

# BRIDGER CANYON PROPERTY OWNERS ASSOCIATION

To: Gallatin County Department of Planning and Community Development  
Gallatin County Attorney's Office  
Gallatin County Compliance Office

From: Richard Lyon, 4794 Aspen Lane, Bozeman, [richardglyon@att.net](mailto:richardglyon@att.net), on behalf of the Board of Directors of the Bridger Canyon Property Owners Association

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BCPOA submits these comments to the proposed Gallatin County Part 1 Zoning Administrative Regulations distributed for public comment on December 12, 2018.

We commend the County departments that prepared the Proposed Regulations for a thorough and comprehensive update that, with the modifications discussed below, can serve as standard administrative procedures for all Part 1 zoning districts. We agree with the County that standardizing administrative procedures will expedite the County's evaluation and management of the planning and development throughout the part 1 zoning districts in the County.

Although we do comment on Proposed Regulation that are strictly administrative, BCPOA's concerns focus primarily upon the possible impact of the Proposed Regulation upon substantive regulations within the individual part 1 zoning districts in the County. Different circumstances – population density, geography, principal uses, location, neighborhood characteristics – often dictate different substantive regulations. Though probably not intended, some of the Proposed Regulation can be read as modifying substantive restrictions that should be the province of the citizens who initiated the zoning in Part 1 districts.

In part A below we summarize general comments applicable strictly to administrative matters. In part B we summarize comments that we believe may modify substantive provisions unreasonably. In the document attached we submit elaborate on these comments, with suggested changes that may ameliorate our concerns and additional comments on specific language.

## **PART A**

1. ***Burden of proof.*** The County should make clear that in any LUP, CUP, Change of Use, nonconformity, or variance application that the applicant bears the burden of proof. This is current law and included in many district regulations. For example, from East Gallatin Zoning District Section 6.7.2: "It shall be the burden of the applicant to prove entitlement to approved nonconforming status by furnishing the Zoning Enforcement

Agent with a preponderance of supporting information. Such information shall include, but not be limited to, septic or sewer hook-up permits, building permits, business licenses and dated photographs." BCPOA believes that a comparable provision should be added as applicable to all applications to the Planning Department or the Planning & Zoning Commission.

2. **Recording.** BCPOA recommends adding a general section indicating that any restrictions or conditions upon building or use be recorded with the Clerk & Recorder's office. Planning Department staff routinely recommends this as a CUP or LUP condition, and its benefits to the public are obvious.

3. **County discretion.** Several provisions of the current Bridger Canyon District Regulations and draft updated regulations make it clear that certain CUPs or variances are not a right but are subject to the County's discretion even if the applicant has met all applicable statutory criteria. For example, "Any modification requested pursuant to this Section 13.10 is not an entitlement and satisfaction of the criteria established in this Section 13.10 does not require the Planning & Zoning Commission to approve an application. The Planning & Zoning Commission retains discretion to deny an application if it determines that the purpose of this chapter as set forth in Section 13.1 is not served by the proposed modification." BCPOA recommends that comparable provisions be added to the Proposed Regulation.

4. **Notification.** The provisions for notice are mixed. Definition: "Published Notice: Notice given consistent with Section 7-1-2121, MCA and the Planning and Zoning Commission's adopted hearing rules." This is a fairly low bar, as it doesn't notify any specific affected individual, just the district in general, I think. The only provision for notifying adjoining landowners is in 5.7c, for Non-Conforming items. This seems insufficient. At a minimum, CUPs and Variances should be included. Really, LUPs should also be included – without notice, there is no way to appeal a permit, because the appeal period is likely to lapse before visible construction commences. In the Bridger Canyon drafting, we considered provisions beyond "adjoining," including things like "within a radius of x feet". Notice to adjoining owner sometimes doesn't work. For example, a neighbor could be extremely close to a project, but separated by a thin road or open space parcel. This could happen anywhere along the highway, or in any PUD for example.

BCPOA believes that notification of hearings and decisions be made on the County website and by email, in addition to the notification provisions in the Proposed Regulation. This will enhance public awareness and participation and expedite the administrative process.

5. **Clarification – LUP required.** The Proposed Regulation should include an express provision that an LUP is required whenever a CUP, Change of Use, or variance

application involves new construction. This appears to be the intent of the Proposed Regulation, but to avoid doubt it should be made explicit.

6. **Available remedies.** Section 18.4.d and .e of the current Bridger Canyon District Regulation list some of the remedies available to the County to correct or prevent zoning violations and make clear that anyone who participates in or contributes to a violation may be liable:

"d. Injunction. After the exhaustion of administrative remedies and pursuant to MCA § 76-2-113, the County Attorney, in conjunction with the Code Compliance Specialist, may bring an action in the name of the County of Gallatin in the District Court to enjoin any violations of this ordinance.

The owner or tenant of any building, structure, premises, or part thereof, and any architect, builder, contractor, agent or other person/entity who commits, participates in, assists or maintains such violation may each be held accountable for a separate violation.

The prevailing party may be awarded all costs, including attorney's fees.

e. Fines. The Planning and Zoning Commission may assess violator's fines of up to \$500 per day of violation for noncompliance until the violation is remedied. When determining the amount and duration of a fine, the Planning and Zoning Commission shall consider the nature, circumstances, extent and gravity of the violation, any prior history of such violations, the degree of culpability, and such other matters as justice may require. In addition, the violator may be required to pay administrative costs. If the fine is not paid, it shall become a lien upon the property. An alleged violator may appeal the assessment of a fine to the County Commission as set forth below. "

Inclusion of a similar provision in the Proposed Regulation would add clarification and perhaps have a healthy deterrent effect.

7. **Miscellaneous clarifications.** As noted in the attachment, certain provisions should be clarified for internal consistency and to close potential loopholes.

## **PART B**

8. **Effect of Noncompliance.** The current regulation makes a permit void as a matter of law, when issued in contradiction to the regulations:

"a. Permits, When Void. All departments, officials, and employees of Gallatin County which are vested with the duty or authority to issue permits or licenses, shall conform to the provisions of this Regulation and shall issue no such permits or

licenses for uses, building, or purposes where the same would be in conflict with the provisions of the Regulation and any such permits or licenses, if issued in conflict with the provisions of the Regulation, shall be and the same is hereby declared to be null and void."

This is stronger than the Proposed Regulation's provisions, The Proposed Regulation limits the ability to challenge a permit to the appeal period. That is an issue that should be considered as a substantive change, in particular in connection with notice of Decisions. See paragraph 4 above.

9. **CUP standards.** Several provisions of the Proposed Regulation can be read as setting CUP requirements rather than merely laying out the procedure for application and consideration. To avoid uncertainty the Proposed Regulation should make clear that the administrative regulations are in addition to and not replacements for any such substantive requirements in District Regulations.

10. **County discretion.** As stated in paragraph 3 above, many applications are subject to County discretion even if all explicit criteria have been met. If the County determines that a general provision to this effect is not appropriate, the Proposed Regulation should make clear that such provisions in District Regulations remain applicable.

11. **Variance.** To discourage frivolous applications language should be added that makes clear that an owner's preferences carry no weight in a variance application. This principle is clear in Montana case law. Alternatively, as in paragraph 10 above the Proposed Regulation should expressly permit inclusion of such provisions in District Regulations.

12. **Nonconformity.** Several sections that address nonconforming parcels, structures, and uses need clarification to emphasize that nonconformity is allowed only to the extent it existed as of the date of adoption of the applicable regulation or amendment. See especially Section 5.2 of the Proposed Regulation.

13. **Available remedies.** The availability of particular remedies discussed in paragraph 6 above can have substantive overtones and should be included in the Proposed Regulation. This is particularly true with respect to the availability of a mandatory or prohibitive injunction and teardown order as remedies.

14. **Statement of Purpose.** Somewhere, the Proposed Regulation language should note that part of its intent is to enable the zoning regulations to execute the general plan of the district. For example:

"3.1 Application. The requirements established by the Zoning Regulations are minimum regulations and apply uniformly to each class or kind of Structure or land throughout the Zoning District. The Zoning Regulations shall be held to the

minimum standard that protects and promotes the public health, safety and general welfare of the Zoning District and provides for the execution of its respective growth plan, general plan or development pattern."

This could be in the preamble to either the Proposed Regulation or the district's zoning.

15. **Drafting issues and clarifications.** The Proposed Regulation use three means of setting out examples of permitted or prohibited activities: e.g. [*exempli gratia*, "for example"], i.e. [*id est*, "that is"], and "including but not limited to." Use of the last of these in all instances would add clarity and help avoid possible claims that one of these is more expansive than another. Similarly, use of "etc." can lead to similar claims and should be avoided in statutory language if possible.

We look forward to working with the County to develop and implement final administrative regulations.

Respectfully submitted,

*Richard G Lyon*