BRIDGER CANYON PROPERTY OWNERS ASSOCIATION

To: Honorable Commissioners of the Gallatin County Planning & Zoning Commission

From: Richard Lyon, 4794 Aspen Lane, Bozeman, richardglyon@att.net; Tom Fiddaman, 1070 Bridger Woods Road, Bozeman, tom@metasd.com; and Andrew Seessal, 7100 Jackson Creek Road, Bozeman, drew@seessalinvestments.com, on behalf of the Board of Directors of the Bridger Canyon Property Owners Association [BCPOA]

RE: Appert Guest House CUP Extension, No. Z2024-0011
Appert Caretaker's Residence CUP Extension, No. Z2024-0012

Date: December 12, 2023

These applications present a question of statutory interpretation that may have consequences beyond the Appert property: the meaning and effect of section 10.10.e.iii of Gallatin County "Part 1" Zoning Administrative Regulation (the "Administrative Regulation"), which addresses extending the deadline prescribed in a conditional use permit:

> 10.10 General Extensions. Upon an Applicant's request, the Planning and Zoning Commission may issue an extension to a Conditional Use Permit as provided below.
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> . . .
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> e. In addition to other relevant factors, the Planning and Zoning Commission's decision on the extension request shall consider all of the following:
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> . . .
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> iii. The extent to which the Use conflicts with any amendments to the applicable District Regulation since initial approval of the Conditional Use Permit.

The answer to this question may be outcome-determinative on the Appert applications. Had those been originally filed under the current zoning neither could be granted. The Guest House application would fail because the proposed structure is more than 150 feet from the Primary Residence, see Zoning, section 12.12.d. The shared utilities requirement might also be an issue. The Caretaker's Residence would fail because each property is allowed only one Accessory Dwelling Unit (ADU). Zoning, section 12.2.a.

Applicant seeks to avoid this result by asserting that because the original CUPs were granted under an earlier version of the zoning (the "prior zoning"), the provisions of the prior zoning provide the guiding standard.[1]

[1] The zoning was amended in August 2021, after Applicant obtained his original CUPs.

The mandatory language ("shall consider") in section 10.10.e.iii of the Administrative Regulation, quoted above, calls that proposition into question. The meaning and effect of that section are the questions to be considered.

FACTUAL BACKGROUND

The underlying facts are straightforward and we do not dispute them. Applicant (with his then-wife) sought and obtained CUPs for construction of a Guest House and Caretaker's Residence on the subject property in July 2021. By their terms and the Administrative Regulation, 10.8, the CUPs required completion in two years, *i. e.*, August 12, 2023. A perfect storm of unfortunate circumstances prevented completion by that date, hence Applicant's renewal applications.

The 2021 zoning amendments includied two provisions material to the subject matter of the Applicant's CUPs. First, the terms *Guest House* and *Caretaker's Residence* were removed from the list of Conditional Uses in the Agricultural Exclusive (AE) subdistrict and replaced by a new term, Accessory Dwelling Unit (ADU), which was designated a Permitted Use. Second, each property was allowed only one ADU. Section 12.12.a: "In a Zoning Classification in which an Accessory Dwelling Unit is a Permitted Use, only one Accessory Dwelling Unit per Parcel of record is permitted (Development Right not required)."

ANALYSIS

Which version of the zoning should apply to the extension requests? The Planning Department assumes that it is the prior zoning (Guest House staff report, p. 8), based solely upon the date of the original applications. With respect, that view pays no heed to the Administrative Regulation's command that changes to the zoning be considered when an extension is requested.

The staff reports mischaracterize the zoning changes when they report,

> … the Bridger Canyon Zoning Regulation has changed since the approval of the original CUP request. It has changed in this way: Conditional Use Permits are no longer required for a [Guest House, Caretakers Residence].

This gives the impression that standards have been relaxed for these uses, but in fact, there is no CUP for a Guest House or Caretaker's residence *because the classifications no longer exist,* having been replaced by the Accessory Dwelling Unit standard.

The Applicant recognizes the issue and seeks to avoid the restrictions in the current zoning by arguing that the visual impact of a second ADU will be minimal as the two proposed

structures are close to each other ("clustered") and barely visible to neighbors and the public (Guest House app, p. 6), and that the zoning changes are "minor."[2] (*id*. p. 8)

Again with respect, these arguments miss the point and assume that section 10.10.e.iii of the Administrative Regulation is permissive rather than mandatory. Applicant proceeds under an inaccurate predicate. Limiting each property to one ADU was a principal objective of the Zoning Advisory Committee in drafting the current zoning,[3] but not from any worry about visual impact. Rather the objective was to limit the amendment's effect on density and expressly to prevent a property with an existing Guest House or Caretaker's Residence from obtaining an additional dwelling unit.[4] This objective was confirmed and supported by the Commission in its adoption of the current regulation limiting a property to one ADU. Our concerns regarding density and the consistent enforcement of the current regulations remain, as our testimony here with regard to these applications demonstrates.

Limited density has always been a guiding principle of the Bridger Canyon zoning regulation, and enjoys overwhelming support of residents in BCPOA surveys. The General Plan provides a basic density of one single family residence per 40 acres. This constraint is the keystone for achieving the Plan's goals, e.g., maintaining Bridger Canyon as "An area with strong citizen interest favoring conservation of natural resources; preservation of open space and agricultural usage; and limited, controlled growth compatible with the natural environment." Provision of additional dwellings without the careful limitations in the ADU regulation degrades the 1-in-40 standard and invites the kind of "density creep" we have recently seen in the Lewis CUP revocation.

Inclusion of post-approval zoning changes among the factors to be considered in an extension request by itself argues for applying the current zoning. Applicant is trying to obtain something now expressly prohibited by the zoning. Using the current zoning prevents placeholder applications, made in anticipation of a forthcoming zoning change and then held speculatively. Common sense suggests that the Planning Department doesn't need the added burden of a handful of applications pending under different versions of the zoning. Nonconforming uses, which involve a similar lookback to earlier versions of a statute, are disfavored in the law for similar reasons. We can think of no logical reason why simply filing under one version of the zoning should vest a landowner

[2] The proposed Guest House's exceeding the maximum distance from the Principal Residence is not a matter that this Commission can dismiss as "minor" or insignificant, or otherwise wave away. Nothing in the current or prior zoning authorizes inattention to any express statutory requirement, however "minor" it may appear to an applicant.

[3] Two of the writers of this testimony, Messrs. Fiddaman and Lyon, sat on the Advisory Committee and participated actively in the drafting of what became the current zoning. Each is prepared to testify to the matters set out in the text.

[4] Inclusion of provisions for converting an existing Guest House or Caretaker's Residence to an ADU and attention to treating earlier structures as nonconforming uses support this proposition.

with application of that version ever after and consequently avoid subsequent zoning changes.

The staff reports consider the present matters as an instance of "vesting", citing the Administrative Regulation, section 3.5. However, vesting pertains to original applications, and indeed the present applications already exploited their vested rights in 2021. The present matter concerns *extensions*, which are governed by 10.10, including the express requirement to consider conflicts with subsequent amendments. Since these are not *de novo* applications following a zoning amendment, 3.5 is irrelevant.

None of this is intended to belittle the misfortunes that befell Applicant (a BCPOA constituent) over the past two years or to doubt his word that they impeded substantial work on the authorized structures. But for the zoning change, BCPOA would likely not have commented on these applications. Strict interpretation of the zoning, however, is a paramount BCPOA objective. The Administrative Regulation requires that the question of which zoning applies must be addressed.

This Commission is faced with a decision with possible precedential impact beyond this district. BCPOA leaves it to the Commission's sound discretion, so long as the requirements of Section 10.10 of the Administrative Regulation are met.

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