

# ANESI LAW FIRM

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June 16, 2021

*Sent via email only to William Tookey: [admin@sanjuancolorado.us](mailto:admin@sanjuancolorado.us)*

San Juan County Board of Commissioners  
PO Box 466  
Silverton, Colorado 81433

**RE: GARY BOWMAN / VARIANCE REQUEST**

*Parcel: Cumberland Mill Site USMS No. 693B – Adjacent to DSNGRR Right-of-way at the Confluence of Deer Park Creek & the Animas River Near Silverton, San Juan Co. CO*

Dear Board of County Commissioners:

Our firm represents Gary Bowman (the “Applicant” or “Mr. Bowman”) in connection with his parcel of land known as the Cumberland Mill Site USMS No. 693B (the “Property”). I am writing to request a variance to the County’s access requirements so that Mr. Bowman can obtain an Improvement Permit and build a cabin on his Property.<sup>1</sup> The following request is made pursuant to San Juan County’s Code § 7-125.<sup>2</sup> Below is a brief factual background followed by the grounds upon which our client’s request is based.

## I. FACTUAL BACKGROUND

Mr. Bowman has been trying to build a 550 square foot cabin on his Property since 2011. The project was first presented to the Planning Commission in 2014, and approved by that body in 2017. It was, however, denied by the Board of County Commissioners (the “Commissioners”) in Fall of 2017. As the basis for denial, two Commissioners asserted that the Property lacked access, though the Applicant has demonstrated that the access requirements were in fact met. All other elements of the application were approved. To address access concerns without again undertaking the entire application process, Mr. Bowman requested a continuance at the time of denial, but said request was denied.

Mr. Bowman was deterred from pursuing a variance request in 2017 due to the associated time and costs. Since there is no statutory limitation or rule within San Juan County’s Code that bars Mr. Bowman from seeking a variance, he is hopeful the Commissioners will grant his

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<sup>1</sup> See E-mail correspondence with D. Goldbricht dated 12/6/19

<sup>2</sup> See SJCC § 7-125

request. Pursuant to the instruction of the San Juan County Attorney and County Administrator, a full application accompanies this variance request. However, we believe it is unnecessary for the County to conduct a *de novo* review of the remaining application components since it previously underwent exhaustive analysis, with subsequent approval of all elements aside from adequate access.

## II. GROUNDS FOR APPEAL

### A. *Existing Precedent and Unique Characteristics / Special Circumstances*

The Bureau of Land Management (“BLM”) and San Juan County Planning Commission, respectively, recognized and approved access to the Property.<sup>3</sup> Denying the Applicant access to reasonably use his Property goes against well-established American property law doctrine and public policy.<sup>4</sup> Nonetheless, during final review of the 2017 application, the Commissioners overruled the BLM and Planning Commission’s findings and stated the Property lacked access. Although not specifically stated during the 2017 hearing, the Commissioner’s primary access concern(s) appears to have been based on limited ability to respond to emergencies. Therefore, the issue appears to be whether *adequate* access exists<sup>5</sup>. While other cabins in San Juan County appear to present equal or greater access challenges, the Commissioners assert that Mr. Bowman’s Property lacks a county road, a state highway connection, or a private road or other access as set forth in SJCC § 4-103(f).<sup>6</sup> It appears the former County Commissioners were unaware that the D&SNGRR’s right-of-way is treated as a highway under Colorado law.<sup>7</sup>

- The railroad’s right-of-way appears to satisfy the intent of the requirements set forth in SJCC § 4-103(f).<sup>8</sup>
- The Property lies along the Animas River, only two miles from the Silverton town limits, and is located 1.6 miles from a parking area.
- It is approximately 100 feet from the railroad track over flat, easily traversable terrain. Mr. Bowman has obtained permission from the D&SNGRR to transport building materials and personnel from Durango or Silverton.
- Access via rail is reliable and reduces environmental impacts associated with motor vehicle access.
- Mr. Bowman has vested rights to access his Property -- beyond mere pedestrian access accorded the general public -- over BLM-owned lands (i.e., by foot or pack animal from a parking area adjacent to County Road 33A). As a patented claim,

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<sup>3</sup> See Planning Commission Staff Report dated 7/18/17

<sup>4</sup> See Restatement of Property § 476 and See Powell on Real Property § 34.07, at 61-62

<sup>5</sup> See Email correspondence with W. Tookey dated 11/15/19

<sup>6</sup> *Id*

<sup>7</sup> See, Colorado State Constitution Article XV

<sup>8</sup> *Id*

the Federal Government conveyed original title to USMS No. 693B and made said claim privately-owned property including rights of access and reasonable use.

- In the event of an emergency, the Property can be accessed by helicopter or rail. Given the relatively flat topography of the Property, it seems a helicopter could more easily gain access in the event of an emergency.<sup>9</sup> Other cabins within San Juan County, such as the OPUS Hut, appear to present greater emergency access challenges.
- Emergency access to the Property has improved since the 2017 denial, because the County Sheriff's Department has acquired a railway "pop car" to provide emergency access to areas within the canyon, south of Silverton. This new form of Sheriff's emergency access creates special circumstances which appear to relieve the primary safety concerns previously expressed by the Commissioners.

Finally, we are unaware of any similarly situated claims within San Juan County, so providing an access variance to Mr. Bowman does not confer a special privilege or create a negative precedent for the County. As such, approval of this variance is in no way injurious to the public, nor will it create a problematic access standard employed by future applicants.

### ***B. Improved Fire Safety Design***

Mr. Bowman recognizes the heightened concerns regarding fire danger and has proactively made fire safety improvements to his cabin design. In the event of a fire, a gas generator and water pump will be accessible. Notably, the Animas River and Deer Park Creek provide immediate water access to extinguish a fire. The Animas River is approximately 150 feet from, and only slightly below, the proposed location of the Applicant's cabin. Deer Park Creek crosses the Property and is above the proposed cabin location, so water could be gravity fed if necessary. These two independent water sources located on or next to the Property provide additional special circumstances which mitigate safety access concerns. Additionally, the Applicant will install a 500-gallon cistern that will provide emergency fire relief.

The Property's proximity to the railroad tracks allows for fire emergency pop cars to reach the Property in the unlikely event a fire occurs when the cabin is unoccupied. The attached application includes additional information regarding fire-safe materials which will be used to build the cabin, such as Hardie Board siding.

## **III. CONCLUSION AND REQUEST FOR RELIEF**

Based on the aforementioned grounds, Gary Bowman requests that this Board of County Commissioners grant a variance to any and all access requirements that apply to his Property.

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<sup>9</sup> See 2015 Improvement Permit Application, Scenic Quality Report, pgs. 20-23

#### IV. PRESERVATION OF RIGHTS

Mr. Bowman reserves the right to introduce additional evidence and grounds for relief which might arise after the submission of this variance request.

Very truly yours,

*Nicholas F. Anesi*

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cc: Client  
Dennis Golbricht, County Attorney *via* E-mail