November 6, 2008

Teton County BOCC
89 North Main Street
Driggs, Idaho 83422

RE: The Ranch final plat hearing.

Dear Commissioners,

Valley Advocates for Responsible Development (VARD) has the following procedural concerns with The Ranch PUD which render the November 13, 2008 final plat hearing void under our own Teton County Ordinances.

A. The Board had no jurisdiction to grant the August 25, 2008 extension.

The Teton County Code puts an explicit, clear, and unambiguous 2-year time limit on all subdivision/PUD applications, and declares them null and void once this time limit has expired:

> The Master Plan, Development Agreement (sic) and Final Plat shall be approved by the Board of County Commissioners within two (2) years of the date of acceptance of the subdivision/PUD concept application by the Planning Administrator *or the entire application is deemed null and void*.[1]

The code does allow for an additional extension of up to 12 months, but it must be received "*prior to the expiration date*" of the application.[2]

Here, the Ranch's extension request was received on August 15, 2008, almost two (2) months after the June 20, 2008 expiration deadline. The Board of County Commissioners' (BOCC) jurisdiction over this application expired on June 20th; the Board had no authority to grant the August 25, 2008 extension. While the code gives no criteria for reviewing an extension request (thus leaving the BOCC with broad discretionary authority to grant or deny them) the time limitation language is indisputable. There is simply no procedural mechanism in the code that allows an extension to be granted after-the-fact. VARD respectfully cautions the Board against attempting to waive the express time limitation that is presented in the code; the Idaho

[1] Teton County Code 9-3-5-B-1. (Emphasis Added.)

[2] Teton County Code 9-3-5-B-2. "The developer may request in writing prior to the expiration date an extension of time for final approval of up to twelve (12) months from the Board of County Commissioners." (Emphasis Added.)

Supreme Court has consistently held that the Board cannot waive express requirements or restrictions in their own ordinances.[3]

B. The P&Z's preliminary plat conditions have not been satisfied.

When the Planning & Zoning Commission (P&Z) conditionally approved this application on April 10, 2007, their directive to the applicant was clear: (1) get DEQ approval for a level one Nutrient Pathogen (NP) study with less than 10% variation on lots, and (2) obtain the water rights necessary to support this development. These directives have not been satisfied, so a final plat hearing should not have been scheduled for this development.

i. The Nutrient Pathogen study is still pending before the DEQ Board.

Rendezvous Engineering conducted the NP study, and it was based on the false assumption that there are no established channels or perennial water features on site. I conducted a site visit on October 30, 2008 and observed significant water features on site. There were springs, marshes, seep holes, and interconnecting channels - all flowing with water even during this dry time of the year. These features also had significant riparian vegetation around them, indicating that these water features are not just ephemeral, but contain significant year-round flows. I also observed significant north-south ridges and east-facing drainages along The Ranch property. These east-facing drainages collect all the surface water running off of the ridges and funnel this water down into the springs and marshes bordering the Young's property. Thus, even though it had not rained in weeks on the date of my site visit, I observed significant surface water features that were interconnected to the marshes on the Young's property and the Teton River. By my observations, the Rendezvous assumption that there are no permanent channels or water features on site is simply contrary to the ground truth.

Because of the factual misstatements in the Rendezvous NP study, the Youngs have filed an appeal of DEQ's September 10, 2008 approval. Thus, the NP study is still pending before the DEQ Board. The Young's DEQ appeal was filed on October 15, 2008, and the Young's counsel sent a letter to the county that same day, notifying them that the NP study was

[3] *Fischer v. City of Ketchum,* 141 Idaho 349, 356 (2005). (The Board's waiver of an express requirement in the ordinances was arbitrary and capricious.); *Payette River Property Owners Association v. Board of County Commissioners of Valley County,* 132 Idaho 551, 556-557 (1999). (The Board cannot overcome an express prohibition in its ordinances.)

up for appeal before the DEQ Board. Until the appeal is considered and the DEQ Board has issued a final decision, the NP study is not "complete" for final plat purposes.

ii. The water right issues have still not been resolved.

A review of the minutes reveals that the lack of appropriate water rights for this development have been an issue since the original concept hearing held over two (2) years ago on July 11, 2006. The real concern was that the developer did not have the appropriate rights for his numerous water features and fire ponds. There are two (2) water rights on this property: the first is a groundwater permit (22-13532) that can only be used for domestic purposes; the second is an irrigation right (22-7228A) which cannot be used for ponds and fire protection unless a transfer application is submitted and approved by IDWR pursuant to I.C. §42-222. It is not hard or costly to file a transfer application, although the resolution can be extremely time-consuming. The P&Z directed the developer to file this transfer over nineteen (19) months ago, but to date, the developer has not even begun the process. Thus, without an approved transfer, this development should not be scheduled for a final plat hearing.

iii. This situation calls for a site visit by the Board of County Commissioners.

In my opinion, the interconnected surface water issue could easily be resolved with a properly noticed site visit to The Ranch property. To be on the property and see it for yourself - the topography and presence of interconnected surface water – it really is quite dramatic. This Board has the authority to schedule a site visit, and this is a situation where it would be very beneficial.[4]

C. Conclusion.

The Board lacked the authority to grant the 12-month extension in the first place. Furthermore, P&Z's conditions for approval have not been fulfilled. Thus, our ordinances require that the November 13th hearing be cancelled and a new application be submitted.

Sincerely,

Anna Trentadue
VARD Program / Staff Attorney

[4] *Eacret v. Bonner County,* 139 Idaho 780, 786 (2002). (The Board may conduct a site visit of the parcel in question if it is preceded by proper notice and the opportunity for the parties to be heard.)