Valley Advocates for Responsible Development

June 15, 2012

Teton County Planning & Zoning Commission
Teton County Board of County Commissioners
150 Courthouse Drive, Room 107
Driggs, Idaho 83422

RE: Sources of legal authority for natural resources and wildlife planning.

Dear Commissioners:

This letter is submitted to clarify and ultimately rebut some of the statements and assertions addressed to the Teton County Board of County Commissioners in the May 24, 2012 letter written by Mr. Robert Harris on behalf of an anonymous client or clients who formed a legal entity called Teton Valley Group for Property Rights (TVPRG).

I. A Comprehensive Plan is not the same as a zoning ordinance.

The TVPRG letter confuses comprehensive planning with zoning. They are not the same thing. Mandated by the Local Land Use Planning Act (LLUPA),[1] a comprehensive plan is intended to be a forward looking, visionary statement of (in this case) Teton County's direction and goals as they affect land use planning decisions.[2] Comprehensive plans do not, and cannot, have the same force and effect as zoning. The Idaho Supreme Court has distinguished comprehensive plans from zoning ordinances in this way:

> [LLUPA] indicates that a comprehensive plan and a zoning ordinance are distinct concepts serving different purposes. A comprehensive plan reflects the "desirable goals and objectives, or desirable future situations" for the land within a jurisdiction. I.C. § 67-6508. This Court has held that a comprehensive plan does not operate as legally controlling zoning law, but rather serves to guide and advise the governmental agencies responsible for making zoning decisions. The Board may, therefore, refer to the comprehensive plan as a general guide in instances involving zoning decisions such as revising or

[1] I.C. §§ 67-6501 to 67-6537, also known as "LLUPA".

[2] *Cove Springs Development, Inc., v. Blaine County,* Case No. CV2008-22, page 15 (5th Dist., June 3, 2008).

> adopting a zoning ordinance. A zoning ordinance, by contrast, reflects the permitted uses allowed for various parcels within the jurisdiction.[3]

The TVPRG letter explicitly asks the county to define or re-define the zoning districts in the draft comprehensive plan. (Letter at p. 4) Neither boards of county commissioners nor their planning commissions have authority to change zoning districts through adoption of a comprehensive plan. It is well established in Idaho that the comprehensive plan cannot be elevated to the level of zoning law.[4] Likewise, the land use designations in the comprehensive plan will not match the then current zoning ordinances unless the county plans for no future improvements or changes to its past development patterns.[5] The land use map, which is a required element of a comprehensive plan, should not be confused with the zoning map that is also required by LLUPA. Zoning maps control what types of developments may be currently constructed in a given area, whereas "the land use map, in essence, is a goal or forecast of future development."[6]

The TVPRG letter also contends that the comprehensive plan must clearly define the land use terms in the framework map. The only statutory requirement for land use terms is that which is inherent in the comprehensive planning process itself – to provide suitable direction to county commissioners and planning commissions of the future intended direction of land use in the polity. Ironically, TVPG then contradicts its own contention by requesting that the land use terms in the draft plan be made more vague by eliminating the "High" "Low" "Medium" density housing descriptions for the land use categories. The existing land use definitions in the draft plan include a sufficient and reasonable directive to guide the

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[3] *Urrutia v. Blaine County,* 134 Idaho 353, 357, 2 P.3d 738, 742 (2000) (internal citations omitted); *See also, South Fork Coalition v. Board of Commissioners of Bonneville County*, 117 Idaho 857, 863, 792 P.2d 882, 888 (1990) (a comprehensive plan does not operate as legally controlling zoning law).

[4] *Urrutia* at 358-59, 743-744 (the general language in a comprehensive plan is a general guideline which cannot be used to effectively rezone land; comprehensive plans cannot be elevated to the level of legally controlling zoning law).

[5] *Bone v. City of Lewiston*, 107 Idaho 844, 850, 693 P.2d 1046, 1052 (1984) (the "in accordance" language of I.C. § 67-6511 does not require that a zoning ordinance's land use designation must be exactly the same as the corresponding designation in the comprehensive plan).

[6] *Bone* at 850, 1052. *See also,* Allen, Gary G.; Meyer, Christopher H.; Nelson, Deborah E., Lee, Franklin G. Lee, *Idaho Land Use Handbook: The Law of Planning, Zoning, and Property Rights in Idaho* (2011).

future land use planning and zoning decisions without going through the build-out scenarios and economic impact studies that will accompany those future actions. While TVPRG asks for certainty in the land use definitions, their requested changes would "gut" these definitions, leaving the land uses to only be vaguely referenced as simply "residential". (Letter at p. 5)

II. Cities and counties (not Idaho Fish and Game) have sole planning and zoning authority over all the lands within their jurisdiction.

The TVPRG letter wrongly asserts that references to the wildlife overlay should be removed from the comprehensive plan as Teton County has no regulatory authority over wildlife. The rationale for this contention is not that wildlife planning is unimportant or has no benefit to the County. Instead, they argue that only the Idaho Department of Fish and Game (IDFG) should be left to regulate wildlife. (Letter at p.5) TVPRG further asserts that IDFG's involvement in preparation of Teton County's 2008 wildlife overlay would not likely be permitted today. (Letter at p. 8) These arguments fail on three counts.

1. Planning decisions that protect and preserve wildlife habitat are not the same thing as regulation of wildlife; the draft comprehensive plan has absolutely no reference to regulating wildlife.

The draft comprehensive plan does not propose to regulate wildlife. It proposes to protect habitat when private property is developed, particularly where proposed development might impact valuable or unique habitats. That such planning in turn benefits wildlife and achieves other important goals does not make it a *de facto* regulation of wildlife. There is a distinct difference. Wildlife refers to the organism, whereas habitat refers to land, often the place or area where the organism might live. Contrary to TVPRG's assertions, nowhere in any of the sections of the June 8 draft of the comprehensive plan does it state that Teton County intends to regulate wildlife. Nowhere in the plan are private property owners required to maintain wildlife or habitat on their property. TVPRG's letter fails to cite a single phrase, sentence, or anything else contained in the draft comprehensive plan which substantiates these claims.

2. Only cities and counties have the statutory authority to plan for the protection of habitat on private property.

All wildlife is declared the property of the state of Idaho, (I.C. § 36-103) but wildlife habitat can be found on both public and private property. By their very nature, wildlife often move between habitats on both public and private lands. While IDFG has the regulatory authority over wildlife, the department has no

regulatory authority over land use decisions affecting private lands.[7] This is because only cities and counties have the jurisdictional authority to plan for the protection of habitat on private property in Idaho. As stated in the recent case of *Cove Springs Development Inc., v. Blaine County*:

> The delegation of land use planning and zoning authority contained in LLUPA is a complete, comprehensive, and exclusive delegation to local city and county governments.[8]

This authority expressly includes the statutory duty to plan for management of natural resources, habitat, and wildlife within the city or county's boundaries.[9] LLUPA further mandates that comprehensive plans must include all of the land within the city or county's jurisdictional boundaries. (I.C. § 67-6508) Contrary to TVPRG's stance, the county has a statutory duty to consider the impact of future planning decisions on habitat so as to preserve natural resources and wildlife.

3. IDFG can provide technical analysis to local governments and enter into cooperative agreements for wildlife management and protection projects.

The TVPRG letter asserts that IDFG's involvement in preparation of Teton County's 2008 wildlife overlay would not likely be permitted today. (Letter at p. 8) This statement is patently false. By statute, IDFG can enter into cooperative agreements with cities and counties for wildlife management and protection projects. (I.C. § 360104(b)(9)) Likewise, IDFG can provide technical analysis for counties to develop their own wildlife overlay maps. Idaho Courts have clearly come to expect IDFG will play a meaningful role in assisting counties with the development of wildlife overlays.[10] IDFG's direct and voluntary participation in

[7] *Cove Springs* at 18.

[8] *Cove Springs* at 17 (Emphasis Added); *See also, Sprenger, Grubb, & Associates v. Hailey,* 133 Idaho 320, 321, 986 P.2d 343, 344(1999) ("LLUPA provides both mandatory and exclusive procedures for the implementation of planning and zoning"); *And, Gumprecht v. City of Coeur d'Alene,* 104 Idaho 615, 617, 661 P.2d 1214, 1216 (1983).

[9] The stated purposed of LLUPA is to ensure that the important environmental features of the state and localities are protected, and also to protect fish, wildlife, and recreation resources. (I.C. § 67-6502) In addition, cities and counties are required to include a natural resources and land use component in their comprehensive plan which expressly includes wildlife. (I.C. § 67-6508)

[10] *Cove Springs* at 19-20, (counties may choose to use the expertise of IDFG to develop a wildlife overlay); *Cowan v. Fremont County,* 143 Idaho 501, 148 P.3d, 1247 (2006) (upholding the

Teton County's comprehensive planning process itself affirms the importance of sound planning to help IDFG achieve its statutory goals of wildlife management.

III. Although it is not a part of the comprehensive plan, the Teton County Wildlife Habitat Overlay is a legitimate zoning ordinance.

Pursuant to the procedures established in LLUPA, the Teton County Board of County Commissioners adopted as a part of its zoning ordinance, the Teton County Wildlife Habitat Overlay on November 14, 2008.[11] The overlay is not a part of the comprehensive plan, but is a part of Teton County's zoning ordinances. These are distinctly different pieces of legislation rooted in different statutory requirements in LLUPA.[12] The June 8th draft comprehensive plan merely references maintaining and updating the overlay, which is precisely the kind of clear and unambiguous directive that a good comprehensive plan is supposed to contain.

As a statutory zoning category, the usage of overlay maps to protect sensitive areas is well established in Idaho. The Idaho Supreme Court has held:

> This Court has recognized that aesthetic concerns, including the preservation of open space and the maintenance of the rural character of Blaine County, are valid rationales for the County to enact zoning restrictions under its police power. The purpose of the MOD [mountain overlay district], as set forth in B.C.C. § 9-21-1(B), falls squarely within the recognized powers of the County.[13]

In fact, the adoption of a natural resources overlay map is not only well recognized in Idaho, it was exactly what the *Cove Springs* court directed Blaine County to create when their wildlife protection regulations came under judicial review:

> If the County desires to make use of the expertise of IDFG, the U.S. Fish and Wildlife Service, the University of Idaho, the USDA Extension Service, or any other expert, it should invite their views in the context of a hearing

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correct usage of critical wildlife habitat maps that are based on natural resources inventory maps identified by Idaho Fish and Game)

[11] Teton County Code §§ 8-5-1 and 8-5-2.

[12] Comprehensive plans are authorized and required by I.C. § 67-6508. Zoning ordinances are authorized and required by I.C. § 67-6511.

[13] *Terrazas v. Blaine County,* 147 Idaho 193, 198, 207 P.3d 164, 174 (2009).

> process that accommodates rebuttal of evidence which reserves the final decision to the County, as mandated by LLUPA. The result of that process should be the adoption of a map or objective criteria that clearly define the boundaries of the zone.[14]

In addition to *Cove Springs*, Fremont County's proper use of natural resource inventory maps and IDFG habitat mapping as a part of their zoning code was recently upheld by the Idaho Supreme Court.[15] Moreover, county wetland regulations and hillside development requirements have been similarly affirmed by the Idaho Supreme Court on numerous occasions as both written ordinances and also in the form of overlay maps.[16]

If wildlife overlays are a lawful part of the planning and zoning structure in many Idaho counties, then setting goals and directives for future use of these overlays is an appropriate subject for a county's comprehensive plan.

IV. In addition to all of the above, comprehensive plans are not reviewable in Idaho.

We appreciate the fact that receiving TVPRG's message on a law firm's letterhead might carry the implied threat of a lawsuit in the event the stated wishes are not granted. However, we encourage you not be intimidated. In addition to the reasons stated above, a lawsuit challenging the draft of the comprehensive plan would have no basis because no one can sue in Idaho over the amendment of a comprehensive plan. The Idaho Supreme Court has clearly held in the recent case of *Burns Holdings, LLC v. Madison County Board of County Commissioners* (2009) that

[14] *Cove Springs* at 19-20.

[15] *Cowan v. Fremont County,* 143 Idaho 501, 148 P.3d, 1247 (2006) (upholding the correct usage of critical wildlife habitat maps that are based on natural resources inventory maps identified by Idaho Fish and Game).

[16] *Noble v. Kootenai County,* 148 Idaho 937, 231 P.3d 1034 (2010) (upholding Kootenai County's enforcement of their county floodplain development ordinance); *Terrazas v. Blaine County,* 147 Idaho 193, 207 P.3d 164 (2009) (upholding Blain County's usage of a Mountain Overlay District to regulate development in avalanche-prone areas); *Rollins v. Blaine County,* 147 Idaho 729, 215 P.3d 449 (2009) (also upholding correct application of Blaine County's Mountain Overlay District); *Cowan v. Fremont County,* 143 Idaho 501, 148 P.3d, 1247 (2006) (upholding the correct usage of both county wetland and county hillside regulations).

there is no statutory right of judicial review of a county's decision to amend its comprehensive plan map.[17]

After the *Burns* decision and two other similar cases were decided by the Idaho Supreme Court, the Legislature passed HB 605 on March 23, 210 as a reaction to these court decisions. The Legislature amended I.C. § 67-6521 to now authorize judicial review of certain land use actions such as zoning ordinances, permits authorizing development, variances and subdivisions. It must be noted however, that the Legislature consciously declined to create a right of judicial review of the substantive elements of comprehensive plans. Thus, *Burns* and the subsequent acts by the Legislature clearly indicate that a comprehensive plan can only be successfully challenged for failure to follow hearing requirements, other procedural requirements in LLUPA, or for failure to include a statutorily required element (ie: natural resources, affordable housing, transportation, etc).[18]

V. The best way forward is to clarify and build on what already exists in the draft plan – not strip away meaning and substance.

Everything that is in the draft comprehensive plan is there through substantial collaboration and consensus. This draft plan has been the two-year work product of 1,800 volunteer hours and over 4,000 public "inputs" to date. Much of the language that TVPRD now challenges, including the descriptors for densities, is the result of extensive and painstaking conversations at the subcommittee and core committee levels. Instead of implementing the major changes requested in TVPRG's letter, (which are potentially the views of only a single person and would essentially "gut" the substance of the plan) the goal now should be to clarify and build on what already exists in the plan.

This plan is the impressive product of a tremendous community effort spanning more than two years – a proud accomplishment for us all. Thank you for your hard work and consideration in the service of our community.

[17] *Burns Holdings, LLC v. Madison County Board of County Commissioners,* 147 Idaho 660, 663, 214 P.3d 646, 649 (2009).

[18] *See also,* Allen, Gary G.; Meyer, Christopher H.; Nelson, Deborah E., Lee, Franklin G. Lee, *Idaho Land Use Handbook: The Law of Planning, Zoning, and Property Rights in Idaho,* (2011).

Sincerely,

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