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**Hard copy provided to:**

Teton County Board of County Commissioners
[address redacted]e

Re: Formal Comments and Objection to the proposed Release and Settlement Agreement between Aaron Powers and Teton County, Idaho

Dear Teton County Commissioners:

Thank you for your time and attention to this matter. We represent Mr. Carl Jordan ("Jordan") who is an affected party and adjacent property owner to the proposed Centennial Estates Subdivision ("Subdivision") which is the subject of the proposed Release and Settlement Agreement by and between Aaron Powers ("Powers") and Teton County ("Settlement Agreement") and relates to the pending litigation between Powers and Teton County in Case No. CV26-23-0079/CV41-23-0199. We respectfully request that the Board of County Commissioners ("Board") reject the Settlement Agreement as unlawful, a violation of Teton County Code, and against public policy. The following formal comments provide the basis for our request that the Board reject this Settlement Agreement and instruct Powers to submit a new final plat application related to the Subdivision.

## I. BACKGROUND AND PRIOR PROCEEDINGS

The subject of the Settlement Agreement and Case No. CV41-23-0199[1] is the Subdivision application ("Application" or "Project") submitted by Powers on November 14, 2022. The

[address redacted]s Order Granting Jordan's Petition to Intervene, the Court notes that Jordan is made an intervenor and matter is modified to be CV41-23-0199.

Application proposed a 14-lot subdivision on roughly 69 acres in unincorporated Teton County. A development of this size is certain to have various impacts on adjacent landowners related to traffic, local services, environmental aspects, and others.

Factually, at the Concept Plan phase, the Application proposed to incorporate Lot 1 along with an adjacent 68 acre parcel to the west, which were both owned by Powers ("Applicant"). A single road was proposed to traverse across the southern boundary of Lot 1 to provide access to the proposed Subdivision. Following the Concept Plan review, on April 19, 2022, Teton County approved a Plat Amendment and Boundary Line Adjustment, which provided a 60' wide strip along the southern boundary of Lot 1 to be combined with the 68-acre parcel to the west. In late 2022, Jordan filed suit against Powers claiming use of the 60' wide strip for access to the Subdivision violated the CC&Rs for the Sorenson Creek Subdivision for which the 60' wide strip was still considered subject to. The District Court agreed and stated that the property could not be used for access without permission from the Sorenson Creek Subdivision, which the Applicant did not have.

By way of procedural background, on June 26, 2023, the Board held a public hearing on the Final Plat application for the Subdivision and found that the Application did not meet the requirements of the then existing Teton County Code 9-3-2(D)[2] which required that a proposed subdivision "is consistent with the public health, safety and welfare of the County and with all applicable provisions of Title 9 and Title 8 of the Teton County Code." Specifically, Teton County Code 9-4-1 (J) required that "[e]ach lot shall have legal and physical access provided and must abut and/or have access to a public street or road." Based on the Applicant's failure to meet the criteria of the existing Teton County Code 9-3-2(D) and 9-4-1(J) the Board denied the Application stating, "**the subdivision application fails to meet all approval criteria and the application must be denied**." *Written Decision for Centennial Estates Subdivision*, Board of County Commissioners, July 24, 2023, ("Written Decision") (emphasis added).

The Board specifically noted in its Written Decision that the Application Final Plat hearing had been continued numerous times before and that based on the Applicant's failure to meet the criteria of Teton County Code, the Board would not grant the Applicant's request to continue the hearing again. Based on the information in the record at the time of the Board's decision, it found the Applicant had failed to meet the criteria of Teton County Code and no evidence had been presented that this failure could be remedied. *Id*. at pg. 3. Of extreme importance, is the Board's direction in its Written Decision which expressly stated, "[d]enial of this application does not bar the applicant from submitting a **new application** that **meets the approval** criteria once access issues have been resolved." *Id*. (emphasis added).

Now, almost three years later the Applicant is attempting to circumvent the requirements of the Local Land Use Planning Act ("LLUPA") and Teton County Code by entering into the

[2] Teton County Code Title 9 was repealed and replaced on August 3, 2022, and amended on May 27, 2026, with the now applicable Teton County Land Development Code. The applicable requirements for all subdivision applications and development previously found in Title 9, is now located in the Teton County Land Development Code, Chapter 4 and 6.

proposed Settlement Agreement which would unlawfully permit the Applicant to proceed with a development project without obtaining the required land use approvals.

Furthermore, Jordan is a party to Case No. CV41-23-0199 and was granted intervenor status on November 13, 2023. Specifically, the Court found "Jordan has a legitimate interest that would be affected by the outcome of this proceeding." Order Granting Jordan's Petition to Intervene, November 30, 2023. The Court's Order goes on to say, "Jordan, is hereby made an intervenor in this matter and **a party thereto**, and the caption of this matter is modified to be as it appears on this order." *Id*. (emphasis added). As will be discussed below, dismissal of Case No. CV41-23-0199, as contemplated by the Settlement Agreement would require stipulation by all parties.

## II. APPLICABLE STANDARDS AND REQUIREMENTS

It is well established that a settlement agreement or other contractual agreement cannot unlawfully circumvent established law. The proposed Settlement Agreement seeks to allow one individual to completely skirt the land use approval process, as established by adopted ordinance, and requires Teton County to "approve the final application for Centennial Estates Subdivision." Settlement Agreement at pg. 2. The Settlement Agreement improperly agrees that "[u]pon execution of the Agreement, Respondent Board of County Commissions shall approve and sign the final plat for Centennial Estates Subdivision." *Id*.

In addition, the Settlement Agreement contemplates in exchange for the approval of the final plat, without following required law and process, Powers will file a Stipulation for Dismissal with Prejudice of CV41-23-0199. However as described below, a Stipulation for Dismissal must be signed by all parties to the case, which includes Jordan, who will not agree to such a dismissal under the terms of illegally granting a final plat application to Powers.

### a. *Teton County Code Requires a New Final Plat Application be Filed*

Idaho Code §67-6535(1) states that, "[t]he approval or denial of any application required or authorized pursuant to this chapter shall be based upon standards and criteria which shall be set forth in the comprehensive plan, zoning ordinance or other appropriate ordinance or regulation of the county." The language of the statute goes on to state that, "[w]henever the nature of any decision standard or criterion allows, the decision shall identify aspects of compliance or noncompliance with relevant approval standards and criteria in the written decision." *Id*.

The Teton County Land and Development Code ("TCLDC"), Chapter 4 outlines the requirements an applicant shall follow when applying for a subdivision approval. Specifically, TCLDC 4-13(E)(1) requires all subdivision final plat applications comply with Title 50 of Idaho Code. Of relevance, any final plat application shall meet the following criteria:

4. Approval Criteria

The determination by the BoCC on the final plat will be limited to:

> a. hose matters related to the plat's compliance with the LDC, other County codes, including Chapter 6, Subdivision Development Standards.
> b. The requirements of the reviewing agencies or other jurisdictions providing public services to the proposed subdivision;
> c. The plat's substantial conformance with the approved preliminary plat;
> d. The Administrator may notify the applicant of any LDC or other County or agency requirements that have not been met, so that the application or final plat may be revised, consistent with the preliminary plat;
> e. Substantial conformance with the County's applicable adopted plans and policies;
> f. The BoCC may also accept any proposed dedication of land or public improvements as part of approving a final plat.

TCLDC 4-13(E)(4)(a-f). There is no provision for the Board to waive or circumvent an applicant from following the approval process for a final plat. The plat must be evaluated against this criteria and findings of fact must be established before an applicant can receive approval for a final plat.

Furthermore, TCLDC 4-13(E)(6) makes clear, "[a] final plat that is approved and not recorded within six (6) months of the date of approval shall be considered expired and a new final plat application shall be required." This provision ensures that a project which receives approval under certain code criteria is not permitted to delay construction and be developed years down the road with evaluation criteria which have been amended and changed.

Idaho law is clear that an applicant is subject to the ordinance that is in existence at the time of filing an application for permit. *South Fork Coal. v. Bd. of Comm'rs of Bonneville Cnty*. 117 Idaho 857, 865-86, 792 P.2d 882, 885-86 (1990). "It is well established that an applicant's rights are determined by the ordinance in existence at the time of filing an application for the permit." *Chisholm v. Twin Falls County*, 139 Idaho 131, 134-35, 75 P.3d 185, 1988-89 (2003). If an application is heard by the governing body and denied, that applicant is then subject to the ordinance in effect at the time of resubmitting the new application.

There is no provision in Idaho Code or Teton County code that allows an applicant whose application has been denied, to forgo applying for a new approval through the established and codified process, and the applicable criteria then in effect at the time of application.

b. *Any Stipulation to Dismiss CV41-23-0199 Would Require the Agreement of Jordan*

An intervenor to a matter, when granted intervention, is deemed a party for purposes of resolution and disposition of the case. The Idaho Rules of Civil Procedure (IRCP) and the Idaho Appellate Rules (IAR) make clear that an action may only be voluntarily dismissed by "a stipulation of dismissal signed by **all parties who have appeared**." IRCP 41(a)(1)(A)(ii) (emphasis added). This is confirmed by the IAR 33 (applicable here) which states "at any point before the issuance of an opinion, **the affected parties** may stipulate for the dismissal of the appeal or petition which stipulation shall contain an agreement as to the taxing of costs and attorney fees.

Any such stipulation for dismissal signed by some but not all parties to an appeal shall be considered and processed as a motion for dismissal under Rule 32."

A settlement agreement executed by some, but not all parties, cannot voluntarily dismiss a case pursuant to a proposed stipulation for dismissal which is not signed by all affected parties. At the very least, the mechanism to request dismissal would be a motion for dismissal which would be briefed and heard by the court where the party opposed to the dismissal could present argument as to why the issues have not been resolved and why the matter should not be dismissed.

## III. LEGAL BASIS FOR REJECTION OF SETTLEMENT AGREEMENT

The fact that the proposed Settlement Agreement seeks to allow Powers to improperly evade the established law applicable to any applicant seeking to obtain a final plat development right for a proposed subdivision, makes the Settlement Agreement on its face unlawful. In addition, to this fact, the Settlement Agreement would also wrongly allow Powers to avoid showing that his project and application meets the current subdivision criteria applicable at the time of his application. Proceeding in such a manner is unlawful based on LLUPA, Teton County code, and public policy.

Furthermore, notwithstanding the illegality of the Settlement Agreement's proposal to grant a final plat without any required process, the Settlement Agreement also inappropriately attempts to agree to a stipulation for dismissal of a pending lawsuit which does not have the stipulation and agreement of all parties as required by Idaho law. For these reasons, the Settlement Agreement should be rejected by the Board.

### *c. Powers Final Plat Application was Denied and a New Application Must be Submitted.*

As properly stated in the Board's Written Decision and as well established by Idaho law and Teton County Code, because Powers' Final Plat Application was properly denied, Powers must resubmit a new final plat application to be reviewed and considered by the Board. The Board's Written Decision denying the Application stated, "[d]enial of this application does not bar the applicant from submitting a **new application** that meets the **approval criteria** once access issues have been resolved." Written Decision at pg. 3. The Board rightfully anticipated that the Applicant would likely attempt to obtain access to the proposed site, and in doing so, would be permitted to submit a new application and be allowed to prove that the new application met the standards for a final plat subdivision.

As discussed above, when an application is denied, the process starts over. Any new application that is submitted is processed under the then current zoning and land use ordinance and is required to meet the then applicable approval criteria. An applicant is not permitted to "revive" a dead and denied application and is certainly not permitted to sidestep the entire process by having an application approved by the Board without following the required process of TCLDC.

*d. Powers' New Application is Subject to the Current Land Development Code.*

Idaho law is clear that an application is subject to the development and zoning ordinance in effect at the time of the application is submitted. *Chisholm*, 139 Idaho at 134-35 (2003). Powers does not have an active application. His Application was clearly denied by the Board. Powers' avenue to seek approval of his project is to submit a new application which is subject to the Teton County Land Development Code which was effective on August 3, 2022, and which was amended on May 27, 2026. Under no circumstances is an applicant permitted to resurrect a denied application to be approved under a land use code that was amended almost 4 years ago.

Powers must submit a new final plat application which is evaluated under the current standards and criteria and properly conditioned to ensure compliance with Teton County code and Idaho law.

*e. Remedy in District Court would be a Remand, Not Approval of a Final Plat.*

It is anticipated that Powers will argue that he has brought suit against the Board under Case No. CV41-23-0199 to invalidate the Board's denial of the final plat and therefore if he is successful in the lawsuit, he will be granted a final plat. This argument is factually and legally incorrect. To the extent the Court were to find that there was error in the Board's denial of the final plat, which upon review of the Board's well-reasoned statement in its Written Decision is very unlikely[3], Powers' remedy would not be approval of a final plat. Instead, the Court would remand the matter back to the Board to either: 1) fix its written decision to meet the standards for a denial (unlikely as it meets the standard); or 2) instruct the Board to reconsider Powers' Application, in which case it would be evaluated under the applicable criteria and approval standards.

In no scenario would the Court's holding, even if most favorable to Powers, result in the Court granting a final plat approval. The Court does not have jurisdiction to approve a final plat and would send the matter back to the deciding body, the Board, to reevaluate the proposal. By executing the Settlement Agreement, in addition to its illegitimacy and potentially opening Teton County up to costly litigation, it more practically provides a windfall to the Applicant in that he does not have to follow the law and application process all other developers must follow, and in addition, no law or facts indicate that he would be successful if the matter was heard and decided by the Court.

*f. Public Policy Supports Proper Review of a New Application.*

Perhaps more significant to the Board and community than the legal basis for rejection of the Settlement Agreement, is the practical, public policy and quasi-judicial duties the Board owes to the Community in requiring that Powers follow the proper procedure for land use development.

[3] *Evans v. Teton Cty*., 139 Idaho 71, 74 (2003) ("There is a strong presumption that the actions of the Board of Commissioners, where it has interpreted and applied its own zoning ordinances, are valid"). This presumption applies both to substantive ordinances (see *id*. at 77-78) and procedural ordinances. *Davisco Foods Int'l, Inc. v. Gooding Cty*., 141 Idaho 784, 787 (2005) (deferring to governing board on ordinance regarding appeals from lower body).

As mentioned, under no other circumstances is an individual or developer permitted to ignore the law and standards required for constructing a development in Teton County.

Moreover, there is a reason that pursuant to TCLDC 4-13(E)(6) a final plat approval is only valid for 6 months from the date of approval if not recorded, and that is because it is imperative that current plans, civil designs, environmental and traffic studies are current and applicable to the surrounding environment at the time of development. The Board should ensure that prior to being permitted to develop this project, the Applicant is required to submit updated materials that are not over 4 years old and do not accurately reflect the conditions of the surrounding neighborhood and community.

## IV. CONCLUSION

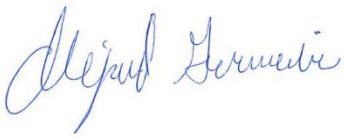
Jordan respectfully requests that Teton County reject the proposed Settlement Agreement and require Powers to submit a new final plat application as required by the law. The Settlement Agreement as drafted is impermissible as it attempts to circumvent established land use and planning law and seeks to dismiss a lawsuit to which all parties have not agreed to said dismissal. Should Teton County proceed with execution of the Settlement Agreement as drafted, Jordan will be forced to seek immediate injunctive relief from the court, as well as all other remedies, damages, and fees.

We appreciate Teton County's attention to this matter and to ensuring that future construction within the community follows the law and aligns with Teton County's policies related to growth and development.

Thank you for your consideration.

Sincerely,

ELAM & BURKE
*Attorneys at Law*



Abigail R. Germaine

ARG/mse