

DISTRICT COURT, DOUGLAS COUNTY, STATE OF COLORADO 4000 Justice Way Castle Rock, CO 80109	DATE FILED: December 16, 2022 11:26 AM FILING ID: 6BD8E14C592D8 CASE NUMBER: 2022CV30649
<p><b>PLAINTIFFS:</b> JAMES SANDERSON, a Colorado resident; THERESA SANDERSON, a Colorado resident; JENNIFER WAGESTER, a Colorado resident; TOM JOHANNNS, a Colorado resident; CONNIE JOHANNNS, a Colorado resident; DOUGLAS G WILSON JR., a Colorado resident; and CATHERINE WILSON, a Colorado resident,</p> <p>v.</p> <p><b>DEFENDANTS:</b> BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY, COLORADO; PAMELA SOLLY, a Colorado resident; and LOUIE MILLER, a Colorado resident.</p>	<p style="text-align: center;"><b>▲ COURT USE ONLY ▲</b></p>
<p><i>Attorneys for Plaintiffs:</i>          Jamie N. Cotter, #40309          Lauren A. Taylor, #52452          Spencer Fane LLP          1700 Lincoln Street, Suite 2000          Denver, Colorado 80203          Phone: (303) 839-3800   Fax: (303) 839-3838          Email: <a href="mailto:jcotter@spencerfane.com">jcotter@spencerfane.com</a>; <a href="mailto:ltaylor@spencerfane.com">ltaylor@spencerfane.com</a></p>	<p>Case Number: 2022CV030649</p> <p>Division: 5</p> <p>Courtroom:</p>
<p><b>PLAINTIFFS' OPENING BRIEF</b></p>	

Plaintiffs James Sanderson, Theresa Sanderson, Jennifer Wagester, Tom Johanns, Connie Johanns, Douglas G Wilson Jr., and Catherine Wilson (collectively, “Plaintiffs”), through counsel, submit their Opening Brief as follows:

**I. PRELIMINARY STATEMENT**

The Board of County Commissioners for Douglas County, Colorado (“BOCC”) abused its discretion when it approved applicants Pamela Solly’s and Louie Miller’s (“Applicants”) application for use by special review for the improvement and use of a parcel of real property located at 8635 South State Highway 83, Franktown, CO 80116 at the intersection of Highway 83

and Lucas Avenue (“Property”) as a commercial event center.

Per Section 21 of the Douglas County Zoning Resolution (“Zoning Resolution”), applications for use by special review are subject to approval by the BOCC. *See* Excerpts of Section 21 of the Zoning Resolution, at Record 003573–577 & 003592, attached as ***Exhibit 1***. In particular, a use by special review application must satisfy the approval standards in Section 2102 of the Zoning Resolution. *See* Ex. 1, at Record 003574–3575.<sup>1</sup> The BOCC, however, misapplied the Zoning Resolution when it did not require Applicants to satisfy each approval standard of Section 2102. Further, the record is devoid of evidence to support a conclusion that Applicants have, in fact, satisfied each approval standard of Section 2102. Thus, the BOCC abused its discretion and exceeded its jurisdiction.

## **II. STATEMENT OF FACTS**

On or around March 3, 2021, Applicants submitted a use by special review application to the Douglas County Planning Services Department, a department of the BOCC, for review and approval of the improvement and use of the Property as a commercial event center (“Application”). *See* Application and Narrative, Record 000934–953, attached as ***Exhibit 2***.

The Property is in the Cherry Valley neighborhood and features a historic white dairy barn (“Barn”) and a metal barn/apartment (“Metal Structure”). *Id.* Applicants purchased the Property in 2019. *Id.* at Record 00937. The Property is approximately 35.387 acres. *Id.* at Record 000934.

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<sup>1</sup> *See also* Ex. 1, at Record 003599 (Section 2109.09) (“The Board shall evaluate the use by special review request, staff report, referral agency comments, applicant responses, the Planning Commission recommendation, and public comment and testimony, and shall approve, approve with conditions, continue, table for further study, remand to the Planning Commission, or deny the use by special review request. The Board’s action shall be based on the evidence presented, compliance with the adopted County standards, regulations, policies, and other guidelines.”).

Applicants are proposing extensive renovations to the Property including renovating the Barn into a commercial party venue with large glass windows and doors, a large outdoor patio, and a fireplace; extensively renovating the Metal Structure to include wedding party suites; constructing monument signs, walkways, a two-lane drive, a 34-spot parking lot, and a bus turnaround; and erecting a white party tent upon a poured concrete pad. *See* Specifications and Drawings, Record 001169–1177, attached as **Exhibit 3**. Applicants expect to host up to 100 events of 150 people per year on the Property. Ex. 2, at Record 00942. In other words, if 2 to 3 events are held each weekend, Applicants expect to host over 15,000 people over 33-50 weekends each year. *See id.* Applicants anticipate events to take place Friday from 3:00 pm to 12:00 am, Saturday from 2:00 pm to 12:00 am, and Sunday from 11:00 am to 9:00 pm. *Id.*

On July 18, 2022, Douglas County Planning and Zoning Board (“P&Z Board”) held a public hearing on the Application (“P&Z Hearing”). *See* P&Z Hearing Agenda, Record 000001–12, attached as **Exhibit 4**; Transcript of the Proceedings of the P&Z Hearing, attached as **Exhibit 5**; and P&Z Hearing Minutes, Record 000218-220, attached as **Exhibit 6**. At the P&Z Hearing, the P&Z Board heard comments from Douglas County residents, including Plaintiffs, expressing opposition<sup>2</sup> to the Application and the proposed improvements and uses of the Property. Ex. 5, at p. 53, l. 19–p. 95, l. 8; Ex. 6, at Record 000219–220. The P&Z Board also received signatures and comments from Douglas County residents opposing the Application and proposed improvements and uses. Comments and Signatures in Opposition, Record 000989–1259, at Record 000989–1020, attached as **Exhibit 7**. Despite this overwhelming opposition P&Z Board voted 6-0 to recommend the BOCC approve the Application. *See* Ex. 5, at p. 131, l. 14–p. 32, l. 17. Ex. 6, at Record 000220.

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<sup>2</sup> Only 2 other Douglas County residents expressed favor. Ex. 5, at p. 53, l. 19 – 95, l. 8.

On August 9, 2022, the BOCC held a public hearing on the Application (“BOCC Hearing”). See BOCC Hearing Agenda, Record 001409 attached as *Exhibit 8*; Transcript of the Proceedings of the BOCC Hearing, attached as *Exhibit 9*; and BOCC Hearing Minutes, Record 000225–229, attached as *Exhibit 10*. At the BOCC Hearing, the BOCC heard comments from Douglas County residents, including Plaintiffs, expressing opposition<sup>3</sup> to the Application and the proposed improvements and uses of the Property. Ex. 9, at p. 65, l. 9–p. 137, l. 16; Ex. 10, at Record 000226–228. The BOCC also received comments and the signatures of 182 Douglas County residents opposing the Application and the proposed improvements and uses. See Ex. 7, at Record 001021–1259. At the conclusion of the BOCC Hearing, the BOCC voted 2-1 to approve the Application.<sup>4</sup> Ex. 9, at p. 167, l. 13–p. 168, l. 2; Ex. 10, at Record 000228–229. Commissioners Teal and Thomas found the Application satisfied all approval standards set forth in Section 2102 of the Zoning Resolution. Ex. 9, at p. 167, l. 13–23. Conversely, **Commissioner Laydon found the Application failed to satisfy approval standards set forth in Section 2102 of the Zoning Resolution, specifically Sections 2102.04, 2102.05, 2102.09, and 2102.10.** Ex. 9, at p. 156, l. 19–p. 158, l. 7; p.166, l. 21–p.167, l. 9; p. 167, l. 24–p. 168, l.1.

### III. C.R.C.P. 106(a)(4) STANDARD

In reviewing a local government’s quasi-judicial action under C.R.C.P. 106(a)(4), courts determine whether the local government exceeded its jurisdiction or abused its discretion. *Alpenhof, LLC v. City of Ouray*, 297 P.3d 1052, 1055 (Colo. App. 2013). A local government exceeds its jurisdiction or abuses its discretion if it “misapplies the law or no competent record evidence supports its decision.” *Id.* (citing *Bd. of County Comm’rs v. Conder*, 927 P.2d 1339, 1343

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<sup>3</sup> Again, only 2 other Douglas County residents expressed favor. Ex. 9, at p. 65, l. 9–p. 137, l. 16.

<sup>4</sup> The BOCC approved the Application with three conditions. See Ex. 8, at p. 167, l. 13–23.

(Colo. 1996)). There is “no competent record evidence” when “the ultimate decision” of the local government “is so devoid of evidentiary support that it can only be explained as an arbitrary and capricious exercise of authority.” *Stor-N-Lock Partners # 15, LLC v. City of Thornton*, 488 P.3d 352, 357 (Colo. App. 2018) (citing *Ross v. Fire & Police Pension Ass’n*, 713 P.2d 1304, 1309 (Colo. 1986)). Further, courts review the interpretation of local codes found in the record before the local government *de novo*. *Whitelaw v. Denver City Council*, 405 P.3d 433, 438 (Colo. App. 2017) (citing *Alpenhof*, 297 P.3d at 1055). Courts also apply ordinary canons of statutory construction to the interpretation of local codes. *Roalstad v. City of Lafayette*, 363 P.3d 790, 792 (Colo. App. 2015). If the language of the code is “clear and unambiguous on its face,” courts “look no further and apply the words as written.” *Id.* Courts are to “consider the statute as a whole and interpret it in a manner giving ‘consistent, harmonious, and sensible effect to all its parts.’” *Id.*

#### **IV. ARGUMENT**

##### **A. The BOCC’s approval of the Application was a “quasi-judicial” function.**

As a preliminary matter, review under C.R.C.P. 106(a)(4) is limited only to “quasi-judicial” actions. There is a three-part test to determine whether an action is quasi-judicial in nature: (1) state or local law requires that the governmental body give adequate notice before acting on the matter; (2) a state or local law requires the governmental body to conduct a public hearing, pursuant to notice, at which concerned citizens may be heard and present evidence; and (3) a state or local law requires the governmental body to make a determination based upon an application of legal criteria to the particular facts before it. *See Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village*, 757 P.2d 622, 626 (Colo. 1988). The approval or disapproval of a site plan or use is a quasi-judicial function—it can adversely affect the rights of property owners, pertains only to a

specific site, and is not a decision affecting future land uses jurisdiction-wide. *See id.* at 628. Here, just as in *Cherry Hills*, the BOCC’s decision to approve the Application is a quasi-judicial function—it has potential adverse impacts on the property rights of Applicants and their neighbors; it pertains only to the Property; and was not a county-wide future land use ordinance.

**B. The BOCC abused its discretion and exceeded its jurisdiction in approving the Application.**

The BOCC abused its discretion and exceeded its jurisdiction in approving the Application because: (1) it misapplied the Zoning Resolution when it did not require Applicants to satisfy each of the approval standards of Section 2102; and (2) the record is devoid of any evidence to support a conclusion that Applicants have satisfied each of the approval standards of Section 2102.

***1. The Zoning Resolution.***

A use by special review application must satisfy all following approval standards of Section 2102 of the Zoning Resolution to be approved by establishing:

- The use complies with the minimum zoning requirements of the zone district in which the special use is to be located. § 2102.01.
- The use complies with the requirements of Section 21. § 2102.02.
- The use complies with the Douglas County Subdivision Resolution. § 2102.03.
- The use will be in harmony with and compatible with the character of the surrounding neighborhood. § 2102.04
- The use will be consistent with the Douglas County Comprehensive Master Plan. § 2102.05.
- The use will not result in an over-intensive use of land. § 2102.06.
- The use will provide roadway capacity necessary to maintain the adopted roadway level-of-service for the proposed development concurrently with the impacts of such development. § 2102.07.
- The use will provide public facilities and services necessary to accommodate the proposed development concurrently with the impacts of such development. § 2102.08.
- The use will not cause significant air, water, or noise pollution. § 2102.09.
- The use will be adequately landscaped, buffered, and screened. § 2102.10.
- The use will comply with standards regarding water supply. § 2102.11.

- The use will not otherwise be detrimental to the health, safety, or welfare of the present or future inhabitants of the County. § 2102.12.

Ex. 1, at Record 003574–3575.

**2. The Application does not comply with Section 2102.01.**

Per Subsection 307 (Minimum Setbacks) of Section 3 (A1 Agricultural One District) of the Zoning Resolution, for an event center on a parcel size greater than 35 acres, the following setback requirements from the street, side lot line, rear lot line, and power lines are required:

Parcel Size	SETBACK FROM:			
	Street	Side Lot Line	Rear Lot Line	115+ KV Power Line
35+ acres	100 feet	100 feet accessory: 50 feet	100 feet accessory: 50 feet	100 feet

Excerpts of Section 3 of the Zoning Resolution, Record 00003559 & 003565, attached as *Exhibit*

*II*. Section 2107.14.3 requires: “Structures, outdoor assembly areas, and parking lots used for the event center shall be setback a minimum of 200 feet from all adjacent property lines.” Ex. 1, at Record 003577.

While the Barn satisfies the 100-foot setback of Section 307, it does not satisfy the 200-foot setback from all adjacent property lines per Section 2107.14.3. The Metal Structure does not satisfy either the 100-foot street setback of Section 307, or the 200-foot setback of Section 2107.14.3. To demonstrate, a diagram of the location of the Barn and Metal Structure with the 100-foot setback requirement of Section 307 and the 200-foot setback of Section 2107.14.3 is attached. Diagram of Barn & Metal Structure with Setbacks, Record 1206, attached as *Exhibit 12*.

Further, the Application’s proposed landscaping and 3-foot earth berm with a 6-foot concrete wall on top (“Barrier”) are to be supposedly located between the Metal Structure and Highway 83. *See* Ex. 3, at Record 001172. Given the proposed location of the landscaping and

Barrier, neither satisfies the 100-foot setback requirement of Section 307, or the 200-foot setback of Section 2107.14.3. *See id.* *See also* Ex. 12.

The Barn, Metal Structure, and Barrier patently do not meet one or both setback requirements as required by Sections 307 and 2107.14.3. The BOCC's approval of the Application, despite failure to satisfy explicit setbacks set forth in Sections 307 and 2107.14.3 (and thus, Section 2102.01), is a misapplication of the Zoning Resolution.

Beyond this misapplication of Zoning Resolution, the record is devoid of evidence demonstrating Applicants satisfied available alternatives to reduce setback requirements of Sections 307 and 2107.14.3. First, Applicants could have sought to obtain a variance to Sections 307 and 2107.14.3 for the Barn and Metal Structure per Section 26 of the Zoning Resolution. Excerpts of Section 26 of the Zoning Resolution, attached as *Exhibit 13*. But, there is no evidence in the record showing that Applicants satisfied Section 26's requirements to obtain a variance, let alone requested such variance per Section 26. Despite this lack of evidence, the BOCC approved the Application—effectively granting Applicants a variance without satisfaction of Section 26. *See* Ex. 9, at p. 167, l. 13–p. 168, l. 2; Ex. 10, at Record 000228–229.

Second, Applicants could have requested reduced setbacks per Section 2106.01. *See* Ex. 1, at Record 003575. Per Section 2106.01, the BOCC “may establish lesser setbacks than those required in Section 21, and heights greater than those allowed in the underlying zone district, if the [BOCC] determines that adequate buffering is or will be provided to mitigate such concerns as noise, visual, dust, or other social or environmental impacts.” *Id.* “The burden of proof is on [Applicants] to demonstrate such adequate mitigation measures.” *Id.* But, there is no evidence in the record to suggest Applicants submitted measures adequately mitigating concerns of noise,



visual, dust, or other social or environmental impacts to warrant reduced setbacks of Section 2106.01. Nor does the BOCC Hearing transcript reflect the BOCC even evaluated whether Applicants had satisfied their burden under Section 2106.01 to warrant lesser setbacks. *See, generally*, Ex. 9. Instead, the BOCC approved the Application, thereby establishing reduced setbacks, without the evidence or evaluation required by Section 2106.01. *See id.* at p. 167, l. 13–p. 168, l. 2; Ex. 10, at Record 000228–229.

### **3. The Application does not comply with Section 2102.09.**

Per Section 2107.14.4, “[n]oise generated by the event center use shall not result in noise levels which exceed 40 dB(A) between 7:00 a.m. and 7:00 p.m., and 35 dB(A) between 7:00 p.m. and 7:00 a.m., measured in accordance with Section 1705A.” Ex. 1, at 003577. Per Section 1705A.04: “For all sound level measurements, consideration shall be given to the effect of the ambient noise level created by the encompassing noise of the environment from all sources at the time and place of such sound level measurement.” Section 17A Noise Overlay, at p. 4, attached as *Exhibit 14*. Per Section 2107.14.5: “A noise study shall be submitted demonstrating compliance with the event center noise standard.” Ex. 1, at 003577.

At the BOCC Hearing, the parties disputed the extent of noise pollution generated by the proposed uses of the Property. Applicants’ noise expert, Jeff Cerjan, estimated the noise levels in the Barn to be 80 dB(A). Cerjan Noise Study, Record 001102–1109, at Record 001106, attached as *Exhibit 15*. Cerjan’s basis for the dB(A), however, was based on another project—not the present Barn or Property. Ex. 15, at Record 001106; Ex. 9, at p. 44, l. 7–12. Further, Cerjan’s dB(A) estimate assumes there is only a DJ playing music in the Barn and no other people. *Id.* Cerjan, thus, does not account for the actual dimensions and parameters of the Barn and Property,

or the noise generated from additional people inside the Barn (eating, talking, singing, dancing, etc.).

Based on 80 dB(A) at the Barn, Cerjan estimated the noise levels 25 feet from the north, south, and east property lines to be below 35 dB(A) between 7 pm and 7 am. *See* Ex. 15, at Record 001107. In reaching this estimate, however, Cerjan did not account for the noise of vehicles, charter buses, guests, outdoor activities, outdoor music, and party tent use on the Property outside of the Barn. Moreover, Cerjan did not increase his estimates based on the impact of funneled valley sound waves and temperature inversion on noise estimates.<sup>5</sup> In other words, Cerjan failed to consider the effect of ambient noise created by the encompassing noise of the environment from all sources as required by Section 1705A.04. Indeed, Cerjan readily admitted “we don’t have all the details figured out yet. This is more of a proof of concept.” Ex. 9, at p. 45, l. 13–14.

To refute Applicants’ noise expert and study, Plaintiffs presented a noise expert and study. EDI Noise Study, Record 002485–2489, attached as *Exhibit 16*. First, Plaintiffs’ noise expert, EDI Engineering Dynamics, Inc. (“EDI”), predicted the noise inside the Barn would significantly exceed Cerjan’s estimated 80 dB(A). Ex. 16. Second, EDI estimated noise generated by the Property—by the Barn itself as well as surrounding structures, features, and traffic not accounted for in Cerjan’s noise study—would far exceed the 35 dB(A) maximum between 7 pm and 7 am 25 feet from north, south, and east property lines, as noise levels. *Id.*

As a preliminary matter, at the BOCC Hearing, Staff admitted it did not have sufficient time to fully review EDI’s noise study. Ex. 9, at p. 11, l. 18–22. Despite Staff’s admission, the

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<sup>5</sup> Indeed, Cerjan expressly noted such factors would enhance sound propagation. *See* Ex. 15, at Record 001105 (“The air temperature, relative humidity, and atmospheric pressure were set to conditions of 10°C, 70%, and 1 atmosphere, respectively. These values represent a low amount of atmospheric absorption of sound available in the ISO 9613-2:1996 method, and result in good propagation of sound level from the site to any receivers.”)

BOCC moved forward with the BOCC Hearing and approved the Application without a full evaluation of EDI's noise study. *See id.* at p. 167, l. 13–23. On its face, this is a misapplication of the Zoning Resolution. Section 2102.09 allows the BOCC to approve a special review only if the BOCC finds that the proposed use “[w]ill not cause significant air, water, or noise pollution”. Ex. 1, at Record 003574. Failing to consider noise studies directly relevant to whether noise will exceed applicable noise levels of Section 2107.14.4 predisposes the BOCC's ultimate conclusion and fails to heed Zoning Resolution text clearly requiring consideration of such findings.

Beyond this misapplication, at the BOCC Hearing, Commissioner Teal commented that the parties' noise studies were “contradictory” and “inconclusive,” and “not even a factor into my planning.” Ex. 9, at p. 162, l. 3–10. Despite these comments, Commissioner Teal, puzzlingly, approved the Application thereby finding Applicants' noise studies and Application did, in fact, satisfy Sections 2107.14.4 and 2102.09. *See id.* at p. 167, l. 13–23.

First, not factoring whether noise studies are relevant to whether there will be significant noise pollution is a misapplication of the Zoning Resolution. The Zoning Resolution explicitly predicates the BOCC's approval upon the submission of a noise study demonstrating compliance with Section 2107.14.4 and a finding there is not significant noise pollution. Ex. 1, Record 003574 (Section 2102.09) & Record 003577 (Section 2107.14.5). Ignoring relevant noise studies, again, predisposes the BOCC's ultimate conclusion and blatantly disregards Zoning Resolution language requiring such submissions and findings.

Second, Commissioner Teal's comment that noise study evidence was “inconclusive” inherently indicates the insufficiency of evidence in the record before the BOCC. Inconclusive is defined as “leading to no conclusion or definite result evidence” or “not conclusive; not resolving

fully all doubts or questions.” MERRIAM-WEBSTER, <https://www.merriam-webster.com/dictionary/inconclusive> (last visited Dec. 1, 2022); DICTIONARY.COM, <https://www.dictionary.com/browse/inconclusive> (last visited Dec. 1, 2022). Informed by this definition, inconclusive noise studies must preclude a finding that such noise studies conclusively demonstrate compliance with Section 2107.14.5 or satisfy Section 2102.09. The BOCC’s conclusion to the contrary is, thus, devoid of evidentiary support.

***4. The Application does not comply with Section 2102.04 or Section 2102.05.***

Section 2102.04 requires the proposed uses of the Property to be in harmony and compatible with the character of the surrounding neighborhood. Ex. 1, at Record 003574.

Prominently not in harmony or compatible with the Cherry Valley neighborhood is the parking and traffic issues generated by the proposed improvements and uses of the Property. For example, the anticipated 34-space parking lot and bus turnaround are not typically found in the Cherry Valley neighborhood and are inconsistent with the historic rural, agricultural use of the Property. *See* Ex. 5, at p. 53, l. 19–p. 95, l. 8; Ex. 7; Ex. 9, at p. 65, l. 9–p. 137, l. 16.

Likewise, new types of traffic (including large charter bus traffic) would be generated by guests, potential clients and customers, trash pickup, cleaning staff, grounds and landscaping crews, vendors, maintenance services, event staff, etc. by the Property—uncharacteristic of the Cherry Valley neighborhood. *See id.* Beyond the uncharacteristic nature of this new traffic itself, the increase in traffic on Highway 83 causes safety concerns and invites drivers onto Cherry Valley local roadways who are unfamiliar with the hazards and conditions associated with such roadways, including the presence of bicyclists, wildlife, escaped livestock, and gravel road conditions. *See id.* This is a real concern of Douglas County residents. *See id.*

Equally as important, per Section 2102.05, the Application and proposed improvements and uses are not consistent with the Douglas County Comprehensive Master Plan, as amended (“Master Plan”). Ex. 1, at Record 003574. Excerpts of the Master Plan, Record 003640–3648, 003714–3724, attached as *Exhibit 17*. In particular, the Application must be considered in light of three Master Plan objectives/policies—Objective 3-3B, Policy 3-3B.1, and Policy 3-3B.6. Ex. 1, at Record 003574; Ex. 17, at Record 003645.

At the BOCC Hearing, the two commissioners who voted to approve the Application did not even consider Objective 3-3B, Policy 3-3B.1, or Policy 3-3B.6. *See, generally*, Ex. 9. As such, their conclusion the Application was consistent with the Master Plan—without consideration of Objective 3-3B, Policy 3-3B.1, or Policy 3-3B.6—was a misapplication of the Zoning Resolution.

Moreover, the record lacks competent evidence supporting the conclusion that the proposed improvements and uses of the Property are actually consistent with Objective 3-3B, Policy 3-3B.1, or Policy 3-3B.6. Objective 3-3B aims to “[m]aintain the agricultural lifestyle and rural character of the Cherry Valley Subarea.” Ex. 17, at Record 003645. Douglas County residents clearly do not think introducing 15,000 people per year to their rural community enhances their quality of life or maintains the agricultural lifestyle and rural character of the Cherry Valley Subarea. *See* Ex. 5, at p. 53, l. 19–p. 95, l. 8; Ex. 7; Ex. 9, at p. 65, l. 9–p. 137, l. 16. Douglas County residents likewise do not believe reconstructing the over-century-old Barn from its original state to one that is commercially trendy to be protection or preservation. *See id.*

Per Policy 3-3B.1, only “[l]ow-intensity rural development is supported in the Cherry Valley Subarea.” Ex. 17, at Record 003645. “Nonurban land uses are generally low-intensity activities that include farming, ranching, large lot residential, parks, and open spaces.” *Id.* at

Record 003640. Clearly, a commercial event center does not fall within this definition. Further, the proposed improvements to the Property include extensive glass windows and doors, a large outdoor patio, a white party tent, a fireplace, walkways, bus turnarounds, a parking lot, lighting, and signs—uncharacteristic of nonurban land uses or low-intensity activities. *See* Ex. 3.

Policy 3-3B.6 provides “[d]evelopment in the Cherry Valley Subarea should minimize visual impacts within major viewsheds.” Ex. 17, at Record 003645. A viewshed is the natural environment that is visible from one or more viewing points. *Id.* at Record 003723. The Cherry Valley Subarea neighborhood, and all who visit it, will see commercial infrastructure and improvements, which are inconsistent with the natural environment of surrounding rural properties. *See* Ex. 5, at p. 53, l. 19–p.95, l. 8; Ex. 7; Ex. 9, at p. 65, l. 9–p. 137, l. 16.

Notably, Commissioner Laydon found the proposed improvements and uses of the Property and Application **did not** satisfy Section 2102.04 or 2102.05 and **were not** consistent with the Master Plan. Ex. 9, at p. 156, l. 19–p. 158, l. 7; p.166, l. 21–p.167, l. 9; p. 167, l. 24–p. 168, l.1. Despite Commissioner Laydon’s valid findings, the remaining two commissioners voted to approve the Application. *Id.* at p. 167, l. 13-23. Indeed, Commissioner Teal admitted his decision to approve the Application was based on an ulterior motive—to receive federal funding to improve Highway 83 as a result of increased traffic to and from the Property. *See id.* at p. 160, l. 5–15.

##### **5. The Application does not comply with Section 2102.10.**

Section 2102.10 requires the proposed improvements and uses of the Property by “be adequately landscaped, buffered, and screened.” Ex. 1, at Record 003574. The record, however, is devoid of evidence showing how the Property’s proposed improvements and uses will actually and adequately be landscaped, buffered, and screened. For example, Applicants propose only a simple

Barrier and landscaping (in addition to already-existing structures/foilage). Ex. 2, at Record 000946; Ex. 3, at Record 001172. But, there is no evidence in the record to assure the Barrier or landscaping (or already-existing structures/foilage) will adequately visually screen the proposed improvements and uses, or that any expert reviewed Applicants' plans.

Moreover, the Property is in a valley, in full view of neighboring properties at higher elevation. Image of Property from Neighboring Property, Record 002226, attached as *Exhibit 18*. The record is, again, devoid of evidence showing the proposed Barrier and landscaping (or already-existing structures and foliage) will prevent view of proposed improvements and uses from neighboring properties that sit at a higher elevation.

Last, there is no evidence in the record to show the proposed Barrier and landscaping will adequately block light pollution from the Property. By 10:00 pm, there is little human activity or light shed in the Cherry Valley neighborhood. *See* Ex. 5, at p. 53, l. 19–p. 95, l. 8; Ex. 7; Ex. 9, at p. 65, l. 9–p. 137, l. 16. At night, the Barn's extensive glass windows and doors will inevitably shine light outside. *See* Ex. 3, at Record 001174–175. Further, outdoor features such as the outdoor patio, fireplace, signs, and party tent will generate light. *See id.* at Record 001176. Walkways, driveways, the bus turnaround, and parking lot will also be lit. *See id.* at Record 001177.

## **V. CONCLUSION**

As set forth herein, the BOCC has abused its discretion and exceeded its jurisdiction. The BOCC misapplied the Zoning Resolution when it did not require Applicants to satisfy each of the approval standards of Section 2102. Further, the record is devoid of any evidence to support a conclusion that Applicants have, in fact, satisfied each of the approval standards of Section 2102.

**WHEREFORE**, Plaintiffs respectfully request that judgment enter in their favor, and against Defendants, as follows:

- a. Declaring that when the BOCC approved the Application it was performing a quasi-judicial function;
- b. Determining that, in approving the Application, the BOCC exceeded its jurisdiction, abused its discretion, and/or otherwise acted contrary to law;
- c. Vacating and/or otherwise overturning the BOCC's approval of the Application;
- d. Restraining the BOCC from approving or considering any further use by special review or other applications for the Property without the requisite satisfaction of the approval standards of Section 2102 of the Zoning Resolution; and
- e. For all such further relief the Court deems appropriate.

Respectfully submitted this 16th day of December, 2022.

SPENCER FANE LLP

*/s/ Lauren A. Taylor*

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*Attorneys for Plaintiffs*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on this 16th day of December, 2022, a true and correct copy of the foregoing was filed and served via the Integrated Colorado Courts E-filing System.

*/s/ Lauren A. Taylor*

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Lauren A. Taylor