Valley Advocates for Responsible Development

July 2, 2010

Teton County P&Z
150 Courthouse Drive
Driggs, Idaho 83422

RE: Comments on changes to Title 8

Dear Commissioners:

Much time and effort has gone into these proposed changes. VARD supports these new additions including the home occupation ordinance, outdoor lighting regulations, and conditionally permitted uses. However, there are a few items this Commission may want to consider:

## Lot coverage standards

As proposed, the Title 8 land use chart will permit several structures per parcel of land: a 3,000 square foot accessory building up to 2 stories in height, a 200 square foot accessory structure, a primary residence of any size, a guest house subordinate in size, and agricultural buildings. With so many permitted buildings, it can be difficult to maintain the purpose and intent of the underlying zoning. Imagine if every house in Drictor had at least one type of additional structure on its parcel? How would this impact the rural landscape? Moreover, every situation is different depending on lot size, structure size, number of structures, and zoning classification.

It is difficult to craft a one-size fits all tool. One approach might be maximum lot coverage standards used in conjunction with the required setbacks. For example, the City of Driggs uses a 35% lot coverage maximum standard for every lot. Perhaps the county could adopt similar rural coverage standard to tackle the density problem created by so many additional structures.

## Revamped outdoor lighting regulations

The attention to detail and effort put into this ordinance is admirable. However, it remains to be seen if these regulations can be practically implemented. Public education on the front end will be critical to success. Ideally, the county should facilitate compliance at the building permit stage.

For those existing lights that must be brought into compliance, the bottom line is whether or not the property owner can even purchase the appropriate lights from within the valley. If not, then the ordinance should change.

## 5-year amnesty period

Another issue is the 5-year amnesty period. This is truly a long stretch of time. To not require compliance for 5 years will ultimately make compliance more difficult because some noncompliant lighting may actually be enhanced and intensified over the next few years. I would suggest a shorter but reasonable amnesty period, like 2 years.

## Unconstitutional flag restrictions

It is clearly not the intention of this Commission to overreach into regulating an individual's right to freedom of expression. However, the currently-proposed version of Title 8 just does that by only allowing the illumination of the U.S. flag or Idaho state flag. The ordinance restricts this form of speech regardless of whether the flag is on public or private property.

Flags are a well-recognized from of communication that is protected by the First Amendment.[1] The expression of ideas through flags cannot be prohibited simply because the ideas are offensive to some listeners.[2] The government has certain supervisory powers to regulate communication in public forums, but less so in private settings.[3] The U.S. Supreme Court has repeatedly held that "[r]egulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated

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[1] Flags have long been recognized as "a form of symbolism comprising a primitive but effective way of communicating" worthy of protection by the First Amendment. *Spence v. State of Washington*, 418 U.S. 405, 410, (1974) *See also, Texas v. Johnson*, 491 U.S. 397 (1989).

[2] 'It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.' *Street v. New York*, 394 U.S. 576, 592 (1969); *Spence v. State of Washington,* 418 U.S. 405, 412, (1974).

[3] *City of Ladue v. Gilleo,* 512 U.S. 43, 59 (1994), See also, *Procunier v. Martinez*, 416 U.S. 396, (1974); *Healy v. James*, 408 U.S. 169, (1972).

under the First Amendment."[4] When it comes to private property, there is a very strong presumption that regulating the content of a citizen's private speech on private property is unconstitutional.[5]

Here, the intent of the outdoor lighting regulation is to curtail light pollution. As written however, the ordinance is regulating the expression of an idea through activity – flying a flag. It regulates the content of what is being illuminated, allowing only government-mandated messages to shine at night. The end result is not a regulation of light pollution, but that of ideas. Thus, the flag restriction must be changed because it unconstitutionally restricts speech.

One suggestion would be to not regulate on the basis of content at all, and either permit all flags to be illuminated, or prohibit all flags from being illuminated. One other middle ground option would be to prohibit the illumination of commercial flags because commercial speech is less protected,[6] and may be regulated so long as the regulation is no more expansive than necessary to serve the substantial government interest.[7] Most illuminated flags in our valley are actually commercial subdivision flags, and the government has a substantial interest in protecting our dark skies. Since the goal of this ordinance is to curtail light pollution, prohibiting the illumination of commercial flags would be a narrow means of achieving this goal.

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[4] *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115-116, (1991), quoting from, *Regan v. Time, Inc.,* 468 U.S. 641, 648-649, (1984). See also *Police Dept. of Chicago v. Mosley,* 408 U.S. 92, 95, (1972).

[5] "With rare exceptions, content discrimination in regulations of the speech of private citizens on private property or in a traditional public forum is presumptively impermissible, and this presumption is a very strong one." *City of Ladue v. Gilleo,* 512 U.S. 43, 59 (1994), See also, *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.,* 502 U.S. 105, 115-116, (1991).

[6] "[C]ommercial speech [enjoys] a limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values," and is subject to "modes of regulation that might be impermissible in the realm of noncommercial expression." *Ohralik v. Ohio State Bar Assn.,* 436 U.S. 447, 456 (1978).

[7] *Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557 (1980).

**Conclusion**

Every once in a while, an issue arises that makes us all think about what our Constitution and its protections really mean. It is very timely that I am writing this letter in anticipation of the anniversary of country's declaration of independence from sovereign rule. Thanks again for all of your hard work.

Sincerely,

Anna Trentadue
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