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Teton County Board of County Commissioners
150 Courthouse Drive
Driggs, Idaho 83422
commissioners@tetoncountyidaho.gov
pz@tetoncountyidaho.gov

Re: Fox Creek LLC (Huntsman Family) letter in support of P&Z decision to deny the Fraiz variance.

Dear Commissioners:

Fox Creek LLC (Huntsman Family) fully supports the decision of the Teton County Planning & Zoning Commission (P&Z) to deny the Fraiz Variance. After almost 3.5 hours of testimony and deliberation from two separate hearings, (November 12, 2024 and January 14, 2025) the P&Z denied Fraiz's request to install over 4,546 sf of building footprints entirely within a critically important wetland - while leaving the nearby upland largely untouched. With a driveway spanning 375 feet and over 12,000 sf of impervious surfaces - the P&Z simply could not approve Fraiz's proposal as the absolute minimum needed for a variance.

Watch the videos of the hearings; the P&Z was clearly uncomfortable with the proposed location of the Fraiz house and guest house. **The debate amongst the commissioners was whether to deny the proposal outright, or table it for further changes.**

Now Fraiz asks this board to reject all of this, and simply approve his project as-is, with NO further effort to reduce impacts. The trouble is, this Board will run into the same problem the P&Z had: there are simply not enough facts in the record to make an affirmative finding that the nine statutory criteria for a variance have been satisfied. (LDC 4-9-E) Look at the size of Upland 1 coupled with the footprint and location of the Fraiz house; there is NO way to conclude that this is the minimum variance needed to make possible the use of the land (criteria #6).

1. **Fraiz had the burden of proof, he did not meet it.**

Fraiz had the burden of proof to proactively build up a record of facts to support an affirmative finding by the P&Z that all nine criteria were met. If even one is not satisfied, the variance must be denied. Where there are conflicting facts, the P&Z is empowered and obligated to weigh them in order to determine which are most credible. Where there is an absence of information, the P&Z cannot make inferences or conclusions.

After the first hearing in November, the P&Z moved to table the Fraiz application. In their motion the P&Z unanimously concluded that the criteria **"have not been satisfied in the application materials."** (Nov 12, 2024 Minutes). Two months later at the January hearing, Fraiz still made NO changes to his application. This was repeatedly questioned by P&Z; they clearly recognized that Upland 1 could sustain a small house with no variance, or even a large house with a variance, which would be a far more compelling request than what Fraiz had proposed.

During Fraiz's presentation at the January 14, 2025 hearing, the P&Z consistently commented on the underutilization of Upland 1. Commission Kohut, an architect, asked that Fraiz use his existing ½ acre of allowed mitigations to simply expand off the Upland 1 to make a large building site. (Hearing at 1:47) Commissioner Braun, a retired planner stated it best:

> **I think what I'm struggling with is the underutilization of the upland area.** And we're looking at a zero setback on 85% of this project all around the house, all around the portions of the driveway. Could that driveway be shifted left or right, and could the guest house be located in the uplands? Could the whole main home be shifted to the north to not extend as far into the wetlands and utilize some of that upland for development - whether it's the guesthouse, the home, the parking, the driveway. It's back to the same discussion we had about the extent of the variance that's being requested. You've got a challenging lot here - there's no question about it. If this property today went through our review process, I would hope that the lot would not have been created because of all the constraints and limitations on it. But the lot's there, so we've gotta deal with it. You've got a hardship. **The question is, how YOU respond to that, and to what extent of a variance is the commission open to entertaining.** (Emphasis added. Hearing at 1:47)

Fraiz later admitted the house could be moved north and he was willing to discuss it. (Hearing at 2:15) Really, this is what P&Z had wanted all along, and was the core problem with the proposal as designed. Fraiz had the chance to move the house - he just didn't do it. And now, Fraiz's appeal shows a refusal to move the house, and instead demands approval as-is.

Fraiz's appeal also falsely claims that the P&Z required him to build an unreasonably small, 202 sf house. In truth, the P&Z simply -and repeatedly - asked Fraiz to make more use of the readily available upland. Commissioner Baker gave direct guidance to Fraiz on how to change his variance to be compliant with county code:

> If this motion does pass, I would encourage the applicants to redesign and come back for a second variance that has far less impact on the wetlands and utilizes the upland land as much as physically possible. (Hearing at 2:22)

One-by-one, Commissioners Wertenbrunch, Weber, Kohut, and Braun each provided Fraiz with additional specific guidance on how to redesign in order to comply with state code and county ordinance. (Hearing at 2:23 *et seq*). This is exactly what is required in I.C. § 67-6519(5)(c) - explain to the applicant what changes are needed to make the application approvable.

Procedurally, moving the project into Upland 1 was deemed to be a significant change by the Board. The P&Z recognized that the entire posture of Fraiz's application needed to "shift".

> I think the denial indicates the wholesale shift that we are looking for. It's not a subtle adjustment. (Commissioner Kohut at 2:27)

Even the three commissioners who ultimately dissented (Kaufmann, Penfold, and Braun) wanted the project moved north into the upland; they were simply in favor of continuing the hearing to require specific changes, instead of outright denying it. (Hearing discussion starting at 2:26) However, with such major revisions needed, the P&Z properly concluded a new application was necessary, and this one therefore must be denied.

> Commissioner Penfold: When we start requesting this, that, and the other, they need to bring those things back to us on a different application. Am I thinking of that right, Jade?"
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> Interim Planner Jade Kruger: Yes that is correct.
>
> Commissioner Penfold: I think that's what legal told us was, punt, and then let them come back with better if that's what everybody's feeling. (Hearing at 2:27)

Fraiz had due process. He had the opportunity to adjust his plan in light of the P&Z's November finding that criteria had not been met. Yet he made NO changes. The Board had no choice but to deny the variance and ask Fraiz to come back with a new proposal that more directly utilized Upland 1. Moreover, Fraiz could strategically re-design, and not even need a variance at all.

2. **P&Z clearly saw that the variance requested was NOT the minimum needed - and the Applicant's representative admitted it.**

We can fight over the size of Upland 1, but the fact remains: on rebuttal at the January hearing, Fraiz's engineer Braden Olson confirmed that Upland 1 is 12,704 sf, which is

approximately .3 acres.[1] Factoring out the wetland setbacks, there remained 11,368 sf. Factoring out the county road setback, **Olson confirmed there still remained 8,052 sf of buildable space in Upland 1.** (Hearing at 2:18). Moreover, the highest elevation of the entire Fraiz property is Upland 1, which is as high as 6004ft.[2]

If Fraiz were fully utilizing Upland 1 for a modest homesite and still requested a variance for small deviations from the 50-ft riparian buffer requirement (LDC 5-4-2) this would be a far more compelling request. In that hypothetical scenario, Fraiz could show that at least SOME effort had been made to use the upland while also mitigating the size, scale, and impacts of the proposed development.

As soon as the public comment at the January hearing identified Upland 1 as a readily use-able building site that was being tactically ignored, Fraiz then pivoted to claim that Upland 1 WAS being utilized - for driveway placement and a reserve site for a septic field.[3] As seasoned decision-makers, the P&Z did not buy it, and neither should this Board. Upland 1 is the highest site on the property, and it can clearly accommodate a house. Fraiz simply desired to build further south, closer to Fox Creek - entirely 100% in the wetlands.

Incredibly, it's as if Fraiz's Site Plan endeavored to not touch the upland at all! The Plan shows the footprint of the main house has been placed a whopping 244 to 369 feet back from the road, with extensive parking features - all within the wetland mapped as "W1" by Intermountain Aquatics. The Applicant attempted to justify this site placement, to which Commissioner Kohut responded:

> Commissioner Kohut: The length of driveways of other properties that likely were built before these regulations were in place feels like an irrelevant statistic. The thing that I can't reconcile is - and maybe you can help us - is not only the distance from the road, but the orientation of the home stretches out even more, longer, further into this fragile habitat. Can you help us understand or see how that is the minimum variance requested versus what appears to be trying to establish the most privacy for the home.

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[1] Our January 3, 2025 comment letter estimated Upland 1 to be 0.46 acres. Email communications with Teton County Planner Torin Bjorklund from January 3, 2025 confirmed this number; Bjorklund's area calculation was 0.43 acres.

[2] Fraiz Residence Compensatory Mitigation Plan produced by Intermountain Aquatics, pages 7 and 21. Upland 1 is identified as the highest land on the property, and most importantly, all of it sits higher than the upland elevation threshold of 6002 feet.

[3] Fraiz Residence Overall Site Plan (Nelson Engineering March 15, 2024) shows Upland 1 would be used for only a driveway; the septic field would be placed further south in a smaller, separate upland more closely abutting higher functioning wetlands. Upland 1 is a site for a potential reserve septic site. Braden Olsen, January 14, 2025 hearing at 1:36.

> Braden Olsen: Um, I guess I didn't design the home. Tim Grimes is here. He's the architect. Um, you know obviously. I think that I would say, we felt that we were within code, and within all our federal and state permits, um, that there was nothing that we could find within the code that, um, implied that we could not put this structure in this location specifically based on the permits we pulled and applied for.
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> Commissioner Kohut: So it likely isn't an effort to reduce the minimum variance requested then, right?
>
> Braden Olsen: So yeah, minimum is a really interesting term, right? Because it's super relative. So it's gonna be- what's minimum on the lot to the east of us? (Hearing at 1:40)

The discussion continued on, with Commissioner Weterbrunch providing additional direct guidance to Mr Olsen on focusing the development in the upland instead. (Hearing at 1:43) The architect Mr. Grimes was then directly asked by the P&Z if he had any information that would explain why the house stretched linearly deep into the wetland. Incredibly, Mr. Grimes simply declined to testify. (Hearing at 1:58).

3. **P&Z properly determined that granting the variance would confer upon the Fraiz property special privileges to build entirely within a wetland which is DENIED to ALL properties in ALL zoning districts.**

No one has the right to build in a wetland. Fraiz asked to be given a special privilege that is commonly denied to other land owners in ALL zones, even though the site in question is not unique from the other surrounding parcels. In order to necessitate a variance, there must be unique physical features on the site that are "peculiar" to the property.[4] The P&Z saw nothing on Fraiz lot to distinguish it from the other surrounding parcels which are all equally encumbered by complex webs of interwoven creeks, streams, and wetlands.

The entire surrounding area is simply one of the wettest, most fragile ecosystems in Teton Valley. Fraiz bought a parcel in the middle of it all, where there is not a house built in over half a mile in either direction. **Fraiz even admitted knowing that when he purchased the conservation property, it would be extremely difficult to build.** (January 14, 2025 hearing at 1:26) The Fraiz parcel abuts conservation easements and preserved public lands to the east, south, and west. There are limited uplands on which to build, and that's simply the norm for this

[4] In *City of Burley v. McCaslin Lumber Co.*, 107 Idaho 906, 693 P.2d 1108 (1984), the Court of Appeals overturned a variance approval on the ground that the circumstances justifying the variance were not "peculiar" to the property at issue under the terms of the ordinance.

fragile area. Yet Fraiz is relatively lucky; a modest home can be built on Upland 1. Instead Fraiz sought out a special treatment afforded to no other similarly situated property owner. The P&Z simply could not grant that privilege to him. (LDC 9-4-E Criteria #3)

4. This Board cannot consider new information introduced on rebuttal.

P&Z was repeatedly very concerned about the large 4,546 sf footprint of Fraiz's two buildings. On rebuttal at the January hearing, Fraiz claimed the one-story structures were absolutely necessary:

> If we could build up, we would build up, but the carrying capacity of the soils don't allow for that, or so I've been told. (Hearing at 2:16)

This assertion was further reiterated in Fraiz's appeal letter (page 7). There is NO prior reference, study, report, or statement regarding this claim. It was entirely new information, thrown into the mix at the last minute on rebuttal to purportedly address a major issue of concern by P&Z.

It is black letter law in Idaho that new information cannot be considered on rebuttal - or on appeal. The Idaho Local Land Use and Planning Act (LLUPA) requires that governing boards adopt hearing procedures that "provide an opportunity for all affected persons to present and rebut evidence." (Idaho Code § 67-6534) When new information is introduced after the close of public comment, affected land owners are deprived of their due process rights to vet and rebut this evidence.

We anticipated this kind of ninth-hour maneuvering might happen. As such, we issued multiple requests for the opportunity to address any potential new information that might be introduced - yet it was still not provided.[5] Fraiz now attempts to use this unvetted claim as a basis to his appeal. When local governments make land use decisions based on new information provided outside of due process, Idaho courts have consistently reversed those decisions.[6]

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[5] See,*Whitted v. Canyon Cnty. Bd. of Comm'rs*, 137 Idaho 118, 121, 44 P.3d 1173, 1176 (2002). Citing *Whitted,* counsel for the Huntsman Family requested a rebuttal in emails to Teton County planning staff and legal counsel on December 27, 2024 and January 3, 2025. Counsel further requested surrebuttal in the January 3, 2025 letter in opposition to the Fraiz Variance, and again in their closing comments at the January 14, 2025 hearing (Trentadue at 2:06).

[6] *See*, *Fischer v. City of Ketchum*, 141 Idaho 349, 109 P.3D 1091 (2005). For some local context, see also the (March 3, 2022) Memorandum Decision on Petition for Judicial Review for CV41-21-0205 also known as " the Victor Broulim's" decision wherein Judge Boyce vacated the City of Victor's rezone approval of land owned by Broulim's Inc. in downtown Victor. Boyce found that the City failed to provide due process by ensuring that the public would be given a meaningful opportunity to consider and rebut all evidence in the proceeding. In that case it was a traffic study. In this case, it's a purported structural justification for an exceedingly large building footprint.

5. Conclusion.

For 28 years, the Huntsman Family has owned the abutting seven parcels of fragile wetland, creeks, streams, and critical habitat areas totalling over 400 acres. Like the Fraiz property, their land is also encumbered by a Conservation Easement held by TRLT. The Fraiz and Huntsman properties are intertwined with both surface and ground waters. The Huntsman Family has a proven record of successful conservation partnerships with TRLT, Friends of the Teton River (FTR), Ducks Unlimited, and Trout Unlimited. Fraiz has NO proven record, other than a Teton County Stop Work Order for unpermitted excavation in wetlands[7] and a claim that their work is supported by Friends of the Teton River - even though the record actually contains a letter of opposition from FTR asking Fraiz to build in the upland instead.[8]

It would be faster and easier if Fraiz simply modified his building plans (as he offered to do at the hearing) and submitted a new proposal, as requested by P&Z. Yet that is not the posture of his appeal, which pushes this board to take on liability by outright reversing the P&Z's decision when there are NO facts in the record to support it. **The cautious and prudent path here is to affirm the P&Z's decision; you cannot defend facts that simply do not exist.**

Please uphold the denial of the Fraiz variance. Fraiz has been given direct guidance as to how he must change his project to make it approvable. The choice is his. Thank you.

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Counsel for Fox Creek LLC / Huntsman Family

CC: D. Andrew Rawlings
Bailey Smith

[7] *See*, Attachment C to FoxCreek LLC's January 3, 2025 letter; *Teton County Stop Work Order* issued against Brian Fraiz on November 19, 2024.

[8] Letter from Amy Verbeten Executive Director of Friends of The Teton River, submitted into the record of decision in Attachment L of the January 14, 2025 hearing packet.