



Board of County Commissioners
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November 9, 2020

VIA FAX TO: (303) 275-5134
Attn: Reviewing Officer

VIA FEDERAL EXPRESS TO:

USDA Forest Service Rocky Mountain Region
Attn: Reviewing Officer
1617 Cole Boulevard, Building 17
Lakewood, CO 80401

RE: USFS Draft Record of Decision on the Berlaimont Estates Access Route
White River National Forest

Dear Sir or Madam:

Eagle County appreciates the opportunity to submit comments during the objection period for the United States Forest Service (“NFS”), Rocky Mountain Region, Draft Record of Decision on the Berlaimont Estates Access Route (“ROD”). The ROD documents the NFS decision to issue a special use authorization for Berlaimont Estates, LLC (“Berlaimont”) to construct a paved access route across the White River National Forest (“WRNF”) to Berlaimont’s private property located in Eagle County, Colorado. The ROD was based on the Final Environmental Impact Statement (“FEIS”) for the Berlaimont Estates Access Route, which was prepared to analyze and disclose the estimated environmental effects of the provision of adequate access to the Berlaimont Estates private property. The ROD and FEIS evaluated four alternatives, and the NFS selected Alternate 2 as the road alignment for the special use authorization.

Background

Berlaimont owns a 680-acre parcel, which is entirely surrounded by NFS lands managed by the WRNF. The property is located on a south-facing hillside, north of I-70 and is currently accessible in the summer months via Forest Service Road (“FSR”) 774 and FSR 780 from the south and FSR 783 from the west.¹ Berlaimont desires to develop up to nineteen (19) single-family residences and associated dwelling units on the property. Berlaimont has indicated

¹ The ROD states that the existing FSRs “may” meet Eagle County Land Use Regulation (“ECLUR”) “driveway” standards and that Berlaimont may be able to use them in their current condition to build and access up to three home sites. See ROD at pg. 2. It is important to note that the County has not evaluated the existing roads to determine whether in fact they do or could meet ECLUR driveway standards.



that the current maintenance level and condition of the existing FSRs are not at the level desired by Berlaimont to meet its objectives.

In 2011, Berlaimont formally platted the property into nineteen (19) lots, each 35-acres or greater. The ROD indicates that Berlaimont platted the property “with Eagle County” and “consistent...with Eagle County authority” (See ROD at pg. 2); however, the County did not review or approve the subdivision of the property or the plat that was filed with the County. Instead, Berlaimont documented the creation of the 19 lots by recording a copy of a land survey plat entitled, “Final Plat Berlaimont Estates”, with the Eagle County Clerk and Recorder’s office.² In 1972, Colorado Senate Bill 35 was enacted to require counties in Colorado to adopt regulations regarding the subdivision of land and requires any division of land not exempted by state law to be approved by the county. State law specifically exempts divisions which result in parcels 35-acres or greater. Consequently, when Berlaimont filed the plat to document the creation of the 19 parcels, Eagle County did not have the authority to analyze the impacts of, nor approve the development of, the subdivision as it would through a typical subdivision or planned unit development (“PUD”) process.

In 2014, the Eagle County Board of County Commissioners (“Board”) conditionally approved a request from Berlaimont for a variance from the improvement standards contained in the ECLUR pertaining to dual access, emergency vehicle turnaround areas and certain road improvement standards, including those for turn radii. The road alignment in the variance application is the same alignment of that in Alternative 3 in the ROD. The standards for approval of this variance are technical in nature; consequently, the Board did not have the authority to consider the social and environmental impacts of a permanent access road to the Berlaimont property or of the residential development.³ Instead, the County’s role was limited to deciding whether to grant a variance to roadway standards. In doing so, the Board was required to balance the hardship to the applicant of not granting the variance against the adverse impact on the health, safety and welfare of persons affected and on lands affected if the variance was granted. This involved an analysis of the impacts of the proposed road if built to standards versus the road if built according to approved variances.

The road and access variances approved by Eagle County in 2013 should not be interpreted as approval for the Berlaimont residential development. The variance simply dictated the standards that a road would need to meet if Berlaimont was to develop it in accordance with the engineering plans submitted to the County.

² See Final Plat Berlaimont Estates recorded at 201107295 of the records of the Eagle County Clerk and Recorder.

³ The ROD discusses the Board’s 2013 approval of the three variances to road standards for Alignment 3, stating that “[u]pon completing the environmental review process with Eagle County, the BOCC granted these three variances for this alignment.” See ROD at pg. 2. However, neither Eagle County nor the BOCC conducted an environmental review process with regard to the Berlaimont variance application.



Further County Review

Although the division of the property into parcels of 35-acres or more is allowed by Colorado State Statute, development of such parcels “nonetheless requires compliance with County regulations regarding access, wildfire hazard mitigation, visual impact mitigation, [and] building and fire code compliance. . .” See ECLUR Section 5-280.B.2.a. - *Division of Land into Parcels of 35 Acres or More*. Such review, when applicable, would take place at building permit application. Additional County review could also be required for approval to develop any water supply system or any sewage system in connection with residential development. See ECLUR, Chapter VI – *Areas and Activities of State Interest* (requiring approval of a 1041 permit for water and sewer systems servicing more than 9 homes). Many of the standards for approval of a 1041 Permit involve consideration of impacts to the quality and quantity of recreational opportunities, animal life and their habitats, plant life, and impacts on land use patterns.⁴ County review may also be required for construction of water storage facilities on the property. See ECLUR, *Article III – Zone Districts, Table 3-300 and Article V, Section 5-250 - Special Uses*.⁵ Finally, additional County variances to road and access standards will also likely be required if the ROD is finalized with Alternative 2 as the approved road alignment. Alternative 2 has not been evaluated by the County; however, it is assumed the Alternate 2 road alignment will require at least three variances: dual access, emergency vehicle turnaround areas and road design standards.

County Concerns regarding the ROD

Because the development of either the access road to Berlaimont Estates and/or the water and septic systems may come back to the County for review and approval, we must maintain our objectivity with regard to the evaluation of the alternative access routes and the impacts of a permanent access across NFS lands. However, we continue to have concerns regarding: (i) the potential environmental and social impacts of a permanent road for use by Berlaimont to access its property, and (ii) the process by which Alternative 2 was selected. We therefore ask that the NFS consider our concerns as part of the ROD objection process.

Section 1323(a) of the Alaska National Interest Lands Conservation Act of 1980 (“ANILCA”) requires the NFS to provide adequate access to private inholdings to secure the owner reasonable use and enjoyment of that inholding property. ANILCA’s requirement to provide “adequate access” is set forth in 36 CFR § 251 Subpart D. “Adequate access” is defined as: “a route and method of access to non-Federal land that provides for reasonable use and enjoyment of the non-Federal land consistent with similarly situated non-Federal land and that minimizes damage

⁴ Under the current ECLUR, 1041 Permit review would be based on an analysis of the impacts that could result from the new water supply system or sewage system, not the impacts of the associated residential development.

⁵ Under the current ECLUR, Special Use Permit review would be based on an analysis of the impacts that could result from the storage tank itself, not the associated residential development.



or disturbance to National Forest System lands and resources.” 36 CFR § 251.111. However, “[w]here there is existing access or a right of access to a property over non-National Forest land or over public roads that is adequate or that can be made adequate, there is no obligation to grant additional access through National Forest System lands.” 36 CFR § 251.110(g). In determining what constitutes adequate access, the NFS shall authorize only those access facilities or modes of access that are needed for the reasonable use and enjoyment of the land and that minimize the impacts on the Federal resources. The determination as to what constitutes “reasonable use and enjoyment of the lands” must be based on contemporaneous uses made of similarly situated lands in the area and any other relevant criteria. 36 CFR § 251.114(a).

The NFS reviewed 4 alternatives for access to the property: Alternative 1 (a no-action alternative) and Alternative 2 – 4, three different road alignments with varying impacts. In its selection of Alternative 2, the NFS determined that Alternative 2 would have the least amount of impact and disturbance to NFS lands and would avoid crucial winter concentration areas for elk, while still meeting the adequate access requirements dictated by ANILCA. In analyzing similarly situated lands, the NFS determined it was “reasonable” for Berlaimont to develop its property as a modern residential development which may serve as an owner’s primary residence, and that the level of access is therefore greater than what would be necessary for recreational cabins, hunt camps or other primitive dwellings intended only for seasonal/intermittent use. The NFS determined that although improved natural-surface roads can be snowplowed for winter use, it would allow the roads under Alternative 2 to be paved because a paved road will result in less sedimentation and maintenance than a gravel road. See ROD, page 6. Alternative 2 winds up a ridge that is visible from the surrounding community. Numerous retaining walls will be required, some up to 600 feet long and 20-40 feet tall. To mitigate the loss of the 1.8 mile native dirt trail, a 2.7 mile natural surface trail will be constructed by Berlaimont west of Berry Creek for recreational use.

Prior to finalizing its decision, we ask the NFS to further consider the impacts that will result from the permanent year-round access associated with Alternative 2, including:

- Impacts to adjacent residential properties from noise, dust, and traffic. The cut and fill associated with Alternative 2 also results in significant visual impacts to public lands.
- Impacts to recreational experiences for hikers, bikers and others. Improvements to NFS 774 and 780 could be beneficial to some types of recreational activities, while having a detrimental effect on others.
- Impacts on local wildlife populations and habitat. The NFS lands surrounding the property are identified in the WRNF’s Land and Resource Management Plan as deer and elk winter range and an important migration route for deer. Historically, these NFS roads have been closed seasonally due to wildlife. Full time residential occupancy at Berlaimont will necessitate year-round access through sensitive wildlife habitat. The



cut-and-fill that will be required across the steep hillsides will require numerous retaining walls. As set forth in the FEIS, the proposed grading and new construction of a road under any action alternative could result in loss of elk winter range, elk winter concentration area, and elk severe winter range, which would add to the declining habitat availability, due primarily to winter range lost to development, habitat fragmentation and year-round recreational impacts.

- Impacts from the new multi-use recreation trail. Although the new recreation trail may benefit public recreation, it would be constructed through the heart of the sage grouse habitat and deer/elk critical winter habitat and could have a negative impact on critical wildlife habitat.
- Impacts on natural resources and the possible impact on the water quality of nearby creeks and streams through runoff and sedimentation.

We also encourage the NFS to engage in a more thorough analysis and vetting of Alternative 1, the “no action” alternative, and to further examine whether Alternative 1 would provide adequate access and reasonably address Berlaimont’s stated purpose and need under ANLICA. Existing FSRs provide access from the south and west and are open to cars and trucks in snow-free seasons and by snow machines in the winter. As the FEIS clearly shows, Alternatives 2, 3 and 4 will have an adverse impact on wildlife in the area, particularly given the high-quality winter habitat in the area of the property. By its nature, the no-action alternative is not accompanied by any of the acknowledged impacts to the human or biological environments. In addition, Alternative 1 would not require amendment of the Forest Plan or elimination of winter closure that currently protect deer and elk in the area.

Finally, the County asks that the NFS reevaluate its consideration of similarly situated parcels when determining what constitutes reasonable use and enjoyment of the Berlaimont property. The NFS based its reasonable use determination on an analysis of parcels which it found by examining GIS data, as well as taking into consideration suggestions received by the public during external scoping and those mentioned by Berlaimont in its application materials. In all, the NFS analyzed 23 parcels and compared them based on a number of characteristics that the NFS determined were relevant. See FEIS C4 – C5. Following its review, the NFS found only one property – the Lichen Ranch/Lake Agnes subdivision – to be similarly situated to the Berlaimont property. Lichen Ranch is a 35-acre inholding subdivision with a snowplowed FSR allowing year-round access by wheeled vehicles. The NFS concludes that because the Lichen Ranch land use is almost identical to what is proposed by Berlaimont, that Berlaimont’s proposed land use is not unprecedented. See FEIS at C-11. Based on its consideration of “other relevant criteria”, the NFS concludes that Berlaimont’s proposed land use is consistent with, among other things, human activities on and around NFS lands within the I-70 viewshed and with the character of other upscale residential developments in the Edwards-Avon-Vail area. See



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FEIS at C-11. Based on these findings of precedent and consistency, the NFS found Berlaimont's proposed development is a reasonable use of its property. What is not clear from the FEIS is whether the road to Lichen Ranch traverses through sensitive winter range for deer and elk. In addition, it appears that the access road to Lichen Ranch is an unpaved dirt road⁶. In its analysis of comparable properties, the NFS does not mention whether an unpaved road may also be adequate access for use of the Berlaimont property. The analysis also does not consider other parcels which could serve as comparable inholdings within the WRNF, such as Deep Creek, Fulford, Piney Lake, which are also accessed by unpaved roads. Finally, we have concerns about comparing the Berlaimont property to other existing developments in the general area to support a finding that Berlaimont is consistent with human activities within the I-70 corridor and other upscale developments in the Edwards to Vail area. The proposed development of the Berlaimont property is different from the development of other properties in the County, particularly because the Berlaimont property sits outside the discrete location of the I-70 corridor, thousands of feet above and miles away from the highway and other development. This departure from the I-70 corridor area does distinguish the subject area from existing development supported by such infrastructure/delivery systems.

In closing, we wish to emphasize that in the event Alternative 2 is approved by the NFS and the proposed development moves forward, no construction of the access road nor any mitigation projects may occur until Berlaimont complies with all applicable permitting necessary to develop proposed lots, including, but not limited to, building permits, grading permits, and waste water system permits.

Thank you for this opportunity to provide comments. We hope any approved action will balance a need for adequate access to private property with the critical need in Eagle County to preserve the quality of public lands and natural resources, including wildlife habitats.

Sincerely,

Kathy Chandler-Henry
Chair

Matt Scherr
Commissioner

Jeanne McQueeney
Commissioner

⁶ See Wilderness Workshop March 18, 2018 comment letter on the DEIS at pg. 9.