

# VAN REMORTELLLC

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February 14, 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  
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 ("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

Please state what you are requesting from the Board of adjustment and what the standards are that you are requesting the variance for.

"The applicant is requesting a variance to allow for a front setback of 3ft where 25ft is required in the RR-5 zoning district in order to resolve an encroachment...."

the ("Property").

This letter is intended to constitute as the cover letter as required with application, and referred in the application as *Exhibit A*. We are requesting a "bump-out" of approximately 3 feet from El Paso County (the "County") in order to resolve an encroachment of part of the residence on the Property into the Calle Bernardo right-of-way (the "ROW"). 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.

Applicant is requesting from the Board of adjustment a partial vacation of a 140-foot County ROW and encroachment of Calle Bernardo Point in Township 17S, Range 65W, Section 35. Applicant is also seeking a variance from the 25 feet setback requirement.

Standards

Applicant is requesting from the Board of Adjustment a partial vacation of a 140-foot County ROW and encroachment located at Calle Bernardo Point in Township 17S, Range 65W, Section 35. The purpose of the request is clear title to Applicant's property so that it may become marketable.

The Property is zoned RR-5. The portion of the existing ROW sought to be vacated is not now and never has been in use as a ROW. The portion of the existing ROW sought to be vacated does not serve a legitimate government or utility purpose. As a result of the requested action "there will be no impact on the status of the lot or parcel, and if a nonconformity will result the nonconforming lot or parcel will be conforming with respect to lot size and will be eligible to apply for a variance in the event they do meet the development standard of the applicable zone district. (LDC 7.2.2(E)(5)(c)). This request complies with C.R.S. §§ 43-2-301, *et seq.* (LDC 7.2.4(2)).

Pursuant C.R.S. § 43-2-302(1)(b) "[i]n the event that less than the entire width of a roadway is vacated, title to the vacated portion shall vest in the owners of the land abutting such vacated portion." Pursuant C.R.S. § 43-2-302(1)(f) "[n]otwithstanding any other provision of this subsection (1), a board of county commissioners may provide that title to the vacated roadway shall vest, subject to a public-access easement or private-access easement to benefit designated properties, in the owner of the land abutting the vacated roadway, in other owners of land who use the vacated roadway as access to the owners' land, or in a legal entity that represents any owners of land who use the vacated roadway as access to the owners' land. Title shall vest to the owner of the land abutting the vacated roadway as otherwise required by paragraphs (a) to (d) of this subsection (1), unless the board expressly requires the title to vest pursuant to the authority set forth in this paragraph (f) in the resolution to vacate the roadway that is approved by the board." Applicant (and subsequent owners of the Property) is the owner person to use or benefit from the part of the ROW that is sought to be vacated.

The requested ROW vacation complies with the LDC and applicable State law. The portion of the ROW sought to be vacated has not been used as a public road. C.R.S. § 43-2-303(2)(e); *see also, Martini v. Smith*, 42 P.3d 629 (Colo. 2002). Accordingly, the strict requirements of the vacation statute do not apply. *Martini*, 42 P.3d at 636.

Vacation of the ROW will not create any parcels without access. C.R.S. § 43-2-303(2)(b). The approval of the requested ROW vacation will not adversely affect the public health, safety, and welfare. No land, by reason of the requested vacation, is left without an established public right-of-way or private access easement connecting said land with an established public road. The ROW, if vacated as requested may be reserved for the continued use of existing sewer, gas,

water or similar pipelines and appurtenances, for ditches or canals and appurtenances, and for electric, telephone and similar lines appurtenances. However, such use is amply available from the existing, non-vacated part of the ROW.

The portion of the ROW that is sought to be vacated lies entirely on Applicant's Property and has not been maintained by El Paso County or any municipality. This request and the action sought hereby do 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 a partial vacation of a 140-foot ROW for part of the ROW for "bump-out" of approximately 3 feet so that the residence will not encroach the ROW. Calle Bernardo travels over for part of the ROW, but does not travel over Applicant's Property. The part of the ROW that goes over Applicant's property 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, approximately 70' from the path of Calle Bernardo. Additionally, Applicant desires to build a garage at the end of his gravel driveway, and that garage would fall in the ROW, but not the road. *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. **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.

Accordingly, Applicant seeks a "bump out" of approximately 3 feet, so the residence is entirely out of the ROW; and a variance of the setback requirement of 25 feet from the ROW. The actual road, Calle Bernardo is not implicated by this request.

### 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**.*<sup>1</sup> The ROW is not identified in the General Warranty Deed and is not identifiable by a site visit. An affixed, manufactured home (the “residence”) is located on the Property. Per an Affidavit of Real Property for a Manufactured Home, recorded July 12, 2012, it appears that the residence 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 residence “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 residence extending 1.9' over the Property line causing the Encroachment, onto the 140' ROW, but not the road. 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, approximately 70' from the residence. Therefore, while the ROW directly abuts the Property and the residence encroaches onto the ROW, the Road, itself does not abut the Property, and the residence does not encroach the Road. *A true and correct copy of the Survey is submitted herewith as **Exhibit 1**.* In fact, the residence 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**.*

In September 2021, Applicant completed a traffic survey that meets the county requirements. *A true and correct copy of the Traffic Memorandum is submitted herewith as **Exhibit 11**.* Applicant 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,

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<sup>1</sup> All references to “recorded” documents are to documents recorded in El Paso County, unless specifically identified otherwise.

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, that plan was not realized and Calle Bernardo actually takes a jog Northwest (away from Applicant’s property) 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, away from Applicant’s Property, 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 bump out vacation of the ROW, will not affect 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 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. Applicant hereby requests that the 3' bump out and variance be approved. Please let the undersigned know if you have any questions or require additional information.

Thank you.

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Planning & Community Development Department  
February 14, 2023  
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Sincerely,

VAN REMORTEL LLC

/s/ Fred Van Remortel  
Fred Van Remortel, Esq

cc: Jesus Barron