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To: BC Planning & Zoning Commission

From: BCPOA Board of Directors

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Re: Pierce permitting, complaints and appeal

BCPOA chose not to appeal the recent decisions regarding the Pierce residence in Bridger Canyon, because we felt it would be a poor use of public time and funds. Ultimately, similar approvals might have been achieved through a properly administered process that followed the Zoning Regulation. However, we would like to state our objections to several aspects of the process, and suggest measures that will benefit applicants and their neighbors and avoid similar problems in the future.

1. The application should have been considered as a Variance

A major cause of the problems with the Pierce project is that an essentially complete teardown of the structure was permitted via a regulatory back door, as a remodel that ostensibly preserved 25% or more of the value of the structure. This enabled the project to be considered under the Nonconforming Structures portion of the zoning, rather than as a de novo project. This permitting process relied on an implausibly low estimate of construction costs, and an implausibly high value of retained components of the structure, some of which, including the floor framing, were not in fact retained.

It would have been more consistent with the Zoning Regulation and better for all concerned to have heard the application through the Variance process. That would have provided public notice and the opportunity for neighbors to comment in a public hearing as well as giving full recognition to the scale of the proposed project. Since the entire project lies within setbacks, grounds for granting such a variance would have been obvious. The Commission would have had an opportunity to review, and mitigate if warranted, impacts such as the roof height increase and deck expansion, and to clarify ambiguities in the application.

Most importantly, when construction commenced, had the variance process been used no one would have been surprised. The cost of a hearing would have been small compared to the enforcement and administrative costs of the process that actually transpired.

2. The approval relied on an unauthorized Administrative Determination.

We agree that it is sensible to have an administrative process for resolving complex questions of fact. However, the Bridger Canyon zoning regulation does not provide an Administrative Determination process. Planners may issue permits that are clearly authorized, and all other matters are to pass to the P&Z Commission.

Lack of transparency of the existing Determination process contributed to problems in this case. There was no public notice to neighbors or the public. Administrative decisions, and even the existence of decisions, are not revealed to anyone unless they specifically know to ask. To be effective and fair, not to mention constitutional, the transparency of the Administrative Determination process must be improved. We hope that the administrative update to the zoning will provide for this.

3. Clear evidence about the expansion of the deck was ignored.

The width of the deck was a central feature in complaints about the project. The applicant asserts that it was unchanged, but presented no objective evidence to substantiate this, while tax records, photographs and neighbors' testimony establish that it was previously very narrow.

Here the only evidence that the pre-teardown deck was eleven feet wide on the north and west is the post-construction builder's affidavit and accompanying "field notes," neither of which was submitted to the County until October 27, 2015, four months after the building permit was issued. The Pierces' application approved by the Planning Department contains no drawings or measurements of the original deck. Only one of the drawings that were submitted shows the deck at all; that drawing has no measurement for the deck.

The only photographs in the record, from 2006 tax records, contradict the applicant's claim, showing that the deck was formerly about six feet wide, as found by the Enforcement Agent. This is corroborated by two neighbors' written statements, based upon years of personal knowledge, stating that the original deck was about half the size of the new one.

This dispute over what should be simple facts could have been avoided easily. The applicant should have disclosed, or been asked to disclose - prior to approval - the dimensions of significant features of the drawings submitted. If that implied expansion of the deck, contrary to the Nonconforming Structures provisions, a Variance should have been sought at that time, per our first point.

The evidence for an expansion of the deck footprint, as originally documented by the Enforcement Officer, is compelling. We do not propose that this matter be investigated further, but instead suggest that two principles ought to be followed:

- Omitted disclosures or obfuscation by applicants constitutes a failure to follow the permit process and should result in a denial or delay in approval until reconciled
- When an Agent clearly documents facts, such findings should not be arbitrarily discounted or reversed, even if they imply risk of liability for prior permitting errors. This is a basic principle of administrative law. Moreover upholding the truth is praiseworthy.

4. A deck is a building, or a part thereof.

The Enforcement Agent's withdrawal, on 2/3/16, of a finding of violation relies on the notion that a deck is not a building. This is based on a grammatical error, specifically a misplaced comma. As we have previously commented to the department and commission:

> *In the definition of Building, there is a comma between "support" and "shelter. In the subsequent interpretation, this comma is omitted. Therefore, the interpretation errs in expecting the deck to "support shelter." That would be absurd on its face, because it requires a building to support a building (shelter). The actual definition must be read as "Any structure built for [ support, shelter or enclosure ] of [ persons, animals, chattels, or property of any kind ]. (Brackets identifying the conjunctive groups for clarity.) Therefore the proper test is whether the deck [supports, shelters, or encloses] any [persons, animals, chattels or property]. I believe that it is easy to ascertain from the plain English understanding of a deck that it supports persons, particularly since the files on the project include photographs with people on the deck.*
>
> *Because the deck supports persons and therefore is a building, the subsequent paragraph of the decision must be reversed. There is factual evidence to conclude that the deck meets the definition of a Building, so the deck is a Non-conforming Building rather than a structure, and is subject to setbacks under 6.5.b and to the provisions of 14.4. The expansion of the deck is not permitted, and the LUP is invalid.*

Further, regardless of its status as a building, a deck also meets the definition of "structure", and nonconforming structures are subject to regulation under 14.4.

In spite of the objective nature of this error, the Commission chose to not acknowledge the error and notice of violation was not reinstated, in contradiction to the Zoning Regulation. Nevertheless, it remains true that a deck meets the zoning regulation's definition of a building.

5. Build first, forgive later doesn't work.

We should not overlook the fact that these problems and questions could have been resolved with minimal cost complication had the applicant not commenced construction in contradiction of explicit, written notice from the Enforcement Officer withdrawing a permit that contradicted the regulation. This was a risky act on the part of the applicant that put the Commission in the awkward position of having no attractive recourse in the event it determined against the applicant (either approve the project or tear it down ex post) and dramatically escalated the costs and risks for all concerned. In general, we as taxpayers would prefer that the increased administrative costs of such misadventures be assessed against applicants, not the District. If there is doubt as to whether this is permissible under MSA §76-2-113, we recommend that the County seek the opinion of the Attorney General on the matter.

We are eager to work with the Planning Department and the Commission to make improvements that help to avoid such problems in the future, and sincerely hope that the forthcoming zoning amendments will make administration easier in situations like this.

For the BCPOA board, respectfully,

Tom Fiddaman