4/11/2013

To: Bridger Canyon Zoning District commissioners and officers

From: Bridger Canyon Property Owners Association
Tom Fiddaman, Chairman;
1070 Bridger Woods Rd, Bozeman MT 59715, tom@metasd.com, 406 582 7608

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

Re: Petty Variances

We would like to express grave concerns regarding the pending Petty variance application, 10600 Bridger Canyon Road.

Should the Commission decide to re-address the merits of Applicants' variance application, the Commission should reaffirm its prior denial.

Applicants have not met the standard set out in either the zoning regulation or Montana law.

- They have shown neither deprivation nor hardship that will be imposed upon them by reason of strict application of the zoning.
- Their new evidence, the flood plain study, demonstrates no hardship. None of their evidence in January demonstrated a hardship.
- The only hardship claimed, in January or now, is an undocumented cry of additional expense. The cost of complying with the law is not a hardship under the statute. Most if not all of additional expense is a self-imposed burden that should be accorded no weight in the Commission's determination.

Instead, we provide evidence that,

- There can be no deprivation or hardship, because the subject property contains ample developable land, unrestricted by zoning.
- Neighboring properties do not enjoy any privileges which the zoning denies to the applicants.
- Granting a variance would harm the public interest.

Standard of review

First, 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.

There are two similar standards of review for variances. Under the Bridger Canyon zoning regulation:

> 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.

And under MCA 76-2-106:

> The board of county commissioners shall have the power to authorize such variance from the recommendations of the planning commission as will not be contrary to the public interest, where, owing to special conditions, a literal enforcement of the decision of the planning and zoning commission will result in unnecessary hardship.

Applicants bear the burden to demonstrate (i) deprivation and hardship and (ii) that these arise from special circumstances and conditions applicable to the property.

If the Planning and Zoning Commission is to be granted due deference, the P & Z recommendation should be honored in nearly every case. The statute should not allow overriding a P & Z recommendation simply because a majority of County Commissioners disagree with it. Otherwise any applicant will view P & Z as irrelevant, contrary to the regulations' and their authorizing statutes' grant of first-instance decision-making power in zoning matters. In its decision P & Z found no deprivation based upon the evidence. "Hardship" should be a far more demanding standard than "deprivation." If the evidence does not justify the first, perforce it cannot justify the second.

In the January hearing, it was proposed that "deprivation" could be interpreted as the inability to replicate nonconforming structures that exist on other properties. By this rationale, the Pettys might qualify for a guesthouse within stream setbacks, if other properties had guesthouses within stream setbacks that existed prior to zoning. There has been no evidence that such structures exist. More importantly, this is not valid legal reasoning. A fundamental principle in Montana law is that a statute may not be interpreted in a way that leads to its defeat. Granting variances on the basis of other nonconforming structures would obligate us to

grant variances for all kinds of oddities that existed prior to zoning, including 1 acre lots. This would utterly defeat the purpose of the regulation, and therefore cannot be sustained.

Montana courts have relied on the same variance standard in a variety of cases, e.g., Lambros v. Board of Adjustment (153 Mont. 20, 452 P. 2d 398 (1969).):

> For the granting of a variance to be valid the following criteria must be met: 1) The variance must not be contrary to public interest, 2) a literal enforcement of the zoning ordinance must result in unnecessary hardship, owing to conditions unique to the property, and 3) the spirit of the ordinance must be observed, and substantial justice done.

Crucially, hardship must not be self-imposed by the applicant:

> The requirement that a petitioner for a variance show that literal enforcement of the existing zoning regulations will result in unnecessary hardship is not met where the claimed hardship is self-imposed. Wheeler v. Armstrong, 166 Mont. 363, 533 P. 2d 964 (1975).

A variance may not be granted where it does not serve the public interest:

> The granting of a variance is not proper where the applicant fails to show that the public interest would be served by the variance. Wheeler v. Armstrong, 166 Mont. 363, 533 P. 2d 964 (1975).

A buyer cannot rely on variances to remedy limitations of land purchased after zoning is in place,

> The denial of a variance does not work an unnecessary hardship on a property owner who bought a parcel of land after the disputed zoning regulations were in place and who knew or should have known that they prohibited the use he wished to make of the tract. Cutone v. Anaconda-Deer Lodge, 187 Mont. 515, 610 P. 2d 691 (1980).

Courts have generally found that financial burdens do not in themselves constitute hardship. In *Arkell V. Middle Cottonwood Board Of Zoning Adjustment*, the court somewhat grudgingly accepted an argument that included excessive costs of construction, but due to peculiarities of a structure and only because of the necessity to accommodate a disabled relative. Here the Applicants identify nothing more than ordinary accessory residential use, with no identifiable hardship to anyone demonstrated.

The principal elements of these standards of review are reflected in Gallatin County's own Zoning Variance Application and Information form, http://www.gallatin.mt.gov/public_documents/gallatincomt_plandept/1zoning/FORMS/ZoningVariancePacket.pdf .

Does the Petty variance meet the standards?

"Special conditions" and "circumstances applicable to the property" do not preclude development

Applicants do not deny (and did not deny in January) that their property would allow these accessory structures outside the setbacks. In fact the uncontradicted evidence submitted in January showed ample space on their property outside the setbacks (and not on the bench across the creek). Applicants' personal preferences on location of their new rec room and guest house carry no weight in a variance application.

The Petty property is very similar in topography to adjacent properties, and larger in size than many; it has a regular shape. It contains over 3 acres of accessible level ground between the setbacks from Bridger Canyon Road and Bridger Creek, which do not require stream or slope crossings for access. Therefore circumstances, particularly setbacks, do not deprive the property of any reasonable development opportunity, and there are no grounds for a variance.

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.

There are no similar "privileges enjoyed by other property in the vicinity"

Applicants have made no showing at all (originally or now) that nearby property owners have been allowed to maintain structures accessory to a residence within the setbacks.

We are not aware of any guesthouse or similar residential use that has been permitted within the stream setback of Bridger Creek in the last 10 years. Referring to high resolution aerial photos, there are no such uses nearby.

- The corner of the first house to the north is about 105 feet from Bridger Creek; the next is set back almost 300 feet. Then Bridger Creek passes a tiny structure at 3 Fiddles Farm, 142 feet distant, and runs for two miles through Taylor's Wytana Ranch, passing only one structure, 200 feet away.

- Structures on the east bank of Bridger Creek are 180 and 450 feet removed from the watercourse.
- To the south, the first property has a barn 130 feet from the creek, and all structures at the second are set back 300 feet. The next residence is set back 170 feet, with a barn at 115 feet.

Any hardship is self-imposed

We refer the Commission to BCPOA's written submission dated April 9, 2013. The timeline (included with that filing, copy in Appendix for convenience) demonstrates why any additional expense to move the barns outside the setback is a consequence primarily of Applicant's "build first, ask permission later" approach to construction, in defiance of the clear requirements of the Zoning regs and explicit notice from Staff. 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. Applicants should not be heard to claim deprivation based upon increased costs now to comply with the law. If this be "deprivation," it is self-imposed.

The variance is detrimental to the public interest

Any request for a variance requires the Commission to weigh an applicant's special circumstances against the public interest. Here Applicants have demonstrated no special circumstances at all other than those substantially of their own making. BCPOA's written submission and today's testimony demonstrate why granting this application would seriously disserve the public interest.

The regulations and Montana case law (e.g., Lambros cited above) interpreting them require the Commission to consider the public interest first and foremost in any application for special treatment or conditional excusal from strict application of the law. The standards for a CUP in section 17.3.2, for example, require the Commission expressly to find 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."

The application is harmful to the moral climate

The public interest on a variance application – not conditional and in substance a private exemption from the regulations - demands no less. Applicants make no argument and present no evidence as to how the public interest will be served by granting the variance they seek. In fact, as stated in BCPOA's April 9 submission, all the evidence, not to mention common sense, indicates that granting this application will reward a scofflaw and breed disrespect for the Commission's authority and for zoning generally.

The variance is harmful to Bridger Creek

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.

Referring to April 11 BCPOA testimony on the determination of eligibility for review, a substantive floodplain study has not been performed. Instead, the applicants cited prohibitive cost and provided a *Design Report* using a study prepared for land 2 plus miles down the road

as a basis for the reports content. The report, by layman standards, seems to fall short in its data analysis and omits property characteristics thought to be pertinent to making a reasonable flood assessment. This is confirmed by Mr. A. English in the attached communication. He states in part, "this report does not provide me with much for answers to my earlier questions, and I am not convinced that there is no flood hazard".

Further, the conclusions of the study appear to contradict photographic evidence, provided by a former owner of the property, that shows Bridger Creek overflowing its banks just upstream of the barns during ordinary spring runoff in the 1980s.

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.

Staff recommend a 50 foot vegetated buffer as a condition of approval. This is admirable, but impractical to create and enforce, as it expects human disturbance around structures to extend for no more than about 5 feet.

The variance does not mitigate effects on views

Observing the setback from Bridger Creek would require structures to be sited closer to Bridger Canyon Road. However, because the property west of Bridger Creek is nearly level, this would make little difference to the visibility of structures. View impacts could be further mitigated with screening vegetation.

Both views from arterial roads and stream quality are protected by objective setback standards. In this case, the structures in question are far from Bridger Canyon Road – over 300 feet, more than twice the standard – but encroach on the stream setback. Therefore view setbacks are not a legitimate reason to violate stream setbacks.

Applicants were, or should have been, aware of zoning

Applicants purchased their property more than forty years after the County adopted the zoning regulation. As citizens they are presumed to be aware of the County's restrictions on land use and construction, and in fact they were expressly advised before commencing construction of CUP, variance, and permitting requirements.

Before seeking the County's permission they proceeded, strictly on their own authority, notwithstanding the County's written notification that permits were required. Rewarding this conduct with the largesse of a variance from regulations that should – absent particular hardship – apply to all District residents cannot be in the public interest.

Under the standard of Cutone v. Anaconda-Deer Lodge, cited above, this means that there is no hardship.

The variance is inconsistent with the General Plan

The Bridger Canyon General Plan (Development Pattern) specifically aims to preserve water quality, and recognizes that development should be limited to be compatible with the natural environment. The variance would relax the standards that implement the General Plan objectives without mitigating any hardship or providing any compensating benefit to the public interest.

Conclusion

Because there are no grounds for a variance, as we have demonstrated, this application should be denied.

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

Respectfully,

Tom Fiddaman

Appendix: Timeline

Refer to BCPOA submission on Petty Permitting & Enforcement, April 9 for supporting exhibits:

- 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 2nd 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.