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July 27, 2021

Via Email Only To mpomeroy@co.blaine.id.us and jlovell@blainecounty.org

Blaine County Board of Commissioners
300 South 1st Avenue, Ste 300
Hailey, Idaho, 83333

RE: APPEAL OF THE DECISION OF THE BLAINE COUNTY COMMISSION DATED
MAY 4, 2021, DENYING APPROACH AND ENCROACHMENT PERMIT.

Dear Board of County Commissioners:

I. APPEAL REQUEST

Mr. Jae Hill is requesting the Blaine County Board of Commissioners review and overturn the May 4th denial of an application for an approach and encroachment permit to maintain a portion Imperial Gulch Road because that decision is contrary to County and State law and results in a regulatory taking under chapter 80, title 67, Idaho Code.

II. THE COUNTY UNLAWFULLY CREATED A NEW STATUS FOR IMPERIAL
GULCH ROAD

Jae Hill and Kyle Kimball (“Applicants”), owners of property served by Imperial Gulch Road (“IGR”), submitted a petition for validation (“Petition”) to the Blaine County Board of Commissioners (“the Board”) for validation of the road in October 2018, with subsequent hearings in February 2019, December 2019, October 2020, and December 2020. This validation application was submitted specifically at the request and suggestion of Blaine County staff. The Board of Blaine County Commissioners issued a Decision and Order (“the Order”) January 28, 2021 finding that IGR is a public county road.

Under Idaho Code § 40-203A the County is tasked with entering and order determining whether the subject road is public or not public:

“Upon completion of the proceedings, the commissioners shall determine whether validation of the highway or public right-of-way is in the public interest and shall enter

an order validating the highway or public right-of-way as public or declaring it not to be public.”

The Order states that IGR is a “Country road, public highway and federal right-of-way[,]” but then states that “validation of IGR is not in the public interest.” The fact that the County concludes validating the road is not in the public interest is largely irrelevant. The statute simply requires an “order validating the highway or public right-of-way as public or declaring it not public.” Idaho Code § 40-203A. The County declared IGR a public right-of-way and therefore validated the road. The Findings sections of the Order is non-enforceable. Only Part 3 of the Order is legally binding as it relates to Mr. Hill’s validation petition under Idaho state law, and that part of the Order clearly declares IGR a public right-of-way.

However, even if IGR was not validated, as contended by the Board’s decision denying the Applicant’s approach and encroachment permit, the County must approve all complete permit applications that comply with its ordinances. Additionally, under the Board’s rationale, the decision to not validate IGR as a R.S. 2477 road simply means that IGR is not subject to the standards of 40-204A, but rather subject to the County’s existing road management plans and laws; this includes the duty to maintain IGR as a public right-of-way.

III. THE COUNTY IS REQUIRED TO MAINTAIN IGR IN ACCORDANCE WITH THE BLAINE COUNTY ROAD INVENTORY CLASSIFICATIONS.

The 2018 Blaine County Road Inventory Classifications identified the portions of IGR on public land as “Recreational Access” but misidentified the portions adjacent to private land as “Private Roads with Public Access”—a classification unsupported by the County’s decision that IGR is a public road. Recreational Access is the lowest defined classification of public road in the County, per the Blaine County Road Right-of-Way Management Plan (“the Plan”) dated January 8, 2019.

On April 22, 2021, Applicant submitted a request to Blaine County Road and Bridge Department Staff for repair and regular maintenance of IGR (“the Request”) which sought to maintain the road at the “Recreational Access” standard as defined in the Plan. The permit application also sought to add a road sign at the intersection of Imperial Gulch Road and Greenhorn Road—this sign is necessary for public safety and was a requirement of the 1980 Greenhorn PUD approval that the Board has refused to enforce.

On May 4, 2021, the Board held a hearing—and without notice to the Applicants of said hearing—denied the Request (“May 4th Denial”), citing findings from the Order that IGR should remain “an unmaintained, primitive public access.” This is despite the fact that permit approval and denial is an administrative action that does not require Board input, and the County has previously required this exact process for prior landowners (see Attachment 1). The Plan contains no such standard for an “unmaintained, primitive” road. The “Recreational Access”

standard is the minimum road classification established by the County for public roads and is all that the Applicants sought in the Request.

The Board is not authorized under state or county law to establish arbitrary levels of service to IGR or create entirely new amendments to the Plan regarding road classification with the Petition—and in fact, no debate on the subject occurred at the public hearing.

The Board's May 4th Denial, however, relies solely on the Findings sections of the Order to establish new and unsupported road classification for IGR, a declared public road, and it uses the Order to deny an otherwise valid permit application. The County is required to maintain IGR to the level of service defined in the Plan, and it must approve permit applications consistent with said Plan.

For the foregoing reasons, the Applicants are requesting the County overturn the May 4th Order and comply with the County's own regulations and applicable state law.

IV. IMPERIAL GULCH ROAD NOW REQUIRES PUBLIC MAINTENANCE

The Board declared IGR a public road, but specifically chose not to validate it under the protections of Idaho 40-204A, the County has accepted responsibility for the road's liability and maintenance—a situation that the Applicants have repeatedly tried in vain to relieve the County of since December 2017.

If the Board will not allow appurtenant homeowners to maintain the road with reasonable conditions, then the County is obligated to undertake repair of Imperial Gulch Road for the portions of which it has jurisdiction, to the boundary of the BLM land—and such repairs must be made to bring the road to the County's existing minimum Recreational Access standard.

Any attempt to modify the Plan to circumvent this situation and retroactively create a new, lower classification for IGR will constitute a taking of the Applicants' appurtenant property rights under state and federal law.

The Applicants hereby demand that the County repair, upgrade, and maintain the entirety of Imperial Gulch Road (within their jurisdiction) to the Recreational Access standard, at a minimum.

V. REQUEST FOR REGULATORY TAKINGS ANALYSIS

The Board has repeatedly declared its intent to prevent "construction and residential traffic" on Imperial Gulch Road. This intention is outside the scope of the Board's authority and arbitrary and capricious. More problematic, the decision to deny the Applicant's application for an approach and encroachment permit deprive the Applicants of the legal right to make beneficial use of their RR-40 zoned properties which allow single-family residential development. Declaring a public road as "unmaintained" and subsequently denying a valid

request for maintenance by the appurtenant property owners to specifically prevent the residential development of property is a regulatory taking.

The County's determination that IGR is an "unmaintained, primitive public access[]" road and the Board's intent to prevent construction and residential traffic on IGR is a regulatory taking prohibiting all of the Applicant's economically viable and beneficial uses of the property as a residence.

Preventing maintenance of the road, contrary to the County's own Plan, deprives the Applicants of their property rights and allowed uses as defined under County Code §§ 9-1-4, 9-3-15.C, 9-6A-1, and others. The County's actions, if upheld, constitute an uncompensated taking under the Fifth Amendment of the United States Constitution and Article 1, Section 14 of the Constitution of the State of Idaho. The County did not conduct a takings analysis, pursuant to Idaho Statute 67-8003, to determine if their denial of the Petition or their denial of the Request constituted such a taking.

If the Board chooses to uphold their May 4th Denial and affirms the conclusion that the Order on the IGR validation did not create a public road, then the Applicants request a takings analysis of both actions, pursuant to Idaho State Statute § 67-8003.

VI. REQUEST FOR COMPENSATION OF REGULATORY TAKING

In the Land Use Element of the County's own Comprehensive Plan, the County does not mandate denial of all applications for development on "remote parcels" but rather states that "low-density zoning and requirements for adequate mitigation are appropriate for remote areas."

The properties in Imperial Gulch are zoned Rural Remote 40 (RR-40) which is described in 9-6A of the Blaine County Zoning Code. RR-40 lots are low-density and the zoning district contains only four permitted use categories:

- A. *Timber production, mining, grazing and other agricultural purposes, except as provided in subsection 9-6A-6M of this chapter.*
- B. *Open space recreational use.*
- C. *Wildlife reserves.*
- D. *Single-family residential use*

Both "open space recreational use" and "wildlife reserves" are passive uses of a property and neither are an economically-viable beneficial use. Lot 38A is not suitable for timber production, grazing, or agriculture due to the topography, vegetation, and other site conditions; even if it were suitable, such uses would arguably require more traffic and be more intensive than that of constructing a single-family home. This leaves mining and single-residential use as the only two feasible permitted activities on the property—mining being immensely more disruptive to the area and requiring even more substantial road improvements. Commercial mining of the

property ceased in 1939 and has not been economically feasible since then. Thusly, a single-family residence is the only economically viable use of the property—one which also requires the least road improvements and generates the least traffic on the road—and yet the Board remains opposed, attempting to deprive the property owner of their ability to do *anything* with their property: this is a blatantly unconstitutional regulatory taking.

Furthermore, Lot 38A has a 1998 parcel determination from Blaine County recognizing the property as suitable for residential development, pursuant to the County's codes and regulations. Declaring the Imperial Gulch lots as "remote mining claims" by the Board ignores the County's own recognition of these types of parcels as suitable for development and underscores the County's current prejudice against these legal lots of record.

Since 2017, the County has been moving the goal posts for issues related to Imperial Gulch Road. In December 2017, the County abruptly (and without proper notice) abandoned their BLM road right-of-way for IGR, telling Jae Hill to apply for his own right-of-way. Jae Hill petitioned the County at that time to maintain the road across the Greenhorn and Deer Creek Ranch properties, and the County claimed that they couldn't prove who owned the road or what the dimensions of such a right-of-way would be. Jae Hill, at the advice of legal counsel and the County, commenced with road validation pursuant to Idaho 40-203A. The County—after charging one of the highest land use application fees in the County's history *and* unlawfully delaying the petition process for more than two years—made a series of incorrect, unsupported, and unauthorized findings on the record which they are now considering binding as law.

The County also committed multiple errors in the processing of the Petition, including ignoring state-mandated processes under 40-203A.1(b) thru (e), public hearing noticing failures, and incorrectly reopening the public hearing to accept facially incorrect testimony from unaffected property owners in Greenhorn—so many errors that they can not simply be attributed to mistakes. When combined with the County's previous treatment of Lot 39 in 2011-2012 (requiring a Conditional Use Permit with two pages of conditions for an open space recreational use), it's clear that the County is deeply opposed to any form of development in Imperial Gulch and willing to violate the law to prevent it.

The County has demonstrated a pattern of malice and prejudicial treatment towards the Imperial Gulch property owners which has deprived the owners of their use and enjoyment of their properties. We can not assume that, even if the Board is forced to overturn their ruling on this particular road issue, the County will cease stalling and preventing the owners' abilities to access and make reasonable use of their lands.

If the Board feels they have a mandate to prevent development in Imperial Gulch to further some legitimate government purpose, and upholds their May 4th Denial decision in an attempt to do so, the County must compensate the property owners accordingly, pursuant to the

Constitutions of the State of Idaho and of the United States, Idaho State Statute, and a substantial body of settled case law.

If the County continues to prevent access to—and reasonable and economically viable use of—the Applicants’ properties, the Applicants are requesting just compensation for the regulatory taking of those properties.

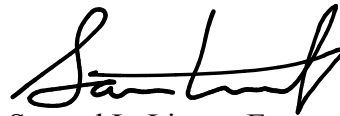
VII. CONCLUSION

The County’s actions unequivocally demonstrate that the County does not want residential development in Imperial Gulch. However, the County is bound by its current zoning regulations and state law, and, therefore, the denial of an approach permit application by the Board of Commissioners is unlawful and counter to the County’s own laws. The Board is being asked to decide between two paths:

1. The County may overturn the May 4th Denial and maintain Imperial Gulch Road to a minimum of a Recreational Access standard; or
2. The must conduct a regulatory takings analysis and subsequently compensate the owners for a regulatory taking, commensurate with current property values in the vicinity for large lots with legal public road access.

Sincerely,

ALTURAS LAW GROUP, PLLC



Samuel L. Linnet, Esq.

On behalf of Jae Hill

Encl

cc: Jae Hill w/enclosure

Tim Graves, tgraves@co.blaine.id.us w/enclosure

Tom Bergin, *via email to* tbergin@co.blaine.id.us w/enclosure

BLAINE COUNTY PLANNING & ZONING
BUILDING DEPARTMENT

P.O. Box 149 Hailey, Idaho 83333-0149
Planning & Zoning: 208-788-5570
Building Department: 208-788-5573
FAX Number: 208-788-5576

ATTACHMENT 1

August 24, 1998

Mr. Brian Saksa
P. O. Box 10134
Ketchum, ID 83340

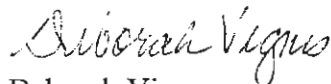
Re: Access to Imperial Lode Mining Claim Located in Section 23, T3N, R17E B.M.

Dear Mr. Saksa:

After having received a phone call from a concerned property owner in the Greenhorn Subdivision, I wanted to bring to your attention that any proposal to improve the public access easement that runs across lots 16 and 17 in the Greenhorn Subdivision would require that the person seeking to make the improvement obtain a road construction permit from the Board of County Commissioners, pursuant to Section 6-1-3 of the Blaine County Code. Such an application would be reviewed for compliance to the County Road Ordinance and may be reviewed for compliance to the intent of the public access provided, Uniform Fire Code and other regulations. I understand from Kay Billington of the BLM that your application to construct a road on BLM property in the Imperial Gulch area is pending, waiting approval from the County and other property owners.

I have enclosed a County road permit for your use. If you have any questions regarding the application, please feel free to contact either myself or Denise Jackson, Assistant to the Commissioners, at 788-5500. The County Code is available for review in the Planning Office.

Sincerely,



Deborah Vignes
Zoning Administrator

/dv

c: Board of Commissioners
Greenhorn Homeowners Association
Richard Davis