

BRIDGER CANYON PROPERTY OWNERS ASSOCIATION

The Board of Directors of the Bridger Canyon Property Owners Association ("BCPOA") submits this memorandum in opposition to the text amendment proposed by The Gallatin County Department of Planning & Community Development. BCPOA intends this memorandum to supplement the submission of Brian Gallik, Esq., on behalf of John and Linda Kensey¹ and BCPOA. Mr. Gallik's submission addresses the Constitutional and legal obstacles to granting the Planning Department's proposed amendment. Here BCPOA focuses on the inadequacy of the review and opportunity for public participation afforded a genuinely serious proposed substantive change in law

1. The Zoning Advisory Committee Should Consider The Proposed Amendment

The Bridger Canyon Zoning Advisory Committee ("Advisory Committee") was established by the Commission in 2010]. Its charge from this Commission included "the role of developing amendments to the Bridger Canyon Zoning Regulations." Since that time it has met countless times and considered countless drafts of the zoning regulation. The Advisory Committee has also held five public meetings in the Bridger Canyon Zoning District to solicit public comment on contentious topics and polled County residents on issues underlying the proposed new zoning. The Advisory Committee expects to present proposed drafts of Sections 3, 6, 7, 15, and 16 of the Regulations for public review this spring.

On December 12, 2018 the County released for public comment its proposed new administrative rules for part 1 zoning districts. According to Erin Arnold, Deputy County Attorney, the draft came after "at least five or six years" of hard work. Eventual approval will require public comment, considered revisions, working sessions, and a public hearing for each district.

Some might say this has taken or will take too long. If there's a problem fix it now. Tedious and frustrating it definitely can be. That however is sometimes the price for participatory democracy. A long lead times ensures a reasonable opportunity for the public – whose interest is at stake – to weigh in. Remember, Part 1 zoning districts are citizen-initiated. MCA § 76-2-101(1). Zoning regulations in such districts should include their landowners' thoughts and preferences. Indeed, it is fundamental that "[p]roperty associations who seek input into the plan surely should be recognized" in the "representation that is reflected in the

¹ On September 26, 2018, the Kenseys filed a complaint with the County, alleging that a Land Use Permit issued to their immediate neighbors, Brady and Jessica Brown, citing Section 14.2. This complaint, which remains pending, was the "catalyst" for the County's review of zoning that prompted the present text amendment.

planning documents and in the process that [leads] to their adoption.” Ziegler, 1 *The Law of Zoning and Planning*, § 14:6 at 14-11 (2018).

Compare the care and deliberation given to these other proposed zoning changes to the process followed by Planning Department here. Without seeking input from the Advisory Committee or two District property owners known to be affected, the Planning Department added its proposed amendment to the Planning & Zoning Commission's agenda together with a batch of other amendments carefully negotiated between BCPOA and the County. When BCPOA requested that the 14.2 amendment be deferred, the Planning Director at first appeared to agree but later requested a decision after a ten-minute hearing before this Commission. BCPOA naturally objected, and the County Commission, to its credit, correctly remanded for a full hearing. Following the County Commission's order BCPOA requested, among other things, that the Advisory Committee consider the matter in the first instance. The Planning Director declined.²

The procedures urged upon this Commission and the public by the Planning Department on this application pay no respect to the due deliberation and the background evidence that the important substantive issues raised by staff's proposed amendment deserve. Which homeowners in the District are impacted? And how? How many other Browns and Kenseys are there? We simply don't know. But they should be given a chance to participate. Is the amendment necessary? Might there be a less draconian alternative? Again, we don't know. The Advisory Committee can consider and address these issues.

2. The Proposed Amendment Is Not Required by the Public Interest

At this writing the Planning Department has presented no evidence of properties potentially impacted beyond summary comments to the County Commission, made no attempt to provide potentially impacted parties with any notice other than published notice, furnished this Commission or the County Commission with any justification for the amendment beyond its own convenience and conformity among regulations in many other [but not all] districts in the County, or otherwise explained why its proposed amendment will serve the public interest, much less is "**require[d]** by] the **public** necessity and convenience and the **general** welfare." [Bridger Canyon Zoning Regulation, § 18.6 .a, emphasis added].

The Planning Department has similarly offered no reason for the ready-fire-aim procedure it advocates. What's the rush? Any administrative advantage can surely wait for development of evidence, by all interested parties, and attention to related legal and policy issues. Those issues are serious, as BCPOA's and the Kenseys' submissions to this Commission and the County Commission make clear. Changing the zoning or any other statute is – or should be – serious

² See email exchange between Richard Lyon, BCPOA, and Sean O'Callaghan, Planning Director, attached as Appendix 1.

business. There may be other means short of a zoning change to meet Planning Department's concerns, whatever those concerns may be. Or the zoning might be changed less drastically.

On the present record this Commission must deny the requested text amendment. The Planning Department bears the burden of proof to demonstrate that it will serve the public interest, *i. e.*, that the citizens of the BC Zoning District and Gallatin Canyon will benefit from it. Undeniably it has not done so. Streamlining or conforming administrative practice is a worthy goal, but that is not the statutory criterion for a zoning change. As said in *Black Citizens for a Fair Media, v. FCC*, 719 F.2d 407 (D.C. Cir. 1983) regarding the role of administrative convenience in weighing the public interest:

"This burden [of proof to demonstrate the public interest] has proven to be substantial. Without a doubt the [proposed rule at issue] makes life easier for both the regulators and the regulated. But the statute imposes this burden, and the Commission is not free to shirk it. *To do so is to place administrative convenience ahead of the protection of the public interest that Congress intended in this regulatory scheme. The Commission's decision to favor administrative convenience is troubling.* The decision indicates that the Commission has . . . lost sight of the fact that a broadcast license is a public trust. The public, as owner of the airwaves, deserves more protection than the Commission's postcard renewal plan provides. The Communications Act mandates this protection in the form of an examination of the programming of each renewal applicant. *This court errs in sanctioning the Commission's effort to shirk these statutory responsibilities.*"

Id., at 435 (Wright, J. dissenting) (emphasis added). So it is here. The zoning statute requires **public** necessity and convenience., not simply the Planning Department's preferences.

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Apart from the merits of any change, the fast-track approach the Planning Department promotes threatens to cheapen the administrative process as much as it ignores the statutory reasons for a zoning change and serious substantive issues it raises. Recommending this text amendment for approval will encourage further attempts to manipulate the zoning for individual advantage.³ This Commission should not countenance it.

³ At the very least the proposed change should not be decided until resolution of the Kensey complaint. The Kenseys deserve a reasoned determination of their complaint under the zoning regulation in force when the Browns started construction and the complaint was filed.

Respectfully submitted,

BRIDGER CANYON PROPERTY OWNERS ASSOCIATION

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