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To: Teton County Board of County Commissioners
RE: Narrative for Fraiz Variance Reconsideration Request

The Board of County Commissioner's (BOCC's) denial of the variance request for the Fraiz 40 acres was arbitrary, capricious and an abuse of discretion. The BOCC's decision is completely at odds with the written decision of the Planning and Zoning Commission's (PZC). The PZC decision specifically states that it "did not consider matters related to wetlands or wetlands mitigation, which is not within the scope of the PZC's review of this application." Yet the BOCC's denial is completely based on matters related to wetlands and wetlands mitigation. The BOCC states in their decision that they are applying the Land Development Code (LDC) in the most liberal way possible: "The Board reads its Land Development Code *broadly* in relation to wetlands and the riparian corridors/buffers." The BOCC decision even goes so far as to say that the LDC can be applied "in a *layered fashion* which allows the county to impose *higher standards beyond those imposed by other agencies or regulatory entities*." This is a far cry from the PZC's determination that matters related to wetlands or wetland mitigation should not be considered. Also, during the previous administration (in September 2024) the applicant was told by the planning and zoning administrator, at the time, that their situation met the requirements for a setback variance. Attached to his letter is an email from Jade Krueger stating "the variance request should be pretty straight forward since it would be an undue hardship to meet those setbacks given the property conditions and delineation." Jade Krueger also told the applicant that a Wildlife Habitat Assessment was not be necessary because the building envelope delineated in the conservation easement already took into considerations the wildlife values it is

meant to protect. Lastly, the PZC and the BOCC both clearly stated that there is an undue hardship due to the nature of the property and that a wetland variance and wetland disturbance is necessary, yet the application was still denied.

In addition to the above inconsistencies, the decision handed down by the Board of County Commissioners ignores the plain language of the LDC and the evidence/facts in the record (the detailed work conducted by Nelson engineering, Intermountain Aquatics, Eastern Idaho Public Health (EIPH) and the Army Corp of Engineers completely disregarded). Every section of the LDC cited in the BOCC decision is met or exceeded in the Fraiz application, yet the BOCC's written decision disregards the plain language of the code and insinuates that the Fraiz variance application does not meet the below code provisions (the decision states that its "broad" reading of the LDC "is supported in several locations in the LDC, including ..." and then cites to the below with no explanation of how the application does not meet these code sections). Even though these code sections are not even applicable to a setback application, the Fraizes meet or exceed these standards.

LDC § 1-4(A)(1)(c) requires development to be clustered to provide meaningful open space and limit impacts on these natural resources.

The Fraizes are proposing to place a residence that comprises 1.25% of their land. This is "clustered" and will provide meaningful open space for the remaining 98.75% of their property. The Fraiz design should be lauded for its meaningful open space and tight clustering. Yet, the BOCC written decision indicates they are not clustering, but fails to state *anything* in the Fraiz application that shows they are not clustering or even mentions that they are building on only 0.5 acre in the northeast corner of the property. The Fraiz application meets or exceeds this standard.

LDC § 5-4-1(E) The decision cites to this section, but conveniently (and it must be assumed, *intentionally*) **leaves out** the very significant language of **§ 5-4-1(E)(2)**:

If impacts cannot be avoided as specified in Section 5-4-1-E, the lost habitat shall be mitigated by replacing it with similar vegetation communities at a one to one (1:1) ratio. The replacement ratio shall be higher within a half mile of riparian areas and equal a two-to-one (2:1) ratio or replacement of two vegetative components for every one that is removed. **LDC § 5-4-1(E)(2).**

This mitigation is *exactly* what the Fraizes are doing, and what is required by the ACOE as documented in their Nationwide Permit 29. In fact, the Fraizes are exceeding both the ACOE and LDC standard of 1:1 mitigation by replacing low functioning marginal emergent wetland with high functioning shrub-scrub wetland resulting in what is deemed a functional lift, which is more costly.

LDC § 1-10(F)(3) “Wetlands setbacks are measured from the edge of the boundary line established by the National Wetland Inventory Map, **or the line established by a detailed site-specific delineation approved by the U.S. Army Corps of Engineers.**”

The BOCC decision states that the above “language **does not support** creation of a new artificial wetlands edge based on the placement of USACoE approved fill.” This completely contradicts the clear language of the LDC. The LDC specifically supports measurement from “the USACoE approved fill.” A site specific delineation is required in order to get a NWP 29 and this delineation does *establish the boundary line for the wetland setback*. The Fraizes must build their home in the resulting USACoE delineated upland, which has been approved by the USACoE via their NWP 29. All of this information was provided to the County by Intermountain Aquatics and is in the staff report.

At that May 1st meeting, the conversation was dominated by one commissioner. In August of 1998 the property was placed in a conservation easement; this easement was drafted by that commissioner, Michael Whitfield (“Whitfield”). Rather than discuss the evidence in the over 200 pages of submittals on the requested variance, at the hearing Whitfield instead focused on his personal opinions of house size/home design, and conservation concerns for which he provided no supporting evidence. During the deliberation Whitfield criticizes the applicant for wanting to build a 3,811sq. ft. house, and a 735 sq. ft. guest house on only 0.5 acre site of a 40 acre parcel for their family of five, stating:

- “It’s not a piece of property that’s appropriate for the scale of house that he wants to build at the outset”
- “I don’t like the magnitude of the house. I don’t think it's appropriate for the location.”

- “He can’t get all of his house on the upland at the magnitude that he’s suggesting.”
- “I don’t think, Commissioner James, it’s a high bar to build a 4,000 sq foot in this kind of landscape. I don’t buy it.”

Ironically, Whitfield drafted the conservation easement to specifically allow for a 4000 sq foot main residence and a 1000 square foot guest house along with other normal residential and farming buildings (including but not limited to garages, corrals, loading chutes and outbuildings) spread over 2.5 acres. Not only is the Fraiz home **smaller** than what the conservation easement allows, the ½ acre of development land is 5 times smaller than what the conservation easement allows.

It is apparent that Whitfield was not looking at the application as a setback variance at all, but a chance to increase the restrictions on the 40 acres (and to set a precedence for the Fraiz’ next door neighbor, Clayton Dennington as well¹). For example, at the start of the meeting, Whitfield states that the question before the board is actually *not* about a variance from the required setback, “but there is another issue that is equally important ... the whole thing is in indicator habitat. We want to minimize the disturbance of that habitat. It’s not just the setbacks that we are talking about.” But it is just setbacks that the BOCC should have been talking about. Instead the BOCC acts as if they are reviewing an application to build in wetlands. Indicator species and habitat are not part of the criteria for a setback variance², but even if they were the expert evidence in the over 200 page staff report clearly shows that the homesite is located entirely on low quality wetlands on higher ground with marginal wetland hydrology, outside the 100 year/ 1% AEP floodplain. Any sensitive habitat on the Property has been degraded by decades of livestock grazing, land mismanagement, erosion, de-vegetation, and changes in hydrology. The *facts* show that if development were allowed to proceed, the **required**

¹ Notably, the conservation easement that Whitfield drafted in 1998 covered 80 acres – 40 now owned by the Fraiz family and the other 40 now owned by Clayton Dennington. Without reference to his previous involvement in his property, Whitfield disregards Clayton’s positive comments as the closest neighbor and instead surmises that Clayton will just “be looking for the same king of variance ... he is on 40 acres with the same kind of layout.”

² The decision also fails to mention that the fact that a Wildlife Habitat Assessment was performed as part of the conservation easement.

mitigation actually **benefits** wildlife by creating new palustrine scrub-shrub wetlands. The compensatory mitigation would drastically increase the health of the aquatic and terrestrial habitat of the entire area which would be a *massive public benefit*.³ Furthermore, the Fraizes have partnered with Friends of the Teton River to do a complete restoration of both Fox creek and Little Fox creek. The Fraizes 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 Fraizes 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. The proposed mitigation site was selected for (1) physical conditions favorable for creating self-sustaining, high functioning wetlands with reliable hydrology and (2) placing the new wetlands where they can provide the greatest benefit to wildlife given the surrounding landscape. Onsite mitigation makes sense here because a degraded, roadside PEM wetland can be replaced with a higher functioning PSS wetland with high value in the context of the Foster Slough landscape. None of this is mentioned in the written decision.

The variance requested is the minimum variance that will make possible the proposed use of the land, building, or structure. Whitfield's suggestion that the applicant move as much infrastructure as feasible to Upland 1 as well as their primary and secondary septic sites is simply not feasible, and it **still would result in a ½ acre of wetland disturbance** in order to maximize the wetland setback. The septic permit calls for a raised leech field and an enhanced septic system. This is not a gravity fed septic system. The effluent from the septic tank will need to be pumped uphill to the leech field. If the County requires the Fraizes to build their home further

³ This mitigation is also what meets Section 5-4-1-E: "the lost habitat shall be mitigated by replacing it with similar vegetation communities at a one to one (1:1) ratio. The replacement ratio shall be higher within a half mile of riparian areas and equal a two-to-one (2:1) ratio or replacement of two vegetative components for every one that is removed."

away from the leech field, there is a higher risk of septic failure, resulting in potential water quality issues in Fox Creek and the Upper Teton River. There have been instances of homes in the area who had to rebuild their septic systems multiple times due to failures. The Fraizes are trying to minimize risk of this happening. The Fraizes are using the majority of Upland 1 for secondary septic site (which needs to be a reasonable distance from driveway for safety reasons), driveway access to their residence, and propane tank. As shown in the attached exhibit prepared by Nelson Engineering, **it is impossible to fit the guesthouse, driveway, primary septic site, and secondary septic site in upland 1.** In Whitfield's configuration, either one of the septic sites or the guesthouse will have to be placed in wetland. The site of the leech field is of utmost importance for this project. The Fraizes conducted a perc test with a water monitoring well that had to be checked on a weekly basis for almost 8 months from December of 2021 to July of 2022. Upland 3 was identified as the likeliest best site for a leech field. Toward the end of the perc test from December of 2021 to July of 2022, Kathleen Price from EIPH and Brian Fraiz walked the entirety of the 2.5 acre building envelope to confirm that upland 3 is in fact the best site for the septic system. Kathleen Price stated that Upland 3 was even drier than Upland 1 and stated that Upland 3 was really best place for the leech field. Kathleen Price has many years of experience in identifying areas suitable areas for septic in wet areas. The BOCC's conclusion that the Fraizes do not meet criterion 6 is completely unsupported by the LDC, the law⁴ and fact and therefore was arbitrary, capricious and an abuse of discretion.

Criteria 8 asks the BOCC to confirm that "granting of the variance is not in conflict with the public interest." The "not in conflict" standard is a low bar that the Fraiz far exceed by actually benefitting the public. The Fraizes are converting low functioning marginal emergent wetland that has been heavily grazed into high functioning shrub-scrub wetland resulting in a functional lift. The Fraizes are planting 340 new willow plants. They are also restoring the

⁴ Idaho law is clear that comprehensive plans cannot be used to turn down site specific land applications such as variances and may only be used as a guide to draft ordinances. Although the comprehensive plan actually would support the approval of this variance, it cannot be used as a reason for approval or denial.

decimated stretch of Fox creek and Little Fox Creek on their property. The Fraizes stopped grazing their land in 2022 and the land has responded very favorably. The Fraizes have been referenced and thanked by Teton Valley Lodge residents and surrounding land owners for discontinuing their grazing, stating that they have had the best hopper fishing in decades on the Upper Teton River. What the Fraizes have done with their property has already resulted in public benefit and allowing them to build their home, which is their right, will result in mitigation and restoration that will continue to have massive public benefit.

Lastly, the written decision states at several points that it relies on legislative intent versus the language in the setback requirement.

The Board's decision relied on language from the LDC which presents a broad perspective of wetlands protection in its intent rather than a narrow perspective focusing only on the letter of the setback requirement.

Idaho courts have long held that there is no reason to look to intent when the language of a statute is clear. *Florek v. Sparks Flying Service, Inc.*, 83 Idaho 160, 359 P.2d 511 (1961); *State v. Lawler*, 81 Idaho 171, 175, 338 P.2d 264, 266 (1959) (“[W]here the language of a statute is unambiguous, the clear express intent of the legislature must be given effect and there is no occasion of construction.”) The *letter of the setback requirement* is the only thing the Board is at liberty to rely upon.

For the abundant reasons touched on above, the Board's decision must be reconsidered and the variance granted.

From: Jade Krueger <jkrueger@tetoncountyidaho.gov>
Sent: Tuesday, September 10, 2024 11:03 AM
To: Jeff Klausmann <jeff@intermountainaquatics.com>
Cc: Torin Bjorklund <tbjorklund@tetoncountyidaho.gov>
Subject: Re: Fraiz GEC permit

Hi Jeff,

I agree re: no need for an A-WHA because of the building envelope. However, the wetland setbacks and the actual development (Driveway/house/garage, etc)... I don't have the authority to just waive that requirement. That should be done through a variance with the PZC. The variance request should be pretty straight forward since it would be an undue hardship to meet those setbacks given the property conditions and delineation.

On Mon, Sep 9, 2024 at 1:14 PM Jeff Klausmann <jeff@intermountainaquatics.com> wrote: They are seeking a building permit and need to build a road. They also need wetland mitigation as part of the Corps permit to develop both. That mitigation is supposed to happen concurrently with any development. Both the Conservation Easement and the Corps permit paint very tight sideboards on the locations of the house and road. The property is in the NRO but most of it is already conserved under the easement and the building site (as per the Land Trust restrictions) is close to the road and away from the creek and sited to minimize impacts to wetlands. I just want to make sure we are permitted (as far as the County is concerned) to start the wetland mitigation. At this stage I see this as a classic case of where a WHA exemption is in order but even as it relates to a wetland variance I'm not sure how that could apply either because of the easement and Corps permit restrictions. I am pressing this because with conditions being as dry as they are the silver lining is that it makes for good construction (for the mitigation). Let me know if you want to get on the phone. Tim Grimes has been working on the GEC and Nelson on the FPDP. We are focused on the wetland permit and compensatory mitigation. Thanks
JK

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