

VAN REMORTELLC

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April 4, 2023

El Paso County, Colorado
Planning and Community Development Department
2880 International Circle
Colorado Springs, Colorado 80910

By E-Application and Email

Re: PCD File No. VR-2114 and PCD File No. BOA-219
Owner/Applicant: Jesus Barron, 10015 Calle Bernardo Point, Fountain CO
80817, (720) 688-1659, barronviper1@gmail.com
Property Address: 10015 Calle Bernardo Point, Fountain, CO 80817
Application: Board of Adjustment and Plat Vacation with ROW

Dear Planning and Community Development Department:

This firm, Van Remortel, LLC represents owner/applicant, Jesus Barron (“Mr. Barron” or “Applicant”), the owner of property commonly known as 10015 Calle Bernardo Point, Fountain, Colorado 80817 and more specifically described as:

Lot 14, Villa Casitas Filing No. 1,
County of El Paso, State of Colorado

Tax ID/Parcel No.: 5735004001
Existing Land Use/Development: RR-5
Zoning District: RR-5

(the “Property”).

This letter is intended to constitute as the cover letter as required with application, and referred in the application as *Exhibit A*. The applicant is requesting a variance to allow for a front setback of 3 feet where 25 feet is required in the RR-5 zoning district in order to resolve an encroachment, and a “bump-out” of approximately 3 feet in order to resolve an encroachment of part of the residence into the right of way (“ROW”), as further described in the survey plat submitted herewith.

Calle Bernardo runs over part of the ROW, but not the part containing the residence or any of Applicant's Property. The part of the ROW over Applicant's Property was originally platted for a road which is not and has never been utilized. This letter is submitted in connection with such application.

This request does not adversely impact adjacent properties or existing drainage patterns.

Applicant applied for an Access Permit (standalone), File No. AP22577 and the Access Permit was approved on April 4, 2022 by El Paso County Planning and Community Development Department.

Introduction

Applicant seeks front setback of 3ft where 25ft is required in the RR-5 zoning district in order to resolve an encroachment, and a "bump-out" of approximately 3 feet in order to resolve an encroachment of part of the residence into part of the ROW over which Calle Bernardo travels and for part of the ROW which was originally platted for a road, but was never used as such. The porch of Applicant's house and the northeast corner of Applicant's house encroach on the ROW. *A true and correct copy of the Land Survey Plat is submitted herewith as Exhibit 1.* A survey obtained of the Property shows that the house extends roughly 1.9 feet into the ROW (the "Encroachment").

A gravel road, Calle Bernardo, lies in the ROW and consumes approximately 8-15 feet of the 140-foot ROW. Exhibit 2 identifies the road highlighted in orange, the part of the ROW over Applicant's Property in green, and the remaining ROW highlighted in yellow. Exhibit 3, from the El Paso County Assessor's office, shows Calle Bernardo in the ROW and then turning Northwest in front of Applicant's property (specifically his driveway) to where it meets Avenida Alegre. It also shows that there is no road over the ROW West of the point where Calle Bernardo turns Northwest, and proceeds West along the Northerly edge of Applicant's Property. In fact, that part of the ROW is unused for a road or anything else.

Photographs submitted herewith show views of Calle Bernardo, the unused ROW and Avenida Alegre. See Exhibit 4-8. All of the properties that border the Northern edge of the ROW, West of the Property are accessible by Avenida Alegre, and in fact use Avenida Alegre for ingress and egress.

Background of the Application

On January 30, 2020, Mr. Barron acquired title to the Property from Superior Properties, Inc., via General Warranty Deed recorded February 3, 2020, at Reception No. 220015077. *A true and correct copy of the General Warranty Deed is submitted herewith as Exhibit 9.*¹ The

¹ All references to "recorded" documents are to documents recorded in El Paso County, unless specifically identified otherwise.

ROW is not identified in the General Warranty Deed and is not identifiable by a site visit. An affixed, manufactured home ("House") is located on the Property. Per an Affidavit of Real Property for a Manufactured Home, recorded July 12, 2012, it appears that the House was affixed to the Property at least by 2012.

In or around July of 2020, Applicant applied to the County for a building permit to construct a detached garage on the Property. El Paso County denied the building permit, asserting that the Property is noncompliant because the House "appears to be over the [P]roperty line."

In August of 2020, Applicant obtained a Land Survey Plat that depicts the north easterly corner of the House extending 1.9' over the Property line causing the Encroachment, onto the 140' Calle Bernardo ROW. The ROW was dedicated to the County per the 1971 subdivision plat, titled Villa Casitas Filing No. 1, El Paso County, Colorado ("Subdivision Plat"). Calle Bernardo is a gravel road located on roughly the northerly half of the ROW. Therefore, while the ROW directly abuts the Property and the House encroaches onto the ROW, the Road, itself does not abut the Property, and the House does not encroach the Road. *A true and correct copy of the Survey is submitted herewith as **Exhibit 1**.* In fact, the House is approximately 70 feet from Calle Bernardo.

Applicant originally requested that El Paso County vacate 70' of the ROW, through an application with El Paso County and an EA file No. 20114. On August 26, 2020, Engineer Meeting notes were obtained with all requirements and policies. This request was denied, due to Applicant not completing all the County's right-of-way vacation request requirements. *A true and correct copy of the El Paso County Checklist for EA-20-114 is submitted herewith as **Exhibit 10**.*

On September 22, 2021, we completed a traffic survey that meets the county requirements. *A true and correct copy of the Traffic Memorandum is submitted herewith as **Exhibit 11**.* We also procured a Title Commitment, which is submitted herewith as **Exhibit 12**.

Historic Background

It appears that the ROW was granted by virtue of a subdivision plat titled Villa Casitas Filing No. 1, dated and ratified April 21, 1971, and recorded May 29, 1971 in Plat Book R-2, Page 63, Reception No. 803466 (the "Filing"). *A true and correct copy of the Filing is submitted herewith as **Exhibit 13**.* The Filing states "All streets so platted shall be dedicated to public use . . . upon acceptance at resolution, all streets and drainage ways so dedicated will become matters of maintenance by El Paso County, Colorado."

The Filing demonstrates that Calle Bernardo was originally planned to jog Southwest beginning at about the Property's Northeast corner until about the Property's Southwest corner and then proceed due West. However, Calle Bernardo actually takes a jog Northwest onto what

is labeled Los Taos on the Filing, but subsequently and currently is identified as Calle Bernardo. See *El Paso County Assessor Information at Exhibit 3*.

Exhibit 14 shows the current Calle Bernardo in yellow, and the ROW labeled Calle Bernardo, but never used as a road in green. It also shows what was labeled as Los Taos, but is now part of Calle Bernardo in orange. Calle Bernardo now continues in a Northwesterly direction until it intersects with Avenida Alegre.

By virtue of a Grant of Right Way from LWD, LLC (“LWD”), as grantor to Mountain View Electric Association, Inc., as grantee dated November 16, 2000 and recorded November 20, 2000 at Reception No. 200140056, LWD granted an easement for power lines, among other things (the “Power Line Easement”). *A true and correct copy of the Power Line Easement is submitted herewith as Exhibit 15*. The requested vacation of the ROW, will not effect the Power Line Easement.

Legal Authorities and Support for the Requested Vacation

A right of way may be an easement. *DeReus v. Peck*, 162 P.2d 404 (Colo. 1945). The term “right of way” is generally construed to describe an easement. See *Hutson v. Agric Ditch & Reservoir Co.*, 723 P.2d 736 (Colo. 1986). The term may be merely descriptive of the purpose to which the is being put. *Dep’t of Transp. v. Gypsum Ranch Co., LLC*, 244 P.3d 127 (Colo. 2010).

Easements may be created by the filing of a plat “specifically dedicating certain portions of the land as avenues to the use of the occupants of the platted tracts” *Page v. Lane*, 211 P.2d 549 (Colo. 1949). An easement is created “if the owner of the property to be burdened . . . conveys a lot or unit in a general-plan development or for the development or community.” *Allen v. Nickerson*, 155 P.3d 595 (Colo. App. 2006). Under this general principle, a plat can give rise to an express easement or dedication for private or public use. *Bolinger v. Neal*, 259 P.3d 1259 (Colo. App. 2010).

The existence of an easement does not preclude the creating of additional easements so long as the additional easements do not unreasonably interfere with the enjoyment of the prior easement holders. *Bolinger*, , 259 P.3d 1259.

Mere nonuse of an easement acquired by grant, however long continued, does not constitute an abandonment. *People ex rel. Standart v. Farmer High Line Canal & Reservoir Co.*, 54 P. (Colo. 1898). Failure to use the full width of the right of way does not constitute an abandonment. *Dep’t of Transp. v. First Place, LLC*, 148 P.3d (Colo. App. 2006). Cessation of the primary purpose for which an easement was granted does not terminate the easement if such purpose was not the sole purpose of the grant. *Smith v. Wright*, 424 P.2d 384 (Colo. 1967).

An easement may be terminated by abandonment. *Williams v. Stirling* 583 P.2d 290 (Colo. 1978). To establish an abandonment of an easement, the party asserting the easement was abandoned must show affirmative acts manifesting an intention on the part of the owner of the

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dominant estate to abandon the easement. *Rivera v. Queree*, 358 P.2d 40 (Colo. 1960); *but see* C.R.S. § 13-25-127.

However, a use by the owner of the servient estate which is inconsistent with the enjoyment of the easement for a period of time long enough to create a prescriptive right will terminate the easement. The servient owner's use of the land must (1) adverse to the use of the easement, (2) open or notorious, and (3) continued with effective interruption for 18 years.

A platted public road or part thereof, may not be vacated so as to leave any land adjoining the public road without an established public road or private access easement connecting the land to another public road. C.R.S. § 43-2-303(2)(a). If a roadway is vacated, the documents vacating the road, including but not limited to any resolution, ordinance, deed, conveyance document, plat, or survey, must be recorded in the office of the clerk and recorder of the county in which the road is located. C.R.S. § 43-2-303(2)(f).

All right, title, or interest of a county in and to any roadway is divested upon vacation by any of the following methods (C.R.S. § 43-2-303(1)):

The board of county commissioners of any county may vacate any roadway or any part thereof located entirely within the county if the roadway is not within the limits of any city or town. If a roadway has been established as a county road at any time, the roadway may not be vacated by any method other than a resolution approved by the board of county commissioners of the county at a meeting ten days' notice of which has been provided to landowners owning one acre or more adjacent to the roadway. This provision does not apply to a roadway that has been established but has not been used after such establishment.

We now amend and revise to application for Board of Adjustment and Plat Vacation with ROW, and submit additional required documents for these requests.

Sincerely,

VAN REMORTELL LLC

Fred Van Remortel, Esq

cc: Jesus Barron