

Ouray County Board of County Commissioners
Public Hearing – High Country Regulations and Development – Continued
October 17, 2016 1:30-4:00PM
Ouray County 4-H Event Center, Ridgway, CO

The Board of County Commissioners met in a continued public hearing on October 17, 2016. Those present for the session were Lynn M. Padgett, Chair; Ben Tisdell, Vice-Chair; Don Batchelder, Member; Connie Hunt, County Administrator; Marti Whitmore, County Attorney; Hannah Hollenbeck, Deputy Clerk of the Board; Mark Castrodale, Planning Director; and Bryan Sampson, Associate Planner.

- **Note – This meeting was recorded for reference purposes.**

1:34 Public Hearing – High Country Regulations and Development, Continued:

The purpose of this hearing was to review a recommendation from the Planning Commission to adopt a new section of the Land Use Code regarding high alpine residential development on patented mining claims and mill sites in the high country. In conjunction with these recommendations, the Board of County Commissioners also reviewed possible related changes to Sections 2, 3, and 13 of the Land Use Code. This hearing was continued from September 13, 2016, September 22, 2016, and October 6, 2016.

Commissioner Padgett reopened the public hearing. She said that the Board had received revised packet materials that included an alternate Section 24. She suggested that the Board focus on the sections that they had been considering in previous iterations of the public hearing, and disregard the alternate Section 24.

Commissioner Tisdell and Commissioner Padgett disclosed that they had received correspondence and a phone call that may be constructed as public comment. Commissioner Tisdell distributed copies of the email correspondence to the Deputy Clerk. Commissioner Padgett said that she referred the caller who had contacted her to the Land Use Department.

Section 2

Commissioner Padgett suggested that the first “generally” and “coverage, less than 20 feet in height” be removed. The Board agreed.

Section 3

Commissioner Padgett suggested that the “Notes” in Sections 3.8(A)(1) and (2) be slightly revised to state *“Further requirements for non-mining development on patented mining claims and patented mill sites, at or above 9,480 feet are located in sections 13 and 24.”* The Board agreed.

Commissioner Tisdell cited a number of reasons supporting the 9,480 feet elevation. He said that a change to the elevation would constitute a significant change and it would need to be referred back to Planning Commission. He stated he was very comfortable with the elevation remaining at 9,480 feet. Commissioner Batchelder asked Whitmore what changes would trigger the need for Planning Commission review. Whitmore said that, as the original Board direction to the Planning Commission was broad and did not specify that a draft Code section be presented, it did not need to be returned to the Planning Commission; however there may be a threshold for additional public comment. Commissioner Batchelder agreed with Commissioner Tisdell regarding maintaining the elevation at 9,480 feet. He said that the County would be better served to not go below that elevation, and simply make the provisions of the proposed sections of Code apply to patented mining claims and mill sites at or above 9,480 feet. Commissioner Padgett said that 9,480 feet was less than a mile from the urban growth area of the City of Ouray; she pointed out that there was a historic mining district near County Road 14 and 14A and the elevation of those mining claims was below than 9,480 feet. It was her preference to go with 8,480 feet in order to be consistent with the stated purpose to minimize the potential impacts on mining. She did not think that the reasons stated by Commissioner Tisdell and Commissioner Batchelder were factually based or persuasive enough to warrant instituting the regulations at 9,480 feet; however, she was willing to concede to the preference of the majority of the Board and move on. The Board agreed to set the elevation for the regulations to “at or above 9,480 feet.”

The Board agreed to globally add *“patented”* to all references to “mill sites” in addition to “mining claims,” as was made in a previous public hearing.

Section 13

Commissioner Padgett requested that *“non-mining development”* replace references to construction or residential development. Commissioner Batchelder was wary that the change would potentially make all other uses subject to the process by the revision. Commissioner Padgett disagreed and stated that her revision exempted all activities except for single-family residences. Castrodale thought that Section 13.10(A) gave the proper context and that the “Note” in Section 13.10 could be removed. For clarity, the Board agreed to take the content of Section 24.2(A) and insert it into Section 13.11 as new subsection (A). Existing Section 24.2(A) would become (B).

Commissioner Padgett asked about including Section 24.2(C). Sampson said that there were no permits pending, but that the permits were valid for a period of three years. The Board agreed to amend Section 24.2(C) to state *“these regulations shall not apply to any patented mining claim or patented mill site within subdivision lots filed and recorded prior to 1971, lots previously approved by the County as a PUD, or any active Site Development Permit from three years prior to the date of adoption of this Section of Code.”* The Board agreed to insert the revised section of Code into Section 13.11(C).

Commissioner Batchelder requested that Section 13.11(F)(11) be slightly amended to state: "All applicants for a site development permit shall be required to sign, *notarize, and record a County Service Statement* acknowledging the following..." The Board agreed.

Commissioner Batchelder said that staff's solution to mitigate the conflict between Sections 4 and 24 was resolved by the Trade Credits proposition. He said that there may be an issue requiring the mineral estate owner to consent to the development. Whitmore suggested that Section 13.11(F)(2) be slightly amended to state "No application may be granted unless Applicant either owns 100% interest in both the surface and mineral estates *of the property subject to the Site Development Permit*, or has provided written consent..." Commissioner Batchelder agreed that it solved the conflict and the Board agreed to the change.

Section 24

Commissioner Padgett reiterated that the Board would keep with the original proposed draft that retained the 35 acre per 1 dwelling unit density.

Commissioner Batchelder suggested that the "Note" in Section 24.2 be removed as it was redundant. The Board agreed.

Commissioner Tisdell asked about the preservation of historical structures; he said that many of the historical structures were in excess of the square footage maximum contemplated by Section 24. He asked how the Code would treat an application if it proposed preserving and restoring the structure. Commissioner Padgett said that the applicants could seek recourse through the variance process in the rare instance that someone wanted to renovate a historical structure. Commissioner Batchelder said that if the Code section was adopted, any legal non-conforming parcels with preexisting structures would become illegal non-conforming parcels and structures. Whitmore said that, in that case, a building permit could not be issued without a variance. Commissioner Padgett said that she was comfortable with the exception and variance processes that existed in order to deal with the perceived problem. Commissioner Tisdell agreed. Commissioner Padgett said that the Board was attempting to preserve historical structures; she did not think that the proposed Code section changed the use.

Commissioner Padgett requested that consistent language be used in Section 24.3(A): "*For proposed non-mining development on patented mining claims and patented mill sites...*" The Board agreed.

Commissioner Padgett asked about the newly introduced term "Trade Credits;" she asked if it was a term that was typically used in Land Use and Development in Colorado. Whitmore said that the term was invented by staff. She said that "development credit" had a different connotation that was not pertinent to the goal of the proposed Code section. Whitmore was not aware of any conflict with State Statute. Commissioner Padgett appreciated that the trade credits gave property owners another avenue to gain additional square footage or to create a 35 acre parcel; she said that it allowed property owners to determine their best interest without exploiting the High Alpine Area. Commissioner Tisdell agreed.

Commissioner Batchelder asked which lots would be considered; he pointed out that there may be a contradiction with the current definition of illegal non-conforming lots in Section 4. He read the definition and stated that the patented mining claims and patented mill sites were created legally by the federal government and cautioned against potentially redefining federal law, or creating a contradiction of the definition in Section 24. Whitmore said that the lots did not fit the within the definition of illegal non-conforming lots, but that they were not legal non-conforming lots either. Commissioner Batchelder asked what the classification of an existing lot with an existing structure would be in that instance. Whitmore said that if the house was damaged or needed to be replaced, the variance process could be used. Whitmore reminded the Board that they specifically asked that Section 4.6 not apply to patented mining claims and patented mill sites at or above 9,480 feet. Commissioner Tisdell agreed; he said that the language was clear and he did not think there was a conflict. Commissioner Tisdell did not agree with Commissioner Batchelder that the parcels would be illegal non-conforming lots. Commissioner Batchelder said that the lots would have no classification if was no longer a legal non-conforming lot and it did not meet the classification of illegal non-conforming. Commissioner Batchelder was cautious of creating unintended consequences. Commissioner Padgett recommended using San Miguel County's language that stated the lots were legally created substandard parcels that must comply to the pertinent sections and had a continuation of use clause.

3:27 The Board took a short break and reconvened at 3:38:

Commissioner Padgett proposed additional language be added to Section 24.3(A) that stated: "*However, a structure existing prior to the date of adoption of this Section 24 on a patented mining claim or patented mill site with insufficient acreage to allow issuance of a new building permit is subject to Section 4.4 of the Land Use Code.*" The Board agreed.

Commissioner Tisdell requested that "*as defined by Ordinance 2016-002 or any subsequent amendments*" be added to Section 24.3(C). The Board agreed.

Commissioner Padgett clarified that the Note in Section 24.3(E)(3)(a) did not mean that the subsurface mining rights could not be leased. The Board agreed.

Commissioner Tisdell requested additional clarity to Section 24.3(E)(3)(d). The Board agreed to the language "In no circumstance shall a *non-mining residential or commercial structure* have a Floor Area larger than 2,500 square feet." Commissioner Padgett reiterated her earlier direction to replace "dwelling" with "*non-mining residential structure*" or "*non-commercial structure*".

Commissioner Padgett and Commissioner Batchelder agreed that "*The maximum number of accessory structures shall be one (1)*" be added to Section 24.3(E)(1). Commissioner Tisdell agreed.

Commissioner Batchelder and Commissioner Padgett disagreed about the applicability of Section 24.3(E)(2); they agreed that the language could be clarified by reworking the formatting. The Board

agreed. The Board further agreed to strike "With the exception of development within the Tundra" in Section 24.3(E)(3)(a).

Commissioner Batchelder was concerned about what would happen if the mineral estate holder eliminated the access to the parcel. He proposed that "Such easement shall be agreed to by the mineral estate holder" be added to Section 24.3(E)(3)(b). The Board agreed.

Commissioner Batchelder clarified that the intent of Section 24.3(l)(6) was to prohibit snow plowing; he requested that any reference be changed to "snow plowing." The Board agreed.

Commissioner Batchelder ensured that that same language that was in Section 13 be included in Section 24.5.

Commissioner Batchelder asked what would happen to the Trade Credit section if the Code was changed in the future, or a time came that "trade credit" signified something different. Trade credit was a loose concept with no definition in the Land Use Code, and he was leery about creating unintentional consequences. He asked what would happen when the trade credit on a property was used. Whitmore said that use of the trade credit did not extinguish any uses-by-right; once the trade credit was used to reach the required acreage, or for additional square footage, the one trade credit was gone and could not be used again for any purpose.

Commissioner Batchelder asked if the trade credit was a property right, and how it would be treated legally. Whitmore said that it could be argued that the trade credit was an aspect of real property and personal property rights. She said that it was a real property right, similar to water rights.

Commissioner Batchelder asked Susie Mayfield, Ouray County Assessor, how the credits would be treated, tax wise. Mayfield said that she would treat it like a severed mineral right. She wasn't sure how the marketplace would be affected until properties were sold.

Commissioner Batchelder asked what would happen to the draft section of Code if a lawsuit was brought against the County. Whitmore said that the current version of the Land Use Code would still be in place, but that if an injunction was filed, the draft sections of Code would not be implemented until the suit was settled.

Commissioner Batchelder asked if it was necessary to have another public hearing for additional public comment. Whitmore said that if the Board had made a significant change to the regulation's applicability, she would have recommended that public comment be reopened; however, as the elevation remained substantially similar to what was noticed in the public hearing notices, it did not need to be reopened for additional public comment.

Commissioner Batchelder said that he was concerned that the regulations would be challenged. He asked if the moratorium could be extended for a short amount of time by Board action. Whitmore said that the statute that the Board originally established the moratorium under allowed a 6 month moratorium without a public hearing. She indicated that case law supported longer moratoriums as long as a public hearing was held. She said that if the Board agreed to extend the moratorium, it could be done during a regular or special meeting.

Commissioner Batchelder stated that adopting something different from what the public originally reviewed and provided comments on could create suspicion. In order to ensure a good political process, he thought that another public hearing should be held and public comment accepted. Commissioner Tisdell said that he did not think it was divergent from the original section of Code received from Planning Commission. Commissioner Batchelder pointed out that the minimum parcel size was changed from 5 acres to 35 acres. Commissioner Padgett replied that the majority of public comment received urged the Board to consider something larger than 5 acres. She did not think that the Board departed from the spirit and intent of the process. She stated that the County Attorney agreed that the process and the Code was defensible. Commissioner Padgett stated that the Board had listened to public comment and made changes pursuant to those comments. Commissioner Batchelder did not disagree; he was mainly concerned about the uncertainty of an outcome from a legal process. Commissioner Tisdell disagreed. Commissioner Batchelder stated that with regards to the 35 acre per 1 dwelling unit provision, the proposed Code section was substantially different than what was originally proposed. Commissioner Batchelder stated that he wanted to review the changes made to the draft during this continued public hearing before making a final decision.

M/S/P – Motion was made by Commissioner Batchelder and seconded by Commissioner Tisdell to continue the hearing to October 19, 2016 at 3:30PM to review the final draft of the Code and, if needed, a special meeting. The motion carried unanimously.

5:15 The Board Continued the Public Hearing to October 19, 2016 at 3:30PM:

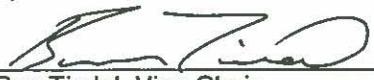
BOARD OF COUNTY COMMISSIONERS
OF OURAY COUNTY, COLORADO

Attest:


Michelle Naber, Clerk and Recorder
By: Hannah Follenbeck, Deputy Clerk of the Board




Lynn M. Padgett, Chair


Ben Tisdell, Vice-Chair


Don Batchelder, Commissioner