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EGGLESTON KOSNIK
A LAW FIRM | LLC

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Via Email

Marti Whitmore
Ouray County Attorney
P.O. Box 28
Ridgeway, CO 81432
mwhitmore@ouraycountyco.gov

Bryan Sampson
Ouray County Planning Dept.
P.O. Box 28
Ridgeway, CO 81432
bsampson@ouraycountyco.gov

Re: BoCC Consideration of the High Alpine Regulations

Dear Mr. Sampson and Ms. Whitmore:

Our firm represents the Ridgway Ouray Community Council (ROCC) and we are writing in support of the High Alpine Regulations. Although ROCC supports the draft regulations, it will be requesting a larger minimum lot size and other amendments to the regulations adopted by the Planning Commission. We are aware that there has been past comment that adoption of the proposed regulations would result in unlawful regulatory taking of private property. The purpose of this letter is to emphasize that the risk of a high alpine patent holder bringing a reasonable taking challenge is low and the County can make further modifications of the proposed regulations without fear of increasing the potential of a taking claim.

We have drafted numerous zoning and land use regulations for county commissioners in Colorado and understand that it is generally undesirable to take legal risk when adopting regulations. Based on the current regulatory taking jurisprudence and the unique nature of the properties in the High Alpine Area, we do not believe that adoption of the proposed regulations present an atypical level of legal risk.

There was comment provided to the Planning Commission that adoption of the proposed regulations would result in a *per se* taking, but we do not agree that a claim of a *per se* taking is a reasonable argument. As you are likely aware, the *per se* taking rule comes from the Supreme Court's opinion in *Lucas v. South Carolina Coastal Council*.[1] A *per se* or categorical taking occurs when a governmental action deprives a property owner of *all* economically viable use of his property. If a *per se* taking has occurred, then the government must compensate the property owner for the deprivation of the use of his land.

[1] *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

In *Lucas*, the Supreme Court ruled that a regulatory taking occurred when the State of South Carolina adopted regulations that denied all economically beneficial or productive use of the land, but that is not the case for properties subject to the proposed High Alpine Regulations. The High Alpine Regulations do not govern typical fee simple parcels, but instead govern patented mining claims. Patented mining claims were acquired through the Mining Law of 1872.[2] The intent of a patent is to provide miners with the right to own the property that they expended resources on while mining and it is not the intent of the law to sell federal land for residential or commercial development.[3]

The proposed High Alpine Regulations are consistent with the intent of the Mining Law of 1872 and the purpose of patented mining claims. The proposed regulations allow for mining and mining related activities as a matter of right, just as intended in the Mining Law of 1872. The proposed regulations are not depriving patent owners of all economically viable use of their property, but instead patent owners can use the land for the reasons that the properties were purchased from the federal government.[4] Thus, *Lucas* is not applicable and it would not be reasonable to bring a *per se* taking claim.

Similarly, we do not agree that a reasonable taking claim can be made under the analysis provided by the Supreme Court in *Penn Central v. New York City*.[5] You are likely familiar with the *Penn Central* analysis, which looks at following three factors:

1. The economic impact of the challenged regulation;
2. The claimant's reasonable, investment-backed expectation; and
3. The character of the government action.

An analysis of the *Penn Central* factors does not provide a reasonable argument that the proposed regulations result in a taking. The following is a brief discussion of the three factors as applied to the proposed High Alpine Regulations:

1. **Economic Impact.** The economic impact is determined by measuring the remaining value left of the property owner after the alleged taking.[6] The remaining value is not based solely on the current market value, but also includes future values.[7] Courts have repeatedly held that regulations that reduce the value of a property from 90% to 95% still do not result in a taking.[8]

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[2] 30 U.S.C. §§ 22-54.

[3] See 30 U.S.C. 38 (in order to obtain a patent, a claimant must provide evidence that the claim was worked for a period of time).

[4] In addition, patent holders can realize economic value through camping, ecological purposes (selling the patents to conservation groups or placing a conservation easement on the patents), or granting easements or permits (to outdoor outfitters or others).

[5] *Penn Central v. New York City*, 438 U.S. 104 (1978).

[6] *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001).

[7] *Agins v. City of Tiburon*, 447 U.S. 255, 262 (1980).

[8] *See also Lucas*, 505 U.S. at 1019, note 8.

The High Alpine Area patents do not have significant value for residential use or general commercial use. There is a limited market for raw land in this zone for residential uses because the properties are hard to get to and immensely expensive to build on, and there are limited public services. There is value in the patents for mining and mining related activities, and it is reasonable to determine that there will continue to be value in the mining claims in the future. As a result, the prohibition of residential uses does not result in a decrease in value anywhere close to 90% to 95% and the economic impact does not rise to the level to sustain a taking challenge.

2. **Reasonable Investment Based Expectation.** It was unreasonable for property owners who bought patents in the High Alpine Area to believe that they can easily develop residential or commercial properties free from regulatory oversight. In reality, any commercial or residential development in the High Alpine Area is already subject to regulations that may make development infeasible. Any expectation of residential or commercial development would have been pure speculation. Again, the intent and purpose of the government patents was to use the properties for mining purposes and not residential. It is reasonable for a purchaser to buy patents to develop mining activities, but it is unreasonable to buy patents for other types of development. Through the adoption of regulations in surrounding counties and alpine areas throughout the West, High Alpine Area property owners should have been aware of the likelihood of Ouray County adopting regulations that would prevent certain types of non-mining activities. Thus, the proposed regulations would not interfere with reasonable investment based expectations of property owners in the High Alpine Area.

3. **Character of the Governmental Action.** The proposed regulations do not constitute a physical invasion of private property by the government, nor can they be characterized as an acquisition of private land to facilitate a uniquely public function. Instead, as stated in the proposed basis and purpose, the regulations are important in protecting the health, safety and welfare of the people, including protecting water supplies, fragile ecosystems, emergency responders, tourism, historic structures, the patented claim owners and the visitors of the high country.

The County can be confident that the proposed regulations would not present a reasonable taking challenge under both *Lucas* and *Penn Central*. The unique nature of the High Alpine Area properties would allow the County to further modify the minimum lot size or the definition of the alpine tundra ecosystem. If either of these regulations were modified, the same taking analysis would apply with the same result of not presenting a reasonable threat of a taking challenge.

If the County wants to significantly raise the minimum parcel size, and it wants to provide additional value to High Alpine Area patent holders, it can add provisions that

allow land to be easily consolidated or development rights to be transferred in the High Alpine Area. This would allow a property to meet the requisite minimum lot size requirements by consolidating land or retiring development rights, and would provide additional value to all properties.

Generally, any time the BoCC adopts land use regulations, property values are impacted and someone can argue that a regulatory taking occurred. The proposed High Alpine Regulations present the same threat, however, we do not believe that a claim can reasonably be presented under the proposed regulations. We hope that there can be a focus on the basis and purpose of the proposed regulations and not on the potential red herring taking argument. The High Alpine Regulations are necessary to protect the health, safety and welfare of the entire community, and we are hopeful that the BoCC can act without the undue concerns of a legal challenge from an individual property owner.

Thanks for your work, and all of the County Staff's work, on this important issue. If you would like to discuss any issues raised in this letter, please feel free to contact me and we would appreciate it if you could include this letter in the legislative record.

Very Truly Yours,

Paul Kosnik
Eggleston Kosnik LLC
pkosnik@e-klaw.com