

February 21, 2025

I. Summary

1. Brian and Whitney Fraiz own a 40 acre lot accessed off of W 5000 S (the “Property”).
2. The Property has limited upland patches but a large portion is low functioning wetland that has been degraded by decades of livestock grazing.
3. The Property is in a conservation easement and has a building envelope that was established by the Teton Regional Land Trust in 1998.
4. The building envelope includes the largest upland patch and is next to County Road W 5000 S, which is a right of way easement established in 1964. The location of the building envelope was determined to minimize impact from development on the protected conservation values including waterways and wildlife habitat.
5. The Fraiz’s have received all the necessary permits from the US Army Corps of Engineers (USACE) to build a 3,811 sq. ft. house, and a 735 sq. ft. guest house for their family in December of 2023.
6. The Fraiz’s received a septic permit from East Idaho Public Health (EIPH) for an enhanced septic system for 5 bedrooms in September, 2023.
7. The Fraiz’s received a permit from Teton County Department of Roads and Bridges and USACE to run electric utility 1.5 miles to the Property in November of 2023. The total cost of the utility run was over \$150,000.
8. The permit from USACE requires extensive 1:1¹ mitigation efforts which will provide a public benefit by vastly improving the wetlands, and increasing the overall health of the aquatic and terrestrial habitat in the area. The Fraiz’s proposed mitigation exceeds the required 1:1 mitigation by offering a much higher functional lift from wet meadow wetlands to shrub/scrub wetlands.
9. The USACE permit allows the Fraiz’s to build within 15 feet of the wetlands.
10. Teton County requires a variance to build within 50 feet of a wetland area.
11. On January 14, 2025 the Planning and Zoning Commission (the “PZC”) voted 4-3 to deny the Fraiz’s a variance.

¹ A 1:1 ratio means that you have to replace the same amount of wetland that you develop. The Fraiz’ mitigation will also provide a higher functional lift – going from wet meadow to scrub shrub / willow dominated wetland.

II. Background

The PZC recently denied a variance to build a home on 40 acres. The need for the variance stems from a requirement in Teton County's Land Development Code (LDC) that structures must be setback at least 50 feet from any type of wetland. Development in wetlands is regulated by the federal government. The Fraiz's obtained all necessary federal permits (FEMA LOMA case# 24-10-0148A granted on January 8, 2024) and the Army Corps of Engineers (NW Permit NWW-2023-00298-104 granted on December 5, 2023). The Fraiz's also obtained a septic permit from Eastern Idaho Public Health (PERMIT-Subsurface Sewage Disposal Permit #4123169-2 granted on September 5, 2023). These permits allow construction of the home and guest home, driveway, landscaping and associated infrastructure. However, because Teton County requires development to be set back 50' from wetlands, and the federal permits allow for the proposed 15' setback, the Property requires a variance in order to build.

To protect conservation values as mandated by the conservation easement and to comply with limits in the USACE and County FPDP permits, the 0.5 acre building envelope is located in low quality wetlands on the property on higher ground with marginal wetland hydrology, outside the 100 year/ 1% AEP floodplain. This low functioning wetland exists in part because of irrigation return flow and has been degraded by livestock grazing, land mismanagement, erosion, devegetation, and changes in hydrology over the last century. This degradation of habitat not only has an impact on the property, but the rest of the upper Teton River watershed. The proposed compensatory mitigation would drastically increase the health of the aquatic and terrestrial habitat in the area which would be a massive public benefit. Furthermore, the Fraiz's have partnered with Friends of the Teton River to do a complete restoration of both Fox creek and Little Fox creek. The Fraiz's have spent tens of thousands of dollars on field work, data

collection, and design for a complete restoration of both Fox Creek and Little Fox Creek that run through the Property. Without the Fraiz's restoration efforts, this degradation of habitat that has occurred over the last century would go unmitigated. The mitigation plan approved by the Army Corps would convert this low functioning, degraded roadside PEM wetland into high functioning PSS wetland which would benefit the Foster Slough landscape and complement future stream restoration work.

When it was determined that a variance was necessary, the applicant team was told by county staff that they would support the variance and saw no reason for its denial. After two public hearings the PZC denied the variance.

III. Discussion

The PZC's decision was not supported by substantial evidence in the record and was arbitrary, capricious, and an abuse of discretion. The current Teton County Land Development Code lists nine criteria that an applicant must meet in order to show undue hardship and receive a variance. In a 4-3 vote, the PZC denied the variance stating that it failed to meet two of the nine criteria (#3 and #6). Completely absent from the written decision are any facts the PZC relied upon in its decision. Idaho Code § 67-6535 requires decision makers to support their decision with a reasoned statement that discloses and explains the basis of the decision in a meaningful way.

Failure to identify the nature of compliance or noncompliance with express approval standards or failure to explain compliance or noncompliance with relevant decision criteria shall be grounds for invalidation of an approved permit or site-specific authorization, or denial of same, on appeal.

Idaho Code § 67-6535(2)(a). Insufficient findings are grounds to vacate a decision. *Workman Family Partnership v. City of Twin Falls*, 104 Idaho 32, 38, 655 P.2d 926, 932 (1982). The PZC's decision should be vacated.

A. The Written Decision Does Not Cite to Any Evidence in the Record Supporting its Reliance on Criteria 3 to Deny the Variance.

A literal interpretation of the LDC would deprive the Fraiz's the right to build their family home on the Property, a right enjoyed by others in the same zoning district. The written decision denying this right states:

The situation of this subject property is not sufficient to distinguish it from other similarly-situated properties in the same Zoning District, such that a variance in this situation as requested by the applicant could only be categorized as a "special privilege" that these other properties have not been afforded.

This conclusory statement violates the Local Land Use Planning Act (LLUPA) and is grounds for reversal. *Crown Point Dev., Inc. v. City of Sun Valley*, 144 Idaho 72, 78, 156 P.3d 573, 579 (2007). LLUPA requires decision makers to explain their reasoning and cite to the facts relied upon in reaching a decision. *Sopatyk v. Lemhi County*, 151 Idaho 809, 816, 264 P.3d 916, 923 (2011). The Fraiz's presented extensive expert evidence showing the unique condition of the Property that distinguishes it from other property in the same zoning district. The PZC decision not only fails to explain its rationale, it fails to address this evidence and ignores the unique characteristics of the Property. For example, the decision does not address the fact that upland areas 1 and 3 have to be used for septic (and reserve septic) sites, access to the property, and utilities hookup. Utilizing these upland areas for propane and septic will result in the least impact on the surrounding wetland from leaks, spills, and/or system failure. There is nothing in the decision regarding the fact that the home needs to be single story due to the bearing capacity of the soil and the 25' height restriction in the conservation easement. These facts, along with the

USACE approved mitigation/conversion of low-quality wetland to high functioning wetland, clearly show that the Property is readily distinguished from other similarly-situated properties. such that the requested variance is not a “special privilege.”

At a minimum, decision makers should identify whether the evidence is conflicting or not and, if so, say at least something about why they found certain evidence more compelling than contrary evidence. *Cowan v. Bd. of Comm’rs of Fremont Cnty.*, 143 Idaho 501, 511, 148 P.3d 1247, 1257 (2006). The requirement for such a reasoned statement is a common law principle rooted in constitutional due process requirements that predate LLUPA. *Id.* Oddly, the PZC’s decision wastes ink on the matters it did *not* consider in making its decision. In about one third of the findings the PZC tries to distance itself from areas controlled by federal legislation, twice stating that it did not consider the wetlands, the mitigation plan, and the fact that the applicant has received all necessary federal and state permitting from the US Army Corps of Engineers, Idaho Department of Water Resources, Eastern Idaho Public Health Department, and the Federal Emergency Management Agency. Although Teton County only enforces its own rules (in this case a 50 foot setback), the peculiar circumstances of the Property, and the federal permits now controlling its use, are important as they distinguish the Property from other properties in the same zoning district. Also, given the fact that some of the Planning and Zoning commissioners spent a good part of the hearing asking questions and commenting on the wetlands and mitigation, it is disingenuous to state that this information was “only background information and not relevant to the PZC’s determination of this application.” For example, Commissioner Tyler Wertenbruch asks why the Fraiz’s don’t build in the 1,400 square feet of upland (there is

202 Sq ft., not 1400 Sq ft. of upland).² Tyler Wertenbruch is accusatory, stating the Fraiz's are going to shed "water and oil and other things into the ground," "disturb all the rest" and that there is no "appreciation for the wetlands." (Jan. 14, 2025 hearing at 1:32:10). Although these *thoughts* do not make it into the written decision, the PZC's statements at the hearing will be considered by a court on appeal.

It is the intent of the legislature that decisions made pursuant to this chapter should be founded upon sound reason and practical application of recognized principles of law. In reviewing such decisions, *the courts of the state are directed to consider the proceedings as a whole and to evaluate the adequacy of procedures and resultant decisions* in light of practical considerations.

Idaho Code § 67-6535(3) (emphasis added). If the Board of County Commissioners "considers the proceedings as a whole" and listens to the audio of the public hearing, it is obvious that the PZC denied the variance because it wants the Fraiz family to build a tiny home in the small amount of available upland. The PZC opinion is based off of conflicting and incorrect assertions from special interest groups that there is enough upland area in which to build a home with little to no wetland disturbance. This is simply not true, unless one considers 202 sq. ft. an adequate home size for a family of five. The requirements for a variance from the setback requirements of the LDC were not analyzed in the context of the LDC, the commission was adjudicating the home's presence in wetlands. This is not the job of the Teton County PZC.

B. The Variance Requested is the Minimum Variance That Will Make Possible the Proposed Use of the Land, Building, or Structure.

Even if the Fraiz's build a 202 sq ft home they need a variance due to the necessity for a driveway to get access to their home.³ Therein lies the Fraiz's undue hardship. This hardship is

² Pointing to actual evidence (vs former VARD staff attorney Anna Trentadue's use of incorrect numbers to artificially inflate impact) Braden Olson with Nelson Engineering shows that there is only 202 sq ft of buildable upland. Jan. 14, 2025 hearing at 1:36:54.

³ Nothing in the LDC requires that you build a small structure in order to meet a setback.

precisely the type of circumstance for which the Idaho legislature created variances. Idaho Code § 67-6516. The minimum variance for the proposed use of the land (to build this residence for their family of five with room for family and guests) is the requested 15' setback around the perimeter of the Property. The home is designed within the constraints placed upon the Property, including those in the conservation easement, those caused by the bearing capacity of the soil, the need for an enhanced septic design, and the detailed federal permits. There is no discussion, for example, of the fact that upland areas 1 and 3 are needed for septic (and reserve septic) sites, access to the property, propane tank, and utility hookups. These parameters are well documented in the application materials and the federal permits, yet the written decision cites to none of the evidence. In accordance with federal law, no more than a 0.5 acre of wetland can be disturbed. If more than 0.5 acre could be disturbed, the Fraiz's could meet Teton County's required 50 foot setback. There is only 202 square feet of buildable upland on the property that meets the 50' setback (a fact that the PZC decision completely ignores). So the variance requested is the minimum needed to make possible the Fraiz's proposed use of the land, building, or structure.

Again, it is obvious from the commissioner's comments at the PZC hearing on January 14, 2025 that they simply don't want development in the [low functioning] wetland. For example, Commissioner Carl Kohut states "I think minimal would be using some of the uplands for development not wetland, (1:42:10). Braden Olson from Nelson Engineering tries to explain that the lot is simply not buildable with a 50 foot setback applied, a clear hardship. In response, Commissioner Tyler Wertenbruch states:

There is opportunity for lessening the amount development and focusing it in the upland, to minimize the amount of variance needed, therefore the amount of mitigation needed. That definition of minimal or minimize is not seemingly applied here. I am not hearing it from you. I'm hearing we can only do 200 sq ft, so we decided to do this house in this orientation for all of these other reasons, not minimizing the impacts. You have a 1:1 mitigation,

which is what you're trying to leverage, trying to say, this is minimum, because we can then disturb all of this other stuff to create a wetland. I'm no expert, I don't know how well creating wetlands from uplands versus just leaving wetlands alone. That's a debate for experts, but if we're going to get into the definition of minimum, going from one extreme to the other, what we're trying to do is apply our code with the concept of minimum to also allow a buildable site. I personally feel like you're going maximum and you're coming up with all these ways to talk about 200 sq ft and mitigation without considering you do have some upland area up there that could have been used and no one is speaking to that other than this is in front of us.

These comments not only evidence a lack of understanding of wetland disturbance to wetland setback, they show the commissioners do not understand what the USACE requires in order to construct in wetland. It also ignores the need for a septic and Eastern Idaho Public Health's (EIPH) requirement for a secondary site. The house is positioned to have as close of a run from the house to the septic as possible. It is an enhanced system with a mounded leach field. If the septic were placed in an upland further from the house, it would have to pump further and it would be more likely to fail. Also, the percolation tests conducted with EIPH determined that the best spot for a septic was on east border of property. Kathleen Price with EIPH also indicated that upland 1 would be a good reserve septic site in the event of a septic failure. These reserve sites need to remain undisturbed for 5-10 years prior to use. None of these facts are discussed in the PZC decision. The PZC decision violates Idaho Code § 67-5279(3) because it was not supported by substantial evidence in the record and was arbitrary, capricious, and an abuse of discretion.

C. There Are Procedural Issues With the Denial.

Although the above is enough reason to overturn the denial, the BoCC should also be aware of certain procedural issues. When the PZC meeting began, Carl Kohut asks the other members of the PZC if the Fraiz application could be moved to the first spot on the agenda because that decision will "set a precedent" for wetland variances. This statement is indicative of

the entire hearing in that the majority of the commission seemed to have their mind made up prior to the hearing.

A land use applicant has, as a matter of law, substantial rights in the fairness of the decision-making process. *Hawkins v. Bonneville Cnty. Bd. of Comm'rs*, 151 Idaho 228, 232-33, 254 P.3d 1224, 1228-29 (2011). Applicants are entitled to decisions made by an impartial, not predisposed, tribunal. *Eacret v. Bonner Cnty.*, 139 Idaho 780, 787, 86 P.3d 494, 501 (2004) (vacating a county board's decision due to a commissioner's likely bias). Commissioner predisposition was also evidenced by the lack of deliberation. At the end of the public hearing, a motion to deny is immediately made and seconded, there is little to no deliberation or discussion on the nine criteria. This behavior indicates that the commissioners had come to a decision prior to the hearing. Where a decision maker "has made up his or her mind prior to the hearing, that is actual bias, and that decision maker must be disqualified from participating." *Floyd v. Bd. of Comm'rs of Bonneville Cnty.*, 137 Idaho 718, 725, 52 P.3d 863, 870 (2002) (A county commissioner's pre-hearing public statement indicating "predetermination" on an issue demonstrated "actual bias" rendering his participation in the hearing "constitutionally unacceptable.")).

Lastly, Landowner applicants also have a substantial right to develop their own property. *Terrazas v. Blaine Cnty. ex rel. Bd. of Comm'rs*, 147 Idaho 193, 198, 207 P.3d 169, 174 (2009). LLUPA requires the decision maker to explain to the applicant how the application could be changed to make it acceptable. Idaho Code § 67-6519(5)(c). This was not done.

IV. Conclusion

The Fraiz's respectfully request that the Board of County Commissioners vacate the decision of the Planning and Zoning Commission and grant their variance application.