

Sent via U.S. Mail and email

April 24, 2017

Wade Gateley  
Elbert County Attorney  
P.O. Box 7  
Kiowa, CO 80117  
[Wade.gateley@elbertcounty-co.gov](mailto:Wade.gateley@elbertcounty-co.gov)

Ernest F. Fazekas, II  
1947-2016

**Re: Independence/PUD Zoning**

Dear Wade,

This firm represents a member of SOD Elbert County regarding the development project known as Independence (formerly known as Bandera East and Bandera West). Specifically, our client is concerned by the County's apparent conclusion that the PUD Zoning—approved by the Board of County Commissioners ("BOCC") pursuant to Resolutions 09-13 and 09-14—remains in force.

The County's publications on this matter, including the attached **Exhibit A**, titled "General Zoning and Subdivision" appear to conclude that PUD Zoning is a "permanent" zoning right, without regard to whether development is actually pursued. This conclusion is contrary to generally accepted interpretations of PUD Zoning, the County's own land use regulations, and Colorado law.

Colorado law is clear that a vested property right expires three years after approval, *unless* extended pursuant to a development agreement. C.R.S. § 24-68-104(1),(2). The term "vested property right" is defined as "the right to undertake and complete the development and use of property under the terms and conditions of a site specific development plan." Planned unit development plans are included within the definition of a "site specific development plan." C.R.S. § 24-68-102(4)(a).

Likewise, Elbert County's Subdivision Regulations ("ECSR") provide that a PUD Plan is a vested property right that remains vested for a period of three years. ECSR § 4(E). The County's regulations on the perishable nature of PUD Zoning are consistent with various jurisdictions throughout the state that have adopted local ordinances consistent with the three year expiration of PUD plans. *See, e.g. City of Greeley Development Code § 18.32.150* (mandating that a developer complete all work within the public right-of-way of an approved final PUD plan within three (3) years); *Louisville Municipal Code § 17.28.200(D)* ("...no

building permit shall be issued more than 36 months after city council approval of the plan unless an extension of time is approved pursuant to subsection 17.28.210.B and issuance is within such extended time.”); *Longmont Code of Ordinances* § 15.02.080 (establishing that a final PUD plan is a vested property right valid for three years, which may only be extended by approval of the city council pursuant to a development agreement). We assume that the County’s apparent willingness to stray from its own zoning regulations is accidental.

The underlying PUD Zoning for the Property was created by the Bandera East and Bandera West PUD in 2009. Consistent with Colorado law and the Elbert County Code, the Bandera West/Bandera East PUD Zoning designations expired three years thereafter. We are not aware of any developer agreement regarding the Bandera East or Bandera West developments that would extend the default 3-year vesting period for PUDs. If such a developer agreement exists, we would appreciate your office forwarding that information to our attention.

Our client is additionally concerned by the fact that the PUD Rezoning for Bandera East and West were both approved pursuant to resolutions whereby the BOCC contemporaneously approved Preliminary Plat and 1041 Permits for Bandera East and Bandera West. As you are aware, Resolutions 09-13 and 09-14 required the Developer to submit a Final Plat within one year. Our understanding is that a Final Plat was never submitted. The County’s Subdivision Regulation § 4(E) provides that the County’s process for Planned Unit Developments requires “Recordation of a Final Plat and Rezone Exhibit and verification of a Preliminary Plat.” The fact that a Final Plat was not recorded within one year renders the developer out of compliance with the Resolution approving the underlying PUD rezoning. The County’s Subdivision Regulations clearly contemplate that recordation of a final plat is necessary and integral to the PUD Zoning process. Notwithstanding the expiration of the 3-year vesting period, the developer’s failure to record a Final Plat before the stated deadline should have caused a termination of the PUD Zoning designation.

In light of the foregoing, our client requests that the County reconsider its willingness to allow the current developer to proceed with platting of the Independence development, without first requiring the developer to either resubmit the expired PUD plan or submit a new plan to the BOCC. Regardless of whether the developer elects to resubmit the expired PUD plan or submit a new plan, any proposed PUD rezoning plan must be reviewed consistent with the procedures and conditions set forth in ECZR Part 1, Section 6 and Part II, Section 16.

If you have additional information you feel is relevant to our discussion, I would appreciate you bringing the same to my attention.

Sincerely,

FOLKESTAD FAZEKAS BARRICK & PATOILE, P.C

Kathryn T. James, Esq.

office. 303.688.3045 • fax. 303.688.3189

18 South Wilcox Street, Suite 200

Castle Rock, Colorado 80104-1909

ffcolorado.com



## COMMUNITY & DEVELOPMENT SERVICES

215 Comanche Street/P.O. Box 7 ~ Kiowa, CO 80117  
303.621.3136

### GENERAL ZONING AND SUBDIVISION

Zoning and subdivision regulations are separate but complimentary sets of regulations, but address different basic matters. Euclidean Zoning, sometimes also referred to as "straight zoning", divides a community into districts, and within any district, only two categories of items are regulated: the various permissible uses of land, and under what terms and conditions, and the physical controls (setbacks, heights, bulks etc.) on the structures which house those permissible uses.

Subdivision, on the other hand, also tends to regulate two categories of items, but different categories than Euclidean Zoning. What subdivision regulations address are things like: the engineering adequacy and safety of site and lot layout, and whether the proposed subdivision is served by a sufficiently adequate compliment of public goods and services (roads, water, sewer, schools, police and fire protection, parks and recreation, etc.) that the resulting lots, when sold, can actually be developed and used. The requirement for a "subdivision process" in Colorado is triggered any time land is being divided into parcels that are smaller than 35 acres (Senate Bill 35, 1973).

### ZONING AND SUBDIVISION OF INDEPENDENCE (FORMERLY KNOWN AS BANDERA)

The Independence property (formerly known as Bandera East and West) is located on the western boundary of Elbert County on County Road 158. This property went through rezoning in 2009 and is zoned "Planned Unit Development" or PUD. Zoning creates an entitlement which is "property right" and the term used to describe this is vesting or vested. The PUD zoning is a vested property right now attached to this parcel of land. The density associated with the approved rezone has been a part of the public record since the rezoned was approved and recorded in 2009.

An entitlement is an asset or "vested right" that is attached to the land in perpetuity and can be sold and transferred with the land just like any other property right. Entitlements are permanent and do not expire, hence the base word "entitle". A property owner is entitled to do the things that are described in his zoning. The thing that can affect an entitlement is if a government entity were to undertake a county-wide rezone or city-wide rezone as a result of something like a new comprehensive plan; this happens infrequently because it affects many land owners and generally citizens don't like the government to

take away or change their property rights. If a government were to undertake such an action it would have to go through a public process as well. All entitlements following a rezoning approval are protected from this sort of government intervention automatically for three (3) years in the state of Colorado. Some developments that are large and are intentionally phased developments may negotiate longer protections in their approval process and this is not uncommon.

Another way to look at an entitlement would be to compare it to subsurface water rights. If a person owns water rights under a piece of land but never drills a well to put the water to "beneficial use", it doesn't mean that their right to or ownership of that water evaporates just because they are not using it. Zoning creates a right to DO something on a piece of land without a requirement that it be done in any given period of time. Zoning is attached to and runs with the land until either the land owner takes action to change the zoning or a government entity, through their authority, undertakes a rezone action of its own that broadly affects zoning within its area of authority.

Here is where it gets a bit more challenging to understand and please note, these are just general "planning" responses and are not necessarily specific to the development at hand.

Subdivisions go through two primary steps:

1. Rezone from one zone district to another; and following that step
2. Subdivision from a large parcel or parcels into separate, distinct lots. This step includes platting (which is then broken into preliminary and final plats -- we will cover that later).

The first step for a subdivision like this one is the "Rezone". Most developments start as a large parcel (or more than one large parcel) of agriculturally or A-zoned land. Land in Elbert County that is 35 acres or larger are almost always A-zoned. The rezone in this case was from A to "Planned Unit Development" or PUD. PUD is a zoning category of its own and is fully negotiated through the public process. It must meet criteria such as the intent of the Master Plan. With large developments it is usually in the best interest of the County to rezone as PUD instead of "straight zoning" as describe in one of the fixed zoning districts in Elbert County Zoning Regulations. This is also referred to sometimes as the Euclidian zoning. Through a PUD process a development can be tailored to better meet the needs, present and future, of the community - it can be "Master

Planned" as a part of the greater community and with regard to itself. The PUD again must still meet the intent of the Master Plan and has its own adopted standards set forth in the Elbert County Zoning Regulations.

In the case of a PUD it is at the Rezone stage that the particular uses are described, the density is outlined (meaning number of residential units) and the balance of residential, commercial, community, open space or parks described. Some PUDs have all of these elements and some don't. But it is the PUD rezone exhibit and documents that describe all these zoning-related elements. PUD is the preferred zoning district for larger developments like Independence/Bandera. PUD allows for a better, more cohesive mix of uses and more creativity than "straight zoning" to something like RA-1 or R-1 and it is better suited to take the greater community needs into consideration. It is generally more expensive for the developer because there is a lot more to think about and plan for and there is a good deal more the developer has to provide the county in exchange for things he or she would like to achieve. With straight zoning none of these "county benefit" negotiations are possible if the developer meets the minimum standards of a Euclidian zone district (like RA-1, R-1, etc.).

With this development the Rezone step is complete (2/2009), the uses approved and the density is approved. Imagine it as a big, undefined "blob" of land where this set of things that are listed on the recorded rezone exhibit can happen. The next stage (subdivision) creates the picture of what the development will look like.

The Subdivision stage makes the rezoned, undivided parcel into a subdivision of lots. There is a preliminary plat and a final plat in the subdivision step. These can be done as distinctly separate applications or they can be done concurrently. This is where the shapes take place, the roads get laid out, the lots are pictures and the "map" of it is created. This is the stage that Independence is beginning; there was an approved preliminary plat. The preliminary plat does not create vesting. Independence has expressed their intent to file the preliminary and final plats concurrently.

So, the developer already has their approved zoning that describes their uses, their density and the balance of land that can be developed and the land that must remain open space. Of all the subdivisions in Elbert County this development has the largest percentage of open space being dedicated. The preliminary plat will have the lots, the roads and all the other elements spelled out and one of the preliminary plat's purposes is to deal with the engineering-related things that are required of a development like drainage, building envelopes, no-build areas and the physical details of what will need to be done to do it properly. The final plat is a simplified version of the preliminary plat that focuses on the layout of the lots, roads, open space and the other community elements.

The approved "Bandera East and Bandera West" documents are all recorded with the Elbert County Clerk and Recorder. Ask for: "Bandera East and Bandera

West approved rezone exhibits and the Bandera East and the Bandera West approval resolutions. You may also request a copy of the Bandera East and Bandera West preliminary plat if you care to see it. Again, this preliminary plat step has to re-occur because the entire "platting" step wasn't complete. All the approved Bandera related rezone documents are a part of the public record. They may be requested from the Recorder's office.

## HOW INDEPENDENCE (BANDERA) REZONE MEETS THE CRITERIA SET FORTH IN THE ELBERT COUNTY MASTER PLAN

It is a challenge to understand things after-the-fact sometimes when you were not able to be present for the public hearings and extensive staff presentations back then. The very best place to learn about any project is to attend the public hearings. This narrative is an attempt to aid understanding at this later date. This development does meet the criteria set forth in the Elbert County Master Plan.

The 1996 Elbert County Master Plan defines this particular development as Rural Residential in a High Density Area. The area in which this development is located is the identified "High Density" area of Elbert County as outlined and defined by the aforementioned Master Plan. The area is also identified as the "study area" of the 2008 West Elbert County Transportation Master Plan based on the concentration of development, Elbert County traffic patterns and demands on County infrastructure.

"Rural Residential – in a High Density Area" in the Master Plan allows for one dwelling unit per 3.00 to 10.00 acres. The area being contemplated is Elbert County's "High Density" area.

So the highest Base Density is 1 lot per 3.00 acres. The Base Density is where a development starts.

The Master Plan allows for and describes possible Density Bonuses that can be granted to developers when they agree to do certain things when they develop. These certain things are highly desired by the Master Plan. The Master Plan was created with a great deal of input from Elbert County citizens and it was approved by the Planning Commission through the public hearing process which entailed even more community and citizen input. If any document represents the 'Voice of the People' of Elbert County, it is the Master Plan. A Density Bonus exchange allows for the applicants to get a bit more of what they want when the county gets something that it wants and values in exchange.

Let's walk through what was then referred to as "Bandera East" and how the numbers meet the intent of the Elbert County Master Plan.

"Bandera East" contains 235.31 acres. We divide that by the maximum density of one unit per 3.00 acres = 78.436 lots

So this is the Base Density without an Density Bonuses = 78 Lots (rounding down)

Now we must look at the density with applicant's requested and approved "Density Bonuses". Again it is important to understand that the Density Bonus process was put through a rigorous public process and public hearings and was approved for recommendation by the Planning Commission -- a public body that seeks extensive public input. It was also approved by the Board of County Commissioners.

The Elbert County Master Plan Provides for the following possible density bonuses:

If the developer provides Central Water/Sewer to 100% of the lots they may be granted a 50-100% increase. A one-hundred percent density bonus was requested by Applicant and approved by both the Planning Commission and the Board of County Commissioners.

If the developer plans for water re-use for irrigation of each lot he then may be granted a 75% density increase. The developer did plan for water reuse and was granted the 75% density bonus.

So the Density for "Bandera East" with the requested Density Bonuses is:

$78 \text{ lots} \times 175\% \text{ bonus} = 78 + 78 (100\%) + 58 (75\%) = 214 \text{ lots}$

We then do the same thing for what was then referred to as Bandera West.

Without going through all the same steps Bandera West contains 776.63 acres / 3.00 = 258.876 lots

258 (rounding down) x 175% bonus = 709 lots

709 (Bandera West) + 214 (Bandera East) = 923 Lots

These density bonuses, the developer requirements and percentages are detailed in the Elbert County Master Plan on page 42.

The Master Plan can be found at: [www.ElbertCounty-co.gov](http://www.ElbertCounty-co.gov) > Government > Departments > Community & Development Services > Zoning Regulations.

Bandera was being worked on generally at the same time that the Housing Section of the Master Plan was being worked on in 2009. The developers at the time respected that there were changes being discussed surrounding housing, density and a desire to promote lower impact "cluster development" with regard to the Master Plan. The developers at the time worked to keep their proposed development in line with what was being discussed in the developing Housing Section at the time possibly because they didn't know if their public hearing was going to happen before or after the adoption of the updated Housing Section.

Bandera was approved for PUD (both East and West) February 11th of 2009. The updated Housing Section of the Master Plan was not completed until May of 2009. Therefore the final approval for Bandera was with consideration of the Master Plan in place at the time of approval and was not required to consider the added Housing Section of the Master Plan.

Even so it is an interesting exercise to explore how closely the development came to achieving the intent of the soon-to-be adopted 2009 Housing Section of the Elbert County Master Plan.

Below is a HYPOTHETIC calculation of what the developer could have achieved under the Housing Section of the Master Plan had it not been approved until after the Housing Section of the Master Plan was approved. **This is an exercise only.**

For a "Conservation Community" as described in the adopted 2009 Housing Section of the Elbert County Master Plan (which Independence/Bandera is) a developer may have a Base Density of one unit per .65 net acres. This doesn't mean that the lots need to be .65 acres or greater -- it means that in total, mathematically speaking, the development may have one housing unit per .65 acres of developable acreage. Conservation Communities are outlined at the bottom of page 11 in the Housing Section.

The Housing Section can be found at: [www.ElbertCounty-co.gov](http://www.ElbertCounty-co.gov) > Government > Departments > Community & Development Services > Zoning Regulations.

The property is a total of 1012 gross acres.

50% is required as open space for a Conservation Community.

A developer is allowed a maximum 10% Buy-Down of Open Space (this is cash paid to the County in lieu of land and is permitted by the Housing Section).

This leaves us with a requirement of 40% Open Space for Conservation Community.



Then 10% would be required for roads which we add to the 40% Open Space.

That leaves 50% of the 1012 acres as developable or 506 net acres.

With one unit per .65 acres we take 506 acres and divide it by .65 acres per unit and get 778 units as the **Base Density**.

Then a developer can get a density bonus of 20% for a Community/Recreation center – which was platted on the preliminary plat.

20% of 778 is an additional 155 units.

$778 + 155 = 933$  units under the Housing Section of the Master Plan.

Had the developer back then committed to preserving some of the historic structures on the parcel he could have asked for another density bonus and that would have been negotiated based on the value of the restored/preserved historic structure and the investment made to restore it.

Pretending that the developer back then did do that and asked for an additional 10% density bonus he could have gotten an additional 77 units for a total of 1,010 units under the Housing Section of the Master Plan.

So the end result only looks a little different (a difference potential of 10 lots) under the two scenarios. The developers of Bandera back then did meet the criteria of not only the Elbert County Master plan but even the Housing Section potentially even though it was not adopted yet. Going forward Independence moves forward with PUD zoning, an approved density of 920 units.