a third the draft and subdivision requirement, and a fifth of FWP recommendations, with almost no vegetated buffer. Streams move, so over time the setback could actually diminish.

The proposed design for the rec room includes a new porch and deck. Enlargement of nonconforming structures is expressly forbidden by 14.3.a. There is no basis for granting a variance for such optional features.

The planned siding is contrary to 15.7.e. “Metal siding shall run in a horizontal direction and shall be lapped.” BCPOA has supported vertical metal siding in the past, reasoning that 15.7.e is aesthetically antiquated. However, this change of exterior material makes the historic preservation benefits of the project somewhat dubious, especially given that interior and structural features have also been removed or altered. Only the envelopes of the buildings remain.

Conditions of Approval

In the event that the application is approved, contrary to the letter and intent of the Zoning Regulation and General Plan, staff recommendations for conditions of approval are generally well drafted and should be adopted. However, two important modifications should be made:

1. The final phrase should be stricken from Condition #1: Guest House and Rec Room condition #1 - The conditional use permit authorizes the use of the Guest House (Rec Room) and shall not be utilized for any other use ~~unless such use is a permitted use in conformance with the Bridger Canyon Zoning regulation.~~ It goes without saying that changes in use must conform to the regulations, and changes in use should not be exempt from review and new permits if necessary.
2. Guest House Condition #6 and Rec Room Condition #7 - state in part “The applicants shall provide the Gallatin County planning Department copies of the GCCEHD approvals (for septic) prior to the use of the Rec Room/Guest House.” This condition should state that permits must be obtained prior to issuance of a land use permit, per 17.2.6.

In addition, conditions should,

- Require a floodplain delineation and mitigation measures prior to issuance of a land use permit.
- Exclude fencing within the setback from Bridger Creek.
- Eliminate the deck/porch and any other features that expand the footprint of the structures within setbacks, as required by 14.3.a.

Conclusion

Because there are no grounds for a variance, this application cannot proceed. There is no discretion on this point. Issuance of a variance requires evidence of deprivation. There can be none, because zoning and topography provide ample developable land outside setbacks, and the application concerns optional amenities.

Even if there were grounds for a variance, given that this is a Conditional Use, the commission must weigh benefits and harm and impose conditions to protect the general welfare. It is hard to see how an appropriate balance can be struck, if even the modest setbacks in the zoning regulation are set aside, given that there is no significant offsetting public benefit. In addition, the project includes additions to nonconforming structures that are expressly forbidden.

Finally, no land use permit may be issued until the appeal period has elapsed and appeals are exhausted (17.3.9).

Respectfully,



Tom Fiddaman