

## Board of County Commissioners - Staff Report

**Meeting Date:** October 18, 2016

**Presenter:** Erin Weisman/Jennifer Anderson

**Submitting Dept:** Planning & Development

**Subject:** Designation of Hearing Officer or Chair to Conduct Abatement Hearing for Owl Creek Retreat, LLC fencing violations

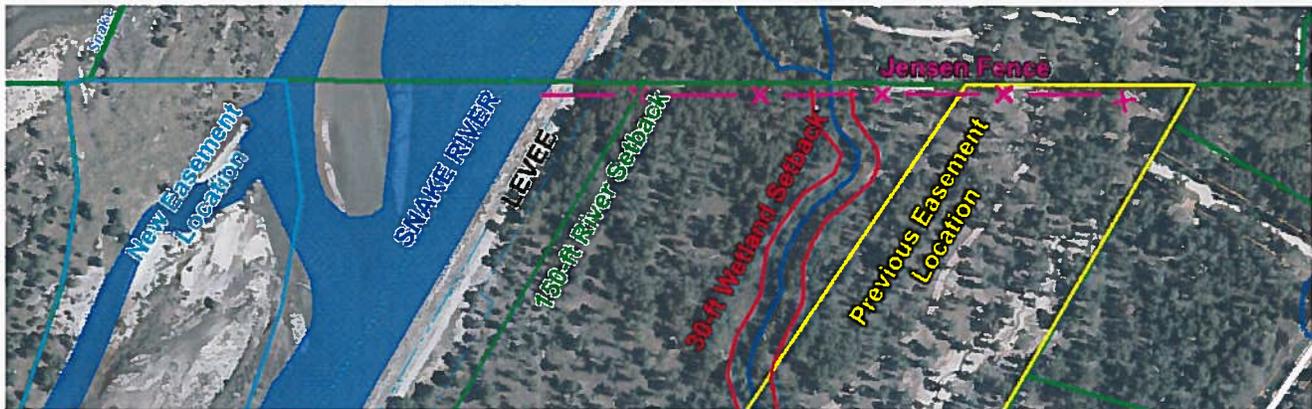
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### **Statement / Purpose:**

Consideration of Designation of a Hearing Officer, or the Chair conduct a Hearing to Abate pursuant to Teton County Land Development Regulations Section 8.9.4. *Abatement of Violations.*

### **Background / Description (Pros & Cons):**

After a long history and effort to resolve fencing violations, on August 17, 2016, a Notice to Abate was sent to the Owl Creek Retreat, LLC (Managing Member Mr. James Jensen) for fencing installed within the river and wetland setbacks at his property known as the "River Parcel" located west of Lots 53, 54, and 54, Owl Creek Subdivision.



In 2014, the owner installed fencing along the northern property line crossing 30-foot wetland setbacks and a 150-foot river setback. Soon after, staff notified the owner of the setback issues and the owner responded by lowering every other top rail. During this time period, the owner and staff had been working on other permit applications in which staff tied the fencing resolution to these permits; however, the permits were eventually withdrawn. The Planning Director sent a Notice to Abate on August 10, 2015, requiring that either the fencing be removed or provide evidence that it replaced a legal nonconformity.

Subsequent to the first Notice to Abate, the owner submitted a Zoning Compliance Verification to determine if the fence replaced a grandfathered fence, but was denied due to lack of information. Two Variance requests were then submitted to allow the fence to remain within the river and wetland setbacks. Staff was prepared to recommend Denial of the Variances, but prior to public hearing before the Planning Commission, the Variances were withdrawn by the owner, who submitted a request for a Planning Director Interpretation. The Interpretation asked the main question: Is a fence a structure? The Planning Director's Interpretation was that a fence is a structure; however it is physical development and not permitted within a waterbody buffer. The owner had then filed an Appeal of the Interpretation, which was recently dismissed on October 4, 2016.

Staff sent the second Notice to Abate to the owner on August 17, 2016, requiring the fence be removed from the waterbody setbacks within fourteen (14) days in order to be in compliance with the LDRs. As of this date, the fences remain and are in violation of both the wetlands setback and the river setback. A copy has been attached referencing the applicable LDR sections.

Also attached is an email chain between the owner and staff from this past week regarding his intentions.



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**Fiscal Impact:**

Fiscal impacts would result if the Board designated a Hearing Officer to conduct the Hearing to Abate.

**Staff Impact:**

N/A

**Legal Review:**

E. Weisman

**Staff Input / Recommendation:** Staff recommends the following attorneys as Hearing Officers:

M.L. Barton

Andrew Salter

**Attachments:**

Notice to Abate dated August 16, 2016

Email update from Owner dated October 5, 2016

**Suggested Motion:**

Move to designate \_\_\_\_\_ as Hearing Officer to conduct the Hearing to Abate violations of LDRs for fencing within waterbody setbacks installed by Owl Creek Retreat, LLC, Managing Member, James Jensen, which abatement hearing shall be scheduled and set a later date within thirty (30) days of this appointment.



www.tetonwyo.org

Lubing Law Group, LLC  
Mr. James K. Lubing  
PO Box 3894  
Jackson, WY 83001

Owl Creek Retreat LLC  
Mr. James Jensen  
PO Box 2052  
Jackson, WY 83001

August 17, 2016

PO Box 1727  
200 South Willow Street  
Jackson, Wyoming 83001

VIA CERTIFIED MAIL AND VIA EMAIL AT  
[jim@lubinglawgroup.com](mailto:jim@lubinglawgroup.com) and [james@stjamesenergy.com](mailto:james@stjamesenergy.com)

ph: 307.733.3959  
fax: 307.733.4451

**RE: NOTICE TO ABATE**

*Nonconforming fence at parcel known as River Parcel directly west of Lots 53, 54 and 55, Owl Creek Subdivision. PIDN: 22-42-16-16-1-01-002*

Dear Mr. Lubing and Mr. Jensen,

Per Teton County Land Development Regulations (LDRs) Section 8.9.4. Abatement of Violations, I hereby provide you with formal notice to abate on the fencing issue on the Owl Creek Retreat LLC property as specified below.

Portions of the fence along the northern property line at the above location are not permitted per LDR Section 5.1.1. Waterbody and Wetland Buffers and the unpermitted fence shall be removed within fourteen (14) days of receipt of this notice. In order to avoid abatement on this issue, promptly contact our office for an inspection when the fence in question has been removed.

The fence you constructed along the northern property line sometime in the Summer of 2014, does not meet the following LDR standards in Section 5.1.1. Waterbody and Wetland Buffers:

**D. No Development, Setbacks/Buffers Required**

*Due to the risk of severe negative impacts on the community at large if waterbodies and wetlands are wholly or partially developed, and the necessity to protect the natural functions of these resources, physical development and use of these resources is prohibited in most cases and a setback/buffer is required. Demonstration of compliance with wetland standards must be provided by a qualified professional.*

1. **Development Prohibited.** *Physical development and use in waterbodies and wetlands is prohibited except for essential facilities as specified below.*
2. **Setback/Buffer Required.** *All physical development and use is required to be setback from specified resources as follows:*
  - a. **Rivers.** *150 feet.*

- b. Streams. Along streams, physical development and use shall be located out of the riparian plant community, but in no case shall the required setback be less than 50 feet or more than 150 feet.*
- c. Natural Lake/Pond. Adjacent to natural lakes or ponds, physical development and use shall be located out of the riparian plant community, but in no case shall the required setback be less than 50 feet or more than 150 feet.*
- d. Wetlands. 30 feet.*
- e. Measurement. Setbacks shall be measured from the mean high water or top of bank, whichever is farthest from the thread of the watercourse or the center of the waterbody.*
- f. Buffer. The area protected by the setback is the "buffer" and shall remain free from physical development and use, parking, and open storage of vehicles, refuse, or any other material. Terrain disturbance for bona fide agricultural purposes as defined in Section 6.1.3.B., flood protection, wildlife habitat enhancement, or public pathways are permitted in the buffer upon receipt of applicable permits.*
- g. Land Protected by a Conservation Easement. Land protected by a conservation easement, where proposed development density is one unit per 70 acres or less and the total acreage subject to the easement is 320 acres or more, shall be exempt from certain stream setbacks required by this Subsection. The stream setback for land under a conservation easement may vary based upon the wildlife, agricultural, and scenic analyses performed as part of the design of the easement. Under no circumstances, however, shall the setback from streams be less than 50 feet.*

No development, which includes fences, is permitted within the 150-foot Snake River setback or the 30-foot wetland setback. The fence in question extends to the levee with a gate within the river setback and through a wetland setback. Without an approved Variance, any fencing within the 150-foot river or 30-foot wetland setbacks is not permitted.

A Zoning Compliance Verification (ZCV2015-0031) request was submitted on September 24, 2016 to determine if the fence in question replaced a nonconforming or grandfathered fence. The application was denied due to lack of information regarding when the original fence was constructed.

Two Variance applications were submitted September 24, 2015:

1. **VAR2015-0013:** to vary Section 5.1.1.D.2.a to reduce the required setback from the Snake River from 150 feet to 0 feet to bring 163 feet of existing fence into compliance; and
2. **VAR2016-0002:** to vary Section 5.1.1.D.2.d to reduce the required setback from a wetland from 30 feet to 0 feet to bring 76 feet of existing fence into compliance.

After postponements, the applications were scheduled to be heard by the Planning Commission on June 27, 2016 and withdrawn by your agent the same date.

On June 22, 2016 an Interpretation (INT2016-0002) request was submitted addressing fencing definition; if a fence is considered a structure; and if other items less than 4 feet in height is a structure or physical development. The Interpretation determined that a fence less than 4 feet in height is not a structure; however any freestanding, manmade, non-living construction, regardless of height does constitute physical development. Physical development is defined Division 9.5. as:

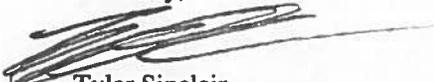
*“Physical development means any of the following activities that alter the natural character of the land and for which a permit may be required pursuant to the LDRs: the construction, reconstruction, conversion, structural alteration, relocation, or enlargement of any buildings, structures, or accessory structures; any grading, clearing, excavation, dredging, filling or other movement of land; any mining, paving, or drilling operations; or the storage, deposition, or excavation of materials. Physical development does not include the use of land that does not involve any of the above listed activities.”*

Based on the above applications and requests, the existing fence, a 41-inch tall post and three-rail wood fence is considered physical development as it is an alteration of the natural character of the land and therefore is not allowed within a waterbody or wetland setback per LDR Section 5.1.1. Waterbody and Wetland Buffers.

The Planning & Development Office requires your action within fourteen (14) days after receiving this Notice to Abate. You are required to remove all fencing along the northern property boundary located within the 150-foot Snake River Setback and 30-foot wetland setback. Your failure to comply to this Notice to Abate, will result in the immediate scheduling of a Hearing to Abate before the Teton County Board of County Commissioners, as described in the LDRs, Section 8.9.4., Abatement of Violations, and may result in prosecution and fines, as provided in Wyoming Statutes §§18-5-201 through 18-5-206. The Wyoming Statutes permit a fine to be assessed for violations of the LDRs and sets the penalty at seven hundred and fifty dollars (\$750.00) for each offense. A separate \$750.00 fine is assessed for each day a violation of the LDRs continues to exist.

Should you have any questions regarding this Notice to Abate, please contact me, or Jennifer Anderson, the Code Compliance Officer. Thank you for your prompt attention to these matters, and I am hopeful that you will bring your property into compliance with the Teton County Land Development Regulations.

Sincerely,

  
Tyler Sinclair  
Teton County Planning Director

Cc: Erin Weisman at [eweisman@wyoming.com](mailto:eweisman@wyoming.com)  
Jennifer Anderson at [janderson@tetonwyo.org](mailto:janderson@tetonwyo.org)

## Jennifer Anderson

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**From:** Jennifer Anderson  
**Sent:** Wednesday, October 05, 2016 3:32 PM  
**To:** 'James Jensen'  
**Cc:** James Jensen; Erin Weisman; Jim Lubing; Laurie Stern; 'Kent Werlin'  
**Subject:** RE: Owl Creek Retreat, LLC Mitigation Monitoring Report

Thank you for the update James. We will sit tight regarding the sureties until such time that the water feature is revegetated.

Regarding the wildlife corridor easement relocation, I understand that On-Sight is very busy this time of year. The Board did however, give you a deadline of 30 days to resolve, which will be on October 12, 2016. Did Todd give you a date which not only the survey could be done, but the document be prepared and recorded?

Regarding the Abatement process for the fencing within the river and wetland setbacks, I think the sooner you can get that removed, the better. We do have a matter from staff scheduled for the Board of County Commissioner's next regular meeting on October 18, 2016. Staff will ask the Board to decide if they would like to appoint a hearing officer. We will proceed with this matter as planned unless:

- The fencing is removed within the waterbody setbacks, and Planning has evidence of such removal or has inspected onsite, before our staff report/request goes to the Board on Wednesday, October 12, 2016. In this case we will withdraw the matter from staff and consider the case closed.
- The fencing is removed within the waterbody setbacks and Planning has evidence of such removal or has inspected onsite, before the Board's meeting on Tuesday, October 18, 2016. In this case we will update the Board at the meeting and consider the case closed.

If we don't have resolution and compliance with the setbacks for the fence, we will update the Board with your intent, the Board will make a decision on appointing a hearing officer or not, and we will schedule a hearing as planned. Should the fencing be removed within the waterbody setbacks before the hearing and we have evidence of the same, we can cancel the hearing and consider the abatement case closed. A hearing date must be set within 30 days of the Board's decision to have the Chair preside over the abatement hearing or appoint a hearing officer to preside, on presumable October 18, 2016. So, a hearing date would have to be scheduled by November 17, 2016.

I'm sure that the migration corridor easement matter will come up during this meeting and the Board want an update as the deadline will be **October 12, 2016**. If you have any updates, like dates for survey completion and recordation, I'm sure they will want to hear that if not already completed. Of course either you or your agent could also attend and make comment.

Please let me know as you have updates.

Sincerely,  
Jennifer

**Jennifer Anderson**  
Code Compliance Officer  
Teton County Planning & Development

PO Box 1727  
200 S. Willow Street

Jackson, WY 83001  
PH (307) 733-3959  
FAX (307) 733-4451

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**From:** James Jensen [mailto:james@maximcrude.com]  
**Sent:** Wednesday, October 05, 2016 12:13 PM  
**To:** Jennifer Anderson <janderson@tetonwyo.org>; 'Kent Werlin' <kwerlin@biotaresearch.com>  
**Cc:** James Jensen <james@stjamesenergy.com>; Melanie Azizi <mazizi@tetonwyo.org>; Erin Weisman <eweisman@wyoming.com>; Jim Lubing <jim@lubinglawgroup.com>; Laurie Stern <laurie@lubinglawgroup.com>  
**Subject:** RE: Owl Creek Retreat, LLC Mitigation Monitoring Report

Jennifer,  
Thank-you for the summary of deposits outstanding and review of what is currently available for return.

To bring you current on the one outstanding issue mentioned below, the re-vegetation of the water feature area is currently being performed through the re- seeding of native grasses , but I don't suspect we see the fruits of that work until next Spring.  
So I will ask Kent do that review as the snow melts next Spring.

On a relate subject, we are proceeding in the process of formally moving the wildlife corridor as per the decision of the County Commissioners, however have been slowed by our inability to get our Surveyor on location to do the proper legal descriptions necessary to get that recorded.  
But I do plan to have this completed and recorded within the next few weeks.  
As part of that work, we will be removing the fence rails off that portion of my land that correspond to the new location of the wildlife corridor (being a 400 foot set back from the mean high water mark bank of the Snake River ) and also removing the fence along the 30 foot wetlands set back.

Hopefully this will bring all these issues to a conclusion.  
Thank-you,  
James Jensen

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**From:** Jennifer Anderson [mailto:janderson@tetonwyo.org]  
**Sent:** Monday, October 03, 2016 1:48 PM  
**To:** Kent Werlin  
**Cc:** james@stjamesenergy.com; Melanie Azizi; Erin Weisman  
**Subject:** RE: Owl Creek Retreat, LLC Mitigation Monitoring Report

Thank you Kent for the Jensen monitoring report. Mr. Jensen, should you want a reduction in the sureties, please fill out the attached surety release form:

<http://www.tetonwyo.org/plan/docs/AdminManual/SuretyReleaseForm.pdf>

Processing fee is \$50.

Here's a summary of the money we are holding:

**GEC2012-0040 \$17,750.00** for wetland mitigation. Per Kent's report, this has been planted. We can release one-third of this amount (\$5,916.66). Biota will continue to monitor. Next season, depending on how the plantings are doing, we may be able to release the next third or the full amount if determined to be well established and successful.

**GEC2015-0107 \$16,562.50** for water feature re-vegetation. Per Kent's report, this has not been completed. Once completed, the full amount may be released.

**GEC2015-0107 \$20,422.50** for tree mitigation. Per Kent's report, the trees were planted this past season. We can release one-third of this amount (\$6,807.50). Biota will continue to monitor. Next season, depending on how the trees are doing, we may be able to release the next third or the full amount if determined to be well established and successful.

So the current eligible amount for return is \$12,724.16. Should you plan to revegetate the rest of the pond this season yet, I would prefer to do all of this paperwork one time!

Let me know how you would like to proceed.

Sincerely,

Jennifer

***Jennifer Anderson***

Code Compliance Officer

Teton County Planning & Development

PO Box 1727

200 S. Willow Street

Jackson, WY 83001

PH (307) 733-3959

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**From:** Kent Werlin [<mailto:kwerlin@biotaresearch.com>]

**Sent:** Monday, October 03, 2016 11:48 AM

**To:** Jennifer Anderson <[janderson@tetonwyo.org](mailto:janderson@tetonwyo.org)>

**Subject:** Owl Creek Retreat, LLC Mitigation Monitoring Report

Hi Jennifer,

James Jensen completed the required wetland and cottonwood mitigation for his project this summer, and I have attached the first annual monitoring report for this work.

Please let me know if you have any questions.

Thanks.

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**Kent Werlin, PWS**

Senior Wetland Scientist/Restoration Ecologist

Biota Research and Consulting, Inc.

P.O. Box 8578, 140 East Broadway Suite 23

Jackson, WY 83002-8578

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