Brian K. Gallik
Jecyn N. Bremer
James P. Molloy

GALLIK, BREMER & MOLLOY, P.C.

Attorneys at Law
777 East Main Street, Suite 203
Post Office Box 70
Bozeman, Montana 59771-0070
(406) 404-1728
brian@galliklawfirm.com
jbremer@galliklawfirm.com
jim@galliklawfirm.com

January 3, 2019

Gallatin County Commissioners
Gallatin County Courthouse **BY HAND**
311 West Main, Room 108
Bozeman, Montana 59715

Re: Opposition to Proposed Deletion of Bridger Canyon Zoning Regulation 14.2 & Request to Remand Proposal to Advisory Committee

Honorable Members of the Gallatin County Commission:

This firm represents the Bridger Canyon Property Owners' Association ("BCPOA") and John and Linda Kensey, members of the BCPOA. Both are adamantly opposed to the recommendation by the Planning and Zoning Commission ("P & Z") to delete Section 14.2 from their zoning regulations. Their opposition is both substantive and procedural. For the reasons that follow, they respectfully request that the proposed amendment be referred back to the Planning Office, to be presented first to the advisory committee, and then presented to the P&Z for recommendation, following a thorough vetting of the proposed amendment and its impact on the Canyon.

As it stands, the proposed Amendment, which first made its appearance in the last 30 days in what has otherwise been years of discussions and negotiations over proposed substantive amendments to the Bridger Canyon Zoning Ordinance, is simply an effort by the County Planning Office to cover its collective tail because it issued a Land Use Permit ("LUP") for a non-conforming parcel of property that should not have been issued under the plain language of Section 14.2.a. of the Regulation. While the owners of the property may have arguments about their reliance upon the County's actions, under the law that does not justify the termination of Section 14.2. Accordingly, this matter should have been

presented to the Advisory Committee, followed by actual notice to those property owners impacted by the proposed amendment, including the Kenseys, and the public. As none of those fundamental requirements has occurred, this matter is property sent back to the Planning Office with direction to submit to the Advisory Committee for identification of properties impacted by the decision, and, depending upon the actions taken, actual notice to impacted property owners, along with notice by publication to the general community. As none of that occurred, the P&Z had no jurisdiction over the Planning Office's request and neither does this Commission.

I.

The Bridger Canyon Zoning District and Ordinance.

Bridger Canyon has the unique and distinct honor of being the first district in Gallatin County formed to regulate and promote growth within its geographic boundaries. The district was formed at the behest of the landowners within the district, an important point to keep in mind. *See,* MCA § 76-2-101, et. seq; General Plan, Ex. A, p. 1 ("A development plan for Bridger Canyon was originally petitioned by area residents.")

Adopted nearly 50 years ago – in 1971 -- the intent of the General Plan and Regulations has been, and remains to this day, to

> **regulate and promote orderly development of the area. Agricultural preservation is a primary goal which is to be accomplished by limiting development to one (1) dwelling unit per 40 acres or one (1) dwelling unit per twenty (20) or ten (10) acres with a planned unit development** except as provided in the Bridger Bowl Base Area. The forty (40) acre minimum lot size, except as allowed through a planned unit development, is based on limiting population so that the capacity of the two (2) lane highway is not exceeded.

Bridger Canyon General Plan and Development Guide, Exhibit A, p. 21 (emphasis added); *accord*, Bridger Canyon Zoning Regulation, Section 2.1 ("Purposes")

Section 14.2 of the Bridger Canyon Zoning Regulation furthers this primary goal, and has furthered that goals, since the time of its adoption, by imposing

limitations on building sites which did not conform to the General Regulations as of the effective date of the ordinance in 1971:

> **14.2 <u>Building Sites Which do Not Conform to the General Regulations</u>.**
>
> a. In any district, notwithstanding other limitations imposed by this Regulation, structures permitted in said district may be erected on any single lot of record on the effective date of this Regulation. Such lot must be in separate ownership. A lot of record that does not meet lot area or lot width requirements must still meet other requirements of the district. <u>If two (2) or more lots and portion of lots with continuous frontage in single ownership are of record at the time of adoption or amendment of this Regulation, and if all or part of the lots do not meet the requirements established for lot width and area, the lands involved shall be considered to be an undivided parcel for the purposes of this Regulation</u>. Where lots are larger than required by this Regulation, said lots may be subdivided into smaller lots except no parcel may be divided so as to create a lot smaller in lot width or lot area than required by this Regulation.

(Emphasis added).

"Zoning and subdivision ordinances establishing minimum lot sizes, and minimum width or frontage of lots upon which a dwelling may be erected, have generally been upheld as a means of regulating density of population and assuring sufficient light and air to the inhabitants of buildings." Ziegler, 3 *The Law of Zoning and Planning*, § 49:2 at 49-3-4 (2018 ed) (citing cases). Ziegler explains the public purpose for regulations, like Section 14.2, as follows:

> Minimum lot size specifications are the means most often relied upon to control the density of population within the community, since the greater the amount of land that must be devoted to each single-family detached dwelling, the fewer dwellings that can be constructed within the community. <u>In addition to controlling density of population, specification of a minimum lot area is considered to promote the general welfare in that it tends to create a uniformity of lot size in a given district, avoiding the incursion of narrow or undersized lots which would be inconsistent with existing development and which would result in the erection of inharmoniously sized structures</u>. It was

> commonly thought that the values inherent in the existing development of a residential area would be adversely affected by the sporadic development of smaller lots, since the character of a residential development is determined by the size of the house as well as by size of lot.

Id., § 49:3 at pp. 49-4-49-5 (emphasis added). Other public health and safety reasons for this substantive provision exist, as it is in furtherance of the fundamental goal of the Bridger Canyon Zoning Ordinance, as explained above. *Id.* at 49-5-6,

Thus, contrary to the Planning Office's position, Section 14.2 of the zoning regulations is a substantive provision of the zoning regulation, not an administrative regulation, the latter of which are located in Section 18 of the Bridger Canyon Zoning Regulations appropriately titled: "Administration." *See*, Regulations, § 18 ("Administration"), pages 63-71. Its argument before the P&Z that the requested change is simply administrative, and because Bridger Canyon is (it claims) the only district in the county with such a provision and thus transforms a substantive regulation into an administrative provision, is thus fatally flawed.

II.

The 2010 Creation of the Bridger Canyon Zoning and Advisory Committee & Its Proposed Changes.

Consistent with the citizen-initiated Bridger Canyon zoning regulations, the Bridger Canyon Planning and Zoning Commission created in 2010 the Bridger Canyon Zoning Advisory Committee "*with the role of developing amendments to the Bridger Canyon Zoning Regulations*." *See*, Exhibit B, Memorandum from Christopher Scott, Planner, to Bridger Canyon Planning and Zoning Commission, dated June 8, 2017 at p. 1, ¶ 3 (emphasis added). Planner Scott writes:

> Over the last 7 years the Advisory Committee met with the Gallatin County Planning Staff on a regular basis to propose comprehensive amendments to the Bridger Canyon Zoning Regulation. Within the last year the Advisory Committee has finished up drafts of the proposed amendments. The Advisory Committee over the last year has held 5 public community meetings at the Bridger Canyon Fire Station informing the public on the proposed amendments and receiving comments on the changes.

Ex. B, pp. 1-2.

Planner Scott's memo summarizes "some of the substantive proposed changes." *Id*. at p. 2. Elimination of Section 14.2, which goes to the very heart of the Zoning Regulation adopted in 1971, was not, and is not, one of the substantive proposed changes presented to or discussed with the Canyon residents over the past eight (8) years. *Id*. at pp. 2-3. Instead, as Planning Staff concedes, it arose because of a complaint filed by the undersigned's law firm on behalf of the Kenseys (since joined by BCPOA) on September 21, 2018. *See*, Exhibit D, Staff Report, dated December 13, 2018 at p. 2. See also, Letter from Gallik to Arnold, dated October 23, 2018 (Exhibit E).

III.

The County's 2018 Issuance of a Land Use Permit in Violation of Section 14.2.

In the fall of this past year, Mr. and Mrs. Brown started construction on a home on a substandard lot in Bridger Canyon (i.e., less than 40 acres). This came as a complete surprise to the Kenseys, and other members of the Canyon, as the lot on which the house was being built was understood, historically, to lack a density right to build.

The Kenseys contacted the undersigned and we retained a surveyor/licensed professional engineer, to research the title to the property at issue. The research confirmed that under the plain language of the zoning regulations, at the time the zoning went into effect the property at issue was part of a larger parcel of property, under single ownership with only one building right under the zoning ordinance. With the construction of a new house by the Browns, still underway, the Browns are acting in violation of the zoning, by placing a new home on land where only one development right exists and has been used.

Mr. Brown and his wife were well aware of the issues associated with Section 14.2 of the Bridger Canyon Zoning Ordinance before they started construction of their home. In an email to Sharon Tudor, a real estate agent, Mr. Brown writes in part as follows:

> [I]'ll give you a brief rundown of what I have going on here so you can rest easy. There are a total of 3 adjacent lots here that I own or used to own. The lot to the south, "lot 4", is about 5.25 acres and I

> sold this recently. The lot the house sits on, "Lot 3", (8855) is also about 5.25 acres and is currently for sale. There is also a lot to the north, partial legal description is the "south 1/2 of lot 2", it is roughly 2.7 acres, and this is where I am currently building a new house for my family to live in.
>
> I know the new construction is the biggest thing in question with you and some other neighbors that are also too cowardice to contact me directly. Lot 2 was split back in the 60's. The north 1/2 of the lot is attached to the Kinsey's [sic] property and the south half to my property. As my good fortune would have it, the property lines were never dissolved, which allowed me the opportunity to build. In fact, I learned this while discussing my property with some of the guys in the county planning and zoning office. They encouraged me to go this route vs. attempting a boundary line adjustment because the rules of Bridger Canyon would make that almost impossible.

Email from Brown to Tudor (emphasis added).

Gallatin County issued Mr. Brown a building permit, apparently following a discussion on how to develop this recently "discovered" tract. In my conversation with Mr. Menard, the County Planner who issued the LUP, it was clear he was unfamiliar with the issues associated with Section 14.2 governing pre-existing non-conforming lots, in single ownership at the time zoning was adopted, as he referred me to the Clerk and Recorder when I raised this issue with him.

Consistent with these facts, and the application of the zoning regulations to these facts as established by the title and tax records and the adoption of zoning, we also learned that Gallatin County has treated the plot at issue as a single 8-acre parcel. Until very recently Brown did as well. The tax records illustrate this fact, and an earlier Conditional Use Permit (CUP) on 8855 Bridger Canyon Road treated the midpoint of what had once been Tract 2 as a property boundary for setback purposes. We also learned that the former MLS listing for 8855 referred to the tracts as a single 8-acre parcel.

Under Section 14.2 of the zoning regulations all pre-zoning tracts at issue were aggregated and the present construction of a new structure was and is forbidden.

Section 14.1 established 40-acre zoning in Bridger Canyon. Section 14.2 specifies (1) aggregation of adjacent parcels less than 40 acres in the aggregate that are under common ownership [fourth sentence], and (2) permits parcels greater than 40 acres to be divided into multiple 40-acre parcels ["lot[s no] smaller in lot width or lot area than required by this Regulation." – last sentence.] Section 14.3 addresses nonconforming uses, allowing so long as nonconformity isn't increased or abandoned. 14.4 addresses nonconforming structures on a similar basis. Read as a whole this interpretation makes common sense and essentially merged the existing non-conforming lots into one (1), allowing one (1) residential structure on those merged tracts.

Allowing a separate and additional building right on tract 2 (south) leads to an unfair or unintended result. If tract 2 retains one building right it is unreasonable to cede that right to the first [2-south or 2-north] to build. If each half has its own building right then a new right has been created from thin air. It is fundamental that laws should be interpreted to avoid such incongruous results.

The Kenseys filed a complaint with the County, which BCPOA has since joined. That matter is pending. See, Exhibit XX

In discussions with the County the issue whether the Regulation constitutes a taking of property arose, and this was also discussed at the December 13 public hearing before the P&Z. For the reasons that follow, as submitted to the P&Z, we respectfully submit it does not.

First, with respect to Section 14.2, for the foregoing reasons, aggregation of smaller lots to less than 40 acres total into a single parcel was a reasonable exercise of the County's zoning authority, done to avoid balkanization of single-owner parcels. As Ziegler notes, as discussed above:

> Minimum lot size specifications are the means most often relied upon to control the density of population within the community, since the greater the amount of land that must be devoted to each single-family detached dwelling, the fewer dwellings that can be constructed within the community. In addition to controlling density of population, specification of a minimum lot area is considered to promote the general welfare in that it tends to create a uniformity of lot size in a given district, avoiding the incursion of narrow or undersized lots which would be inconsistent with existing development and which would result in the erection of inharmoniously sized structures. . . . .

Ziegler, § 49:3 at 49-4-5.

Moreover, even if Section 14.2 is read as taking building rights from a landowner, any taking occurred in 1971 and, regardless, the owner of the property in 1971 had a right to build one (1) residential structure and thus the owner of the property was not deprived of any economically viable return on the owner's original investment. Ziegler, § 49:10 at 49:16.

Second, a claim against the County for compensation is well outside the statute of limitations or any equitable equivalent.

Third, any claim vested in the owner of the parcels in 1971. Takings claims are personal. Any taking claim expired when the property owner first sold Tract 3 and the South ½ of 2. To hold otherwise would invite opportunistic revival of similar stale or expired claims. It would also result in a windfall to any buyer, who paid fair value based upon a single building right.

Basing a decision on the boundary line of a County map alone, as Mr. Brown suggests, would generate a similar windfall. It's far more logical to say that the map should have been changed when tract 2 was divided than to speculate that Rinderknect intended to retain one or more building rights on tract 2. Separate numbering [8855/8859] didn't occur until 2017 and has no bearing on the question of a separate building right. Instead, courts regularly recognize that contiguous, substandard lots under common ownership, as we have here, may lose their separate identity and are treated as a single parcel for purposes of zoning and similar restrictions. Zielger, § 49:13 at 49-21. Ziegler observes that merger provisions, like that in the Bridger Canyon Ordinance, have been upheld against due process, equal protection and taking claims. *Id*. at 49-22 (citing cases).

The point of reference is not the present. Instead, it is the effective date of the zoning. *Id.* at § 49:13. As Ziegler states: "The basic purpose of the ordinance provision establishing generally applicable minimum lot requirements has as its corollary the purpose to freeze and minimize substandard lots. If there is a merger provision in the ordinance [as Bridger Canyon has] it is designed to result in a maximum number of standard lots from each separate tract of land in single ownership at the effective date of the ordinance. The number of separately described parcels which an owner or his predecessors in title may have acquired over the course of time to make up the entire tract is thus immaterial." *Id., citing Giovannucci v. Board of Appeals*, 344 N.E.2d 913, 915 (1976).

Finally, well-established precedent holds that Brown gets no credit for starting construction before this issue is resolved. As the email attached makes clear, they are not innocent purchasers for value. They were on actual and constructive notice of the zoning regulations and the contents of the real property records concerning their property. Likewise, Brown may not rely on advice from the Planning Department. The Planning Department cannot be responsible for interpretation of legal issues surrounding zoning and should not be responsible for deep due diligence. Adverse financial consequences could easily have been avoided by advising his next-door neighbors of his plans before starting construction.

IV.

Proposed Amendments to the Zoning Regulation and the P&Z's Approval of Staff's Request to Delete Section 14.2.

After the filing of the Complaint against the Browns' actions, the County Planning Office included in proposed amendments to the Zoning Regulation, the deletion of Section 14.2, at issue in this case. *See*, Staff Report, dated December 13, 2018 at p. 1. This request was added to other amendments flowing from a settlement of a lawsuit between BCPOA and the County. Id., p. 1. BCPOA was not consulted by the County before this action, and the proposed amendment, to delete Section 14.2 had not, as discussed, been presented to the Advisory Committee, which had been working on amendments to the Regulation for over 7 years. When BCPOA and Kenseys learned of the proposed amendment, they objected and requested that it be considered at a later time, as the Planning Director states in his memo to the P&Z:

> It is my understanding that the . . . . BCPOA objects to changing the requirements for Non-Conforming Lots (Section 14.2 of the Zoning Regulation) at this time and will request that this topic be considered separately from the other text amendments. The standardization of the requirements for Non-Conforming Lots is part of the effort to adopt the Gallatin County "part 1" Zoning Adminitrative Regulation and could be dealt with at that time.[1]

[1] The Planning Director requested deferral of certain of the Petty-related amendments for similar reasons, a request assented to by BCPOA at the hearing and granted by the Commission.

> The Planning and Zoning Commission should be aware that the topic of how non-conforming lots are treated in the Zoning Regulation is relevant to a compliance case currently pending before the Code Compliance Officer. In summary that complaint alleges that the Planning Department issued a Land Use Permit in spring of 2018 contrary to the requirements of Section 14.2 of the Zoning Regulation where a landowner owned more than one non-conforming lot or portion of lots with continuous frontage.

Staff Report, p. 2 (emphasis added).

The Planning Director correctly observed that BCPOA requested that 14.2 be considered later from the other proposed amendments because (1) it was a substantive amendment; (2) has the potential for impacting multiple other properties in the Canyon; and (3) the matter had not been considered, let alone discussed by the advisory committee. Accordingly, counsel for BCPOA requested in writing that the matter be considered, and the County attorney did not object. Counsel understood, it was later learned in error, that the Planning Office did not object, and its Staff Report, Exhibit XX, provided no evidence to the contrary.

At the P&Z hearing, in December, Mr. O'Callaghan advised, for the first time, that he wanted a decision on 14.2. Counsel for BCPOA objected for the reasons set forth above, and the P&Z, by a vote of 5-1, approved the Staff's request, with the County Commissioners assuring the balance of the Commission that BCPOA and others would have a chance to raise their objections at the January 2019 Commission hearing. This Memo, therefore, is submitted to make clear that BCPOA and the Kenseys object to the proposed amendment to delete 14.2 for the reasons that follow.

First, the proposed amendment is not, as the Planning Director suggests, an administrative amendment. It is a substantive amendment which goes to the heart of the zoning district – preservation of the rural nature of the property.

Second, as a substantive amendment, it was properly presented in the first instance to the Advisory Committee, which has been working on substantive changes for over 7 years. As it was not presented to the Committee, this Commission, like the P&Z does not have jurisdiction over the proposed Amendment.

Third, the Amendment was made in response to the Planning Office's acknowledged concern that it issued a LUP in violation of Section 14.2, not based upon an alleged need to standardize administration of the various zoning districts.

Fourth, the Planning Department undertook no analysis or investigation of how many other parcels of real property within the District would, or could, be impacted by this amendment. As this Amendment, if approved, allows for the construction of improvements on substandard lots, in violation of the fundamental premise of the zoning district, due process commands that, like a variance request, where the basic zoning regulations have been requested to be modified, that adjoining landowners, at the very least, receive actual notice of the proposed Amendment, not simply notice by publication, as was done here.

Fifth, the proposed Amendment should not, in any fashion, alleviate or remedy the pending complaint against the Browns. At the time they understood the actions at issue, Section 14.2 was a duly enacted regulation governing the use of land in Gallatin County. The Planning Director's effort to have the Amendment apply, *ex post facto*, is without merit.

For these reasons, we ask that the Commission remand this proposed Amendment to the Planning Department with instructions to present the proposed Amendment to the Planning and Zoning Commission for action consistent with the procedures applicable to that Commission.

Sincerely,

GALLIK, BREMER & MOLLOY,

Brian K. Gallik

Brian K. Gallik

Enclosures

C: Client
Erin Arnold