

February 19, 2020

Frisco Community Development Department  
Town of Frisco  
PO Box 4100  
Frisco, CO 80301

RE: Planning File No. 260-19-VAR (Miller Waterside Setback variance)

Dear Planning Commission Board and Staff:

The undersigned Windstream Subdivision Owners submit this comment on the above-referenced Planning File Number seeking a variance from the Town's Water Quality Protection ordinance and waterside setbacks requirements. The location is Lots 23-24, Block D, Frisco Townsite. Zoning is Residential High Density (HR) District; the Applicants are Jacob and Rori Miller; and the current owner is Lakewood Properties LTD. Specifically, the Applicants are requesting relief from Section 180-6.7, Water Quality Protection of the Frisco Code in order to reduce or ignore the 25-foot waterside setback.

The Applicants' requested variance is not supported by the Town's code. Granting it would undermine the purpose of the ordinance to the detriment of adjacent property owners and the larger community. Further, granting this variance risks creating a precedent that could open the door for other developers to request special treatment at the expense of other residents, the natural environment, water quality, and the Town's commitment to sustainability, resilience and climate action informed by science and community support.

We Windstream Owners are extremely concerned about the need for the Town to respect the letter and spirit of the protective conditions in the code, rather than granting a variance based on a set of facts and location that falls far short of meeting the criteria set forth in the law.

**1. Residential zoning does not establish that every lot in the zone is appropriate to build.**

The Staff Recommendation states that the property is designated for residential development and is located in a Residential District. Staff Rec at 3. This is because the property is on a street in a platted residential neighborhood.

The property is also a wetland adjacent to Ten Mile Creek. Looking at the attributes and natural features of the property requires considering whether there is sufficient land area to be built on consistent with applicable codes, ordinances and policies – including the purposes of the protections.

The Staff Recommendation provides that the Town's water quality protection regulations were expanded in 1995 to apply the 25-foot streamside setback to wetlands.

The existing wetlands designation is not on a corner or a small portion of the property – but almost the entirety of both lots. 80-90% of lot are currently wetlands.

Relying on the Corp's nationwide exemption for residential development may make the loss of the wetlands permissible according to that federal agency's regulations, but it does not undo the fact that the wetland is being lost and not replaced. On a statewide or national scale, 4,000-some square feet of wetlands may be perceived as insignificant, but the combined impacts are not. Like other mountain communities in Colorado with strong environmental ethics and planning commitments, Frisco should lead by ensuring that we walk the talk on environmental protection. As the saying goes, think globally, act locally.

Ten Mile Creek is not a small, itinerant waterway, but the signature stream that defines the Town, and one of the major drainages and watersheds in Summit County.

The requested floodways encroachment is not a matter of a few feet or forgiving a proposed building footprint that would only encroach on an arguably insignificant 5 or 10% of the 25-foot setbacks or buffers. Rather, due to the undersized lot, the variance would require almost entirely ignoring the setback as depicted in Balduf's comment letter at page 4.

The 4,975 square foot lot size for which a variance is sought is not just 10 or 20% smaller than the district's 10,500 minimum lot size – but more than 50%-plus smaller.

The extent of non-conformities on multiple components of the proposed construction reinforces the degree to which the variance is inappropriate under the criteria reviewed below.

**2. The proposed variance does not satisfy Criterion 1 because the exception physical conditions at the site establish that granting the variance will undermine the purpose of the code.**

The Staff Recommendation states criterion 1 as whether the property has extraordinary or exception physical conditions that do not generally exist in nearby properties in the same zoning district. It states that “the subject property has extraordinary and exceptional physical conditions including wetlands, Ten Mile Creek, and a mapped Floodway Special Flood Hazard Areas associated with Ten Mile Creek.” Staff Rec at 9.

In other words, the property has three conditions that mitigate *against* granting the variance. In baseball and common parlance, the saying goes *three strikes and you're out*. Here, any one of the conditions would make a compelling argument to deny the variance. The confluence of three extraordinary physical conditions and natural features that make it a bad place to build establishes that this criterion is unmet.

Staff's analysis then states a fourth major concern -- the lot size is less than half of the minimum for properties in the residential zoning district:

In addition to these unique characteristics, the subject property is also legally non-conforming in regards to the minimum lot size standard of 10,500 square feet prescribed for properties located within the Residential High Density Zoning District. This existing lot is fifty feet (50) in width from west to east with a total area of 4,975 square feet.

Staff Rec at 9.

Lot size is a significant concern that goes to the heart of the purpose of the code and policy protections for wetlands, Creekside properties and floodways. The parcel is too small to locate a residence that would avoid the mapped wetlands or satisfy the buffers. It cannot be built without entirely ignoring the ordinances or setbacks, and the underlying purpose for those policies. Under just the first criterion, the proposed variance has four strikes against it.

3. **The proposed variance does not satisfy Criterion 2 because the exception physical conditions establish that building on this undersized streamside lot is an unreasonable use.**

Criterion 2 considers whether the extraordinary or exception physical condition of the property will not allow reasonable use of the property in its current zone in the absence of relief. Staff Rec at 9. The general setbacks for the district are 20 feet in the front yard, 10 feet in the side yards, and 10 feet in the rear yard. Id.

Staff's analysis reveals that the property "is also subject to the waterside setback that prohibits soil disturbance within 25 feet of a body of water" and is subject to a "mapped Floodway Special Flood Hazard Area associated with Ten Mile Creek." Id.

The February 1, 2020 comment letter submitted by Edward Balduf and others explains the importance of considering the current high water line, current wetland status, and current property boundaries. With maps, diagrams, pictures and narrative explanations, that comment establishes that carving out the proposed building footprint would make no sense and that construction would disturb the wetlands.

Staff's Recommendation states that the lot is 50 feet in width from west to east and the applicant's requested relief from the waterside setback from wetlands is "because applying a 25-foot setback from the existing wetlands locating on neighboring properties would render the subject property unbuildable."

The property is unbuildable without ignoring applicable ordinances and the purpose of the ordinances, as further explained below. The property is too small and the building footprint would have too great an impact on wetlands and floodways, as well as water quality in the creek.

4. **The proposed variance does not satisfy Criterion 3 because the variance would adversely impact surrounding properties, the neighborhood and the community.**

Under Criterion 3, the Staff Recommendation states that the proposed construction would satisfy all standards and requirements of the Town’s development regulations – other than the four significant non-conformities stated above. Staff Rec at 9.

When the Town was originally platted in 1880, the founders were not considered with wetlands protections or flood dangers. But all owners over the past 140 years have apparently acknowledged that building on the property is inappropriate, or they failed to obtain waivers of applicable standards designed to protect the environment and water quality.

Adverse impacts to surrounding properties includes concerns stated in previously submitted comments regarding melting snow and/or surface water from 6 units at 317 Galena St and surface water from all of Galena Street, and swale concerns.

5. **The proposed variance does not satisfy Criterion 4 because the precedent of allowing development on this property would open the door wide for ignoring wetlands and floodways provisions on future applications.**

Under Criterion 4, the Staff Recommendation states that approval of a variance does not set a precedent for future variances. Staff Rec at 10. The Recommendation then contradicts this statement by citing previous decisions where variances to the 25-foot waterside setback was approved at 196 North 4<sup>th</sup> Avenue and 200 North 4<sup>th</sup> Avenue is legally non-conforming regarding driveway encroachments into the 25-foot waterside setback for Ten Mile Creek.

Both of these prior examples cite to just one extraordinary condition or natural feature – unlike at least four that apply to the subject property. There is no statement that either lot size for the other two properties was non-conforming, let alone less than half the minimum lot size. A driveway is a far lesser impact and different in kind than locating a house in the waterside setback.

In 2020, heightened environmental awareness and the community’s commitment to responsible decisions informed by a commitment to intelligent land use and planning in the context of a changing climate should be considered. Neither was.

The requested variance would set a precedent big enough for a fleet of bulldozers and should be denied.

6. **The proposed variance does not satisfy Criterion 5 because granting it would be inconsistent with the Community Plan.**

Criterion 5 provides that “the granting of the variance shall not be substantially inconsistent with any plans adopted by the Town.” Staff Rec at 11. But staff only cites to general guiding principles and omits reference to important provisions that the application is inconsistent.

The Community Plan recognizes the need to consider flood hazard areas:

**Environmental Values and Constraints.** Frisco’s natural environment and scenic quality are defining characteristics of the community that should be protected. These characteristics also mean that in some areas of the community a number of natural hazards exist—steep slopes, flood hazard areas, and wildfire risk—that **must** be taken into account and mitigated as the Town plans for the future.

Community Plan at page 52 (emphasis added).

Here, granting the variance would ignore flood hazard areas and water quality at the expense of the natural environment.

The “Sustainable Environment” section includes Goal 6.3:

**Minimize risks to property, infrastructure, and lives from natural hazards and disasters.**  
**Strategy 6.3-a:** Regularly review regulations to ensure compliance with the latest hazard resiliency practices and standards.

Id. at 82.

Granting the variance would lessen, not strengthen, community resilience.

The Frisco Community Plan commits to protecting the quality and health of the natural environment including surface waters and ground water quality in Ten Mile Creek. Specifically:

PROTECT THE QUALITY AND HEALTH OF THE NATURAL ENVIRONMENT IN  
FRISCO AND THE SURROUNDING AREA. [. . .]

6.2

6.2A Protect and enhance surface and ground water quality in Lake Dillon, Ten Mile Creek, and other locations.

Community Plan at page 47.

The natural environment is protected by protecting wetlands and respecting floodways.

Several other provisions from the Community Plan are directly relevant to the proposed variance but were not addressed by the Staff Recommendation.

Section 6.1 provides that the Town will: “LEAD BY EXAMPLE ON EFFORTS TO ADVANCE COMMUNITY SUSTAINABILITY AND THE REGION’S ABILITY TO PREPARE FOR, AND ADAPT TO, THE IMPACTS OF CLIMATE CHANGE.”

Section 6.3 provides “MINIMIZE IMPACTS TO PROPERTY, INFRASTRUCTURE AND LIVES FROM NATURAL HAZARDS AND DISASTERS.” 6.3B provides for educating property owners on the impacts of development in areas that are subject to risks from natural hazards. 6.3C provides that the town will “evaluate town policies and regulations to support best practices in hazard resiliency.”

Again, these provisions all support a decision denying the variance that compromises the natural environment, exacerbates risks related to the impacts of climate change, and compromises the Town’s resilience, ability to adapt to a changing climate, or implement best practices.

Indeed, communities across the country are protecting greenways corridors on flood-prone creeks rather than authorizing new development. This is consistent with sound land planning principles and fiscal responsibility.

FEMA publishes a relevant manual titled Hazard Planning: Integrating Best Practices into Planning which provides that the first goal is the common sense approach of keeping future development out of known hazard areas:

- *Keeping future development out of known hazard areas. The purpose here is to influence the location of public and private investment, guiding it away from known hazard areas and toward safe growth locations. For example, zoning and subdivision regulations can direct private development away from hazard areas through designation of location-specific allowable land uses and standards for public safety.*

FEMA Manual at 49, available online at [https://www.fema.gov/media-library-data/20130726-1739-25045-4373/pas\\_560\\_final.pdf](https://www.fema.gov/media-library-data/20130726-1739-25045-4373/pas_560_final.pdf) (italics original, underlining added).

The FEMA Manual further provides:

Flood zoning typically is implemented through placement of floodplain boundaries on the local zoning map and the use of various regulations to enforce restrictions on development in and adjacent to those floodplains. The most common regulation prohibits development within the most hazardous part of the floodplain—the floodway channel where water flows and where obstructions would limit the channel and increase downstream flooding. It also limits the density (or amount of obstruction) that can be placed in the flood fringe area, which is within the floodplain but outside the floodway.

Other flood zoning elements include use regulations that permit only open-space land uses within floodplains; setbacks to minimize flood exposure of buildings and to provide waterfront buffers, maintain natural vegetation, and limit runoff; nonconforming-use regulations that prescribe standards for allowable reconstruction of flood-damaged structures.

FEMA Manual at 49-50 (underling added).

The subject property seeks a variance to allow building within the floodway on a nonconforming lot that also impacts designated wetlands. This goes against the intelligent planning principles recommended by FEMA. It also undercuts the environmental protection, natural hazards, water quality, sustainability, climate change and resiliency provisions in the Frisco Community Plan.

The Staff Recommendation omits mention of either the terms and concepts “resiliency” and “climate”. These apply to the requested variance and warrant consideration. Because they went unmentioned and unanalyzed, the Board should decline to follow the Staff Recommendation.

Climate change science is clear that future natural hazards or disasters such as flooding are expected to continue to result in more frequent and severe events. Like Frisco, many Colorado communities have recently experienced major flooding events and are planning proactively to lessen the impacts of future floods.

According to the FEMA manual: “The ability to guide development in a manner that respects identified hazard areas is an important long-term aspect of hazard mitigation and should be included in a community comprehensive plan.”

A Summit Daily article on Frisco’s Community Plan highlights additional issues raised by the proposed variance that were not considered in the Staff Recommendations:

“If you drive by today, it’s built out at a much higher density,” said Lee. “I think little parcels like that on both sides of Main Street have been coming into play. If you go down Second Avenue you’ll notice that where 10 years ago there were some vacant lots and single-family homes, now you have much higher density two- and three-story townhome developments. There was a sense of, ‘oh my gosh, I thought we had this really low-density residential pattern that was always going to be these cute little cabins on this lot.’ Now that’s changing.”

So as the process of infill and redevelopment has already begun, the town will be looking at how best to manage that process over the coming years to minimize the impacts on Frisco residents’ way of life. Nothing has been decided, but the community plan opens the door for the town to potentially tweak regulations to produce more desirable outcomes, such as strengthening incentives for affordable housing, giving bonuses for higher quality architecture, altering design guidelines to make sure new developments fit the town’s character and more.

“I think there’s a concern that, if not done well, this infill development could make our town feel different,” said Lee. “We could lose that sort of quaint, friendly mountain community because we’re building higher and more dense, not leaving space for landscaping and public access, or choking off what we love best. We have to be sensitive to that and make sure we have regulations in place to make sure that the buildings coming in are in line with the character we love in Frisco.”

See

<https://www.summitdaily.com/news/frisco-hopes-to-balance-growth-and-character-in-developing-new-community-plan/>

Frisco's Flood Preparedness webpage recognizes the risks of development in flood hazard areas.

## **Build Responsibly**

The Town of Frisco regulates construction and development activities in the floodplain through **Chapter 97, Flood Hazard Area, of the Frisco Town Code**. Development is defined as: "Any man-made change in improved and unimproved real estate, including but not limited to buildings or other structures, mining, dredging, filling, grading, paving, excavation or drilling operations or storage of equipment or materials." The Community Development Department administers the permit requirements for construction and development in the floodplain. A Floodplain Development Permit is required for all development proposed to occur on properties located within the Special Flood Hazard Area (SFHA) as identified on the Flood Insurance Rate Maps (FIRM). These applications may be processed concurrently with an associated site plan review and building permit applications.

<https://www.frisco.gov/departments/community-development/planning-division/flood-preparedness/>

Although Frisco may decide against denying *all* future variance requests in floodways and wetlands adjacent to Ten Mile Creek, it would make sense to closely scrutinize and deny proposed construction variances that trigger *multiple* warning signs. The current application is such a request.

- 7. The proposed variance does not satisfy Criterion 6 because granting the variance would materially weaken the general purpose of the protective regulations from which the applicant seeks relief.**

The Town Code for Flood Hazard Areas provides:

§ 97-2. Findings of Fact.

- A. The Town Council of the Town of Frisco finds that there are, within the Town of Frisco, floodplains which constitute natural hazards of state and local interest and are subject to periodic inundation which results in loss of life and property, health and safety hazards, disruption of commerce and governmental services, extraordinary public expenditures for flood protection and relief and impairment of the tax base, all of which adversely affect the public health, safety and general welfare unless appropriate regulations are adopted concerning the use and occupation of such hazard areas.

Code at Chapter 97, page 1 (underlining added)



At § 97-3, the Statement of Purpose provides that the “purpose of this ordinance to promote public health, safety and general welfare and to minimize public and private losses due to flood conditions in specific areas[.]” Id. at 2. Allowing development in designated floodways is directly contrary to this purpose.

Section 97-4. Methods of Reducing Flood Losses,” provides that:

In order to accomplish its purposes, this ordinance uses the following methods:

- A. Restrict or prohibit uses that are dangerous to health, safety or property in times of flood, or cause excessive increases in flood heights or velocities;
- B. Require that uses vulnerable to floods, including facilities which serve such uses, be protected against flood damage at the time of initial construction;
- C. Control the alteration of natural floodplains, stream channels, and natural protective barriers, which are involved in the accommodation of flood waters;
- D. Control filling, grading, dredging and other development which may increase flood damage;
- E. Prevent or regulate the construction of flood barriers which will unnaturally divert flood waters or which may increase flood hazards to other lands.

Ordinance at page 2-3.

This section establishes that restricting or prohibiting dangerous uses is a top priority strategy under A; mitigates against the alternation of floodplains at C; addresses filling that could increase flood damage at D; and addresses the potential that the development sought under the proposed variance could increase flood hazards to other lands at E. These provisions do not appear to have been adequately addressed by the Staff Recommendation, and some were entirely unanalyzed.

The Town should be careful to avoid potentially creating future liability when it has the chance. Avoidance is the best strategy for natural flood hazards, climate, and resiliency. Absent avoidance community smart growth strategies are buying out inappropriate development after the fact: “Use buyouts, transfers of development rights, and other incentives in hazard-prone areas to promote relocation to safer areas, and develop those areas in a manner consistent with smart growth principles.” [https://coastalsmartgrowth.noaa.gov/pdf/hazard\\_resilience.pdf](https://coastalsmartgrowth.noaa.gov/pdf/hazard_resilience.pdf) at 10. Hazard-resilient smart growth for waterfront communities is the key concept throughout this NOAA and EPA publication. Hazard avoidance strategies include: “Protect hazardous areas and environmentally sensitive areas, such as wetlands and floodplains”. Id. at 8.

An informed decision should take account of flood probabilities for Ten Mile Creek in town. According to a 2019 newspaper article:

At 5 feet, Tenmile Creek is at flood stage. At that point, there will be minor flooding of roads and properties along Tenmile Creek. At 6.5 feet, or moderate flood stage, houses begin to

flood. Major flood stage starts at 7.5 feet, with significant flooding in Frisco and on the westbound lane of Interstate 70.

See

<https://www.summitdaily.com/news/tenmile-creek-and-straight-creek-approach-flood-stage-as-spring-runoff-lets-loose/>

Summit County's Flood Preparedness Guide has a chart stating that Tenmile Creek below North Ten Mile Creek had a historic peak flow of 1,910 cfs in June 16, 1965 and an average peak flow of 943 cfs. See

<http://www.summitcountyco.gov/DocumentCenter/View/9596/Flood-Preparedness-Guide?bidId> at page 3. These flow numbers are based on 61 years of data. *Id.* These two sources raise questions about the relationship between cfs numbers from the County Flood Guide and the flood state numbers starting at 5 feet in the newspaper article.

The probability of a home on the property flooding or being washed downstream under a 100-, 200- or 500-year flood event should be considered before granting a variance authorizing development of the undersized lots.

The purpose of the ordinance would be weakened by granting the variance and affirmed by denial.

**8. Denial will result in community benefits and avoid any injustice.**

The Applicants who submitted the variance request do not currently own the property. Thus, denial will allow them to purchase an existing home for sale in the Town, or to identify a suitable, conforming lot elsewhere to build.

The undersigned are interested and committed to fairly and equitably applying the Town's ordinances. We would be interested in seeking a mutually agreeable outcome with the current owner of the property such as a public-private or private purchase that subject to a conservation easement that would guarantee future compliance with the letter, spirit and stated purpose of the policies and code sections analyzed above.

**9. Because the Recommended Findings are unsupported by the facts, the Variance Application should be denied.**

Staff's Recommended Findings suffer from the same logical flaw as the criterion by criterion analysis. They presume that if the property needs a variance to obtain the result sought by the Applicants, that the variance should be granted simply because extraordinary physical conditions or natural features on the property mean that the proposed development *requires* a variance exempting the property from the code and rules. Staff Rec at 15-16, including paragraphs 1 and 2.

The nature of the extraordinary conditions and the degree and extent of non-compliance necessitating the variance request are given short shrift. As explained above, granting the

variance would be detrimental to the environment, raises serious concerns for the neighborhood and the community, and is inconsistent with the Frisco Community Plan.

Under Recommended Finding 6, the facts and analysis fail to support the assertion that granting the variance would not materially weaken the general purpose of Chapter 97, the Flood Hazard Areas.

Under Recommended Finding 7, the proposed finding fails to address the fact that the requested relief would eviscerate the waterbacks setback from wetlands for essentially the entire building footprint, not just a few square feet on the edge of the proposed structure. The proposed finding fails to mention that there is no evidence of variances being granted for lots that are less than half the minimum lot size and almost entirely covered by designated wetlands.

Water quality protection will suffer if the variance is granted, but adverse impacts to water quality are not addressed.

The Planning Commission should approve a motion that DENIES the proposed variance.

### **Conclusion**

For the reasons stated above, the proposed variance raises serious concerns under each of the six criteria analyzed above. The waiver is sought for a property that is a designated wetland, located on banks of Ten Mile Creek, in a floodway, on a lot that is less than half the minimum size for the zoning district, would adversely impact the neighborhood, under conditions that would create an open-ended precedent, and inconsistent with the Community Plan. It should be denied.

Thank you for considering this comment.

Sincerely,

Windstream Subdivision Owners

Ed Balduf, Robynn Balduf, Julie King, Paul Gugielmo, Chris Reiss, Derek Goosen, Crystal Goosen, Holly Tompkins